I. Introduction
   a. Contract: an exchange relationship created by agreement, containing at least one
      promise, recognized as enforceable in law.
      i. Offer, Acceptance, Consideration
         (Haley: think of an exchange – a promise for a promise)
      ii. Unilateral contract: promise → performance
      iii. Bilateral contract: promise ←→ promise
   b. What makes an agreement a contract?
      i. Cohen v. Cowles
         1. A moral and ethical obligation does not alone create a contract
         2. The lack of belief by either party that they were entering a legal
            contract negates the existence of a contract
         3. Not every promise is a contract
   c. Enforcement of contracts
      i. Common law rule: you’re allowed to breach a contract, you just have to
         pay damages if you do
      ii. Expectation damages: put the victim back in the position she would have
         been in were it not for the breach
         1. Direct damages: the actual loss under the contract itself (the
            difference between the contract price and the substitute price)
         2. Consequential damages: losses beyond the contract that resulted
            from the breach (lost revenues due to delayed opening)
         3. Incidental damages: expenses incurred in dealing with the effect of
            the breach (cost of getting a new contractor)
      iii. Specific performance: court order compelling performance
         1. Most often awarded in sale of land complaints
      iv. Enforcement of damages is separate from judgment—if the Δ has no
         money, there can be no enforcement. The judgment dies there.
      v. Keltner v. Washington County
         1. Generally you cannot recover in contract for mental suffering
         2. In most jurisdictions, you must demonstrate physical suffering to
            recover mental suffering damages in contract
   d. Restatement vs. Restatement (Second)
      i. Restatement: Williston & Corbin – Corbin school of thought, looks at
         judicial decisions actually made
      ii. Restatement (Second): Braucher – Williston school of thought, describes
         the law as it ought to be

II. Introduction to Statutory Law Method: UCC Article 2 – Sale of Goods
   a. Statutory law vs. Common law
      i. Statutory law: mandatory rules
      ii. Common law: default rules
   b. Creation of the UCC
      i. Most contracts are governed by the rules and principles of common law,
         but some statutory rules for particular kinds of contracts exist
      ii. Uniform state commercial laws are desirable: variations create
         uncertainty/confusion and impeded interstate commerce
iii. National Conference of Commissioners on Uniform State Laws (NCCUSL) draft uniform statutes and recommend them to legislatures

iv. NCCUSL statutes needed updating → creation of the UCC in the 1950s. Today: adopted by many states but not all.

c. Article 2
   i. Applies to sale of “goods”, but not “sale of services” (some transactions include both)
   ii. **Pass v. Shelby Aviation, Inc.**
      1. Courts decide whether a contract is for a sale of goods or sale of services using 1 of 2 tools:
         a. **Gravaman test**: looking only at the portion of the transaction upon which the complaint is based
         b. **Predominant factor**: looking at the transaction as a whole – **court prefers this test**
      2. Problem with Gravaman test: plaintiff will always win
   iii. **Custom Comm. Engineering, Inc. v. E.F. Johnson Co.**
      1. The 4-year statute of limitations under the UCC applies to dealership agreements
      2. This case also affirms the predominant purpose test
   iv. Gatekeeping function: courts strategically apply the UCC to determine if a case will go forward or not.

III. Contractual Assent
   a. Contracts are formed by mutual consent. Both parties must intend to enter the contract, and agree on its terms.
   b. Determining if the parties intended to create a contract
      i. **Objective test**: the apparent intent, as shown by overt words/acts
      ii. **Subjective test**: determining the state of mind of the actor
   c. Economic efficiency is maintained by the objective test
      i. People won’t enter into contracts if they can’t rely on what the other person does/says to indicate if there is a contract
      ii. Courts would waste resources trying to determine state of mind
   d. **Kabil Developments Corp. v. Mignot**
      i. Subjective evidence is admissible as support for the objective test of contract (testimony on the state of mind of one party is OK)
      ii. Order of offer and acceptance between contractor & subcontractor
         1. Subcontractor makes offer to contractor (no contract)
         2. Contractor makes offer to owner (no contract)
         3. Owner accepts contractor’s offer (contracts are formed at both levels—between owner and contractor AND between contractor and subcontractor) **see Drennan v. Star Paving**
   e. Four factors courts use to determine reasonableness:
      i. Actor’s attributes
      ii. Background info. that the actor possessed
      iii. Relationship between the parties
      iv. The context of the transaction
f. **Lucy v. Zehmer**: internal assent of the parties is not a requisite for the formation of a contract, provided the parties’ external words/actions are reasonably interpretable to indicate assent

IV. Offer and Acceptance  
   a. **Offer**: the hallmark of an offer is that the offeree must reasonably understand that the offeror has given her the initiative to create the contract by accepting the offer. (The wording in context must make it clear to indicate that acceptance binds the parties immediately.)
   
   b. **Fairmount Glass Works v. Gruden-Martin Woodenware Co.**
      i. Once the offeree accepts the offer, a contract is formed
      ii. A price quote alone is not an offer, but accompanied by specific language so indicating, it can be construed to be an offer
   
   c. **People v. Braithwaite**: In order for there to be a valid offer, the offeror must exhibit the intent and ability to deliver on his offer.

V. Advertisements as Offers  
   a. **Lefkowitz v. Great Minneapolis Surplus Store**:  
      i. Ordinarily, an advertisement to the general public is a solicitation for offers. The definite nature of the terms in the ad create an offer
      ii. The test of whether a binding obligation may originate in advertisements addressed to the general public is: “whether the facts show that some performance was promised in positive terms in return for something requested.” [Williston]
   
   b. **Leonard v. Pepsico, Inc.**
      i. An advertisement to the general public that is obviously a joke is not an offer
      ii. In order for an ad to be an offer, there must be some language of commitment or some invitation to take action without further communication [Restatement (Second) of Contracts §26]
   
   c. **Declaratory judgment**: the court is asked to give judgment declaring the rights of the parties.
   
   d. **Injunction**: a court order compelling the defendant to take or forbidding them from taking a specified action.
   
   e. **UCC 2-204. Formation in General** – p.83

VI. Acceptance  
   a. **Acceptance**:  
      i. Substantive aspect: assent to the contract terms
      ii. Procedural aspect: communication of that assent in the proper time and manner (in the absence of specific instructions, must happen within a reasonable time)
      iii. An offer may be accepted only by the person(s) designated in the offer
      iv. Acceptance must be a knowing, voluntary, and deliberate act
      v. Whether or not a person has accepted is measured by an objective standard
   
   b. **Counteroffer**: in legal effect a new offer to the offeree, constitutes a rejection of the original offer and a substitution of the new one in its place
   
   c. **Revocation**: the offeror has the ability to cut short the time for acceptance by revoking the offer, as long as the offer has not yet been accepted
d. **Keller v. Bones:**
   i. The language of a written contract can dispense with the communication element of acceptance
   ii. *The offeror is the master of the offer:* the offer sets out the terms of the contract
      1. If the contract lacks necessary terms, the court may apply default rules (common law) or “gap fillers” (UCC) OR may declare the contract void due to indefiniteness
   iii. *The acceptance mirrors the offer:* acceptance must conform in all respects to the offer, and comply with all of the terms the offer sets out for the manner of acceptance
   iv. Specific performance is the standard remedy for sale of land

e. Substantive nature of the offer: the terms setting out the transaction that is being offered (the proposed contract)
   i. Acceptance must mirror the offer
   ii. New terms in the acceptance must be evaluated for consistency with the original terms (they do not necessarily create a counteroffer)

f. Procedural nature of the offer: the part of the offer which sets out the procedure to be followed by the offeree if he wishes to accept the offer
   i. In the absence of such terms, communication can occur in any manner that is reasonable
   ii. If acceptance is communicated in a different way than the terms set out, it may be effective anyway if it is:
      1. reasonable; AND
      2. consistent with the manner prescribed in the offer; AND
      3. no less protective of the offeror’s rights

g. **Roth v. Malson:** STUDY THIS CASE
   i. Majority opinion: acceptance must be absolute and unqualified, and must mirror the offer completely (common law)
   ii. Dissenting opinion: if the intent of both parties to enter into a contract is clear, then why be a stickler for exact language? (UCC)

h. Effective date of acceptance: an acceptance takes effect when it is communicated to the offeror
   i. *Mailbox rule:* where the mail is an expressly or impliedly authorized medium of acceptance, a properly addressed acceptance takes effect when deposited in the mail

i. **Glover v. Jewish War Veterans of United States, Post No.58**
   i. A private organization is not required to award reward monies if the act for which the reward was offered is performed without knowledge of the reward (a person cannot claim a reward if they did not know about the reward at the time they performed the act)
   ii. According to the objective test this would be a contract, but this is an exception to the rule UNDERSTAND THE OBJECTIVE TEST

j. Silence as acceptance
   i. Usually silence constitutes a rejection of the offer
ii. The offeror cannot write the offer in such a way that compels the offeree to respond to avoid accepting

iii. Exceptions: Restatement, Second §69
   1. Where the offeree takes the benefit of offered services with reasonable opportunity to reject them AND reason to know that they’re offered with expectation of compensation
   2. Where the offeror has stated or given the offeree reason to believe that silence constitutes acceptance AND the offeree intends to accept the offer through their silence
   3. Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

VII. Termination of the Power of Acceptance
a. Ways in which the offeree’s power of acceptance may be terminated
   i. Lapse of the offer
   ii. Rejection – the offeree can’t change her mind once she’s rejected
   iii. Counteroffer – a response may be a counteroffer if it is communicated too late or not in accordance with prescribed terms
   iv. Revocation – only becomes effective when it is communicated to the offeree (mailbox rule does not apply!)
   v. The Death or Mental Disability of the Offeror – does not terminate a contract once formed, but does effectively revoke the offer

b. Vaskie v. West American Insurance Co.: An expired statute of limitations does not cause a contract to lapse when the offer was made before the statute expired.

c. Hendricks v. Behee: No contract is formed until the acceptance is communicated to the offeror. The offeror reserves the right to revoke the contract until acceptance is communicated.

d. Dickinson v. Dodds: Indirect revocation - once the offeree knows that the offeror has revoked the offer, there is no longer a “meeting of the minds” and the contract is effectively revoked.

