OUTLINE FOR KIEFF’S CONTRACTS CLASS

- **Auction** – Public contracting: Sealed bidding must be utilized if (1) time permits, (2) the award will be made on the basis of price and other price-related factors, (3) it is necessary to conduct discussion with the responding sources about their bids, (4) there is a reasonable expectation of receiving more than one bid.

- **Auction** – Unfolding: (1) prepare an invitation to bid (IFB), (2) IFB is distributed or publicized widely enough, (3) bidders prepare and submit their bids, (4) bids are open and evaluated by the government, (5) award is made.

- **Interpretation:** The standard criterion for determining the existence of requisite assent in a contract is objective. One is bound by the reasonable impression created in the mind of the other party. While the avowed purpose of interpretation is the ascertainment of the contracting parties’ intention, it is not actual subjective intention which is sought, but expressed or apparent intent. Primarily, this involves consideration of the language used, be it oral or written, taken in the context in which it was found.

  - In an adhesion contract, ambiguous terms must be treated in a way that a reasonable consumer would so expect.

  - An express condition is an express statement in the contract providing either (1) that a party to the contract does not come under a duty to perform unless some state of events occurs or fails to occur; or (2) that if some state of events occurs or fails to occur, the obligation of a party to perform one or more of his duties under the contract is suspended or terminated. An express condition is a provision whose fulfillment creates or extinguishes a duty to perform on the part of the promisor under a contract. Conditions precedent must be satisfied before a contractual duty of this type comes into existence; the effect of the occurrence of a condition subsequent is to extinguish or discharge a duty.

- **Excuse of Conditions**

  - The law of conditions fosters a policy favoring freedom from contract. If an express condition precedent has failed, the promisor has a defense and may be discharged from the contract without any obligation to compensate the promise for part-performance.

  - The condition turns out to be immaterial to the promisor and the promise has relied or conferred a benefit on the promisor, discharging the promisor may provide a severe test for the “freedom from” contract policy.

  - A way to temper forfeiture is to excuse the condition on some ground: (1) An agreement by both parties modifying the contract to discharge the condition; (2) Conduct by the party for whose benefit the condition was made that “waives” the condition; (3) Changed circumstances that make compliance by the promise with the condition impracticable; and (4) Discharge by the court.

- **Excuse of Express Conditions:** Normally, there is no obligation to perform a contractual duty unless all applicable express conditions have been fulfilled. In some
cases, however, a condition may be excused, so that a duty must be performed despite the fact that the condition has not been fulfilled.

- **Waiver:** A party by words or conduct may waive his right to insist on the fulfillment of a condition upon which his duty of performance depends.

- A contract term that prohibits a non-written modification can be waived without writing at common law.

- **Effect of an anti-waiver clause:** anti-waiver clause is relevant but not dispositive.

- **Impossibility:** Impossibility or impracticability excuses the fulfillment of a condition if fulfillment of the condition is not a material part of the agreed exchange and forfeiture would otherwise result.

- Think about who is the better risk bearer and least cost avoider.

**Types of damages:**
- Expectation – net gains prevented by the breach
- Reliance – out of pocket expenditures associated with the performance.
- Restitution

**Four types of enforceable promises or contracts**
- Promise plus consideration
- Promise plus antecedent benefit
- Promise plus un-bargained-for reliance
- Promise plus form.

**Types of enforceable promises or contracts (4-5)**
- **Party based theories:**
  - Will Theories – commitments are enforceable because the promisor has “willed” or chosen to be bound by his commitment.
  - Reliance Theories – Contracts are an effort to protect a promisee’s reliance on the promises of others. Basis obligation of detrimental reliance
- **Standards-based theories:**
  - Efficiency Theories – legal rules and practices are assessed to see whether they will expand or contract the size of the pie.
    - 3 conclusions from negotiating costs are possible: (1) we don’t know whether exchange is worthwhile, (2) Government may be responsible for preventing exchange and appropriate response is to eliminate the inefficiency, (3) Alternatives: (a) form a new company by merging, (b) combine products into a single package.
• Substantive Fairness Theories – assumes value can be found by which the substance of any agreement can be objectively evaluated.
  
  o Process-based theories:
    
    ▪ Bargain theory of consideration – Where consideration is present, an agreement ordinarily will be enforced. Where there is no consideration, enforcement is supposed to be unavailable.
      • Restatement 2d § 71: (1) to constitute a consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise.

