I. Contractual Assent and the Objective Test

A. The Objective Standard for Determining Assent
   1. Legal assent to a contract is 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.
   2. It would defeat the reasonable expectations of the other party and undermine the security of transactions as a whole if courts based assent on what a party actually thought rather than on what he reasonably seemed to have intended by his words or conduct.
   3. *Kabil Developments Corp v. Mignot*
      a. what one person believed as a result of conversation or negotiation with the other party was likely based on what the first party had observed in the words and actions of the second. It is not the belief, therefore, that is being used as evidence; it is the other party’s demonstrable actions which led to that belief

B. The Determination of Objective Meaning
   1. The Reasonable Person Construct
      a. The purely subjective understanding of one party is no more relevant the subjective intent of the person who made the promise. Rather, courts look at what a reasonable person would have understood from the words and actions of the other party.
      b. “Reasonableness” must be contextual. It is not an abstract concept. It takes into account a person’s attributes, background, and the relationship between the parties

C. Deliberately Undisclosed Intent
   1. *Lucy v. Zehmer*
      a. Whether Zehmer was “kidding” about the entire agreement does not matter, since his actions were sufficient to lead a reasonable person to believe that a contract had been formed.

II. The Offer

A. What is an Offer
   1. The Formation of Contracts: The Offer and Acceptance Model
      a. A contract is formed by an exchange of communications in which a transaction propose by one party is accepted by the other
   2. The Definition of “Offer”
         i. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain invited and will conclude it.
      b. Final decision to contract must rest with the offeree, or else there was no offer.
   3. Interpreting the Intent of a Communication to Determine if it is an Offer
         i. A price quote can be binding in situations where the tone and context make it clear that it was, at one point, intended as an offer.
      b. *People v. Braithwaite*
         i. affirms prong test set for in Gandolfo for determining what constitutes an offer under the existing statute—1. a bona fide offer and 2. indication of ability and intent to complete transaction.
B. Is an Advertisement and Offer or a Solicitation?
   1. What Makes a Proposal an Offer Rather than a Solicitation?
      a. *Lefkowitz v. Great Minneapolis Surplus Store*
         i. An advertisement could be an offer if, interpreted in context, it would lead a reasonable prospective buyer to understand that an offer was intended
      b. *Harris v. Time, Inc.*
         i. An advertisement that promises something to a customer in return for a clear, definite action can be viewed as an offer
      c. *Leonard v. PepsiCo, Inc*
         i. 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
   2. The Impact of Legislation on the Interpretation of Advertisements
      a. Legislatures have passed statutes regulating the effect and content of advertisements in an attempt to curb “bait and switch” practices.

III. Acceptance
   A. What Happens After an Offer Is Made? An Overview of the Offer and Acceptance Model
      1. Once an offer has been made, there are three possible responses that can be made by the offeree
         a. Acceptance (within timeframe and in manner prescribed by offeror)
            i. Contract is formed immediately upon acceptance, since the power of acceptance must be held by the offeree or else there is no offer
         b. Refusal (or inaction)
            i. With an express refusal, the offer is terminated as soon as it is refused. Offer may also expire if the refusal or acceptance is not made within the allotted time.
         c. Counteroffer
            i. This is, in effect, a refusal of the initial offer and then a new offer made to the first party
            d. The offeror in most situations retains the right to withdraw the offer at any time before it is accepted.
   B. The Nature, Mode, and Effect of Acceptance
      1. Acceptance: The Offeree's Signification of Assent to the Offer
         a. Acceptance must be a knowing, voluntary, and deliberate act. Assent is measured by the objective standard—how would a reasonable person interpret the actions/words of the offeree?
      2. The Acceptance Must Accord with Both the Substantive Terms and the Procedural Requirements of the Offer
         a. The Substantive Nature of the Offer
            i. The proposed contract is the substantive content. An acceptance must accept all substantive terms
         b. The Procedural Nature of the Offer
            i. The procedure to be followed by the offeree if he wishes to accept the offer. In absence of anything to the contrary, the offeree may accept it within a reasonable time, and the communication of acceptance may be by any mode and in any manner that is reasonable.
            c. *Roth v. Maison*
               i. Conformity to the structure of a standardized form is important in limiting loopholes and “game playing” by one party. Non-conformity can also be viewed as an objective measure of a subjective belief. By signing in the “counter to counter offer” space and including terms—even the same terms that had been offered to him—Π was creating a counter offer and giving the power of acceptance back to Δ.
   C. The Effective Date of Acceptance
1. An acceptance takes effect when it is communicated to the offeror. When the parties are dealing face to face, this is straightforward. However, when they are communicating by means other than direct contact, there can be a lag between the offeree decides to accept and when it is communicated to the offeror.
   a. mailbox rule—acceptance is effective when it is mailed, not when it is received, unless some provision of the offer specifies otherwise

D. Inadvertent Manifestations of Acceptance
   1. Too rigid of an application of objective test can result in finding a contract where the offeree did not intend one.
   2. *Glover v. Jewish War Veterans of United States, Post No. 58*
      a. There can be no contract unless the claimant knows of the offer, even if actions of claimant would have indicated agreement to offer

E. Silence as Acceptance
   1. It would not 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 contract. Therefore, the usual rule is that if an offeree fails to respond to an offer before it expires, this inaction is a rejection.
   2. *Restatement, Second §69. Acceptance by Silence or Exercise of Dominion*
      a. Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
         i. Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation
         ii. Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
         iii. Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
      b. An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror, it is an acceptance only if ratified by him.

F. Termination of the Power of Acceptance
   1. The Ways in Which the Offeree’s Power of Acceptance May Be Terminated
      a. Lapse—either by the passing of a date or measurable amount of time without an acceptance or, in absence of a specific time, a reasonable amount of time.
      b. 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.
      c. Counteroffer—one the offeree (now offeror) makes a counteroffer, he cannot accept the original offer
      d. Revocation—if the offeror communicates to the offeree that the offer no longer stands, the offeree may not then accept
      e. Death or Mental Disability of the Offeror—if the offeror dies or becomes mentally incompetent before the offer is accepted, the offer lapses
   2. Lapse of an Offer by the Passage of Time
         i. 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
   3. Revocation of the Offer
      a. Unless the offeror receives something in consideration for keeping the offer open, he is free to revoke it at any time prior to the offeree’s acceptance.
      b. *Hendricks v. Behee*
         i. 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 mere private act of the offeree does not constitute acceptance. Communication of acceptance of a contract to an agent of the offeree is not sufficient and does not bind the offeror.

c. *Dickenson v. Dodds*
   i. 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

G. Acceptance by Performance—The Distinction Between Bilateral and Unilateral Contracts

1. The Bilateral-Unilateral Distinction
   a. In most contracts, the parties are exchanging promises for some future action. Since, at acceptance, both parties are bound by future promises, the contract is bilateral. On the other hand, some contracts require performance as acceptance of the contract. In that case, only the offeror is bound by a future promise at the time of acceptance, so the contract is unilateral.
   b. *Carhill v. Carbolic Smoke Ball Co.*
      i. 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 contract as soon as the offeree(s) perform
   c. *Harms v. Northland Ford Dealers*
      i. 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

2. Performance as an Exclusive or Permissive Method of Acceptance
   a. While performance may be the preferred method of acceptance of an offer, unless the offer specifies that it may only be accepted through performance, the offeree may accept in any manner that is consistent with the terms of the offer and is reasonable

3. Communication of Acceptance by Performance
   a. The general rule is that, where the offer invites acceptance by performance, no notification is necessary to make the acceptance effective unless the offer requests notification

4. Acceptance of an Offer by an Act That Cannot Be Accomplished Instantaneously
   a. *Restatement, Second §45. Option Contract Created by Part Performance or Tender*
      i. Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it
      ii. The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
   b. This section of the Restatement applies only in contracts where performance is the sole method of acceptance
   c. *Restatement, Second §62. Effect of Performance by Offeree Where Offer Invites Either Performance or Promise*
      i. 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.
      ii. Such an acceptance operates as a promise to render complete performance
   d. In this section, what is begun or tendered must be part of the actual performance invited, rather than preparation for performance, in order to make this rule applicable. For example, actually beginning play of the golf tourney as opposed to putting the clubs in the car and driving to the course.

