Seven Basic Contract Questions-
I. Is there a deal?
II. If there is a deal, how do courts enforce deals?
III. If there is a deal, is there any reason for the court not to enforce the deal?
IV. What is it that was the deal? (what did we agree to?)
V. Once we know the deal, did anyone not do what he agreed to do?
VI. If someone didn’t do what he agreed to do, is there any legally recognized excuse?
VII. Does anyone other than the two who made the deal have legal rights because of the deal?

Contract – UCC 1-201;

Common Law – a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law some way recognizes as a duty.

Express Contract – verbal. Based solely on words. Find the deal. Answer Q1 solely from words of parties

Implied Contract – based at least in part on conduct. Cannot find a deal simply from the words of the parties.

Quasi Contract – equitable remedy. not contract law – rules of K law have no application at all.
Since it is an equitable remedy, and equity is about doing what is fair, any time result strikes you as unfair, you should have a paragraph describing quasi contract.

Bi-lateral and Unilateral Contract –
1. Bilateral – results from an offer that is open as to how it can be accepted. Any time the offer doesn’t require a particular method of acceptance.
2. Unilateral – kind of contract that results from an offer that requires performance for acceptance.
3. Basically a bilateral world

Executory – when a K is described as executory – means it has not yet been performed. People have not yet done what they agreed to.

Restatement – not law. How important does your particular professor think it is?

Article 2 – UCC Some contracts are governed by this

When do I do Article 2? Question will not tell you. Has to be a SALE of GOODS.
GOODS – moveable, personal property. Buying a can of coca-cola. Anything that is ‘moveable at the time of identification for sale other than money in which the price is to be paid, investment securities and things in action.” NOT a good – real estate, money being used to pay for the bargain. Washing machine; chandelier – good until plugged in/attached as a fixture.
Examples not UCC in employee or service, not in real estate. Only personal property. Only concern – The mixed deal. Painting house. Buying paint – mixed deal. Paying for goods and labor. How do we deal with the mixed deal

All or nothing (Article 2 to whole deal or none of it)
We ask ourselves, what is the more important part of the deal? Is it basically a sale of goods, or painting – labor. Basically a services contract with the paint thrown in,
Example – assume someone buys a $15,000 grand piano, and 4 weeks of piano lessons are thrown into the deal. Piano is goods, and lessons are thrown in. Article 2 applies to the deal.

Merchant – UCC 2-104 one who deals in goods of the time.

Understand the relationship between Article 2 and common law contract?
The two overlap
Common law deals with a lot that Article 2 never deals with, fills in the gaps
EXAM IMPORTANT: areas where Article 2 produces a different result than common law.
I. Is there a Deal?

a. Manifestation of Mutual Assent

b. The first objective of the bargain relationships is the effort to reach agreement on the proposed exchange. Usually, one party will withdraw from the relationship and the other will assert that agreement had reached a point where a contract was formed.

   i. Common Law: Meeting of the minds; subjective test
   ii. UCC: Outward manifestation of agreement; objective test
   iii. Test for measuring assent – was the person making an offer really meaning to make that offer?
      1. Old Test - Subjective meeting of the minds;
      2. New Test – purely objective outward manifestations of actions or reasonable appearance of the parties dealings. Subjective intent does not matter. A more consistent measure for parties to go by. Fixed purpose: the courts look to the intention of person making the offer and reasonable impression created in the mind of the other.

iv. CONTEXT – what is the setting

   1. Embry v. Hargadine McKittrick – President (Δ), told Embry (∏) to “Go ahead, You’re all right” when ∏ had not yet signed an additional written employment. Δ terminated ∏ in Feb. Δ argued that his intent was not to continue ∏’s contract. Court held that a reasonable person would interpret the Δ’s actions as an assent to ∏’s demand, therefore there is mutual assent.
   2. Bargaining History – is there one that preceeds this communication? History of bargaining, commitment, just joking with one another?
      a. Lucy v. Zehmer - drunken contract to sell land. Δ expressed in a bar that he would sell land to ∏, said it was simply as a joke. But, going through drafting and execution of the contract determined that he was not too drunk to know his actions, and that ∏ was justified in believing that Δ was acting in good faith and intended to be bound. Probably would not have been allowed had Δ been laughing, tone of voice or ridiculous price.
   3. Cohen v. Cowles – Δ agreed to give ∏ confidentiality for information in a news story. The court determines that this is more of a morally binding contract than a legally binding one and the parties were not thinking in terms of commercial contract terms.
   4. In general, if the parties actions or words make it clear that they intend to be bound, even before a writing is drawn up, the court will find an enforceable contract. However, if the parties clearly express that they intend not to be bound, the courts will not find an enforceable contract.

v. Offer creates the power of acceptance. Rest. § 24 – manifestation of a willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reasons to know the person making it does not intend to make a bargain until he has made a further manifestation of assent. UCC – uses the word “offer” does not have to be in the contract. Four basic guidelines:
   i. What a reasonable person in the position of the offeree would be led to believe;
   ii. The language used, especially words of promise, undertaking, or commitment;
   iii. The specificity of the persons to whom the writing is addressed; and
   iv. The definiteness of the proposal.

   1. Advertisements – gen. Rule – An advertisement is Not an offer. Treated as invitations to make an offer.
   2. Exceptions – focus on whether the ad is specific about how many of the items aree available and about who can accept the advertisement.
   3. Lefkowitz v. Great Minneapolis – Fur store advertisement. The test used to determine if an ad is an offer: whether the facts show that some performance was promised in positive terms in return for something requested. Court held that the ad was an offer because it was clear, definite, and left nothing open for investigation.
   4. Southworth v. Oliver - Line between offers and preliminary negotiations depends upon the definiteness of the words used. The court held that the letter to the ∏ was an binding offer. The word “offer” does not have to be in the contract. Four basic guidelines:
      i. What a reasonable person in the position of the offeree would be led to believe;
      ii. The language used, especially words of promise, undertaking, or commitment;
      iii. The specificity of the persons to whom the writing is addressed; and
      iv. The definiteness of the proposal.
   5. Longegan v. Scolnick - Δ placed an ad to sell land; ∏ called and asked questions; Δ sold to someone else. ∏ sued. Court held that neither the ad, nor letters, constituted a definite offer.

vi. Offerer – person who makes the offer

vii. Offeree – person to whom the offer was made

c. was a deal ever even proposed? (did we even have an offer?) – looking for a manifestation of commitment.
d. Words or conduct. Evidence that shows person was committed. I did put a proposal on the table and said if you want it, we have a deal. Testers will tell you what offeror intended. This is a red herring. We are only looking for a manifestation of commitment – what did he say, do, or write?

e. CONTENT – for immediate acceptance – standard case – Fact pattern is going to give you the very wording of the parties. There will be something wrong with the words. How does content matters

i. Missing Terms, incomplete. Essential Terms: Parties to the Contract; The subject matter of the contract; Time for performance; and Price

ii. No longer a requirement that a communication contains all of the necessary terms. The more the gaps the harder is to argue that it manifests commitment, i.e.– the missing price problem. Communication relating to a proposed sale – encounter difference between UCC and common law.

1. Under common law, the price term or description of the real estate is Essential.

2. Article 2-305 – communication CAN be an offer even though there is a missing price term.
   a. Always no offer, common law/UCC because you are just not at commitment yet.
   b. Cases for Missing and Ambiguous Terms

   i. **Raffles v. Wichelhaus (Peerless Rule)** – Two ships Peerless, one arriving in Oct. and one in Dec. made a material difference on payment was due. When 2 equally possible interpretations and each party had a different one in mind, there is no mutual assent.

   ii. **Restatement 20** – no manifestation if: (a) neither party has reason to know meaning attached, (b) both parties have reason to know the meaning attached. Misunderstanding

   iii. **Konic v. Spokane Computer** – Case of the high and low priced surge protectors. Different meaning assigned to “fifty six twenty.” Court determines that there is no K b/c each party though the price terms meant something different and therefore no mutual assent. Contract is not valid where there is a reasonable but different understanding.

d. Indefinite Agreements

i. **Varney v. Ditmars** – Employee was going to receive a “fair share.” Contract terms must be definite and explicit. But, does not prevent recovery in quantum meruit, because there was reliance.

ii. **Lelfkowitz v. Great MN Surplus Store** – Some performance is definitely promised for something requested. The offer was clear, explicit and definite and therefore not indefinite.

e. Incomplete Agreements: Ambiguous/ Indefinite Term – words like fair, reasonable, appropriate. - vague ambiguous language means court will conclude that it is not a manifestation of commitment.

i. **UCC 2-204 (3)** Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Rsmt 33

ii. **Metro-Goldwyn Mayer, Inc. v. Scheider** - Movie star did pilot but refused to do series because no start date. Court said Even if there is an essential term missing the court can use an industry standard to fill it in. He had to perform. Consider if this was opportunistic behavior.

iii. **Joseph Martin Jr. Deli v. Schumacher** – only agreed to agree upon the rent and if not, then no renewal. The court held that they could not supply a term to the contract if there was no indication in the contract as to the parties’ intent to that term.

iv. **Oglebay Norton Co. v. Armco** – Parties had long term contract which the courts and parties were interested in preserving. In a long term contract, the court will fill in terms where the parties intended that judicial decision could be used. Where there is intent (objective), the court will fill in.

v. **Empro v. Ball-Co.** – where a letter had all the terms of an offer, but also contained the words “subject to” this condition eliminates the intent of being bound immediately. Not creating the power of acceptance. Indicates no manifestation to be bound and no power of acceptance.

f. FIXES - things to consider: status of parties contracting, is it unfair to leave one party without remedy? Do we want to implement quasi contract remedies.
i. **Red Owl case** – essentially a remedy for promissory estoppel. Can’t enforce the agreement, so the court awards damages based on the extent of your reliance in the situation. Where there is a missing or ambiguous term, go to the potential remedies for these terms. Just like in Texaco – where there was no contract, but parties had violated an implied duty of good faith in negotiation. In Texaco, the ∏ recovered in tort. Here the court used quasi-contract remedy to make ∏ whole.

ii. *Be very conscious of the difference between missing term and ambiguous term.*

3. **Requirements Contract** – situation involving a sale of goods in which the quantity is described in terms of the buyers needs. An exclusivity agreement. I will buy all that I require, all that I need. These are valid contracts, even though ambiguity is generally fatal.
   a. **Rehm Zeiher v. Walker** – RZ set contract so that they could stop buying in the event of “any unforeseen reason.” The court held that the unforeseen reason released them from the contract, and because only one side was bound there was no mutuality of obligation and therefore no consideration. Instead of a requirements K, this is a “I will buy all I desire from you K.”
   b. **McMichael v. Price** – Because the buyer purported to be a seller of sand, the Δ agreed to sell all of ∏’s requirements to him. The court held that there was mutuality of obligation and hence, a valid contract. *Output contracts are determined by the seller.*
   c. when we encounter this, the rest of the question, there is a dramatic increase int eh buyers demands. Is there any sort of artificial ceiling on what the requirements can be?
   d. *UNREASONABLY DISPROPORTIONATE.* Have to match what he is asking for today with what he previously demanded.