  "Estoppel"

  o Elements for equitable estoppel: (1) a representation or concealment of material facts, (2) representation must be made with knowledge of the facts, (3) party to whom it was made must have been ignorant of the matter, (4) must have been made with the intention that the other party should act upon it, (5) the other party must have been induced to act upon it to his detriment.
    
    ▪ Can only be used as a “shield” or defense.
  
  o Promissory Estoppel: (Restatement § 90) – A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise 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. You have to show why there was reliance and why the reliance was reasonable.
    
    ▪ Used as a “sword” in a cause of action for damages.
    
    ▪ Factors that are relevant: policies implicit in the transaction type, the reason for the non-performance, the degree of disproportion associated with enforcement of the promise, and any historical patterns of enforcement associated with the transaction type.
    
    ▪ Damages = amount of reliance

  A contract has been performed if there is:

  o Offer
  o Acceptance
  o Performance/willingness to perform
Whether there is a BARGAIN

- If performance or a return promise has been bargained for? ✓
- If performance or a return promise is coincidental? ❎
- If performance or return promise is bargained for it is sought by the promisor in exchange for his promise (and v.v.) ✓
- If promise must be either an act other than a promise, or forbearance, or creation modification, or destruction of a legal relation ✓
- If performance or return promise may be given to promisor or to some other person (3rd party). ✓

Whether there is CONSIDERATION…

A valuable consideration may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

A promise without consideration is just a promise (except in some places, where charitable subscriptions are binding).

- If consideration made in good faith? ✓
- If consideration conscionable? ❎
- If it has value? (i.e. is it not a peppercorn?) ✓
  - Note, there are some non-peppercorn jurisdictions
- If there a pre-existing duty? ❎
- If there is reliance on a promise to the promisee’s detriment? ✓

Whether an agreement is BINDING…

- If there consideration? ✓
- If there isn’t consideration, would non-enforcement lead to an injustice upon the promise? ✓
- If the promise is disproportionate to the benefit? ❎
- If the promise conferred as a gift? ❎
- If the reasoning for enforcement merely moral, rather than legal? ❎
- If a material benefit been gained? ✓
- If there manifestation of mutual assent (objective test)? ✓

A contract is unconscionable when:

- You usually need both forms of unconscionability to win in court:
  - Procedural Unconscionability – deception or overreaching in process of bargaining.
- Substantive Unconscionability – objectionable or oppressive clause in contract
  - It is the general rule that inadequacy of consideration, exorbitance of price or improvidence in a contract will not, in the absence of fraud, constitute a defense. Inadequacy is rarely an avowed reason for relief from a bargain, but it may be grounds for denying specific performance.
  - Kieff doesn’t like this (neither does the court, very much)
  - Burden of proof goes on person who claims unconscionability. She must give evidence for a prima facie case by showing a substantial disparity between the value of the bargain as measured by the price agreed for… and the value of the bargain when the seller invokes a particular contract term against the consumer. Once P has fulfilled the burden, burden shifts to the other party to persuade the court that the contract or clause was conscionable at the time of contracting.
  - …there is a disclaimer in car warranty against personal injury.