IV. Preliminary and Incomplete Agreements

A. The problem of Indefiniteness
   1. *UCC 2-204(3)* states that if the parties intended to make a contract there is a reasonably certain basis for giving a remedy, a contract should not fail for indefiniteness, even though
some terms are left open. Many courts adopt a similar rule for contract formation under common law.

2. Contracts can be indefinite because it completely omits some matter that is vital to the exchange; does not fully, clearly, and unambiguously deal with that matter; or deliberately leaves that matter open for future negotiation.

3. *Academy Chicago Publishers v. Cheever*
   a. A contract may be enforced even though some contract 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 contract.

B. Deferred Agreement
   1. *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*
      a. A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.
      b. Definiteness as to the material matters is of the very essence in contract law.

C. The Effect of an Agreement to Reduce to Writing
   1. When parties have reached an informal bargain and decide to reduce this agreement to writing, leaving certain terms open which will be ironed out when the formal agreement is drafted, an ambiguity may arise: Are the parties immediately bound by the oral or informal agreement, so 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?
      a. Decision as to this question is context specific and different courts have ruled in both directions.

D. The Obligation to Bargain in Good Faith
   1. A situation may arise where the parties have not bound themselves to a contract, but have bound themselves to continue to bargain in good faith. This does not assure that they will eventually form a contract, but is does at least ensure that the parties are obliged to continue making good faith effort to do so.
   2. *Jenkins v. County of Schuylkill*
      a. An agreement to bargain in good faith can be enforceable if it meets the test set forth in *Grossman*: 1. both parties intended to be bound by the agreement; 2. the terms of the agreement are sufficiently definite to be enforced; and 3. there was consideration.

E. The Tort of Interference with Contract Relations: Liability for Enticing a Party to Abandon the Duty to Negotiate in Good Faith or to Renege on an “Agreement in Principle”
   1. Courts have held that the tort of interference is met when the third party knows of the agreement to bargain in good faith AND encourages one of the principles in the bargain to abandon this duty. The same may apply when an “agreement in principle” has been reached and a third party attempts to interfere.

V. The Statute of Frauds
   A. The Basic Principle
      1. Certain types of contracts are required by law to be in writing; if they are not, they cannot be enforced by legal action.
      2. While the list of contracts that must be in writing is relatively short, courts are wary of applying the statute rigidly even in those cases, since the statute could be abused by a part who did intend to be bound and is simply looking for a loophole.
      3. In essence, a statute of frauds has 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 one is signed.
         b. A *signature* by the party against whom the contract is to be enforced. This is broad enough to cover any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer.
         c. *Sufficient content*—must contain only enough information to show that a contract was made, identify the subject matter, and reveal material terms.

B. The Statute of Frauds Relating to Contracts at Common Law
1. Sales and Transfers of Land
   a. Restatement, Second §125(1)—“A promise to transfer to any person any interest in land is within the statute of frauds”

2. Contracts Not Performable Within One Year of Execution
      i. A contract that fails to specify explicitly the time for performance is a contract of “indefinite duration” and is therefore outside of the Statute’s proscription.
      ii. An oral contract is enforceable when the method of performance called for in the contract contemplates performance over a period of time greater than one year, but does not explicitly negate the possibility of performance within one year.

3. The Part Performance Exception to the Statute of Frauds Relating to Contracts at Common Law
   a. In very limited circumstances, courts will dispose for the need for writing if the actions of the parties provide enough proof of the existence of a contract. This is very rare, however.
   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.

VI. Consideration
A. Consideration—The Basic Doctrine
   1. Introduction to the Consideration Doctrine
      a. Restatement, Second §17. Requirement of a Bargain
         i. Except as stated in subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
         ii. Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§82-94.
      b. Restatement, Second §71. Requirement of an Exchange; Types of Exchange
         i. To constitute consideration, a performance or a return promise must be bargained for.
         ii. 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 promisee in exchange for that promise.
         iii. The performance may consist of
            (A) an act other than a promise, or
            (B) a forbearance, or
            (C) the creation, modification, or destruction of a legal relation.
         iv. The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.
   2. The Elements of Consideration
      a. The Requirement of an Exchange
      b. Congregation Kadimah Toras-Moshe v. DeLeo
         i. An oral promise of a gift or donation is unenforceable because it lacks consideration.
      c. Hamer v. Sidway
         i. 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.
         i. A detriment to the offeree must be bargained for by the offeror and must be either a direct or indirect benefit to the offeree.
   3. The Elusive Purpose of the Consideration Doctrine
      a. Consideration is best understood by looking at the functions it performs
         i. Help to testify that the promise was actually made (evidentiary function)
i. Makes it more likely that the individual will recognize that something serious is going on and act accordingly (cautionary function)

ii. Allows a court to easily separate the enforceable promises from those that should be ignored (channeling function)

   i. Past consideration in exchange for a future promise is not sufficient to support a binding contract
   ii. Courts rarely enforce agreement within personal relationships. Consideration probably could have been found, but court did not want to enforce this promise between a husband and wife because it would be bad policy

B. What Suffices as Consideration

1. A fair and even commercial exchange is the prototype for adequate consideration

2. Adequacy of Consideration
   a. It is not the focus of the court to decide if the consideration was adequate to support the promise that was made. So long as there is consideration, courts will be satisfied.
   b. *Apfel v. Prudential-Bache Securities*
      i. the consideration given need not be novel as long as something of real value in the eyes of the law was exchanged.
   c. *Bataskis v. Demotsis*
      i. any consideration, unless found by the court to be grossly inadequate, is sufficient to support a contract

3. Pre-existing Duties
   a. under normal contract law, a promise to do something already required is not sufficient consideration
   b. *Restatement, Second §73. Performance of Legal Duty*
      i. Performance of a legal duty owed to a promisor which is neither doubtful not 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 way which reflects more than a pretense of a bargain
   c. *State v. Avis*
      i. 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 information he discovers

4. Settlement Agreements
   a. *Restatement, Second §74. Settlement of Claims*
      i. Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
         (A) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
         (B) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid
      ii. The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.
   b. *Fiege v. Boehm*
      i. If, at the time the compromise was made, both parties had reason to believe that \( \Delta \) was the father and bargained accordingly, then the contract remains valid in spite of later evidence to the contrary.

C. Mutuality and Its Limits

1. What “Mutuality of Obligation” Means
   a. Both parties must have given up and gained something for consideration to be sufficient.
b. However, there is nothing that says that both parties be bound to a contract at the same time, to the same extent, or under the same circumstances (mutuality does not equality of obligation)

2. Performance as Consideration  
      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 right to not work or, at least, to not work for company in question, thus there is consideration.