VIII. Bilateral and Unilateral Contracts and Perspectives
a. Bilateral contract: at the point of contract formation, both parties have made promises to be performed at a future date

b. Unilateral contract: the offeree’s performance is complete at the point of contract formation, and only the offeror’s promise is outstanding when the contract is created

c. Carlill v. Carbolic Smoke Ball Co.
   i. An advertisement offering a reward is an offer for a unilateral contract, and anyone who performs the conditions accepts the offer
   ii. Duty of immediate performance is created once the conditions are fulfilled
   iii. In a unilateral contract, the offeree can never breach (unequal relationship)

d. Harms v. Northland Ford Dealers
   i. Courts ascribe contracts their plain and ordinary meaning.
   ii. Unannounced rules and conditions in a contract cannot be enforced.
e. Acceptance by EITHER promise or performance: unless a method of acceptance is unambiguously prescribed as exclusive, the offeree may accept by any method that is:
   i. consistent with the terms of the offer AND
   ii. is reasonable.

f. Communication of acceptance by performance, Restatement, Second §54
   i. Where an offer invites acceptance by performance, no notification is necessary to make the acceptance effective unless the offer requests notification
   ii. HOWEVER, when the offeree knows that the offeror has no means to learn of the performance with reasonable promptness and certainty, the offeror is not bound.

g. Acceptance by an act that takes time to complete: protecting the offeree from revocation when performance is the exclusive mode of acceptance, Restatement, Second §45:
   i. When an offer prescribes performance as the exclusive mode of acceptance, an option contract (prohibiting the offeror from revoking the offer) is created once the offeree begins performance
   ii. The offeror’s duty of performance is conditional upon completion of the performance

h. Acceptance by an act that takes time to complete: protecting the offeree from revocation when EITHER promise or performance are acceptable modes of acceptance, Restatement, Second §62:
   i. When an offer allows EITHER promise or performance as acceptance, the beginning of performance is an acceptance by performance
   ii. Such a performance operates as a promise to render complete performance

i. Boilerplate: preprinted terms contained in standard forms

IX. Offer and Acceptance under the UCC: Basic Principles
a. UCC 1-103: provides that principles of law and equity supplement the provisions of Article 2 (instructs judges to consider FAIRNESS)

b. UCC 2-204: general guidelines for deciding if a contract for the sale of goods has been formed (emphasis is on agreement, not rigid rules):
   i. If either the words or the conduct of the parties show an intent to make an agreement, a contract for the sale of goods should be recognized.
   ii. A contract may be formed even if the court can’t determine the exact moment of its making.
   iii. It is not fatal to contract formation that some terms are left open—provided it’s clear that the parties intended to make a contract AND the court can find a reasonably certain basis for giving an appropriate remedy.

c. UCC 2-206: Offer and acceptance in formation of contract
   i. Unless otherwise unambiguously indicated by the language OR the circumstances,
      1. An offer to make a contract invites acceptance in any manner and by any medium reasonable in the circumstance
      2. An order or other offer to buy goods for prompt shipment invites acceptance EITHER by prompt promise to ship OR shipment
3. Shipment of non-conforming goods does not constitute acceptance IF the seller promptly notifies the buyer that the goods are offered only as an accommodation. (If the seller does not notify the buyer that the goods were NOT intended as acceptance, then the seller is bound to deliver conforming goods.)

ii. An offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance (even if the seller has begun performance)

d. **ProCD, Inc. v. Zeidenberg:**
   i. Licenses *inside of boxes* are enforceable
   ii. One of the terms to which buyer agrees by purchasing the item is that the transaction is subject to a license
   iii. The license expressly extends a right to return the item for a refund if the terms are unacceptable
   iv. Standardization of terms is essential to mass production
   v. MOST CONTRACT PROFS DON’T AGREE WITH THIS CASE

X. **Battle of the Forms**
   a. **UCC 2-207:** frequently involves standard forms (designed to combat unfairness of “mirror image” rule)
      i. A definite or seasonable expression of acceptance or a written confirmation which is sent within a reasonably time *operates as an acceptance* even though it state terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms
      ii. The additional terms are to be construed as proposals for addition to the contract. BETWEEN MERCHANTS such terms become part of the contract unless:
         1. the offer expressly limits acceptance to the offer terms
         2. they materially alter it, or
         3. notification of objection to them has already been given or is given within a reasonable time after notice is received
      iii. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.
   
b. **Materiality:** a term is material if it relates to an important aspect of the transaction
      i. Official Comments 4 and 5 to UCC 2-207: one attribute of a material alteration is that it would cause “…surprise and hardship if incorporated without express awareness by the other party…”

c. **UCC 2-104(1):** definition of a merchant. A party may qualify if he:
   i. Deals in goods of that kind
   ii. By his occupation represents that he has knowledge or skill peculiar to the *practices* involved in the transaction
iii. By his occupation represents that he has knowledge or skill peculiar to the goods involved in the transaction
iv. Employs an intermediary with that knowledge or skill, so that the intermediary’s expertise is attributable to him
d. Basic idea of special rule for merchants [2-207(2)]: to distinguish the experienced professional buyer or seller from someone who is a casual buyer or seller
e. Counteroffer under UCC 2-207(1); 3 situations create counteroffer:
   i. If the acceptance is not timely, then the offer has lapsed
   ii. If the written language makes clear that the offeree does not intend to accept the offer but proposes a contract on different terms
   iii. Where acceptance makes it clear by the use of specific language that the offeree’s acceptance is conditional upon the offeror’s agreement to the offeree’s terms
f. “Additional” vs. “Different” terms [UCC 2-207(1) uses both terms, UCC 2-207(2) omits the word “Different”]; courts use 3 approaches:
   i. If a term is found to be “different” rather than “additional,” it is simply discarded
   ii. The omission of the word “different” was a drafting error, “different” terms = “additional” terms
   iii. Knockout rule: the conflicting terms in the offer and acceptance cancel each other out, the resulting gap is filled by the default rules in the UCC (Comment to the UCC adopts this rule.)
g. Klocek v. Gateway, Inc. (rejects the ruling in ProCD)
   i. UCC 2-207 can be applied even when a “battle of the forms” issue is not present
   ii. Under UCC 2-207, the buyer is not a merchant and additional terms included in the box with an item will NOT be enforced unless they expressly state that the buyer must accept the additional terms in order for the seller to continue in the contractual relationship
h. Recent amendment to the UCC virtually destroys 2-207. It will almost certainly not be around by the time we begin practicing law

XI. Preliminary and Incomplete Agreements
a. Indefiniteness: an agreement may be indefinite because it:
   i. Completely omits some matter that is vital to the exchange
   ii. Does not fully, clearly, and unambiguously deal with that matter
   iii. Deliberately leaves a material issue open for future negotiation
b. Academy Chicago Publishers v. Cheever: If the essential terms are so uncertain that there is no basis to determine breach, there is no contract. (A vague contract is not enforceable, even if both parties have behaved as if a contract existed.)
c. Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher: an agreement to agree at a later date is not enforceable, especially in landlord-tenant agreements.
d. Oral agreements followed by a writing: to determine if the parties meant to be bound by the oral contract or the later writing, courts must interpret the parties’ intent from their language and dealings in context.
e. Jenkins v. County of Schuylkill: a letter agreeing to negotiate in good faith is not an enforceable contract
f. Haley on vagueness:
   i. Generally, vagueness does not negate a contract
   ii. UCC allows courts to use “gap fillers” to add the necessary terms when a contract is vague (As long as the contract has the important and essential terms that proved a contract exists and should be enforced.)
g. The tort of “Interference with Contract Relations”:
   i. Liability for enticing a party to abandon the duty to negotiate in good faith or to renege on an “agreement in principle”
   ii. Requires that the defendant have had knowledge of the existence of the original contract, and must have actively induced the breach

XII. Statute of Frauds
a. Restatement, Second §131: a writing satisfies the statute of frauds if:
   i. it is signed by the party to be charged
   ii. it reasonably identifies the subject matter of the contract
   iii. it is sufficient to indicate that a contract with respect to that subject matter has been made between the parties; and
   iv. states with reasonable certainty the essential terms of the unperformed promise in the contract
b. Restatement, Second §134: “signature” includes any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer (initials, thumbprint, or arbitrary code will qualify)
   i. UCC 2-201(39): “signed” includes any symbol executed or adopted by a party with present intention to authenticate a writing
c. Three most common transactions covered by the statute of frauds:
   i. Contracts for the sale of land or the transfer of an interest in land (contracts with real estate agents may NOT apply, unless you are selling your real estate agent the land)
   ii. Contracts that cannot be performed within one year from the time of their execution
   iii. Contracts for the sale of goods over $500 (proposed amendment to raise the threshold to $5,000)
d. Roberts v. Karimi:
   i. Documents that are not a contract but which prove the existence of an agreement can be used to affirm the existence of a contract
   ii. The purpose of the statute of frauds is to protect people against fraudulent enforcement of agreements that were never made, not to allow parties to evade genuine agreements that were reached
e. C.R. Klewin, Inc. v. Flagship Properties, Inc.:
   i. A contract of “infinite duration” does NOT fall under the statute of frauds. (An oral contract that fails to specify explicitly the time for performance.)
   ii. If the contract of infinite duration could be completed within one year, the statute of frauds does not apply, and on oral contract can be enforceable
f. Part performance doctrine: conduct by the parties following the alleged oral agreement can provide enough proof of the contract so as to dispense with the need for a writing
g. **Burns v. McCormick**: not every act of part performance creates a contract. There must be a performance “unequivocally referable” to the agreement.

h. **Nashan v. Nashan**: plaintiff must show reasonable reliance on the contract that would make it unjust for the defendant to hide behind the statute of frauds (in order to invoke the part performance doctrine)

i. **UCC 2-201**: formal requirements; statute of frauds
   - Comes into play when a *contract for the sale of goods* (different from a “sale of goods”) >$500 is alleged to have been made. Requires:
     1. A writing
     2. Signed by the party against whom enforcement is sought (or signed by the agent of that party)
     3. Must be sufficient to show a contract for sale of goods between the parties
     4. (Comment adds a requirement for a *quantity term* – the contract is not enforceable beyond the quantity stated)

ii. A writing in confirmation of a contract *between merchants* is enforceable if it is:
   - received in reasonable time
   - if the party receiving the writing has reason to know of its contents
   - if the party receiving the writing does not object to its contents in writing within 10 days

iii. The requirements of (i) are suspended, if the contract is valid in other respects and if:
   - The goods contracted for are suitable *only* for sale to the buyer
   - If payment is made and accepted

XIII. Consideration
   a. Look to consideration as an “easy knock-out” tool—if you can solve the contract issue through consideration, don’t worry about other issues.
   b. **Restatement, Second §17**: formation of a contract requires a bargain with mutual assent to the exchange and a consideration (SEE §71)
   c. **Restatement, Second §71**: requirement of an exchange, types of exchange:
      - To constitute consideration, a performance or a return promise must be bargained for.
      - A performance or return promise is bargained for it if is sought by the promisor in exchange for the promise and is given by the promisee in exchange for that promise
   - The performance may consist of:
     1. an act other than a promise, or
     2. a forbearance, or
     3. the creation, modification, or destruction of a legal relation
   - 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
   d. See Allison’s outline: purpose of consideration doctrine
   e. **Congregation Kadimah Toras-Moshe v. DeLeo**
i. An oral promise is not enforceable against an estate, unless there is reliance or consideration
ii. Judges distinguish between conditional gifts and consideration by looking at the gift giver’s intent (Did they want to give a gift or induce an action?)

f. **Hamer v. Sidway**
i. “…where there is no legal benefit to the promisor nor detriment to the promisee, there is no consideration.”
ii. Courts do not evaluate the value of the benefit or detriment, only whether or not a benefit or detriment actually occurred
iii. The giving up of a legal right can be a detriment
iv. A contract for a gift is not enforceable

g. **Patel v. American Board of Psychiatry & Neurology, Inc.** in order for a contract to have consideration, an exchange must be “bargained for”. In other words, one party must be actually asking the other party to do something

h. **Carlisle v. T&R Excavating, Inc.**:
i. A contract to provide free services does not contain consideration and is not enforceable (gratuitous promises are not enforceable due to lack of consideration)
ii. Past performance cannot be consideration, no bargaining is required to obtain that which you already have

i. **Apfel v. Prudential-Bache Securities, Inc.**
i. The decisive question in determining whether a contract for the sale of goods had valid consideration is whether or not the product had value, not whether or not it was “novel” (if it was in the private rather than the public domain)—consideration exists even after the value is extinguished
ii. The courts will not protect people from making bad decisions

j. **Batsakis v. Demotsis**: the courts do not care if bargained for exchange is unfair/unwise/inequitable/bad business practice/etc., they only look to see if consideration existed at all

XIV. **Preexisting Duty Rule and Settlement**
a. **Restatement, Second §73**: Pre-existing duties
i. A person promising to perform an obligation that they already owe does not constitute valid consideration
ii. Persons already bound cannot extract additional payment/contract terms from the other party without offering new consideration
iii. A similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain

b. **State v. Avis**: An individual already under duty to investigate and report information relating to a crime (i.e. a law enforcement officer) is not eligible to collect a reward.

c. **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
   1. the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
2. 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.

d. **Fiege v. Boehm**: If based on a doubtful claim (that the promisor made in good faith, with reasonable belief that it was true), a promise of forbearance is sufficient consideration to support a contract.