f. Did the proposal die out? *(was the offer terminated)*
   i. LAPSE OF TIME – nothing is said about when you have to accept. Years later I see you, and say I will take that now. Even if no express time limit, courts will propose a reasonable time limit.
   ii. When was the offer made?
   iii. How long a gap was there?
   iv. DEATH OF EITHER PARTY – when someone dies, the offer dies with them

g. **REVOCATION OF AN OFFER** – where the offerer puts offer on table and then changes mind and pulls the offer back.
   i. **Dickinson v. Dodds 339** – Δ could revoke his offer at any time before acceptance. ∏ had learned of revocation by way of Δ offering to someone else. After this, ∏ decided to accept. Court held that ∏’s learning that Δ was going to sell to someone else, was sufficient retraction of the offer, even though the communication came through a third party and not Δ himself.
   ii. **Hendricks v. Behee 273** – revocation is valid if the offeror did not know of the oferee’s acceptance. What about mailbox rule here
   iii. **Peterson v. Pattberg** – Old Rule that an offer can revoke a unilateral contract even if he knows the oferee is ready to perform. Guy came to door to revoke. Also use for Old Rule for non-existence of option contracts.

 iv. How it happens?
    1. words or conduct of offerer that was communicated to the oferee. Two player game. Sharon stone.
    2. if he sold to someone else, it is conduct inconsistent with offer, but she doesn’t know of it. She will have contract law rights, even if she doesn’t get the car.OFFOREE AWARENESS

v. When it happens?
   1. common sense rule – revocation must come before acceptance.

vi. When it can’t happen? Irrevocable
   1. Option – there is a promise not to revoke. Pay $10 to keep it open. What makes it irrevocable – promise and consideration for the promise.
      a. **Humble Oil v. Westside Investment 348** – a conditional exercise in that option does not preclude a conditional exercise of an option. “I’ll do this if…” does not terminate the offer. Option keeps it open so you can bargain. Rest. Option K is a promise which meets the requirements for formation of a contract and limits the promisers power to revoke an offer.
      b. **Electrical Construction v. Maeda 370** – Maeda induced EC to submit a bid with the promise that EC’s bid would be accepted if it was the lowest, and Maeda was awarded the contract. M got K, but didn’t hire EC. EC sued and court said that M was required to
hire EC because EC only acted b/c of M’s promise. Made K an option based on submission of bid. Differs from Drennan b/c EC v. M deals with submission of a bid, as opposed to revocation of a bid.

2. 2nd special UCC rule - The UCC firm offer Rule. UCC 2-205 Sale of Goods - sale of goods and we have a writing and a writing signed by a merchant. By a person in business. That not only promises to buy and sell, this writing has to expressly promise that the offer will not be revoked.
   a. Watch out for writing without an express promise
   b. Only a 3 month ceiling. No matter what the writing says.

3. Reliance
   a. *James Baird Co. v. Gimbel Brothers, Inc.* – Δ submitted a bid to Π for subcontracting of linoleum. Δ soon after realized they were mistaken. A mere submission of bid does not count as acceptance. Offer said, “prompt acceptance after contract is awarded.” The Δ withdrew their offer prior to the Π being awarded the bid.” Π is not eligible for promissory estoppel b/c Δ’s offer anticipated Π’s acceptance, not bid, and therefore no promise had been made.
   b. *Drennan v. Star Paving* – Δ’s mistake is no defense. Π used principle of detrimental reliance. Δ knew Π would accept if Δ was lowest. Therefore Δ’s bid was not specifically revocable. Because of Π’s detrimental reliance, Δ had an implied promise not to revoke.

4. Fourth way – Have had a start of performance pursuant to an offer to enter into an unilateral contract. Have an offer to enter into unilateral contract – offer requires performance to accept.
   a. *Marchiondo v. Scheck* – part perf. By offeree in a unilateral contract results in a contract with a condition, that part performance transforms it into an option contract. Remanded to see about partial performance. Broker – 6 day time limit to sell, revoked, but then later got an option to sell it.
   b. This offer can be accepted only by performance.
   c. Other guy starts to perform, makes the offer irrevocable.

i. Was the deal or the offer accepted? Was it rejected. Termination – Counter Offers
   a. *Minneapolis & St. Louis Railway v. Columbus* - Mirror Image rule Rsm 39; even though sale of goods; before the UCC. So if any additional term or condition not implicit to the contract then the offer is terminated
   b. *Leonard Pevar v. Evans* - an oral agreement, followed by a written agreement. Under UCC 2-207, the parties may have an agreement but it has to go back to the jury to determine whether the new terms materially altered the original agreement. If the court had determined no previous oral agreement, the written terms would simply be an purchase offer. As long as not contingent on other terms
   c. *Step saver v. Wyse* – Δ said it counteroffered Π’s phone offer with the presentation of the box top. Π didn’t like box top agreement and said, “I thought the agreement we had was the one over the phone.” Δ said you could have terminated after you read the box top because this is what we consider to be binding agreement. Step saver continued to order under the assumption they were not under the box top license. Court decided that repeated sending of these rules without any action upon them. If they are material or contradictory to previous agreement then mere recieving of those terms does not constitute assent.
   d. *ProCD v. Zeidenberg* – Zeidenberg tried to argue that they were not bound by the licensing agreement b/c it was not printed on the outside of the box. ProCD reputed that it would be impossible to put the entire agreement on the box, and that it is common practice for the purchaser to open at home, and read the terms, before they are bound. Court determined that the license was binding because Zeidenberg had an opportunity to read the terms before acceptance. Essentially that acceptance was not at the time of purchase. Under UCC 2-606 (1) the buyer accepts the goods when after an opportunity to inspect he fails to make an effective rejection. (notifying the seller)
   e. *Hill v. Gateway* – contract is not formed until the buyer has had an opportunity to inspect the goods. If a buyer decides not to read the contract and commence use of the product, the buyer will be bound to the terms of the K, even if the terms later prove to be unwelcome. Additional terms do not revoke the contract under 2-207, but merely are construed as additional proposals for contract.
   f. *Brover v. Gateway* – additional arbitration clause was not considered to be a material alteration of the contract. But, the clause was found to be unconscionable and therefore the contract would be invalid because of this.
   g. *Mortensen v. Timberline* – limitations on damages were not unconscionable because the parties involved were purely commercial, looking for new innovative technologies.
1. 2-207(2) additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
   a. the offer expressly limits acceptance to the terms of the offer;
   b. they materially alter it; or
   c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

i. Indirect rejection
   i. counter offers kill (common law. UCC)
   ii. conditional acceptance – I accept if…., I accept but….., I accept provided….. (killing the offer) There could be an implied contract, because we are acting like there is a contract. ****** (common law. UCC) something new MUST be included in the offer.
   iii. additional rules - I accept AND. Under common law this is rejection of offer. Difference from 2. not insisting on Alabama, simply throwing out idea. Common law has the Mirror Image Rule – acceptance cannot add anything to the offer.

iv. Common Law: The acceptance must perfectly mirror the offer, or it represents a rejection of the offer and an issuing of a counter offer.

v. UCC: Acceptance containing additional terms are merely proposals and do not destroy the original offer, but the other party must expressly consent to those terms. Any difference in terms negate each other and the UCC fills in the gaps.

vi. What does UCC do to this? UCC 2-207
   1. Sale of goods fact pattern – where the communications don’t exactly match up.
   2. If something is just added, not insisted upon, if conditional we go back to rule #2. Talking about rule #3. Provides a new term ----- ALWAYS – conclude that there is an express contract created by this exchange – adding a term is not a deal breaker for sale of goods. Seasonable expression of acceptance.
   3. If either of the people are not merchants, then the new term is a proposal and not part of deal, unless offeror agrees to it. Still have a deal, but the new term is not a part of it.

j. ACCEPTANCE – manifestation of mutual assent to terms of the offer Rsmt 35.
   i. EXCEPTION TO ACCEPTANCE Corinthian Pharmaceutical v. Lederle Labs – Partial Shipment Not An Acceptance. shipping goods generally constitutes and acceptance. But, in this case the shipper notified that shipment was just an accommodation. This means that buyer is not obligated by contract. P has no contract to base their insistence of specific performance on.
   1. UCC 2-206 – not an acceptance if the seller seasonably notifieds the buyer that the shipment is offered only as an accomodation to the buyer.

k. Who is accepting
   i. Hendricks v. Behee – This case does not follow the mailbox rule b/c not mailed. Communication of acceptance of contract to agent of offeree is not sufficient and does not bind offeror. So, the offeror could still revoke the contract b/c he was not aware of the acceptance.
   ii. Has to be the person to whom the offer is made
   iii. Offeree must know of the offer.
      1. Glover v. Jewish War Veterans of United States- Knowledge of offer. Acting in a manner that would indicate performance is not valid if performer did not know about offer. It is impossible to accept unless on knows of the offer. Rule may not apply to gov’t agencies who benefit regardless of how ignorant the performer is to the offer.

l. How are thye accepting
   i. La Salle National Bank v. Vega – method and communication of acceptance to offeror. The only way for the contract to be accepted was for P to execute. P never signed, which was the execution, therefore no contract. Where required written acceptance, nothing else would do.
   ii. Ever-Tite Roofing v. Green – agreement would be binding upon written K, OR commencement of performance by ∏. What constitutes a reasonable time to accept by performance? ∏ started performance by loading trucks and sending to ∑’s house. Also, 9 days was reasonable time b/c had to perform credit check.
   iii. Carlill v. Carabolic Smoke Ball Co. – use was sufficient acceptance of offerAdvertisement of a reward. ad stating that reward would follow if product didn’t protect someone from influenza. Notice was not required b/c too many people would accept. The court found for the person who tried the advertised product. Carabolic had to pay.
   iv. Russell v. Texas Co. - if you retain and accept the benefits promised in an agreement such retention and acceptance constitutes acceptance of the agreement and you are bound to the agreement. If your retention
and acceptance is tortuous, the offeror may choose to treat your behavior as an acceptance even when you manifest an intention not to accept (tortfeasor or contract breaker)

v. Offer can control method – please pay by cash. You come with check.

vi. If offer doesn’t say?

vii. Bilateral and unilateral –

1. Bilateral – can be accepted in any way.

2. Unilateral can be accepted only by performance. This offer can be accepted only by performance. Either analyze as unilateral or as offer can control method of performance.

a. Industrial America v. Fulton Industries – acceptance by performance with knowledge. A person can accept an offer that can be accepted by performance, without notifying the offeror, unless there is a manifestation of intention to the contrary. Even if person was motivated by something other than the offer, as long as they knew of the offer, performance constitutes accepts.

viii. Silence as Acceptance

1. General Rule – Offeror cannot force the offeree to reply by wording his offer: “Your silence will be an acceptance of my offer” Rsmt 2d § 72.

2. Ammons v. Wilson & Co. – silence here could be enough because objective evidence from the past suggested that something more was necessary to refuse the offer to buy the shortening. The court relies upon the past relationship between the parties.

3. Smith Scharff Paper Co. v. P.N. Hirsch & Co. - a long-term business relationship involving conduct understood by both parties can be said to be agreed upon and binding since benefits of such conduct are accepted. This was an implied contract because the buyer had previously benefited from the business practices of the [ ] and they continued to receive this benefit under this new deal, so the contract was binding upon buyer.