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 condition 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  
      i. The possibility of risk does suffice 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  
      i. the fact that I would get nothing if he did no work is a detriment and works as consideration in enforcing his exclusive dealership contract

VII. Promissory Estoppel  
A. An Overview of Promissory Estoppel  
   1. Theory that sometimes protects a promisee who has relied to his detriment on the promise, even though consideration or other elements of enforceability are not otherwise present.
   2. Related to equitable estoppel (which keeps defendants with dirty hands from profiting from their own misconduct).
   3. The Origins and Nature of Promissory Estoppel as a Theory of Recovery  
      a. Restatement, Second §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) without proof that the promise induced action or forbearance
   4. The Theoretical Context of Promissory Estoppel and Why it Matters  
      a. If promissory estoppel is a substitute for consideration, once it is established, the case should follow contract 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  
         i. Emotional damages are not available in a contract claim, even under promissory estoppel, without proof a separate tort action

B. Promissory Estoppel and Non-Commercial Promises  
   1. Wright v. Newman  
      a. 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
   2. In re Morton Shoe Co.  
      a. A pledge to donate money can be enforceable under promissory estoppel if the promisor could reasonably expect the promisee to rely on this money  
         i. Note that this is in spite of the black letter rule that promises not supported by consideration are not enforceable

C. Promissory Estoppel in the 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. Promissory Estoppel and Commercial Promises
   a. *Ypsilanti v. General Motors Corp.*
      i. 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

3. Promissory Estoppel and Commercial Promises: The Specific Example of Employment Disputes
   a. 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
   b. *Lord v. Souder*
      i. 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
   c. *Restatement, Second §139. Enforcement by Virtue of Action in Reliance*
      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 action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires

4. Promissory Estoppel in Commercial Negotiations
   a. Courts will sometimes use promissory estoppel when the plaintiff incurs large expenses in anticipation of a contract based on what plaintiff has been told by defendant in negotiations
   b. *Gruen Industries v. Biller*
      i. promissory estoppel cannot be used to remove all risk from a business transaction

D. Remedies in Promissory Estoppel
   1. Remedies available will depend on whether the court in question sees promissory estoppel as a replacement for consideration (and therefore a contract law question) or a totally separate body of law (in which case remedies normally found in torts may be found)

VIII. Options and Firm Offers
A. Option Contracts
   1. The purpose of an option contract is to allow the offeree some time in which to decide whether to accept the offer. Therefore, an option contract removed the power of revocation from the offeror during the term the option contract is in effect. The offeree still makes no promise that he will ever accept the offer, so there must be consideration on the part of the offeree.
      a. The option contract is not the same as the contract that ultimately replaces it when the offeree accepts. Courts are a little more relaxed in trying to find consideration in these contracts, since these contracts serve important commercial functions.

B. Promissory Estoppel and Offers
   1. Parties do not always have the foresight to enter into an option contract. Sometimes, however, courts will attempt to fit contracts into the option format when free revocation will create an undue hardship on the offeree.
         a. It’s reliance on the Δ’s bid in calculating his own costs for a job made Δ’s offer irrevocable
IX. Obligation Based on Unjust Enrichment and Material Benefit

A. Unjust Enrichment

1. The Relationship Between Unjust Enrichment and Contract
   a. Unjust enrichment is not based on a promise. Rather, it 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. It functions as a totally different cause
      of action than the promissory actions discussed previously.

2. The Elements of Unjust Enrichment
   a. if the courts find the elements of unjust enrichment, the remedy granted is restitution.
      The two elements are:
      i. Injustice
      ii. Enrichment—the Benefit—in deciding restitution amounts, courts generally
         look to the fair market value
         (A) quantum meruit—market value of services
         (B) quantum valebant—market value of goods

3. Terminology
   a. Unjust enrichment is still sometimes referred to as “contract implied in law” or “quasi-
      contract”

4. The Distinction Between Factually and Legally Implied Contracts
   a. *Martin v. Little, Brown & Co*
      i. volunteers of information have no right to restitution if the expectation of
         payment is not express and upfront
   b. *Feingold v. Pucello*
      i. unjust enrichment cannot apply where there is no tangible benefit conferred on
         the defendant

5. Volunteers and Intermeddlers
   a. *Estate of Cleveland v. Gorden*
      i. 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

1. The Meaning of “Moral Obligation” in This Context
   a. In all circumstances where moral obligation is used, three factors are present:
      i. Some benefit was conferred on the promisor by the promisee before the promise
         was made
      ii. The benefit unjustly enriched the promisor
      iii. The promisor subsequently made a promise to pay for the benefit

2. The Application of the Doctrine of Moral Obligation Where a Debtor Promises to Pay a
   Preexisting Unenforceable Legal Debt
   a. Normally, there would seem to be no consideration here. 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

3. Moral Obligation Where the Prior Benefit Does Not Constitute an Unenforceable Legal
   Debt—The Material Benefit Rule
   a. *Webb v. McGowin*
      i. 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
   b. *Restatement, Second §86. Promise for Benefit Received*
      i. A promise made in recognition of a benefit previously received by the promisor
         from the promisee is binding to the extent necessary to prevent injustice
      ii. A promise is not binding under subsection (1)
(A) if the promisee conferred the benefit as a gift or for other reason the promisor has not been unjustly enriched; or
(B) to the extent that its value is disproportionate to the benefit

c. Dementas v. Estate of Tallas
   i. services performed gratuitously are the same as a gift and subsequent promises to pay for these services are not enforceable under moral obligation

X. Policing Contracts for Improper Bargaining
A. General Introduction to the Doctrines in this Chapter
1. Doctrines considered herein are regulatory in nature and give courts the ability to police contracts
2. Where the court finds one of these doctrines applicable, the remedy is to allow the victim of the improper conduct to avoid the contract
   a. This is not the same as a void contract. A void contract is a legal nullity, a voidable contract, the aggrieved party has the option to get out of the contract or to keep it in force.

B. Misrepresentation and Fraud
1. The General Principles and Elements of Misrepresentation
   a. generally, an assertion not in accordance with the facts. If it is known to be false 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.
   b. may take the form of an express statement, might be a deliberate concealment of facts, or may even be a failure to disclose a material fact
   c. Two possible remedies for fraudulent misrepresentation
      i. rescission of contract, or
      ii. keep contract in place and sue for any loss in value of the performance as a result of the fraud
   d. Restatement, Second §164. When a Misrepresentation Makes a Contract Voidable
      i. If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient
   e. Restatement, Second §162. When a Misrepresentation is Fraudulent or Material
      i. A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest assent and maker
         (A) knows or believes that the assertion is not in accord with the facts, or
         (B) does not have the confidence that he states or implies in the truth of the assertion, or
         (C) knows that he does not have the basis that he states or implies for the assertion
      ii. A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so
   f. Restatement, Second §160. When Action is Equivalent to an Assertion (Concealment)
      i. Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist
   g. Restatement, Second §161. When Non-Disclosure is Equivalent to an Assertion
      i. A person’s non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
         (A) where he knows that disclosure of the fact is necessary to prevent some precious assertion from being a misrepresentation or from being fraudulent or material
         (B) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure if the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing
(C) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part

(D) where the other person is entitled to know the fact because of a relation or trust and confidence between them

2. Affirmative Fraud
   a. Sarvis v. Vermont State Colleges
      i. Material falsehoods on a resume or job application that cause the person to be hired are a form of fraud in the inducement and can be grounds for termination of the employment

3. Silence as Fraud: Fraudulent Nondisclosure and the Duty to Speak
   a. In re House of Drugs, Inc.
      i. Failure to disclose that which a person could find out on their own and which does not induce the creation of a contract is not fraud and is not grounds for termination of the contract
   b. Stambosky v. Ackley
      i. When a condition which has been created by the seller materially impairs the value of the contract 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
      ii. Dissent: The seller of real property is under no duty to speak when the parties deal at arm’s length

4. Misrepresentation of Fact, Opinion, and Future Action
   a. Cummings v. HPG International, Inc.
      i. If person has no reason to believe that the statements they are making are false, it is not misrepresentation if the statements are later shown to be untrue

5. The Distinction Between Fraudulent and Negligent Misrepresentation
   a. A negligent misrepresentation is not deliberately false, but is made carelessly. A fraudulent misrepresentation is making statements without confidence in their truth or without the necessary information to support the assertion.
      i. Restatement, Second §164 says that misrepresentation is actionable if it is “fraudulent or material”