XV. Mutuality

a. **Mutuality of obligation**: both parties to a contract must give (or promise) something of legal value in order to get something in exchange

i. Simultaneous duty of performance is not a requirement

ii. Unilateral contracts never have consideration

b. **Weiner v. McGraw-Hill, Inc.**

i. When consideration exists, mutuality is not necessary

ii. If an employer makes a promise not to terminate unless certain conditions are met (a length of time, just cause, etc.), and the employee begins performance, the employer can no longer terminate at will. Even if the employee has made no return promise and has retained the ability to terminate their employment “at will”.

c. **Conditional promises**: unless the condition comes to pass, the promise does not become enforceable (conditional promises can constitute valid consideration)

d. **Iacono v. Lyons**

i. Mutuality of obligation alone is enough to constitute a contract.

ii. If the promise is illusory (i.e. based on something that cannot or would not ever happen, such as “pigs flying”) then it cannot form consideration.

e. **Discretionary promises**: an illusory promise based on a condition, such as: I will share half my earnings, if I’m feeling generous.

i. If the promise seems seriously and reasonably made, the modern trend is to enforce it.

ii. “Satisfaction clauses” are an example: most courts enforce the duty to act in good faith, so satisfaction cannot be arbitrarily decided

g. **Wood v. Lucy, Lady Duff-Gordon**

i. An “implied promise” provides sufficient consideration to create a contract

ii. “A promise may be lacking, and yet the whole writing may be “instinct with an obligation,” imperfectly expressed.” (*McCall v. Wright, Moran v. Standard Oil Co.*)

h. **Third Story Music v. Waits**: the court refuses to read an “implied promise” over the express language. In this case the express language specifically contradicts the purported “implied promise,” and the contract as a whole has sufficient consideration, so its specific language is enforceable.

h. **UCC 2-306**: requires parties to use best efforts in those situations where they have agreed to deal exclusively with one another.
i. **Output contract**: the buyer agrees to purchase whatever goods the seller produces

ii. **Requirements contract**: the seller agrees to provide whatever goods the buyer requires to satisfy its needs

**XVI. Promissory Estoppel**

a. **Restatement, Second §90**: Promise reasonably inducing action or forbearance

   i. A promise is binding if the promisor:
      1. should reasonably expect to induce action or forbearance on the part of the promisee or a third person; and
      2. actually does induce such action or forbearance; and
      3. if injustice can be avoided only by enforcement of the promise.

   ii. The remedy granted for breach may be limited as justice requires

   iii. A charitable subscription or a marriage settlement is binding under Subsection (i) without proof that the promise induced action or forbearance.

b. **Competing theories of promissory estoppel**

   i. **CONTRACT LAW**
      1. A substitute for consideration: an alternative means of determining if a promise is worthy of enforcement
      2. Focus on the nature of the promise: a very clear and definite promise is likely to induce reliance, a vague and incomplete promise is less likely to induce reliance

   ii. **TORT LAW**
      1. An independent theory of recovery
      2. Courts are most concerned with the harm to the promisee, they may require less in terms of the promise and focus more on the nature and extent of the promisee’s reliance.
      3. Damages for emotional distress may be available.

c. **Deli v. University of Minnesota** (p.246)

   i. Promissory estoppel is a contract-based claim.
   
   ii. Π’s cannot recover for emotional damages under promissory estoppel claims.

   iii. First question: could you have enforced this contract without promissory estoppel? Only use promissory estoppel as an alternative.

   iv. Reason to try under promissory estoppel instead of contract: when the promise was not part of an exchange

d. **Kirksey v. Kirksey**: gratuitous promises are immune from promissory estoppel

e. **Wright v. Newman**: Under promissory estoppel, knowingly promising child support when you are not the father creates an enforceable contract. (Because it creates a detriment to the mother by denying her a search for the real father which would result in rightful child support.)

f. **Allegheny College v. National Chautauqua County Bank**: A gratuitous gift can be enforced under promissory estoppel when the promisee suffered a detriment. (The determining factor is NOT whether the promisor benefited.)

g. **In re Morton Shoe Company**: 
i. A charitable gift is enforceable under promissory estoppel when the charity has relied on the gift.

ii. This is a typical promissory estoppel case

h. Promissory estoppel in the commercial context

i. Rarely applied in commercial contexts: commercial promisors seldom intend to be bound unless exchanges are contemplated

ii. Most states have been willing to apply it in certain situations, under strict scrutiny

i. **East Providence Credit Union v. Geremia**: A chattel mortgage is not enforceable if the Bank fails to fulfill a term of the mortgage contract, IF the party taking out the mortgage has relied on the Bank’s promise to fulfill that term.

j. **Ypsilanti v. General Motors Corp.**

i. Promissory estoppel requires an actual, clear, and definite promise.

ii. Reliance is reasonable only if it is induced by an actual promise.

iii. Applying for a tax abatement does not constitute an actual promise to remain in business for the full term of the tax abatement

k. Promissory estoppel and employment disputes

i. Some court distinguish between pre-hire and post-hire promises

ii. Most courts hold strongly to the policies underlying the employment-at-will doctrine, making most promissory estoppel claims unsuccessful. (Even if fairly clear promises are made, reliance on those promises is not reasonable in light of the at-will nature of employment.)

l. **Lord v. Souder**:

i. In a post-hire, employment-at-will situation, reliance on an additional promise not to terminate is enforceable under promissory estoppel

ii. In a unilateral contract, promissory estoppel will always be enforced

m. **Restatement, Second §139**: Allows enforcement under promissory estoppel when statute of frauds bars enforcement under contract. (Has received less than full acceptance by courts.)

n. **Hoffman v. Red Owl Stores, Inc.**

i. In commercial negotiations, promissory estoppel provides a remedy when one party promises that a contract is forthcoming, and induces action based on that promise, but then doesn’t deliver.

ii. The promising party is NOT free to break off contract negotiations at any time for any reason.

o. **Gruen Industries v. Biller**

i. Promissory estoppel will NOT be applied to pre-contractual promises when the risk is assumed voluntarily (not at the request of the party who eventually pulls out of the agreement).

ii. **Always apply the four-step inquiry to determine if promissory estoppel is appropriate**:  
   1. Was there a promise?
   2. Did the promisor expect the promisee to act in reasonable reliance?
   3. Did the promisee actually act in reasonable reliance?
   4. Did an injustice occur which can be solved by remedy?
p. Remedies in promissory estoppel actions: judges have some discretion in fashioning remedies in promissory estoppel cases, even if the plaintiff establishes all of the elements of the case.

XVII. Options and Firm Offers

a. **Option contract:** created when an offeror, in exchange for consideration, promises to limit his power to revoke the offer
   i. Courts take a lenient approach towards consideration in option contracts (a mere recital of consideration may be sufficient, even if it was never paid)
   ii. If the offeree rejects the offer or makes a counteroffer, the original offer will remain in effect
   iii. Option contract is preliminary to, but distinct from, the actual contract

b. **Drennan v. Star Paving Co.:**
   i. Restatement, Second §45: creates an option contract once the offeree begins (or tenders) the requested performance
   ii. A general contractor must notify subcontractors of their acceptance of the bid offer ASAP after receiving the contract (mailbox rule applies). Subcontractors are not bound until the general contractor accepts.

c. **Pavel Enterprises, Inc. v. A.S. Johnson Co.:** there are many ways to prove that a contractual relationship exists between a general contractor and a subcontractor:
   i. Restatement, Second §87: Option Contract (4-step test)
      1. Offeror reasonably expects the offer to induce action/forbearance
      2. Action/forbearance is of a substantial character and would occur before acceptance
      3. Offer actually induces such action/forbearance to occur
      4. Binding offeror must be necessary to avoid injustice
   ii. UCC §2-205: Firm Offers (6-step test: applies to merchants only)
      1. Offer in writing
      2. Offer gives assurance that the offer will be held open
      3. Not revocable (unless revocation is bargained for) during the stated time
      4. If no time is stated, is not revocable for a reasonable time
      5. Period of irrevocability cannot be >3 months
      6. Any such term of assurance must be separately signed by the offeror
   iii. *Conditional bilateral contract:* when an exchange of promises takes place before the construction contract is awarded to the general contractor, that exchange constitutes a valid bilateral contract, conditional upon the general contractor being awarded the construction contract.
   iv. *Unilateral contract:* use of the sub-bid in the general’s bid constitutes part performance, which renders the initial offer irrevocable under Restatement, Second §45
   v. *Unrevoked offer:* a jury might choose to disbelieve that a subcontractor had withdrawn the winning bid. The offer was never revoked, therefore it’s binding.
   vi. Once the general contractor’s bid is chosen, the general contractor cannot:
1. **bid shop**: use the lowest bid as a tool to negotiate lower bids from other subcontractors
2. **bid chop**: pressure the subcontractor to reduce their bid
3. **bid peddling**: submit no bid or a high bid, then use the information submitted by the lowest bidder to fashion a better bid

XVIII. Unjust Enrichment and Material Benefit

a. **Unjust enrichment** ("quasi-contract” or “contract implied in law”)
   i. Two essential elements:
      1. One party must have obtained an economic benefit
      2. It must be unjust for the beneficiary to keep the benefit without paying for it
   ii. Not a promissory theory, distinct from contract (an ALTERNATIVE remedy to contractual damages)
   iii. Available when a contract is unenforceable or when the contract has a default that allows one of the parties to set it aside
   iv. If the benefit was conferred with *gratuitous intent* or by an *officious intermeddler*, or cannot be returned, recovery is not available
   v. The benefit is assessed using *market value* of the goods/service

b. **Martin v. Little, Brown & Co.**: A voluntary act of service cannot be used as grounds for a claim of unjust enrichment.

c. **Feingold v. Pucello**: In order to recover for unjust enrichment, the suing party must prove that their actions conveyed a tangible benefit upon the Δ.

d. **Estate of Cleveland v. Gordon**:
   i. Family members are generally precluded from recovering for services provided to their close relatives
   ii. A person who pays another’s debt because of a moral obligation is not an officious intermeddler and is entitled to reimbursement unless the payment was gratuitous

XIX. Moral Obligation

a. **Moral obligation** (3 exceptions to the past consideration rule): created by a new promise, which serves as new consideration:
   i. **Statute of limitations**: if a statute of limitations has run, and the promisor agrees to pay the debt anyway, then a new promise is formed (regardless of the lack of new consideration)
   ii. **Bankruptcy**: a person declaring bankruptcy can agree to pay a creditor, even though they are legally protected by bankruptcy. The promise is enforceable (but protected by a series of restrictions – don’t want to allow creditors to exploit the bankrupt person)
   iii. **Affirmation**: if a minor enters into a contract (which is otherwise not enforceable), and then after she becomes an adult she promises that she will pay the debt, the promise is enforceable

b. **Restatement, Second §82**: a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable, or would be except for the effect of a statute of limitations
c. **Voidable obligation**: one that CAN be avoided by one of the parties to the contract, typically on the ground that assent was obtained by fraud, duress, mistake, or other improper means, or because she lacked capacity to contract (fully enforceable unless the person with the right to avoid enforces that right)

d. **Webb v. McGowin**
   i. A moral obligation is sufficient “consideration” to support a subsequent promise to pay, where the promisor has received a *material benefit*, even if there was no original duty or liability resting on the promisor
   ii. This case is the exception! Most courts do not apply the moral obligation doctrine

e. **Restatement, Second §86**: Promise for benefit received
   i. Required components: 1) a promise, 2) a benefit
   ii. If the benefit is conferred as a gift, it’s not enforceable.
   iii. Enforcement of the promise must be necessary to avoid injustice
   iv. If unjust enrichment/restitution does not require a promise, then it seems only fair that the existence of an actual PROMISE would make restitution extra-enforceable

f. **Dementas v. Estate of Tallas**: 
   i. In order for the moral obligation doctrine to apply, the π’s services must have been rendered with the expectation of being compensated (gratuitous acts will not be compensated)
   ii. This is the usual case. Courts normally only apply the moral obligation doctrine if it is necessary to prevent some injustice

g. Difference between promissory estoppel and restitution: 
   i. Promissory estoppel: courts value/focus on the *detriment* to one party
   ii. Restitution: courts value/focus on the *benefit* to one party

