Exam Logistics
* 3 hours (with a page limit)
* Read whole exam first
* 3 problems (2 short and 1 long)
  - Point Allocation and amount of time for each question:
    - 1st 2 questions: 30% (1 hour)
    - Long question: 70% (2 hours)
* Consider doing last question first
* Work out problems first (outline)
  - don’t need a lot of time to write (designed to spend 1 hour writing)
* Material after mid-term will be more prominent
* UCC: won’t need to refer to unless expressly given
* Primary concern: give the answer (here’s what I think is the answer)
  - these are the issues to be resolved to get to the answer
  - those issues (as tools) that are relevant must be there

* Bring: scratch paper (outline answer)
- Something to take notes on
- Mark notes with exam number

PMBR Lecture
* Key to Contracts: Liability is being debated b/c of the promise made by one of the parties

* 6 Issues within Contract Law:

1. Did the parties form an agreement?
   - the law of offer and acceptance: there can be no contract unless the
   - impact of ambiguity of language or mistake of the traders to preclude agreement

2. is their agreement a contract?
   - if the traders formed an agreement, was a contract formed:
     1. consideration:
        - substitute is promissory estoppel
     2. absence of defenses that would preclude formation (defenses to enforcement: personal defenses)

3. Do the terms of that contract or subsequent conduct of either of the parties that formed it confer any rights/duties to non-traders

4. Have the performance obligations created by the contract matured?
   - once all persons who may have rights/duties are ascertained: have the contract obligations matured?
   - need to fix time and order of performance:
- use the law of conditions:
  - express: created by very terms used to form bargain
  - implied in fact: arise by necessary physical inference
  - implied at law: constructive conditions (last gasp if parties have not settled the matter by express conditions)
- conditions impact upon state of present liability: every condition modifies a promise
  1. inserts contingency which must be satisfied
     - condition precedent
  2. inserts contingency which must be satisfied simultaneously
     - concurrent condition
  3. insert contingency which will discharge/extinguish what had been up to that point an express condition
     - conditions subsequent

5. If the contract obligations have matured, has performance been excused?
- if no performance: consider if the contract obligations have been excused
  1. where performance obligations have become objectively impossible
  2. where the performance obligations have become commercially impracticable
     - only at a grossly high cost
  3. frustration of purpose: subsequent to the formation of K, circumstances have so altered that the other parties duty has no meaning, I now want to be excused of my duty

6. If performance has not been excused, and in the fact pattern it has not been tendered, it is breach and must discuss remedies
- Factually not performed
  1. present material breach
  2. breach by anticipatory repudiation
  3. breach by voluntary disablement

- Expectation
- Restitution
- Reimbursement
- If no adequate remedy at law: equitable remedies (specific performance, injunctions)

* UCC: Article 2
- always to compare/contrast the common law to the simplifications of the UCC
- Be aware when to apply it:
  1. if the subject of the bargain is the sale of goods
     - answer must reflect code principles
     - areas of reform where the common law is in a mess
     - what are goods?
        - not land, interest in land, rendition of personal services, sale of intangible things
  2. If goods, the parties must both be merchant to reach the most dramatic provisions of the Code
     - merchant: makes livelihood (professional) from the good
     - or even if person purports to be a merchant
* Deal w/ UCC when: goods are subject matter and merchants on both sides
1. Is There an Agreement? Is it a Contract?
* chapters: 1, 3, 4, 11, 5, 6, 7, 8, 9

* Chapter 1: Intro to Contracts:
A. Contract formed by an exchange of communications in which a transaction proposed by one party is accepted by the other.

* Chapter 3: Contractual Assent:
A. Objective Standard for Determining Assent
   1. Kabil Development v. Mignot: subjective evidence can supplement to determine objective intent
   2. Lucy v. Zehmer

* Chapter 4: The Offer:
A. Offer: creates the power of acceptance in the offeree
   1. “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” (from Restatement, Second §24)
B. Determining an offer: interpreting the intent of communication to determine if it is an offer
   1. Fairmount Glass Works v. Grunden-Martin: Fairmount’s letter of April 23 constituted an offer that was accepted by Grun.-Mar. on April 24 b/c the true meaning of the correspondence must be determine by reading it as a whole
C. “counteroffer”: new offer by the offeree that constitutes a rejection of the offeror’s original offer and the substitution of a new one in its place
D. revocation: Although an offer has a period of duration, the offeror usually has the ability to cut short the time for acceptance by revoking the offer
E. Advertisements as Offer or Solicitation?: (p. 69) advertisements commonly construed as invitations to the public to make offer or can be interpreted as an offer depending on the context.
   1. Advertisement can be considered an offer where it would lead a reasonable prospective buyer to understand that an offer was intended
   2. Not an offer: Leonard v. PepsiCo.: no reasonable person could objectively conclude the commercial was an offer
   3. Offer found: Lefkowitz v. Great Minneapolis Surplus Store: led a reasonable prospective buyer to understand that an offer was intended

* Chapter 11: Options and Firm Offers:
A. Absent independent consideration, under classical view, any promise to keep an offer open is a legal nullity. With consideration, the offeror’s promise to limit his power of revocation is enforceable.
B. Option Contract purpose: allow offeree time to decide whether to accept the offer.
   1. Held: The sub’s offer was irrevocable: general contractor reasonably relied on bid and sub had made the mistake
D. UCC 2-205 “Firm Offers”: offer by merchant in signed writing which includes in terms that it will be held open is not revocable (consideration will be found)
1. period of irrevocability cannot exceed 3 months

* Chapter 5: Acceptance:
A. Acceptance has:
   1. substantive aspect: assent to the contract terms
   2. procedural aspect: communication of that assent in the proper time and manner.
B. “mailbox” rule: where mail is an expressly or impliedly authorized medium of acceptance, a properly addressed acceptance takes effect when deposited in the mail (Cantu v. Central Ed. Agency (p. 99))
C. Rewards from private individuals: Glover v. Jewish War Veterans: No contract unless claimant when giving the info knew of the offer (of reward) and acted w/ intention of accepting the offer
D. Silence as Acceptance or Exercise of Dominion: Duck hypothetical
E. Termination of the Power of Acceptance:
   1. lapse of offer
   2. rejection
   3. counteroffer
   4. revocation
   5. death/mental disability of offeror
   6. lapse of an offer by passage of time