6. The Choice of Remedy for Fraud; Punitive Damages
   a. Normally, the victim of fraud may choose either to terminate the contract completely and to recover anything paid or delivered under the contract on grounds of unjust enrichment or to keep the contract in force and to claim damages for loss caused by the fraud.
   b. However, since fraud is also a tort, tort law could be used if the plaintiff wished to obtain damages instead of rescission.
      i. This means that a person may either sue for rescission and not claim punitive damages or sue for compensatory damages and seek punitive damages at the same time

7. Fraud in the Inducement Distinguished from Fraud in the Factum
   a. If the fraud is what creates the contract, that is fraud in the inducement. If the fraud concerns the very nature of the contract document itself, its character or an essential element, that is fraud in the factum.
      i. Courts have treated fraud in the factum as making the contract void, not merely voidable. This means that the person who was the victim of the fraud does not have the option of keeping the contract in place

C. Duress
   1. The Elements of Duress
      a. Duress is the compulsion of manifestation of assent by force or threat. It may consist not only of a threat of physical violence to the other party or someone the party cares about, but also of economic harm or loss—sometimes called “economic duress”
      b. Restatement, Second §175. When Duress by Threat Makes a Contract Voidable
If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

c. **Restatement, Second §176. When a Threat is Improper**
   i. **A threat is improper if**
      (A) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property
      (B) what is threatened is a criminal prosecution
      (C) what is threatened is the use of civil process and the threat is made in bad faith, or
      (D) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient
   ii. **A threat is improper if the resulting exchange is not on fair terms, and**
      (A) the threatened act would harm the recipient and would not significantly benefit the party making the threat
      (B) 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
      (C) what is threatened is otherwise a use of power for illegitimate ends

2. **Market or Circumstantial Pressure Distinguished from Duress**
   a. **Quigley v. KPMG Peat Marwick, LLP**
      i. 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 contract invalid
      ii. duress must take the form of something greater than would be encountered by any employee taking the same job

3. **Coercion by a Nonparty and the Distinction Between Void and Voidable Contracts Induced by Duress**
   a. The problem of duress by a third party is illustrated by *Trane Co.* and it shows that the court must be solicitous of the reliance interests of the contracting party who was not the perpetrator of the duress and was unaware that a threat was made.
   b. According to the court in *Trane Co.*, “duress sufficient to render a contract void consists of the actual application of physical force that is sufficient to, 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 of the signer in actual, reasonable, and imminent fear of death, serious personal injury, or actual imprisonment”

D. **Duress and Bad Faith in Relation to Contract Modification**
   1. The Application of Consideration Doctrine and the Preexisting Duty Rule to Modifications
      a. People involved in a contract are free to negotiate an agreement to modify the original document. The agreement itself then becomes a binding contract.
         i. This agreement therefore falls under all the rules of contract law in that it must consideration to be valid and it can be avoided if it was induced by duress.
         ii. If a person promises to do something he already had a duty to do, this is not consideration (preexisting duty), but if there are any new terms in the agreement, this is consideration
      b. **Alaska Packers’ Association v. Domenico**
         i. A promise to pay contract employees a higher salary which does not alter any facet of the employment is not supported by consideration
   2. **The Application of Duress Doctrine to Modifications**
      a. Even if there is consideration in a case such as *Alaska Packers*, if the contract change was made under duress, the change may still be found to be invalid
      b. **Austin Instrument, Inc. v. Loral Corp.**
A demand for changes in a contract 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.

3. Supervening Difficulties as a Basis for Upholding a Modification Without Consideration
   a. Where events following the formation of a contract create a difficulty not anticipated by the parties at the time of contracting, a fairly bargained modification of the contract to take account of that unforeseen difficulty is valid (even if there is no consideration to support such a bargain).
      i. **New England Rock Services, Inc. v. Empire Paving, Inc.**
         
         (A) For the “unforeseen difficulties” rule to supercede the “preexisting duty” rule, the following standards must be met:
         1. Contract must be subject to substantial and burdensome difficulties no anticipated at the time of contraction
         2. Party benefiting from the modification to the contract must conform to the standards of honesty and fair dealing
         3. The change in the contract must be reasonable and manifestly fair with respect to the changed condition

E. Undue Influence
   1. The doctrines of undue influence and unconscionability may be available to a party who cannot pinpoint a false representation or an improper threat as the inducing cause of the contract but who can show that the contract was nevertheless executed under circumstances that would make its enforcement unjust.
      a. Undue influence is typically available only when the victim has some type of relationship of submissiveness, trust, or reliance on the other party.
   2. Note on *Rudolf Nureyev Dance Foundation v. Noureeva-Francois* and *Tinney v. Tinney*
      a. There must be substantial evidence showing improper dealing, inequality, and detriment to the dependent party (*Nureyev*).
      b. Undue influence is “the substitution of the dominant party’s will for the free will and choice of the subservient party” (*Tinney*).
   3. *Odorizzi v. Bloomfield School District*
      a. Undue influence is persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment.

F. Unconscionability
   1. The Derivation and meaning of “Unconscionability”
      a. Suggests that the transaction is so unfair that it would offend the conscience of the court to enforce it.
      b. **Restatement, Second §208. Unconscionable Contract or Term**
         i. *If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.*
   2. The Elements of Unconscionability
      a. Decided as a matter of law by the court, not by a jury.
      b. Exists as a catch-all for the courts if they cannot apply fraud, misrepresentation, etc. It is a very fluid doctrine and is better applied by the judge than a jury.
         i. Procedural and Substantive Unconscionability
            (A) Procedural: relates to the way in which the contract was formed.
            (B) Substantive: relates to terms or the resulting contract.
         ii. Contracts of Adhesion
            (A) Any contract in which one of the parties, having superior bargaining power, is able to dictate the terms of the contract to the other on a take-it-or-leave-it basis, and the weaker party has no choice but to “adhere” to the terms.
   3. Unconscionability in Transactions Between Sophisticated Businesses
   i. Between sophisticated business entities, the party claiming unconscionability must show either substantive unconscionability (actual terms of the contract) or procedural unconscionability (by comparing age, education, intelligence, business acumen and experience, relative bargaining power, and whether there were alternative sources of supply)

4. Relief for Unconscionability
   a. court may refuse to enforce the contract, remove the unconscionable term, or get rid of the unconscionable effect of the term
      i. 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
   c. *Sosa v. Paulos*
      i. Contract provisions are severable if the parties intended severance at the time they entered into the contract and if the primary purpose of the contract could still be accomplished following severance

XI. Policing Contracts on the Grounds Other Than Improper Bargaining
   A. Introduction
      1. Policing doctrines are all based on public policy—that is, to protect people from contracts entered into as a result of dishonesty, unfair pressure, or abuse of power
      2. Policing is also important when the contracts are fairly bargained but the contract itself harms societal interests.
         a. When a contract violates a rule of law, its enforcement is most obviously against public policy. Generally, however, it is one of the parties in the contract who raises the issue of illegality because he doesn’t wish to perform. Courts must figure out how to police these contracts while not rewarding the wrongdoing of one party.
   B. Illegality
      1. Note on *The Diversified Group v. Sahn*
         a. *in pari delicto potior est conditio defendentis*—the idea that, when both parties are at fault, the condition of the defendant is the better one—does not apply when the transaction itself is forbidden by a state which provides for relief
      2. *Danzig v. Danzig*
         a. Courts may enforce illegal contracts when it is determined that the parties are not *in pari delicto* and that the public cannot be protected because the transaction has already been completed.
   C. Contracts in Violation of Public Policy
      1. When the court finds that the contract is not illegal but that enforcement would offend an identifiable public policy, decision not to enforce can come very close to judicial law making
      2. *Stevens v. Rooks Pitts & Poust*
         a. Courts will not declare a contract illegal unless it expressly contravenes the law or a known public policy of the State.
      3. Note: The “Rule of Reason”
         a. a clause or contract will be upheld to the extent that it is reasonable as to the scope and nature of the activity it restrains
         a. a party who seeks to avoid the enforcement of a contractual 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 generalize public policy
   D. Incapacity
      1. Incapacity and Exploitation
a. The public policy for these two doctrines is the protection of children and the mentally infirm
   i. With a few narrow exceptions, a minor can avoid his contract simply by showing that he was a minor at the time he made the contract
   ii. When deciding whether to avoid a contract because of incapacity, courts look to see the degree and seriousness of the incapacity and whether that party’s vulnerability attracted exploitation