XX. Policing Contracts: Improper Bargaining, Misrepresentation and Fraud

a. **Fraudulent misrepresentation**: deliberately and dishonestly inducing the contract by a lie (whether by words, concealment, or nondisclosure). Three remedies:
   i. Allow the victim to rescind the contract and to obtain restitution for performance already rendered
   ii. Permit the victim to keep the contract in force and to sue for any loss in value of the performance as a result of the fraud
   iii. Allow the victim to recover punitive damages in tort

b. **Restatement, Second §164**: When a misrepresentation makes a contract voidable
   i. Party’s manifestation of assent was induced by a fraudulent or material misrepresentation
   ii. Party who assented was justified in relying on the misrepresentation
   iii. The contract is voidable by the recipient

c. **Restatement, Second §162**: when misrepresentation is fraudulent or material
   i. If the maker intends his assertion to induce assent, AND:
      1. Knows or believes the assertion is untrue, OR
      2. Does not have the confidence that he states or implies, OR
      3. Knows that he does not have the basis he states or implies
ii. A misrepresentation is *material* if it would be likely to induce a reasonable person to manifest assent, or if the maker knows that it would be likely to induce the recipient to do so.

d. **Restatement, Second §160**: Concealment (when an action = an assertion): 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.

e. **Restatement, Second §161**: When non-disclosure = an assertion
   i. When he knows that disclosure is necessary to prevent a previous assertion from being a misrepresentation
   ii. When he knows that disclosure would correct a mistake of the other party as to a basic assumption on which the contract is made AND non-disclosure amounts to a failure to act in good faith
   iii. When he knows that disclosure would correct a mistake of the other party as to the contents or effect of a writing
   iv. When the other person is entitled to know the fact because of a relation of trust and confidence between them

f. **Sarvis v. Vermont State Colleges**:
   i. If a person purposefully misleads someone through an omission (silence), they are liable for fraud as if they had made a fraudulent statement
   ii. Materiality is required where the mistake or false statement was not intentionally made

g. **In re House of Drugs, Inc.**:
   i. Persons entering into contracts have a duty of reasonable diligence. If a person knows enough that he *could* have uncovered the misrepresentation or omission, then no fraud has been committed.
   ii. Elements of legal fraud:
      1. A material misrepresentation by the defendant of a presently existing or past fact
      2. Knowledge or belief by the Δ of that representation’s falsity
      3. An intent that the plaintiff rely thereon
      4. Reasonable reliance by the plaintiff on the representation
      5. Resulting damage to the plaintiff

h. **Strambovsky v. Ackley**:
   i. *Caveat emptor*: buyer beware (strictly applied in NY only)
   ii. If the misrepresentation/omission cannot be determined by normal inspection of the property, then the Δ cannot use a caveat emptor defense
   iii. Caveat emptor imposes a duty on the vendor to disclose info about the premises ONLY if there is a confidential or fiduciary relationship, OR if some conduct by Δ constitutes “active concealment”
   iv. Nondisclosure constitutes a basis for rescission as a matter of equity WHEN: a condition created by the seller materiallyimpairs 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

i. **Cummings v. HPG International**:
   i. When a Δ did not know that the statements were false at the time he made them, he cannot be held liable for deceit
ii. Only statements of fact are actionable, statements of opinion cannot give rise to a deceit action (however, an opinion may constitute deceit if it can reasonably be understood by the π as implying that there are facts to justify the opinion, or at least that there are no facts incompatible with it)

j. *Negligent misrepresentation:* not deliberately false, but made carelessly

k. *Fraud in the factum:* a misrepresentation of the nature of the document, relates not to an underlying fact but to the document being executed

l. **Restatement, Second §163:** manifestation of assent induced by fraud in the factum renders a contract VOID, not merely voidable

XXI. Duress

a. *Duress:* the compulsion of a manifestation of assent by force or threat

b. **Restatement, Second §175:** When duress by threat makes a contract voidable: if assent is induced by an improper threat 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
      1. What is threatened is a crime or a tort, or the threat itself would be a crime or tort if it resulted in obtaining property
      2. What is threatened is a criminal prosecution
      3. What is threatened is the use of civil process AND the threat is made in bad faith, or
      4. 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
      1. The threatened act would harm the recipient and would not significantly benefit the party making the threat
      2. 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
      3. What is threatened is otherwise a use of power for illegitimate ends

d. **Germantown Manufacturing Co. v. Rawlinson:** it is improper to threaten criminal prosecution to induce an embezzler or their relative to undertake to pay

e. **Quigley v. KPMG Pear Marwick, LLP:** threat of termination of employment is not oppressive or morally wrong, and does not support a duress claim

f. **Restatement, Second §174:** the contract is treated as VOID (rather than merely voidable) when the victim’s manifestation of assent is “physically compelled”

g. **Restatement, Second §175(2):** if a party’s manifestation of assent is induced by one who is not a party to the transaction, a contract is VOIDABLE by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction

XXII. Economic Duress, Bad Faith and Contract Modification

a. **Contract modification:**
   i. Needs consideration to be valid (trivial consideration may suffice)
   ii. Can be avoided if it is induced by duress

b. **Rinck v. Association of Reserve City Bankers:** In general, the parties to a contract are free to modify that contract by mutual consent. In order to be valid,
however, the modification must possess the same elements of consideration as necessary for normal contract formation.

c. **Austin Instrument, Inc. v. Loral Corp.**:
   i. Economic duress/business compulsion is demonstrated by:
      1. Proof that immediate possession of needful goods is threatened OR
      2. By proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand
   ii. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate.
   iii. One who would recover moneys allegedly paid under duress must act promptly to make his claim known

d. **Supervening/Unforeseen difficulties rule**: (a basis for upholding a modification without consideration) Where events following the formation of contract create a difficulty not anticipated by the parties at the time of contracting. 3 requirements:
   i. After the contract is made, it must become apparent that performance of the contract is subject to substantial and burdensome difficulties not anticipated, and not within the contemplation of the parties at the time when the contract was made (they must not be attributable to error in judgment in setting the price for performance)
   ii. The party benefiting from the modification must conform to standards of honesty and fair dealing
   iii. The change in performance by the party who assumes the increased obligations must be reasonable and manifestly fair in view of the changed conditions

e. **UCC 2-209**: Modification, Rescission and Waiver:
   i. No consideration is needed to validate an agreement modifying a contract for the sale of goods
   ii. Parties can sign a writing which requires consideration to modify. Between merchants this writing must be separate from the actual contract
   iii. The modification is subject to the statute of frauds

f. **Good faith**
   i. **UCC 1-201(19)**: good faith means honesty in fact in the conduct or transaction concerned (subjective test, focuses on parties’ state of mind)
   ii. **UCC 2-103(1)(b)**: good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade (looks at state of mind AND the objective criterion of accepted commercial mores)

XXIII. Undue Influence

a. Undue influence: narrower than unconscionability, typically applicable only when the victim is particularly vulnerable to the persuasion of the other party because of some kind of relationship of submissiveness, dependence, or trust

b. **Restatement, Second §177**
   i. (1): undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the
relation between them is justified in assuming that the person will not act in a manner inconsistent with his welfare

ii. (2): a person whose manifestation of assent is induced by undue influence may avoid the contract

iii. (3): the victim an avoid a contract induced by the undue influence of a NONPARTY unless the other party in the contract in good faith, and without reason to know of the undue influence, gives value or relies materially on the transaction

c. Rudolf Nureyev Dance Foundation v. Noureeva-Francois:
   i. Suspicion of undue influence arises where a confidential or fiduciary relationship (such as an attorney-client relationship) existed between the conveying party and the person who benefits from the conveyance
   ii. There must be substantial additional evidence showing improper dealing, inequality, and detriment to the dependent party

d. Tinney v. Tinney: to decide if undue influence has taken place, the trial court must examine the totality of the circumstances, including:
   i. The relationship between the parties
   ii. The physical and mental condition of the grantor
   iii. The opportunity, disposition, and conduct of the person wielding the influence

e. Odorizzi v. Bloomfield School District:
   i. Undue influence: persuasion which overcomes the will, but not the mind
   ii. Misrepresentations of law or fact are not essential to the charge of undue influence, because a person’s will may be overborne without it
   iii. A confidential or authoritative relationship between the parties need not be present when the undue influence involves unfair advantage taken of another’s weakness or distress
   iv. Whether a person of subnormal capacities has been subjected to ordinary force, or a person of normal capacities subjected to extraordinary force, the match is equally out of balance
   v. Undue influence cannot be used as a pretext to avoid bad bargains or escape from bargains which refuse to come up to expectations
   vi. Undue influence is usually accompanied by certain characteristics:
      1. Discussion of the transaction at an unusual or inappropriate time
      2. Consummation of the transaction in an unusual place
      3. Insistent demand that the business be finished at once
      4. Extreme emphasis on untoward consequences of delay
      5. The use of multiple persuaders by the dominant side against a single servient party
      6. Absence of third-party advisers to the servient party
      7. Statements that there is no time to consult financial advisers or attorneys

XXIV. Unconscionability
   a. Unconscionability: the transaction was so unfair that it would offend the conscience of the court to enforce it
      i. The arbiter of unconscionability is the COURT, not the jury
b. **UCC 2-302**: Unconscionable contract or clause
   i. If a contract is found unconscionable, the court may refuse to enforce it,  
      OR it may enforce the remainder of the contract without the  
      unconscionable clause, OR it may so limit the application of any  
      unconscionable clause as to avoid any unconscionable result  
   ii. Once a claim of unconscionability is raised, the parties will have a  
       reasonable opportunity to present evidence as to the commercial setting,  
       purpose, and effect to aid the court in making a decision

c. **Restatement, Second §208**: Unconscionable contract or term: if a term is found  
   unconscionable, the court may refuse to enforce the contract OR it may enforce  
   the remainder of the contract without the unconscionable term, OR it may so limit  
   the application of any unconscionable term as to avoid any unconscionable result

d. **Germantown Mfg. Co. v. Rawlinson**: if a form contains an unusual and not  
   reasonably expected term that imposes a material burden on the signatory, that  
   term should not be enforced

e. **Procedural vs. Substantive Unconscionability**:  
   i. **Procedural**: relates to the way in which the contract was formed  
      (“bargaining naughtiness”)  
   ii. **Substantive**: relates to the terms of the resulting contract  
   iii. Both elements must be satisfied at least to some degree for a judge to find  
        a contract unconscionable (for example: unreasonable terms, agreed to  
        under undue influence)

f. **Contracts of adhesion**: if a contract is described as “adhesive,” that signifies that  
   there was oppression in its formation. It’s adhesive nature may alone be enough to  
   supply the procedural element of unconscionability

g. **NEC Technologies, Inc. v. Nelson**:  
   i. **UCC 2-719**: there is a presumption of unconscionability if the sale is of  
      consumer goods and the exclusion covers personal injury  
   ii. Factors courts have considered in examining **procedural unconscionability**  
       1. Age, education, intelligence, business acumen and experience of  
          the parties  
       2. Their relative bargaining power  
       3. The conspicuousness and comprehensibility of the contract  
          language  
       4. The oppressiveness of the terms  
       5. The presence or absence of a meaningful choice  
   iii. Factors courts have considered in examining **substantive unconscionability**  
       1. The commercial reasonableness of the contract terms  
       2. The purpose and effect of the terms  
       3. The allocation of the risks between the parties  
       4. Similar public policy concerns

h. **Southwest Pet Products, Inc. v. Koch Industries, Inc.**:  
   i. Businesses, especially those that are run by sophisticated management,  
      often have a difficult time in establishing unconscionability  
   ii. Substantive unconscionability must be found to have existed at the time of  
       contracting
iii. Failure to read does not support a finding of substantive unconscionability
iv. If the bargaining power between the two parties is skewed (if one party is
    “the only game in town”), that may indicate substantive unconscionability
i. **UCC 2-302** and **Restatement, Second §228**: the court has various remedial
   options when a contract is found unconscionable:
   i. Nonenforcement of the contract as a whole
   ii. Removal of the unconscionable term (“severance”)
   iii. Adjustment (rewriting) of the term to get rid of its unconscionable effect
j. **Brower v. Gateway 2000, Inc.**: A customer’s original order of a product is not
   the offer. Rather, the offer is the delivery of the product with the enclosed
   standard terms. A customer accepts the offer when they keep the product beyond
   the amount of time allowed for in the standard terms for return of the
   merchandise.
k. **Sosa v. Paulos**: Severance is not always appropriate (courts may balk at changing
   a contract in a way that alters the fundamental basis of the bargain). One possible
   rule is to only allow severance when the parties agreed upon it at the time of
   contracting, and when the severance would not substantially alter the contract