- Whether a MODIFICATION is valid…
  - If the parties already agreed to whatever is proposed to be modified? ✗
  - If modifications made under duress? ✗
  - If there is good faith? ✓
  - Did D say “this is a contract to modify and it is supported by consideration”? ✓
  - Is there a fundamental change in some basic assumption? ✓ (Angel)

- Whether there is a CONTRACT IMPLIED IN FACT…
  - If: (1) D requires P to perform work, (2) P expected D to compensate him or her for those services, and (3) D knew or should have known that P expected compensation? ✓

- Whether PAROL EVIDENCE can vary, add to, or contradict a contract…
  - If the contract is fully integrated? ✗ (Parole Evidence Rule)
  - If (1) the agreement is a collateral one; (2) it does not contradict express or implied provisions of the written contract; (3) one of the parties would not ordinarily be expected to embody in the writing. ✓
    - Some say there should also be (4) comparison rule: must compare the writing and the negotiations before determining whether they were in fact covered.
  - If the oral terms are inconsistent with the written agreement? ✗

- Whether a writing is INTEGRATED
  - If there is intent shown in the “face of the instrument” (object test)? ✓
    - Minority of jurisdictions, including CA
If the parties actually intended it to be an integration? 
- These courts will consider any relevant evidence to determine whether the parties actually intended the writing as the final and complete expression of their agreement. Leads to narrower application of the parol evidence rule and leads to the admission of parol evidence.

If the integration clause does, in fact, express the genuine intention of the parties to make the written contract the complete and exclusive statement of their agreement? [✓]

Whether the contract is valid...
- If the contract bilateral? [✓]
  - Does one side have power to enforce and the other not? [✗]
- If the contract seems unilateral, is there, maybe, an implied promise? [✓] (Cordozo approach)

Whether the offer is valid...
- If the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent? [✓]
- If there has been revocation of the offer (provided it follows procedures) [✗]
- If the offeror died? [✗]
- If there has been an unreasonable lapse of time? [✗]
- If there has been a counter-offer? [✗]
  - The offeror cannot modify the contract terms after performance.
- If offeree changed the offer? [✗]
- If offeree said “no”? [✗]
- If the offerer’s language make it terminate? [✗]
- If there definiteness in the proposal? [✓]
- If price included in offer? [✓]
  - Price is a lynchpin; if it is left out, courts get fidgety about finding an offer.
- If the offer is for a sale that can only be done once, and the offeror sold the property before offeree issued his acceptance? [✗]
- If the offer is for a sale that can only be done once, and the property gets destroyed? [✗]
If the offer supported by a binding contract that the offeree’s power of acceptance shall continue for a stated time, and offeree rejects and then accepts?

- Offeree can do whatever she wants during the contracted time.
- If acceptance of the offeror has materially changed his position in reliance on the communicated rejection (such as by selling or contracting sell the subject matter of the offer elsewhere), the subsequent acceptance will be inoperative.

If offeree has actual knowledge that offeror has done some act inconsistent with the continuance of the offer?

Whether there is acceptance…

- If the offer been accepted by authorized party?
- If the acceptance been communicated to the offeror?
  - If offeror repudiates before he is aware of the offeree’s acceptance, the offer is dead.
  - If the contract indicates that notice is by performance, to kill the offer, offeror has to repudiate before offeree performance.
  - There needs to be separate consideration in the contract of the offer to be irrevocable.
- If the offeree stipulate that the goods delivered are merely an accommodation of the order?
- If the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to him, and offeree performs the condition?
- If, when giving information, claimant knows of offer of reward for the information?
  - (If not, there’s no mutual assent).
- If acceptance is made in a manner and by a medium invited by an offer?
  - If so, as soon as put out of the offeree’s possession, without regard to whether it ever reaches the offeror, the offer is accepted.
  - Above is the mailbox rule.
  - Acceptance is made by action, even though it may not be intended.
- If the contract at the convenience of the offeror? (If so, there’s automatic acceptance unless notice otherwise.)
- If there been notification of acceptance?
- If it a mirror offer?
- If there a counter-offer?
To accept with additions that don’t count as counter-offer, say “I’m not rejecting it, I’m trying to think about it, can we talk about something different?…” The more independent the subject matter, the more likely it will be seen as an independent subject proposal.