2. Minority
a. Age at which a person can contract is fixed by state statute. In most cases it is 18. Until that age, the minor does not have the ability to enter a legally binding contract.
b. In most cases, lack of capacity to contract makes the contract voidable, not void. Minor may elect to disaffirm while still a minor or within a reasonable time after reaching majority.
c. Note on Webster St. Partnership, Ltd. v. Sheridan
   i. There is a narrow exception to minority, where an emancipated minor may contract for necessities.
d. Zivich v. Mentor Soccer Club, Inc.
   i. Parents have the authority to bind their minor children to exculpatory agreements

3. Mental Incapacity
a. Contrary to a minor, the court assumes that adults have the capacity to enter agreements. This assumption is rebuttable if it can be shown that the adult had mental impairment at the time of the contract.
   i. Showing incapacity renders the contract voidable, not void.
   ii. If the incompetent person regains capacity after making the contract, she can ratify it
b. Restatement, Second §15. Mental Illness or Defect.
   i. A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
      (A) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
      (B) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition
   ii. Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in party or the circumstances have so changed that avoidance would be unjust.
c. Farnum v. Silvano
   i. Competence to enter into a contract 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

XII. Contract Interpretation and Construction
A. Interpretation
1. Looks at what the content of a contract or obligation actually is. The intent of the parties, as expressed by the reasonable meaning of their words and actions, remains central.
2. Interpretation, or the Search for Contract Meaning
   a. Courts look to what a reasonable person would have expected under the circumstances of the contract when determining what the obligations are.
   b. Guilford Transportation Industries v. Public Utilities Commission
      i. When resolving an ambiguity in a contract, courts look to the “generally prevailing meaning” of the contract languages and also look to see if the ambiguity is resolved elsewhere in the contract.
3. Sources of Contract Meaning and Standards of Interpretation
   a. Ambiguous terms may become perfectly clear when read in the context of the contract. Where there are conflicting clues as to a meaning, the Restatement and UCC provide rules as to what clues are relevant.
      i. Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
      ii. A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
      iii. Unless a different intention is manifested,
           (A) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
           (B) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.
      iv. Where an agreement involves repeated occasions performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, an course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
      v. Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as confident with each other and with any relevant course of performance, course of dealing, or usage of trade.
      i. In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:
         (A) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect
         (B) express terms are given greater weight than course of performance, course of dealing, and usage of trade; course of performance is given greater weight than course of dealing and usage of trade; and course of dealing is given greater weight than usage of trade
         (C) specific terms and exact terms are given greater weight than general language
         (D) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.
      i. Π has the burden of showing that a word has a more specific usage than would generally be accepted

4. Interpretation of Standard Contracts
   a. *Atwater Creamery Co. v. Western National Mutual Insurance Co.*
      i. 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 Contract Obligations
   1. The role of contract 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
   2. Using Good Faith to Interpret and Construe Contracts
      a. Obligation to perform contractual obligations in good faith applies to all contracts, not just those that are unclear and incomplete. This requirement is echoed in both the Restatement and the UCC.
         i. A contract expressly terminable at will may be ended for any reason or no reason at all.
XIII. The Parol Evidence Rule
A. Introduction to the Parol Evidence Rule
   1. The Purpose, Premise, and Content of the Rule
      a. When a written memorial of an agreement exists, the parol evidence rule limits a party’s
         ability to offer extrinsic evidence and to have the factfinder consider such evidence in
         interpreting the contract. In general the rule holds that
         i. Where the writing is “fully integrated”, no parol evidence may be admitted to
            contradict or augment it.
         ii. To the extent that the writing does not express the entire agreement of the parties
             but nevertheless is the final record of the matters it covers, parol evidence may be
             admitted to supplement the writing by filling the gaps left in the writing. However,
             even here the evidence may not contradict what has been included in the writing.
         iii. If the writing is unclear or ambiguous, parol evidence may be used to clarify the
             unclear or ambiguous term but, again, cannot contradict what has been clearly
             included in the writing.
   2. The Process of Dealing with Parol Evidence
      a. First, courts must decide if the evidence is admissible. This is the function of the judge.
      b. If admissible, the evidence is presented to the factfinder and he evaluates the credibility
         along with all other evidence presented at trial.
B. Application of the Parol Evidence Rule
      a. Rational interpretation of a contract requires at least a preliminary consideration of all
         credible evidence offered to prove the intention of the parties.
C. The Use of Merger or Integration Clauses
   1. Some contracts clearly state that the written memorial not only supercedes prior agreements,
      but is also a complete and exclusive statement of the terms of the agreement. These “merger”
      or “integration” clauses invoke the strongest possible protection from the parol evidence rule
   2. UAW-GM Human Resource Center v. KSL Recreation Corp.
      a. When the parties include an integration clause in their written contract, 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
D. Escape from the Parol Evidence Rule:
   1. Exceptions for Evidence of the Validity or Voidability of the Contract
XIV. Misunderstanding, Mistake, and Excuse Due to Changed Circumstances
A. Misunderstanding
   1. In rare circumstances, courts may decide that the two parties simply misunderstood one
      another and attached totally different meanings to the same words. In these cases, there may
      exist reason to excuse the contract, since there was no meeting of the minds and no contract
      was actually formed.
   2. Konic International Corp. v. Spokane Computer Services, Inc.
      a. Because the two parties attached different meanings to “fifty-six twenty”, no contract was
         actually formed
B. Mistake
   1. The 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.
      a. Three general themes exist to illustrate when Mistake is available as a remedy:
         i. The mistake must relate to a fact that was in existence at the time of the
            contract... it cannot be a mistake in judgment or a prediction of future events
ii. The mistake must relate to something that is central to the contract, rather than a minor or peripheral matter, and it must have a significant effect on the benefits of the mistaken party.

iii. The mistake must be unfair or otherwise inappropriate to allocate the risk of the mistake to the aggrieved party.

2. Mutual Mistake
   a. A mutual mistake will be grounds for voiding a contract if:
      i. It relates to the facts in existence at the time of the contract.
      ii. It is shared by both parties.
      iii. It relates to a basic assumption on which the contract was made.
      iv. It 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 that arise after the contract is entered into, are not appropriate fodder for mistake doctrine.
   c. *Mattson v. Rachetto*
      i. Although there was clearly a mistake of law neither side took advantage of the other. Therefore, the contract is voidable under mutual mistake.
   d. *Restatement, Second §154, When a Party Bears the Risk of Mistake*
      i. A party bears the risk of a mistake when:
         (A) the risk is allocated to him by agreement of the parties, or
         (B) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
         (C) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.
   e. *Estate of Nelson v. Rice*
      i. Under the circumstances of the case, the Estate was a victim of its own folly and it was reasonable for the court to allocate to it the burden of its mistake.

3. Unilateral Mistake
   a. Under the unilateral mistake doctrine, because one party is more mistaken than the other or the mistake is more material to one party than it is to the other, courts require a particularly strong showing of inequity in order to avoid the contract.
      i. 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. Some courts are still really strict when determining relief under mistake. They hold that rescission is the only remedy and is only available when the contract is purely executory. Other courts (and the Restatement) have taken a broader view and grant relief as justice may require—including protecting a parties reliance interests or even adjusting or reforming the terms of the contract.
   b. *Rancourt v. Verba*
      i. Because the clear intent of the PI was to purchase land suitable for lakeshore development, and because it is impossible to do so under state and federal wetland regulations, they are “entitled” to rescission.