XXV. **Illegality**
   a. **Diversified Group v. Sahn**: contracts that violate statutory law (for example:
      contracts to scalp tickets) will not be enforced
   b. **Danzig v. Danzig**:
      i. As a general rule, contracts which are illegal or against public policy will
         not be enforced by the courts. That rule is subject to an exception where a
         court determines the parties are not in *pari delicto*. (That is, when they are
         not “equally culpable.”)
      ii. The rule should not be applied when:
          1. The public cannot be protected because the transaction has been
             completed
          2. No serious moral turpitude is involved
          3. Δ is the one guilty of the greatest moral fault
          4. To apply the rule will be to permit the Δ to be unjustly enriched at
             the expense of the π
      iii. A π will not be denied relief if he can show that he was *excusably ignorant*
           of facts or of legislation of a minor character, especially if the legislation
           is of a local, specialized, or technical nature, and he reasonably could have
           assumed that the other party had knowledge of such matters
   c. **Stevens v. Rooks Pitts & Poust**: where the parties to a contract against public
      policy are in *pari delicto*, a court generally will not aid either party but will leave
      both parties where it finds them. But the court will not leave them where they
      have placed themselves if it detrimentally affects the public.
   d. **Noncompetition clauses**: usually subject to the most careful scrutiny
      i. *Rule of reason*: a noncompetition clause will be upheld to the extent that it
         is reasonable as to its duration, the geographic area that it covers, and the
         scope and extent of the activity it restrains. Courts must consider:
            1. The degree to which it is needed to protect the legitimate interests
               of the former employer
2. Any undue hardship it will impose on the former employee
3. The general public interest

ii. Likelihood of enforcement of noncompetition clauses:
   1. When part of a contract for sales of businesses: most likely
   2. When part of partnership agreements: somewhat likely
   3. When part of an employment contract: least likely

e. Harmon v. Mount Hood Meadows, Ltd.:
   i. A party seeking to avoid contractual responsibility must demonstrate that
      enforcement of the contractual provision as to him or her will offend
      public policy. That is so regardless of whether enforcement of the same
      contractual provision against other parties in other circumstances would
      violate public policy
   ii. Courts favor enforcement of contracts unless enforcement will, in fact,
      offend an important public policy

f. Surrogate parenting contracts:
   i. Payment of money to influence the mother’s custody decision makes the
      custody agreement void
   ii. Any custody agreement is subject to a judicial determination of custody
      based on the best interest of the child

XXVI. Incapacity
   a. Mental incapacity: courts usually take into account not only the degree and
      seriousness of the mental incompetence, BUT ALSO whether the vulnerability of
      the incompetent party attracted exploitation by the other
   b. Minority:
      i. In most cases, a minor’s lack of contractual capacity makes the contract
         VOIDABLE, not void
      ii. A minor may disaffirm the contract, expressly or by conduct, at any time
          before reaching majority, OR within a reasonable time after reaching age
      iii. Once the contract is disaffirmed, it comes to an end and the minor cannot
          change his mind and seek to enforce it
      iv. Even if the minor never disaffirmed during his minority, or actively
          affirmed or performed during his minority, he still has a right to disaffirm
          within a reasonable time after reaching majority
      v. Alternatively, a minor can ratify a contract expressly after reaching age
   c. Webster Street Partnership, Ltd. v. Sheridan: A minor lacks contractual
      capacity. His right of avoidance is intended to protect him against “his own
      improvidence and the designs of others,” and to discourage adults from
      contracting with him
   d. Halbman v. Lemke:
      i. Upon avoidance, the minor is entitled to recover all the consideration he
         furnished under the contract. In return, the minor must restore whatever
         consideration he received under the contract. (He cannot be permitted to
         profit by keeping it.) HOWEVER, he is only responsible for returning
         what he still has of the property at the time of disaffirmance
      ii. Where there is misrepresentation by a minor or willful destruction of
          property, the major party may be able to recover damages in tort
e. **Zivich v. Mentor Soccer Club, Inc.**
   i. With adult participants, the general rule is: releases from all liability for injuries caused by negligent acts arising in the context of *recreational activities* are enforceable
   ii. With minor participants, the general rule is: contracts entered into by a minor, unless for “necessaries,” are voidable by the minor, once the age of majority is reached, or shortly thereafter
   iii. Parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed

f. **Shields v. Gross**: Legislatures can statutorily revoke a minor’s right to disaffirm

g. Mental incapacity:
   i. Most courts treat incapacity as rendering the contract **VOIDABLE**
   ii. *Cognitive test*: at the time of contracting, the party must have had such a severe mental illness that she was unable to understand the nature and consequences of the transaction
   iii. *Motivational test*: (broader) the party may have understood the transaction, but the mental illness affected her ability to act rationally in relation to the transaction

h. **Restatement, Second §15**: Mental illness or defect:
   i. Allows for either test
   ii. Enforces a contract if the other party didn’t know about the mental defect AND has already begun performance AND voiding would be unjust

i. **Farnum v. Silvano**:
   i. Acting during a lucid interval can be a basis for executing a WILL
   ii. Competence to enter into a CONTRACT presupposes something more than momentary lucidity. The contracting party must comprehend the *nature and quality* of the transaction, together with an understanding of its *significance and consequences*
   iii. **Restatement, Second §15(1)**: makes a contract voidable if it fails the test above, AND if the other party knew about the mental defect

j. Most jurisdictions hold that absent fraud or knowledge of the incapacity by the other contracting party, the contractual acts of an incompetent is voidable **ONLY** if avoidance accords with equitable principles

XXVII. Contract Interpretation and Construction
   a. **Interpretation**: the process of determining the meaning intended by the parties
   b. **Construction**: the process of adding contract terms by legal implication (based on tests of what is fair, just, or otherwise required by relevant public policies)
   c. *Objective theory of contracts*: demands that the court focus NOT on what parties actually intended, or even what they actually understood their contracting parties to intend, but rather on what a REASONABLE PARTY would have expected
   d. **Guilford Transportation Industries v. Public Utilities Commission**:
      i. Unambiguous contract terms are for judicial interpretation. Ambiguous contract terms are for the fact-finder to interpret.
ii. Contract language is ambiguous when it is reasonably susceptible to different interpretations

e. Restatement, Second §202: Rules in aid of interpretation
   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,
      1. where language has a generally prevailing meaning, it is interpreted in accordance with that meaning
      2. 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 for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any 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 consistent with each other and with any relevant course of performance, course of dealing, or usage of trade

f. Restatement, Second §203: Standards of preference in interpretation
   i. 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
   ii. 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 or usage of trade, and course of dealing is given greater weight than usage of trade
   iii. Specific terms and exact terms are given greater weight than general language
   iv. Separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated

g. UCC 1-205: Course of dealing and usage of trade
   i. A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct
   ii. A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court
iii. A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement

iv. The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other, but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade

v. An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of performance

vi. Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter

h. **UCC 2-208**: Course of performance or practical construction:

i. Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement

ii. The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other, but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade

iii. Subject to the provision of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or a modification of any term inconsistent with such course of performance

i. Hierarchy of interpretation and construction tools:

   i. Express terms
   ii. Course of performance
   iii. Course of dealing
   iv. Usage of trade

j. **Frigaliment Importing Co. v. B.N.S. International Sales Corp.**: when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be shown by proving either that he had actual knowledge of the usage or that the usage is “so generally known in the community that his actual individual knowledge of it may be inferred”

k. **Atwater Creamery Co. v. Western National Mutual Insurance Co.**:

   i. where there is unequal bargaining power between the parties so that one party controls all of the terms AND offers the contract on a take-it-or-leave-it basis, the contract will be strictly construed against the party who drafted it (controversial rule!)
ii. Similar to a “contract of adhesion”: unequal bargaining power, one party is unfamiliar with the issues while the other is an expert

l. **Gap fillers**: certain fact patterns have come up so frequently that courts recognize standard contract terms that are used to fill out the parties’ intent
   i. Consent theory: gaps in parties’ specific agreement should be filled by reference to conventional or common sense understanding in the community to which the parties belong
   ii. Economic approach: the function of gap fillers is to promote efficiency in contract law
   iii. Societal/community approach: judges should not use gap fillers, but should consult norms, insights, arguments, and rules of thumb after taking due account of the relationship between the parties

m. **UCC 2-314**: Implied warranty of merchantability:
   i. Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
   ii. Goods to be merchantable must be at least such as
      1. pass without objection in the trade under the contract description; and
      2. in the case of fungible goods, are of fair average quality within the description; and
      3. are fit for the ordinary purposes for which such goods are used; and
      4. run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
      5. are adequately contained, packaged, and labeled as the agreement may require; and
      6. conform to the promise or affirmation of fact made on the container or label if any.
   iii. Unless excluded or modified, other implied warranties may arise from course of dealing or usage of trade

n. **UCC 2-316**: Exclusion or modification of warranties
   i. Subject to the next subsection, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous
   ii. Notwithstanding the last subsection
      1. unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all fault” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and
      2. when the buyer before entering into the contract has examined the goods or sample or model as fully as he desired or has refused to
examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

3. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade

o. Indiana-American Water Co. v. Town of Seelyville
   i. UCC 2-306: obligation to act in good faith under requirements contracts
   ii. Buying less under a requirements contract that sets maximum limits is OK, as long as the buyer isn’t buying substitute product from anyone else
   iii. If the buyer has a legitimate business reason for eliminating its requirements, as opposed to a desire to avoid its contract, the buyer acts in good faith

p. Restatement, Second §205: Duty of good faith and fair dealing in every contract

q. UCC 1-203: Obligation of good faith in every contract

r. United Airlines, Inc. v. Good Taste, Inc.: Terminable-at-will contracts are generally held to permit termination for any reason, good cause or not, or for no cause at all

XXVIII. Parol Evidence Rule

a. Parol evidence: evidence other than the written memorial of an agreement that is offered by a party to prove alleged contract terms (includes evidence of alleged oral agreements made before or contemporaneously with the execution of the writing and alleged written agreements made before the writing)

b. Parol evidence rule:
   i. Where the writing is “fully integrated,” (complete and final) 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 (such a writing is often called “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.
   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.

c. Procedure: applying the parol evidence rule:
   i. First stage: judge decides whether the evidence is admissible
   ii. Second stage: the evidence is presented to the factfinder, who evaluates its credibility along with all of the other evidence presented at trial
   iii. Completely integrated writings bar contradictory and supplemental terms
   iv. Partially integrated writings bar only contradictory terms
   v. Four corners of the document: classical approach to parol evidence, limits the contract terms to the “plain meaning” of the written language (the judge pays little attention to the specific circumstances of the parties)
   vi. Reasonable parties: Williston’s approach to parol evidence, the analysis should remain objective: a court should seek to determine whether
reasonable parties would naturally and normally enter into the alleged agreement (no demand that the terms be included in the writing)

vii. **Contextual approach:** must make a decision about admissibility based on a preliminary evaluation of the credibility of the parol evidence, rather than the content of the writing alone

d. **Masterson v. Sine:**
   i. **Credibility test:** the decision to admit parol evidence is made on the basis of a preliminary evaluation of the credibility of the parol evidence, rather than the content of the writing standing alone (aka “the contextual approach”)
   ii. Some parts of the agreement can be found to be “fully integrated” while others are only “partially integrated”
   iii. **Restatement:** permits proof of a collateral agreement if it “is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract”
   iv. **UCC:** (excludes the evidence in even fewer circumstances) “If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.”