- If the acceptance on new terms? ☑

**Whether a STANDARD FORM is binding…**

- If all of the agreement contained in the form and the other party has signed the form or appeared to assent to it by conduct? ☑
- If there no manifestation of assent? ☑
- If the party manifesting assent had an opportunity to review the form? ☑
- If the terms unconscionable? ☑
  - Note: higher standard of care required for customers
- If it is an adhesion contract? ☑

**Whether the sale falls within the STATUTE OF FRAUDS…**

- If the item for sale valued at more than $500? ☑
- If the promise, by its terms, have to be done within one year? ☑
  - If it’s less than a year, it doesn’t have to be done in writing
- If it a promise made in consideration for marriage? ☑
- If it a promise to sell land? ☑
- If it the promise by an executor to pay for the debts of the estate? ☑
- If it a promise to pay for the debts of someone else? ☑
  - MYLEGS: Marriage Promise that may not be performed within one Year Land Executor Goods over $500 Surety.

Have the requirements of the statute been satisfied?

- YES – No formal barriers to enforcement
- NO – agreement is not enforceable unless other grounds (waiver, admission or estoppel) can be established

**Under the statute of frauds, whether the contract is enforceable…**

- If it’s an oral promise for something that cannot possible be done in one year? ☑ (unless also in writing)
- If it’s an oral promise to work for two years? ☑
o If it’s an oral promise for something that may, however remote, be done within one year? ✓

o If the written agreement is in more than one document (that may be connected with one another either expressly or by internal evidence of subject-matter and occasion)? ✓

o If the contract fails, but the party in-the-right wants to continue? ✓

o If there is complete performance? ✓

o If there is no writing, but the goods are to be specially manufactured for buyer and can’t be sold to another and seller without knowledge of refusal, has made a substantial beginning or commitment for their procurement? ✓

  ▪ (This is an exception to the statute of frauds)

**Whether parties INTEND TO BE BOUND in the absence of a document executed by both sides…**

o When there been an express reservation of the right not to be bound in the absence of a writing? ✓

o When there been partial performance of the contract? ✓

o When all the terms of the alleged contract been agreed upon? ✓

o When the agreement at issue the type of contract that is usually committed to writing? ✓

  ▪ Despite evident intention to be bound, so called agreements to agree have generally been held to be unenforceable. UCC § 2-204(3) breaks with the traditional approach.

o Is there evidence that the contract was to set the stage for the negotiations of details? Did P rely on the contract other than basic inquiry costs? ✓

o If there is parol evidence saying there was intent? ✓

**Whether there is a MEETING OF THE MINDS…**

o When a mistake occurs and A thinks one thing and B things another? ❌

  ▪ In *Peerless*, Kieff thinks the problem is defective contract formulation, not mistake.

o If the parties attach materially different meanings to their manifestations and neither knows or has reason to know the meaning attached by the other? ❌

  ▪ Doctrine doesn’t apply if misunderstanding is through the party’s own fault.

o If the promise, or agreement, of the parties is certain and explicit, and their full intention may be ascertained to a reasonable degree of certainty? ✓
- If objective criteria are available that will establish an ambiguous term that is not in the agreement itself, it can be found in commercial practice or other usage and custom.

**Whether all courts enforce the contract...**

- If are impermissible parties to the agreement?
- If there are impermissible defects in the bargaining process?
- If there are impermissible terms in the agreement?