C. Excuse Due to Changed Circumstances
   1. Unlike mistake, which is present before the contract is formed, impracticability and frustration of purpose look to events which happened after the contract is made. Both still look to risk allocation and materiality when determining whether the doctrine(s) apply.
      a. Neither of these doctrines normally apply to a buyer in a commercial setting because the buyer’s only duty is to pay money, which cannot really be rendered impracticable.
2. Impracticability
   a. *Taylor v. Caldwell*—Original case which allowed for impracticability
      i. When a change in circumstances surrounding a contract so drastically increase
         the burden on the party claiming relief that performance can fairly be regarded as
         impracticable, the contract can be avoided
   b. *Restatement, Second §261. Discharge by Supervening Impracticability*
      i. Where, after a contract is made, a party’s performance is made impracticable
         without his fault by the occurrence of an event the non-occurrence of which was a
         basic assumption on which the contract was made, his duty to render that performance
         is discharged, unless the language or the circumstances indicate the contrary
   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...(3) the seller assumed the risk of the
         contingency
   d. *Opera Company of Boston v. Wolf Trap Foundation*
      i. Forseeability 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

3. Frustration of Purpose
   a. *Krell v. Henry*
      i. Performance can also be extinguished where a change in circumstances
         following the contract defeated the mutually understood purpose of the contract if the
         purpose is fundamental and shared.
   b. *Restatement, Second §265. Discharge by Supervening Frustration*
      i. Where, after a contract is made, a party’s principal purpose is substantially
         frustrated without his fault by the occurrence of an event the non-occurrence of which
         was a basic assumption on which the contract was made, his remaining duties to
         render performance are discharged, unless the language or the circumstances indicate
         the contrary.
      i. Although economic return may be characterized as the “principal purpose” of
         virtually all commercial contracts, mere economic impracticality is no defense to
         performance of a contract

XV. Conditions and Promises
   A. Components of a Contract: Conditions and Promises
      1. The Nature of Promises and Conditions
         a. Conditions are “an event, not certain to occur, which must occur…before performance
            under a contract becomes due.”
      2. Non-Events and Past Events
         a. Conditions do not have to be something that happens. They can be something that is
            NOT to happen.
            i. i.e. “provided that X does not take drugs.”
         b. Uncertainty as the event generally means that the event must be future, since it is not
            likely that a past event can be uncertain
      3. Sequencing: Conditions Precedent and Concurrent Conditions
         a. **Condition precedent**—Where a condition must be satisfied before the performance
            subject to that condition will become due
         b. **Concurrent conditions**—Set of promises that are dependent on each other and must be
            performed simultaneously
      4. **Conditions Subsequent**
         a. discharges a duty that is already in existence
i. ex. “duty to do X will be excused if Y”

b. whether the condition is precedent or subsequent, the ultimate effect of its non-occurrence is the same: the contingent promise need not be performed

c. 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

5. Express, Implied, and Construed Conditions
   a. **express conditions** are articulated within the contract—“conditional upon”, “subject to”, “provided that”, etc.—with obvious intent to make it a condition
   b. **implied (“implied in fact”) or 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.

6. **Pure and Promissory Conditions**
   a. Where there is a combined promise and condition, you have a promissory condition. If this is not fulfilled, the consequences of both a failure of a condition and a breach of contract follow.

7. Interpretation to Determine When and Event is a Condition
   a. **Koch v. Construction Technology, Inc.**
      i. conditions precedent are not favored in contract law
      ii. “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 as a timing provision

B. Express, Implied, and Construed Conditions
   1. The general rule is where the parties clearly and unambiguously express a condition, the court should strictly enforce it to give effect to their manifest intent.
      a. If the term is not express, courts have more latitude in interpretation
   2. **Oppenheimer & Co, c. Oppenheim, Appel, and Dixon & Co.**
      a. 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
   3. **Jacob & Youngs, Inc. v. Kent**
      a. 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. The Various Uses of Conditions
   1. There are four functions that a condition may serve:
      a. to allow a party to escape the contract is a specified even occurs or fails to occur
      b. 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
      c. to allow for alternative performances
      d. as a means of sequencing performances by making one performance a condition of the other
   2. The Use of a Condition to Allow a Party to Escape the Contract
      a. Note on **Merritt Hill Vineyards v. Windy Heights Vineyard, Inc. and Fry v. George Elkins Co.**
         i. **Merritt Hill**—if there is no promise to perform a condition, failure of the condition does not entitle the plaintiff to damages
         ii. **Fry**—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
   3. Conditions of Satisfaction
a. Conditions of Satisfaction may be expressed in the contract itself, but even if it is not, it may be implied or construed based on what the parties reasonably must have intended
   i. 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.*
   i. 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 contract where it is not expressly stated

4. The Use of Conditions to Provide for Alternative Performances
   a. Can structure the contract so that if X occurs, Y performance will be rendered and if X does not occur, Z performance will be rendered

5. The Use of Conditions to Sequence Performances
   a. Use of conditions to sequence allows parties to set up the contract in a way that allocates the risk of who goes first
   b. Where one or both performances cannot be complete instantaneously, there is even a 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. Waiver and Estoppel
      a. After the contract has been entered, the party who is the beneficiary of the condition manifests the intention, reasonably interpreted from words or conduct, that he will not require the condition to be satisfied as a prerequisite to his performance
      i. **waiver** is a knowing and voluntary abandonment of a right. May be made expressly or by implication from words or conduct
         (A) 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 contract
         (I) If the right is material to the contract, it can only be abandoned by a modification contract, not by waiver
         (B) Unlike estoppel, waiver does not require justifiable reliance and detriment
      ii. **estoppel** operates in this context where the beneficiary of a condition indicates by words or conduct that he will perform the contingent promise despite nonfulfillment of the condition
         (A) unlike waiver, estoppel is not confined to nonmaterial changes in contract, and the behavior need not meet the same standards of knowing and voluntary abandonment of a right—a party may be estopped on the basis of careless action not deliberately intended to give up a right
   2. 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*
         i. To excuse a party’s nonperformance, the conduct of the party preventing performance must be “wrongful” and “in excess of their legal rights”
   3. Unfair Forfeiture
      a. Based on the court’s determination that enforcement of the condition would result in undue and unfair hardship to the party to whom the performance is due
      b. *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*
         i. Tenant in possession of premises under an existing lease may establish equitable grounds to excuse the condition of timely exercise of its renewal option if it can be shown that:
            (A) tenant made valuable improvements to the property
            (B) tenant honestly but inadvertently failed to exercise the option to renew
            (C) lessor had not been harmed by the delay in the giving of notice
XVI. Material Breach, Substantial Performance, and Anticipatory Repudiation
A. The Distinction Between Material and Non-Material Breach
1. **Material Breach**—If the term broken is a promissory condition—both a promise and a condition—then its nonfulfillment entitles the other party both to decline performance (because of the condition) and claim breach (because of the promise).
2. **Substantial Performance**—If the nonfulfillment of the promissory condition is not enough qualify as a material breach and instead is merely a partial breach, then substantial performance has occurred and the other party is not entitled to completely decline return performance. She may be required to accept the substantial performance.
   a. The determination of what constitutes materiality is decided by evaluating the discrepancy between what was promised and what was performed and assessing the impact of this on the expectations of the victim.
3. **Cure**—A breach may be material but not be 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 contract expectations
4. *Seydel v. Ige*
   a. A material failure by one party gives 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.
5. *Worcester Heritage Society, Inc. v. Trussell*
   a. There is ample authority for refusing recission where there has been only a breach of contract rather than an utter failure of consideration or a repudiation by the party in breach.

B. The Consequences of Substantial Performance
1. The Proper Measure of Relief for Substantial Performance
   a. Substantial performance is NOT full and proper performance. It is still a breach which entitles the victim to remedy. Usual measure for this remedy is the cost of fixing the defective performance. This award is not appropriate, however, when the breach is not material/willful and cost to fix would be grossly out of proportion.