4. Harris v. Time - de minimus theory used to disregard the technical validity of a claim. P didn’t have to give notice b/c Δ anticipatorily repudiated.

ix. Four recurring fact patterns:

1. Mailbox rule story

a. Mailbox Rule

   i. Common Law: Acceptance is made in a way invited by the offeree is operative as soon as it is out of the offeree’s possession

   ii. UCC: Less reliance upon mailbox rule because of reduced delay in times of communication.

b. Adams v. Lindsell – Acceptance sent by mail is effective as by the date sent. UCC 1-201 (38) Mailbox Rule. Other rule would be to make P lose the benefit of the contract and put parties in status quo. Not the normal rule.

c. Where reasonable to respond by mail/fax – acceptance dates when offeree relinquished control. Or revocation must actually be communicated – has to get the federal express letter. Acceptance must only be in the mailbox.

2. The offer is made and then in response to the offer, the person to whom it was made starts performance. Offer $1000 to paint house, start painting house. Ist he start of performance acceptance:

a. Generally start is viewes as a promise to perform and generally constitutes acceptance (gives manifestation of mutual assent)

b. Where offer requires acceptance to perform, then there is no deal. Painter can walk away. Start of performance is not acceptance to an offer of a unilateral contract.

3. Notice of acceptance –

   a. Acceptance by promise. That has to be communicated to the offeror.

   b. If performance – don’t have to give notice if it is obvious that performance has started.

4. More bar exam – Sale of Goods question - UCC – where the fact pattern is that the buyer offers to buy goods and the seller sends the wrong stuff. I send in an order. An offer to buy – case of Vaseline. Seller sends a case of grape jelly. Where the seller sends the wrong stuff. Sending wrong stuff is acceptance and it creates a deal that Epstein can now sue for breach.

   a. Accomadation exception – sends wrong stuff with an explanation. Creates a counter offer.
II. If there is a deal, how do courts enforce deals?

a. Specific Performance – court ordering someone to do that which she agreed to do
   1. is an equitable remedy. Equitable history – is employed only where legal remedies are viewed as inadequate.
   2. Injunctive Relief is used in:
      a) Real property
      b) Unique chattels
      c) Usually denied against the builder or repair; but okay when no adequate remedy at law.
      d) Usually specific performance is denied in employment contracts, on both sides.
   3. Money damages are the legal alternative of equitable remedy of specific performance
      a) Because of the equitable origins of specific performance, specific performance is available only if money damages are inadequate
         (1) Real estate deals is a big deal here. Specific performance is an available remedy in real estate. Each piece of real estate is unique – so buyer can get specific performance.
         (2) In sale of goods, only is goods are unique – art, antique, or custom made.
         (3) Never do specific performance in service/employment contracts.
      b) Negative specific performance – injunctive relief
         (1) Prevent someone from working for one of your competitors
            (a) Covenants not to compete. – will be enforced if reasonable to time and place and no broader than necessary. Denied in cases where ordinary workers are barred b/c monetary damages are adequate.
            (b) ABC v. Wolf- limitation on remedy after employment is terminated. Can’t obtain enforcement of a personal service contract after the term of employment has expired.

4. Book’s Analysis of Equitable Remedies for Breach of Contract:
   a) What was the inadequacy in the legal remedy asserted by the ∏ to justify equitable relief?
   b) What, if any, are the particular problems involved in enforcing an in personam order in the particular case?
      (1) Is it acting, performing, building, painting?
      (2) How is the court going to supervise this?
   c) Any questions of fairness associated with enforcing the contract or problems of morality associated with the ∏’s conduct?
      (1) Specific enforcement unconscionable?
      (2) Must ∏ do equity to receive equity?
   d) May the ∏ recover damages in addition to equitable relief?
      (1) If remedy is not available, can we award both damages & specific performance.
   e) Further help from legalines:
      (1) Contract definite and certain
      (2) Inadequacy of remedy at law
      (3) Enforcement must operate equitably
      (4) Enforcement must be feasible
      (5) Mutuality of remedy no longer required.
   f) Curtice Brothers v. Catts 955 – Goods which are necessary and unavailable – specific performance granted because ∏ will suffer irreparable injury w/o delivery of tomatoes. UCC 2-716 (1) unique chattels
   g) Laclede Gas Co v. Amoco Oil Co. – mutuality of obligation. Even though P had a restricted right to cancel, that does not make all the other promises invalid. they were still bound to the contract. Had the cancellation power been unrestricted, that would have changed things.
   h) Northern Indiana Public Service v. Carbon County Coal Co. – specific performance is only available where monetary damages are not an adequate remedy. Rsmt 360 ∆ is seeking specific performance on the basis of the workers losing their job, which the court says is an irrelevant loss as considered by this suit.
   i) Walgreen v. Sara Creek Property Co. - ∏ has to show the burden is inadequate. The injunction works because it allows the burden of determining the cost of ∆’s conduct to the parties, who are better than the government at making this determination. Simple negative injunction and it allows the court to wash its hands of the monetary issues.

B. DAMAGES – primary method of dealing with enforcement of deals –
   a) ∏ must prove amount within a reasonable certainty.
   b) Recovery is limited to what the ∏ would have received had the contract been performed.
   c) Nominal damages may be awarded even without actual loss. Even the most minor is entitled to nominal damages.
   d) Avoidable damages are not recoverable. The non-breaching party has a duty to mitigate.
e) The enforceability of contract provisions regarding damages depends upon whether they operate as punitive damages or reasonable forecasts of actual damages.

2. **Liquidated Damages** – contract provision that tries to fix or set the damages. General rule is that liquidated damages is a valid way of dealing. Good faith effort to estimate the actual damages. Terminology is not that important in this analysis (liquidated v. punitive)

a) Requirements for LD
   1. Must be shown that upon entry into K, the actual damages would have been difficult to ascertain.
   2. Must be a reasonable forecast of fair compensation for harm from breach.

b) Most economists don’t like courts restrictive attitudes toward liquidated damages or punitive damages: p. 988 of casebook.
   1. It removes the contracting parties’ choice
   2. Parties are better informed than the judicial system to determine damages
   3. Ban on penalties forces the risks to be allocated elsewhere. If the parties wanted to raise the LD to balance more risk, the court might find unconscionable.

c) **Southwest Engineering v. US 989** – Look at whether the parties at the time they entered the K expected the damages to be X, or did the damages turn out to be X later? SW argues unfair b/c the damages are later $0. The government’s argument, that the court buys, is that the reasonableness of the forecast is to measured against the state of the world when the agreement was made. If the intent of the parties was to compensate rather than punish, it is ordinarily the duty of the court to carry out that intent.

d) **United Air Lines v. Austin Travel 995** – issue of whether the LD are proportional to actual damages. Has to be a gross disproportionality in order to not uphold LD. This 80% is upheld. The 80% was primarily fixed costs, so they only really paid what they would have paid for extra services after the termination.

e) **Leeber v. Deltona Corp.1000** – Test for unconscionable LD: “If the damages are ascertainable on the date of the contract, the claus is a penalty and unenforceable; if they are not so ascertainable, the clause is truly one for LD and enforceable; however, if subsequent circumstances demonstrate it would be unconscionable to allow the seller to retain the sum in question as LD, equity may relieve against the forfeiture. Four part test to determine (i) fraud on Δ’s part (ii) uncontrolled misfortune accounting for ∏’s failure to perform, (iii) mutual recission, or (iv) a benefit to the Δ the retention of which, kompared with the total contract price, would be shocking to the court’s conscience.

f) **Agreed Remedies (contracted for)**
   1. **Lewis Refrigeration v. Sawyer Fruit, Vegetable, Cold Storage 1007** – the contract contained a provision outlining the remedies that could be sought. In order to use one of these remedies, the court would have to declare the provision as unconscionable.

3. **Punitive damages** no such thing as punitive damages in breach of contract. Not in common law or UCC (only if claim can be grounded in tort) Penalty provisions are unenforceable.

a) **F.D. Borkholder v. Sandock** – punitive damages are not recoverable for breach of contract unless the breach is accompanied by a separate tort or tort-like conduct. These tort damages serve the public interest. Where the Δ built a concrete wall and lied about the construction, so it was not up to ∏’s specifications.

b) **Boise Dodge v. Clark** – Δ had set back the speedometer on a used car. ∏ was allowed to recover punitive damages because the court wanted to deter owners from tolerating employee misconduct. Had to be proportionate to the actual damages. Couldn’t be result of passion or prejudice.

c) Exists when intended as a pecuniary threat to prevent breach, or as security to ensure other parties performance.

4. **Compensatory Damages** – judicial effort Trying to make the world just like it would have been if the contract had been done right.

a) What would the ∏ now have if the contract had been performed
b) What does the ∏ actually have?
c) What does it take to get her from b to a.

d) **Sullivan v. O’Conner** – lays out definitions:
   1. Compensatory or expectation – an amount intended to put ∏ in the position she would be in if the contract had been performed as agreed.
   2. Restitution damages – an amount corresponding to any benefit conferred by ∏ upon Δ in the performance of the contract.
   3. Reliance damages – any expenditure made by ∏ and for other detriment following proximately and foreseeably from Δ’s failure to carry out his promise.

e) Examples: contract to paint house for $1000, I breach, has to pay someone else $1500. Takes $500 to get him from b to a.
   1. Three Major Limitations to expectation damages
(a) Avoidable damages are not recoverable.
   (i) In a breach, other side keeps going
   (ii) Was the breach clear and unambiguous.
   (iii) Situation in which it can be fairly argued that continuing to perform does not increase
   the damages, but decreases damages.
   (iv) Employment contract context – not that P ran up damages, but P could have had a
   comparable job (pharmacist).
   (a) Shirley maclaine contract.
   (v) Acting in a way that runs up the damages
   (vi) Not taking employment that reduces the damages.
(b) Rule of Consequential Damages – UCC 2-715 (2) consequential damages are
   recoverable only if foreseeable by both of the parties. Damages that don’t arise in every
   situation.
   (i) Hadley v. Baxendale – jury must be properly instructed in how to make a determination
   of consequential damages. Damages arising from special situations maybe awarded
   where the [i] informs the Δ of special circumstances or where these damages
   are reasonably foreseeable by the Δ at the time that the K is formed. - mill in small village in England. Not a situation that would always arise.
   (ii) Spang v. Aetna – Knowledge of the consequences of failure to perform will be imputed
   as of the time when a dater for performance was set. UCC 2-715(2) buyer has
   right to “cover” (mitigate) and where he fails to do so, he is barred from
   recovering consequential damages which he could have prevented by covering.
   (iii) Hydraform v. American Steel & Aluminum Corp. – woodstoves. CD limited to
   compensation for reasonably foreseeable losses “resulting from general or
   particular requirements and needs of which the seller at the time of contracting
   had reason t know.” In this case the # of woodstoves was foreseeable.
   (iv) L. Albert & Son v. Armstrong Rubber – If the Δ is able to prove that the [i] would have
   suffered a net loss had the K been completed, then the [i]’s reliance recovery will
   be limited to what his expectation damages would have been, basically the
   consequential damages, minus the lost profits.
(c) Economic Waste – Cases for economic waste Groves against john wonede, and Peavy
   House.
   (i) The unrestored land has the same market value than restored.
(f) Allen v. Jones – damages for mental distress, without physical injury, for negligent performance are
   recoverable. TORT damages.