**Whether a contract is VOIDABLE...**

- If it is for a necessary item to an infant?
  - If necessaries are involved, recovery is limited to unjust enrichment.
- If there is a statute against infant rule?
- If it deals with duties imposed on infant by law (i.e. marriage, child support)?
- If it is with a m.i. person who is unable to understand in a reasonable manner the nature and consequences of the transaction?
  - Courts say that burden of proof rests on the person asserting lack of capacity to establish the same by clear and convincing proof.
- If it is with a m.i. person who is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition?
- If the contract is made on fair terms and the other party is without knowledge of the mental illness or defect?
- If there is a guardian appointed to the m.i. person?
  - All 4, above, are from Restatement 2d
- If the m.i. person can restore the other party to her pre-contractual position?
- If the item contracted-for is necessary for the m.i.?
- If a person taking part in a contract is a bit drunk?
- If a person engaging in a contract is intoxicated to such a degree that he was, at the time of the contracting, incapable of exercising judgment, understanding the proposed engagement, and of knowingly what he was about when he entered into the contract?
  - Ratification is a fix for a contract that is voidable – drunk guy sobers up and ratifies, so it’s now binding; same true for infancy. Upon age of majority, and upon sobering up, express disaffirmance gets the incompetent out, or the minority out.
Whether MISTAKE makes the contract voidable…

- If one can show by clear and convincing evidence either mutual mistake or a unilateral mistake of which the contracting officer had actual or constructive knowledge? ✗
  - For such mistakes, agencies are authorized to rescind the contract or reform the contract so as to delete the times involved in the mistake or to increase the price of the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids.
- If mistake of both parties makes a material effect on the agreed exchange of performance? ✓
- If mistake is made by the party who does not bear the risk of mistake and the effect of the mistake is such that enforcement of the contract would be unconscionable? ✗
- If there is a mistake but it has no legal significance? ✗
- If the contract was for something materially different than what was being sold? ✓
  - Example: barren cow
- If mistake is made by the party who does not bear the risk of mistake and the other party has reason to know of the mistake or his fault caused the mistake. ✓
- If an erroneous letter of admissions is sent? ✗
- If the mutual mistake is in the formulation rather than the reformation of the contract? ✗
  - Rather, the appropriate remedy is rescission rather than reformation of the contract.
  - Reformation is an equitable remedy. Reformation is designed to restore the efficacy of a writing which does not reflect the earlier agreement of the parties, frequently oral, which they apparently intended to be reflected in the writing
    - Mutual mistake in reformation → reform
    - Mutual mistake in formulation → rescission
- If the mistake is material and prompt notice of error is given? ✓

In the case of an erroneous bid, is one entitled to the equitable relief of rescission…

- If she can establish: (1) the mistake is material, (2) enforcement would be unconscionable, (3) the mistake did not result from violation of a positive legal duty or from culpable negligence, (4) the party to whom the bid is
submitted will not be prejudiced except by the loss of his bargain, (5)
prompt notice of error is given? ☑

**Whether FRAUD occurs…**

- A statement from a party having superior knowledge may be
  regarded as a statement of fact although it would be considered as
  an opinion if the parties were dealing on equal terms.

  - If there was an intentional misrepresentation of fact AND reasonably
    induced detrimental reliance? ☑
      - Constructive fraud is above actual fraud. In order to find
        constructive fraud, the parties must have duties to each other
        (confidential trust relationship).

  - If there is suppression of material circumstances within the knowledge of
    the vendee, and not accessible to the vendor, is equivalent to fraud, and
    vitiates the contract? ☑

  - If vendor remains silence about circumstances? ❔

  - If silence may be construed to mean that there’s nothing the buyer should
    know. ☑
      - You want to say something like “that’s a great question; find out
        for yourself.”
      - You can’t contract yourself out of consequences of your own
        fraud.