e. **Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.**: Parol evidence should be excluded ONLY when the intent of the parties is clear from the instrument alone (an extremely liberal application of the parol evidence rule)

f. **UCC 2-202:** Final written expression; parol or extrinsic evidence: written agreements may not be contradicted by parol evidence, but may be explained or supplemented by a course of dealing or usage of trade, or by evidence of consistent additional terms (unless the writing is found to be fully integrated)
   i. Decidedly contextual approach
   ii. Official comment: if the additional terms are such that, if agreed upon, they would certainly have been included in the document, then evidence of the terms will be excluded

g. **Merger/Integration Clauses:** (the strongest possible protection from the parol evidence rule) a clause that states that a written memorial not only supersedes prior agreements, but also is a complete and exclusive statement of the terms of the agreement

h. **Bristow v. Drake Street, Inc.:**
   i. **Doctrine of extrinsic ambiguity:** allow the submission of parol evidence to the judge for determination of whether a “knowledgeable insider” would think the written contract meant something different from what it appeared
   ii. **Evidence of trade usage:** objectively verifiable meanings that members of the trade/calling out of which the contract arose would attach to apparently clear words, phrases, or sentences (meanings that may be different from what the “clear” terms of the contract mean in ordinary discourse). Admissible to interpret a seemingly clear contract (in some courts)

i. **UAW-GM Human Resource Center v. KSL Recreation Corp.:** 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 case of fraud that invalidate the integration clause OR where an agreement is obviously incomplete “on its face” and, therefore, parol evidence is necessary for the “filling of gaps.”

j. Parol evidence that would make a contract void or voidable: under common law, admissible even under the parol evidence rule

k. Sound Techniques, Inc. v. Hoffman:
   i. Contracts or clauses attempting to protect a party against the consequences of his own fraud are against public policy and void where fraud inducing the contract is shown
   ii. A contracting party cannot rely on a merger clause as protection against claims based on fraud or deceit

XXIX. Misunderstanding, Mistake and Changed Circumstances

a. Misunderstanding: where parties attach materially different meanings to contract terms, and neither knows nor has reason to know of the misunderstanding, no contract results

b. Mistake: one or both of the parties are operating under a misapprehension of fact when they enter the contract (although the parties share a common understanding of the terms, the complaining party alleges that he wouldn’t have made the contract but for the mistaken belief). Courts examine three general themes:
   i. The nature of the mistake
   ii. The seriousness of the mistake
   iii. It must be unfair or otherwise inappropriate to allocate the risk of the mistake to the aggrieved party

c. Changed circumstances: (“impracticability” or “frustration of purpose”) something happens after the parties form the contract that radically alters the nature and effect of the agreed performance. Courts examine two issues:
   i. Materiality
   ii. Risk allocation

d. Konic International Corp. v. Spokane Computer Services, Inc.:
   i. Restatement, Second §20: There is no manifestation of mutual assent to an exchange if the parties attach materially different meaning to their manifestations and neither knows or has reason to know the meaning attached by the other
   ii. The doctrine does not apply when one party’s understanding, because of that party’s fault, is less reasonable than the other party’s understanding
   iii. Parol evidence is admissible to establish the facts necessary to apply the rule

e. Restatement, Second §§152 and 154: Mutual mistake
   i. The mistake related to facts in existence at the time of the contract
   ii. The mistake is shared by both parties
   iii. The mistake relates to a basic assumption on which the contract was made
   iv. The mistake has a material effect on the agreed exchange of performances
   v. The complaining party did not bear the risk of the mistake

f. Mattson v. Rachetto:
i. A mistake of law in relation to a contract is voidable ONLY when it arises from a mistake about the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake

ii. Freedom from negligence is NOT a requirement to invoke this rule

g. Restatement, Second §154: When a party bears the risk of a mistake:
   i. When the risk is allocated to him by agreement of the parties
   ii. When he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
   iii. The risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so

h. Estate of Nelson v. Rice:
   i. The parties’ mutual mistake must have had such a material effect on the agreed exchange of performance as to upset the very basis of the contract
   ii. The mistake must not be one which the party seeking relief bears the risk of

i. Dingeman v. Reffitt: the mistake must relate to a fact in existence at the time the contract is executed

j. Restatement, Second §153:
   i. The mistake relates to facts in existence at the time of the contract
   ii. The mistake may be by one party only
   iii. The mistake relates to a basic assumption on which the mistaken party made the contract
   iv. The mistake has a material effect on the agreed exchange of performances that is adverse to the mistaken party
   v. The mistaken party did not bear the risk of the mistake
   vi. Either (a) the effect of the mistake is such that enforcement of the contract would be unconscionable or (b) the other party had reason to know of the mistake or his fault caused the mistake

k. Drennan v. Star Paving Co.: unilateral mistake: if \( \pi \) had reason to believe that \( \Delta \)’s bid was in error, he could not justifiably rely on it

l. Rancourt v. Verba:
   i. The proper remedy for mutual mistake is rescission, not an abatement in the purchase price
   ii. Restatement, Second §158(2): acknowledges the power of an equity court to eliminate the effect of mistake by supplying a new term or otherwise modifying the agreement as justice requires, in order to protect the parties’ reliance interests

m. Restatement, Second §261: Discharge by supervening impracticability: 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

n. UCC 2-615: Excuse by failure of presupposed conditions: Except so far as a seller may have assumed a greater obligation, delay in delivery or non-delivery in whole or in party by a seller is not a breach of his duty under a contract for sale if
performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid

o. **Ling v. Board of Trustees of Doane College:** *Doctrine of supervening impossibility*: When statutory law limits/restricts a party’s ability to adhere to contract terms, damages will not be recoverable for a breach of that term

p. **Clark v. Wallace County Cooperative Equity Exchange**: In order to use the “supervening impossibility” defense, performance must be *impracticable*. Only objective impracticability (“the thing cannot be done” as opposed to an individual who says “I cannot do it”) relieves a party of their contract obligation

q. **Opera Company of Boston v. Wolf Trap Foundation**: If the supervening event was reasonably foreseeable, or even foreseen, it does not automatically bar defense under the doctrine of impossibility of performance. *Improbable contingencies* can be enough to warrant a finding of impossibility

r. **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

s. **7200 Scottsdale Rd. General Partners v. Kuhn Farm Machinery, Inc.**:
   i. Impracticability of performance is usually found in 3 types of cases:
      1. Death or incapacity of a person necessary for performance
      2. Destruction of a specific thing necessary for performance
      3. Prohibition or prevention by law
   ii. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The value of the counter-performance to be rendered by the promisee must be “totally or nearly totally destroyed” by the occurrence of the event.

XXX. Conditions
   a. **Promise**: a commitment to act or refrain from acting in a specific way in the future
   b. **Condition**: an event, not certain to occur, which must occur before performance under a contract becomes due
      i. The condition event does not have to take place in the future (a condition based on a past event can be valid if the parties are unsure about whether it occurred or cannot readily ascertain information about it)
      ii. **Condition precedent**: when a condition must be satisfied before the performance subject to that condition will become due
      iii. **Concurrent condition**: essentially a set of promises that are dependent on each other and must be performed simultaneously
      iv. **Condition subsequent**: (really just the same as condition precedent) a condition precedent gives rise to a duty, while a condition subsequent discharges a duty that is already in existence
v. *Express condition*: a condition stated clearly and expressly in a contract ("conditional upon", "subject to", "provided that"). Its conditional nature must also be express. Courts will strictly enforce this manifested intent.

vi. *Implied in fact condition*: when a condition is not expressly stated but can be inferred as a matter of evidence from the language in context. The court has greater flexibility in enforcement than with express conditions.

vii. *Construed condition*: when 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 reasonable and fair, given the nature of the relationship and the usual expectations of this type of contract, to find that a condition exists. The court has greater flexibility in enforcement than with express conditions.

c. *Promissory condition*: a combined promise and condition. If the promissory condition is not fulfilled, the consequences of both a failure of a condition and a breach of contract follow (generally found if one of the parties has some ability to influence the outcome of the conditioned event)

i. *Pure condition*: when there is no obligation to perform, and failure of the condition is not a breach (generally found if the occurrence of the condition is completely beyond the control of the parties)

ii. *Pure promise*: when there is no further performance under the contract contingent on the promise, when it is not a condition of anything else

d. *Kock v. Construction Technology, Inc.*:

i. Conditions precedent are not favored in contract law, and will not be upheld unless there is *clear language* to support them. This applies with particular force in the context of “pay when paid” clauses.

ii. Normally the insolvency of the owner will not defeat the claim of the subcontractor against the general contractor. In order to transfer this normal risk, it must be an *express condition* in the contract.

e. *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*:

i. *Express conditions*: those agreed to and imposed by the parties themselves. Must be LITERALLY PERFORMED

ii. *Implied or constructive conditions*: those imposed by law to do justice. SUBSTANTIAL PERFORMANCE is sufficient

f. *Jacob & Youngs, Inc. v. Kent* (Cardozo): In most cases the cost of replacement is the measure. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly out of proportion to the good to be attained. When that is true, the measure is the *difference in value*

g. Functions served by conditions:

i. Allows a party to escape the contract if a specified event occurs or fails to occur (qualified by the promise of “best efforts” to achieve the condition)

ii. Allows one of the parties to exercise judgment by making that party’s performance contingent on her being satisfied with a specified outcome

iii. Allows for alternative performances

iv. Used as a means of sequencing performances

h. *Meritt Hill Vineyards v. Windy Heights Vineyard, Inc.*: If conditions precedent are not fulfilled by one party, the other party is released from
performance. (As long as they are “pure conditions” and not “promissory conditions.”)

