BACKGROUND on UCC:

- **Pass v. Shelby Aviation (2000):** Pass’ took private on plane; crashed due to turbulence. Prior to flight, plane was serviced and wing brackets were replaced. Issue surrounds whether Shelby provided a service or sale of goods. **Holding:** Transaction was service which incidentally involved goods. Court looked to emphasis of “repair” and “service” on invoice, and percentage of cost of goods.

- **Custom Comm. v. E.F. Johnson (1993):** Custom enters into agreement with Johnson, manufacturer of radios. Custom must promote sales of Johnson’s products, maintain inventory, service facility. Johnson breaches contract when it appoints other dealers. **Holding:** Transaction was sale of goods. Nonsale components foster the dominant purpose of the agreement, to sell Johnson’s products through Custom. “Buyer” and “seller” explicit in agreement.

**Intent to Contract:**

- Parties must “mutually assent.”
- **Objective theory of contracts:** only the parties’ acts and not their subjective thoughts are relative in discussing mutual assent.
  - **Intent:** What a reasonable person in the position of the other party would conclude that his objective manifestations of intent meant.
    - Secret terms are irrelevant
  - Helps to determine the meaning of contracts: (Ex: B says to A this deal’s just like the one’s before. If B insured deals in the past, B will be placed under contractual obligation to do so in this situation)
  - **Kabil Devel. Corp. v. Mignot (1977):** Kabil, contractor, approached Δ’s, subs, to supply helicopters for contracting job. In court, testimony was allowed which included Kabil’s vice-presidents subjective view-point of whether a contract had been reached in the final meeting b/w the two parties. **Holding:** Testimony should be allowed as long as jury did not treat it as something more than evidence bearing behavior and perceptions of negotiations. What a party thought he was doing should show in what he did.

- **Intent to create legal relations:**
  - Look at the context of the overall agreement in determining enforceability.
  - **Business agreements:**
    - **Contracts made in jest:** if one party makes an offer in jest, and the other party reasonably believes that she is serious, and seriously accepts the offer, the contract will be binding.
      - **Lucy v. Zehmer (1954): Rule:** A person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.
      - If both parties manifest intent for contract not to be legally binding, it will not be enforceable.
    - **Domestic/Social Situations:** Where agreement arises in social or domestic situation, presumption is legal situation was not intended.
      - Agreement b/w husband and wife living amicably together: not intended to be legally enforceable unless they were not living amicably together.

- **Intent to memorialize** agreement in writing: what happens if parties reach mutual assent on all terms of proposed agreement, and decide to subsequently formulate a written agreement which they will later sign
  - **Intent to be bound (prior to signing of document) manifested:** Contract
  - **Intent not to be bound (until written document signed) manifested:** No Contract
  - **No intent manifested:** Typically courts rule there is a contract.
  - **Letter of intent, contemplating more formal agreement:** Situation where parties sign a “letter of intent” but anticipates further negotiations.
    - Depends on the intent of parties as shown by the document; have to look for clues in the document

- **Agreement required on major terms:**
Offer (O):
- “…manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”
- Typical contains a conditional promise
  - Unilateral offer: Exchange of offeror’s promise for offeree’s act. Contract in which only one party promises to do something, and the other party is free to act or not as she wishes.
  - Bilateral contract: Contract which consists of exchange of promises
- Confers on the offeree the power of acceptance
  - Options: Contract in which offeror promises that he will keep the offer open for a certain time.
- VALIDITY of offers:
  - JEST: Offer which offeree knows or should know is made in jest is not a valid offer
  - Offer must contain a promise or commitment; reasonable person in position of “offerree” would have understood the “offeror” as having proposed a bargain.
  - Preliminary negotiations: Party could just be deciding to solicit bids (contractor-subcontractor).
    - Use objective test; subjective intent is irrelevant.
    - Statement of intention to contract in the future is irrelevant.
  - Price quotations distinguished from offers:
    - Quantity: Quote will only be an offer if it makes clear quantity in question
    - Addressee: Quote not addressed to a particular person, but part of a general price list: unlikely to constitute an offer.
    - Use of term “quote” or “offer”: If proposal refers to itself as a quotation, it is less likely to be an offer.
    - Proposal is not an offer if it reserves to proposer power to close the deal
    - If existence of offer is close question, court will generally find that there was not an offer
- Case: Fairmount Glass Works v. Grunden-Martin (1899): GM wrote Fairmount, seeking lowest price Fairmount would make them on their order. Fairmount replied, quoting the prices for the different size Mason jars, the last shipment date, and the acceptance dates. Grunden wrote back twice, once telling Fairmount to enter their order in as ten car loads, and again detailing the further specifications of the transaction. Rule: Fairmount’s response letter indicated clear indication to sell (offer). Whether or not quotation is offer depends on the language used.
  - Advertisements as Offers:
    - Carill v. Carbolic Smoke Ball Co. (1893): Manufacturer advertises that it will pay $100 to anyone who contracts influenza after using its anti-influenza medicinal smoke-balloon for two weeks according to direction. Rule: The advertisement consists of an offer, b/c its language contains an express commitment; direct promise in plain words. (Also looked at in terms of a unilateral contract; acceptance was purchasers act of using product. If condition is not met, there is no duty on offeror’s part for immediate performance.)
    - Lefkowitz v. Minneapolis Surplus Store (1957): Δ placed advertisement for fur coats. Ad stated distinct prices on two different Sundays. Π tendered money for coat, and was denied good b/c offer was intended for women only. Holding: Since the sale was clear, definite, and explicit, (included price, subject matter, time of performance, first come first served) advertisement constituted an offer.
    - Harris v. Time (1987): Time sent out letters which read - I’ll give you watch free for opening the envelope prior to date. Once opened, it was seen that offer was only good if additional certificate was mailed. Holding: Letter was sufficient to be an offer. Unilateral contract: promise contingent upon opening of the envelope; performance becomes the acceptance. Case was dismissed.
Leonard v. PepsiCo. (2000): Δ’s Pepsi Stuff commercial – final scene of commercial offers Harrier Fighter Jet for millions of points. Π comes up w/ the money to purchase jet and is denied. **Holding:** Under objective theory of contracts, no objective person could reasonably have concluded that the commercial actually offered consumers jet. Offer is indefinite: details left to catalogue, no “first-come first-served” language. Commercial made in jest.

- **Invitations to Bid:** Invitation is not offer unless language indicates so.
  - Language is offer if it indicates commitment on part of inviter to award contract or sale to highest bidder: inviter bound to contract w/ highest bidder.

- **Indefinite Offers:**
  - Essential terms of agreement:
    - 1.] parties
    - 2.] subject matter
    - 3.] time for performance
    - 4.] price
  - Vague offer missing essential terms will not be a contract
  - Contract may later be saved if parties later supply missing terms or courts apply “gap fillers.”

- **Offers proposing a series of contracts:**
  - Series of contracts vs. a single contract w/ several installments: A has right to revoke offer prospectively any time he wishes in “series of contracts” case; may not revoke in “single contract, several installments” case.

- **Elements of an offer:**
  - 1.] communicated to the person to whom it is addressed
  - 2.] indicates a desire to enter into the contract; may propose manner and time for an effective acceptance
  - 3.] directed at some person or group of persons
  - 4.] invites acceptance
  - 5.] creates reasonable understanding that upon acceptance, a contract will arise w/o any further approval being required from the offeror

- **Duration of the offer**
  - Must be accepted within a *reasonable time* [if details not stated]. Ways to terminate prior:
    - 1.] Rejection
    - 2.] Counteroffer
    - 3.] Offeror’s Death/Mental Disability: Death/Mental Disability have to be prior to acceptance. Post-acceptance is still a contract.
    - 4.] Revocation: [Termination of the power of acceptance]
      - 1.] received notice of revocation from offeror
        - Effective receipt: Ex: if written offer was made to a specific offeree, written notice of revocation is deemed to be received when writing is delivered into possession of offeree or authorized rep., or deposited in authorized place
        - 2.] offeree has learned from other reliable sources that offer has been withdrawn. [*Dickenson v. Dodds* (1876)]
          - *Indirect revocation:* offeror takes action clearly inconsistent w/ the continued intent to enter into contract, and offeree obtains reliable information of this action
          - Cannot be reached if: a.] information is uncertain or b.] action is not clearly inconsistent w/ continued existence of offer

**ACCEPTANCE (A):** offeree’s manifestation of assent to offer; reasonable person understood manifestation as acceptance
Offer may only be accepted by person in whom offeror intended to create power of acceptance.

Offeree sometimes required to know of the offer:

- Restatement – It is essential to a bargain that each party manifest assent with reference to the manifestation of the other.
- **Reward:** Where a reward is offered for a particular act, a person who does the act /wo knowing about the reward cannot claim it
  - *Glover v. Jewish War Veterans* (1949): Δ placed ad in newspaper offering reward for information leading to apprehension/conviction of person guilty of murder. Π, after reward was published, was questioned regarding one murder suspect and divulged information leading to apprehension of suspect. **Rule:** Person who gives information leading to an arrest of a murderer without any knowledge that a reward has been offered for such information is not entitled to collect the reward. Π did not divulge information out of sense of public duty; had to be questioned.
  - **Exceptions:** Rewards offered by public agencies. “Standing offers” by governmental bodies.

- **Objective manifestation:** All that matters is that offeree’s conduct leads offeror to reasonably conclude that offeree knew of the offer; does not matter that subjectively the offeree was unaware of the offer
  - Offeree can bind himself to an offer even though he is ignorant of certain of its terms.
- **Method of Acceptance:** Offeror can prescribe method of acceptance
  - Where mode of acceptance is not specified, acceptance may be given in any **reasonable manner** given circumstances.
    - *Keller v. Bones* (2000): Π submitted offer to purchase ranch on July 17. Offer stated it would lapse if not accepted prior to July 21 at 5pm. Bones decided to accept the offer, and faxed signed copy of offer to their agent at 4:53 pm. Agent called Keller at 5:12 informing him of acceptance. Shortly after, Bones received a matching bid from a buyer he preferred, and wanted out of agreement w/ Keller. **Rule:** Where the terms of the offer require that it only be signed prior to 5pm and not communicated prior, a faxed signed copy of acceptance w/o oral communication is sufficient. When an offer does not specify time by which communication of offer must be made, one must use a reasonable time. **[Focus on specific terms in offer required of mode of acceptance]** Seller’s acted as if there was a sale; parties acted and talked as if they were bound.

- Acceptance of unilateral contracts:
  - Only accepted by full performance, but partial performance makes offer temporarily irrevocable.
  - If B’s words are clear that he did not intend his act to constitute acceptance, there will be no contract.
- Acceptance of **bilateral contract:** Acceptance usually in words, but may be in form of actions
  - Assent must be implied: reasonably appears to the offeror that this is what the offeree has intended.
  - Notice of acceptance: In a few situations, offeree may accept by being silent; generally, offeree must at least attempt to communicate it to offeror in reasonably prompt manner.
  - If offer indicates that acceptance can become effective before any attempt to communicate it made, acceptance will become immediately effective.
- When offer invites either promise or performance:
  - Language of offer relevant to mode of acceptance
  - Shipment of goods: UCC & Restatement – either shipment or promise to ship constitutes acceptance
    - Acceptance by seller even if good don’t match the offer

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Acceptance of **unilateral contract**: offeree does not have to give notice of his intention to accept; acceptance occurs through performance by the offeree of the act desired by offeror.

- **Restatement/UCC**: Binding upon performance; Offeree must still give offeror notice that he has performed; failure to give notice could lead to discharge
- **Few courts**: no contract until performance & notice.
- **Harms v. Northland Ford Dealers (1999)**: \( \Pi \) hits hole-in-one in contest. \( \Pi \) paid entrance fee. \( \Delta \) stated that \( \Pi \) had to hit from men’s tee; although it was not stated on banners nor sheet given to golfers. **Holding**: Unilateral contract existed: Offer to deliver car for performance of hole-in-one.

**Acceptance by silence**:

- **Common-law rule**: silence does not constitute acceptance
- **Restatement**:
  - 1.] reason to understand: offeror has given offeree reason to understand that silence will constitute acceptance; judged based on subjective intent of offeree
  - 2.] Acceptance of services: offeree silently receives benefit of services will be held to have accepted contract if he a.] had a reasonable opportunity to reject goods and b.] knew or should have known that provider expected to be compensated
  - 3.] Prior course of dealing
  - 4.] Exercising Dominion

- Acceptance varies from offer:
  - **Common-law rule**: acceptance must be precise **mirror image** of offer
    - Rationale: 1.] Injustice; 2.] last shot opportunity
    - **Roth v. Mason (1998)**: \( \Delta \) offered counter-offer on plot of land to \( \Pi \). \( \Pi \) signed and dated under “counter to counter-offer.” **Holding**: No contract. \( \Pi \)’s response was counter to counter-offer. Purpose of a form contract is defeated if it can’t be filled out right. \( \Pi \) might have hidden motives in filling out contract this way.
  - **UCC view**: contract may be created where acceptance does not match the offer; Code attempt to specify what the terms of the contract are
    - Purchase order typically favors the buyer. Acknowledgment form contains clauses which favor the seller. Dispute later erupts concerning adequacy of seller’s performance. Eventual notice that forms are not in complete agreement and there are some “non-negotiated” terms.
    - **Role of 2-207**:
      - 1.] determine whether contract has formed at all
      - 2.] determine what terms of the contract are
    - **Two major changes from common-law approach**:
      - 1.] document can constitute acceptance even if it states terms additional to or different from those offered or agreed upon
      - 2.] additional terms proposed can become part of contract if other party merely remains silent.
    - **Acceptance expressly conditional on assent to changes**:
      - No contract formed by the exchange of documents
      - Restrictive reading of clause; must conform to language of §2-207
      - If there is assent to changes, the changes become part of the contract; if buyer makes one objection, he has probably implicitly assented to the other changes
    - **Additional terms in acceptance**:
      - Whether additional term becomes part of the contract depends on whether both parties are merchants: merchant (def’d) – almost every person in business.
If one party is not a merchant, only way additional term becomes part of contract is if offeror explicitly assents to it.

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  **Klocek v. Gateway (2000):** Klocek purchased computer from Gateway. Box which contained copy of the Standard Terms of Agreement. A note states that the buyer agrees to the terms if the computer system is kept beyond five days after the date of delivery. Paragraph 10 of the Standard Terms of Agreement was an arbitration clause, requiring disputes to be settled in Chicago. **Rule:** When one party is not a merchant, only way additional term becomes part of the contract is if the offeror explicitly assents to it. Not returning product in five days is not explicitly assenting. Gateway’s standard terms would only have been a counter-offer, if Gateway expressly made its acceptance conditional on plaintiff’s assent to additional or different terms.

- Both parties are merchants: additions automatically become part of the contract unless one of three exceptions §2-207(2)(a)(b)(c) is triggered.
  
  **(a):** clause in offer stating offeror expressly limits acceptance to terms of offer
  
  **(c):** notification of objection given or given w/in reasonable time
  
  **(b) Materiality:** Disclaimer of Warranty typically regarded as material. Arbitration clauses are borderline.

  **Additional terms in first document, not second:**
  
  • Assuming seller’s form was definite and seasonal expression of acceptance, it will deemed to have accepted all terms of offer, not just those on which writings agree.

  **Different (conflicting) terms in the documents:**
  
  **Knockout rule:** conflicting clauses get knocked out, so that neither enters the contract. UCC gap-filler provision is used if one is relevant; otherwise common law controls.

  **Alternative approach:** Clause proposed in second form fails to have any effect. Clause appearing in the offer enters the contract.

  **Response diverges too much to be acceptance:**
  
  • Key terms which may cause response to diverge too much: price, quality, quantity, or delivery terms.

  **Contract by parties’ conduct:** divergence of offer & acceptance, but parties go ahead and make full or partial performance
  
  • Sufficient to establish a contract; terms of particular contract consist of terms which writings of parties agree, together w/ supplementary terms incorporated under any other provisions

  • “Expressly conditional” cases:
    
    **Seller’s act of shipment and buyer’s act of payment may constitute conduct which both parties recognize existence of contract.** If forms do not agree on arbitration, there will be no arbitration unless arbitration is “supplementary term” available under code.

  • No attempt at offer and acceptance:
    
    **ProCD v. Zeidenberg (1996):** Δ buys “consumer” version at retail store. Box says on outside that software comes with restrictions contained on a license inside the box. Text of the license inside the box says that this version may be used only for non-commercial purposes. Δ disregards license, puts data on Internet and sells it for a lower price. **Rule:** Π proposes a contract which buyer would accept by using software after reading license terms inside box. Δ’s retention of the product constituted acceptance.

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Confirmation of oral agreement:

1. Additional terms in confirmation: become part of the contract unless one of the three subsections of §2-207 is satisfied.

2. “Different” terms in confirmation: does not enter into contract, even if party receiving confirmation fails to object. No enforcement of knockout rule; original term in oral agreement enforced.
   
   - What if confirmation is sent consisting of additional or different terms and statement that deal is “expressly conditional” on those terms? No effect.

3. Both parties send conflicting confirmations: conflicting terms do not become part of contract; knockout rule is imposed by Code.

4. Terms present only in one confirmation: If subject is only covered in one confirmation and does not conflict w/ explicit term in oral agreement, treated as proposal for additional term.

Negotiations involving battle of forms:

- 1. May never have been any contract or
- 2. Existence of an unwritten contract through conduct; §2-207(3)

Duration of power of acceptance:

- Ways in which offer can be terminated:
  
  1. rejection or counter offer by offeree
  2. lapse of time
  3. revocation by the offeror
  4. death or incapacity of either offeror or offeree

  Power is also terminated by non-occurrence of any condition of acceptance under terms of offer

- Counter-offer acts in same way as rejection
  
  - If original offer is irrevocable (i.e. option contract), counter-offer will not terminate power of acceptance

- Lapse of Time: Offeror sets the time limit
  
  - If offer does not set a time limit for acceptance, power of acceptance terminates “at the end of a reasonable time period.”
  
  - Reasonable time question of fact depending on circumstances
  
  - Late acceptance can act as an offer

- Offers sent by letter & telegram: period measured from time offer is received

  
  - Holding: No merit to argument that claims automatically terminate after two years. West American failed to limit duration in offer. Reasonable duration, unlike commercial offer, is not fixed at particular time. Question of fact for jury to decide. 
  
  - Rule: When duration of offer is not specifically stated, the reasonable time limit for acceptance is question of fact for jury.

- Revocation:
  
  - Revocation by offeror does not become effective until it is received by the offeree
  
  - Receipt of revocation: comes into offeree’s possession, possession of someone authorized to receive it for him, or when it is put into his mailbox

- Indirect Communication of Revocation:
  
  - Standard rule: when one learns of an actual contract to sell the property to someone else, there is a revocation
  
  - Dickinson v. Dodds (1876): (not followed) Dodds signed and delivered offer to sell estate to Dickinson. Offer was left open. Dickinson then heard that Dodds was offering property Allen. Dickinson handed acceptance of
offer to Dodds later; Dodds refused. **Rule:** Since offeree knew that offeror was no longer minded to sell the property, there was sufficient revocation.

- Hearing a rumor typically is not sufficient
- If the offeree does not learn of the inconsistent act, power of acceptance is not revoked, and there will be an action for damages
- **Hendricks v. Behee** (1990): Behee made written offer to Π. Π signed proposed agreement. Before being notified, Behee contacted Smith’s agent and withdrew offer. **Rule:** Notice of revocation to agent is sufficient of revocation/notice to principal. Π did not “accept” the offer. If Π had put the signed offer in the mailbox, that would have been sufficient acceptance.

- **Death or Incapacity** of offeror/offeree: Death or loss of legal capacity by either to enter into contract - power to accept is terminated
  - Exception: Option contracts – power to accept is not terminated by death or incapacity of either party
- **Irrevocable** offers: typical offer is revocable even though offer states that it will remain open for some stated period of time.
  - 1.] Option Contract
    - **Common Law:** Option could be formed if offeree gave the offeree consideration (Ex: handing over $1)
    - **Restatement:** Contract could be formed without the actual giving of consideration; contract just needed to “recite a purported consideration.” (Ex: contract states a $1 will be paid, but is never paid: still a contract)
      - Even if contract states it is both an option and irrevocable, it is revocable unless there is either written consideration or giving of consideration.
    - **Counter-offer** does not terminate power of acceptance in option contract, where consideration has been written or paid.
    - Reliance may substitute for consideration.
    - **Subcontractors – Drennan v. Star Paving (below)**
      - **Baird Co. v. Gimble Bros (1996):** Hand rejected two theories – 1.] there was no unilateral contract, where general contractor’s use of the sub’s bid constitutes acceptance and 2.] promissory estoppel limited to charitable pledges. No option contract here. **Problem w/ option contract:** general cont. free to bid-chop.
      - 2.] Firm offers under UCC (§2-205): offer by a merchant to buy or sell goods is irrevocable if the offer is a.] signed in writing and b.] gives explicit assurance that the offer will be held open
        - A.] offer is revocable for a reasonable time if not explicitly stated
        - B.] Longest offer can be irrevocable is three months
        - C.] If firm offer is contained on a form drafted by the offeree, offer is irrevocable only if that particular “firm offer” clause is signed separately by offeror
      - 3.] Part performance or detrimental reliance:
- **Partial Performance/Detrimental Reliance:**
  - **Unilateral contract:** (§45) beginning of performance by offeree creates an option contract; once offeree starts to perform, the offer becomes temporarily irrevocable
    - Offeror’s duty is conditional upon complete performance by the offeree
    - §45 of Restatement only deals with contracts which call for performance, not promises
    - Option contract takes effect only when offeree starts the actual performance requested by offer; offeror can still revoke if offeree makes “preliminary preparations”
• Exception: if offer explicitly states right of revocation is reserved to the offeror
• UCC: where the beginning of performance would be a reasonable form of acceptance, it is effective as an acceptance only if offeree seasonably notifies the offeror that he has accepted
  ➢ Unilateral or bilateral: (§ 62) acceptance as soon as offeree begins to perform
    • ***Key distinction: Once the offeree begins to perform, he has accepted the contract, and is bound to complete performance
    • Beginning of performance operates as acceptance only if the offeror is notified of the acceptance within a reasonable time
  ➢ Preparations prior to acceptance: § 87
    • “An offer which the offeror should reasonably expect to induce action or forbearance of substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.”
    • **Distinction from § 45 & 62: Deals with preparations made prior to acceptance by promise or performance
    • Sub-contractors: Where sub submits a bid to general contractor, who then relies upon it in figuring his own over-all bid, sub-contractor’s bid usually held to be irrevocable, for at least time necessary for general to obtain job and accept sub’s bid. (creation of an option contract)
      ➢ Drennan v. Star Paving (1958): Sub submits written offer for paving to general. Sub’s bid is lowest, and G relies on it in preparing its own bid, and submits sub’s identity. Sub later notifies general that its bid was too low b/c of error. General’s bid on general contract is accepted, and sub refuses to perform. **Holding:** (Promissory estoppel as consideration for implied promise to keep bid open; promissory estoppel replaces acceptance) General justifiably and substantially relied upon sub’s offer. Sub’s offer was irrevocable until general had a reasonable chance to notify sub of the award and of general’s acceptance of sub’s bid.
      ➢ Older case: Baird Co. v. Gimbel: same situation as Drennan. **Holding:** There is no promise in this case. Sub’s offer was not a unilateral contract; promissory estoppel limited to charity pledges – no binding promise of an irrevocable offer, and there was no consideration for such a promise.

➢ When Acceptance Becomes Effective:
  o General Rule: “Mailbox” rule – acceptance is effective upon proper dispatch (based on manner and medium invited by offer), regardless of whether it ever reaches the offeror
    ➢ Cantu v. Central Education Agency (1994): Cantu hand-delivered resignation to supervisor effective Aug. 18th. A requested paycheck be sent to McAllen Texas. A received recognition on Aug. 20th, and wrote a letter accepting resignation by mail. On Aug 21st at 8:00 a.m., A hand-delivered withdrawal. **Holding:** School district’s acceptance of A’s resignation was effective when mailed. Mail is a reasonable means of dispatch, and was impliedly authorized under the circumstances.
  o Mailbox rule:
    ➢ Applies only to acceptances by promise, not acceptances by performance
    ➢ Rule is no different w/ more modern methods of communication: facsimile and e-mail
    ➢ Binds the offeree as well
  o Exception if offer provides otherwise, i.e. it specifies when there is acceptance (personal receipt rather than dispatch)
  o Reasonable means are not chosen:
If unreasonable means of dispatch are used by offeree, or there is a misaddressing, acceptance is still effective when dispatched if it is received within time in which properly dispatched acceptance would arrive.

- **Acceptance Lost in transmission:**
  - Courts discharge offeror if he never receives notice of the acceptance
  - Offeree sends both acceptance and rejection:
    - A. Dispatch of rejection, then acceptance: Acceptance is not effective unless it reaches offeror before he receives rejection
    - B. Dispatch of acceptance, then rejection: Contract is binding as soon as the acceptance is dispatched.
      - Exception – Estoppel: if revocation is received before the acceptance, and the offeror relies on it, he may be estopped from enforcing the contract.
  - Acceptance of option contracts: Effective upon receipt.
  - Risk of mistake in transmission: contract is formed on terms of the offer as received by the offeree, as long as offeree does not know terms are messed up

- **INDEFINITNESS:** when terms are too uncertain contract is typically void
  - Essential elements of an agreement: 1.] parties; 2.] subject matter; 3.] time for performance; 4.] price
  - 1.] Implication of reasonable terms – Complete omission of a matter:
    - UCC: “GAP-FILLERS” – as long as parties have “intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy” court is authorized to fill in price, place for delivery, time for shipment or delivery, time for payment, etc.
      - Price term: a.] nothing is said of price; b.] left to be agreed by parties and they fail to agree; c.] price is to be fixed in terms of some agreed market or other standard
      - Delivery: if not specified, delivery is seller’s place of business or residence
      - Time for shipment or delivery: reasonable time for delivery
      - Time for payment: At time and place at which the buyer is to receive the goods
    - **UCC 2-314/2-316:** Policy in favor of providing warranties in certain types of sales of goods – becomes part of the contract unless its express terms clearly exclude them. Seller can contract out of them only if contract satisfies certain formalities – sales contract must mention “merchantability” and, if in writing, disclaimer must be conspicuous.
  - 2.] Implied obligation of GOOD FAITH & fair dealing:
    - A.] consistency w/ other party’s reasonable expectations
    - B.] A cannot interfere with or refuse to cooperate with B’s performance; especially true where B’s performance is condition of A’s performance
    - C.] A has an obligation to take affirmative steps to exercise its discretion
    - D.] Output & requirements contracts: (UCC §2-306) both are explicitly authorized; no quantities unreasonably disproportionate
    - E.] Not employed to override a specific contractual clause
      - **United Airlines v. Good Taste (1999):** Π entered catering contract with Δ.
        Π had to greatly expand operations to serve contract. Termination provision in agreement stated “either party may terminate agreement upon 90 days written notice.” Δ gave notice of termination one year into contract.
        **Holding:** Δ did not breach implied covenant of good faith. Illinois courts have never held implied covenant to require good cause or legitimate business reason for terminating a contract w/ express no-cause termination provision. Δ did not deliberately try to drive Π out of business; Δ had no subjective bad faith or ulterior motive.
**Indiana American v. Town of Seelyville:** Company agreed to sell to Town, and Town agreed to purchase from Company quantities of water that the Town would need. Limit of 1 million gallons that Town could purchase a day. 14 years after contract was entered, Town planned to develop well field of its own. **Holding:** Drafters of UCC were not concerned about case where buyer takes less than estimated requirements, provided he does not buy from someone else. Were concerned with the buyer buying more than he needed, and selling the goods at a higher price in competition with the seller. **Rule:** If the buyer has legitimate business reasons for eliminating its requirements, as opposed to a desire to avoid its contract, the buyer acts in good faith.

**Implied Obligation to Continue Negotiations in “Good Faith:” Jenkins v. County of Schulykill (1995):** Δ wrote Π letter stating it desired to consummate a lease within 30 days, and that good faith negotiations would ensue. **Rule:** An agreement to bargain in good faith can be enforceable if it meets the test set forth in Grossman – 1.] both parties intended to be bound by the agreement; 2.] the terms of the agreement are sufficiently definite to be enforced; 3.] there was consideration

- 3.] Courts are willing to supply missing terms (only if parties have manifested intent to create binding contract); if parties have attempted to deal w/ particular term but their expression of intent is too vague or uncertain, court will not supply a reasonable term and rule contract void

**Academy v. Cheever (1991):** Cheever, Δ, entered into publishing agreement with Π. Agreement stated Π would publish work in it’s own “style and manner.” Δ subsequently objected to publication of contracts. **Holding:** No contract, since essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken. Agreement provides no basis for determining when breach has occurred. No mutual assent as to essential terms. Subject matter of contract was not decided upon (missing terms) and when there is no standard available for reasonable implication, courts ordinarily refuse to supply missing term.

- 4.] AGREEMENT TO AGREE: matter open for future negotiation

  **Martin Delicatessen v. Schumacher:** Renewal clause left future rent to be determined on price agreed upon. When tenant made it clear he would renew, landlord stated @ a price of $900. Tenant appraised fair market value at $545. **Holding:** Agreement to agree is unenforceable. No issue if there was a methodology behind obtaining the rent price, or if the rent depended on an objective extrinsic event. (Court could have filled in rent price, but for policy reasons, landlord should have been able to raise rent price; Established pattern of practice exists; in both parties best interest to agree at some point)

**UCC 2-305(1)(b):** allows court to supply a reasonable price term if the price is left to be agreed by parties; more indefinite in relation to other terms

**Non-UCC cases:** increasingly willing to supply a reasonable term for the issue only if parties have intended to make a binding contract

- 5.] Trade usage helps to determine if term is sufficiently definite

- 6.] ONE PARTY SETS TERMS, i.e. has right to determine a particular term of performance at a subsequent date:

  **[UCC §2-311(1):]** as long as there is intent on both sides to contract, and there is a reasonably certain basis for giving an appropriate remedy, contract “is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties.”
  - If buyer has right and obligation to set the specification, and she does not do so, §2-311(3)(b) gives seller right to perform in any reasonable manner and recover if buyer does not pay.

**STATUTE OF FRAUDS:**

**BACKGROUND:**
Statute of Frauds has three requirements:

1. Writing: does not have to be one document, it can be pieced together and include electronic recording or e-mails, as long as one is signed.

2. Signature: by party against whom contract is to be enforced. Broad enough to cover any symbol made or adopted w/ intention, actual or apparent, to authenticate the writing as that of the signer.

3. Sufficient Content: Must contain only enough information to show that contract was made, identify subject matter, and reveal material terms.

Roberts v. Karimi (1999): Rule – Although memorandum of sale was not signed, the signed affidavit, and note combined with the details in the memo were sufficient to meet requirements of statute of frauds. Policy - The purpose of the statute of frauds is to protect persons from the fraudulent enforcement of agreements that were never made, not to allow parties to evade genuine agreements they have reached. Protection of the plaintiff due to a reliance interest.

LAND CONTRACT

Provision: promise to transfer or buy any interest in land falls within SofF – applies to a contract providing for the subsequent conveyance of land

- Promise to transfer an interest in land along with promise to pay for such an interest falls within Statute
- Two ways in which such a contract can become enforceable:
  1. full performance on the part of the vendor (i.e., vendor makes the contracted for conveyance)
  2. significant reliance by the vendee

CONTRACTS NOT PERFORMABLE WITHIN A YEAR: If promise contained in contract is incapable of being fully performed within one year after making of contract, contract must be in writing.

- Measured from the time of execution of the contract, not the time it will take the parties to perform
- Provision applies only if complete performance is impossible within one year after making the contract; does not factor in possibility of a discharge
  - Personal service contracts: possibility that party might die within one year is not enough to prevent the Statute of Frauds from applying.
  - Lifetime employment: not within one-year provision (does not need writing)
  - Employment contract for fixed term: within one-year provision
  - Covenant not to compete: not within provision

C.R. Klewin v. Flagship Properties, Inc. (1991): Δ, Flagship, entered into a contracting agreement with Π for a construction/management service. It was an oral agreement for the whole project (signed only for first phase); performance of what was contracted for typically takes over a year, although agreement did not specifically state this. Holding: Oral contract is one of indefinite duration. Contract is enforceable, since it is outside the proscriptive force of statute. Possible that contract might be performed within the year.

- Alternative performances: If contract gives one or both parties the choice b/w two or more performances, contract is not within one-year provision if any of alternatives can be performed within one year from time of making of contract
  - Termination clauses: one or both parties has choice b/w performing fully or terminating contract by giving notice
    - Traditional view: not performable within one year; giving of notice simply excuses contract, falls within provision
    - Alternative view: does not fall within provision; giving of notice to terminate is a form of performance
    - Second Restatement – distinguishes b/w termination right that parties intended as a means of performance (ex: 30 days notice - no writing
required) and termination right that parties intended as discharge (allowing employee to quit at any time - writing required)
  o 4.] **Full performance:** full performance by one party removes the contract from the one-year provision, even though it actually took that party more than one year to perform
  ▪ Part performance by one party does not remove contract from one-year provision
    • **Burns v. McCormick (1922):** Π’s claim they entered into agreement with decedent for which if they boarded and cared for him the house and furniture would be theirs. No deed, will, or memorandum exists to authenticate promise. **Holding:** Δ is protected by statute of fraud. Π’s did purchase food; however, they could have been doing this for room and board. Π’s could have lived there in expectation of reward. Focus on acts rather than words.
    • **Nashan v. Nashan (1995):** **Holding:** Court held that if Π’s depositions and affidavits were proved at trial, they were sufficient to establish part performance exception to Statute of Frauds doctrine. **Rule:** Evidence must be such that 1.] only reasonable conclusion to which it leads is that a contract was made, and it cannot be readily explained on any other ground. 2.] Π must also show reasonable reliance on a contract and must 3.] demonstrate equities that would make restitution an inadequate remedy and would make it unjust for the Δ to hide behind the statute of frauds

➢ **CONTRACT FOR THE SALE OF GOODS:** Contracts for sale of goods over $500 must be in writing
  o 1.] One sale vs. several: If parties intended for one single contract, and one single contract is over $500, SoFF applies.
  o 2.] Contract which is primarily one for services does not fall under this section of SoFF
  o 3.] Exceptions:
    ▪ A.] Goods are specifically manufactured for buyer and buyer has made either a substantial beginning of manufacture or commitments for their procurement.
    ▪ B.] Party against whom enforcement is sought admits in pleading, testimony, or otherwise that a contract for sale was made.
    ▪ C.] Goods for which payment has been made and accepted or which have been received and accepted.
  o 4.] Enforceable between merchants if…within a reasonable time writing in confirmation of contract and sufficient against sender is received and party receiving it has reason to know its contents and party against whom enforcement is sought does not provide written notice of objection to its contents within 10 days of when letter is received

CONSIDERATION: View consideration from the eyes of the PROMISSOR.

➢ **BACKGROUND:**
  o For there to be a binding contract, must be “mutual assent” and consideration (there are exceptions to the rule)
  o Consideration acts to distinguish enforceable and non-enforceable promises
  o Promise is supported by consideration if:
    ▪ 1.] promisee gives up something of value, or circumscribes his liberty in some way (legal detriment); and [commercial exchange]
    ▪ 2.] promisor makes his promise as part of a “bargain”; that is, he makes his promise in exchange for the promisee’s giving of value or circumscription of liberty. [gift]

➢ **BARGAIN ELEMENT – GIFTS:**
  o “bargain” def’d: “A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise.”
  o 1.] promise must be part of a “bargain” and 2.] promisee must suffer a detriment
Bargains v. pre-conditions: must ask whether occurrence of the condition is of benefit to the promissor

- **Patel v. American Board of Psychiatry & Neurology (1992):** Patel performed internship in India and wrote Board requesting credit. Board wrote him back that internship satisfied requirement for certification. **Holding:** No bargained-for-exchange. Π suffered an unbargained detriment; however, there was no requested performance by Δ. Offeree must do something that offeror wants him to do. **Rule:** A detriment to the offeree must be bargained for by the offeror, and must either be a direct or indirect benefit to the offeror.

- Bargain present w/o NON-ECONOMIC benefits:
  - **Hamer v. Sidway (1891):** Uncle promises nephew $5,000 if the latter will refrain from smoking, drinking and gambling until he reaches the age of 21. The nephew abstains. **Holding:** Uncle’s promise was “bargained for,” and supported by consideration. Uncle was clearly attempting to obtain something he regarded as desirable (nephew’s health, morality, etc.), and was thus bargaining. Furthermore, although nephew did not suffer any economic harm and most likely benefited morally and physically, he still circumscribed his freedom of action. (“detriment”)

- DONATIVE/ALTRUISTIC pleasure:
  - Only donative & altruistic pleasure (no consideration) vs. donative & altruistic intent w/ some aspects of bargain (consideration)
  - **Congregation Kadimah Toras-Moshe v. DeLeo (1989):** Decedent suffered illness and is visited by Congregation’s spiritual leader. Decedent made oral promise to give $25,000. **Holding:** There is not a bargained-for-exchange of promises. Congregation’s plans to name library after decedent not a benefit to decedent and did not lead him to make promise. Hope or expectation are not examples of detriment. **Rule:** An oral promise of a gift or donation is unenforceable b/c it lacks consideration

- Nominal consideration: ($1 in return for promise)
  - $1 may be a detriment, but it was most likely not bargained for
  - Whether or not consideration is paid is typically a non-issue, as long as there is other evidence to show that there was in reality a bargain

> BARGAIN ELEMENT – “PAST CONSIDERATION”: detriment is previously suffered

- **Carlisle v. T&R Excavating (1997):** Π provided bookkeeping services to Δ. Δ offered to pay her, and upon her refusal, offered work on her preschool building at a cost only of materials. Π & Δ divorced, and Δ did not finish work on building. **Holding:** No consideration, only a conditional gratuitous promise. Reimbursement for materials was not a bargained-for-benefit to promisor or detriment to promissie; it was instead a condition. **Rule:** Past consideration in exchange for a future promise is not sufficient to support a binding contract. Courts rarely enforce agreements w/ private relationships.

- Pre-existing debt:
  - Ex: no consideration for new promise to pay pre-existing debt
  - Sometimes courts will enforce promises relating to pre-existing debts b/c of a moral obligation

- Past services: no consideration
  - Sometimes courts may find promise binding w/o consideration due to “moral obligations.”

> DETRIMENT: promisee must do something he does not have to do, or refrain from doing something that he had a right to do.

- Consideration may be either a promise or a performance
- “ADEQUACY” of detriment does not matter:
  - **Apfel v. Prudential Bache Securities (1993):** Π’s conveyed rights to techniques and certain trade names and Π agreed to pay stipulated rate based on those techniques. Δ
obligated to pay even if techniques became public. Π promised that techniques had no previously been disclosed and were kept away from public. Holding: Does not matter if consideration is “grossly unequal.” Δ also obtained value from the exchange. Rule: Only concern is whether something of real value is exchanged between the two.

- **Batsakis v. Demotsis (1949):** Π lends Δ 500,000 drachmae, at the time worth $25. In return for the loan, Π requires Δ to sign a promissory note for $2,000, payable at end of the War. Holding: Π entitled to recover $2,000; transaction amounted to a sale by Π to Δ of 500,000 drachmae in return for signing of the instrument. Δ got what she bargained for. Rule: “Mere inadequacy of consideration will not void a contract.”

➢ **PRE-EXISTING DUTY RULE:** “If a party does or promises to do what she is already legally obligated to do, or if she forbears or promises to forbear from doing something which she is not legally entitled to do, she has not incurred the kind of detriment necessary for her performance or forbearance to constitute consideration.”

- **Alaska Packers Ass’n v. Domenico (1902):** Π’s, workmen, sign contracts at fixed rate to work on Δ’s ship, as ship goes from San Fran. to Alaska and back. When ship arrives in Alaska, men tell Δ that they will not do any more work unless Δ gives them a very substantial increase in salary. Δ agrees since he has nowhere to get replacement men. Δ refuses to pay extra money. Holding: Agreement to pay extra money was w/o consideration, since by agreeing to work on way back to San Francisco, Π’s were agreeing to do what they were already bound to under contract.

- **State v. Avis (1990):** $20,000 reward for arrest and conviction of murderer. Depretis was a private investigator employed by Attorney of co-defendant. Depretis provided signed confession from Π, who admitted responsibility for murder. Holding: Although Depretis might have initially began activities as a result of relationship w/ lawyer, reward induced him to take further action.

➢ **Exceptions:**

- **Restatement 2d §89:** Modification may be binding, if its is “fair and equitable in view of circumstances not anticipated by the parties when contract was made.”
- Pre-existing duty owed to third person
- UCC cases involving modifications
- Undertaking of slightest additional duties constitutes required “detriment.”

➢ **SETTLEMENT AGREEMENTS:** “If a Π promises to waive a valid claim, all courts are in agreement that this promise is “detriment” to the Π, and constitutes consideration for the Δ’s promise to pay settlement.”

- **Invalid claims:**

  - **[Majority View] Fiege v. Boehm (1956):** Π, an unmarried woman, becomes pregnant. Before child is born, she tells Δ that he is the father, and Δ agrees to pay expenses of having child in return for Π’s promise not to bring paternity suit. After child is born, Δ reneges, Π brings a paternity suit, and trial court find that, on basis of blood tests, Δ cannot possibly be father. Holding: Agreement is enforceable. Father had a sincere belief and thought he was getting something in return. Rule: Π has to establish both that she had, at time of agreement, a bona fide belief that Δ was really the father, and that a reasonable person in her position might have had such a belief.

  - **Restatement View:** Requires either subjective belief or objective reasonableness

- **Valueless claims:** Requires either subjective belief or objective reasonableness, or both.

➢ **MUTUALITY:** “Each party must furnish consideration to the other; each of the contracting parties must undergo a detriment which was bargained for by the other.”

- **Unilateral contracts:** Performance acts as acceptance, consideration, and it fulfills a condition

- **Performance as Consideration – Weiner v. McGraw Hill (1982):** Π hired away from Prentice Hall, which offered him more money to stay. Π was assured by Δ that company had
a firm policy not to terminate employees w/o just cause. This was stated in the handbook, which Π’s contract was subject to. Π fired 8 years later for “lack of application.” Holding: Commencement of work by employee is sufficient consideration in return for promises made at time of hire. Employee gives up right not to work, or at least not to work for company in question.

- Conditional Promises as Consideration: Under conditional promises, unless the condition comes to pass, there can be no enforceable promise. When the outcome of the condition is uncertain or unknown, the fact that the promisor has taken on the risk of such event happening is often sufficient consideration
  - Iacono v. Lyons (2000): Δ agreed to pay all expenses if Π came w/ her to Vegas. Δ offered to split gambling winnings 50-50. Π took Δ to slot machine in dream, and said “this one’s for you pudding.” Holding: Promises by each to split the winnings represent a bargained-for-exchange. Also represents consideration and perfect mutuality. Rule: The possibility of risk does suffice as a legal detriment if the risk is what entices the promisor to make the promise.

- Discretionary Promises as Consideration:
  - Wood v. Lucy, Lady-Duff Gordon (1917): Π employed by Δ, was given exclusive rights to use her endorsements/designs. In return, he was to have half of all profits and revenues from contracts he made. Π claims Δ broke contract when she placed her endorsements on products without his knowledge and kept promise. Holding: Valid consideration. Π’s promise to account for profits and take out patents/copyrights shows he had some duty and was going to give reasonable efforts. Implied promise by Π to seek out sales. Rule: Fact that Π would get nothing if did no work is a detriment and works as consideration in enforcing exclusive dealership contract.
  - Illusory promise: statement which appears to be promising something, but which in fact does not commit the promisor to anything at all
  - Alternative promises: Alternative performances is generally consideration only if each of the alternative performances would have been consideration if it had been bargained for alone.
  - Right to terminate agreement

- Output & Requirements Contracts:
  - Requirements Contract - Eastern Air Lines v. Gulf Oil Corporation: Π agreed to purchase oil from Δ at complicated pricing formula, which allowed for escalating prices. During Mid-East embargo, Δ wanted to change formula in order to charge higher price. Δ argued that since Eastern could order nothing, agreement lacked sufficient consideration. Rule: Π had an implied obligation to act in good faith, and that was sufficient consideration. [UCC Gap Fillers - § 2.306 1.] implies both a good faith and a reasonableness obligation on the party who is to determine the quantity of goods ordered or supplied and 2.] implies an obligation of best efforts on both parties when the contract imposes an obligation on one of them to deal exclusively w/ the other.

PROMISSORY ESTOPPEL: Think in TERMS OF PROMISEE

- BACKGROUND:
  - Rest. 2nd § 90(1) - Elements:
    - 1.] promise was made
    - 2.] reasonable expectation of the promisor to induce action or forbearance on the part of the promisee
    - 3.] the promisee reasonably relied on the promise and took action to his detriment
    - 4.] such promise is binding b/c injustice can be avoided only by enforcement of the promise
  - Purpose: enforce promises not supported by consideration
Unbargained-for reliance:
1. originally applied to gratuitous promises which were relied upon by promisee
2. expanded to cover certain commercial situations, such as preliminary negotiations

Foreseeability of reliance: Promisee’s reliance, and particular way in which he relied, must have been reasonably foreseeable to the promisor.

UNILATERAL CONTRACTS: Promissory estoppel always established in unilateral contracts.
Brings in element of tort law: δ held blameworthy for intentionally or negligently inducing other party to rely on negotiations

Deli v. University of Minnesota (1998): Π was head coach of UofM gymnastic team. Π, w/ wife, recorded sexual relations on same videotape as gymnastic performances. Athletic director asked Π for videotape, and said she would not view it. Π was eventually terminated. **Holding:** In promissory estoppel you cannot recover emotional distress damages b/c promissory estoppel is essentially a contract claim & you are limited to the type of damages of a contract; to recover, plaintiff would have had to prove an independent tort.

Not explicitly recognized in UCC (Firm offers)

NON-COMMERCIAL context:

Gifts:

Intra-family promises: Ricketts v. Scothorn (1898): Grandfather, distressed b/c Granddaughter has to work in store, gives her promissory note, telling her that he has done this so that she will not have to work anymore. She quits her job and he dies. **Holding:** Graddaughter justifiably and foreseeably relied on Grandfather’s promise of payment, by giving up her job. Reliance made the note enforceable.

Charitable Donations:

• In Re Morton Shoe Company (1984): Morton made a pledge for $10,000 a year. Δ said Π still owed $20,000. Based on estimated amount of subscriptions, Δ borrows money from banks so that it can make immediate distributions to recipients before obtaining the actual pledge amount. **Holding:** Unlike DiLeo, Δ substantially relies on pledge.

Child Support - Wright v. Newman (1996): Requirements for promissory estoppel are met: Immediate promise existed (listing name on birth certificate and acting as father), promisor had a direct action or forbearance (did not take action to find out who the real father was), and this ruling prevents injustice.

Convey land – promissory estoppel may be used as substitute for Statute of Frauds
Charitable subscriptions: no reliance necessary as long as promise to charity is written

COMMERCIAL Context:

1. Gratuitious Agents - East Providence Credit Union v. Geremia (1968): Δ’s take out car loan from Π. As part of loan, Δ’s contract to keep insurance in force on the car. Insurance premiums become overdue, and an employee of Π tells Δ’s that he will pay the premium, and charge it to Δ’s account. Δ’s acquiesce, and Π neglects to pay premium. Car is destroyed by fire. **Holding:** Δ’s relied on Π’s promise to pay insurance, and forbore paying it themselves. Sufficient to allow application of promissory estoppel. Furthermore, there is valid consideration, since Δ expected Π to pay interest on the loan. [Courts typically hesitant in applying promissory estoppel in insurance-procurement cases]

2. Discontinuation of At-will business arrangement (reliance damages)
   - Gruen Ind. v. Biller (1979): Δ’s orally agreed to sale of Windsor’s assets to Π. At time of oral agreement, Π’s allege they informed Δ’s that they would not incur the expenses of preparing an oral agreement unless they were assured that there was a firm commitment. Another Δ, PCA, stepped in and purchased shares from Δ at higher price. **Holding:** There is no reasonable basis for reliance; suffering is from a failed negotiation rather than a reliance. **Rule:** Promissory estoppel cannot be used
to eliminate all risk from a business transaction. [Court doesn’t see one side being taken advantage of]

3.] Employment Disputes

- **Pensions:** Promissory Estoppel employed where promise is made after employee has retired, or made under terms allowing employee to retire immediately, since the bargain element necessary for consideration is typically not present.

- **Promise of an at-will job:** Employer has promised an at-will job to an employee, and then revokes the promise before the employee shows up for work, or very soon thereafter.
  - “Unjust not to hold $A$ to its promise of a job.” Even if $\Pi$ were to work for one day, and then get fired, she would still have a remedy since $\Delta$ had to give a **good faith opportunity** to allow $\Pi$ to perform his duties to the $\Delta$’s satisfaction once on the job.
  - $\Pi$ can recover **reliance** (what $\Pi$ lost in quitting job he held nad in declining one offer) damages under promissory estoppel theory

- **Lord v. Souder (1999):** $\Pi$ became aware that $\Delta$ was engaged in illegal activities. $\Pi$ sought out vice-president of HR, and in exchange for promise of protection $\Pi$ revealed information. Souder found out via reckless dissemination of information through VP. $\Pi$ was fired. **Holding:** $\Pi$ would not otherwise have been fired, and she did incur a financial detriment: promissory estoppel exists. Promise by VP induces $\Pi$ to furnish information. **Rule:** Promissory estoppel not limited to only pre-hire circumstances. **Alternative View:** There was consideration, since there was a bargained-for-exchange of promises; “formation” of new employment contract.

4.] Sub-contractors: general contractor reasonably relies upon sub-contractor’s bid, and would suffer a loss if sub-contractor backed out and a new one had to be found.

5.] Franchises: Courts can enforce implied promise of good faith, and award contract-based damages. They do not need to expressly rely on promissory estoppel.

- **Type of Remedy:** contains elements of contract, quasi-contract, and tort

- **Hoffman v. Red Owl (1965):** $\Pi$ negotiates w/ $\Delta$ to become supermarket franchisee of $\Delta$. $\Delta$ assures $\Pi$ that if he raises $18,000 worth of capital and does certain things, he will be given franchise. $\Pi$ sells bakery, purchases and resells a small grocery store to gain experience, makes payment on site of proposed store, moves residence to location near where store is to be, and borrows $18,000 from father-in-law. $\Delta$ tells $\Pi$ deal is off, unless he can procure statement from father-in-law that $18,000 is a gift and not a loan. **Holding:** $\Pi$ may recover for all out-of-pocket expenses and losses he suffered in reliance on $\Delta$’s promise of franchise. **Promissory estoppel applies even though negotiations were highly indefinite:** no agreement on size, cost, design, layout of store building, and terms of lease. Parties had not finalized details of proposed bargain sufficient enough even to constitute offer, let alone a contract.

6.] Tax Abatement:

- **Ypsilanti v. General Motors Corp. (1993):** $\Pi$, township, approved $\Delta$’s application for tax abatement. Tax abatement act established to encourage creation and maintenance of jobs in the state. **Holding:** Fact that $\Delta$ solicits tax abatement and persuades municipality w/ assurances of a job is not evidence of a promise. Even if there was a promise, reliance would not be reasonable

#### DAMAGES:

- **1.]** Courts typically reward reliance damages: $\Pi$ is placed in position he would have been in had the promise never been made. Include “out-of-pocket” expenses.
- **2.]** Courts are more likely to award expectation damages if there is a breach of covenant of good faith.
- **3.]** If remedies are about compensating injured plaintiffs, we might see recovery keyed more explicitly to the extent of the detriment the plaintiff suffered.
RESTITUTION: UNJUST ENRICHMENT & “MORAL OBLIGATION”

BACKGROUND:
- **Restitution**: “focus is on cases in which one party has obtained a benefit at the expense of another under circumstances that make it unfair for the recipient to retain the benefit w/o paying for it.”
  - Two elements: 1.] Δ has received benefit from claimant and 2.] Unjust to keep it
- **Unjust Enrichment**: Results when there is no actual agreement, or an agreement which does not qualify as a contract.
  - No promise exists. Separate cause of action than promissory actions previously discussed.
  - Benefit conferred results in unjust enrichment
  - Contract implied in law for purposes of giving a remedy (Quasi-contract) [Also plays a role in breach of valid contract] THINK IN TERMS OF EXPECTATIONS
  - Contract implied in law [not a real contract] vs. contract implied in fact [actual contract in which agreement is inferred from conduct rather than express words]
    - *Martin v. Little Brown & Co. (1981)*: Π notified Δ that book previously published had been plagiarized. Δ offered to send copy of book w/ plagiarized portion highlighted. Δ obliged, and Π sent book. Δ later found out Δ was seeking compensation for the copyright infringement and demanded compensation of his own. Rule: Volunteers of information have no right to restitution if the expectation of payment is not express and upfront.
    - *Feingold v. Pucello (1955)*: Δ injured in motor accident. Π, without discussing fees, set up doctor’s apt., obtained police reports, took pictures, inspected accident site, etc. Close to a month later, Π mailed Δ contingency fee agreement w/ 50/50 split. Δ declined to use Π and told him to keep materials he procured. Π argues Δ’s new attorney will use some of the information he helped procure. Rule: Unjust enrichment does not apply when Π has unclean hands along w/ the absence of a tangible benefit conferred to Δ

TWO ELEMENTS:
- 1.] claimant must have intended to charge for it (objective test utilized)
- 2.] must not have imposed it on the recipient
  - A benefit is not officious if it was requested by the recipient or if it arose during an emergency situation
- *Estate of Cleveland v. Gordon (1922)*: Π’s aunt became seriously ill. Π discussed her finances w/ her aunt’s bank, who stated she would be reimbursed. Π’s aunt was aware Π was using her own money, and told her she would get back whatever she had left. **Holding**: Π acted out of family obligation; the benefits conferred were not gratuitous. Furthermore, Π’s aunt knew that Π expected to be reimbursed, and verbalizes her intent/expectation. Rule: Family members are allowed to recover under unjust enrichment when their actions go beyond the scope of familial obligation and are done w/ reasonable expectations of being reimbursed.

MEASURING ENRICHMENT:
- 1.] Market value
  - Services: quantum meruit
  - Goods: quantum valebant
  - Typically determined by testimony of expert in market; if there is no expert, Π may be able to provide evidence of his own usual price; finally, if there are neither, Π may just show costs
- 2.] Recipient’s net fiscal gain (profits)
  - Objective: what it is reasonably worth in general
Subjective: beneficiary’s particular circumstances
  o Fault or impropriety in the conduct of the conferrer not serious enough to preclude relief -
    court may award lowest measure of relief
  o One measure is disproportionately large or small - fairness or reasonable community
    expectations may require that it not be selected.
  o Recipient guilty of dishonest or improper conduct - highest measure is likely to be used.

➢ MATERIAL BENEFIT RULE:
  o Promises which satisfy the prerequisites of the doctrine of “moral obligation” are enforceable
    despite the absence of consideration. [past consideration]
    ▪ Ex: Debtor never pays $5,000 owed. Creditor does not get around to suing him and
      six year statute of limitations passes. Debtor then promises to pay back money.
      Rule: Pre-existing valid but barred debt is recognized as furnishing a moral
      obligation sufficient to dispense w/ need for new consideration.
  o Traditional applications: 1.] statute of limitations, 2.] bankruptcy and 3.] incapacity
  o Restatement § 86:
    ▪ 1.] Promisor has been unjustly enriched by a benefit previously received from
      promise
    ▪ 2.] Benefit was not given as a gift
    ▪ 3.] Promisor subsequently makes a promise in recognition of the benefit.
    ▪ 4.] Value cannot be disproportionate to the benefit
  o Webb v. McGowin (1935): Π, in act of dropping pine block, saw McGowin below. Instead of
    dropping block, Π held onto block, diverting it & hitting the ground, suffering serious injury.
    Afterwards, in consideration of having prevented injury, McGowin agreed to pay him $15
    every two weeks. Holding: Preserving a life is a material benefit. Material benefit along w/
    the crippling act as consideration. Services rendered were not gratuitous.
  o Dementas v. Estate of Tallas (1989): Π provided a variety of services for Tallas during their
    friendship. Tallas later met w/ Π, stating in memo that he owed him $50,000 for services
    which spanned a lifetime. Tallas also indicated he would change his will to reflect this. He
    never did. Holding: Services performed gratuitously are the same as a gift and subsequent
    promises to pay for these services are not enforceable under moral obligation.
  o Differences b/w two cases:
    ▪ 1.] Materiality of benefit: Webb was crippled saving a life; Dementas helped Tallas
      out
    ▪ 2.] Injustice of not enforcing the promise, in relation to materiality of the benefit
    ▪ 3.] Proportionality of the benefit of the promise made

IMPROPER BARGAINING:
➢ POSSIBLE REMEDIES:
  o 1.] Voidable: resulting contract is made voidable at the instance of the aggrieved party.
    ▪ Def.: a valid contract that remains fully effective unless the aggrieved party elects to
      exercise the right to terminate it.
    ▪ Disaffirm - restitution or Affirm - sue for damages
  o 2.] alter or eliminate the improperly imposed terms.
  o 3.] Leave contract in full, but claim damages to compensate for the economic consequences
    of wrongful bargaining. Compensatory & punitive damages. [Typically used in situations
    like fraud, where wrongful act is a tort claim as well]
➢ MISREPRESENTATION: Res. § 159 – “an assertion not in accord with the facts.”
  o Fraudulent: LIES BY OMISSION AND COMISSION
    ▪ Elements (§ 162):
      ▪ 1.] assertion is made w/ knowledge that it is false (or w/o confidence in its
        truth or w/o known basis in fact), and
      ▪ 2.] w/ the intention of inducing the other party’s agreement” – made w/
        deliberate & dishonest intent
• **Material:** A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so

• **Justifiable Inducement:** 1.] false representation must be of a kind sufficient to be an inducing factor and 2.] victim must have acted justifiably in relying on it (§162: measure inducement subjectively – do not require the victim to show materiality; still incorporates objective reasonableness)

  ▪ Evaluated using *subjective* standard: perpetrator’s accountability for purposeful deceit usually outweighs any culpability the victim may have for gullibility or carelessness

  ▪ **TYPES** of Fraud:
  
  • **Fraud in the Inducement:** fraudulent misrepresentation concerning a fact that forms the basis of the contract, giving the party to whom it is made a false incentive to enter it
    
    ▪ **Fact vs. Opinion:** Cummings v. HPG Int. (2001):
      
      Δ installed roofs in Π’s building in ’86. Δ’s representatives asserted roofs would last 20 years, would perform better, would last same or longer than other commercial roofs in the market, and was suitable for Massachusetts climate. Roofs had ten-year warranty. Δ learned in ’88 that roofs were prone to shattering. Π’s roof shattered in ’97.

      **Rule:** If person has no reason to believe that the statements they are making are false, it is not misrepresentation if the statements are later shown to be untrue.

      ▪ State of affairs in existence at time it is made vs. Promise of future performance or prediction of future events (Fraud if at time of the assertion, the party making it has no genuine belief in the correctness of the prediction, or no intention of performing as promised)

  • **Fraud in the Factum:** misrepresentation relating to the nature or effect of a document to be signed.

    ▪ **Remedy:** Voids contract

• **Types of Fraudulent Misrepresentation:**

  • **Modes:** Written, oral, conduct, silence

    • 1.] **Affirmative false statement:**
      
      ▪ Sarvis v. Vermont State Colleges (2001): Π was incarcerated b/w ’95-’98. After released, Π applied for job at CCV. In two separate resumes for two different job apps., Π stated company he previously worked for CMI was sold off and he retired and he was “semi-retired.” Δ later terminated Π. **Holding:** Case of fraud by affirmative assertion – Π fraudulently induced Δ into entering into contract. Π’s partial disclosure led Δ to believe he had full disclosure.

    • 2.] **Affirmative act:** deliberate conduct to hide a fact

    • 3.] **Non-disclosure:** problem is not stated – tough to draw the line b/w what has to and does not have to be stated.

      ▪ § 161: 1.] party knows disclosure is needed to correct a previous assertion; 2.] to correct a mistake; 3.] relationship of trust b/w parties; 4.] disclosure is required when it is demanded by reasonable standards of *fair dealing*

      ▪ In. re House of Drugs, Inc. (2000): Π entered into lease w/ Δ. Prior to entering into lease, Π explored benefits. Π observed traffic patterns, financial records, and sales volumes. Π was represented
by experienced counsel. Π did not ask for permission to review leases of existing tenants or inquire if tenants were leaving. **Holding:** Π did not reasonably rely – it made several assumptions during the negotiation. **Rule:** Failure to disclose that which a person could find out on his own and which does not induce the creation of the contract is not fraud and is not grounds for termination of the contract.

- **Stambovsky v. Ackley (1991):** Π purchased home from Δ which was known for paranormal activities. Δ reported paranormal activity in national publications & local press. House was also part of walking tour for haunted houses. Π want to sell the house, and paranormal activity is driving down price. **Holding:** Π entitled to rescission – abnormal case since this deals w/ impairment due to reputation rather than a physical one. Typical homeowner required to act prudently to assess fitness and value of purchase. **Rule:** Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care w/ respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity.

- **Negligent:** person making misrepresentation failed to act w/ reasonable care in ascertaining and communicating the truth
  - **Objective** importance of the misrepresentation balanced against victim’s duty to verify the facts
  - Only gives grounds for relief if it relates to a fact central to the transaction & party making the misrepresentation knew or had reason to know of its importance

**DURESS:**
- Physical threat no longer necessary. **Economic duress,** threat to proprietary or economic interests, is well recognized as a basis for relief.
- Evaluate inducement both **objectively** and **subjectively**
  - Takes into account subjective attributes of victim.
  - Inquiry: “whether, under all the circumstances, duress substantially overcame the free will of this party, leaving him no reasonable alternative but to acquiesce.”

- **§ 174:** person’s manifestation of assent is physically compelled, so that the act of manifesting assent is completely lacking in free will. (remedy – void)

- **§ 175 & 176:** **ELEMENTS**
  1. one of the parties must make a threat
  2. the threat must be improper: “goes beyond the legitimate rights of the party applying the pressure, or that constitutes an abuse of those rights.”
    - A.] threat to engage in vexatious litigation
    - B.] threat to withhold performance or property to which victim is entitled
    - C.] threat to disclose information that would embarrass the victim
    - D.] threat to file criminal charges
  3. threat must induce the apparent assent, in that it leaves the victim no reasonable alternative but to agree

**Germantown Mfg. Co. v. Rawlinson (1985):** Mr. Rawlinson embezzled money from Π. Insurance adjuster, Kulanksi, for Π came over to have Mrs. Rawlinson sign two judgment notes. Kulanski stated if Mrs. Rawlinson acted in good faith and continued to cooperate, there would be no need for an attorney. Mrs. R had just suffered miscarriage and was crying during proceedings. Mrs. R. also believed she was only signing one note for $160,000 instead of two. **Holding:** Duress (failure to disclose)
is present – threat of prosecution is implicitly stated. Circumstances further compounded the situation. [Defense: Rawlinson could have asked questions]

- **Market/Circumstantial Pressure vs. Duress – Quigley v. KPMG Peat Marwick (2000):** II refused to sign agreement b/c it did not benefit him. II claimed he signed agreement b/c he needed job to support family. II signed and initialed U.D. for under duress. Rule: In order for duress to be found, circumstances must be more severe than the ordinary economic pressures faced by employees who need a job.
  - Take it or leave it contracts are not improper – there is no obligation to hire

**TYPES OF THREAT:**
- 1.] Explicit
- 2.] Implied: determined by interpretation, taking into account circumstances of the relationship
- 3.] Positive action or to refrain from acting
- 4.] Harm may consists of any adverse consequences sufficient to overcome victim’s resistance to the contract.
- 5.] 3rd party threat: duress is only enforceable if first party is connected; where conduct of non-party involves actual physical force, contract may be void, not just voidable (§ 174)

**MODIFICATION of Existing Contract:**
- Modification should be upheld if it was fairly bargained, but avoided if one party’s assent to provide increased compensation was induced by the other’s improper threat to otherwise withhold promised performance

- **Consideration Doctrine & Pre-Existing Duty Rule – Rinck v. Ass. Of Reserve City Bankers (1996):** II worked for company which eventually merged. II talked to Executive Director of merged corporation, who asked if any of the staff members would be terminated as a result of the merger. Exec. Director stated the reports were correct and nobody would be terminated. II was eventually let go b/c of no room in merged org. Holding: Executive Director gave II a promise which acted as a modification of the contract. II gave consideration to this modification, by staying on and providing company w/ the benefit of his work.

- **UCC §2.209:** abolishes requirement of consideration for a modification, and subjects it to test of good faith.

- **Restatement § 89:** Two instances in which modification can be enforced despite absence of consideration.
  - 1.] Party benefited by promise of modification has acted to his detriment in reliance on it – promissory estoppel.
  - 2.] Modification motivated by unforeseen supervening difficulties – performance of party seeking modification becomes more burdensome then originally expected
    - New England Rock Services v. Empire Paving:
      - A.] Contract is subject to substantial and burdensome difficulties not anticipated, and not within the contemplation of the parties at the time when contract was made.
      - B.] Party benefiting from modification must conform to standards of honesty/fair dealing.
      - C.] Change in performance of party who assumes the increased obligations must be reasonable and manifestly fair in view of the changed conditions.

- **Economic Duress – Austin Instrument, Inc. v. Loral Corp. (1971):** Austin, general contractor, involved in sub-contracting agreement w/ Δ. In the middle of agreement, Δ refused to accept orders below minimum quantity and furthermore stated that it
would cease deliveries unless \( \Pi \) consented to substantial increased retroactively and ordered a new batch. \( \Pi \) contacted 10 other subs, none of whom could meet \( \Pi \)’s time commitments. Furthermore, \( \Pi \) would be liable to U.S. gov. for substantial liquidated damages. \( \Pi \) paid the increased price. **Rule:** A demand for changes in a contract price which is made when the other party has no option but to comply creates a situation of economic duress and may render the change invalid.

- **Remedy:** common for court’s to treat it as voidable at victim’s election, unless contract is induced by extreme degree of duress
  - Adjustment: only rarely offered
  - Victim may be able to obtain damages in tort in addition to any relief under contract law.

**UNDUE INFLUENCE:**
- § 177: concerned w/ cases of abuse of trust, confined to relationships of dependence and trust
- **ELEMENTS:**
  - 1.] Victim had a relationship of dependency & trust w/ the other party that gave the other party dominance over him and justified him in believing that the dominant party would not act contrary to the victim’s interests
  - 2.] Dominant party improperly abuses this position of trust and psychological advantage by unfairly persuading the victim to enter the contract adverse to his interests.

- **Rudolf Nureyev Dance Foundation v. Noureeva-Francois (1998):** Two months prior to death, Nureyev donated U.S. assets to a newly created foundation, RNDF based on instructions by attorney. \( \Pi \)’s object to transfer, claiming Nureyev was of unsound mind and was unduly influenced by his attorney. **Holding:** No evidence of undue influence, since Nureyev remained strong-willed and forceful, and attorney’s good faith beyond doubt. **Rule:** For undue influence to be present, there must be substantial evidence showing improper dealing, inequality, and detriment to the dependent party.

- **Tinney v. Tinney(2001):** Kevin, 30-yr. old local handyman, moved in w/ Tinney’s. \( \Delta \) became fond of Ruth Tinney, 80 yr. old housewife. \( \Delta \) told Ruth to adopt him or he would leave. \( \Delta \) was eventually adopted, and \( \Pi \)’s conveyed one quarter interest in castle to him. **Holding:** Kevin extended his influence to Ruth’s son through her. **Rule:** Undue influence is the substitution of the dominant party’s will for the free will and choice of the subservient party.

- **Odorizzi v. Bloomfield School District (1966):** \( \Pi \), a teacher, was arrested on criminal charges of homosexual activity. Superintendent of district and principal came to \( \Pi \)’s house, stating they were trying to help him, had his best interests at heart, and should take their advice and resign his position. At the time, \( \Pi \) was suffering from resignation, actual arrest, booking, and 40 hours w/o sleep. \( \Pi \) pleads \( \Delta \)’s were able to substitute their will and judgment in place of his own. **Holding:** Undue influence measured in terms of combination of susceptibility of \( \Pi \) and excessive pressure of \( \Delta \).

- **Remedy:** Contract is voidable

**UNCONSCIONABILITY:**
- Commonly associated w/ 1.] consumer transactions, involving standardized contracts in which a dominant or sophisticated party supplies a standard-form contract that is signed by the consumer w/o much opportunity to negotiate its terms; also used in 2.] commercial transaction b/w businesses
  - Businesses – **Southwest Pet Products, Inc. v. Koch Industries, Inc. (2000):** Southwest purchases feed wheat from \( \Delta \). Purchase confirmed in written sales confirmation: included terms and conditions which expressly excluded implied warranties of merchantability and fitness for specific purpose. Terms and conditions also excluded incidental and consequential damages. If goods failed, \( \Delta \) would replace goods or pay difference contract price and fair market value of goods. \( \Pi \) inspected wheat for vomitoxin & did not find any. \( \Pi \) then manufactured dog food,
which turned out to be bad. **Holding:** Procedural unconscionability: Π has signed similar contracts w/ other vendors, and has choices among vendors. **Substantive** unconscionability: Terms were standard in the industry.

- Constrained in some jurisdictions only to **sale of goods:** courts only have statutory power to give relief for contracts that are sale of goods.
- **UCC § 2.302 & Restatement § 208:** “transaction must exhibit both bargaining unfairness (procedural unconscionability) and resulting unfair or oppressive terms (substantive unconscionability)

**PROCEDURAL** Unconscionability:

- § 208: “aim is to prevent oppression and unfair surprise but not to disturb the allocation of risks b/c of superior bargaining power.”
- There is always going to be one party which is more powerful: key is whether the party abused its power to impose will on the other party.
- **Contracts of adhesion:** one of the parties enters the transaction w/ such bargaining power relative to the other, that the stronger party has enough control over the transaction to leave the weaker w/ no choice but to enter it on the terms proposed by the dominant party.
  - Also benefit consumer: ease of transaction, limitation of transaction costs which eventually limits the price of goods.

**SUBSTANTIVE** Unconscionability:

- Procedural leads to substantive unconscionability
- Terms are **harsh, unfair, or unduly favorable** to one of the parties
- Terms viewed in light of **commercial background** and **commercial needs** of particular trade or case
- Ex’s of unfair terms: 1.] excessive price for goods or services; 2.] exorbitant interest rates; 3.] harsh penalties in the event of default; 4.] waiver of legal protection or of the right to seek legal redress in a proper forum.

**NEC Technologies, Inc. v. Nelson (1996):** Π’s purchase television from Δ. Sales warranty covered damages to the television, but no incidental or consequential damages. Television caught fire and caused property damage, but no personal injury. **Holding:** No 1.] procedural unconscionability, since Π was free to look at other sets, compare warranties b/w sets, or inquire regarding typical extent of warranties. No 2.] substantive consonscionability, since legislature allows the warranty and exclusion of consequential damages.

**Remedies:** 1.] avoidance & restitution; 2.] eliminate unconscionable aspects.

**Brower v. Gateway 2000, Inc. (1998):** Π purchased computer from Δ. Δ included in materials shipped a copy of it’s “Standard Terms and Conditions” which included clause stating arbitration must be performed in Chicago, in accordance w/ rules formed by ICC. Note to customer indicated that if merchandise is kept for 30 days or longer, Terms and Conditions are accepted. **Holding:** Procedural unconscionability: not present since customer had variety of manufacturers to purchase from, had 30 days to inspect merchandise and decide if they wanted it to be returned. **Substantive** unconscionability: excessively costly to arbitrate before ICC. Parties have opportunity to seek substitution of arbitrator. **Rule:** Substantive element alone is enough to render terms of provision at issue unenforceable.

**Sosa v. Paulos (1996):** Π went for knee surgery performed by Δ. One hour prior to surgery, Π was asked to sign three documents – two medical consents and an arbitration agreement. Arbitration agreement: disputes and claims settled by panel of three arbitrators; if panel awarded less than one-half amount of claim, Π would be required to pay for all costs and fees of arbitration, etc. Agreement also stated that if any provisions were held to be unenforceable, remaining provisions would not be affected. **Holding:** Procedural Unconscionability: Agreement was present right before surgery. **Substantive** Unconscionability: Payment of arbitration fees. **Rule:** Contract provisions are severable if the parties intended severance at the time they
entered into the contract and if the primary purpose of the contract could still be accomplished following severance.

**ALTERNATIVE WAYS OF POLICING CONTRACTS:**

- **ILLEGALITY:** contract contravenes a statute or the common law
  - Making of contract could be a criminal act or law’s purpose may be satisfied by making the contract ineffective
  - **REMEDY:** Nonenforcement of contract
    - **Restitution:** When guilt is shared, court will not intervene to help them; “in pari delicto”: when the parties are in equal guilt, Δ’s position is stronger – leave the parties as they are
    - **Assessing relative guilt:** courts look at role played by each party and purpose of violated law and goals it is intended to achieve – balancing of blame & public interest

  - **Diversified Group v. Sahn (1999):** Π sold season tickets to Coleman, who sold them to Sahn, who then sold the tickets at $140,000 above face value to Haber. Contract provided that if MSG canceled subscription, Haber would have no further rights against Sahn, and Sahn would have no further obligation to the agreement. MSG cancelled subscription and refunded Coleman’s money. Sahn repaid face value of tickets to Haber. **Holding:** Although the court recognizes the maxim *in pari delicto*, statutory policy in this circumstance overrides it. Statute specifically provides for a private action, thus Sahn must return the money.

- **PUBLIC POLICY:** contract is not illegal, but seriously undermines or harms the public interest
  - Balancing of policy concerns and of equities b/w the parties
  - If harm to public interest outweighs benefit of enforcement to public and the parties, enforcement must be refused.
  - **REMEDY:**
    - **Enforcement on adjusted terms:** Used when equities favor the party who seeks enforcement and the harm to the public interest can be averted or minimized by eliminating the offensive terms
    - “*In pari delicto*” may be used, although courts are more likely to employ restitution
    - **Ex: Covenant not to compete** – clause is against long-established public policy
      - **If on balance, deleterious impact of the clause outweighs the interests of the established doctor, court may refuse clause altogether**
      - **Court may also cut down restraint to level that goes no further than necessary to protect interest [reduce time or geographical limit]**
      - **Stevens v. Rooks (1997):** Π left law firm for another Chicago firm. Π’s contract: 4/5ths to be paid unconditionally, the remaining 1/5th contingent on partner not directly or indirectly engaging in the practice of the law, in competition to the legal practice of the partnership in the Chicago area for a period of one year subsequent. Δ refused to pay remaining 1/5ths. **Rule:** Where the non-competition clause is unreasonable and involves competing lawyers, courts will sever the clause and enforce the remainder of the agreement.
    - **Harmon v. Mt. Hood Meadows (1997):** Π signed application for season-long ski pass. Application had an exculpatory pass, releasing Δ from liability of injury. Π
injured. **Rule:** Although an exculpatory clause as a whole may be against public policy, it is still enforceable if it is not against public policy against a particular individual’s injuries. (Negligence vs. willful misconduct)

- **INCAPACITY:**
  - **MINORITY:**
    - **Objective test:** age
    - **SITUATIONS WHERE MINOR IS LIABLE:**
      - **1.** Contract for **Necessaries:**
        - May be enforced on theory of unjust enrichment (not on contract)
        - Recovery would be in restitution: major party can recover no more than the market value of the goods or services, even if the contract price is higher
      - **2.** Emancipated minor (married or living independently): Broader scope of goods and services which are a necessity. Greater liability for necessaries.
    - **Misrepresentation** of age: Court may enforce contract by estopping minor from asserting minority
    - **Parents & Minors:**
      - **Zivich v. Mentor Soccer Club (1998):** Zivich signed release of physical injury for son to participate in soccer league. League sponsored by charity. Π’s son hurt. **Holding:** Parents have the authority to bind their minor children to exculpatory agreements
      - **Shields v. Gross:** When Π was ten, mother entered her into modeling contract. Pictures were taken of her posing nude. Brooke saw pictures in magazine when she was 17. **Holding:** Where a statute does away w/ a minor’s right to disaffirm consent to publication, the minor cannot disaffirm the contract.
    - **REMEDY:** Voidable contract at minor’s instance
      - Right to make the election to disaffirm extends for a reasonable time past the attainment of majority. If, upon reaching majority, the minor expressly ratifies the contract or fails to exercise the right of disaffirmance within a reasonable time, she becomes fully bound.
      - **Restitution** following disaffirmation:
        - **Major party:** Must always restore value in full of anything that he has received from the minor.
        - **Minor party:** Shielded from liability beyond the duty to return the present and existing economic advantage that he retains at the time of avoidance.
        - **Webster St. Partnership v. Sheridan:** Two teenagers rented out apt. Both were minors. Paid security deposit and made rent deposits for first month and a half. Tenants eventually forced to vacate. **Rule:** Where contracted item is not necessary, minors are not emancipated, and there is not a reasonable time to allow minor to disaffirm, Δ must restore value in full of anything received from minor.
        - **Halbman v. Lemke:** Δ sold Π, a minor, a car for $1,250. Π paid $1,000 up front, and the rest in $25 installments. After five weeks, car malfunctioned, and Π was forced to take it into the shop. Car needed $600, which Π could not pay. Repair shop stripped car of transmission & engine and returned it to doorstep of Halbman, Sr. **Rule:** Not given the two exceptions, minors have the right to disaffirm the contract w/o having to provide restitution of the car in its entirety.
MENTAL INCAPACITY:
- Based purely on subjective attributes
- Determined at the time of contracting
- **Trend towards broadening the test to include wider range of psychological disturbances
- Burden: lies on allegedly incompetent party to prove a disabling mental condition. Requires that 1.] condition existed and 2.] it was severe enough to preclude adequate degree of assent
- Presumption in favor of capacity: other party is entitled to rely on apparent capacity unless some behavior or other circumstances signal a problem. Other party’s knowledge or reason to know of capacity is key.
- Court must balance b/w protecting incompetent’s best interests and not unduly interfering w/ contractual liberty
- Alcohol or Drug Abuse: avoidance only if level of intoxication is sufficient to deprive him of understanding or of ability to act rationally, and other party had reason to know of this. (Restatement § 16)

REMEDIY:
- Cognitive test: “contract can only be avoided if the party was unable to understand in a reasonable manner the nature and consequences of the transaction.” (§ 15 (a))
- Farnum v. Silvano (1989): Π sold house to Δ for way less than market value. Prior to purchase, Δ was put on notice that by nephew that he would bring an action if sale took place. Π’s mental competence failed three years before the sale. Π was eventually hospitalized w/ organic brain disease, and afterwards diagnosed w/ dementia & seizure disorder. Π represented by bank who Silvano provided. Π claimed she still owned house after transaction; she was also cash strapped at time of sale. Rule: Reasonableness is measured based on the nature of the transaction. Where the aggrieved party lacks the mental capacity to enter into a contract, and the other party knows of the condition, the contract is avoidable and consideration is given only to the benefits the claimant may have received. Consideration generally not given to mortgage payments, benefits Π did not request, and interest.
- In the past, courts have typically favored avoidance. However, a broader test has been utilized to recognize a variety of disorders. Because of this, if party was unable to act in a reasonable manner towards the transaction, it is only grounds for avoidance if the other had reason to know of the condition. (Restatement § 15(b))
- Restatement § 15 (2): If there is performance or the other party may have otherwise changed his position in reliance on the contract, and the other party contracted on fair terms w/o awareness of incapacity, power of avoidance is terminated to the extent that the contract has been so performed, or circumstances have so changed that avoidance would be unjust.
- Avoidance: results in restoration to status quo ante. However, if other party knew of an took advantage of the incompetence, disabled party may be excused from paying to the extent that benefits received did not ultimately enrich him.

CONTRACT INTERPRETATION & CONSTRUCTION:
- INTERPRETATION: “evaluation of facts for the purpose of deciding mutual intent.”
Guilford Transportation Industries v. P.U.C. (2000): Π entered into agreement w/ Δ, allowing Π to maintain “occupations and appurtenances” over, across, along, and under land belonging to Δ. Π wants to use fiber optic cable on the land. **Rule:** When *generally prevailing meanings* support both sides and *examination of the entire document* along with *extrinsic evidence* does not resolve ambiguity, the interpretation is left to the factfinder.

Four areas of factual inquiry:

1. Language & conduct of parties in forming the agreement
2. Conduct in performing the contract after it was formed (course of performance)
3. Conduct in prior comparable transactions w/ each other (course of dealing)
4. Customs and usages of the market in which they are dealing w/ each other (trade usage)

**#1 - EXPRESS WORDS & CONDUCT:**

- Court seeks meaning of provision in *context of language of agreement* as whole
- Earlier cases: “four corners” rule – disinclined to entertain broader contextual evidence. Use common grammatical meaning of the words used by the parties.
- **Ordinary sense** of words is primary focus

**#2 – COURSE OF PERFORMANCE:** UCC §2.208, Restatement §202(4)

Guidelines:

1. Course of performance must be pertinent to the meaning of the term in controversy.
2. Conduct must show that party performed or accepted performance w/o protest or reservation of rights.
3. Conduct by only one of the parties not known and acquiesced in by the other may show what the performing party understood the agreement to be, but does not prove that the other party shared this view.
4. Extensiveness and repetitiveness of conduct.

**#3 – COURSE OF DEALING:** relationship in period before transaction

Pertinent if:

1. earlier relationship is comparable or analogous
2. transactions substantially similar
3. term in controversy present in earlier dealings
4. past conduct relevant to meaning in issue

**#4 – TRADE USAGE:**

May be a particular market or specialized trade or industry

UCC Test: whether the usage is currently observed by great majority of decent dealers (common law shifting towards this)

Four things to prove in order to use trade usage:

1. Use pertinent to term at issue.
2. Usage does in fact exist in the trade or market in which the transaction occurred.
3. Both parties must be sufficiently connected to the trade or market in question.
4. Usage must not be excluded by or incompatible w/ the express terms of the agreement.

**General Rules:** Restatement § 202-203

1. Unless different intention is manifested:
   - if language has a general prevailing meaning, it is interpreted in accordance w/ that meaning
   - technical terms and words of art are giving their technical meaning when used within their technical field.
2. The court should favor the meaning that validates the contract.
3.] Specific or precise provisions should be given greater weight than general provisions.

4.] Conflicts b/w standardized and negotiated terms resolved in favor of negotiated terms.

5.] Give greatest weight to express terms of parties -> course of performance -> course of dealing -> usage

- *Frigaliment Importing Co. v. B.N.S. International (1960):* Π engaged in two contracts to purchase chickens from Δ. Π found, upon receipt of first set of chickens, that chickens were not broiling and frying chickens but stewing chicken/fowl. **Holding:** Course of dealing: review of disposition is not convincing of Δ’s inconsistency. **Trade usage:** Δ just entered poultry business – no actual knowledge of alleged usage of “chickens.” **Dpt. of Agriculture definition** (cited in contract): Broiling, frying, and stewing chickens. Also look at pricing in contract: Π should have noticed Δ was selling chickens at a loss. Judgment for Δ.

- *Interpretation of Standard Contracts - Atwater Creamery Co. v. Western National Mutual Insurance Co. (1985):* Δ insured Π at time goods were stolen. Π’s doors were secured, and the day after burglary doors were still locked, padlocks were missing, and turbuckles were loosened. Not an “inside job” as determined by police. Insurance policy required “evidence of forcible entry,” and there was none. Π’s employees tried to read policy but gave up. **Rule:** Where the technical definition of a burglary in a burglary insurance policy is an exclusion from coverage, it will not be interpreted so as to defeat the reasonable expectations of the purchaser. (It is a “burglary” policy – meant to protect insurance company from inside jobs and force insured to secure premises)

**CONSTRUCTION:** “goes beyond available facts to find, not necessarily what the parties did mean, but what they probably would have meant in making the manifestations that were made.”
- Only used when parties did intend to make a contract, but there is little or no evidence from which a factual inference can be drawn on their intent regarding a particular aspect of that contract
- Limited situations: term may be implied in law even though it overrides or conflicts w/ the evidence of what was agreed – implied to effect some public policy.

**PAROLE EVIDENCE RULE:**

- **Restatement 2nd § 213 (UCC §2.202):** “To the extent that the parties execute a writing that is and is intended to be a final expression of their agreement, no parol evidence may be admitted to supplement, explain, or contradict it. However, to the extent that the writing is not a final and complete expression of agreement [Either incomplete or ambiguous], consistent, but not contradictory parol evidence may be admitted to supplement or explain those parts of it that have not been finally expressed.”

- **Masterson v. Sine (1968):** **Rule:** Where a collateral agreement, such as that alleged, “might naturally be made as a separate agreement,” parol evidence is allowed.

- **Pacific Gas & Electric Co v. G.W. Thomas (1968):** Rational interpretation of a contract requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.

**Contemporaneousness:**
- **Oral:** Excludes testimony of contemporaneous oral agreement at time of writing
- **Written:** Most courts say contemporaneous written agreement at time of writing is not excluded

**Modifications:** Written after execution

**FEATURES of the rule:**
- 1.] Rule only applies when written agreement is executed
- 2.] Writing must have been adopted by both parties
- 3.] Favors oral communications, but also applies to written evidence
- 4.] Judge decides whether jury should be allowed to hear evidence

**INTEGRATION:**
- **Total integration**: Written memorandum is **COMPLETE** and **FINAL**, and certain record of parties’ agreement
  - Even if parties’ intended for total integration, if writing is **unclear or ambiguous** parol evidence will be admissible

- **Partial integration**: not a complete & final record of agreement; only **FINAL**
  - Parol evidence rule still applies to individual terms which are fully, finally, and clearly expressed in writing
  - Parol Evidence needed to supplement/explain aspects which are not integrated

- Determining Integration: **JUDGE DECIDES** whether 1.] writing was intended as integration, 2.] integration is “partial” or “total;” and 3.] whether particular evidence would supplement the terms of a complete integration
  - **Classical View**: “Four-Corners” approach – judge decides whether there is an integration, and whether it is total or partial, solely by looking at the document
  - **Modern View**: Entertain extrinsic evidence to determine actual intention of parties
  - Question to ask: Restatement §216(2)(b) – is the term such as might naturally be omitted from the writing?
  - **Merger clause**: clause stating that the writing constitutes the sole agreement between the parties. Court will more likely find total integration.
    - *Bristow v. Drake Street, Inc. (1994)*: Π and Δ signed a an employment contract. Bristow employed as associate producer of show for two years. Only way Δ could terminate the contract w/o liability is if Π was convicted of a crime. Contract included integration clause. Π was fired. **Rule**: Even with an integration clause, if evidence of trade usage is presented and the doctrine of “extrinsic ambiguity” is invoked, parol evidence may be admissible.
    - *UAW-GM Human Resources Center v. KSL*: **Rule**: When the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete on its face and the evidence is necessary to fill the gaps

- **CONSISTENCY**:
  - Inconsistency can be present if express or implied words of the writing are contradicted
  - **Implicit words (ex.)**: Architecture contracts – fee paid upon execution of contract

- **WHERE PAROL EVIDENCE DOES NOT APPLY**:
  - **Fraud, mistake, or other voidability**: Parol evidence rule never prevents introduction of evidence that would show that no valid contract exists or that the contract is voidable.
    - **Exception – Disclaimer**: some courts prevent part from showing disclaimer is false
    - *Sound Techniques, Inc. v. Hoffman (2000)*: Π sought place of recording studio. Δ’s leasing agent said Π did not need to worry about bar noise downstairs. Π was assured space would accommodate its needs. Lease was conditioned upon Sound’s inspection: nobody did walkthrough of bar or checked it out. Π experienced problems. Contract included integration clause stating tenant has not relied upon any warranties/representations. **Holding**: Δ makes negligent misrepresentation but has honest intentions; there is no evidence that bargaining power was tainted by fraud/duress/unconscionability/illegality. Testimony inadmissible due to integration clause and parol evidence rule.
  - **Existence of a condition**
  - **Collateral Agreements**: oral agreement that is supported by separate consideration may be demonstrated, even though it occurred prior to what seems to be total integration

- **INTERPRETATION**:
  - **Ambiguous Terms**: If term is ambiguous, extrinsic evidence must be allowed
    - Evaluated by **JURY**
Extrinsic evidence allowed is extremely broad

- **Unambiguous Terms**: Judge decides on term’s meaning, and instructs jury of it
- **Deciding Ambiguity**: different approaches court’s take
  - 1.] Four Corners – no consulting extrinsic evidence
  - 2.] “Plain Meaning” Rule – court will not hear evidence of preliminary negotiations, but hears evidence about circumstances or “context,” surrounding making of agreement.
  - 3.] Liberal rule – pre-contract negotiations admissible

- **Sources of interpretation**: UCC gives sources specific treatment
  - **Types**:
    - 1.] Course of Performance:
    - 2.] Course of Dealing:
    - 3.] Usage of Trade: Meaning attached to a particular term in a certain region/industry
  - Sources are not subject to parol evidence rule – may be used even if writing is a complete integration
  - **Exception**: may not be used to contradict express terms of contract

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**MISUNDERSTANDING: words used in contract**

- **Misunderstanding (def)**: 1.] the parties each have a different subjective belief about a term of the contract; 2.] that term is a material one
- **Restatement §20 and 201**: “A material misunderstanding precludes contract formation when the parties were equally innocent in not reasonably realizing the misunderstanding or equally guilty in realizing it but saying nothing. However, if on balancing the degree of fault of the parties, it appears that one is more accountable than the other for knowing of the misunderstanding, a contract must be found to exist on the terms understood by the more innocent party.”
  - **Raffles v. Wichelhaus (1864)**: Buyer and seller agree to sale of cotton on board ship Peerless. It so happened there were two ships named Peerless, and the two had different ships in mind. **Holding**: Since both parties were equally innocent, the misunderstanding prevented a contract from arising.
  - **Konic International Corp. v. Spokane Computer Services, Inc.**: Young instructed by $\Delta$ to order surge protectors. Young was quoted at prices ranging from $50-$200. Young referred to one of $\Delta$’s salesman, who quoted him at “fifty-six twenty.” Young thought this means $56.20. **Rule**: When both parties attribute different meanings to a material term, such as price, there is no contract.

- **Offeree doesn’t understand the offer**: Offeree fails to understand or read the offer
  - Offeree is negligent: bound by the terms of the contract as stated in the offer
  - Misrepresentation: If offeree’s misunderstanding is due to the offeror’s misrepresentation of the terms of the offer, and the offeror knows this, there is a contract on the terms as understood by the offeree

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**MISTAKE: facts**

- **Def**: “a belief that is not in accord with the facts.”
  - Only applies to a mistaken belief about an existing fact, not an erroneous belief about what will happen in the future
  - Ex: Buyer and seller both think that a stone is an emerald when it is in fact a topaz: mistake.
- **MUTUAL**:
  - **Elements**:
    - 1.] Mistake must concern a **basic assumption** on which contract was made.
      - Market conditions: not “basic” (i.e., underestimate price)
      - Existence of the subject matter of the contract is basic
      - Quality of subject matter is basic
    - 2.] Mistake must have a **material effect** on the “agreed exchange of performance.” (deals strongly w/ price)
3. Adversely-effected party must not be the one on whom the contract has implicitly imposed the risk of the mistake. **[KEY ELEMENT]**

- **§ 154:** Party bears the risk of mistake when,
  1. the risk is allocated to him by agreement of parties
  2. 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 knowledge as sufficient, or
  3. the risk is allocated to him by the court on the grounds that it is reasonable in the circumstances to do so.

- **Minerals in land:** seller bears risk that valuable oil and gas deposits will be found on land
- **Building conditions:** Builder bears the risk of a mistake about soil or unexpected conditions.
- **Estate of Nelson v. Rice:** Π hired appraiser to value estate’s property. Appraiser specifically stated she did not appraise fine art. Δ attended estate sale and purchased two oil painting for $60, which were later valued at thousands. **Rule:** Where the seller consciously ignores the possibility of undervaluing the sale of assets, she has assumed the risk of mistake.
- **Dingemann v. Ruffin:** Π sold two parcels of lakefront property. Π’s had both lots inspected, and were told that the East lot was incapable of sewage draining. Π sold land detailing the circumstances. Δ’s purchased land and were told they could establish sewage draining in the lot. **Holding:** The circumstances did not materially effect the agreement of the parties. **Rule:** When an “as is” clause is utilized in the contract, the buyer bears both the risks and benefits of the present condition in the property.
  - **Mistake of Law - Mattson v. Rachetto:** Π’s agreed to sell Δ’s a piece of land in consideration of money and a leaseback provision. Leaseback provision was invalidated due to statutory law. **Rule:** Where the seller would not have entered in the contract without a specific provision, and the provision is subsequently invalidated due to a mistake in law at the time of contract formation, the seller is still entitled to rescission.

- **UNILATERAL:**
  - More difficult to for mistaken party to avoid contract
  - Must show three elements (basic assumption, material effect, risk on the other party), plus either 1.] unconscionability or 2.] reason to know: other party had reason to know of mistake or other party’s fault caused the mistake.
    - Sub-contractor/Contractor example – Drennan v. Star Paving Co.: Sub submitted a bid which he later seeks to withdraw b/c it is $25,000 too low. **Rule:** When a contractor relies on a sub’s bid by using that price in preparing his own master bid, the sub will not be able to make the requisite showing that enforcement of the contract would be “unconscionable.”
      - Exception: “Snapping up of the offer” – Contractor knows that the bid by sub is underpriced, and uses it in bid to contractor for that reason.

- **Defenses:**
  - Negligence: Fact that the mistake was due to party’s (who seeks to avoid contract) negligence will not ordinarily prevent relief.
    - **Failure to read:** not normally entitled to rescind.

- **Remedies:**
  - **Avoidance:** rescission typically awarded for mutual mistakes, not unilateral; awarded w/ restitution
    - **Rancourt v. Verba:** Rule: Because the clear intent of the Π was to purchase land suitable for lakeshore development, and because it is impossible to do so under state and federal wetland regulations, they are “entitled” to rescission. (In this instance, it was determined that there was mutual assumption of risk)
**Reliance:** awarded when restitution would not work – one party has suffered losses but the other has not received benefits.

**EXCUSE DUE TO CHANGED CIRCUMSTANCES: SUPERVENING EVENTS**

- **IMPRACTICABILITY:**
  - Def: “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.”
    - **FORESEEABILITY IS KEY**
  - UCC § 2-615: “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...” (war, crop failure, drought, etc.)
  - **Cost Increases:** Sellers have been found to have implicitly assumed the risk of the contract. Furthermore, sometimes the cost increase was reasonably foreseeable.
    - *Clark v. Wallace County Cooperative:* Δ entered into agreement with Π to sell 4,000 bushels of corn. Due to a freeze in the area, Δ could not come up with all the necessary bushels. **Rule:** Where the cost increase is reasonably foreseeable and performance is still feasible through other supplies, the contract will still be enforced.
    - *Opera Company of Boston v. Wolf Trap Foundation:* Foreseeability is one fact to be considered in resolving first how likely the occurrence of the event in question was, and second, whether its occurrence was of such reasonable likelihood that the obligor should have guarded against it.

- **FRUSTRATION OF PURPOSE:**
  - Def: “where a party’s purpose in entering into the contract is destroyed by supervening events, most courts will discharge him from performing.”
  - Restatement § 265: “Where, after a contract is made, 1.] a party’s principal purpose is 2.] substantially frustrated without his fault by the occurrence of an event 3.] 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.”
  - **Frustration of Purpose vs. Impracticability:** In frustration of purpose, party is claiming that it makes no sense for him to perform, b/c what he will get in return does not have the value he expected at the time he entered into the contract.
    - *Krell v. Henry:* Π rents apt. to Δ for a two-day period, at a very high rate. As known to Π, Δ’s purpose is to view the coronation of the king. The coronation is cancelled b/c of the king’s illness. **Holding:** Δ is discharged from performing b/c his purpose in entering the contract has been frustrated.
  - *7200 Scottsdale Rd. General Partners v. Kuhn Farm Machinery, Inc:* Π contracted with Δ to use resort for convention. Π invited over 200 independent dealers, and considered success of overseas personnel crucial – this was not relayed to Δ. Π became concerned about those attending convention in light of terrorists attacks: European dealers did not want to come. Domestic & Canadian dealers still signed up. **Rule:** Where the party’s principal purpose is not a common understanding and relayed in a proper fashion, and the value of performance is not near totally destroyed, the contract will still be enforced.
  - **Factors:**
    - 1.] Foreseeability: The less foreseeable the event which thwart’s the promisor’s purpose, the better.
    - 2.] Totality of the frustration: The greater the better.

**CONDITIONS:**

- Def: “An event which must occur before a particular performance.”
- **Condition precedent**: where a performance must be satisfied before the performance subject to that condition will become due.
  - Must be shown by the party claiming breach
- **Condition subsequent**: discharges a duty that is already in existence
  - Available as an excuse for the party against whom breach is claimed.
- **DISTINCTION B/W CONDITIONS & PROMISES**:
  - Promise -> breach -> remedy (damages)
  - Condition -> Non-occurrence -> discharge
  - Conditional Promise -> Total breach -> discharge/exit damages
  - Look to intent of the parties: “upon condition that” vs. “I promise” or “I warrant”
  - Failure to keep promise will general constitute failure of constructive condition (“conditional promises”)
- **CONCURRENT conditions**: particular kind of condition precedent which exists only when the parties to a contract are to exchange performances at the same time
  - Ex: A promises to deliver his car to B on a certain date, at which time B is to pay for the car
- **EXPRESS, IMPLIED, AND CONSTRUED conditions**:
  - **Express**: parties expressly agree that a duty is conditional upon the happening of some event
    - Strict compliance
    - Courts try to avoid forfeitures
    - Courts may rule that fulfillment of the express condition is “excused” where extreme forfeiture would occur -> damage to the other party’s expectations from non-occurrence of the condition is relatively minor
  - **Jacob & Youngs, Inc. v Kent**: Π built country residence for Δ, and sues for the balance of cost remaining unpaid. Specification for the plumbing work stated: “all wrought iron pipe must be well galvanized, lap welded pipe of the grade known as standard pipe of Reading manufacture.” Δ learned that pipe was manufactured by other factories and ordered architect to do the work over – demolition of substantial parts of completed structure.
    - **Holding**: Specification is an implied condition: Reading pipe is substituted for typical “pipe” much like Kleenex is for tissues. This is an unfair forfeiture case; however, it would be enforced if it was an express condition. Π substantially complied. Framed as a breach of a promise: damages are the difference between the value of the pipe, which is minimal. (Substantial performance case)
  - **Satisfaction**:
    - Party: court presumes that an objective standard of “reasonable” satisfaction was met. If you have complete and absolute discretion, it becomes and illusory promise.
      - “Tastes”: good faith but unreasonable dissatisfaction still counts as non-occurrence of condition.
      - Fry v. George Elkins Co.: Contract was conditioned upon buyer obtaining loan. Π’s bank contacted and accommodated buyer.
        - **Rule**: Buyer has an implied obligation to make a good faith effort to fulfill a condition which is on his terms and which he has control over. (Results in breach of promise which results in damages)
      - Incomm v. ThermoSpa: Π made advertising materials for Δ. Δ did not want to use Π anymore. Contract said nothing about payment being conditioned on Δ’s approval of final product. **Holding**: If the contract were interpreted to include a condition of satisfaction (implied), it would have been met. **Rule**: Where there is no express condition of satisfaction, the court will refuse to imply a subjective good faith condition of satisfaction.
    - 3rd person: subjective judgment; must be in “good faith” however
Koch v. Construction Technology, Inc.: $\Delta$ was general contractor for construction project for Memphis Housing Authority. $\Delta$ subcontracted painting portion to Koch. Second part of contract, not dealing with the payment for the painting, utilized a “condition precedent” clause. $\Delta$ refused to pay $\Pi$ for services rendered, since $\Delta$ was not paid by the MHA. **Rule:** When a party is capable of creating an express condition (as is done in other parts of the contract), and the intents of the parties is for the payment, no implied or construed condition will be created. “Pay when paid” clauses do not release the general contractor from all obligation to make payment to the subcontractor in case of nonperformance to the owner, but merely act as a timing provision.

Oppenheimer & Co. v. Oppenheim, Appel, Dixon, & Co: $\Pi$ and $\Delta$ agreed to subleasing contract subject to certain conditions. One condition obligated $\Pi$ to obtain “prime landlord’s written consent to proposed tenant work and deliver such consent to the $\Delta$ on or before January 30, 1987. Deadline was extended, and $\Pi$ still failed to deliver written consent on tenant work. **Holding:** Duties in this case were expressly conditional. (“if,” “unless,” “until”) $\Pi$ also does not suffer from unfair forfeiture or undue hardship. **Rule:** When duties are made expressly conditional, they protect a party from substantial compliance and allow only strict compliance.

- **IMPLIED:** are not expressly stated but can be construed as a matter of evidence from the language in the text; **CONSTRUCTIVE:** not enough evidence to draw a factual inference, but either a rule of law recognizes a condition under the circumstances or the court concludes as a matter of law that it is fair and reasonable to find one.

- **Order of Performance:**
  - **Periodic Alternating:** typical of installment contracts; it is important to decide who was the first to fail.
  - **General Presumptions:**
    - 1.] The performance requiring time must ordinarily occur first; performance is a constructive condition to the other party’s performance (service contracts)
    - 2.] Require simultaneous performance when party’s promised performance can occur at the same time as the others. (sale of goods and land; concurrent conditions)
      - Where the two performances are concurrent, each party must tender performance to another. (i.e., *had the check in his possession and arrived at the place of closing with it*)
      - **Strict/Perfect Tender:** one party has not met condition to tender, and other side is discharged

- **Independent Promises:**
  - If courts construe promises to be independent, the court will not apply the theory of constructive conditions. (Ex: real estate leases – construed as being independent.)

- **Divisible Contracts:** both parties have divided up their performance into units or installments in such a way that each part performance is roughly the compensation for a corresponding part performance by the other party. (treated as separate contracts)
  - **Significance:** if one party partly performs, the other will have to make part payment. If the contract is not divisible, then the non-breaching party won’t have to pay anything at all.
  - **Employment contracts:** contract will be divided into lengths of time equal to the time b/w payments.
  - **Fairness:** Court will not find a contract to be divisible if it would be unfair to the breaching party.
**Promissory Conditions**: Combined promise and a condition. If this is not fulfilled, the consequences of both a failure of condition and a breach of contract follow.

- **Merritt Hill Vineyards v. Windy Hill Vineyards**: Rule: If there is no promise to perform a condition, failure of the condition does not entitle the Π to damages.

**Excuse of Conditions**:

- **Hindrance**: Where one party’s duty is conditional on an event, and that same party’s wrongful conduct prevents the occurrence of the condition, the non-occurrence of the condition is excused, and the party must perform despite the non-occurrence.
  - **Implied promise of cooperation**: Each party makes to the other an “implied promise of cooperation.”
    - **Sullivan v. Bullock**: Woman won’t let construction workers finish job. **Rule**: When a party refuses to let the other party finish the performance of a condition, he breaches the implied promise of cooperation and is liable for damages. (**Expectation damages**: balance of contract price less savings resulting from breach)
  - **WAIVER**: Knowing and voluntary abandonment of a right. Party may indicate that he will not insist upon the occurrence of the condition before performing. (**express waiver**)
    - **Minor conditions**: court will find that minor conditions are more likely to be waived
      - If the right is a material to the contract, it can only be abandoned by a modification contract, not a waiver.
    - **Continuation of performance (by implication)**: If a promisor continues his own performance after learning that a condition of duty has failed to occur, his conduct is likely to be found to operate as a waiver of the condition.
      - **Mercedes Benz Credit Corporation v. Morgan**: Π bought the car on credit, and was obliged to make 48 monthly payments. All but one of Π’s next 14 payments were late. Δ periodically contacted Π about late payments, but always accepted them. Δ eventually decided to repossess car. **Rule**: Where a company repeatedly accepts late payments, it has waived it’s right to repossess. **Dictum**: Waivers can be retracted.
      - **Gould v. Artisoft**: **Rule**: Where a contract refers to an “enclosed agreement,” and pieces of the necessary materials to sign are lacking, the company providing the contract to be signed waives the condition of signing those pieces left out. [Concern is w/ materiality in this case; was the implied condition material?; borders on the edge]
  - Promisor may still be entitled to recover damages for breach of condition.
  - Does not require justifiable reliance and detriment
  - **Vs. Promissory Estoppel**:
    - Beneficiary of a condition indicates by words or conduct that he will perform contingent promise despite non-fulfillment of condition
    - Unlike waiver, estoppel is not confined to nonmaterial changes in contract, and the behavior need not meet the same standards of knowing and voluntary abandonment of right – a party may be estopped on the basis of careless action not deliberately intended to give up a right
  - **Unfair Forfeiture**: based on the court’s determination that enforcement of the condition would result in undue and unfair hardship to the party to whom the performance is due
    - **J.N.A. Realty Corp. v. Cross Bay Chelsea**: Δ, which operated restaurant, leased land on Π’s premises. Δ made clear during negotiations that it wanted to increase renewal option to 10-24 years. Π regularly sent reminders about lease obligations but nothing about impending expiration. Lease expired w/o renewal. **Rule**: Where non-occurrence of a condition would cause disproportionate forfeiture, the court may excuse a condition
unless occurrence was material part of the contract. Tenant may establish equitable grounds for an excuse if:
   1. valuable improvements to the property
   2. one had honestly but inadvertently failed to exercise the option
   3. lessor had not been harmed by the delay in the giving of the notice.

SUBSTANTIAL PERFORMANCE:

- **Material Breach**—If the term broken is a promissory condition—that is both a promise and a condition—
  then its nonfulfillment entitles the other party both to decline performance (because of the condition) and
  claim breach (because of the promise).

- **SUBSTANTIAL PERFORMANCE**: If the nonfulfillment of the promissory condition is not enough to
  qualify as a material breach and instead it is merely a partial breach, then substantial performance has
  occurred and the other party is not entitled to completely decline return performance. She may be
  required to accept the substantial performance.

  - Seydel v. Ige: Δ offered Π employment and stock to leave Australia and work for company. Π
    left home, relocated, but was not given stock and quit after seven weeks. Δ admitted that
    stock was key inducement. **Rule**: Where an item is reasonably expected and a material term
    in the formation of the contract, yet the breaching party does not intend to fulfill or cure the
    breach, the breach is material.

  - Π argues for a material breach in order to get out of a promissory condition: he seeks both discharge and damages.

- **FACTORS REGARDING MATERIALITY**: breach is material if breaching party has not
  substantially performed

  1. **Deprivation of expected benefit**: the more the non-breaching party is deprived of the
     benefit which he reasonably expected, the more likely it is that the breach was material.

  2. **Part performance**: The greater the part of performance which has been rendered, the less
     likely it is that a breach will be deemed material.

  3. **Likelihood of cure

  4. **Willfulness**

  5. **Delay**: Even a substantial delay will not necessarily constitute a lack of substantial
     performance. “Time is not of the essence unless the contract states so.

  - Worcester Heritage Society, Inc. v. Trussell: Π conveyed house to Trussell, who
    was in charge of renovating exterior and interior. Exterior was to be completed
    within a year. Clause in contract stated possibility of a delay. **Rule**: Where there is
    evidence to suggest that the breaching party intends to complete performance and a
    clause exists stating a possibility of performance, there is only a partial breach.
    (could be a case of waiver b/c the extensions were allowed)

- **MATERIALITY – UCC**:

  1. “Perfect Tender rule” (§ 2-601) As long as the contract does not involve installments,
     “unless otherwise agreed...if the goods or tender of delivery fail in any respect to conform to
     the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any
     commercial unit or units and reject the rest.”

  2. **REJECTION**: right exists if the goods deviate in any respect from what is required under
     the contract.

  - Printing Center of Texas, Inc. v. Supermind: **Rule**: Where there is sufficient
evidence that goods do not conform to the contract, there exists a material breach,
and damages are awarded.

  - **Reasonable time**: buyer must give prompt notice of rejection

  - **Must not be preceded by acceptance**: Acceptance involves:
• 1. after a reasonable opportunity to inspect, buyer has indicated to the seller that the goods are conforming or that he will keep them despite non-conformity
• 2. buyer fails to make a timely rejection (after buyer is given reasonable time to inspect)
• 3. buyer does “any act inconsistent with the seller’s ownership” (using goods as part of manufacturing process)
  o REVOCATION: if buyer accepts goods, he may be able to revoke his acceptance
    ▪ “non-conformity” must substantially impair the value of the goods: buyer must make a stronger showing than buyer rejecting
  o CURE: seller has the right to cure a non-conformity
    ▪ §2-508: Seller has additional time to cure once the time for delivery has passed, if he reasonably thought that either:
      • 1. the goods, though non-conforming, would be acceptable to the buyer; or
      • 2. the buyer would be satisfied with a money allowance.
    ▪ Ramirez v. Autosport: PI’s purchased car from Δ’s which was to be delivered two weeks later. On three subsequent pick-ups, there were problems with the car and service. Ramirez asked for their old car back. Rule: Where breaching party is given ample time to cure and still fails to provide product which conforms to contract, contract can be rescinded.
  o INSTALLMENT CONTRACTS: § 2-612 “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.”
    ▪ Cancellation of whole: defective installments must substantially impair the value of the whole contract.
    ▪ Graulich Caterer, Inc. v. Hans Holterbosch, Inc.: PI catered booth in pavilion for Δ. Δ approved sample taste tests. First order was of poor quality. Δ conferred w/ PI to improve quality, but it was unacceptable also. PI took no more curative measures, and Δ ordered no more food. Holding: Δ was justified in canceling contract. PI was given ample opportunity to cure and non-conformity in second delivery substantially impaired value of whole contract and resulted in breach of whole.
  ➢ CONSEQUENCES:
    o REMEDY: Cost of fixing the defective performance. Award is not appropriate when the breach is not material/willful and cost to fix would be grossly out of proportion.
      ▪ Lyon v. Belosky Construction, Inc.: PI’s entered into contract w/ Δ for construction of home. PI’s hired professional engineer to overlook the construction b/c of Δ’s advice. Roof was centered in wrong place and exterior pillars could not be utilized properly. Rule: Where the defect is substantial and aesthetic appearance is of the utmost importance in the contract, requiring the breaching party to pay for the replacement costs would not result in economic waste.
    o Recovery of Breaching party:
      ▪ Unjust Enrichment: awarded not at fair market value but at value received
        ▪ Divisible Contracts: Carrig v. Gilbert-Varker Corp.: Δ builder repudiates contract after constructing 20 houses, which had financing allocated to each lot. Rule: A contract which allocates price and financing to specific portions of units can be treated as a divisible contract, such that breaching party is entitled to what he has completely performed and is liable for the material breach of the rest of the contract in expectation damages. Builder collects through restitution – unjust enrichment. Is this an express condition, there would have been a material breach – results in builder getting nothing.
- If breacher has substantially performed and breach is not material, breacher can enforce the contract and receive the contract price less allowance for rectifying the deficiency.

**REMEDIES:**

- **TYPES OF DAMAGES:**
  - **Direct:**
    - **Expectation:** represents the economic loss suffered by the victim and calculated as the amount of money needed to put the victim where he would have been had the contract not been breached.
  - **Indirect:**
    - **Consequential:** losses beyond the contract that were nonetheless caused by the breach
    - **Incidental:** expenses incurred in dealing w/ the breach

- **Calculation:**
  - **Owners:** Cost of completion plus other costs (amounts paid) and losses less Kp and costs saved and losses avoided, if any
  - **Builders damages:** Kp plus other costs and losses (incidental and consequential damages) less costs saved and losses avoided, if any.
  - **Damages = Loss in value plus other loss – cost avoided – loss avoided**

- **ON THE CONTRACT:** “where parties have formed a legally enforceable contract, and the Δ has breached the contract, the Π will normally sue on the contract.”
  - **Freund v. Washington Square Press:** Π and Δ were engaged in a publishing contract. Δ had a right to termination if it notified Π 60 days prior to delivery. Δ terminated w/o notification. **Holding:** Damages for the publishing contract are too speculative: they cannot be quantified with reasonable certainty. Nominal damages awarded. **Rule:** Damages are not measured by what the defaulting party saved by the breach, but by the natural and probable consequences of the breach to the plaintiff.

- **QUASI CONTRACT:** Π is usually asking for damages based on the actual value of his performance, irrespective of any price set out in the contract. (not really asking for enforcement of contract)
  - **Situations used:**
    - 1.] not attempt to even form a contract, but Π deserves some measure of recovery
      - Emergency situation
    - 2.] Contract is unenforceable: Statue of Frauds, impossibility, illegality
      - Restitution/reliance damages
    - 3.] Enforceable contract, but Π materially breached
      - Π recovers restitution interest less the Δ’s damages for the breach: recovery in quantum meruit
      - Construction Cases
      - Limitation of pro-rata contract price, less Δ’s damages for breach
      - **Willful default:** Π usually cannot recover
      - **UCC § 2-718:** UCC gives a breaching buyer right to partial restitution with respect to any deposit made to the seller, before the buyer reached. Seller can only keep 20% of the total contract price or $500.
    - 4.] Δ has breached, but Π is entitled to damages on the contract
      - Reliance & Restitution damages
  - **Efficient breach:** legal system should structure remedies so that breach would be permitted without penalty, so long as the non-breaching party receives adequate compensation. This facilitates transfer of resources from less to more valuable ones.

- **EXPECTATION** – contract: “court attempts to put the plaintiff in the position he would have been in had the contract been performed. Plaintiff is given the “benefit of her bargain,” including any profits she would have made from the contract.”
Subject to the limitations stated in §§350-53, the injured party has a right to damages based on his expectation interest as measured by

- the loss in value to him of the other party’s performance caused by its failure or deficiency; plus
- any other loss, including incidental or consequential loss, caused by the breach, less
- any cost or other loss that he has avoided by not having to perform

Π’s expectation damages = value of Δ’s promised performance (contract price) – costs saved

- Costs saved does not include overhead
- Π normally can recover cost of remedying Δ’s defective performance. If costs of remedying defects is clearly disproportionate to the loss in market value from the defective performance, plaintiff will only recover the loss in market value.

- Economic waste: Defect is minor yet remedying it would involve “economic waste.”
  - Jacob & Youngs v. Kent: Court only awarded difference in value b/w the two pipes, not the much greater cost of ripping out the walls and all of the existing piping to make the replacement.
  - Lyon v. Belosky Construction: Fixing roof & pillars would not result in economic waste.

Π can only recover for losses which established with “reasonable certainty” – Π must show the likely profits

- Carpel v. Saget Studios: Δ contracted w/ Π to take black-and-white photos for $110. Photos never delivered due to negligence/carelessness of Δ. **Holding:** Expectation damages cannot be awarded because Π’s cite no authority for awarding damages. **Rule:** Where no reasonable evidence is given detailing the cost of a substitute contract, expectation damages will not be awarded. Sentimental damages are too highly speculative. Mental suffering can only be awarded if it is a result of willful conduct.

- New business: courts reluctant to award
- Cost of completion: Π must show accurately what cost of completion would have been.

Fair Market Value:

- When measuring Π’s expectation interest courts do so in reference to the market value of the contract performance or the cost (or benefit) of a substitute transaction.

- Procopis v. G.P.P. Restaurants: **Rule:** A subsequent sale price, taken alone, is not dispositive proof of the fair market value when the subsequent sale is on materially different terms than the first.

Substitute Transaction:

- If Π obtains substitute performance for Δ’s breach, and that substitute performance is less advantageous than Δ’s would have been, Π may ask that damages be measured w/ reference to the particular substitute instead of market value

- Handicapped Children’s Education Board v. Lukaszewski: Δ breached employment contract and worked somewhere else. Π was forced to find a substitute which cost $1,000 more. Substitute had more teaching experience. **Rule:** When the non-breaching party acts reasonably in finding a higher-priced substitute, it will be awarded the difference in salaries since the substitute was imposed on it.

SUBSTANTIAL PERFORMANCE: “A party who substantially performs may sue for expectation damages for breach of contract, if the other party fails to perform.”

- Divisible contracts: A party who has substantially performed one of the parts may recover on the contract for that part, even though he materially breach w/ respect to the other portions.
- Non-breaching party has claim for damages due to incomplete or deficient performance: awarded difference in value b/w what Π expected and what Π received under contract.
- Cases with unfair forfeiture or economic waste: court must balance extent of waste, willfulness of breach, desire of non-breaching party, etc.
  - Limitations:
    - REASONABLE CERTAINTY:
      - *Mears v. Nationwide Mutual Insurance Co.*: Rule: Specification of only a brand name (of a car) in a contest is reasonably certain enough to award damages.
      - *Locke v. United States*: II awarded federal supply contract. II’s name was placed on schedule. There was no guarantee II’s name would be chosen for contracts; however, received business and was low bidder. Contract was later terminated for default. Rule: where the value of a chance for profit is not outweighed by a countervailing risk of loss, and where it is fairly measurable by calculable odds and by evidence bearing specifically on the probabilities that the court should be allowed to value that lost opportunity.
      - Standard of proof – consequential damages: *ESPN, Inc. v. Office of Commissioner of Baseball*: Rule: With respect to damages for loss of goodwill, business reputation, or lost profits, proof requirements are much more stringent and II must show not only a certain loss, but a reasonably certain amount.
    - FORESEEABILITY: consequential damages will not be awarded for breach unless:
      - 1.] Damages were reasonably foreseeable
        - *Hadley v. Baxendale*: Holding: Lost profits to the mill were not reasonably foreseeable, and Δ was not on notice of the special fact that mill was closed due to a broken shaft. Rule: Where lost profits are not reasonably foreseeable to person in Δ’s position and Δ was not on notice of the special fact, II cannot recover for lost profits.
          - Direct & Incidental damages usually survive the Hadley test. Consequential damages usually do not, as the losses are more remote.
      - *Kenford Co. v. County of Erie*: Rule: Even though II anticipated and expected that it would reap financial benefits from an anticipated increase in the value of its peripheral lands upon the completion of the proposed domed stadium, the expectations did not ripen into breach of contract damages, since Δ had no reason to believe that it would be held responsible for II’s unrealized land gains (damage was not within the reasonable contemplation of Δ; not part of the promise) [II also assumed the risk]
      - 2.] Damages were remote or unusual but Δ had actual notice of the possibility of these consequences.
    - MITIGATION:
      - General principle: “Where II might have avoided a particular item of damage by reasonable effort, he may not recover for that item if he fails to make such an effort.” - only requires a reasonable effort
        - *Parker v. 20th Century Fox*: Rule: Where non-breaching party is given an opportunity to work in a starring role different than initially intended and damaging to her trademark, non-breaching party did not fail to mitigate.
        - *Marchesseault v. Jackson*: Rule: Mitigation is an affirmative defense. Up to Δ to show that II did not mitigate.
• UCC § 2-715 - Buyers Damages – Consequential Damages: Buyer must “cover” for the goods if he can reasonably do so – he may not recover for the damages which could have been prevented had he covered.
  • Buyer still entitled to difference b/w market price at the time of the breach and the contract price: loses the ability to collect consequential damages that he might otherwise have gotten
• UCC § 2-710 – Seller: less of a duty to mitigate.
  • Seller can choose b/w: 1.] reselling the goods and collecting the difference b/w resale price and contract price or 2.] not reselling them (and recovering the difference b/w market price and unpaid contract price) – seller can also recover lost profits.

➤ RELIANCE – promissory estoppel: “court puts plaintiff in as good a position as he was in before the contract was made. Plaintiff usually awarded out-of-pocket costs incurred in the performance he already rendered, but does not recover any part of the profits he would have made on contract had it been completed.”
  o Used when…:
    • 1.] impossible to measure expectation interest accurately (ex: profits from a new business which the Π would have been able to operate cannot be computed accurately)
      • Profit too speculative
      • Vendee in land contract: Δ fails to convey. (Π can recover down payment, expenses reasonably incurred, etc.)
      • Sullivan v. O’Connor: Rule: Cost and pain and suffering resulting from unsuccessful surgeries are classified as reliance damages. Furthermore, since it is difficult to determine the difference in value between a perfect nose and an imperfect nose, it awards the more foreseeable consequential damages of pain and suffering.
      • Hollywood Fantasy Corp. v. Gabor: Π contracted with Δ to appear at fantasy vacation. Π had only one previous vacation, and it lost money. Only 2 people signed up at cancellation. Rule: When a new business is involved, and revenues are extremely speculative, reliance damages (out-of-pocket costs) will be awarded.
      • Sullivan v. Oregon Landmark-One, Ltd.: Π’s own opinion of their value of their reliance losses, is by itself, insufficient to establish reasonable certainty as to amounts.
    • 2.] plaintiff recovers on promissory estoppel theory
  o Limits:
    • Reliance damages limited to contract price
    • Do not allow reliance damages to exceed expectation damages: When seeking lost profits (in expectation damages), the PLAINTIFF must prove them with reasonable certainty. When seeking reliance damages that the breaching party claims are not owed because the contract would have been a losing one, the DEFENDANT must prove the probable loss with reasonable certainty.
      • Wartzman v. Hightower Productions: In appealing a judgment for Π, Wartzman claimed that the venture itself was to have been such a losing one that Π should recover nothing despite Δ’s breach. However, Δ was unable to prove these anticipated losses with any sort of certainty, thus Π was entitled to recover all reliance damages which it had previous established
  • Expenditures before contract is signed: Π not normally permitted to recover

➤ RESTITUTION – unjust enrichment: “plaintiff receives amount equal to the benefit which the defendant has received from the plaintiff’s performance.”
  o Used when…:
1. non-breaching party has partly performed, and the restitution measure is greater than the contract price
2. breaching plaintiff has not substantially performed, but is allowed to recover the benefit of what he has conferred on the Δ.
   - More likely to be enforced when breaching party is innocent
   - United States ex. Rel. Palmer Construction v. Cal State Electric: Where the innocent party has paid more than the contract price for the goods and services ordered from the breaching party, the innocent party may recover the overage from the breaching party. The breaching party may not recover under quasi-contract against the innocent party, since the latter is not unjustly enriched. (Δ can only recover under unjust enrichment if substitute contract comes out less than contract price)
   - Bausch & Lomb Inc., v. Bressler: Because the doctrine of restitution looks to the reasonable value of any benefit conferred upon the defendant by the plaintiff, and is not governed by the terms of the parties’ Agreement, restitution is available even if the Π would have lost money on the contract had it been fully performed
   - Market value approach: based on the value rendered to the Δ; sum which the defendant would have to pay to acquire the plaintiff’s performance
   - Not limited to contract price: If the work done by Π prior to Δ’s breach has already enriched Δ in an amount greater than contract price, entire enrichment may be recovered by Π.
   - Restitution not available where Π has fully performed
   - Losing contract: can be used even in a losing contract

SALES CONTRACTS:
- Where goods are not accepted:
  - Buyer’s rights:
    - “Cover:” buyer has right to buy the goods from another seller, and to recover the difference between the contract price and the cover price from the seller. The buyer’s purchase of substitute goods must be reasonable, and must be in good faith without unreasonable delay.
      - Chronister Oil Co. v. Unocal Refining & Marketing: Π breached contract for sale of gasoline at 60.4 cents a gallon. Δ’s substitute: oil from inventory, during which market price was 55 cents a gallon. Holding: Since Δ “self-covered,” damages would be awarded at the difference of the market price (not the inventory price) and the contract price. Nominal damages awarded, since Δ saved money. Rule: Where the non-breaching party “self-covers,” damages are awarded at the difference of the market price and the contract price.
    - Contract/Market Differential: If buyer does not cover, she can instead recover the contract/market differential, i.e., the difference b/w the contract price and the market price “at the time when the buyer learned of the breach.”
      - Buyer contracts to resell at fixed margin: Most courts hold that buyer is entitled to the full contract/market differential even where this would put her in a better position than had the contract been fulfilled, b/c limiting damages to the buyer’s lost profits would incentivize the seller to breach.
    - Consequential damages: profits which the buyer could have made by reselling the contracted-for goods had they been delivered.
      - Must be proved w/ appropriate certainty & be reasonably foreseeable
      - (UCC) Wullschleger & Co. v. Jenny Fashions: Π entered into contract w/ Δ to sell fabric. Π knew that Δ was going to use fabric
for skirts. \( \Delta \) could not use the fabric. **Holding:** \( \Pi \) breached the implied/express warranty of merchantability. Expectation (consequential) damages are reasonably foreseeable: \( \Pi \) knew that \( \Delta \) was going to use skirts for business. **Calculation** of damages: Damages for two cancellations and six purchase orders minus amount recouped at close out sales, rebate for unsewn dresses, balance due in fabric. **Rule:** Where lost profits are reasonably foreseeable and non-breaching party reasonably attempted to cover, party can recover consequential damages.

- **Incidental** damages: transportation expenses, storage expenses, and other small but direct expenses
- Buyer may reject the goods.

**Seller’s damages for breach:**

- 1.] **Contract/resale** differential: Seller resells goods to a third party. Difference awarded between resale price and contract price, together with incidental damages
- 2.] **Contract/market** differential: difference b/w the market price at the time and place for delivery, and the unpaid contract price, together with incidental damages.
- 3.] **Lost profits:** where contract/resale and contract/market differentials do not make the seller whole, seller can recover lost profits using either differential:
  - Lost volume sellers: one who:
    - 1.] had a big enough supply that he could have made both the contracted-for sale and the resale
    - 2.] probably would have made the resale anyway as well as the original sale had there been no breach
    - 3.] would have made a profit on both sales.
  - New England Dairies, Inc. v. Dairy Mart Convenience Stores:
    - **Rule:** Where the seller has capacity to enter into other agreements even if there was no breach, he is a lost-volume seller, and is entitled to lost profit damages.
- 4.] **Action for contract price:**
  - 1.] Buyer has “accepted” the goods. (although buyer has counterclaim for damages for non-conformity)
  - 2.] **Risk of loss:** If risk of loss has passed to the buyer, and the goods are lost in transit, seller may sue for the entire contract price
  - Unsaleable goods: If seller has already earmarked particular goods, and buyer rejects them or repudiates before delivery, seller may recover the entire contract price if he is unable to resell them on reasonable basis. (perishable, or custom-made goods)
- Incidental damages: transportation charges, storage charges, other charges relating to seller’s attempt to deal w/ the goods after the buyer’s breach
- Consequential damages: Not recoverable for sellers.

- **Accepted goods:**
  - Buyer’s acceptance: seller may recover full contract price. (If good are non-conforming, buyer can counter-claim for breach of warranty)
  - Buyer has accepted, and goods turn out to be defective:
    - § 2-714 (2) **Breach of warranty:** “difference at the time and place of acceptance b/w the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.”
• **Non-warranty damages**: damages resulting from seller’s delay in shipping the goods; breach of an express promise to repair defective goods

**AGREED REMEDIES**:
- **Liquidated damages**: provision, placed in contract itself, specifying the consequences of the breach.
  - **Penalty**: provision cannot constitute a penalty
  - **Two requirements**:
    - 1.] amount fixed must be reasonable relative to the anticipated or actual loss of breach
      - **Modern view (followed by UCC also)**: Clause enforced if
        - 1.] clause is reasonable forecast when viewed as of the time of contracting or
        - 2.] clause is reasonable in light of the actual damages which have occurred
        - (Ex: clause which is an unreasonable forecast can still be saved if it turns out that Π’s damages are unexpectedly high, and therefore in line with the clause)
        - **No loss at all**: clause not enforced if no actual damage has been sustained
    - 2.] Harm caused by breach must be uncertain or very difficult to calculate accurately
- **Lake River Corp v. Carborundum Co.** **Rule**: Where the contract contains a liquidated damage clause which overstates damages by not taking into account cost saved, it is viewed as a penalty clause and is void.
- **(UCC) Wedner v. Fidelity Security Systems, Inc.** **Rule**: A limitation of liability clause does not try to calculate damages, but instead limits the compensation to a particular amount. In determining whether a limitation of liability clause is enforceable, courts look to previous business.

**NONECONOMIC AND NONCOMPENSATORY DAMAGES**:
- **Damages for Pain, Suffering, and Emotional Distress**:
  - Some exceptions exist to the rule that emotional harm/pain and suffering are not recoverable under contract action.
  - 1.] Nature of the contract itself makes emotional damage particularly likely in the event of a breach. These are typically contracts for funeral services, communication of the fact of death, or contracts for caesarian section.
    - **Lane v. Kindercare Learning Centers**: Damage may be awarded for emotional distress caused by a breach of a personal contract even where the emotional distress does not result in a physical injury, if the contract is so obviously connected to the mental well-being of Π that breaching it is likely to cause emotional harm. [Case viewed from a promise perspective: Π had to show that there was a promise to do something which the Δ did not do – promise was to care for child and provide medication. Exception to the rule.]
    - **Johnson v. Jamaica Hospital**: Where a harm is caused by a third party and is caused by a breach of an implicit contractual promise, the court, there cannot be recovery for emotional distress. [No duty to parents]
  - 2.] Nature of the Breach itself makes emotional damage particularly likely. Either the breach is, itself, a tort that would allow for emotional damage recovery or is similar enough to a tort that the court can justify the award.
- **Restatement § 353: Loss due to Emotional Disturbance**: 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.

- **Punitive damages**: Also called “exemplary” damages, punitive damages are sought to punish the breaching party and deter others from behaving in the same manner. Generally, these are inconsistent with contract law and, therefore, courts do not favor them.
  - § 355: conduct constituting breach must also be a tort
  - Cases where breach amounts to physical harm, breach is accompanied by significant willful fraud, fiduciary relationship b/w parties (insurance companies)

➤ **EQUITABLE REMEDIES**:

- 1.] **Specific performance**: remains available only where damages would be inadequate to compensate Π. Even where they would be inadequate, courts have the power to refuse specific performance. Orders the promisor to render the promised performance
  - **Land-sale contracts**: irrespective of whether seller or buyer breaches
  - Not utilized in personal service contracts
  - **Sale of Goods**: sometimes used; likely in outputs & requirements contracts where item is not in ready supply
  - **Van Wagner Adv. Crop v. S&M Enterprises**: Neither the need to project into the future nor the contingencies allegedly affecting Π’s terms render inadequate the remedy of damages for Δ’s breach of its lease. Therefore, specific performance should not be awarded.
  - Courts will refuse specific performance, even if damages are inadequate, when specific performance would advantage Π unfairly, unfairly burden Δ or 3rd parties, or involve the court in matters which as a matter public policy it does not want to address.
    - **Bloch v. Hillel Torah North Suburban Day School**: Despite the unique nature of a specific school to the education of a child, courts will not order specific performance in a situation where, to do so, would be a court ordered performance of personal services. This is a policy issue stemming from the idea of forced service as slavery.

- 2.] **Injunction**: directs a party to refrain from a particular act
  - **New York Football Giants v. San Diego Chargers Football Club**: Where the aggrieved party acted in bad faith (comes to the court with “dirty hands”), courts will not issue an injunction against Δ which would amount to a validation of Π’s improper behavior.
  - **Ticor Title Insurance Co. v. Cohen**: An injunction should be granted when the intervention of a court of equity is essential to protect a party’s property rights against injuries that would otherwise be irremediable. The basic requirements to obtain injunctive relief are:
    - a showing of irreparable injury, and
    - the inadequacy of legal remedies.

- **FACTORS** courts use to decide where equitable remedies are appropriate:
  - 1.] **Damages must be inadequate** to protect the injured party
    - A.][ the injury cannot be estimated with sufficient certainty
    - B.][ money cannot purchase a substitute for the contracted-for-performance
  - 2.] **Contracts terms must be definite** enough for court to frame an adequate order
  - 3.] **Difficulty in enforcing and supervising** the order.

Cases: Delicatessen
Look at all the different times we see contractor-sub relationship: offer & acceptance, option contract, unilateral mistake, detrimental reliance, etc.