**Whether there is DURESS…**

- If the party making the claim can prove deprivation of his free will? ☑

- If the party making the claim can prove that immediate possession of
  needful goods is threatened? ☑

- If the party making the claim could have obtained the goods from another
  source of supply? ❔

- If there was no continuing contract between P and D when D demands
  payment coupled with a threat to terminate an existing contract? ❔

- If D’s threat is within D’s legal rights? ❔
Whether ILLEGALITY bars restitution…
  o If denial of restitution causes disproportionate forfeiture, If P was
    excusably ignorant of factors or of legislation of a minor character, in the
    absence of which the promise would be enforceable, If P was not equally
    in the wrong with the promisor and P did not engage in serious
    misconduct and he withdraws from the transaction before the improper
    purpose has been achieved? ☒
  o If a contract is founded on an illegal consideration? ☒
  o If a contract is made for the purpose of furthering any matter or thing
    prohibited by statute, or to aid or assist any party therein? ☒
  o If the illegality part is a minute part (such cohabitation)? ☒ in WI/☐ in IL
    ▪ In jurisdictions like WI, you need to show there’s a lot more going
      on than the illegality; otherwise, it’s against p.p. & unenforceable.
    ▪ Courts will find illegality, even if it’s not pleaded, when statute is
      broken.

Whether failure to fulfill a CONDITION bars recovery…
  o If P fails to meet the condition for which he agreed upon? ☑
  o If the condition is implied? ☒
  o If, through the weighing method, the court finds condition not fulfilled can
    be mitigated to avoid total forfeiture? ☒ (Majority)

Whether a promise is mutually dependent…
  o If parties intend performance by one to be conditioned upon performance
    by the other? ☑
  o If one party does not have to perform until after the other party has
    performed (“condition precedent”) ☐
  o If a condition which, if not met by one party, abrogates the other party’s
    obligation to perform (condition subsequent) ☒
  o If the conditions are to be met concurrently (condition concurrent). ☐
  o If there is no mention about dependency? ☒
  o If contrary intention to dependence clearly appears? ☒

Whether a condition may be nullified…
  o If the condition is deemed immaterial? ☐
  o If the parties’ intent is mutual performance of a condition (i.e. condition
    precedent) and the first actor has not yet acted? ☐
  o If you the other party’s duty is conditional upon your performance, and
    you have performed? ☒
- You don’t need to perform, you only need to show you could have fully performed.

**Whether there has been SUBSTANTIAL PERFORMANCE…**
- When a provision is very important, it is treated as a condition. When a provision is minor, it is treated as substantial performance.
  - If one completely has to replace the disputed goods? ✓
  - If performance meets the essential purpose of the contract? ✓
  - Factors taken into consideration: extent of the contracted-for benefits that the innocent party has received, the extent to which damages will be an adequate compensation for the breach, the extent to which a forfeiture will occur if the doctrine is not applied, and the extent to which the breach was wrongful or in bad faith.

**Whether a contract is DIVISIBLE**
- If it is possible to apportion the party’s performances into matching or corresponding parts that the parties treat as equivalents? ✓
- If a contract provision is very important, payment for the part performance can be made if the contract is divisible. ✓
- If laborer renders substantial performance but breach their employment contract before its terms are completed? ✓
- If the person who breaches does so willfully and this is the way contracts of that type (real estate) are done? ✓

**Whether QUASI-CONTRACT is an option**
- If the event (1) conferring a benefit from P to D (2) D appreciates benefit (3) D accepts and retains the benefit? ✓
- If parties had no opportunity to bargain, but the issues concern survival? ✓
  - obligation is imposed despite intent.
  - When there is no contract remedy and the outcome seems unfair, apply quasi-contract analysis