i. **Fry v. George Elkins Co.**: Parties have an implied obligation to make a good faith effort to fulfill the conditions of the contracts they enter into

j. **Condition of satisfaction**: where a party’s desire for the contract is dependent upon her or another party being satisfied with the outcome of some uncertain event
   i. If a party retains unlimited discretion to decide whether to perform, she really has made no commitment, and the promise is illusory
   ii. Satisfaction must be measurable against an objective standard
   iii. Conditions of satisfaction may be implied or construed
   iv. *Generally, if a satisfaction relates to matter of taste or artistic judgment, the party’s dissatisfaction must be in good faith
   v. *Generally, if the satisfaction relates to matters of a technical or commercial nature, the dissatisfaction must be reasonable

k. **Incomm, Inc. v. Thermo-Spa, Inc.**: The distinction between good faith and reasonableness is often more a question of focus than of bright-line difference. If a party cannot rationally explain his objection, his assertion of goof faith dissatisfaction is likely to lack credibility

l. **Hierarchy of conditions**:
   i. Pure (no promise)
   ii. Partly promissory (best efforts required)
   iii. Fully promissory (failure to perform = breach)

m. **Sequencing performances**:
   i. If parties provide for a sequence of performances, but don’t expressly state that conditions are precedent or concurrent, the court will fill this gap by implication or construction
   ii. **UCC 2-511(1) / UCC 2-307**: If a contract is silent on the sequence of performance, a court is likely to construe the performances as concurrent if they can be performed instantaneously and simultaneously
   iii. **Restatement, Second §234(2)**: If one of the performance is capable of instantaneous completion (such as payment of money) and the other will take time (such as construction of a house), the usual rule is that the longer performance is a condition precedent to the instantaneous one

n. **Waiver**: knowing and voluntary abandonment of a right (express or implied)
   i. Common law: the non-waiving party can only enforce a waiver if it is nonmaterial. If the right is a material part of the exchange, it can only be given up by a modification with consideration
   ii. Does not require justifiable reliance and detriment

o. **Estoppel**: where the beneficiary of a condition indicates by words or conduct that he will perform the contingent promise despite nonfulfillment of the condition
   i. Not confined to nonmaterial changes in the contract
   ii. Two requirements:
      1. Party must have known or had reason to know that his words would be relied on
      2. They must in fact have been relied on
p. **Mercedes-Benz Credit Corp. v. Morgan:**
   i. The waiver itself is the party’s choice. When a party does not enforce a condition, they can be deemed to have waived it.
   ii. Waivers can be “revoked” if parties just give notice that the condition will be enforced anew
q. **Gould v. Artisoft, Inc.:** If a party behaves in such a way that indicates a waiver of the condition, the other party is under no obligation to fulfill the condition
r. Obstructive or uncooperative conduct:
   i. In most contracts is it appropriate to imply a promise not to impeded fulfillment of a condition (but it’s not true in all contracts!)
   ii. When a promisor acts in bad faith to prevent the occurrence of a condition, it becomes a pure promise (nonfullfillment of which results in breach)
s. **Sullivan v. Bullock:** Implied in every contract is a condition to cooperate
t. **Unfair forfeiture:** an excuse for nonfullfillment of a condition, based on the court’s determination that enforcement would result in undue and unfair hardship to the party to whom performance is due
u. **J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.:**
   i. A tenant in possession of premises under an existing lease may establish equitable grounds to excuse the condition of timely exercise of its renewal option. To invoke this relief, it had to show:
      1. That it had made *valuable improvements* to the property;
      2. It had honestly but inadvertently failed to exercise the option to renew, and;
      3. The lessor has not been harmed by the delay in the giving of notice.
XXXI. Material Breach and Substantial Performance
a. **Material and total breach:** where the breach is so serious that it allows the other party to decline her performance, terminate the contract, and sue for full expectation damages
   i. Materiality is a question of fact to be decided by evaluating the discrepancy between what was promised and what was performed, and assessing how central the nonconformity is to the bargain and its impact on the reasonable expectations of the victim of the breach
   ii. If a party materially breaches, he cannot recover any damages
   iii. Where it is consistent with the intent of the party, portions of the contract may be severable (allowing breaching parties to recover even if they have materially or partially breached other portions of the contract)
b. **Substantial performance / partial breach:** when the performance of the breaching party, even though it falls short of what is required by the contract, is not of the above gravity
   i. If a breach is not important enough to qualify as material, it will not completely excuse the other party from return performance and allow it to obtain that additional cost of a substitute. Instead, it may be forced to accept the nonconforming performance and be content with damages
ii. The cost of achieving the contract expectation (of rectifying the defect) is the normal measure of damages for substantial performance. It should be declined ONLY where that would constitute unfair forfeiture.

iii. If the breacher has partially performed, most courts recognize that he has a restitution/unjust enrichment claim (although the measure is restrictive):
   1. If the value of performance is less than market value, the claim is limited to market value.
   2. Restitutionary recovery is offset against any damages to which the other party is entitled.

c. Cure: a breach may be material, but not total, because it can be cured
   i. The non-breaching party must permit the breaching party the opportunity to cure the defective performance.
   ii. If there is a material breach, and the attempt to cure is ineffective, then the breach becomes total.
   iii. If there is a material breach, and the attempt to cure is successful, then there is substantial performance/partial breach only.

d. Seydel v. Ige:
   i. Five factors to consider in determining whether a breach is material:
      1. Whether the breach deprives the injured party of a benefit which he reasonably expected.
      2. Whether the injured party can be adequately compensated for the part of that benefit which he will be deprived of.
      3. Whether the breaching party will suffer a forfeiture by the injured party’s withholding of performance.
      4. Whether the breaching party is likely to cure his breach.
      5. Whether the breach comports with good faith and fair dealing.
   ii. Where there is no express provision that time is of the essence, whether delay in performance is a material breach depends on the surrounding circumstances.
   iii. A material failure by one party gives the other party the right to withhold further performance as a means of securing performance. Such an act suspends the injured party’s duties until the breaching party cures the default. The breaching party has a reasonable time to cure, after which the injured party may either sue for total breach or rescind and obtain restitution. (SELF HELP!)

e. Worchester Heritage Society, Inc. v. Trussell: In the absence of fraud, nothing less than conduct that amounts to an abrogation of the contract, OR that goes to the essence of it, OR takes away from its foundation, can be made a ground for rescission of it by the other party.

f. Lyon v. Belosky Construction, Inc.: where the contractor’s breach was unintentional and constituted substantial performance in good faith, AND remedying the defective performance would result in unreasonable economic waste, damages should be based upon the difference between the value of the property as constructed and the value if performance had been properly completed. Otherwise the measure of damages is the cost of correcting the defect.
g. **Carrig v. Gilbert-Varker Corp.**: when a contract is divisible, breaching parties may recover restitution damages for the part of the contract that was performed

XXXII. UCC

a. **Common law**: delivery of nonconforming goods is subject to a determination of materiality before buyer’s rights can be determined

b. **UCC 2-601**: Buyer’s rights on improper delivery: If the goods or the tender of delivery fail IN ANY RESPECT to conform to the contract, the buyer may:
   i. Reject the whole; or
   ii. Accept the whole; or
   iii. Accept any commercial unit or units and reject the rest

c. **Printing Center of Texas, Inc. v. Supermind Publishing Co.**
   i. If the seller provides a sample to the buyer, the usual understanding is that the seller warrants that the goods will conform to the sample
   ii. To decide whether tendered goods are conforming, the court may examine any course of dealing, trade usage or course of performance.
   iii. The buyer’s right to reject nonconforming goods is subject to the general obligation of good faith

d. **UCC 2-508**: Cure by seller or improper tender or delivery; replacement
   i. Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery
   ii. Where the buyer rejects a non-conforming tender which the seller has reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have further reasonable time to substitute a nonconforming tender

e. **Ramirez v. Autosport**: The determination of what constitutes a “further reasonable time” depends on the surrounding circumstances

f. **UCC 2-612**: “Installment Contract”; Breach
   i. An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause “each delivery is a separate contract” or its equivalent
   ii. The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment AND cannot be cured OR if the non-conformity is a defect in the required documents; BUT if the non-conformity does not fall within subsection 3 and the seller gives adequate assurance of its cure the buyer must accept that installment
   iii. Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performances as to future installments.

g. **Graulich Caterer, Inc. v. Hans Holterbosch, Inc.**
i. It is not enough that the breach in the current installment merely makes the buyer feel insecure about the seller’s ability to deliver conforming installments in the future.

ii. The test as to whether the nonconformity in any given installment justifies canceling the entire contract depends on whether the nonconformity substantially impairs the value of the whole contract, and NOT on whether it indicates an intent or likelihood that the future deliveries will also be defective.

XXXIII. Remedies: Expectation Damages

a. Contract remedies: operate on a compensation principle. In the usual case, they seek to make the aggrieved party whole. They do not aim to deter, punish or exact revenge. The aggrieved party is supposed to be as well off as if the contract had been performed, but no better off.

b. Restatement, Second §344: Purposes of Remedies

i. Expectation interest: his interest in having he benefit of his bargain by being put in as good a position as he would have been in had the contract been performed, including profits (most generous).

ii. Reliance interest: 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, (somewhat generous) or

iii. Restitution interest: his interest in having restored to him any benefit that he has conferred on the other party (least generous).

c. Freund v. Washington Square Press:

i. The injured party should not recover more from the breach than he would have gained had the contract been fully performed.

ii. Damages must be quantifiable within reasonable certainty.

d. Efficient breach: Posner, theory that the central purpose of contract law is to facilitate the transfer of resources from less to more valuable uses.

e. Components of expectation damages:

i. Direct damages: the loss to the π of the value that would have come directly from the contract itself.

ii. Indirect losses: losses in addition to the mere loss of the value of the K

   1. Consequential losses: those that relate not to the value of the contract itself but instead arise as a consequence of the breach.

   2. Incidental losses: generally refer to the π’s costs of coping with the breach, such as the costs of inspecting the defective performance, or the costs of arranging substitute performance.

f. Restatement, Second §347: Measure of damages in general

i. The loss in the value to him of the other party’s performance caused by its failure or deficiency, plus.

ii. Any other loss, including incidental or consequential loss, caused by the breach, less

iii. Any cost or other loss that he has avoided by not having to perform

g. Damage formulas:

i. Formula 1: Damages = loss in value + other loss – cost avoided – loss avoided.
ii. Formula 2: Damages = incurred costs (reliance) – loss avoided + profit + other losses
iii. Employer’s damages = cost of substitute employee – Kp + other costs + other losses – costs saved – losses avoided
iv. Employee’s damages = Kp + other costs + other losses – loss suffered by employee by substitute Kp – costs saved – losses avoided

h. Carpel v. Saget Studios, Inc.: Consequential damages are normally only available to a π when they are ascertainable to a reasonable certainty. (UCC is more lenient in cases where the market value is not available as a guideline.) Damages which are wholly speculative in amount and incapable of reasonably ascertainment are not allowed.
i. Procopis v. G.P.O. Restaurants, Inc.: The measure of damages of a breach by the buyer of land is the difference between the contracted purchase price and the value of the land to be conveyed. (At fair market value.)
j. Handicapped Children’s Education Bd. V. Lukaszewski: Damages for breach of an employment contract include the cost of obtaining other services equivalent to that promised but not performed (cost of the “substitution contract”), plus any foreseeable consequential damages

k. When is performance excused? When are damages sufficient?:
   i. Material and total breach excuses the non-breaching party from her own performance and also allows her to seek damages
   ii. If the breaching party has substantially performed, the non-breaching party must also perform, but she may have a claim for damages due to the incomplete or deficient performance
   iii. Factors to consider:
      1. The extent of the waste (resulting from requiring complete do-over of the defective portion of the contract)
      2. The willfulness of the breach
      3. The desires and motivations of the non-breaching party

l. Peevyhouse v. Garland Coal & Mining Co.: Normally the measure of damages is the cost to complete the work, but where the cost would be disproportionate and where the breach is not related to a major part of the contract, the diminution in value is an appropriate measure

XXXIV. Limitations on Recovery: Certainty and Foreseeability
a. Limitations on recovery of expectation damages:
   i. The reasonable certainty principle
   ii. The foreseeability principle
   iii. The mitigation principle
b. Mears v. Nationwide Mutual Insurance Co.: 
   i. In order to be binding, a contract must be reasonably certain as to its terms and requirements. A contract is sufficiently certain if it provides a basis for determining the existence of a breach and for giving an appropriate remedy.
   ii. The law does not favor the destruction of contracts because of uncertainty.
c. **Locke v. United States**: If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery. The amount may be approximated if a reasonable basis of computation is afforded.

d. **ESPN, Inc. v. Office of Commissioner of Baseball**:  
   i. A π seeking compensatory damages has the burden of proof and should present to the court a proper basis for ascertaining the damages it seeks to recover.  
   ii. When the existence of damage is certain, and the only uncertainty is as to its amount, the π will not be denied recovery of substantial damages.

e. **Hadley v. Baxendale**: Damages must have been foreseeable at the time of contracting.

f. **Wullschleger & Co. v. Jenny Fashions, Inc.: UCC 2-715(2)**: a buyer may collect consequential damages resulting from a seller’s breach of warranty for “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”

g. **Kenford Company v. County of Erie**: Damages which may be recovered by a party for breach of contract are restricted to those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed.