5. Problems of Breach by Payor
   awards all payments up to the case, but will not award future payments. Must pay in installments, because
   others have not been breached, and it does not work for insurance industry to make preliminary payments.
   (1) Could have an acceleration clause which would say that if a breach, all future performance would
   become due at the time of the breach.
   b) American Mechanical Corp. v. Union Machine 871- awarded damages to put non-breaching party in as
   good of a position. If the breaching party knows the consequences of its breach, the more likely
   they are to be held for the entirety of them.
   c) Lowy v. United Pacific 875 – the contract is divisible, so payment must be rendered for the portion already
   performed.
   (1) DIVISIBLE- if it expressly made so by stipulating compensation for each separate installment os
   performed, or if a reasonable interpretation indicates that a failure to perform one installment
   would not constitute a failure of the basic consideration bargained for.
   d) New Era Homes Corp. v. Forster 875 – unlike Lowy, this case does not have a severable contract. The
   payments at fixed points, do not indicate payment for different portions of the work. Mostly just considered
   to be for the convenience of the involved parties.
   e) Bernstein v. Nemeyer – Restitution - the objective is to put the breaching party back in the position they were
   in before the contract had been made.
   f) Locks v. Wade 886 – lost volume deal – could have realized profits on both juke boxes, so even though he
   mitigated, Contract Price – Cost of Performance.

6. Problems of Breach by Payee/ Performer
a) *Reliance Cooperage v. Treat 896* – Whiskey barrels. Futures market. The measure of damages is the difference between the contract price and the market price on the date the delivery was due. Otherwise, where the market price was rising, a seller would be encouraged to repudiate a contract.

b) *Jacob & Youngs v. Kent 902* – Δ’s architect refused to pay because Reading pipe had not been used. And it was specifically enumerated in the contract. Since substantial performance had been rendered, and the breach was neither material, nor willful so the damages were measured by the diminution in value.

c) *Rivers v. Deane* – 902 – In this case, since the completion of the construction project was inadequate, but because of the Δ’s mistake was not both “trivial and innocent”, the court measured damages by the market value of the cost to repair the faulty construction.

(1) **Difference in value Rule**: limited to cases in which the builder’s failure to perform is both trivial and innocent, such that damages may be measured by a diminution in value.

d) *American Standard, Inc. v. Schectman* – the court held that despite the cost of completion being so much greater than the difference in value, that the Δ had to perform. This defect, unlike Reding pipe, would not result in economic waste. Δ’s failure also was not unintentional, unlike Reding.
III. If there is a deal, is there any reason for the court not to enforce the deal?

a. Capacity – Who made it? If a person lacks capacity, they have the ability to disaffirm the contract. Rsmt 12.
   i. Who lacks capacity (who made it) – the burden is on the person asserting lack of capacity.
      1. Infant - statutory decision, only requirement is age. No capacity to contract
         a. Infancy: Bowling v. Sperry – Minor purchased a car. Took car back for repairs and decided he didn’t want to pay. Gave the car back. Δ sued. A minor may rescind a contract for the purchase of a car which is not vital to his existence.
            i. Exception to this general rule when it involves contracts for necessary items.
      2. Intoxication
         a. Lucy v. Zehmer – see above – a case where drunkenness is not a defense to contract formation.
      3. Mental incompetence – inability to understand
         a. Mental Incompetence: Heights Realty, Ltd. v. Phillips 439 – 84 year old woman found to be mentally incompetent. The presumption of mental incompetence that must be overcome by clear and convincing evidence by the person asserting the lack of mental capacity. Showing previous incompetence is presumed to overcome this burden, unless overcome by evidence that proves of a lucid interval.
            i. Mental competence – capable of understanding in a reasonable manner the nature and effect of the act in which the person is engaged.
            ii. Factors to consider:
               1. The person’s prior or subsequent condition
               2. The person’s physical condition
               3. The adequacy of consideration
               4. Whether or not the transaction was improvident
               5. The relation of trust and confidence between the parties to the transaction.

4. disaffirm – word must have in exam answer. A person who has the ability to disaffirm, to get out of the agreements that he or she has made. AND
5. Implied affirmation – after of age, then you affirm the contract.
6. Even people without capacity are legally obligated for contracts on necessities – place to live, food, health care. But this obligation is not a contract obligation but a quasi contract obligation.

ii. How was the deal made?
1. Duress – how does concept of pre-existing duty fit in with duress? principles of duress have expanded beyond physical to economic duress
   a. Austin Instrument v. Loral Corp. - a contract modified under the threat of economic duress is not enforceable. Economic duress is demonstrated by proof that immediate possession of needful goods is threatened or that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand. Δ had threatened to stop delivery unless prices increased. Austin put Loral in a position they could not fill.
   b. Machinery Hauling v. Steel of West Virginia - Δ sued on basis of extortionate demands by Δ. The threat was for a loss of future business. The Δ could not base a claim on threats against something that did not exist (the future contract).
      i. Threat is actionable where threatened party can show:
         1. He has been the victim of a wrongful or unlawful threat
         2. The threat deprives the victim of his unfettered will.
      ii. Economic Duress
         1. Improper threat by the Δ, did the potential deal enforcer do something improper.
         2. Look at the Δ, were they left with any reasonable alternative?
   
   c. Could have criminal basis for duress – where not found in contracts. Criminal extortion – statutorily created, etc.
   
   d. Fact patterns:
      i. Involving changing the deal, modification in contracts. Fishermen in CA agreed to one thing, and then once in Alaska said they wouldn’t fish unless more money.
Look at ∏, was there an improper threat. Can the Δ argue that he wasn’t left with any choice?  

ii. Litigation settlement. Where the ∏, settled for less than she had earlier acknowledged that she owed.  

2. **Fraud** and the duty to disclose cases: Rsmt 1st § 477 – If either party has tricked or defrauded the other into executing the contract, there is no consent and the contract is voidable by the innocent party. Fraud – any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him” Misrepresentation of fact has to be material and other side has to rely upon it. 

   a. **Common Law Fraud:** general rule prohibiting misrepresentation  
      b. **UCC Fraud:** open ended standards that discuss unfairness or deception without giving specifics.  
      c. How does it differ from Duress? Standard for ∏ in duress is Improper threat. In Fraud- ∏ has to demonstrate unfair threat. Milder standard. Standard for Δ is tougher – has to be under the domination of the ∏.  
      d. Will talk about both in any fact pattern  
      e. Problem with how the deal was done.  
      f. Talking about a much weaker Δ, she was under the domination of. Hard with corporate or business Δ, usually an individual  
      g. **Morta v. Korea Insurance Corp 471.** – the ∏ was in a car wreck. ∏ accepted small monies b/c needed to get car back. He signed a general release claim, which the court held was extended even to claims not known or suspected at the time. Ended up with much more hospital bills than he originally considered. He was out b/c the court found that there was no mistake, misrepresentation or fraud. Just because there is a bad result, doesn’t mean there was fraud. ∏ neglected his own duty to read contract.  
      
         i. **Actual fraud**  
      
         ii. **Constructive fraud** - the difference between these two is their relationship between the parties gives rise to the duty.  
      
         iii. **Undue Influence** – look for (i) use of confidence for the purpose of obtaining an unfair advantage over him (ii) taking an unfair advantage of another’s weakness of mind (iii) raking a grossly oppressive and unfair advantage of another’s necessities or distress.  
      
   h. **Laidlaw v. Organ** – caveat emptor. By not conveying extrinsic information to the seller, the buyer did not commit fraud. It is not the seller’s responsibility to communicate the information about the increase in tobacco prices because of the signing of the treaty to end the war of 1812.  
   
   i. **Hill v. Jones** – termite case. Opposite from laidlaw because one party had greater access to information. Suppression of material fact is equivalent to false representation when parties are acting in good faith.  
      
         i. Vendor has an affirmative duty to disclose material facts if:  
            1. disclosure is necessary to prevent a previous assertion from being fraudulent or a material misrepresentation;  
            2. disclosure would correct the other party’s mistake as to a basic assumption, and non-disclosure would be a falsity to act in good faith and fair dealing;  
            3. disclosure would correct the other party’s mistake as to the contents or effect the writing; and  
            4. the other person is entitled to know the fact because of a relationship of trust and confidence between them.  
   
   j. **Vokes v. Arthur Murray, Inc.** – If he has superior knowledge then he may have a duty to have accurate knowledge. (and convey the accurate knowledge)  
      
         i. Generally misrepresentation must be one of fact. Exceptions:  
            1. Parties are not dealing at arm’s length  
            2. Where the representee does not have an equal opportunity to become aware of the truth or falsity of the fact represented.  

3. **Mistake**
a. Sherwood v. Walker – rose the 2nd of Abalone – cow, owner and buyer thought was barren. When rose was sold – she was pregnant. Seller says, Wait – we didn’t know these facts.

b. Where both make a mistake about a **basic material fact**, then the deal is not enforceable.

To trigger that rule, we need a basic material mistake

i. **If it is a mistake that both guys make about what something is** – goes to the nature of the item, that is always basic or material. **If it is merely a question or misunderstanding about what something is worth, that is never basic or material or a ground for not enforcing the deal.**

c. Cases:

1. Recission – a remedy– parties are restored to their pre-contractual positions.

ii. UNILATERAL- where the party uses words that are clear but make some unilateral mistake of fact. Had he known this mistake he would not have expressed himself in the same way. Ex. Computation and use of words or symbols not intended. Rsmt 153

1. Common Law: Unwilling to allow recission for these types of mistakes, to not disappoint the expectations of the other party.
2. Rsmt: The party seeking to avoid must show that mistake was a basic assumption; it has a material effect on the agreed exchange; the party does not bear risk of mistake AND enforcement would be unconscionable or the other party had reason to know of the mistake.
3. Boise v. Mattefs Construction 445 – the bidder could rescind the bid because it contained a material clerical mistake. Had to establish: (i) mistake was material; (ii) unconscionable to enforce mistaken terms (iii) mistake not a violation of positive legal duty or result of negligence (iv) party receiving bid will only lose the amount of the mistake (v) prompt notice of the error is given.

iii. MUTUAL MISTAKE – where both parties make a mistake concerning a material fact which is the subject of the K, the K may be rescinded if neither party knew (or should have known) of the mistake. Rsmt 152

iv. Beachcomber v. Boskett – classic mutual mistake case both parties under mistaken impression regarding a fact that was the basis for the transaction. Either party may rescind the contract if the mistake materially alters his position. Neither assumed risk.

v. Lenawee County Board of Health v. Messerly – what kind of mistake gets to count? Bought apartment that ended up being worth a negative amount. Though it was a mutual mistake, the acceptance of the Mistake in value is not a legitimate excuse for non-performance. “as is” meant that one party assumed risk and therefore mistake is not an available defense.

vi. Ayer v. Western Union Telegraph 468 – between buyer and seller, person who picks mode of communication bears liability of risk. Between chooser and Western Union, Western union has to bear fault for mistake. So, If WU screws up and only writes $10 instead of $100, chooser has to perform contract for $10. But, then chooser can sue WU for remainder $90.