F. Acceptance by Performance: Bilateral and Unilateral Contracts
   1. bilateral: both sides make a promise
   2. unilateral: promise for performance
      - if language not clear: acceptance allowed by either promise or performance
   3. Carlill v. Carbolic Smoke Ball Co. and Harms v. Northland Ford Dealers: unilateral contracts were accepted in both cases

* Chapter 6: Acceptance Under the UCC (see more under #6 below)
A. “Battle of the Forms” UCC 2-207:
   1. Subsection (1): absent clear indication that counteroffer was intended, court should not apply the common law “mirror image” rule
      - response apparently intended as acceptance should be treated as such
      - variations from the offer should be seen merely as proposals for additions to the contract
   2. Subsection (2): response to offer qualifies as acceptance containing additional terms (very narrow requirements for these additional terms to enter the K)
      - usual result of this subsection is that the additional terms in the acceptance will not become part of the contract
   3. Subsection (3): applies where no K resulted from the communications of the parties but they went ahead and performed anyway

* Chapter 7: Preliminary and Incomplete Agreements:
A. Indefiniteness can still allow contract
B. Agreements too indefinite to enforce:
   1. No Gap fillers
   2. No remedy
   3. Business Practice
      - Policy: Courts not likely to fill in gap with a standing business practice
C. Lack of Intent: can make agreement unenforceable:
   1. Ex: parties don’t intend to have rental agreement until agreed on price

E. Preliminary/Incomplete Agreement Principles:
   1. can’t see a breach: can’t determine what promises were made
      - Academy Chicago Publishers v. Cheever: publishing agreement
      - no “meeting of the minds”, no mutual assent
   2. Agreement to Agree
      - Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher: graduated rent, landlord ↑
      - Held: mere “agreement to agree” is unenforceable
   3. Good Faith Principle
      - Jenkins v. County of Schuylkill: negotiations for 911 call center
      - Court doesn’t directly decide: if agreements to “good faith” negotiations are enforceable

* Chapter 8: Statute of Frauds:
A. Includes:
   1. be written
   2. be signed
   3. sufficient content to evidence a K
B. Applies to:
   1. Transfers of Land
   2. Contracts not performable within one year of execution
   3. Contracts for sale of goods
C. Purpose: it is a defense- even though a contract was made
   1. only the party against whom enforcement is sought needs to have signed
D. Email??: signature issue (requires unique signature, i.e. PIN number)
E. Exceptions: Burns v. McCormick: part performance

* Chapter 9: Consideration:
A. Consideration: promise in exchange for something in return (deal, bargain)
   1. sought by promisor and given by promisee
   2. Ask: Where was promise? What was given in exchange for the promise?
   3. illusory promise: promise that only consists of subjective estimations. Such a situation lacks mutuality and is not enforceable b/c no consideration (looks like a promise but not a promise: absolutely not required to do anything)
      a. don’t enforce: illusory promises lack consideration (if no other consideration in contract then contract is unenforceable)
      b. enforce: if intent to enter enforceable contract is evident, can read agreement to mean “to act in good faith” (see UCC 2-305(2))
B. Examples:
   1. Hamer v. Sidway: consideration = nephew’s refraining from the conduct
   2. Patel v. American Board of Psychiatry: Board never requested Patel’s performance
C. Gratuitous Promise: consideration not found
   1. Congregation v. DeLeo: $25,000 promised to rabbi
D. Past Consideration does not uphold Present Consideration:
   1. Carlisle v. T & R Excavating: husband/wife divorced he was to build preschool
E. There can be consideration even if the exchange is grossly unequal: Apfel v. Prudential and Batsakis v. Demotsis

F. **Preexisting Duty Rule:** preexisting legal duty cannot serve as consideration for a contract
   1. *State v. Avis:* DePretis, a private investigator, should receive the reward b/c he did not have a preexisting duty

G. Settlements:
   1. *Fiege v. Boehm:* forbearance on bastardy charges was considered consideration

H. **Mutuality:** If plaintiff seeks to enforce another party’s promise as a contractual obligation, that plaintiff will have to demonstrate that it provided a return promise or performance.
   1. unless both are bound, neither is bound (both parties must have given up and gained something for consideration to be sufficient)
   2. 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 ≠ equality of obligation)
   5. Discretionary Promise as Consideration: Wood v. Lucy, Lady Duff-Gordon: There was implied obligation on Wood to use reasonable efforts to perform his side of bargain, thus consideration
   6. Mutuality and its Limits: requirements contracts results from a term which measures the quantity by the output of the seller or the requirements of the buyer
      a. the above means such actual output or requirements as may occur in good faith (no unreasonable quantity may be tendered or demanded)
      b. Eastern Air Lines v. Gulf Oil: Eastern to get its “requirements” for jet fuel from Gulf Oil. Eastern’s obligation was not illusory b/c an obligation to act in good faith was implied
      c. UCC 2-306 “Output, Requirements and Exclusive Dealings”

2. **What does the contract contain?**
   * chapters: 6, 15, 16, 18

   * **Chapter 6: “Battle of the Forms Issues”:** found above in section #1 (Is there K?)
     A. Especially subsection 2 and additional terms
   * **Chapter 15: Contract Interpretation and Construction**
     A. **interpretation:** process of discerning the meaning intended by the parties to a contract
        1. pure interpretation: focuses on discerning the actual manifested by the parties
     B. **construction:** process of adding contract terms by legal implication
        1. pure construction: supplies contractual content base on public policies or general principles of law
   C. Sources of Contract Meaning and Standards of Interpretation
      1. Frigaliment Importing Co. v. B.N.S. Intl. Sales Corp.: what is chicken?
         a. common “trade” usage
         b. context of negotiations (surrounding circumstances): market price (in Frigaliment market price of old = $.30, new = $.37 and K price = $.33, so not helpful)
D. Interpretation of Standard Contracts
   1. Atwater Creamery v. Western Natl. Ins.
      a. Held: the “forced entry” provision was not upheld because of the reasonable expectations of the purchaser of the policy about the definition of burglary
      b. **contract of adhesion**: Insurance Company, standard form, expectation: person won’t read policy