**Whether IMPRACTABILITY or FRUSTRATION discharges performance...**
- If impracticability arises without performer’s fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made? ✓
- If language or circumstances indicate impracticability was an assumed possibility upon contract formation? ✓
- If availability is not impossible, but only available at great costs? ✓
- If the essential person dies or becomes incapacitated? ✓
\begin{itemize}
\item If the promisor dies or becomes incapacitated, but that person’s responsibility may be delegated to a 3\textsuperscript{rd} party without the other party’s consent? \checkmark
\item If the parties specify a particular source of supply in the contract and that source fails, and both parties assumed that the source was exclusive, the seller employed all due measures to assure that the source would perform, and the seller turned over to the buyer any rights against the supplier corresponding to the seller’s claim of excuse? \checkmark
\item If market price at the time for performance has dramatically changed? \xmark
\item If promisor’s cost of performance dramatically exceeds the contract price due to supervening events? \xmark
\item If the subject matter of the contract or the specified means for performance is destroyed or becomes nonexistent after the contract is entered into, without fault of the promisor? \checkmark
\item If middleman’s source of supply fails? \xmark
\item If middleman’s source of supply fails and (1) the spruce of supply is shown to have been contemplated or assumed by the parties at the time of contracting the exclusive source of supply; and (2) the seller ahs taken all due measures to assure himself that the supply will not fail? \checkmark
\begin{itemize}
\item Frustration: (rarely allowed defense) Requires (1) an event that frustrates the purpose of one of the parties and the occurrence of this even must be the basis on which both parties entered into the contract, (2) the frustration must be total or nearly total, (3) The party who asserts the defense must not, expressly or impliedly, have assumed the risk of this occurrence nor be guilty of contributory fault.
\item According to Cordozo, depending on whether you imply a warranty or a condition decides who wins. This is consistent with Cordozo’s willingness to imply duties of good faith in Lady Duff and Alleghany
\item If parties have allocated for risk, courts will not rewrite contracts even when there is impracticability if the parties have contracted for the risk.
\end{itemize}
\end{itemize}
\footnotesize{Whether there is a DUTY of GOOD FAITH…}
\begin{itemize}
\item When modifying a contract? \checkmark
\item When discharging an agreement? \checkmark
\item When there is evidence that there was reliance on the continuation brought about by the promisor, in terminating an at-will contract? \checkmark
\end{itemize}
\footnotesize{Whether the party has acted in GOOD FAITH…}
\begin{itemize}
\item If party evades the spirit of the bargain? \xmark
\end{itemize}
If the party lacks diligence and slacks off?

If there is willful rendering of imperfect performance?

If there is an abuse of power to specify terms?

If there has been interference with or failure to cooperate in the other party’s performance?

If D, in a reserved digression case, continues production until cancellation, even though there will be no profit.

If D, in a reserved digression case, discontinues production before cancellation because there will be no profit.

If a party refuses to negotiate in response to changed circumstances.

Most courts say that neither contract law nor the UCC imposes a duty on the parties to negotiate in response to changed circumstances.

If a contract needs remedy and, (1) disadvantaged party proposes a modification that would be enforceable if accepted by the advantaged party; (2) the disadvantaged party didn’t assume the risk of the unanticipated event by agreement or under the UCC § 2-625(a), or otherwise; (3) the conclusion is bolstered by what might be the imperatives of an emerging theory of relational law.

Whether promisor owes THIRD PARTY BENEFICIARY...

If promisee enters into a contract with the purpose of having a gift conferred upon a 3rd party?

3rd party = creditor beneficiary
Incidental beneficiary = untended benefited 3rd party.
Creditor beneficiary = if a promisee extracts from the promisor a promise to render a performance to 3rd party because promisee is indebted to 3rd party.

If the contract is accepted, adopted, or acted upon by the 3rd party?

Majority view: promisor can rescind or modify the 3rd party contract until this point.
The court says that 3rd party does not have to be consulted for modification of the contract. The restatement says that you do have to be consulted if you know about it and you relied to your detriment.