iii. Unconscionability – Rsmt 2nd § 208 Defines Unconscionable Contract or Term UCC 2-302

a. Cases: often an “unfair surprise” where unreasonable terms are contained where a reasonable person could not find them, or where if found, could not bargain to have them removed.

b. What the issues are that need to be discussed

i. How the deal was made? Procedural unconscionability. Disparity of bargaining power, whether the terms were hidden,

ii. Substantive unconscionability– the problems with the terms itself.

iii. To have a complete answer – UCC or common law – use phrase procedural unconscionability or

iv. Cutler v. Latshaw 511 – confession of judgment language in contract. 5 pages of standard forms. Only one of them contained the “confession of judgment” which says “You win and I will allow you to go to court and act like my attorney and
tell the court that I say you win.” Court held that this authority had to be clear and explicit on the document. And therefore was not enforceable.

v. **Jones v. Star Credit Corp.** – UCC2-302 says that the clause, as well as the entire contract can be found unconscionable as a matter of law. Here, while fraud isn’t present, or necessary, the disparity of value, inequality of bargaining power, and knowledge by the seller of the purchaser’s limited resources are factors that may render this contract unconscionable. The contract can be denied enforcement if it is unconscionable. Procedural unconscionability

vi. **Weaver v. American Oil Co.** – Δ signed a hold harmless clause. Δ would hold Π harmless and also indemnify Π for any negligence of Π occurring on the leased premises. Δ was liable for all the harm Π caused. Court held that a party with disproportionately greater bargaining power could NOT limit liability for its own negligent acts. Decided that oil had this great bargaining power by considering Δ’s education. Δ’s signature was a mere formality, since Δ didn’t read form and could not be expected to understand its terms. I THINK THIS IS REALLY BAD!!!!!! Substantial unconscionability

vii. **Zapatha v. Dairy Mart Inc.** - UCC 2-302

1. is this covered by UCC
2. element of surprise? Unconscionability – unfair surprise (procedural); oppression (substantive) - Π’s business experience should indicate this is not suprising, nor oppressive. Not unconscionable.
3. Good faith – no evidence that Δ was dishonest about the termination clause.

c. Where it comes from – tend to think about being UCC law, there is 2-302. Williams v. Walker-Thomas – common law incarnation.

i. **Williams v. Walker-Thomas Furniture Co.** – case re: the paying off of rental goods. The company kept a running balance instead of closing out each item once paid. Caveat emptor was modified by UCC 2-302: where a party to a form contract has no real choice as to whether to accept the terms of the contract, due to his economic position relative to the other party, it makes no difference that this party know of the terms; there is not a “meeting of the minds” necessary for the formation of the contract.

2. Illegality makes a K non-enforceable

a. If known At time of K
b. If known after offer but before acceptance
c. If it is illegal after accepted, then it is an impossibility.

d. Cases

i. **Sinnar v. LeRoy 541** – getting the illegal liquor license. court decides to leave parties where it finds them. Π’s punishment for engaging in illegal activity was to not be remedied against Δ’s actions.

ii. **Homami v. Iranzadi 547** – contract must have a legal objective. Court will not assist a Π who must show he has broken the law in order to prove his case. contract to not report income to the IRS enforced.

iii. **Patterson v. McLean Credit Union** - Π’s right to contract was not impaired. The discrimination did not occur during the formation of a contract. Her harassment and firing were not actionable under the statute that she claimed.

iv. **Data Management, Inc. v. Greene** – there was an overbroad restriction against competing in Alaska for 5 years. The courts could either (1) refuse to enforce, (2) apply “blue pencil rule” (3) reasonably alter to make enforceable. Court prefers 3. Rsm. 2d § 184 (2).

1. **Factors in evaluating the reasonableness of a covenant agreement:**

a. Limitations of time and space
b. Is it directed at unfair or ordinary competition
c. Is the benefit to the employer disproportionate to the detriment to the employee
d. Does it protect a legitimate interest of the employer
e. Does the covenant preclude the employee’s sole means of support?
v. *Watts v. Watts* – though statutes apply to protection of married couples, it does not mean that unmarried couples cannot achieve the same remedy through contract. Go Back and Re-evaluate this on Wednesday. P. 566 p. 99

iv. CONSIDERATION

1. The wax seal, way of enforcing obligations without requiring the seal (writ of covenant). Came up with assumpsit – consideration was part of this.  
2. Today – consideration is talked of more in terms of exchange and bargain. In the context of a reason that the courts should not enforce the deal. The concept of consideration is at its essence a concept of exchange  
3. Four step approach
   a. What is the promise in question? One guy saying my promise is not legally enforceable.  
   b. Who made that promise – that will be Δ. This is not legally enforceable against me. Promisor, Promisee.  
   c. What was the promisor asking for in exchange for the promise? What was the promisor bargaining for?

   1. *Kirksey v. Kirksey* 57 - This was a promise for a gift, before promissory estoppel where there was no consideration because it was a gift. Conditions on the gift also do not constitute consideration. She moved and he let her live there. Let her move into the house, pushed her into the woods, then told her to get off. She had no remedy, because there was no promissory estoppel.  
   2. *Langer v. Superior Steel* 58 - Employees restraint from what he had a right to do was sufficient consideration (detrimental reliance). Reliance or detriment is relevant even if the other side hadn’t considered it. Here it was decided that if occurrence of the condition exists then it is considered a bargain. Pay $100 per mo. To not take another job. Consideration  
   4. *Thomas v. Thomas* 67 - motive is not same as consideration, but a peppercorn is enough according to this court.  

   5. ii. Return performance  
   iii. Return promise to perform  
   iv. Forbearance (Hamer v. Sidway) asking in return for you not to do something you have a legal right to do.  
   v. Person that made the promise has to be acting for something in return.  
   vi. Hamer v. sidway – no drink, smoke, gamble – if what the uncle was bargaining for was a return performance, and the nephew doesn’t abide by promise, then there is no consideration for the uncle’s promise. That is easy. But, can the uncle sue the nephew, no because nephew never made any promise. What if nephew makes a return promise, and breaks that promise, then can the uncle sue the nephew. *Watch out for this revised situation, because there are 2 promises.* *Hamer v. Sidway* 79 consideration was valuable because p gave up legal right to drink, smoke and play cards until he was 21.

   vii. Sufficiency of Consideration:  

   1. *Courts do not acquire into the amount of consideration. Peppercorn* – mere peppercorn is enough.  
   2. *Exclusive Sales Contracts: UCC 2-306 (2)* – in a lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.
3. *Wood v. Lady Duff Gordon* - reasonable efforts by one party can be implied. Also evidence that wood made a best effort. This gives consideration and therefore validity to the K.

4. *Apfel v. Prudential Bache Securities* 84 - The question to be looked at with regard to novelty is whether the idea had any value with buyer at the time of sale. The lack of novelty in and of itself does not demonstrate a lack of value.

5. *In re Greene* – the court did not enforce this contract where there was nominal consideration. $1 and “other good and valuable consideration” which did not exist. We don’t even know if he got the dollar. The consideration was empty. MORE

6. *Fiege v. Boehm* - honest intent is required to establish consideration, does not have to be factually true, just thought to be so by both parties

d. Was this thing that was bargained for a detriment to the promissee?, or a benefit ot the promisor?

1. Will almost always be YES, three exceptions : past consideration
2. Pre-existing legal duty rule – doing something that you are already legally obligated to do is not consideration for a promise to pay you more money to do it. Typically avoided by adding something to the contract by avoiding the previously bargained for contract. Autograph party for Derek Jeter. Rsmt 89, UCC 2-209
   a. **Common Law**: Performance or the promise to perform a pre-existing duty does not constitute consideration
   b. **UCC**: An agreement modifying a contract needs no consideration to be binding. Emphasis on good faith and equity of the modification.
   c. *Levine v. Blumenthal* – An agreement to alter the terms of a lease is not enforceable if no additional terms are given. General economic difficulties experienced by Δ are not consideration to support a new promise by Π to release part of debt.
   d. *Alaska Packers v. Domenico* – the agreement to pay more than originally agreed, with no new consideration, is not enforceable. The workers took unjustifiable advantage of the boat owner, so his promise cannot be legally enforced, even though fishermen acted in reliance upon it.
   e. *Angel v. Murray* - Compensation paid under a contract may be increased if additional performance is required.

3. Part payment on a debt – creditor – pay me part and I will release the rest of the claim. Part payment of a debt that is due and undisputed is not consideration for a release. Essentially a part of accord and satisfaction.
   a. Ex. I owe you $500. you just want me to pay something. Look, you pay me $300 right now and I’ll forget the rest. Law says, since you have a legal obligation to pay $500, there is no new consideration when you pay $300.

4. **Substitutes for Consideration:**
   a. Promissory Estoppel (new law, American law) invented by prof. Williston – Restatement the main substitute for consideration. Arrose from cases that presented compelling reasons for enforcement.
      i. Although gratuitous (without consideration), it is the type of promise that might foreseeably induce the promissee to rely on it.
      ii. The promisee did rely on it
      iii. Reliance was reasonable
      iv. As a result of the reliance, the promisee suffered a substantial economic detriment
      v. Injustice can only be avoided by enforcing the promise.
b. Rsmt § 90 – a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

c. Cases

1. **Ricketts v. Scothorn** – “Having intentionally influenced the Plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker or his executor to resist payment on the ground that the promise was given without consideration” grandfather giving granddaughter $2000, she quit work, then went back. Still gets it.

2. **Allegheny College v. National Chautauqua County Bank of Jamestown** – Woman gave charitable gift to school. Before her death, she wrote a letter stating she was taking back her promise. When she died, school sued for the remainder of her revoked donation. Promissory estoppel was not invoked in this case because the court decided that the consideration existed. The college had a duty to use her name in conjunction with the scholarship and the court likened this to consideration. The bilateral agreement can exist even though one of the mutual promises is implied in fact. To help determine whether words in a condition are consideration or state a gratituous promise, consider whether the happening of the condition will be a benefit to the promisor.

3. **Feinberg v. Pfeiffer** – Plaintiff had been employee for 37 years. Offered $200/mo. Upon retirement by owner. Retired one year later, at 57. When Plaintiff was 63, new owner stopped payment. Since she relied on the promise of pension and decided not to work when she was employable, she is entitled to payment. Sufficient reliance by Plaintiff, foreseeable by Defendant. Unjust to not enforce Defendant’s promise. Probably hinges upon Plaintiff having cancer and not being able to work anymore. If that fact was gone, different outcome.

4. **Grouse v. Group Health Plan** – Even though there is a termination at-will employment contract. Elliot told Grouse he had a job. Grouse gave 2wk. Notice, turned down other job, to take this one. He had done all that had been asked. Assume he has a right to be given a good faith opportunity to do the job. Damages should be based on what Plaintiff lost by quitting his job and declining the other offer. Consider potentially misleading actions of health plan.