E. **Construction of Contract Obligations**
   1. **Gap Fillers**: rather than frustrate the parties’ contractual intent by refusing to enforce a contract, the law supplied a standard term to fill out the parties’ agreement
      a. UCC as an example: (2-305, 2-307 – 2-310) will supply a price, method of payment, method of delivery if parties failed to do so(determined w/ “reasonableness”)
      2. General Obligation of Good Faith and Fair Dealing (p. 469): there is a general obligation of good faith in performance and enforcement of contracts
      b. UCC 2-306: instructs courts to construe parties’ obligations under output and requirements contracts in light of a good faith standard
   3. Using Good Faith to interpret and construe contracts
      a. United Airlines v. Good Taste, Inc.: issue of implied covenant (good faith/fair dealing). Held: contract could be terminated at will

* Chapter 16: Parol Evidence Rule
A. **Parol Evidence** refers to evidence other than the written memorial of agreement that is offered by a party to prove alleged contract terms. The rule reinforces and extends preference given to written contract terms.

B. **Integrated Agreement**: writing that is final, written final agreement (complete and exclusive)
   1. Final writing (most recent, last writing): supercedes previous agreements
   2. “fully integrated”, no parol evidence may be admitted to contradict or augment it
   3. “partially integrated”: 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
      - Exceptions:
         1. Can show evidence of illegality, fraud, duress, mistake, lack of consideration
         2. Proof of prior conditions agreed to
         3. Collateral agreements (supported consideration) may be demonstrated
         4. Subsequent Transactions

C. **Merger Clause** can ensure parol evidence not let in: “this is final, complete and exclusive agreement of the parties” (strongest protection against Parol Evidence rule)

* Chapter 18: Conditions and Promises
A. **Condition**: an event, not certain to occur, which must occur…before performance under a contract becomes due (Restatement § 224). When making the contract, parties agree that the obligation to render a particular performance (or set of performances) is contingent on the happening of a specified uncertain event.
   1. conditions: way parties allocate risk (protect themselves)
   2. material condition: she would not have entered the agreement but for this condition (at the time of the agreement)
   3. Can create by conditions what is in effect an option

B. **Distinction between Promise and Conditions**
   1. Condition - Non-occurrence - Discharge/Exit
2. Promise - Breach - Damages

C. 3 Classifications of Conditions:
1. Express: if not stated, then either #2 or #3 below
2. Implied
3. Construction
   - How explicit must condition be before it is implied?
   - Express Conditions: courts will enforce as written
   express conditions are articulated within the contract—“conditional upon”, “subject to”, “provided that”, etc.—with obvious intent to make it a condition
   implied (“implied in fact”) conditions—implied conditions are not expressly stated but can be inferred as a matter of evidence from the language in context;
   construed (“implied in law”) conditions- 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

D. Placement of Conditions
1. condition precedent: condition that must be satisfied before the performance subject to that condition will become due
2. concurrent condition: set of promises that are dependent on each other and must be performed simultaneously
3. condition subsequent: discharges a duty that is already in existence

E. Express, Implied and Construed Conditions
1. Jacob & Youngs, Inc. v. Kent: some pipe not manufactured by Reading
   a. Held: substantial performance satisfied condition

F. Substantial Performance: express conditions will be enforced for substantial performance. Courts likely to say w/ constructed or implied conditions: substantial performance not enforced.

G. Various Uses of Conditions
1. Use of a Condition to allow a party to escape the contract:
   a. Conditions as escape mechanisms: nonfulfillment permits a party not to honor a promise that would have had to be performed had the condition been satisfied
2. Merrit Hill Vineyards v. Windy Heights Vineyard (p. 580): condition = seller was to have ins. policy satisfactory to buyer
   a. Held: duty discharged

H. Condition of Satisfaction: party’s desire for the contract is dependent upon her being satisfied w/ the outcome of some uncertain event (may be dependent on 3rd party acting on her behalf)
   1. Condition under control of one of parties (one party has complete discretion)
   2. Nothing binding (illusory promise): if condition based on “if I want to do it”
      a. no consideration: no contract (promise unenforceable)
   3. Conditions of Satisfaction: allowed if something out of control of promissory (objective/reasonable standard)
      a. Mattei v. Hopper (p. 235): shopping center, developer must have satisfactory leases
         i. Held: Leases were satisfactory

I. Use of Conditions to Sequence Performance
1. default rule: places the full credit risk on the party w/ non-instantaneous performance
J. **Excuse of Conditions**: 3 of the ground for excuse (waiver, estoppel, and obstructive or uncooperative conduct) arise from post-formation words or actions of the party for whose benefit the condition was included in the contract

1. **waiver**: knowing and voluntary abandonment of a right (waiver only given if material?)
   
   a. Mercedes-Benz Credit Corp. v. Morgan (p. 592): car lease agreement
       i. Held: waiver (dealer could reinstate the condition and give the doctor notice)

2. **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

3. Obstructive or Uncooperative Conduct: likely to be implicit as part of the general obligation of good faith and fair dealing
   
   a. Maybe like Gould v. Artisoft: Artisoft failed to give employment agreement to Gould (could hold that this obstructed)

4. Unfair Forfeiture: when Court determines that enforcement of the condition would result in undue and unfair hardship to the party to whom the performance is due

**3. Is the Contract Enforceable?**
* What are the obligations? Have they been performed? If not performed, is there an excuse?
* chapters: 1, 7, 8, 13, 14, 17, 18

* **Chapter 7: Preliminary and Incomplete Agreements**: (see discussion under #1)