B. The Consequences of Substantial Performance
2. The Recovery of the Breaching Party: Unjust Enrichment or Recovery Under the Contract
   a. If a party has partially performed BEFORE materially breaching the contract, 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.
   b. If a party has substantially performed and the breach is not material, the breacher can enforce the contract and receive the contract price less allowance for rectifying deficiency

XVII. Contract Remedies
A. Note from chapter 1
1. **expectation damages**—most common. Represent the economic loss suffered by the victim and calculated as the amount of money needed to put the victim where he would have been had the contract not been breached. Usually composed only of actual loss (direct damages).
2. **consequential damages**—losses beyond the contract that were nonetheless caused by the breach
3. **incidental damages**—expenses incurred in dealing with the breach
B. The Goal and Fundamental Principles of Contract Remedies
1. Contract remedies operate on a compensation principle. Usually, they seek to make the aggrieved party whole, not to punish or deter the breaching party.
   a. Courts usually seek to do this through ordering specific performance (rare), enjoining the breach (rare), or giving monetary damages.
2. The Distinctions Among the Expectation, Reliance, and Restitution Interests
   a. Expectation damages seek to give the aggrieved party the “benefit of the bargain” by giving them what they would have received had the contract been performed fully.
Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:

(A) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,

(B) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

(C) his “restitution interest,” which is his interest in having restored to him any benefit that he conferred on the other party.

c. In limited circumstances where expectation damages cannot be established or are otherwise inappropriate, aggrieved parties may rely on or restitution damages.

i. Generally, restitution damages are less generous than reliance damages which are less generous than expectation damages.

d. Freund v. Washington Square Press

i. Damages are not measured by what the defaulting party saved by the breach, but by the natural and probable consequence of that breach to the $\text{\Pi}$. In this case, since the amount of royalties the $\text{\Pi}$ would have received could not be adequately ascertained, so he received only nominal damages ($0.06$)

3. Theoretical Perspectives on the Compensation Principle

a. “efficient breach”—legal system should structure remedies so that breach would be permitted without penalty, so long as the non-breaching party receives adequate compensation. This facilitates the transfer of resources from less to more valuable uses.

C. The Expectation Interest

1. Components of Expectation Damages

a. The loss to $\text{\Pi}$ of the value of the contract is the quintessential component of expectation damages. Courts refer to these damages as “direct damages”, that is damages that come directly from the contract itself. Where there is a complete lack of performance, this amounts to the value of the entire contract from $\text{\Pi}$’s point of view.

b. $\text{\Pi}$ can also suffer losses additional to the loss of the contract value. Courts characterize these as “indirect” losses and break them into “consequential” and “incidental” losses.

i. Consequential—losses which do not relate to the value of the contract but arise as a consequence of the breach (i.e. lost profits, injury to property, personal injuries)

ii. Incidental—$\text{\Pi}$’s cost of coping with the breach (i.e. cost of inspecting defective performance, cost of arranging substitute performance)

iii. The classification of the loss may have a direct impact on whether or not it is compensable at all.

2. Introduction to Measurement of the Expectation Interest

a. Courts take a broad range of factors into account when comparing $\text{\Pi}$’s actual situation to where $\text{\Pi}$ would have been had the contract been fulfilled. Nonetheless, any accounting of $\text{\Pi}$’s expectation interest must tally up the losses suffered and offset any gains or savings realized as a result of the breach.


i. Subject to the limitations stated in §§350-53, the injured party has a right to damages based on his expectation interest as measured by

(A) the loss in value to him of the other party’s performance caused by its failure or deficiency; plus

(B) any other loss, including incidental or consequential loss, caused by the breach, less

(C) any cost or other loss that he has avoided by not having to perform

c. Since the court is looking at the “loss in value to the other party”, factors such as individual preferences and party’s characteristics can play into the accounting
i. Still, the injured party must establish expectation with reasonable certainty, show that they were reasonably foreseeable to both parties, and overcome any objection that the damages should have been reasonable avoided.

d. *Carpel v. Saget Studios, Inc*
   i. Loss of sentimental value is too highly speculative to be considered by a contract court and the mental suffering alleged by Π does not constitute a proper element of damages under PA law.

3. Measurement of the Expectation Interest by Reference to Market Value
   a. When measuring Π’s expectation interest, courts do so in reference to the market value of the contract performance or the cost (or benefit) of a substitute performance.
      i. 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.

4. Measurement of the Expectation Interest by Reference to a Substitute Transaction
   a. If Π obtains substitute performance for Δ’s breach and that substitute performance is less advantageous than Δ’s would have been, Π may ask that damages be measured with reference to the particular substitute instead of market value.
   b. *Handicapped Children’s Education Bd. v. Lukaszewski*
      i. When the employee hired to replace breaching Δ was hired reasonably at a higher salary, Π is entitled to receive this difference as damages in order to restore the benefit of its bargain.

5. Measurement of the Expectation Interest When Performance is Deficient
   a. When the breaching party has substantially performed, the nonbreaching 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 between what Π expected and what Π received under the contract.
      i. The challenge is distinguishing those cases where the cost of completion would work as an unfair forfeiture or result in unreasonable economic waste from those cases where it would do neither.
         (A) Courts must look at the extent of the waste, the willfulness of the breach, the desire of the nonbreaching party, etc. Decisions will usually rest on some combination of these factors.

D. Limitations on Recovery of Expectation Damages
   1. Three important principles operate to limit a Π’s potential recovery: those of reasonable certainty, foreseeability, and mitigation.
   2. Reasonable Certainty of Damages
      a. In short, Π must prove that it suffered economic loss due to the breach and it must prove the extent of those damages to the court’s satisfaction.
      b. **The standard of proof for Damages generally**
            (A) Courts will not enforce a contract where the determination of damages is left to speculation and conjecture. However, damages need not be proven with absolute, mathematical certainty.
         ii. *Locke v. United States*
            (A) The Δ who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof that is unobtainable by reason of Δ’s own breach. Π must still establish that he has sustained some injury.
      c. **The standard of proof for Consequential Damages**
         i. *ESPN, Inc. v. Office of Commissioner of Baseball*
            (A) With respect to damages for loss of goodwill, business reputation or future profits, proof requirements are much more stringent and Π must show not only a certain loss but also a reasonably certain amount.
Courts are leery of giving any sort of lost future profit/loss of goodwill in the case of “new” businesses and many refuse to do so (“New Business Rule”) because these amounts are by their nature too speculative.

3. Foreseeability of Damages
   a. *Hadley v. Baxendale*
      i. Damages, to be recoverable, must have been foreseeable to both parties at the time the contract was made or must have been of the sort that would arise naturally in the course of this type of contract.
         (A) Direct and incidental damages usually survive the *Hadley* test. Consequential damages do not always survive this test as the loss becomes more and more remote from the ordinary consequences of such a breach.
   b. *Kenford Co. v. County of Erie*
      i. Even though Π anticipated and expected that it would reap financial benefits from an anticipated increase in the value of its peripheral lands upon the completion of the proposed domed stadium, the expectations did not ripen into breach of contract damages, since Δ had no reason to believe that it would be held responsible for Π’s unrealized land gains (damage was not within the reasonable contemplation of Δ).

4. The Mitigation Principle
   a. Contract law places a burden on the nonbreaching party to reduce the negative consequences of breach. If they do not, they may not recover for any avoidable additional damages which arise after the breach (though they may still seek damages for the breach itself). Mitigation theory arises from the idea of the “efficient breach”.
   b. *Marchesseault v. Jackson*
      i. Π has a “duty” to reasonable efforts to mitigate his or her damages. Mitigation is an affirmative defense, however, and it is up to Δ to show that Π failed to take reasonable steps to mitigate.

E. Reliance Damages as an Alternative to Expectation Damages
   1. Introduction to Reliance Damages for Breach of Contract
      a. In some circumstances, Π may recover the costs that she incurred in reasonable reliance on the contract, even if she cannot recover her full expectation damages (because those damages are either Inappropriate or Cannot be Established)
      b. The damages are controlled by the same rules as damages generally, *supra*, and they seek to place Π in the position they were before the contract was made.
         i. If Δ can show with reasonable certainly that Π’s cost in performing the contract would have been so high as to make the contract unprofitable, the court will adjust the reliance damage downward.
   2. Reliance Damages When Expectation Damages Cannot Be Established
      a. One of the most common occurrences of reliance damages is when expectation damages cannot be calculated with reasonable certainty, but reliance damages can.
      b. *Hollywood Fantasy Corp. v. Gabor*
         i. Although Π 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.
         i. Π’s own opinion of the value of their reliance losses is, by itself, insufficient to establish reasonable certainty as to the amounts
   3. Reliance Damages in a Losing Contract
      a. Recovery of full reliance damages may not be permitted where such a recovery would put Π in a better position than performance of the contract would have done.
         i. As an alternative to the measure of damages stated in §347 [the expectation measure], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less
any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

c. Note the differences here: When seeking lost profits (in expectation damages), the PLAINTIFF must prove them with reasonable certainty. When seeking reliance damages that the breaching party claims are not owed because the contract would have been a losing one, the DEFENDANT must prove the probable loss with reasonable certainty.
d. Wartzman v. Hightower Productions, Ltd.
   i. In appealing a judgment for Π, Wartzman claimed that the venture itself was to have been such a losing one that Π should recover nothing despite Δ’s breach. However, Δ was unable to prove these anticipated losses with any sort of certainty, thus Π was entitled to recover all reliance damages which it had previously established

F. Restitution as an Alternative to Expectation or Reliance Damages
   1. Restitution is basically “disgorgement of the benefits received”. That is, with the goal of preventing unjust enrichment, courts require a breaching party to disgorge the benefits he received from the nonbreaching party under contract.
   2. Introduction to Restitution as a Contract Remedy
      a. Bausch & Lomb, Inc. v. Bressler
         i. Because the doctrine of restitution looks to the reasonable value of any benefit conferred upon the defendant by the plaintiff, and is not governed by the terms of the parties’ Agreement, restitution is available even if the Δ would have lost money on the contract had it been fully performed
   3. Measurement of Restitution
      a. Most often, courts award damages equal to the net benefit received by Δ. They reach this amount by looking at either the market value of the benefit or the extent to which Δ has been enriched (may be greater or less than market value). Courts are more likely to award higher restitution amounts where Δ’s conduct was esp. egregious
         i. Where profits made by a breaching party stem from their breach, disgorgement of these profits is an acceptable part of the restitution remedy. Where the profits stem from their own business actions and not the breaching action, breaching party is entitled to keep them.
   4. Limits on Recovery of Restitution
      a. There is one limitation of restitution that has wide acceptance by many courts—where the aggrieved party has fully performed all of her obligations and all that remains is the payment by the breaching party of a specified amount of money, courts will not grant restitutions recovery.
   5. Restitution to the Party in Breach
      a. 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 sometime willing to grant limited restitution to the breaching party.
         i. Equity plays a large role in determining this award, so courts are more likely to award it in situations where Δ is relatively innocent and Π was clearly enriched by the partial performance.
         i. Where the innocent party has paid more than the contract price for the goods and services ordered from the breaching party, the innocent party may recover the overage from the breaching party. The breaching party may not recover under quasi-contract against the innocent party, since the latter is not unjustly enriched.

G. Agreed Remedies
   1. Policing Liquidated Damages Clauses
         i. Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipate or actual loss caused by
the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty...

b. \textit{Lake River Corp. v. Carborundum Co.}
   \begin{enumerate}
   \item When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, the specification is not a reasonable effort to estimate damages; and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, it is a penalty and not an enforceable liquidated damages clause.
   \end{enumerate}

H. Noneconomic and Noncompensatory Damages
   1. Damages for Pain, Suffering, and Emotional Distress
      \begin{enumerate}
      \item Some exceptions exist to the rule that emotional harm/pain and suffering are not recoverable under contract action.
         \begin{enumerate}
         \item Where the nature of the contract itself makes emotional damage particularly likely in the event of a breach. These are typically contracts for funeral services, communication of the fact of death, or contracts for caesarian section. \textit{(A) Lane v. Kindercare Learning Centers, Inc.}
            \begin{enumerate}
            \item Damage may be awarded for emotional distress caused by a breach of a personal contract even where the emotional distress does not result in a physical injury, if the contract is so obviously connected to the mental well-being of $\Pi$ that breaching it is likely to cause emotional harm.
            \item Where the Nature of the Breach itself Makes Emotional Damage particularly likely. Either the breach is, itself, a tort that would allow for emotional damage recovery or is similar enough to a tort that the court can justify the award.
            \end{enumerate}
        \end{enumerate}
      \end{enumerate}
   
   b. Restatement, Second §335. Loss Due to Emotional Disturbance.
      \begin{enumerate}
      \item Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.
      \end{enumerate}

2. Punitive Damages
   \begin{enumerate}
   \item Also called “exemplary” damages, punitive damages are sought to punish the breaching party and deter other from behaving in the same manner. Generally, these are inconsistent with contract law and, therefore, courts do not favor them.
   \end{enumerate}

   \begin{enumerate}
   \item Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.
   \item In general, courts will allow punitive damages either in cases where the breach amounts to physical harm or where the breach is accompanied by significant willful fraud. Still others will allow them when there is a fiduciary relationship between the parties (notably insurance companies, but also lawyers).
      \begin{enumerate}
      \item Courts have created tort to deal with this final situation—bad faith denial of an insurance claim.
      \end{enumerate}
   \end{enumerate}

I. Specific Performance and Injunctions
   1. Specific performance remains available only where damages would be inadequate to compensate $\Pi$. Even where they would be inadequate, courts have the power to refuse specific performance. Generally, today, only land sales will require specific performance.

2. Inadequacy of Damages
   \begin{enumerate}
   \item \textit{Van Wagner Advertising Corp. v. S&M Enterprises}
      \begin{enumerate}
      \item Neither the need to project into the future nor the contingencies allegedly affecting $\Pi$’s terms render inadequate the remedy of damages for $\Delta$’s breach of its lease. Therefore, specific performance should not be awarded.
      \end{enumerate}
   \end{enumerate}

3. The Discretionary Nature or the Remedy
   \begin{enumerate}
   \item Courts will refuse specific performance, even if damages are inadequate, when specific performance would advantage $\Pi$ unfairly, unfairly burden $\Delta$ or $3^{rd}$ parties, or involve the court in matters which as a matter public policy it does not want to address.
b. *Bloch v. Hillel Torah North Suburban Day School*
   i. Despite the unique nature of a specific school to the education of a child, courts will not order specific performance in a situation where, to do so, would be a court ordered performance of personal services. This is a policy issue stemming from the idea of forced service as slavery.

4. Injunctive Relief as an Alternative to Specific Performance
   a. When specific performance is unavailable, courts may still decide to issue a different form of injunction (usually a “prohibitory” injunction, enjoining the breaching party from doing something which would allow them to profit from their breach).
   b. *New York Football Giants v. Los Angeles Chargers Football Club*
      i. When the aggrieved party acted in bad faith (comes to the court with “dirty hands”), courts will not issue an injunction against Δ which would amount to a validation of Π’s improper behavior.
   c. *Ticor Title Insurance Co. v. Cohen*
      i. An injunction should be granted when the intervention of a court of equity is essential to protect a party’s property rights against injuries that would otherwise be irremediable. The basic requirements to obtain injunctive relief are:
         (A) a showing of irreparable injury, and
         (B) the inadequacy of legal remedies.