5. **Cohen v. Cowles** – Plaintiff relied on anonymity and lost job when promise was broken. Defendant agrees that there was not any compelling reason to break promise to Plaintiff. Injustice would result in not allowing Plaintiff to assert promissory estoppel.

ii. What is the promise in question?

iii. Label who made the promise, who is promisor and promissee?

iv. What did the promisee (Plaintiff) do after the promise was made?

v. Was this thing, this action or reaction that Plaintiff did induced by the promise? (the distinguishing factor between promissory estoppel and consideration)

vi. Should the guy that made the promise have anticipated this action? Was it foreseeable? Reasonably foreseeable is a fact question.

vii. Would it be unjust not to enforce the promise.

d. Moral Obligation exception that makes a promise to pay for a benefit previously received legally enforceable. Worker injures self saving employers life, employer says he will pay. Cant make enforceable under consideration. But, some courts will say legal consideration under moral obligation.

e. Past consideration – an oxymoron. Homer simpson can’t bargain for Apu to save Lisa’s life. Already happened. Have to have a bargained for NEW detriment, or benefit.

i. **Mills v. Wyman** - moral obligation is not sufficient consideration to a promise. Plaintiff took care of Defendant’s dying son. Defendant promised to pay, and later took back promise. If the promise is based on a pre-existing obligation, previously rendered inoperative
because of law, a basis is formed for an enforceable promise. “only when party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity”

ii. Manwill v. Oyler – No obligation b/c contract isn’t binding b/c it isn’t in writing and the moral obligation alone will not suffice, if it is based upon an original benefit conferred by a gift. If contract obligation need be no more than a promise, no consideration is necessary. Promises are inherently moral obligations. Farming grazing permits.

1. **Material benefit rule** – where the promisor (Δ) has received something from the promisee (∏) of value in the form of money or other material benefits under such circumstances as to create a moral obligation to pay for what he received, and later promises to do so, there is consideration for such a promise. Rule supposes there must be something beyond a bare promise. I.e. ∏ expected compensation.

iii. Webb v. McGowin – Minority Rule: where Webb saves McGowin. Webb is crippled. McGowin says hewill take care of Webb. McGowin dies, estate stops payment. Webb sues. This is a MATERIAL BENEFIT. Court decides because there is Sufficient Consideration based on Moral Obligation because the benefit conferred was SO substantial. Here McGowin had to take the benefit, where father in Wyman did not? Duty to care

iv. Harrington v. Taylor - ∏ caught descending axe, meant for Δ’s head. ∏ saved Δ’s life, but ∏’s hand was mutilated. Δ promised to pay for injury. Court held there was no valid consideration, that this was a humanitarian act, voluntarily performed, not consideration at law. Duty to aid

b. **Statute of Frauds – Lack of writing (no easier question to ask)**
   i. Common Law: MY LEGS – must be in writing
   ii. UCC: Relaxing of standards: Indefinite contracts are outside the statute so long as they could be completed within the year; goods over $500 are outside if they are specially made.
   1. Cases
      a. C.R. Klewin v. Flagship Properties, Inc. 195 - It could have taken over a year but the explicit terms of the contract did not designate it, nor was it absolutely found within the necessary construction therefore the contract is treated as one of indefinite duration.
      b. North Shore Bottling co.v. C. Schmidt & Sons Inc. 202 - the present agreement was susceptible to performance within a year and therefore outside the statute of frauds
      c. Mason v. Andreson - the necessary construction of the K designated that the agreement MUST be for longer than one year. Only case where the necessary construction of the physical aspects of the contract is considered. The loan repayment was occurring at such a rate that the contract would, by nature, HAVE to take longer than a year and therefore fell under the statute of frauds.
      d. Compliance with the Statute: Crabtree v. Elizabeth Arden 210 - if memos were not contained in one document, the court could use parol evidence (i.e. oral testimony of the party to be charged) “permitting the signed and unsigned writings to be read together, provided that tthey clearly refer to the same subject matter or transaction.” 2-208
      e. DF Activities v. Brown 218 - (FLW chair) additional discovery is prohibited whenever a D raises a statute of frauds defense and submits a sworn denial that he or she formed an oral contract with the P. exercise care in creating contracts and he has no grounds for suing b/c he didn’t exercise enough care in the formation of potential K and for him to be able to sue would be putting a great burden on the P for an agreement that she may or may not have consented to. Higher bar for agreement to a contract of this sort and majority opinion should not
   iii. general rule is that oral agreements are okay.
iv. notion that certain types of agreements that courts are concerned about either subject matter or susceptibility of fraud. MY LEGS. Therefore you need some proof that the deal was made. *Within the statute of frauds*. MY legs deals are within the statute of frauds.

1. M- marriage
2. Y- Personal services contracts (only those personal services contracts that are not capable of being performed within a **year**) if task specific there is no statute of frauds.
3. L- Land - real estate regardless of dollar amounts has a termination of greater than one year. Leasing for exactly one year – not within statute of frauds.
4. E- executory
5. G- Sale of **goods** and price is $500 or more
6. S- sureties (BONDS)

v. We are looking for *satisfying the statute of frauds*

1. Primary way to do this is by a writing
2. In order for writing to satisfy statute of frauds, **all material terms must be in writing.**
   a. Who are the contracting parties?
   b. What did each agree to do?
3. If sale of goods for more than $500 then all you have to have is the quantity information. Writing does not have to have all the material terms.
4. Look at who signed the writing –
   a. common law unless it is a sale of goods question with UCC, then the rule is that in order to satisfy the statute of frauds, it has to have been signed by the Δ, the person whom the agreement is being enforced.
   b. UCC Statute of Frauds special rule – 2-201 over $500 sale of goods.
      i. Essnetially silence as assent: Both guys are merchants and the Δ received a writing from ∏ merchant and Δ never responded. Only has to be signed by the ∏. If you don’t answer the letter within 10 days of the receipt then you are considered to be on board. Answer the damn letter exception.

vi. Non-compliance with Statute of Frauds:

1. Maj. K is voidable not void
2. Min- defense to formation; K is void.
3. If one parties relied on another party’s waiving of statute of fraud requirement, they cannot use S of F as defense.
IV. What is it that was the deal? (what did we agree to?)
a. Parol Evidence Rule - All about the importance of the written agreement. The primacy of written agreement. Effect that a written agreement has on previous agreements.
   i. Common Law: All evidence external to the writing is excluded; the writing trumps any previous oral agreement
   ii. UCC: The UCC rejects the assumption that just because the writing is final on some issues it is final on all; the UCC also allows in evidence about the course of dealing between the parties. UCC 2-202
   iii. Policies furthered by the parol evidence rule (J. Traynor in Masterson v. Sine)
      1. Written evidence is more accurate than human memory
      2. Fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts
      3. Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled and that the rule should therefore be based on the credibility of evidence.

iv. Parol Evidence???
v. Integrated writings and the Parol Evidence Rule
   1. Mitchell v. Lath 578- one oral, one written agreement. Real estate contract; orally agreed to move ice house. Court held that this oral agreement could not be integrated b/c terms would likely have been included in the terms of written contract if intended. Test for determining if oral agreement can vary the written contract
      a. Agreement in form must be collateral, serving to support or corroborate.
      b. Must not contradict express or implied conditions of the written contract
      c. Must be one that parties would not ordinarily expect to embody in writing. (not so clearly connected to principal transaction as to be considered part and parcel)
   2. To show the writing was only a partial integration: the proponent of the parol evidence may claim that the parties intended the writing as the final expression of their agreement only on the subjects covered therein. In such a case, the integration would be only “partial” and the rule would not bar parol evidence on matters not covered by the writing”
      a. Masterson v. Sine 582 – to determine integration ask whether the parties intended their writing to serve as the exclusive embodiment of their agreement. Parol evidence has been admitted to prove the existence of a separate oral agreement to any matter on which the document is silent, and not inconsistent with its terms. UCC said it would exclude evidence if additional terms certainly would have been included in the document. Use Rstmt to determine if agreement might naturally be made between 2 parties of this nature. Consider the formalized structure. The court decided that extrinsic evidence about option to exercise should have been allowed, because the evidence is of the nature that it would have naturally been made as a separate agreement and not have “certainly” been included in the deed. Rstmt 1 § 240 1-b
   3. Alaska Northern v. Alveska Pipeline 587 – Court decided that the parol evidence rule restricts external evidence that contradicts the integrated terms of a written contract. Companies signed K with agreement to come to price term later. Committee reviewed later price term and “turned down contract” ∏ sued b/c not within Δ’s power – had to accept, just waiting to fix price. The said that the committee had full right of review (as stated in the full written contract), but that ∏ had unreasonably interpreted something different from the parol evidence.
   4. To prove the existence of a condition precedent to a written agreement: parol evidence is also admissible to prove a condition precedent (written or oral) to the legal effectiveness of a written agreement, as long as the condition does not contradict the express terms of the agreement.
      a. Luther v. Johnson – a written contract may be conditioned upon an oral condition precedent, and parol testimony to prove such a condition is admissible if the K is silent on the matter.
         i. Parol testimony is admissible when:
            1. contract says nothing about the conditional oral agreement
            2. testimony does not contradict or is not inconsistent
            3. and understood that parties did not intend writing to be complete statement of their transaction
   5. Parol evidence – evidence of some agreement made prior to this writing, does not necessarily mean oral. Could have a letter. Earlier.
6. **Integrated agreement** – written and final. Intended by the parties to be the final agreement.
7. **Complete integration** – a writing that is final and complete
8. **Partial integration** - writing final as to what it covers, but it may not be the full deal.
9. **Merger clause** – short hand way of describing contract provision that says, this is the complete deal.

vi. Where you have an integrated agreement, parol evidence can never contradict it. If the writing says, K to sell blackacre for $1000, court will not consider parol evidence that the deal was really to sell Whiteacre for $600.

vii. What if parol evidence doesn’t contradict, but simply adds terms to it. Written agreement for sale of Cadillac for $400. Come in and say “part of the deal was that car was to be cleaned and waxed. I have a letter.” Not contradicting anything, just saying there is more to it than the writing. When will the court consider this part of the evidence. Court will ask – is this the full deal – is this a complete integration? Always a question for the court.

viii. Even if it is a complete integration, parol evidence can be used to explain the ambiguous terms. Chicken case.

b. **Contract Interpretation (levels of persuasiveness)** – if K is ambiguous, or becomes such in performance, parol evidence is admissible to determine parties’ intent. If too ambiguous, no way to determine intent, may be unenforceable. Trend is toward allowing more parol evidence. Mandatory v. Discretionary p. 600 in book
   1. *Pacific Gas v. G.W. Thomas & Rigging* - If the language of the contract is susceptible to the interpretation argued for by admission of extrinsic evidence then parol evidence will be allowed. *if the courts are too liberal in allowing “interpretation” could possible vary or contradict the true meaning. Questionable ruling by stating that obligations arise from intentions and not contractual language opens door up for every contract to be attacked by parol evidence. Look at the parties past relationship.
   2. *A Kemp Fisheries v. Castle & Cooke* – If language of the contract is Not reasonably susceptible to interpretation suggested by the Δ then parol evidence will not be admissible. Integration was intended, shown in letter. Test of admissibility of extrinsic evidence: whether the offered evidence is relevant to prove a meaning to which the language of the instrument is not reasonably susceptible.” Court held K was not ambiguous.
   3. *Frigaliment v. BNS International* - chickens. Court is hesitant to narrow the interpretation of language where there is a common definition. The buyer or ∏ has the burden because they are arguing for special meaning, different from industry definition. No previous contracts and FDA mentioned in the K. Court can look at outside sources such as government or industry standards to determine meaning.
   4. *Gray v. Zurich Ins. Co.* – under policy Δ was obligated to defend ∏ in any suit alleging bodily or property damage. Also small disclaimer relieving Δ of liability if ∏ intentionally acted. Courts would not enforce the Δ’s exclusionary clause because it was not “conspicuous” or “plain and clear.” Went against the reasonable expectations of ∏, who was the beneficiary of the insurance. Also considered the unequal bargaining power, and inability of ∏ to change these elements of a contract.
      a. Adhesion Contract – boilerplate contract that implies no bargaining power.
      ii. Course of performance - All about what these very people have previously done in this very deal. Very persuasive form of extrinsic evidence as to what the deal means.
      iii. course of dealing – these very people have previously done under earlier similar deals. Same people, similar but different deal.
      iv. custom in usage – different people have done in different but similar deals

c. **Gap Fillers**
   i. Common Law: Courts are reluctant to fill gaps and indefinite agreements or agreement to agree are unenforceable. Rsmt 105
   ii. UCC: Protect against invalidation. Contracts for sale will not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. 1-203
   iii. Duty of Good Faith – where parties have not specifically defined identified risks or desired performance standards, and left this up to the parties to exercise discretion, a duty of good faith is implied in exercising this discretion.
      1. *Centronics v. Genicom*765 – cannot impose a duty of good faith in addition to particular terms. The good faith action for this issue could have been bargained for. The good faith imposes an
additional restriction to release funds from escrow, when the contract says they will only be released when there is a final decision made.

2. **Omni Group v. Seattle** - Potential buyer wants to view a feasibility report, and his purchase is conditioned upon his satisfaction. Seller backed out b/c they argued they weren’t burned anyway. Promise is not illusory b/c it depends on a condition precedent. **Condition is governed by a duty of good faith;** not illusory. The promisor’s duty to exercise judgment in good faith is an adequate consideration to support the contract. The satisfaction is a question of fact.

3. **Neumiller Farms v. Cornett** – wont accept potatoes unless they are satisfactory. Term “satisfactory” has to be applied with good faith, honesty, reasonable commercial standard. The good faith req. on applying satisfactory standard is a gap filler to allow the parties to know their obligation.

4. **Reid v. Key bank of Southern Maine 778** – Lender Liability: the demand note sent to notify loaner of desired full payment immediately has a good faith covenant implied in it. UCC 4-103 –established a standard of good faith and ordinary care for bank accounts.

5. **Feld v. Levy & Sons 787** – Good faith includes honesty in fact and reasonable commercial dealings. An output contract is enforceable because it is held to be all the seller can output in good faith. Good faith cessation of production terminates any further obligations. Must have losses from continuance which are more than trivial. – Q of fact. UCC 2-306

iv. Case law: common law:

1. recognizes as a gap filler that there is an implied duty of good faith

2. **Wood v. Lucy Lady Duff Gordon** (Cardozo) – in determining the consideration given by Wood, the court said that through formation of the contract there was an implied duty of good faith. Court construed contract to fit reasonable commercial expectations of the parties.

v. UCC 2-314 & 315

**Implied Warranty of Merchantability**

1. An express warranty is created when:
   a. Affirmation or fact about goods that is part of the basis of the bargain.
   b. Description of goods which is part of the bargain
   c. Sample or model which is part of the bargain
   d. Doesn’t have to explicitly say “warranty” or “guarantee”, nor does specific intention to create a warranty have to exist.

2. **Implied warranties:**
   a. Warranty is good from a merchant if merchant deals in those goods
   b. When buyer is relying on seller for proper goods to meet a particular purpose, there is an implied warranty that the goods shall be fit for such purpose.

3. If sale of goods – rich source of terms to fill the gap

4. Two important
   a. Implied obligation of good faith – made a part of the performance of any sale of goods contrat
      i. Good
   b. Implied warranty of merchantability – cannot equate merchant w/ business person.
      i. Person who regularly sells good of that kind and sells something that turns out to be defective
         1. Conviser – goes buys more gold chains. No term about quality of chains. Has there been a breach of K when his 7 chest hairs turn green? Yes. Not if he buys a car thru jewelry store.
         2. Gap filler – sale of goods, jewelry store,
         3. Check to see if other gap fillers.
         4. **Henningesten v. Bloomfield Motors** - court will not uphold provision in contract exculpating seller from liability. It was insufficient to let a reasonable person know they were releasing all claim to personal injury claims. Unequal bargaining power b/c there was no competition as all car dealers had the same provision. Void b/c against public policy protection for consumers.

5. **Murray v. Holiday Rambler, Inc.** - ’s bought motor home, had lots of problems. A never refused to repair, but ] wanted to revoke acceptance. UCC 2-715 Right to revoke acceptance, right to recover consequential damages. The limited remedy clause failed its essential purpose when the
object is so substantially damaged as to not conform to the contract at all. Since the buyer needed the mobility associated with a vehicle, the damages are the loss of use of the inoperable vehicle.
V. Once we know the deal, did anyone not do what he agreed to do? Yes. Otherwise no contracts question.
   a. Who did not do what she agreed to do?

VI. If someone didn’t do what he agreed to do, is there any legally recognized excuse?
   a. Five excuses for not doing what you agreed to do.
      i. **Conditional** – there is an unmet condition of performance.
         1. If, provided that, so long as. Watch for words of condition in the fact patter.
         2. If short of phrase: on condition that, add a statement to answer that says if there is any doubt about whether the K language creates an express condition, then the preferred interpretation of the courts is that this is not a condition. If determine that there is language of condition, the general test is that conditions must be strictly complied with. *Reding pipe contract said this was not express condition.*
      3. What constitutes a valid condition?
         a. *Omni – Group v. Seattle –First* – Potential buyer wants to view a feasibility report, and his purchase is conditioned upon his satisfaction. Seller backed out b/c they argued they weren’t burned anyway. Promise is not illusory b/c it depends on a condition precedent. Condition is governed by a duty of good faith; not illusory. The promisor’s duty to exercise judgment in good faith is an adequate consideration to support the contract. The satisfaction is a question of fact.
      4. Conditions
         a. *Dove v. Rose Acre Farm 634* – employee agreed to work 5 full days for 12 weeks to get the bonus. He missed the bonus by 2 days and sued for recovery because he says he completed the work. Court said that despite dove’s illness, personal services contracts, and especially bonuses, are made on the basis of the individual being there. Sickness operates as a discharge or termination or excuse for non-performance, but none will be paid. Impossibility of performance does not require recovery. Dove knew what he was getting into.
         b. *Wal-Noon Corp. v. Hill 638* – when you’ve had an adequate opportunity to contract, we will not implement a quasi-contract analysis. Failure to give notice of a need to repair precludes recovery when the notice requirement is implicit in the lease agreement. Leasee fixed roof before telling owner that it needed fixing. Then asked owner to pay for it. Owner said no b/c it was in the K what you should have done.
         c. *Jacobs & Young v. Kent* – minor failure to perform the condition will be excused. Used other pipe instead of reding. Had to pay difference in value of house.
         d. *In re Carter 649* – keeping money in an escrow account until the deal is done. The condition is that the money wouldn’t go to the seller unless the financial condition was as good or better than before. Difference between conditions and warranties?????? Courts will not treat a stated condition as a warranty for performance. Condition allows you to walk if its not performed, unlike warranty, where if it is not performed, you have a breach. If you move forward with non-performed condition you lose your right to complain. Warranty – probably have to go ahead and move forward, you cant just leave the deal.
      5. Excuse of Conditions
         a. *Clark v. West 654* – if one side ignored a condition, and the other side knew it but moved forward anyway? The non-violating side has to go along with the contract b/c they induced reliance on the part of the writer that he would be paid even though he was in violation b/c they knew it and SAID he would be paid. The writing of the book was enough consideration for either $6 or $2. therefore, D can waive the condition. Remanded so trial court could hear that Δ expressly waived the condition. Δ’s silence and acceptance alone would not constitute a waiver.
         b. *Aetna casualty v. Murphy*– Absent a showing of material prejudice, an insured’s failure to give timely notice does not discharge the insurer’s continuing duty to provide insurance coverage. Strict compliance with written contracts may be excused to avoid a disproportionate forfeiture. B/c it was an insurance contract, contract of adhesion, the terms were not really bargained for. Other ways to overcome the disadvantage that
Chubb encounters here. This failure to give notice is not a breach of K, but a defense for the insurance company.

ii. **My non performance is excused because the other party breached.**

1. **Material Breach Rule** – when will one parties non-performance excuse the other.
   a. *O.W. Grun v. Cope* - If the activity is really important, treat as a condition, if not, treat as substantial performance. Any material breach will preclude the breaching party from claiming substantial performance. Put on a streaky roof. If done correctly, would not have been that way. Breach cannot be tolerated if it frustrates the purpose of the Contract.
   b. Ex. H hires P to paint house. The house is supposed to be painted 2 coats white Sherwin-Williams paint. Common law contract. Turns out P is a big fan of prince. Goes out and paints house purple. You should not have to pay for this big screw up. Material Breach. *What if P uses Glidden paint instead*? Ist here a breach? Yes. Should you get house painted for free? No. Not a material enough breach. In applying common law rule, we need to know 2 exceptions to the material breach rule.
      i. Language of condition exception. – if K said, I will pay you $1000 for painting house white, on the condition that you are using sw paint – then it has to be strictly complied with.
      ii. Divisible contract exception – ex. H has 20 room house. H hires P to paint the 20 rooms for $4000. P only paints 3 rooms. Ought to be able to recover some – go to quasi contract. Under common law, his material breach excuses H for paying anything under the contract. Changed facts: H hires P to paint 20 identical apartments for $200/apartment. Now we have a divisible contract.
         i. *Lowy v. United Pacific* – If substantial performance for a part of the contract has been performed, then you can get payment for that part. Has to be somehow divisible though. Δ was hired to do 3 things to property. After 98% complete with first, a dispute arose. Has to be in compliance with rules of divisible contracts to apply this remedy.

c. Three types of these contracts
   i. Independent – can’t allege counter breach; if the parties intend that performance by each of them is in no way conditioned upon performance by the other.
      Exchange promises for promises, not the performance of promises for the performance of promises.
   ii. Conditions and dependent
      1. *Kingston v. Preston 669* – you doing your part is a condition to my duty. So, I don’t have to do mine because you didn’t do yours.
      2. *Goodison v. Nunn 671* – Contract where Π was going to buy land for 210 pounds. LD clause w/ recover of 21 pounds if breach. Δ refused agreement. Π failed to tender performance before bringing this action. Δ’s duty to pay arose when Π performed. Π never performed, so Δ never had to pay. A constructive condition exists that a party must perform before bringing suit for breach.
      3. *Palmer v. Fox 672* - If you are treating promises as conditions, you are excused if the other side cannot deliver, but you still have to show that you could have.
   iii. Mutual conditions to be performed at the same time.
   iv. Avoiding Forfeiture: courts will often construe contracts to avoid a forfeiture if at all possible. Rsmt. 2nd § 241 extent to which the party failing to perform or to offer to perform will suffer forfeiture. Courts will excuse an agreed express condition if there would otherwise be an extremely harsh forfeiture.
      i. *Jacobs & Young v. Kent* - a forfeiture of this contract would result in extremely harsh result, the economic waste of replacing all the very good pipe, just for Reading pipe.
      2. *Implied in law conditions can be satisfied by substantial performance.*
3. In cases where risks of forfeiture are less extreme, courts assert: “a contracting party ought not be forced to accept less than he bargained for”
   a. **UCC 2-601 Sale of goods** - The place where Article 2 differs from common law. Has the Perfect Tender standard. B orders 100 green widgets. Y sends 100 yellow widgets. B doesn’t have to pay. Any time the seller of goods is less than perfect.
   b. Two exceptions to **Perfect Tender** standard
      i. **Cure** – in limited situations, to require the seller to be perfect, because such a demanding standard, will probably give seller a second chance. Watch for situation in which the seller sends the wrong stuff early. Question will likely give you the delivery deadline
      ii. **Installment sale contract** – where the parties in their agreement have agreed that there will be deliveries in several separate installments. Then, a problem with one installment, so long as it is not a substantial problem, will not excuse payment. Rationale is that one minor problem can be adjusted in future installments.

4. **Quasi-Contractual Analysis** –
   a. **Majority** – where part performance is not substantial, no recovery at all.
   b. **Minority** – where part performance and not substantial performance, recovery will be allowed to the extent of the reasonable value of the benefits conferred less any damages arising out of the breach.
   c. **Britton v. Turner** - If substantial performance does not apply, the court can implement a quasi-contract analysis. $\Pi$ worked 9 mo. Of year contract. To deny partial recovery, means a windfall for the employer (\Delta).

5. **Effect of Willful Breach** – no recovery granted to a willful defaulter. Minority view says that courts should be more concerned with preventing unjust enrichment, then punishing the contractor for his breach.
   a. **Maxton v. Lo Galbo 699** – a vendor in real estate is entitled to retain the down payment when a purchaser willfully defaults. The way to get around this is to implement a different contract.

iii. **Anticipatory Repudiation** – I am not doing my part because the other guy said he wasn’t doing his. I am not going to pay. Called anticipatory because it was said before the performance even happened. An excuse of non-performance, gives a right to stop performance and sue immediates. Gives rise to an Immediate cause of action. Rsmt 250-257 and UCC 2-610
   a. Need to stop performance to mitigate further expenses.
2. Hochster v. De La Tour 815 – courier has suffered an opportunity cost. He could have sold his services elsewhere. So, he can sue upon the employer’s anticipatory breach. Or he can wait until the date of performance. Most jurisdictions will still hold that the $\Pi$ has a duty to mitigate his damages, by looking for other ways to perform the contract.
3. Taylor v. Johnston 819 – If you are going to sue before date of performance, then you must sue before the party who anticipatorily repudiated undoes their breach. They can still go back and correct if you have not sued. Voluntary disablement- conduct making it appear that a party is unwilling to perform. anticipatory repudiation – words manifesting intent not to perform.
4. **AMF v. McDonald’s 828** – a party, with reasonable belief that a contract would not be performed, requested assurances and received none. The court would not enforce the contract. UCC 2-609 – reasonable grounds for insecurity. Requires a written demand, but decided to not be so strict in interpretation.
5. **Plotnick v. Pennsylvania & Refining Co.** – A material breach is required to excuse performance. \Delta’s failure to pay ONE part of the installment, does not constitute a material breach such that $\Pi$ can cancel any further performance on his part. Partially performed installment contract. UCC 2-612
iv. Later Agreement

1. Novation (later agreement) – BOTH parties agree to a new agreement. Someone’s later performance is excused because they BOTH agreed for someone else to do it.
   a. Modification: Angel v. Murray - Compensation paid under a contract may be increased if additional performance is required. The contract was modified to include extra homes to pick up trash from.
   b. Roth Steel v. Sharon Steel 792 – A court must look to the true intent of the parties when determining whether to enforce the modification. Under UCC 2-209 no new consideration is needed. But it is limited by the obligation of good faith:
      i. Was the party’s conduct consistent with reasonable commercial standards of fair dealing in the trade?
      ii. Were the parties in fact motivated to seek modification by an honest desire to compensate for commercial exigencies?

2. Accord & Satisfaction (later agreement)
   a. Common Law: Once you eposited the check or accepted the goods (performance), the contract was complete and no disputes would be entertained.
   b. UCC/Rsmt: UCC gives parties the option to contine delivery, payment, acceptance, etc. “without protest” and “under protest” when there are ongoing disputes
      i. Mutual Termination of Contractual Relation:
   c. Not a change in who is going to do it, it is a change in who it gets done. Promise to repay $100.. Later agree to clean someone’s house instead of repaying $100 dollars.
   d. Agreement to clean the house instead of pay the money is the accord. My actual cleaning of the house is the satisfaction.
   e. AND – in order to have this excuse, we need both.
   f. Unilateral Termination of Contractual Relation:
      i. Seubert v. McKesson – employment for indeterminate period of time could be terminated without any notice. Even though this is what he was told, it is invalidated by the written policy specifying conditions under which employees will be terminated. The contract between the two parties was not intended to be the entire deal between the two parties.

v. Impossibility / Impracticability - UCCand Frustration of Purpose – something happened after the deal

1. Cases
   a. Existing Impracticability – Rsmt 2nd § 266 (1) a party has not duty to render a performance which was impracticable at the time of contracting if the parties did not know at the time that is was impracticable. It is voidable if based on a mutual mistake 152. Either theory is applicable in a given case.
      i. Mineral Park Land co. v. Howard – an uncontemplated existing condition rendered performance impracticable. Most of the gravel was underwater. No one knew.
      ii. US v. Wegematic 718 – Basic engineering difficulties, which prevent timely delivery, do not constitute commercial impracticability. Here, having the technology was a basic assumption for the contract, so it was not necessary for the language to be found in the K. UCC 2-615
   b. Supervening Impracticability – rsmt 2nd § 261 OR UCC 2-613, 2-614 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.
      i. Taylor v. Caldwell – site of contract, music hall, burnt down before the concert. The party may be excused from the performance of a contract when accidental destruction of the building, which was the subject of the lease, occurred. Rsmt 2nd 263 says that destruction of a specific thing which was necessary for the performance of an event the nonoccurrence of shich was a basic assumption on which the K was made.
      ii. Canadian industrial alcohol co. v. Dunbar Molasses – court says they will not let off the person who did they choosing. They should be responsible for choosing
poorly. The failure of a seller’s supplier does not amount to impossibility of performance. Δ didn’t even have a contract with the molasses refinery to secure its position.

iii. *Dills v. Town of Enfield* – A contractual obligation may NOT be excused if the impracticability of a separate obligation makes performance of the first a futile and useless act. Rsmt 261

1. **Doctrine of Impracticability**- some conditions cannot be met because of unforeseen circumstances (only have to show that one is met)
   a. An event that made the performance impracticable
   b. The nonoccurrence of the event was a basic assumption on which the contract was made
   c. The impracticability resulted without the fault of the party seeking to be excused; canadian
   d. The party has not assumed a greater obligation than the law imposes.

iv. *Kaiser-Francis v. Producers Gas Co.* – market failure does not have the *force majeure* – not unforeseen consequence

1. Force majeure clause – intended to protect against risks beyond the ordinary contract risks. A fixed-price contract is intended to allocate the risk of a market rise to the seller (the buyer gains) and the risk of a market drop to the buyer (the seller gains).

   c. **Frustration of Purpose** – where the bargained for performance is still possible but the purpose or value of the contract has been totally destroyed by some supervening event, such frustration of purpose will discharge the contract. Required elements:
      1. Some supervening act or event
      2. That is not reasonably foreseeable at the time the contract was entered into
      3. The avowed purpose or object of the contract was known and recognized by both parties at the time they contracted
      4. The supervening act or event totally or nearly totally destroys the purpose or the object of the contract.

   ii. Common Law: Performance is excused if the entire purpose of the contract is gone/implied condition.

   iii. UCC: Modern courts rarely grant excuse for frustration – usually impracticability

iv. *Paradine v. Jane* – still had to pay because the duty was contractually created by the parties, not created by law. The invasion of his leased territory was not considered frustration of purpose.

v. *Krell v. Henry* – the contract to use flat for 2 days to see coronation was excused due to frustration of performance when the king cancelled due to illness. The purpose of the K was foreseeable, but the frustration was not. Purpose of the K may be implied form extrinsic sources (parol evidence)

vi. *Washington State Hop v. Goschie*. - purchased rights to be in hops business; immediately after purchase, the government lifted permit requirement. The termination of this government program constituted frustration of purpose. Rsmt 2nd § 265. Frustration must be so sever that it is not within the risks assumed under the K.

2. Time sequence – the deal was made and then something happened.

3. What happened was totally unexpected, unless totally unexpected it is unexcused

4. Had either party assumed the risk of the unanticipated happening. Sentence *if either party had assumed the risk, then*

5. Did this event make the performance impossible? Taylor v. Caldwell – concert hall burned down.
   a. Favorite variation: home owner contracts w/ builder. When 90% complete it burns down. Do we have a post contract occurrence? Yes. Unforeseen. Neither party assumed. Look at realationship between unforesseen occurrence and the breach. Is it still possible to build a house? Yes, and therefore not allowed as a defense for builder.
   b. Some situations where the relationship b/w the two is so burdensoeme that the performance is excused. Tends to be a judgment call with the exception of –
i. If later unforeseen occurrence that makes it more expensive, that is not impossibility, it is the tough luck rule.

vi. Frustration of purpose is different from or similar to impossibility

vii. Prevention, Hinderance and Duty of Cooperation – when entering into K, implied duty of good faith and non intereference.
1. Element of “wrongfulness” The interference must be “wrongful”- not necessarily malice, or bad faith. The other party woul not have reasonably anticipated such conduct, whatever its motivation. A practical approach by courts.
   a. Patterson v. Meyerhofer 940- a party in a contract implicitly agrees not to interfere with the other side’s performance. Δ agreed to purchase land from Π. Π planned to acquire the land, but Δ bid against Π in the sale, after repudiating the contract. Π sued to recover the $620 in damages. Π could have purchased property at same price for Δ, therefore Π should get difference between what Δ purchased it for, and the original contract price.

2. Extent of hindrance -
   a. Blanford v. Anderson 939 – andrews boliged to procure a marriage b/w blanford and palmer at or before special feast. Blanford called potential wife a whore and made threats. Blanford sued for his compensation and Andrews defended by stating that blanford had hindered his performance. Court stated that Andrews failed to attempt to procure the marriage and he may have done so despite blanford’s acts, so he had to pay blanford the 80 pounds.
   b. Iron Trade v. Wilkoff Co. 942 – unintentional interference on the part of the Δ meant that Π was still responsible for counterperformance of contract, even though the Δ’s interference was making it more difficult. Δ’s conduct would have had to make performance Impossible for Π to be released from their obligations.
   c. Billman v. Hensel 946 – a party to a contract must make a good faith effort to perform a condition precedent to his duty to perform. Cannot rely on the existence of a condition precedent to excuse his performance when he prevents performance of the condition. Δ’s asking about ONE bank loan, and making no formal application, was insufficient in an attempt to secure financing. Homeowners had taken off market and stopped showing on the reliance that Δ was acting in good faith to secure financing.

Does anyone other than the two who made the deal have legal rights because of the deal?

Bailey v. West - determine where this goes.