A. Agreements too indefinite to enforce:

   1. No Gap fillers
   2. No remedy
   3. Business Practice
      - Policy: Courts not likely to fill in gap with a standing business practice

* **Chapter 13: Policing Contracts for Improper Bargaining**:

A. Fraud: lie

Duress: threat

Undue Influence: relationship

B. Consequences are the same (for the 3 above):

   1. promisor can exit (rescind) the contract
   2. promisor may have partially performed: they get it back through restitution
   3. exit and restitution go together

- General principle about consent: if free will is lost then can avoid bargain/promise

C. **Misrepresentation**: assertion not in accord w/ the facts

   1. When does misrepresentation make a contract voidable?
      a. induced by misrepresentation to enter contract: one party’s manifestation of assent induced by either fraudulent or material misrepresentation by the other party
      b. if recipient was justified in relying on contract, then the contract is voidable by the recipient
2. 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

D. Affirmative Fraud:
1. Sarvis v. Vermont State Colleges: convicted bank fraud, later teacher at college
2. Competing values:
   a. regulatory: correct for harms caused by wrong conduct
   b. punish: wrong conduct (moving into tort and criminal areas)

E. Silence as Fraud
1. Stambovsky v. Ackley: house supposedly haunted by ghosts
   a. Held: seller had duty to tell: omission of a material factor

F. Remedies: since fraud is also a tort, tort law could be used if the plaintiff wished to obtain damages instead of rescission (this would open up claim for punitive damages if not bringing claim for rescission under contract)

G. Duress: the compulsion of a manifestation of assent by force or threat has long been recognized as a basis for avoiding a contract. Coercion can undermine the free will of a party giving rise to a false manifestation of assent
   - Duress Argument need to prove:
     1. Is there a threat?
     2. Is it improper?
     3. Did it induce assent?
     4. No reasonable alternative

- Germantown Mfg. Co. v. Rawlinson: husband embezzled, Mrs. Rawlinson signed 2 judgment notes, didn’t know what she signed
  - Held: Kulaski had a duty to speak (he is taking advantage)

H. Restatement, Second §176. When a Threat is Improper
   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

   A threat is improper if the resulting exchange is not on fair terms, and
   (E) the threatened act would harm the recipient and would not significantly benefit the party making the threat
   (F) 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
   (G) what is threatened is otherwise a use of power for illegitimate ends

I. Economic Duress: assumes bargaining leverage but it is used improperly. In world of free contracts you are allowed to use leverage you have so have econ. duress is narrow
1. Policy: not to interfere w/ bargaining, so economic duress rule narrow
2. Ways to interpret these issues: opinion, promise, warranty promise, statement of fact, condition

J. Duress and Bad Faith in Relation to Contract Modification:
1. Austin Instrument v. Loral Corp.: Navy contract, radio sets, Austin = sub
   a. Held: Austin’s threat to stop deliveries unless the prices were increased deprived Loral of its free will. Clear that this is: economic duress and improper threat
K. **Undue Influence:** The doctrines of **undue influence** or **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 the enforcement unjust

1. **Tinney v. Tinney:** Belcourt Castle Ruth Tinney elderly, mentally weak
   a. Held: undue influence, deed set aside, Kevin=undue influence over Ruth
2. **Odorizzi v. Bloomfield School District:** elem. School teacher, homosexual
   a. Held: rescission of a consent b/c of undue influence

L. **Unconscionability:** unconscionable if not in accord with what is right, offends the conscience b/c it is unreasonably excessive, unscrupulous or egregious. Transaction so unfair that it offends the conscience of the court to enforce it

1. **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

2. **Contracts of Adhesion:** 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. **UCC allows for limits on damages,** manufacturers can include this clause in contract. This practice is justified b/c standard form contracts/contracts of adhesion keep costs lower (cheaper for consumer): I pay less b/c I have more risk

4. Policy: allow for limits on liability b/c strict liability ↑ price

5. Relief for unconscionability: court may refuse to enforce the contract, remove the unconscionable term, or get rid of the unconscionable effect of the term

* Chapter 14: Policing Contracts on Grounds Other than Improper Bargaining:

A. Some situations in which transaction is fairly bargained, its enforcement fully serves freedom of contract, yet there is some other public policy that is offended by enforcing the contract

B. **Illegality:**

1. **“in pari delicto” rule:** both parties at fault, leave parties where they are, law doesn’t intervene

2. **Danzig v. Danzig:** attorney paying someone to get clients
   a. Held: the contract should be enforced despite being illegal (refusing to enforce the sole remaining task under the contract, payment to Steven, would not further protect the public)

C. Contracts in Violation of Public Policy

1. **Stevens v. Rooks Pitts & Poust:** noncompetition clause w/ lawyers
   a. Held: noncompetition clause may be severed, remainder of agreement enforced

2. **rule of reason:** Most noncompetition clauses determined by the rule of reason: if court finds noncompetition clause is reasonable then it can be enforced

D. **Incapacity**

1. **Minority:** age at which a person attains contractual capacity is typically fixed by statute (most states = 18)
   a. **Webster Street Partnership v. Sheridan:** apartment lease, not 19
      i. Held: He can disaffirm (can be emancipated but still disaffirm)
      ii. right to disaffirm by minor (capacity) = bright-line rule

2. **Mental Incapacity:** Mental Incapacity: when you lose capacity = no bright-line rule. Adults presumed to have contractual capacity. Presumption is rebuttable:
mentally incompetent party may overturn the presumption by evidence that establishes that she lacked contractual capacity at time of entering transaction

a. Farnum v. Silvano: 90 yr. old lady, question mental abilities, sell house
   i. Held: Farnum lacked capacity to enter contractual agreement

* Chapter 17: Misunderstanding, Mistake, & Excuse due to changed circumstances:
A. misunderstandings arises when the parties differ in their subjective interpretation of contract terms
   1. Konic Intl. Corp. v. Spokane Computer Services: contract for surge protector, meaning of “56-20.” Held: Because the two parties attached different meanings to “56-20”, no contract was actually formed
B. mistake = material affect on exchange, mistake as to fact. Relates to the parties’ beliefs about the factual circumstances underlying the contract.
   1. 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
   2. The mistake must be unfair or otherwise inappropriate to allocate risk of mistake to the aggrieved party
C. Mutual v. Unilateral Mistake
   1. Mutual mistake: party not bearing risk can rescind contract
   2. Unilateral mistake: party not bearing risk can’t rescind contract
      a. 2 Exceptions to above test:
         i. unconscionability
         ii. other party knew of mistake or their fault caused the mistake
   3. Who wins these cases?
      Buyer Seller
      Topaz Cow
      Painting

- What controls? – Seller has possession and more able to learn nature of what being sold

D. Excuse Due to Changed Circumstances: disappointed party may seek to be excused from her burdensome or pointless contractual obligations under one of two closely related doctrines: impracticability (sometimes called impossibility) or frustration of purpose
   1. Doctrines of impracticability and frustration of purpose look to events subsequent to contract formation
   2. Promissor generally bears risk (of mistake, supervening event, etc…) and thus will often put in conditions
      a. “force per jour” clause (act of God) = condition
E. Frustration of Purpose: Restatement, Second §265. Discharge by Supervening Frustration
   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
   1. Scottsdale Road v. Kuhn Farm Machinery: Held: Kuhn not entitled to relief from the K b/c of impracticability or frustration.
      a. Hotel didn’t know, not paying premium for European guests

4. Was the Contract Breached? What remedies for a breach?
* chapters: 1, 19, 20, 13 B.6

* Chapter 13 B.6
A. Choice of Remedy for Fraud: punitive damages
   1. rescission (accompanied by restitution if there has been partial performance) and damages are the two most common alternative remedies for fraudulent misrepresentation
   2. Fraud = intentional tort: if plaintiff sues for rescission, he may be deprived of punitive damages but if plaintiff sues for compensatory damages he may seek punitive damages too

* Chapter 19: Material Breach and Substantial Performance
A. material and total breach: where a breach is so serious that it allows the other party to decline her performance, terminate the contract and sue for full expectation damages
   1. express condition = part of bargain = material condition
B. substantial performance: where breach is not of above gravity, it is called partial breach and the performance of the breaching party, even though it falls short of what is required by the contract, is called substantial performance
C. cure: sometimes a potentially material breach can be averted by cure, by fixing the problem before it becomes serious
D. Reasonable Time:
   1. Seydel v. Ige: Held: non-fulfillment of condition (delivering stock) = chef can be discharged (walk away). Also claim for damages for other party’s breach
   2. Reasonable time goes to 2 issues:
      a. performance (promise to deliver stock in reasonable time)
      b. Now w/ breach: reasonable time to cure
E. Consequences of substantial performance: Courts will read conditions (read K) so as to prevent forfeiture
   1. unfair forfeiture: Jacob & Youngs: Reading pipe
   2. unreasonable economic waste: Lyon v. Belosky Construction, Inc.; roof/dormers were built wrong on house. Held: express condition and material breach
   3. Way to avoid forfeiture: divisible contract
      a. Carrig v. Gilbert-Varker Corp.: subdivision K to build 35 houses
F. Breach and Substantial Performance under UCC Article 2
   1. strict tender rule: UCC Article 2 (section 2-601): Seller’s principal obligation under a contract for the sale of goods is to tender delivery of the goods at the time and place provided in the contract
      a. Cure (UCC 2-508): time for cure may extend if reason to believe tender was conforming
      b. Good Faith: honesty in fact/observance of reas. commercial standards
   2. Sale of Goods: Buyer can accept partial delivery
   3. Installment Contracts: (UCC 2-612): each installment is a separate contract
      a. Graulich Caterer, Inc. v. Hans Holterbosch, Inc: Held: it was sufficient for failure of 2 installments to impair contract as a whole

* Chapter 20: Contract Remedies
A Overview of Remedies. Restatement, Second §344. Purposes of Remedies. 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,
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 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.

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

* Expectation Damages:

<table>
<thead>
<tr>
<th>Formula #1</th>
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<tbody>
<tr>
<td>Damages =</td>
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<tr>
<td>Loss in value plus other loss</td>
</tr>
<tr>
<td>Less cost saved</td>
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<tr>
<td>Less loss avoided</td>
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- Formula #2

| Damages= |
| Incurred costs (reliance) |
| Plus profit, plus other loss |
| Less loss avoided |

1. indirect losses: in addition to the mere loss of the value of the contract
   a. indirect losses = “consequential” and “incidental” losses

A. Speculative Damages Not Awarded:
      a. can’t recover for non-economic values (publish for tenure)
      b. Lesson: rarely will recover for full losses that you have

   2. New Business Rule: 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

B. Measurement of the Expectation Interest by Reference to Market Value
   1. Procopis v. G.P.P. Restaurants: sell diner for $112,500, buyer to obtain financing and can’t, 2nd K for $100,000
      a. Held: Proof of damages was not sufficient to uphold damages of $12,500
         b. cash sale = lowest value on market

C. Measurement of the Expectation Interest by Reference to a Substitute Transaction
   1. Handicapped Children’s Ed. Bd. v. Lukaszewski: found teaching job near home
      a. Held: the Board suffered damages for the loss of its bargain in the amount of the additional compensation it was required to pay Lukaszewski.

D. Efficient Breach: neither party worse off for breach
   1. law and economics promotes efficient breach

E. Measurement of the Expectation Interest when Performance is Deficient:
   1. unfair forfeiture: Jacob & Youngs
   2. unreasonable economic waste: Lyon
   3. Peevyhouse v. Garland Coal & Mining Co.: mining co. pit, diff. in value =$300
      a. Held: Peevyhouse family doesn’t get performance (egregious case)

E.1 Requirements Contracts:
1. **Locke v. U.S.**: requirements contract for typewriter repair. The requirements contract contained mutuality and is enforceable. Court can find a way to award damages.