If 3rd party is a member of a class of people intend to/expected to/supposed to benefit from the contract (think: liability insurance).
When parties enter into contract with intent to benefit 3rd party? ✓

Whether a party may EXCULPATE from consequences of negligence …

- If, in a commercial transaction, they clearly and conspicuously set out the purpose of the drafter? ✓
- If it is attempted by a party who is “under a public duty entailing the exercise of care”? ❓
  - Matter of pp. Example: common carrier
- If the party is in a position of superior bargaining power? ❓
  - Example: hospital exacting a release from an entering patient.
- If it exempts a party from tort liability for harm caused intentionally or recklessly? ❓
- If the terms exempt a seller of a product from his special tort liability for physical harm to a user or consumer? ❓
- If the covenant protects some legitimate interests of the promise and/or if it is reasonable in scope? ✓
  - Courts tend to be more favorably disposed to those covenants which are ancillary to the sale of a business, because they’re usually seen as protective of the good being sold, than to those which restrict an employee’s competitive activities.

Whether there has been breach…

- Has P or D acted in bad faith? ✓
- Has either party intentionally interfered with the other party’s ability to perform? ✓
- Has either party unintentionally interfered with the other party’s ability to perform? ❓

REMEDIES

How to remedy an INDEFINITE contract:

- If it’s too indefinite, it’s not a contract, so somebody gets to walk away.
- Some courts say there’s no such that as a contract that is too indefinite; the court will just fill in the gaps.
- Some courts will cut away parts of the contract and keep other parts and consider the contract definite.

How to remedy an UNCONSCIONABLE contract:

- Court may refuse to enforce
- Enforce remainder w/o unconscionable part. Thus, after striking an unconscionable clause, a court may then award damages for breach of the contract without that clause.
o Limit the application of the unconscionable clause so as to avoid any unconscionable result. (Aggrieved party is limited to defensive weapons).

o Damages may be recovered under a state’s deceptive trade practice statute.

o Blue pencil jurisdiction: they can cross out any words that they don’t like.

o Jurisdiction where they can rewrite: the court can strike what they don’t like, and rewrite to make the contract better.

**Whether an action counts as REPUDIATION…**

- If it is a voluntary act that disables the promisor from performing? ☑
- If there is a positive, unconditional refusal to perform as promised in the contract? ☑
- If there is a mere expression by the promisor of “doubts” that he will be able to perform? ☒
  - Such expressions may, however, constitute a prospective inability to perform, permitting the other party to suspend counter performance.
- If provider announces that services are not needed? ☑
  - It is an immediate trigger of the ability of a promise to sue for damages.
  - Efficiency (holder’s) Rule – If one party has to sit around wasting resources waiting for an actual breach, the party may be able to sue for repudiation right away. One must prove that there is opportunity cost.
- If the repudiating conduct makes contract’s performance impossible? ☑
- If the repudiating party’s conduct creates the impossibility? ☒
- If an insecure party demands, in writing, assurance of adequate performance and does not receive adequate assurance? ☑

**Whether ANTICIPATORY BREACH is appropriate…**

- Insistence on terms that are not contained in a contract? ☑
- If party to a contract demands a performance to which he has no right under the contract, and states that unless his demand is complied with he will not render his promised performance? ☑

**Remedies for breach of enforceable bargain:**

- Non-breaching party may suspend performance or cancel contract
- Monetary damages are preferred over performance (i.e. jail)
- Deterrence is NOT a primary objective.
• Limitations: provable losses must be reasonably foreseeable to D. P has to make all reasonable efforts to avoid consequences of breach

Responses to Breaches:
  o MATERIAL BREACH: A may (1) sue B for damages resulting from the breach but let the contract continue, (2) terminate the contract and sue B for breach of the whole contract (“total breach”)
  o MINOR BREACH: A can sue B for damages resulting from the breach. However, A cannot terminate the contract. In fact, if A terminates the contract, A will be in total breach, and B can sue A. Therefore, a decision by A as to whether a breach by B is material or minor is fraught with danger, because if A guesses wrongly that the breach is material and terminates the contract, A will end up owing substantial damages to B.
  o Breaches of representation: You could argue that you don’t have a duty to perform because you’re excused because of a failure of condition – if you’ve already performed, you’ve waived that condition. You can try to argue no formation, fraudulent inducement. