I. Introduction (omitted)

A. Preliminary Survey
1. UCC vs. common law – UCC newer take on law
2. more emphasis on fairness in modern law
3. default vs. immutable laws
4. basic questions
   a) which contracts enforced?
   b) scope of obligation?
   c) how enforced?
   d) which rules can we contract around?

B. Introductory Cases

1. Bailey v. West – alternatives to formal contracts (lame horse w/out a home)
   a) contracts implied in fact – infer the elements of contract from circumstances
   b) contracts implied in law – ignore the elements and enforce in equity
      (quasi-contract)–elements:
      (1) benefit conferred
      (2) appreciation of benefit
      (3) acceptance and retention of benefit where injustice would result if not compensated

2. Hamer v. Sidway – consideration (kid gives up smoking, etc.)
   a) consideration consists of either benefit to promisor or detriment to promisee
      (either-or test)
   b) Restatement (2d): 1) act, 2) forbearance, or 3) creation/destruction/modification of
      legal relation
   c) must be bargained-for performance or return promise (bargained-for test)

3. Ricketts v. Scothorn – estoppel (woman gave up work after promised $)
   a) inducement of detrimental reliance may replace consideration
   b) equitable estoppel – based on representation of past or present facts – no damages
      (1) can’t say ‘X’ then go into court and say ‘not X’
   c) promissory estoppel – based on promise (future), as here – can get damages
   d) “I have the present intent to…” – statement of fact, not a promise

4. Williams v. Walker-Thomas Furniture Co. – Unconscionability (no items paid off until all are)
a) adhesion contract – contracts where parties are unequal in bargaining power
b) unconscionability – terms so unfair and one-sided that courts won’t enforce them
(1) determine at time of contracting

5. Sullivan v. O’Connor – measure of damages – three ways to compute (botched nose job)
a) compensatory or expectation – puts $\pi$ where she would have been if K performed
b) reliance – return of expenditures made which flowed naturally from contract
c) restitution – return of benefits conferred to other party
6. Notes:
a) preference for monetary damages over specific performance
b) point is to make $\pi$ whole, not to punish

II. The Bases of contract Liability
Contract = offer + acceptance + consideration

A. Consideration (bargain + legally sufficient)
Either some right, interest, profit, or benefit given to the promisor or some 
forbearance, detriment, or loss to the promisee: include goods, money, promise to do 
sth, relinquishing a legal right, forbearance from acting.

1. Bargain-for

   Kirksey v. Kirksey – gratuitous/free of charge promise not enforceable (woman 
   moved w/ kids in reliance) (1) would be enforced in equity today.
   Hamer v. Sidway – see I.B.2. (what constitutes consideration)
   Langer v. Superior Steel – forbearance=consideration (pension given ‘for’ noncom 
   petition) (1) fact that $\Delta$ really wanted what it got in return distinguished from gift (2) 
   also enforceable in equity today (promissory estoppel)

   Bogigian v. Bogigian – must have consideration (ct. rejected release of judgment – 
   no consid.)

2. Mixed motives and nominal consideration

   Thomas v. Thomas – ct. doesn’t assess adequacy of consideration (1£ & repair for 
   house) (1) this is problematic – seems nominal – old case
   Notes:
   (1) look to cultural context when considering what is valuable consideration
   (2) look to objective evidence – did promisor/ee get and expect to get something?

3. limits of the consideration doctrine

   1). Sufficiency of Exchange – ct. usually refuses to consider – wants parties to 
   decide what valuable – 

   peppercorn theory of consideration – peppercorn is enough if bargained for

   Haigh v. brooks
Novel idea not required (computerized bond trades)

In reality, courts often look at adequacy of consideration – consider the following exceptions

1) **Exception for equitable relief** – must show adequate consideration to get specific performance

2) **Exception for fraud, duress, mistake, unconsc.** – insufficient consideration may be evidence of these.

    *Jones v. Star Credit Corp.* – consid. so disproportionate -- unconscionable ($1200 freezer)

3) **Exception – nominal consideration** – appearance of a gift

    *In re: Green* – nominal consideration (adultery case - $1 for promise to pay much more)(a) saying ‘good and valuable consideration’ meaningless if nothing given

    (b) stuff done before and illegal stuff don’t count as consideration

    **Exception to exception: option contracts** – nominal consideration ok

    *Fiege v. Boehm* – promise to forgo baseless lawsuit (bastardy – π thought Δ father, wasn’t) (a) no consideration, but enforced for p.p. – encourage settlement – only when good faith (b) if a legitimate dispute, then something of value was surrendered – not nominal

2) **Preexisting duty rule** – performance of duty already owed ≠ consideration

    *Levine v. Blumenthal* – payment of debt already owed ≠ consid. (rent owed) (a) if Δ had expressly agreed to forego bankruptcy -- consideration (forgo legal right)

    *Alaska Packer’s Association v. Domenico* – performance of work already due ≠ consideration (duress -- no other labor available) (a) workers were playing *hold-up game* – this rule designed to prevent exactly this

**Exception:**

----- **Changed circumstances** *Angel v. Murray* (trash removal contract) (a) no consideration needed for modifications made in good faith – elements:

(i) modification must be before full performance  
(ii) underlying circumstances unanticipated  
(iii) modification fair and equitable

(b) no holdup game here b/c voluntary (no duress)

----- **Promise to pay barred legal obligation** – enforceable

(a) obligation barred by s.o.l. or bankruptcy

(b) can only enforce amount of new promise – must have written promise if barred by s.o.l.

3). **Mutuality of obligation (both promises must be binding promises or the contract is void for lack of consideration)** – both sides must be bound or neither is bound.
i.e. illusory promises lack of mutuality of obligation: promisor reserves expressly or by implication an alternative by which he can escape performance altogether, such promise is not sufficient consideration.

Rehm-Zeiher Co. v. F.G. Walker Co. – **illusory promise** (whiskey seller ‘unforeseen reason’)(a) unlimited discretion=not bound=no consideration

McMichael v. Price – **requirements contracts** (agreed to furnish all sand that P could sell) (a) valid because quantity ascertainable – tacit assumption: Price would stay in business

Wood v. Lucy, Lady Duff-Gordon – **implied promise** (exclusive endorsement contract) (a) court can imply a duty of **good faith** effort to render mutuality (Cardozo)

Omni-Group, Inc. v. Seattle-First Nat’l Bank – **“satisfaction” as condition precedent** (sale contingent upon property found satisfactory for development)(a) condition precedent≠lack of mutuality, so long as a question of fact, determinable (i) condition may be objective or subjective, if determinable (ii) duty of **good faith** again

B. Moral Obligation: Promise Plus Antecedent Benefit

1. restitution and **Quasi-contract** – alternative to contract remedy (Restatement emphasizes this as alternative to moral obligation = consideration, which is problematic b/c every promise is a moral obligation)

The law creates or implies a contract, is to avoid unjust enrichment of the d at the p’s expense.

   elements:
   (1) p conferred benefit on d
   (2) p expect of being paid and not acting as an intermeddler or volunteer
   (3) d accepted/acknowledged/retained benefit (promise given, in below cases)
   (4) injustice would result if no compensation

measure of damages – either unjust enrichment d or detriment to p

2. Moral obligation

exception: legal obligations rendered unenforceable can be renewed by written promise

   * Mills v. Wyman* - **Moral obligations not sufficient consideration** (cared for Δs sick son)

   * Manwill v. Oyler* – **can’t renew legal obligation w/ oral promise** (alleged oral promise, cows)

   * Webb v. McGowin* – **minority rule – material benefit rule** (saved life, falling weight in mill) a) material detriment and benefit moral consideration sufficient – note this is not normal consideration because it wasn’t bargained for – two ships passing in the night – note that material benefit is the most important part.

   * Harrington v. Taylor* – **humanitarian act not sufficient** (saved abusive husband, cut hand) a) volunteerism no good, must expect payment

C. Promissory Estoppel: Promise plus Unbargained-For Reliance
Applied now to bargain situations as well as gift situations.

1. elements:
   a) promise made which might foreseeably induce reliance; promise did rely on the promise.
   b) reasonable reliance causing substantial detriment to promisee
   c) injustice would result if no enforcement

2. Major criticism – motivates people to do things to establish reliance

   _ricketts v. scothorn_ (grandfather give money to granddaughter who quit her job later)
   p.e applied.

   _Allegheny College v. National... Bank... no consideration needed for charitable donations_ (charitable donation to college) – therefore no need for p.e. here; a) Cardozo implied a promise (consideration) to perpetuate name of donor – today enforced by p.e.

   _Feinberg v. Ptiefer Co._ – ex. of p.e. (gratuitous pension plan, sick p) a) probably no injustice here if π still able to work – but wasn’t so p.e.

   _Grouse v. Group Health Plan, Inc._ – ex. of p.e. (at will employment, illusory promise)
   a) reliance on an illusory promise can be reasonable

   _Cohen v. Cowels_ - ex. of p.e. (agreement not to disclose identity of source – poss, 1st A. issue)

   _All –tech telecom, inc. v. amway corporation_ p.e. not allowed.

D. Formalities in Contracting: The Statute of Frauds

By statute, a few types of contracts are required to be in writing, or at least evidenced by a signed, written memo of the essential terms. The purpose is to prevent fraud and perjury as to the actual terms of the contract ad to provide better evidence of the contract terms in the event of dispute.

1. Formalities in Contracting: Promise Plus Seal or Other Form
   in some states, seal = consideration, or gives presumption (old c.l.) - most states have abolished

2. The Statute of Frauds (UCC)
most oral agreements valid, but some must be written: (MarriageYear LandExecutorGoodsSurety)

   (1) Surety contracts – promise to guarantee the debts of another to a creditor
   exception: if the guarantor is seeking to benefit himself, then no writing required

   (2) contracts incapable of being performed in one Year
   ------ indefinite duration – _C.R. Klewin v. Flagship_ (performance likely to take 3-10 years)(i) contracts of indefinite duration are outside the SOF and enforceable, unless they are by definition impossible to perform in less than a year.
   ------over a year w/ termination provision – _North Shore Bottling Co. v. C. Schmidt_ (i) ok b/c they could have terminated w/in a year. Outside the SOF.
   [(c) exception – fully performed on one side – _Mason v. Anderson_ (payments made on loan)(i) here the loan was full performance, repayment taking over a year shouldn’t bar
(3) contracts for sale of Goods over $500 (UCC)
all tangible moveable property – not stocks, securities, services
exceptions:
(i) buyer has partially accepted goods
(ii) buyer gives part payment
(iii) special goods for buyer
(iv) b/w merchants, written confirmation sent and no object w/in 10 days
(v) contract admitted to in court

(4) contracts for sale of Land – leases, etc. as well

(5) contracts in consideration of Marriage

(6) Executor – can’t be held personally liable for debts of deceased without a writing

Several writing be considered together for purpose of sof if they refer to the same
subject matter or physically attached. writing must contain the following to be
satisfactory (under common law):
(1) parties
(2) subject matter
(3) terms and conditions
(4) recital of the consideration
(5) signature of party sought to be charged
UCC: writing must only contain indication of a contract for sale, quantity only
necessary term
Electronic signature recognized in most states.

Crabtree v. Elizabeth Arden Sales Corp. – ‘writing’ composed of multiple
documents ok (employment contract on several memos)

effect of non-compliance of the statute:
--- contract voidable (SOF is a waiveable defense) but not void (oral agreement valid
but can not be sued, neither party can rescind once oral contract performed)
(a) unless performed already
(b) only to the extent the contract was not admitted to by the other party
--- third parties may not raise as a defense
--- enforceable against signing party even if not enforceable against other party
--- quasi-contract (unjust enrichment) and estoppel (if party represented they would
waive SOF, may be estopped from later relying on it) are still options to defense sof.

DF Activities Board v. Brown – one contract denied, may not force further
denials in hopes of tripping up the witness (contract for sale of Frank Lloyd Wright
chair) (1) written affidavit is sufficient to deny???
III. The Bargain Relationship

A. Mutual Assent

1. Ascertainment of Assent (offer or acceptance): The Objective Test—it does not matter what the parties subjectively intended, but rather their words and actions are judged by what a reasonable person would believe such words and actions meant.

   *Embry v. Hargadine, McKittrick Dry Goods Co.* – *subjective test incorrect* (‘go ahead, you’re all right’ employment dispute) (1) mutual subjective intent unnecessary – would a reasonable person think a contract formed? (2) subjective test – asks ‘was there a meeting of the minds’, not ‘was there a m.of m.a.?’

   *Lucy v. Zehmer* – offers made in jest can be valid (‘high as a Georgia pine’) (1) offers made by a drunk are valid too – look to objective acts

   *Cohen v. Cowles Media Co.* – revisited – this was the original decision (1) ct here claimed the parties never intended to contract – looked to trade practices

Assent in electronic commerce

   *Specht v. netscape communications corporation*

2. Offer: Creation of Power of Acceptance

a) definition: manifestation of the offeror’s intent to be bound creating in offeree power to accept. Under restatement (second) an offer creates the power in the offeree to make a contract between the parties by an appropriate acceptance.

b) elements of an offer:

(1) *manifestation of present contractual intent – not negotiation*
   
   must consider words used, circumstances, addressee, definiteness, discussion of formalizing later. Objective test: would a reasonable person in the shoes of the offeree feel that if he accepted the proposal, a contract would be complete?

(2) *certainty and definiteness of terms*

(3) *communication to the offeree*

   *Lonergaon v. Scolnick* – ‘to first buyer’ not an offer (exchange of letters over real estate deal)

   *Lekkowitz v. Great Minneapolis Surplus Store* – *ad to public an offer b/c terms sufficiently definite – ‘first person’* (ad for $1 fur stole, ‘bait advertising’) binding if the facts show that some performance is definitely promised for sth requested. (1) *usually ads are invitations for offers, not offers*

   *Leonard v. pepsico, inc.* (ad intended to entertain). Ad not offer unless there is some language of commitment or some indication to take action without further communication. Ad is clear definite and explicit and leave nth open for negotiation. No offer here.
**Southworth v. Oliver** – use of word ‘offer’ not necessary (sale of neighbor’s ranch)

1. it can be very difficult to distinguish between an offer and negotiations

**Bretz v. Portland general electric co.**

**Equitable life assurance society of US v. first national bank**

**Definiteness** – 2 similar approaches – concern is over ability to fix damages

---contract/essential terms must cover (expressly or impliedly)

(a) parties
(b) subject matter
(c) time for performance
(d) price: Ct may imply when it is completely omitted. While contract unenforceable if the price indefinite.

**UCC**--- omission of critical terms ok – will imply so long as basis for remedy

3. Acceptance: Exercise of Power of Acceptance

elements of an acceptance (common law): - **UCC varies**

1. only offeree may accept
2. must be unequivocal (clear) and unqualified (unlimited or restricted)
3. unilateral vs. bilateral – affects mode of acceptance and ability to revoke
   - unilateral – accept by commencing performance (old rule – must complete performance); with knowledge of the offer and the intent to accept it.
   - bilateral – accept by giving return promise (with knowledge of the offer + notice generally), objective test.
   - if it is unclear which the contract is, construe as bilateral

**UCC** default rule: can be in any manner reasonable – ignore unilateral/bilateral

**Auctions**: normally just invitations to offer, unless without reserve—must sell to high bid acceptance by promise

communication of acceptance

**LaSalle National Bank v. Vega** – offeror is master of offer – sets time, manner, method of acceptance (contract required signature for acceptance, was none)

**Hendricks v. Behee** – revocation prior to communication of acceptance (agents negotiating) (1) uncommunicated intention to accept≠ acceptance

**Ever-Tite Roofing Corp. v. Green** – acceptance must be within reasonable time

(a) weird contract allowing acceptance by writing or commencement of performance (1) no time settled must allow reasonable time – here performance was begun, so it’s a moot point.

**Corinthian Pharmaceutical Systems v. Laderle Laboratories** – partial shipment≠ acceptance (increased price of drug – accommodated)(1) common law – shipping goods = acceptance (2) **UCC** – shipment of nonconforming goods≠ acceptance if seller tells buyer ‘accommodation’
Acceptance by performance (not by promise) --- Unilateral contract.

Carll v. Carbolic Smoke Ball Co. – advertisement for award = offer ($ if get flu using ball) (1) ad was found definite enough in terms.

Glover v. Jewish War Veterans of U.S. – must be aware of offer to accept by performance (reward offered for info on murder) (1) if police officer, would be prior existing duty, no reward

“Industrial America” Inc. v. Fulton Industries, Inc. – (brokered merger b/w 2 firms) (1) acceptance by performance with knowledge was ok here – even if motive was different (2) no need to notify if acceptance by performance allowed.

Time when acceptance is effective

Adams v. Lindsell – mailbox rule – acceptance effective date sent (letter delayed in mail)

EDI (Electronic Data Interchange) – treat as face to face – offers valid on receipt

Acceptance by conduct or silence

Russel v. Texas Co. – accept and retain benefit offered=acceptance (revocable license offered for continued use)

(1) test: where offeree exercises substantial dominion, acceptance if offeror led to believe so

(a) exception – tortious exercise of dominion – offeror may treat rejection as acceptance

silence as acceptance – general rule is no

Ammons v. Wilson & Co. – pattern of conduct + silence=acceptance (orders accepted by silence in the past – creates reasonable belief of acceptance)

Textile unlimited, inc.v. A...BMH and company inc.
Klocek v. gateway

4. Termination of Offer: Destruction of the Power of Acceptance

common law: (mirror image rule – acceptance must be mirror image of offer)
(1) may terminate by rejection
(2) by qualified acceptance—counteroffer—rejection

Minneapolis & St. Louis Railway v. Columbus Rolling Mill (answered quote w/ lower qty. than allowed by offer) conditional acceptance = rejection, later acceptance of prior offer is counteroffer. (b) note: ‘grumbling acceptance’ ok
‘conditional’ acceptance ok only if condition already implied in original terms

UCC: (battle of the forms 2-207)
(1) acceptance w/ changes is valid, unless acceptance made contingent on assent to
changes
(2) additional terms seen as proposed additions. for merchants, terms are part of contract unless:
   (a) offer expressly limited acceptance to terms of offer
   (b) material change
   (c) notice of objection already given or given w/in reasonable time
(3) if parties don’t expressly agree to new terms, conduct may imply a contract – areas of disagreement or material difference will be covered with gap fillers

   Leonard Pevar Co. v. Evans Products Co. – ex. (dispute over sale of plywood)
   (1) K results under c.l. or UCC – continued dealings indicate the parties thought they had a K (2) typical example of nonmatching boilerplate (sample) forms, reading packet
   Hill v. Gateway (dispute over terms in box re: arbitration - 30-day trial period) (a) ct found contract valid – not merchants here, but no other form, just a phone call. (i) substantively – not ‘shocking to the conscience’ at time of formation (ii) procedurally – terms weren’t hidden

memorandum from Kieff:
(a) first determine if a good or service (must be good for UCC)
(b) UCC doesn’t require all material forms to find a contract – can be implied or admitted to
(c) telephone orders viewed as offers
(d) where additional terms are viewed as proposals to modify:
   non-merchants: must assent – mere silence not enough
   b/w 2 merchants: terms become part of contract if assented to, and become candidates unless material, etc.

other means of termination other than rejection/ counteroffer (see above for c/offers)

(1) lapse of reasonable time, if no time specified (begins to run on receipt)
(2) revocation (by offeror): (a) can be by words or conduct (b) must be communicated to offeree (c) effective when received.
   Hendricks v. behee
   Dickinson v. Dodds – (learned of third party’s acceptance of offer)(a)
   communication of revocation can be by 3rd party – if it puts a reasonable person on notice (b) acceptance by other party a problem only if good unique or limited supply
(3) destruction of subject matter
(4) death or insanity of offeror or offeree
(5) intervening illegality

5. Irrevocable Offer: Nondestructable Power of Acceptance/option contracts

general rule: offers are revocable even if offeror promises to keep open
exceptions:
(1) firm offer b/w merchants (UCC) – signed written offer – valid for no more than 3
months

(2) **option contract** – consideration given to hold open (possibly just recital of consideration? arguable point)

   *Humble Oil v. Westside Investment Corp.* (exercised option and proposed modification) (i) **counteroffers don’t terminate options** (ii) **mailbox rule doesn’t apply to options in most jurisdictions** – valid on receipt

(3) revocation of **unilateral contract after part performance**
Substantial part performance --- irrevocable of the unilateral offer
new rule – *Marchiondo v. Scheck* (withdraw from brokerage after buyer found) (i) **part performance creates an option contract** (ii) other explanation include implied promise, equitable estoppel, conversion into a bilateral contract

(4) **detrimental reliance (promissory estoppel application)**
(a) old rule: *James Baird Co. v. Gimbel Brothers* (contractor relied on bid withdrawn)
   (i) detrimental reliance ≠ acceptance – relier could still have revoked, no mutuality
(b) new rule: *Drennan v. Star Paving Co.* (same as above, but diff outcome)
   (i) court expanded notion of **detrimental reliance to make bid irrevocable**

   *SKB Industries Inc. v. Insite* same application of new rules.

B. Insufficient of Agreement: Indefinite, Incomplete, and Deferred Terms
(contract term interpretation)

1. Defective Formulation and Expression of Agreement

   *Raffles v. Wichelhaus* – **latent/potential ambiguity** (the two ships peerless) (1) contracts subject to two interpretations which the 2 parties interpret differently, do not give rise to mutual assent, no meeting of the minds, no contract. **The Rule established:**
   no contract exists when (1) each party attaches a materially different meaning to the parties’ manifestations of mutual assent and (2) neither knows or has reason to know the meaning attached by the other. It should not apply where one party’s understanding because of its fault is less reasonable than the other party’s understanding.

   *Konic International v. Spokane Computer Services* – 2 **understandings of price** (surge protector) (1) no contract here either – **consider whether either party had more reason to suspect a different meaning**. court may construe against the drafting party or whichever party may have had reason to know the other party had a materially different interpretation.

2. Indefinite Agreements

   *Varney v. Ditmars* – traditional approach – don’t imply terms (promise to give ‘fair share’) (1) could still recover in equity for services already rendered in reliance on terms (2) Cardozo dissented saying terms should be implied

   **modern rule is to enforce indefinite agreements** to incentivize definiteness –
imply reasonable terms where none are expressly stated by the parties...

Lefkowitz v. great Minneapolis surplus store

3. Incomplete and Deferred Agreement

Metro-Goldwyn-Mayer v. Schneider – enforcement if missing essential term (a pilot show) imply terms (1) the court may look to industry custom for essential terms

Joseph Martin Jr. Deli v. Schumacher – need indication of intent (price term ‘to be agreed on’) limitation on implying term (1) agreements to agree unenforceable without course of dealings, etc, to hint at terms.

Oglebay Norton v. Armco – court may imply price (price mechanism in long term K failed)

Empro Manufacturing v. Ball-Co Manufacturing – letter of intent (preliminary negotiation?) not enough (letter ‘subject to’ later formal agreement never reached) (1) this case illustrates the problem of determining whether negotiating or came to agreement

[UCC – court may imply any term but quantity and complete a contract]

4. Remedies Where Agreement Incomplete or Indefinite

No contract--- no remedy; however, where only negotiations carried on but one party failed to act in good faith in concluding contract---- cause of action arise

Hoffman v. Red Owl Stores – detrimental reliance may be compensated for even in absence of a contract! (corporation franchise promise but no contract) (1) this extended the doctrine of promissory estoppel – best applied when one party refuse to complete bargaining in good faith.

Copeland v. baskin robbins U.S.A. p.s applied.

IV. Avoidance of Contract

A. Capacity to Contract: Infancy, Mental Incompetence

1. Infancy: Contracts with a minor voidable at the option of the minor, minor may enforce the k against the adult. Exceptions: minors are liable for necessaries of life (food, clothing, shelter, medical care and education).

Bowling v. Sperry – (minor purchased a car), The car is not so vital to the minor’s existence, exception not applied. The minor is not required to tender back the money or property he has received. minor need only return what they still have, if still intact or not – no restitution

2. Mental Incompetence: contract entered into by a person lacking mental capacity is voidable by him or his guardian (but not the other party). Note in some state it is void. Exception same as the minor: his estate/property is liable for the reasonable value of necessities furnished. State law test for mental capacity to make a contract or deed is that at the time of execution of the instrument, a person possesses understanding sufficient to
comprehend the nature extent, and consequences of a transaction.

*Heights Realty v. Phillips* – *voidable even though terms reasonable,* the court may look outside the 4 corners for evidence of incompetence

*Citifinancial, Inc v. Brown* (retarded person contract void not voidable) returning the consideration is not a precedent to the void. if K is fair it is valid to extent already performed

*Erin v. Hosanna Ministry, Inc.* (intoxication and drug addiction, diminished capacity, contract void)

**B. Defects in Bargaining Process**

1. Unilateral and Mutual Mistake

a) **Unilateral Mistake** – K *voidable if other party knew or should have known of mistake*

*Boise Junior College v. Mattefs Construction* (mistake in bid w/ actual notice before acc.)

b) **Mutual Mistake** – K *voidable if neither party knew or should have known of the mistake where both parties make a mistake concerning a material fact which is the subject of the contract,* voidable by prejudiced party

*Beachcomber Coins v. Boskett* – (both parties thought fake coin was genuine) contract voidable.

*Sherwood v. Walker* (barren cow, void contract) mistake was on a basic assumption of the contract – mere value enough? – must also be Material

*Lenawee County Board of Health v. Messerly* (both parties thought house habitable) mutual mistake here, but one party assumed risk with ‘as is’ clause acceptance. rescission when the mistaken belief relates to a basic assumption of the parties upon which the contract is made and which materially affects the agreed performances of the parties.

c) **Mistake in transmission** – **person who selects telegraph as means of communication must bear risk of loss**

*Ayer v. Western Union Telegraph* (telegraph company sent wrong price) telegraph company was held responsible for the difference between price offered and price transmitted to buyer

2. Fraud and the Duty to Disclose

  consent induced by fraud, duress, or mistake=defense against K liability, contract voidable by the innocent party.
  fraud = misrep + detrimental reliance (Kieff)

*Laidlaw v. Oregon* - no duty to disclose external circumstances (seller knew of
treaty that would chance price of tobacco) knowledge was equally available – general rule – *caveat emptor* (buyer beware)

*Vokes v. Arthur Murray* - misrepresentation must usually be of fact (lady told she could be great dancer) misrepresentation of opinion accepted here because: (a) parties not dealing at arm’s length (b) one party (Vokes) was of inferior knowledge. e) Misrepresentation may also be made by conduct as well as by words

*Hill v. Jones* (*termite inspection house, seller failed to disclose*) *duty to disclose in some circumstances* (1) prevent previous assertion from being fraudulent (2) disclosure would correct a mistake as to basic assumption or meaning of a writing (3) relationship of trust and confidence

warranties in the UCC:
(1) express warranties if:
(a) affirmation of fact or promise made
(b) description given
(c) model or sample used to describe
(2) implied warranty of merchantability if DIGOTEK
(3) implied warranty of fitness for intended use if seller knows use and buyer relies on expertise
(need not be DIGOTEK)

3. Duress and undue influence
Duress is any wrongful act or threat by one contracting party which compels or induces the other party through fear to enter into a transaction against his will. **removal of free will to contract.**

Psychological duress: *Rubenstein v. Rubenstein* (*wife threaten husband for property*) moral compulsion or psychological pressure may constitute duress if the subject of the pressure is overborne and he is deprived of the exercise of his free will.

Economic duress: **normally economic duress is no defense, unless other party responsible**

*Austin Instruments v. Loral* (subcontractor refused to deliver unless price increased) economic duress found here, but same decision reachable by finding of modification in bad faith, or c.l. preexisting duty rule

*Machinery Hauling v. Steel of West Virginia* (mnfr. demanded wrongful payment, threatened no business in future) **threat of loss of future business not duress a threat to exercise a legal right does not constitute duress.** Court reason: a threat sufficient to invoke the rule must involve business or economic duress such that the victim is forced into a transaction by unlawful threats **that leave the victim no reasonable alternative but to acquiesce.**

4. Unconscionability
Under common law, refers to manifestly unfair or oppressive; under UCC, sale of goods terms apply to all other contracts. i.e.

a) options of the court
(1) refuse to enforce contract
(2) enforce contract minus unconscionable clause (‘blue pencil’ approach)
(3) rewrite (reasonably alter)/ limit the application of the unconscionable clause

b) liquidated damages clauses, if too large, void as a penalty

c) limitation of consequential damages for personal injury from consumer goods prima facie unconscionable, while such a limitation with respect to commercial losses is not (therefore, parties may limit or exclude consequential damages in the commercial contract).

**substantive vs. procedural unconscionability**
(1) procedural – arises from formation or execution of the contract i.e. absence of meaningful choice, via lack of knowledge or voluntary assent (such as adhesion contract, a contract that heavily restricts one party while leaving the other free (as some standard form printed contracts) implies inequality in bargaining power)
(2) substantive – oppression of the substantive terms i.e. excessive price, unreasonable warranty disclaimers.

Consumer transactions

*Williams v. Walker-Thomas Furniture* (credit is not paid off until all items paid)  
---Common law rule of caveat emptor (buyer beware, buyer take care of himself) applied, each party entering a contract must take responsibility for reading it and knowing its terms, not apply unconscionability;
---UCC section 2-302 reversed the common law rule, form contract, weak party, no real choice and no meeting of minds, unconscionable (absence of meaningful choice and **contract terms unreasonably favorable to the other party**)
---after this case, cts have required **absence of meaningful choice** and **commercially unreasonable term**

*Jones v. Star Credit Corp.* – **price unconscionability hard to claim** – though successful here

*Fleet v. United States consumer council (charge poor person high price for referral fees)* excessive price void

*Ferguson v. countrywide credit industries* mandatory arbitration clause in the employment contract both unconscionable in procedural and substantive

Commercial transaction
Weaver v. American Oil Co. – disproportionate bargaining power limitation of liability was found unconscionable here

Zapatha v. Dairy Mart (clause allowed termination without cause) no unconscionability found. Court reasoning: basic test for unconscionability is whether the clause is so on-sided that it could result in unfair surprise or oppression to the disadvantaged party, but it does not involve the allocation of risks. A termination without cause is not per se unconscionable. Check restatement (second) section 208

Coursey v. Caterpillar, Inc. consequential damages disclaim in the commercial contract not apply the rule.

adhesion contract – a contract where one party has disproportionate bargaining power – may be conceptual overlap b/w illegality and unconscionability here

C. Illegality: Agreements Unenforceable on Grounds of Public Policy

1. illegality (consideration or the object illegal) at any point of contracting process terminates K (subject, intervening, later)
   a) illegality by statute or as against public policy
   b) serious illegality need not be pleaded

Sinnar v. LeRoy – violation of public policy (bribe paid for liquor license, suit to recover) object illegal, serious illegality, the defense cannot be waived and the court if it suspects illegality, may examine witnesses and develop facts not introduced by the parties.

Homami v. Iranzadi – K must have lawful object (K agreed not to report income to IRS) interest payments were made in secret. courts won’t come to the aid of a wrongdoer

2. Indirect aid to illegal activity not a bar to recovery

3. Exculpatory (escape from the liability) clauses for fraud, intentional tort are illegal, but those for negligence often upheld

Data Management v. Green – covenant not to compete (barred entire state for 5 years)
noncompetes must be reasonable in time and scope – this wasn’t illegal???
Watts v. Watts (unmarried person property division) traditional approach is
Enforcing contracts between Unmarried Persons – against public policy, while court here adopted minority – contracts enforceable. alternate theory available – unjust enrichment

Matter of baby M: Surrogacy contracts as sale of infants-illegal
Wallis v. Smith child’s need prevail, supporting kid not illegal

V. Performance of Contract

A. Determining the Scope and Content of Obligation

1. Integrated Writings and the Parol Evidence Rule
If an agreement reduced to writing is the intended final and complete expression of the parties, then it is ‘integrated’, and parol evidence – earlier oral and written expressions – is inadmissible.

Tests used:
(1) old view – does K appear complete and final? Face of the agreement test
(2) new view – any evidence admissible to determine if K complete
   Integration or ‘merger’ clauses are strong evidence of completeness

Exceptions:
(1) To show collateral oral agreement on a separate contract supported by consideration
   of 1st ok if: (i) terms don’t conflict (ii) subject is of a type not normally covered in the 1st
   Mitchell v. Lath – ex. of type normally covered (removal of ice house on adjacent prop.) the oral agreement is not collateral here.

(2) if the final writing is only on the subjects covered therein, the integration would be only partial and the rule would not bar parol evidence on matters not covered by the writing.
   Masterson v. Sine – elements of agreement not reduced to writing (keep house in family.)
   Alaska Northern Pipeline vs. Aleyska Pipeline Service (term: K subject to final approval) term conflicted w/ integrated portion – ‘absence of reasonable harmony’ test

(3) To show additional consistent terms, unless would have been included
(4) To show subsequent oral agreement
(5) To prove existence of condition precedent
   Luther Williams v. Johnson – (contract conditioned upon approval of financing) here an integration clause was ignored b/c there was no contradiction in terms
(6) To clarify ambiguities – but if too fundamental, no K – this becomes a question of interpreting the words in the contract

2. Interpretation

   Pacific Gas & Electric v. G.W. Thomas Drayage (court interprets meaning of word ‘all’) if a word is subject to 2 interpretations, evidence is admissible as to which intended risk here is destroying true intent of parties. It does not follow the traditional rule that prohibits the use of extrinsic evidence to interpret vary or add to the terms of an unambiguous integrated written contract.
   A. Kemp Fisheries v. Castle & Cook – limits Pacific Gas (fishing boat w/ broken freezer) test: is the K reasonably susceptible to the meaning advanced? Parol evidence not adopted.
Frigaliment Importing v. B.N.S. International Sales (dispute over two meanings of ‘chicken’) reference to outside reference sources is acceptable. view language in light of all circumstances, construe against draftsman

B. The duty of good faith

1. Scope and Content of Good Faith Duty
Requirement contracts and contracts in which adequacy of performance depends on one party’s satisfaction. Since every contract imposes a duty to act in good faith, terms reserving discretion are valid.

*Centronics v. Genicom* – Good faith doesn’t supersede terms of contract (disputed escrow)

2 prevention hindrance and the duty of cooperation.: court read all contracts as containing an implied condition that the parties will act in good faith and will not hinder or prevent the other party from performing under the contract.

prevention must be wrongful (though not necessarily bad faith) to amount to a violation of an implied condition precedent.

*Patterson v. Meyerhofer* – interference with only source of supply (deal to sell 4 lots of land) hindrance. parallel to notion that we won’t allow breacher to recover damages.

*Iron Trade Products v. Wilkoff* – innocent interference making performance harder (purchase of rails) no clear line, but here, innocent effect on demand was not enough to count as hindrance

*KW plastics v. united states can co.*

*Stockton v. sowerwine* (d refused the repurchase of land of p) d’s action hindrance, violate the implied covenant of good faith defined as honesty in fact in the conduct or transaction concerned

*Market street associates limited partnership v. frey*

3. exercise of Reserved Discretion

*Omni Group v. Seattle-First Bank* see II.2.f.4

*Billman v. Hensel* – good faith duty to satisfy condition precedent (sale of house, parents scared) Δs here made not even one formal loan application

*Neumiller Farms v. Cornett* (contract for chipping potatoes) without good faith this contract would be illusory b/c the party who reserved discretion could not be bound. Bad faith rejection invalid.

*Feld v. Henry S. Levy & Sons* – good faith renders output Ks mutual (supply – breadcrumbs). It imposes an obligation on the seller to use its best efforts to supply the goods unless the parties agree otherwise.

4. Modification

*Angel v. murray*

*Roth Steel Products v. Sharon Steel* modification requires good faith (shady steel
supplier) court must look to true intent of parties. (2) UCC: modification needs no consideration, only good faith (a) look to reasonable commercial standards of fair dealing in the trade (b) motivated by honest desire to compensate for commercial exigencies? (3) what about changed circumstances here? yes, but bad faith too – also a duress issue? (4) no duty to modify in response to changed circumstances – this would require commercial good samaritanism (mercy).

5. Termination of Contractual Relations for other than breach
   Zapatha v. Dairy Mart at IV.B.4.i.

most courts require consideration for an agreed discharge of duties – but easy if bargained for

Hillesland v. federal land bank association of grand forks (at will employment contract)

C. Allocation of Risk: Conditions and Warranties

1. Representations and Warranties of Quality

UCC 2-313: 3 ways to create express warranties:
   (1) affirmation of fact (representations) or promise made (warranties)
   (2) description of goods given
   (3) model or sample used to describe

UCC created implied warranties of merchantability and fitness for particular purpose (see above IV.B.2.g.)

   Henningsen v. Bloomfield Motors – disclaimer of warranty (small print limits warranty on car) invalid. Normally there is freedom of contract between the parties, however, the ct will declare void as against public policy any contractual provision that tends toward injury of the public. / implied warranty of merchantability is only a default rule, but must be clearly disclaimed / warranty of fitness also only a default / here it was in small print/ agreements excluding liability for personal injury are prima facie unconscionable

   Murray v. Holiday Rambler – limited warranty (exclusive remedy of repair, repairs failed) if limited remedy fails of essential purpose, then limitation is disregarded, possible remedies then found in UCC: right to revoke, consequential damages

2. Express Conditions

Conditions may be precedent, concurrent, or subsequent to contract performance
(1) precedent – must occur to create duty of performance
(2) concurrent – ex. normal sales contract – performance on one side creates duty on other
(3) subsequent – extinguishes (pay off) duty – sim. in effect to a statute of limitations
Covenants vs. Conditions
(1) covenants are absolute duties to perform
(2) sometimes it is unclear which terms are covenants, and which not – look to intent of parties
c) The question with these Ks is what constitutes sufficient performance of a condition

nature and effect
   *Dove v. Rose Acre Farms* - *strict enforcement of the condition* (bonus forfeited by one absence) terms were clear, violation was of central theme
   *Wal-Noon Corp. v. Hill* – *notice condition will often be implied* (repaired roof w/ no L notice) goal is to protect expectations of parties; won’t find a quasi-contract to cover area already dealt with in existing K.
   *In re Carter* – *conditions precedent, once waived or past, are no longer enforceable* (agreement conditioned on financial status of company)(1) one party wanted the court to treat the condition as a warranty – no dice
   *Omni group, inc. v. seattle first national bank*

Excuse of express conditions
   *Clark v. West* condition precedent may be waived by conduct (contract to write and not drink)(1) here, the writing of the book, not the abstinence, was the bargained-for consideration
   *Ferguson v. phoenix assurance co of new york* (insurance policy against the public policy, is not deemed as valid condition for the contract)

(2) majority rule – insurer must prove prejudice
j) grounds for excuse of a condition include:
   (1) agreement modifying
   (2) conduct waiving
   (3) changed circumstances
   (4) discharge by court
   k) even a written term prohibiting modification can be altered without a writing if conduct of the other party induces reasonable reliance
(1) two opposing principles: 4 corners vs. disproportionate forfeiture

3. Constructive Conditions of Exchange (Implied Conditions)

Historical development

Implied-in-fact vs. Implied-in-law conditions
(1) Implied-in-fact: reasonable person would imply as necessary to part of performance
   (a) important example – implied condition of good faith
   (b) very similar conceptually to excuse of performance by prevention

*Implied-in-law*: implied in the interest of fairness and justice (constructive conditions)
Kingston v. Preston – dependant covenants (transfer of house conditioned on security)

(old rule) – three types of covenants
(a) mutual and independent – breach by one no excuse for nonperformance by other!
(b) conditional and dependant – one party liable after other performs
(c) simultaneous – one tenders, other refuses action for default

modern view – each performance an constructive condition to others duty to perform

Goodison v. Nun – ex. of modern view – dependant covenants (established modern view)
d) Types of conditions implied-in-law:
(1) earlier performance condition precedent to later performance
(2) simultaneous performance conditions concurrent

Palmer v. Fox (one side agreed to pave road, failed to, then wanted to sue for breach)
failure to perform relieves counter-performance.
Concurrent—dependent—perform conditions with each other
(3) protracted (delayed) performance condition precedent to a single act: if one side’s performance requires time, they must perform first.

Excuse of condition——-doctrine of “substantial performance” to avoidance of forfeiture
Where complete performance by one party is a constructive condition precedent or concurrent to the other party’s duty of counter performance, that condition may be excused if the party has rendered “substantial performance”. the doctrine applied primarily in cases involving building contracts. The risk of forfeiture and unjust enrichment is too extreme.[note: UCC: contracts for the sale of goods not suitable for the doctrine. Rule of perfect tender applied.]

Jacob & Youngs v. Kent – substantial performance (built house w/ pipe other than specified) (1) trivial and accidental omissions overlooked, damages according to difference in value,(2) usually courts will only apply this doctrine to implied (constructive) conditions.(3) Kieff dislikes this decision b/c it makes no allowance for esoteric preferences

Lowy v. United Pacific Insurance – divisible contracts (98% performed street work)(a) substantial performance may be applied to severable portion of contract (b) divisible only if expressly made so or reasonable interpretation

Exceptions:
1. Material breach of the contract
   O.W. Grun Roofing v. Cope –material breach≠substantial performance (roof tiles wrong)(a) substantial performance=good faith effort + no massive defects
2. bad faith or intentional breach: willful breach almost definitely prevents ‘substantial performance’, may impair quasi-contract recovery as well.

Measure of Damages

(1) if builder substantially performs – then cost or repair/replace if without undue
expense---- difference in value if repair undue expense.

(2) if not ‘substantial performance’, then quasi-contract recovery?
(a) majority – no recovery
(b) minority ‘modern rule’– recovery for benefits conferred less damages

*Britton v. Turner* (worked 9.5 mos. out of one year) – recovery allowed (a) labor contracts are almost always divisible.

D. Changed Circumstances: Impracticability and frustration of purpose

Impracticability excuse the non-performance.

1. **Existing Impracticability** – Same situations also allow for voiding by mutual mistake

   Restatement (second) 266 (1): a party has no duty to render a performance which was impracticable at the time of contracting, if the parties did not know at the time that it was impracticable.

   *Mineral Park Land Co. v. Howard* (needs contract to remove gravel, gravel below water table)(1) 10 times greater cost considered impracticable

   *United States v. Wegematic* (contract to deliver computer system)(1) engineering difficulties ≠impracticability(2) holding otherwise would allow risk free gambling by subs

2. **Supervening Impracticability:** where the subject matter of the contract or the specified means for performance or source of supply is destroyed or becomes non-existent after the contract is entered into, without fault of the promisor, the promisor’s duty may be discharged. (UCC)

   *Taylor v. Caldwell* – destruction of subject matter (fire destroyed leased music hall)(1) performance excused – where performance depends on existence, condition implied (2) look not to what parties actually intended, but what reasonable person contracting would have intended the implied conditions to be.

   b) **Death or illness in a personal services contract discharges performance**
   c) **Temporary Impossibility suspends performance**

   Exception case: *Canadian Industrial Alcohol v. Dunbar Molasses* (supply contract, supplier’s supplier failed) Failure of Supply does not discharge performance.(a) foreseeable risks do not excuse performance if under the control of one of the parties.(i) parties must take all possible steps to avoid the ‘impossibility’. (b) impracticability is really about assumption of the risk.

   *Dills v. Town of Enfield* – futility (useless) ≠impracticability (2 conditions warring for 2 outcomes)(1) inability to obtain financing doesn’t excuse performance of a condition made futile

   **elements of impracticability:**
(a) event made performance impracticable
(b) nonoccurrence was a basic assumption of the contract
(c) impracticability not the fault of the party seeking to be excused
(d) party didn’t assume the risk

Unforeseeable + out of control (force majeure: unavoidable)

another test for impracticability: who is the better risk bearer?
United states v. winstar
Bolin farms v. American cotton shippers ass’s

Kaiser-Francis Oil v. Producer’s Gas (take or pay contract for oil)
(1) drop in demand/price, loss of profitability not a force majeure event
(2) take or pay clause was intended to allocate risk.

3. Frustration of Purpose- performance possible but pointless (the purpose or value of the contract has been totally destroyed by some supervening event), discharge the contract.

   elements:
   (1) supervening act/event
   (2) unforeseeable when contract made
   (3) avowed (admitted) purpose known and recognized by both parties at time of contracting
   (4) act/event totally or almost totally destroys purpose

   Paradine v. Jane (apartment overrun by Prince Rupert’s army)
   (1) no discharge of lease b/c party assumes the risk of its own nonperformance/inability
   (2) few courts will grant relief from lease for frustration.

   Krell v. Henry (rented room to see coronation)
   (1) purpose known to both parties vs. 4 corners
   (2) attainment of performance becomes an implied condition precedent

   Washington State Hop Producers v. Goschie Farms (gov’t reg. ceased, bids for hop base)
   (1) termination of government program = supervening cause
   (2) very few cases rely on frustration of purpose.

VI. Breach of Contract and Permissible Remedial Responses

A. Right to Suspend Performance or Cancel Upon Prospective Inability or Breach

1. Material vs. Minor Breach
   a) Criteria: extent performed, willfulness, extent of benefit/payment exchanged, hardship resulting
   b) Repudiation/willful breach is always a material breach.
   c) Material Breach excuses counter-performance, immediately entitles to remedies for entire contract.
   (1) damages
   (2) specific performance
   (3) rescission and restitution
(4) quasi-contract  
(5) tort action

d) Minor Breach: may suspend performance, immediately get damages caused by breach.

2. Anticipatory Repudiation = present, material breach, immediate action for the entire value of the promised performance, duty of Counter performance excused.

_Hochster v. De La Tour_ (repudiation of a tour guide’s contract)(1) can sue immediately, so that one party need not be idle. b) _This only applies_ to contracts were _neither side has performed in full yet_ (executory obligations remain).c) Other party must mitigate damages. d) Duty of Counter performance excused.  

_Plotnick v. Pennsylvania Smelting & Refining_ (partially performed installment contract) **Breach must be material to discharge the contract** (a) _Failure to pay one installment not usually a material breach._ Consider:(i) does it make continued performance difficult?(ii) does it create a huge risk in seller’s mind?