F. **Limitations on Recovery on Expectation Damages**

1. **reasonable certainty principle**: plaintiff must prove damages w/ reasonable certainty, not absolute certainty
   
a. **Hadley v. Baxendale**: transport mill shaft in one day
   
i. Held: the loss of profits was not reasonably considered as a consequence of breach when the parties formed the contract
   
b. 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
   
c. **Wullschleger & Co. v. Jenny Fashions, Inc.**: “first quality” cloth for Jenny to manufacture dresses
      
i. Held: damage was foreseeable – plaintiff had reason to know of Jenny’s intended use and Jenny made reasonable efforts to prevent loss

2. **Mitigation Principle**: contract law places a burden on the nonbreaching party to reduce the negative consequences of breach (“duty to mitigate damages”)
   
a. **Parker v. 20th Century Fox**: Shirley MacLaine to play in “Big Country, Big Man” instead of “Bloomer Girl”
      
i. Held: offer of role in “Big Country” was both different and inferior (MacLaine had no duty to mitigate)
      
ii. *exception to duty to mitigate*: *not fungible*

G. **Sales Remedies Under the UCC**

1. Provisions for remedies (UCC and common law) include mitigation principles

   - Employment employee
     
     Substitute employment - possible wages/salary
     
     Opportunity - wages/salary
     
   - Similar concept: buyer
     
     “cover”: cover price - Kp
     
     “market price” – Kp

   - Seller

     Damages (2-708)

2. **resale**: must be made in good faith and in reasonable commercial manner

3. **Lost Volume Sales**: Often applied under UCC 2-708(2)
   
a. By breaching the contract, the buyer has deprived the seller of sales volume, and the profit that comes from one additional sale

* **Reliance Damages**: reliance damages may be available in some cases where there is a bargained-for exchange, but is unenforceable for some reason, such as failure to satisfy statute of frauds

   1. **essential reliance**: the costs the disappointed party incurs in preparing to perform under the contract
2. **incidental reliance:** the costs the party incurs in preparing to take advantage of the benefits to accrue to it under the contract

3. **Security Stove:** makers of new stove
   a. Damages: all expenses incurred in prep for trade fair (in anticipation)

4. Reliance Damages when Expectation Damages are Inappropriate:
   a. **Sullivan v. O’Connor:** “perfect nose” = speculative, but we do know the incurred costs

5. Reliance Damages When Expectation Damages cannot be Established
   a. **Hollywood Fantasy Corp v. Gabor:** Held: profits no foreseeable, left w/ incurred costs ($57,500)

6. Reliance Damages in a Losing Contract:
   a. **reasonable certainty principle = 2 sided sword**
   b. **losses avoided:** burden on breaching party to prove losses avoided by the aggrieved party as a result of the breach
   c. **profits lost:** in expectation damage calculation, the burden is on the nonbreaching party to prove the profits lost as result of the breach

* **Restitution**
  A. restitution = disgorgement for benefits received
  B. General rule: breaching party cannot claim in restitution
  C. **Bausch & Lomb v. Bressler:** Sonomed materially breached: B&L can terminate and then claim in restitution (for part of the $500,000: losing contract)
    1. restitution is available even if the Π would have lost money on the contract had it been fully performed

* **Agreed Remedies**
  A. Parties who disagree w/ the general principle that an injured party should be compensated for breach or parties who seek to simplify and clarify this principle’s operation may choose to specify in their contract the nature and extent of remedies available
  B. **liquidated damages clause:** liquidates (or makes certain) the damages that are available to the aggrieved party
    contemporary rule: parties free to liquidate damages but limitation (reasonable amount)
  C. In determining whether damages are reasonable, one must consider:
    1. the anticipated or actual harm caused by the breach
    2. the difficulties of proof of loss (UCC formulation includes consideration of difficulties of obtaining an adequate remedy)
  D. **actual loss:** when actual damage is much different from forecasted loss
  1. Courts w/ hindsight: loss was so big and one-sided: this only works as penalty
  E. Remedies in **Standard Form Contracts** (try to limit damages)
    1. Consequential damages may be limited/excluded unless unconscionable
      a. give Courts wide discretion
      b. Injury to person in consumer goods is assumed to be unconscionable

* **Noneconomic and Noncompensatory Damages**
A. The dominance of economic considerations, sometimes to the exclusion of other compelling ethical and social policies, finds especially strong expression in the law of contract remedies.

B. **Nature of the Contract:** certain types of contracts are so personal in nature that their breach is almost certain to cause significant distress
   1. These are typically contracts for funeral services, communication of the fact of death, or contracts for caesarian section.

C. **Nature of the Breach:** if breach is such that the facts establish an independent tort for which these types of damages are available under tort law, courts are likely to allow such damages in a contract cause of action.

D. **Damages for Pain, Suffering and Emotional Distress**
   1. narrow exceptions allowed from the general prohibition of above damages
   2. *Lane v. KinderCare Learning Centers:* mother leaves 18 month old daughter at daycare, baby left, locked up
      a. Held: damages awarded for emotional distress caused by a breach of a personal contract even where the emotional distress does not result in a physical injury
   3. **Restatement, Second §355. Punitive Damages.**
      *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.*
      a. i.e. puni. damages allowed in contract, but only w/ a tort, so really not

*What is not recoverable in Contract (damages normally not available)?*
*many damages normally not available at law in contract can be put into contract
A. attorney’s fees
B. emotional distress: could make pain/suffering compensable (put it in contract)
C penalty clause (limit on liquidated damages): can’t include in contract
   1. if liquidated damages clause too high

*Specific Performance and Injunctions: alternate remedy which give the plaintiff the specific thing for which she contracted*
A. **Inadequacy of Damages:** Restatement, 2nd § 359(1): specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.
B. **Rationalization for common law rule against specific performance:** But no justified origin (only comes from history of common law courts)
   1. bad for employment contracts
      a. Problem w/ employment contracts: if specifically performed, borders on involuntary servitude
      2. efficient breach for social good
C. **Specific performance** almost always allowed where property is unique:
   1. something **not fungible** (land, Monet painting, etc…)
D. **Employment Contracts** where specific performance not available (injunction possible):
   1. *Ex:* baseball player Suzuki, contracted to play for Orex Buffaloes, wants to go to another team
      a. order can’t play for anyone else (not same as ordering him to play)
      b. this will encourage negotiation: what will it take
5. Other Ways to Enforce a Promise?