XXXV. Mitigation Principle  
   a. **Mitigation principle**: contract law places a burden on the non-breaching party to reduce the negative consequences of breach (designed to encourage efficiency).
   b. **Parker v. Twentieth Century-Fox Film Corp**:  
      i. The measure of recovery by a wrongfully discharged employee is: the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned (or with reasonable effort might have earned from other employment).
      ii. The breaching party must show that the other employment was comparable or substantially similar, to that which the employee had been deprived. The employee’s rejection of or failure to seek other available employment of a different or inferior kind may NOT be resorted to in order to mitigate damages.

c. **Marchesseault v. Jackson**: In some situations, the owner will, even after retaining another contractor to complete the work, still not have as good a structure as she had contracted for. The owner could then claim the difference in value between what was contracted for and what was actually received, IN ADDITION to the cost of completing the work.

XXXVI. Remedies under the UCC  
   a. **UCC 1-106**: Remedies to be liberally administered: UCC favors expectation damages always, and only allows for consequential, special, or penal damages in special situations.
   b. **Buyer’s remedies**:  
      i. **UCC 2-716**: specific performance is exceptional, but may be available where goods are unique or in other proper circumstances.
ii. **UCC 2-712**: buyer may choose to “cover”, damages would be the difference between cost of cover and Kp. Failure to cover does not bar him from other remedy

iii. **UCC 2-713**: If buyer does not cover, the measure of damages = market price – Kp. Market price is always set at the *time* of the breach, but *place* of the breach is variable. (It will be the place of tender unless the rejection occurs after arrival, then at the place of arrival.)

iv. **Chronister Oil Co. v. Unocal Refining and Marketing**: taking a good out of your inventory and selling it is not a “cover” because it is not a purchase in a market. There is no purchase price to use as a ready index of the harm that the buyer incurred by the seller’s breach

v. **UCC 2-714**: If the buyer accepts nonconforming goods and has given notice, they can recover the difference between the value of the goods received and the value of the goods if they had arrived as warranted

vi. **UCC 2-710**: Seller’s incidental damages:
   1. any commercially reasonable charges, expenses, or commissions incurred in stopping delivery
   2. in the transportation, care and custody of goods after buyer’s breach
   3. in connection with resale of the goods or otherwise resulting from the breach

c. Seller’s remedies:
   i. **UCC 2-703**: Seller has several options once a buyer wrongfully rejects or revokes acceptance of goods or fails to makes a payment:
      1. withhold delivery of such goods
      2. stop delivery by any bailee as hereafter provided
      3. proceed under the next section respecting goods still unidentified to the contract
      4. resell and recover damages as hereafter provided
      5. recover damages for non-acceptance or in a proper case the price
      6. cancel

   ii. **UCC 2-706**: Seller’s resale including contract for resale: seller may resell the goods where the sale is made in good faith and in a commercially reasonable manner (damages = resale price – Kp + incidental damages – expenses saved by the breach) OR the measure below, seller can choose

   iii. **UCC 2-708**: Seller’s damages for non-acceptance or repudiation:
      1. If no resale occurs, damages = market price – unpaid Kp + incidental damages – expenses saved by the breach
      2. If the measure above is inadequate (lost volume sellers), the measure is: damages = expected profit + incidental damages

iv. **New England Dairies, Inc. v. Dairy Mart Convenience Stores**: A lost volume seller is one who has the capacity to perform the contract which was breached as well as other potential contracts, due to their unlimited resources or production capacity. The lost volume seller can have two expectations, a profit from the breached contract and a profit from one or
more other contract that the seller can perform simultaneously with the 
brecked contract

v. **UCC 2-715**: Buyer’s incidental damages:
   1. expenses reasonably incurred in inspection, receipt, transportation 
      and care and custody of goods rightfully rejected,
   2. any commercially reasonable charges, expenses or commissions in 
      connection with effecting cover, and
   3. any other reasonable expense incident to the delay or other breach

XXXVII. Reliance Damages
   a. **Reliance damages**: the usual measure of damages where recovery is based on a 
      theory of promissory estoppel rather than breach of contract (may be available 
      even when the K is not enforceable, such as under the statute of frauds)
      i. **Essential reliance**: the costs the disappointed party incurs in preparing to 
         perform under the contract
      ii. **Incidental reliance**: the costs it incurs in preparing to take advantage of the 
          benefits to accrue to it under the contract
   b. **Sullivan v. O’Connor**: Haley thinks this is a bad case (plastic surgery on the 
      nose, promise that the nose would be perfect, π recovered out-of-pocket expenses 
      and pain and suffering for the 3rd operation)
   c. **Hollywood Fantasy Corp. v. Gabor**:
      i. An injured party may, if he so chooses, ignore the element of profits 
         (expectation damages) and recover as damages his expenditures in 
         reliance
      ii. The mere hope for success of an untried enterprise, even when that hope is 
          realistic, is not enough for recovery of lost profits
      iii. When the contract was going to be a loser anyway (when the non- 
           breaching party was poised to lose money regardless of the breach), the 
           court will usually offset those expected losses from the reliance damages 
           awarded. However, the loss must be proven by Δ.
   d. **Restatement, Second §349**: Damages based on reliance interest: as an alternative 
      to expectation damages, the injured party has the right to damages based on his 
      reliance interest, including expenditures made in preparation for performance or 
      in performance, less and loss that the party in breach can prove with reasonable 
      certainty the injured party would have suffered has the contract been breached
   e. **Wartzman v. Hightower Productions, Ltd.**: Where anticipated profits are too 
      speculative to be determined, monies spent in part performance, in preparation 
      for, or in reliance on the contract are recoverable

XXXVIII. Restitution
   a. **Restitution**: disgorgement of the benefits received by one party (may be 
      appropriate where a contract is unenforceable for some other reason, such as 
      indefiniteness, a defect in the bargaining process, or failure to satisfy the statute of 
      frauds).
      i. An alternative to damages for breach of contract (can’t get both)
      ii. Available as a remedy ONLY when there has been a total and material 
          breach of contract
      iii. The non-breaching party may affirmatively seek restitution
iv. If the aggrieved party has performed all of her obligation under the K, and the only performance left owing by the breaching party is the payment of a definite amount of money, courts will NOT grant restitutionary recovery. Instead, they will enforce the obligation to pay the Kp

v. A party who has not substantially performed under a K is not entitled to recover (but even breaching parties may recover restitution if they have substantially performed)

b. **Bausch & Lomb, Inc. v. Bressler:**
   i. *Restitution damages*: if Δ is liable for material breach, π can recover “the reasonable value of services rendered, goods delivered, or property conveyed less the reasonable value of any counter-performance received by him
   ii. Restitution is available even if the π would have lost money on the contract if it had been fully performed. The doctrine of restitution looks to the *reasonable value* of any benefit conferred upon the Δ by the π.

c. **EarthInfo Inc. v. Hydrosphere Resource Consultants, Inc.**: In situations where breach is particularly egregious or wrongful, or if the parties have a special (i.e. fiduciary, confidential) relationship, courts may require that profits from the breach be disgorged, whether or not they flow from the nonbreaching party’s performance

d. **United States Ex Rel. Palmer Construction, Inc. v. Cal State Electric, Inc.**: 
   i. If the breaching party has conferred a benefit upon the innocent party rather than a detriment, it would unjustly enrich the innocent party and unduly punish the breaching party if the latter received nothing for its services.
   ii. The breaching party should not, in any case, be able to recover more than the contract price
   iii. Williston’s “true measure of quasi-contractual (restitution) recovery: Kp (unpaid) – cost of completion – any other additional harm to the breaching party = net benefit conferred on the innocent party
   iv. The innocent party is not unjustly enriched when it receives what it bargained for and pays no more than contract price.

XXXIX. **Agreed Remedies**

a. *Contract penalties*: unenforceable, against public policy

b. *Liquidated damages clause*: specifies in the contract what the damages for breach will be
   i. **Restatement, Second §356**: Liquidated damages and penalties: 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 anticipated or actual loss, AND the difficulties of proof of loss
   ii. **UCC 2-718**: Liquidation or limitation of damages; deposits: same as restatement, except additionally there must be proof of inconvenience or infeasibility of otherwise obtaining an adequate remedy
   iii. **Lake River Corp. v. Carborundum Co.**:
      1. 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
2. When the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, it is a penalty
c. Limit the liability for breach:
   i. Cap damages
   ii. Specify that the breaching party will not be responsible for specified categories of damages
   iii. Include a clause that limits the recovery of consequential damages
   iv. **Werner v. Fidelity Security Systems, Inc.:**
      1. An agreement *limiting the amount of damages* recoverable for a breach is **NOT** an agreement to pay either liquidated damages or a penalty. The contracting parties can, by agreement, *limit their liability* in damages to a specific amount, either at the time of making their principal contract, or subsequently thereto
      2. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation for *injury to a person* in the case of consumer goods is prima facie unconscionable, but limitation for *commercial loss* is not
      3. It is against public policy to permit a common carrier to limit its liability for its own negligence
   v. **UCC 2-719:** Contractual modification or limitation of remedy: the agreement may provide for remedies in addition to or in substitution for those provided in the UCC, and may limit or alter the measure of damages recoverable under the UCC (parties are free to contract!)
d. Restrict the types of remedies available
   i. Buyer’s sole remedy is…
   ii. Specify the procedures that must be used to resolve disputes
   iii. Require the aggrieved party to give notice of breach within a certain period of time
   iv. Allow the breaching party an opportunity to cure before the aggrieved party seeks remedies
   v. Require arbitration instead of litigation

**XL. Noneconomic and Noncompensatory Damages**
a. Damages for pain, suffering, and emotional distress:
   i. **Nature of the contract:** where the nature of the contract makes emotional disturbance a particularly likely result of breach, courts may be willing to allow recovery of damages
   ii. **Nature of the breach:** if the breach is such as to cause bodily harm, most states will allow emotional disturbance damages
b. **Lane v. Kindercare Learning Centers:** (nature of the contract) It is generally held that damages for emotional distress cannot be recovered for the breach of a commercial contract
c. **Johnson v. Jamaica Hospital:** (nature of the breach) The general rule in contract cases is that “absent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty
d. **Restatement, Second §353**: 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

e. **Restatement, Second §355**: Punitive damages: not recoverable for breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable

XLI. **Specific Performance and Injunctions**

a. **Specific performance**: an exceptional remedy, rather than the norm

i. Contempt power of the court is available to enforce a specific performance decree with fines and even imprisonment

ii. Threshold question: will damages be inadequate to compensate the π?

iii. Traditionally, damages are routinely considered inadequate if a seller breaches a contract to sell real estate

b. **Van Wagner Advertising Corp. v. S&M Enterprises**: 

i. Specific performance of real property *leases* is not awarded as a matter of course in NY, but specific performance of real property *sales* is

ii. The word “uniqueness” is not a magic door to specific performance. A distinction must be drawn between physical difference and economic interchangeability

iii. In asserting that the subject matter of a particular contract is “unique” and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough info about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee

iv. The imposition of an equitable remedy must not itself work an inequity, and specific performance should not be an undue hardship

c. **Block v. Hillel Torah North Suburban Day School**: Where the contract is one which establishes a personal relationship calling for the rendition of personal services, the proper remedy for a breach is generally not specific performance but rather an action for money damages

d. **New York Football Giants v. Los Angeles Chargers Football Club**: He who comes into equity must come with clean hands

e. **Ticor Title Insurance Co. v. Cohen**: 

i. The basic requirements to obtain injunctive relief have always been a showing of irreparable injury and the inadequacy of legal remedies

ii. The issue of whether a non-compete covenant is enforceable by injunction depends in the first place on whether the covenant is reasonable in time and geographic area

iii. Enforcement of non-compete covenants will be granted to the extent necessary:

1. To prevent an EE’s solicitation or disclosure of trade secrets
2. To prevent an EE’s release of confidential info regarding the employer’s customers
3. In those cases where the EE’s services to the employer are deemed special or unique