**exception:** 1. **repudiator retracts** (withdraw) – this revives the duty of counter performance unless rescission was accepted or repudiatee has changed their position in reliance

_Taylor v. Johnson_ **Repudiation must be unequivocal** (horse to be studded) (i) no implied repudiations(ii) **voluntary disablement** vs. **anticipatory repudiation:** voluntary disablement is _conduct_, not words, which make it look like other party is unwilling to perform. (iii) an implied repudiation results when the conduct of the promisor makes it impossible to substantially perform his promise.

2. Ambiguous expression insufficient

**Remedy for the repudiation:**  **UCC:** _sales of the good contract allows any party right to demand “adequate assurances of performance” if “reasonable grounds for insecurity” (for believe the anticipatory repudiation). Other party has 30 days to respond._

_AMF v. McDonald’s_ – **no assurance=breach** (faulty computerized cash registers) UCC interpreted loosely – need not use exact verbage

_B. Compensatory Damages_

1. Basic Policies/ introduction to contract remedies  
The general theory of damages in contract actions is that the injured party should be placed in the same position as if the contract had been properly performed, at least insofar as money can do this. Compensatory damages are designed to give the plaintiff the benefit of his bargain.

---monetary damages/relief: 3 measures:

(1) **expectation**: gain expected. Place the promise in the position he would have been in
had the promise been performed.

(2) **reliance**: out-of-pocket expenditures and opportunity costs (i.e. cost of substitute performance). as if the promise has not been made.

  *sullivan v. o’connor* for breach of physician-patient agreement. Damages include the expenditure plus other detriment following proximately and foreseeable from d’s failure to carry out his promise.

(3) **restitution (restore to the original state)**: value to the breaching party of / by the injured party’s performance. promise not been made.

must prove loss with reasonable certainty

nominals always available

duty to mitigate no recovery for avoidable damages

provisions for damages enforceable unless punitive in character

--- **consequential damages** (i.e. loss of profits)
The breaching party is liable for all losses resulting from his breach which the parties as **reasonable person** should have **foreseen** at the **time that the contract was made** as likely to result from the breach.

includes damages which are reasonably foreseeable as flowing from the breach

  *Hadley v. Baxendale – foreseeability of damages* (broken mill crankshaft shipped)
(a) **breacher must be aware of special circumstances** for damages to be foreseeable

  *Spang Industries v. Aetna Casualty & Surety* (steel for bridge delayed, frozen concrete)
(a) **knowledge of special circumstances determined at time date of performance set**

  *Hydraform Products v. American Steel* (steel for woodstoves, new business) loss of profit awarded when foreseeable contract (a) **need clear evidence** of foreseeability for consequential damages to be awarded (b) **UCC test – reasonable certainty vs. common law – no new businesses per se**

[comparison]

--- **punitive damages**: no, with rare exceptions

Mental distress damages and punitive damages:

  *bohac v. department of agriculture* nonpecuniary damages here denied. It is awarded without proof of pecuniary/money loss for bodily harm, emotional distress, and pain and suffering. **In breach of contract cases at common law, damages for mental distress are either not awarded or awarded only for wanton and willful misconduct, not for ordinary negligence.**

  *acquista v. NY life insurance co.* where bad faith involved, may include foreseeable money damages.

  *Boise Dodge v. Clark* punitive used to deter conduct for public policy (commercial fraud) (1) amount: no hard and fast rule, but **no so much as to be result of**
**passion and prejudice**

**Standard measure of damages:**

(1) contracts for sale of goods
   difference between contract price and market price at time of delivery
   may collect more if loss due to a **commercially reasonable response**
   (a) seller’s breach: buyer has a **right to cover** – get difference, must cover or won’t get
      consequentials. **if buyer can’t cover, can get replevin (return the goods).**
   (b) buyer’s breach: seller has a **right to resell** – get difference
      goods already “identified” to the K – **can get full value** if can’t resell
      can get consequentials as a result of breach

(2) land sale contracts
   general rule: difference between contract price and fair market value
   minority rule (only when vendor breaches) (English Rule): can only get lost expenses
   unless breach was bad faith

(3) employment contracts
   ER breaches: EE gets full contract price after mitigation
   EE breaches: ER gets cost of replacement unless death, etc. – including expenses over
   (i) willful breach: EE can recover for divisible parts offset by ER damages
   (ii) nonwillful breach: EE can recover for value of services rendered

(4) building/construction contracts
   owner breaches: builder entitled to profits would have made, plus expenditures
   builder breaches: can get cost of completion plus damages for delay
   (i) if only breach is lateness, recover for loss of use only

2..Breach or repudiation by payor

Anticipatory repudiation not applied.

*John hancock mutual life insurance v. cohen*
*American mechanical v. union machine co. of lynn inc.*
*Lowy v. united pacific insurance*
*New era homes v. forster*
*Bernstein v. nemeyer*
*Locks v. wade*
*Inchaustegui v. 666 5 th avenue limited partnership*

3. **Breach or Repudiation by Performer**
   Mitigate damages: If the repudiate is supposed to receive performance he must, after a
   reasonable length of time, look elsewhere for the performance which was due under the
   contract.
Reliance cooperage v. treat
Jacob & young v. kent
Rivers v. deane
Peevyhouse v. garland coal & mining co.
American standard v. schectman

C. Equitable Remedies: Prohibitory Injunction and Specific Performance

1. Consequential vs. Equitable Remedies
   a) consequential damages: money awards enforced against Δ's property (in rem)
   b) equitable remedies: (specific performance, etc) enforced against Δ (in personam) to allow the p to obtain the promised performance. Non compliance is punishable by fine or imprisonment. It is available when the p’s legal remedies are inadequate.
      i.e. land sales contract- specific performance is common as remedy.

2. Requirements for specific performance
   a) K must be definite and certain
   b) remedy at law must be inadequate
   c) no undue hardship must result
   d) enforcement must be feasible
   e) mutuality of remedy no longer required: can get s.p. even if other party would not be able to.

3. Specific Performance for sales of goods – when “goods unique or other proper circumstances” other circumstances refer to damages are difficult to estimate (i.e. output contract for a long term) or where an equivalent substitute performance unavailable or hard procured
   a) exception: goods necessary and unavailable
      Curtice Brothers v. Catts (tomatoes needed for canning)(a) irreparable injury to π's business would have resulted otherwise(b) personal service required here, but ct said it would assign a picker if need be
      LaClede Gas v. Amoco Oil (requirements contract to supply propane) (a) any restriction on right to cancel generally held to satisfy mutuality(b) specific performance awarded even though other party couldn’t have gotten
      Northern Indiana Public Service Co. v. Carbon County Coal (K to supply coal)(a) specific performance would result in inefficient outcome here – denied(b) losses of 3rd parties irrelevant to suit (workers)
      Walgreen v. Sara Creek Property (suit to keep out competitor in the same building)
      (a) D has burden to show damages inadequate – here bilateral monopoly would result Injunction awarded here.

4. Specific Performance for real property conveyances
   lands typically seen as unique, so damages are presumed inadequate

5. Specific Performance and the problem of court supervision
   a) construction contracts – usually no specific performance unless supervision not a
big problem

b) employment contracts – **no specific performance for employment contracts**
   
   *American Broadcasting v Wolf* (broadcaster switches networks)(1) **no specific performance enforcement of a personal services contract**
   (2) once K terminated, **no injunction possible** (injunction = negative specific performance)

6. Covenants not to compete:
   a) enforced in equity so long as reasonable in time or place
   b) granted only if not against public policy (aka slavery)
   c) injunctive relief granted where the contract calls for unique services or where the employee is carrying away trade secrets or goodwill of the employer. Sales people, workers are denied.

D. Effect of Agreement Liquidating Damages or Altering the Scope of Liability or Remedy

The enforceability depends upon whether the court finds it to be a valid liquidated damages clause or an attempted penalty. Penalty unenforceable, liquidated damages may be enforced.