* chapter: 10, 12

**Chapter 10: Promissory Estoppel:**

A. Promissory Estoppel is a theory that sometimes protects a promisee who has relied to his detriment on the promise, even though consideration or other elements of enforceability are not otherwise present. Promissory Estoppel is either an alternative to consideration or an independent theory of recovery.

B. Elements:
   1. promise
   2. reasonably induce action or forbearance
   3. does induce action or forbearance
   4. injustice results

C. Wright v. Newman: Wright not father of child but had his surname on birth certificate and established parent-child relationship
   1. Held: under promissory estoppel, Wright’s duty to support is enforceable.

D. Promissory Estoppel in the Commercial Context:
   1. Hoffman v. Red Owl Stores: Family made many efforts to get a Red Owl franchise. Held: Red Owl was liable under promissory estoppel even though the parties had not reached full agreement.

E. **Remedies:** award full expectation damages under promissory estoppel or limit to reliance damages?

**Chapter 12: Unjust Enrichment and Material Benefit:**

A. Unjust enrichment not based on a promise. Distinct from contract: separate and independent cause of action. Claimant has conferred benefit on the recipient under circumstances that make it unjust for the recipient to keep the benefit w/o paying for it.

B. Restitution Elements:
   1. enrichment- the benefit (defendant received the benefit)
   2. injustice (unjust to keep it)

C. “benefit” = core concept (same meaning as “promise” in contract)

D. Remedy: restitution (quantum meruit/quantum valebant (p. 300) or quasi-contract from Corpus Juris Civilis)

E. **officious volunteer:** an intermeddler w/o consent receives no restitution
   1. Martin v. Little, Brown & Co.: law student, publisher
      a. Held: No, no promise (neither implicit or explicit), Martin = offic. vol.

F. Family Members: sometimes don’t recover b/c it’s not unjust that they pay
   1. Estate of Cleveland v. Gordon: even though a family member restitutionary recovery was appropriate b/c of at least some degree of consent.

G. **Moral Obligation and Material Benefit Rule:** Elements:
   1. benefit conferred on promisor by the promisee before the promise was made
   2. benefit unjustly enriched the promisor
   3. promisor subsequently made a promise to pay for the benefit

- Webb v. McGowin: appellant saved McGowin from getting hit by a pine block

6. Other Considerations?

* UCC, 2, 6, Objective Test 3
* Chapter 2: UCC (Sales of Goods):
A. Pass v. Shelby Aviation
   1. Court used predominant purpose test: transaction = predominantly a service and not subject to warranty provisions of the UCC

* Chapter 6: Acceptance Under the UCC:
A. Both 2-204 and 2-206: establish broad guidelines and leave to courts to handle detailed rules in accordance w/ common law principles
B. “Battle of the Forms” UCC 2-207:
   1. Subsection (1): absent clear indication that counteroffer was intended, court should not apply the common law “mirror image” rule
      - response apparently intended as acceptance should be treated as such
      - variations from the offer should be seen merely as proposals for additions to the contract
   2. Subsection (2): response to offer qualifies as acceptance containing additional terms (very narrow requirements for these additional terms to enter the K)
      - usual result of this subsection is that the additional terms in the acceptance will not become part of the contract
   3. Subsection (3): applies where no K resulted from the communications of the parties but they went ahead and performed anyway
C. UCC 2-104(1) (p. 143): “Merchant” defined

* Chapter 11: Firm Offers under the UCC: (see under #1)
A. UCC 2-205 “Firm Offers”: offer by merchant in signed writing which includes in terms that it will be held open is not revocable (consideration will be found)
   1. period of irrevocability cannot exceed 3 months
* PMBR: Remedies for Breach/UCC Article 2 Provisions

* Breach:
  - 2 components:
    1. what is the impact of that breach upon the affirmative duties of the agreed parties (affirmative obligations)
    2. What is the effect of the remedies (remedial rights)
* **Was this breach material or minor?**:: most important value judgment you must make and defend on the exam
  A. If material: will go to the very essence of the bargain
  B. If minor: has impaired the bargain only in some insignificant sense
* **When faced w/ fact pattern:**:
  1. what were the commercially reasonable expectations of the parties
  2. what were the consequences of the breach?
  3. has the breach destroyed the expectations or not?
    - reaches conclusion of material or minor breach
* **Material Breach**: the contract is dead, immediate cause of action, amount of money to put party into position if there had been full performance
  - if that can’t be done, party can sue in equity
  - b/c contract is dead: party must abandon the contract in face of material breach
  - party seeks to mitigate damages and turns to remedies
* **Minor Breach**: aggrieved party must go forward and perform contract duties
  - can receive remedies for any loss that the party can prove
  - problem: when party views breach as material and is later judged to be minor
    - must err on conservative side and be sure material breach has occurred
* **Affirmative Duties of the Aggrieved Party:**
  - From this point, assume all breaches material: common law, abandon contract and mitigate (avoid all avoidable losses)
    - this is principle if contract does not fall under the UCC (often for personal services)
    - if subject matter unique: often difficult to mitigate damages
  - Not complicated at common law, more complicated for sale of goods under Article 2 of the UCC
* **Example:** Contract between seller and buyer (both are merchants), 100 cases of navel oranges, Kp = $3/case, seller to deliver goods to buyer’s warehouse on or before June 10th, K formed last week of May
  - Assume: June 8, seller sends trucks to buyer w/ 100 cases (**tender**)
  - First duty of buyer: inspect the goods for conformity: buyer must assert prompt inspection of the goods
    - If no inspection, goods have been received and they are to be paid for at the Kp (very dramatic, that’s why it’s a duty)
  - Assume: 99,900 cases conform to the description (oranges), 100 cases don’t conform to contract (lemons)
  - June 8: inspection and nonconformity discovered
    - buyer = aggrieved buyer
- buyer is to give prompt and specific notification to the seller: failure to give such notice leads to a **waiver** and the buyer is to pay for the goods as tendered at the Kp
- the aggrieved seller may take advantage of the **perfect tender doctrine**: the seller can
  1. reject all the goods,
  2. she can elect to accept only the conforming goods,
  3. the aggrieved seller may elect to waive the nonconformity and accept the tender as is w/ knowledge of the non-conformity
- pay at Kp: treat lemons as if they were oranges
- Our example: inspection, prompt and specific notice and election (to reject goods??) under doctrine of perfect tender
- But: deadline was June 10th, not notwithstanding election to reject goods, if time remains to perform the contract the next affirmative duty of the buyer:
  - cooperate with any effort to **affirmative cure** (breach healed through marketplace)
  - the seller announces intention to cure the bargain, to replace the lemons with oranges, buyer had affirmative duty to allow cure
  - if seller in good faith is surprised that goods non-conforming: then the code requires that the buyer grant the seller a reasonable extension of time (code’s interest in curing breaches through the marketplace)
  - Buyer expected to cooperate but not sacrifice