1. Liquidated Damages (versus penalty clauses)

   a) if damages would result in penalty or forfeiture, they are unenforceable
   b) terminology is irrelevant, ct looks to outcome

   **requirements for a valid liquidated damages clause:**
   (1) actual damages difficult to ascertain when contract entered into.
   (2) amount must be a reasonable forecast of compensation for harm (how possible?) when contract made.

   *Southwest Engineering v. United States* (build stuff for airports, delayed. l.d. clause)
   (i) **reasonableness determined at time K executed** (ii) *As contribution to delay factored into amount awarded*

   *United Airlines v. Austin Travel* (cancellation of computerized reservation system)
   (i) **large percentages of K amount are o.k. in some circumstances** (high fixed costs)
   (ii) **fact that damages provide same remedy for all breaches is irrelevant**

   *Leeber v. Deltona* (15% deposit retained as liquid damages on sale of condo)

   **liquidated damages enforced unless:**
   (a) fraud
   (b) uncontrolled misfortune preventing performance
   (c) mutual rescission
   (d) benefit retained shocking to conscience of court
   (e) failure to pay money rarely justifies a further sum

2. Agreed Remedies – can replace default

Under UCC, parties may provide for remedies other than those otherwise provided by
law, limitations on agreed remedies include failure of essential purpose and unconscionability. If circumstances cause the remedy to fail of its essential purpose, the UCC remedies may apply even if the contract makes the agreed remedy exclusive.

*Lewis Refrigeration v. Sawyer Fruit, Vegetable, and Cold Storage* (broken freezers, lost Freon) (1) limitation of consequential damages clause ok in a commercial context unless unconscionable (2) the court here remanded for determination of unconscionability c) commercial warranty package – very effective: gives (free from defects), limits, disclaims, excludes – rarely found unconscionable.

**An introduction to Contract remedies (omitted see supra)**

A. basic policies
B. measuring and compensating loss resulting from a breach
   *sullivan v. o’connor*
   *curtice brothers co. v. catts*
   *Hadley v. baxendale*
C. mental anguish and punitive damages
   *bohac v. department of agriculture*
   *acquista v.NY life insurance co.*
   *Boise Dodge v. Clark* punitive used to deter conduct for public policy (odometer dialed back) (1) amount: no hard and fast rule, but no so much as to be result of passion and prejudice.

**VII. Third Party Interests (not compare with the study aid)**

A. Assignment and Delegation

1. General concepts:
   distinguish from other three-party contracts
   (1) third-party beneficiary: original K contemplates performance to 3rd party, w/ A&D it was unexpected
   (2) novation: obligee discharges original party from performance, A&D does not

2. Assignment of Rights – transfers rights to a 3rd party or parties

a) general rule: all contract rights are assignable
   *Fitzroy v. Cave* motive of assignor immaterial (π driving Δ to bankruptcy)

Exception: can’t assign if it materially alters obligor’s duty
(a) personal service contracts – test is degree of personal nature involved
(b) requirement and output contracts not assignable
(c) assignment can’t alter essential terms of K: price, time of delivery, etc.
b) manifested intention to vest a present right is sufficient

c) gratuitous assignments revocable at will, by:
   (1) successive assignment to another
   (2) death of assignor
   (3) bankruptcy of assignor
   (4) notice of revocation
   (5) acceptance by assignor of payment directly from obligor

gratuitous assignments can be made irrevocable by a signed or sealed writing, or other document.

e) assignments given for consideration are irrevocable

f) can assign future right in existing K, but not future rights in future K

affect of prohibition on assignment:
   (1) promissory – can still assign, but are liable for breach of K (destroys only right to assign)
   (2) condition – can’t assign (destroys right and power to assign)
   (3) UCC: generally holds limitations on assignment void – allows free assignment of rights, at least for account debtors and assignors

   Allhusen v. Caristo Construction (subcontract to paint public schools – nonassignable) (i) ct upheld nonassignment clause – but result would have been opp. under UCC

effect of irrevocable assignment:
   (1) rights of assignee against obligor:
      (a) right of direct action (can sue)
      (b) once obligor has notice, he pays anyone else at his peril

   Owen v. CAN insurance/continental casualty company
   Continental Purchasing v. Van Raalte notice (EE assigned wages to creditor)

problems with successive assignments of same right
   (1) 1st assignment revocable---subsequent always wins
   (2) 1st assignment irrevocable

   common law: priority established by:
   (i) if one of parties has a stronger equity, they win (ex: subsequent knew of 1st)
   (ii) if equities equal:(a) majority: New York rule:1st in time wins (prior assignee)
   (b) “English” rule: 1st to give notice to obligor wins

   UCC: filling requirement – 1st to file ‘perfects’ their security interest

3. Delegation of Duties – appoints duties to a 3rd party, but orig. remains liable

   a) duties delegable unless performance would vary materially from original performer’s

   Sally Beauty v. Nexxus Products no assignment to competitor (exclusive distribution hair prod.)

   UCC: may prevent delegation if have a “substantial interest” in having original
party perform

(a) no assignment for purposes of collection only???
(b) can always assign rights which are no longer executory

rights of parties following delegation
(1) if delegatee has expressly assumed duty
   creditor beneficiary contract – express assumption
      (i) obligee and delegator can sue delegatee, delegator can get specific performance
      (ii) assumption can be shown by parol evidence
(2) if delegatee has not expressly assumed duty
   --- delegation with no assignment of rights
   delegatee only liable to delegator – mere performance/acceptance not enough
   ---- delegation with assignment of rights
   still only liable to delegator, but growing modern trend says treat as express

delegator always remains liable as surety
debtigation gives obligee right to demand assurances

B. Third Party Beneficiaries – only occurs when original K involved 3rd party

1. Creation of Rights

a) sue to enforce?
   (1) old view – 3rd party beneficiaries can’t sue to enforce
   (2) modern view – 3rd party may sue to enforce

b) test – K must be “primarily” for 3rd party’s benefit – promisee’s intent
determinative
   (1) performance rendered to 3rd party?
   (2) presence of express provisions?
   (3) 3rd party expressly named?
   (4) relationship of parties

c) creditor beneficiary vs. donee beneficiary – look to intent again
   (1) creditor beneficiary – if promisee’s intent was to discharge a debt – even if no duty
       owed
       operates exactly like a delegation and express assumption of duties
       ex- B promises to pay As debt to C – B expressly assumes duty
   (2) donee beneficiary – if intent was even partly to give a gift
       KMART corporation v. balfour beatty
       Johnson v. Holmes Tuttle Lincoln-Mercury member of a class may sue to enforce
       (agreement to insure car, guy injured in accident w/ buyer sued)
       Hale v. Groce - intended beneficiary of a will may sue (lawyer failed to provide for
gift)
       Zigas v. Superior Court beneficiaries of government contracts may sue
(Landlord violated rent cap) (1) difficult to determine intended beneficiaries of government contracts.

2. Nature of Rights
   a) once rights have vested, beneficiary may sue
   b) promisor can assert the normal defenses to K
   c) beneficiary may retain performance given unless he knew it was a rescindable K

   d) vesting requirement:
      (1) *Tweeddale v. Tweeddale* vesting automatic (son beneficiary of real estate, unaware)
      (2) minority view – rights vest when detrimentally relied on
      (3) original Restatement:  
         donee vests automatically  
         creditor vests when detrimentally relied on or brings suit
      (4) Restatement (Second): no donee/creditor distinction – rights vest when:  
         manifests assent to promise  
         brings suit  
         detrimentally relies

**VIII: Resolution of Contract Disputes: Some Alternatives to Courts (omitted)**

1. The Legal Framework for Settlement

2. Agreed settlement or discharge

   *Douthwright v. northeast corridor foundations*
   *Devalk Lincoln mercury v. ford motor*

3. Private adjudication: arbitration
   Dispute Resolution in Construction Contracts
   *Parisi v. netlearning*
   *Michael-curry co. v. Knutson shareholders*
   *Brook v. peak international*