* **Affirmative Duties**
  1. prompt inspection to ascertain conformity
  2. specific/prompt notice to other trader
  3. under perfect tender: efforts to cure breach
     - affirmative duty to facilitate cure
  - if seller makes no intention to cure, now for the first time seller is in breach

* **breach: no cure, non-conforming goods under UCC**
* Affirmative duties after breach:
  1. follow any instructions: do what seller says with goods being rejected
  - buyer must at own expense follow any reasonable instructions
  2. if seek instructions what to do and seller gives none: then buyer must use **self-help** to preserve the goods that I am rejecting (conserve commercial value)

* Buyer must get rid of non-conforming goods and then receive the conforming goods
  - Buyer now goes to produce market as seller of lemons and buyer of oranges
  - resell the lemons
  - form **cover contract** for oranges (seek to buy 100 cases of navel oranges)
  - buy 100 cases of oranges for $5/case
  - $200 in consequential damages
  - any expenses for transporting and seeking out this cover contract are incidental expenses (in this example say $50)
  - now sell the non-conforming lemons: $3/case so receive $300
* no need for litigation/lawyer: now have what I bargained for (I send check for $50 to seller)
* Affirmative Duties of Buyer under Article 2
1. inspect goods (promptly at peril of paying for them “as is”)
2. prompt/specific notice (if fail: waiver)
3. if prompt/specific notice then have right to perfect tender doctrine:
   - cure, then problem healed
   - my interest won’t be sacrificed
4. go to marketplace
   - follow seller’s instructions (any expenses incurred become incidental damages)
   - if no instructions: self-help (seek substitute seller: cover contract, consequential damages)
   - conseq. + incidental – proceeds from selling nonconforming goods

* Affirmative Duties of Seller
* Buyer breaches and says I can’t accept the 100,000 cases of oranges
* Benefit of seller’s contract: was to turn the oranges into $: so the seller goes to the marketplace and resells the goods
   - any difference between….?
   - additional expenses to arrange resale (incidental damages)
* These are the ideas of mitigate damages

* Remedies: only 1 remedy at law (award of money damages: taxed to the party in breach and given to the aggrieved party)
   - different measures of this remedy:
     - loss of bargain recovery down to recovery of nominal damages
     - loss of bargain preferred: that sum of money which puts the aggrieved party in the position she would have occupied had there been full and timely performance instead of breach (expectation interest)
       - expectation interest does require a contract: theroretically is the difference between market price and the contract price at time and place the defendant should have performed
* Plaintiff must hurdle common law barriers to obtain the “big check”: these barriers try to narrow the possible big check:
  1. Plaintiff must plead and prove the damages were consequential upon the breach (matter of cause and effect)
  2. Upon breach, plaintiff may only recover for damages foreseeable at the formation of the bargain:
     i. those losses generally foreseeable
     ii. those losses that were specially foreseeable
        - the distinction: the defendant will pay only for those damages that were reasonable at time of contraction formation (damages that were probable, from point of view of a reasonable person)
        - reasonable person given information predicate (only the terms of the contract) to determine what damages were probable
        - had the reasonable person stopped to think about
        - just what was probable
* Ex: automobile, to be repaired, Mon. afternoon I call and say costs $1800, I promise to have it done by 4 pm, at 4 pm it’s not reasonable
- what damages are reasonably foreseeable?
  - the costs of renting an automobile
  - not foreseeable: going to propose rich girl
- At the formation stage: disclose to the trader items of special need on your part, if the person above would have said the Ferrari was very important and I plan to propose the foreseeable damages go much farther
  3. only those items of loss that are **unavoidable** given attempts to mitigate may be recovered
    - With Example: if you could have rented another red Ferrari- you could have still proposed to the rich girl (the $50 million damage ticket then was avoidable)
    - only expected to expend reasonable efforts (these are affirmative obligations, efforts to mitigate)
- **duty to mitigate**
  4. **Specific Dollar Amount:** Must prove losses to a certain dollar amount: How can you prove that but for the breach and having the Ferrari you would have gotten the $50 million rich girl.
    - Unless you can give figures: you will walk away w/ $1 in nominal damages
    - Then have standing to sue in equity, if you don’t get anything in equity
- Quasi-contract will confer to you the market value of benefit you conferred
- if you suffered detrimental reliance (out of pocket expenses): seek damages in promissory estoppel

* **Stipulated Remedies Clause:**
  - judicial response: this is social question to be decided by courts, litigants not free to contract about breach and its consequences (that is for court)
    - liquidated damages clause: can be valid
    - penalty clause
  - Determination on 2 elements:
    1. at K formation, parties must have anticipated breach and decided the damage remedy at law would not function, then they adopt as a consequence of breach a stipulated remedy (to remedy the wrong/loss of the aggrieved party)
    2. not allowed to build in a deterrent to breach (stipulated remedy must be remedial in nature and not deterrent)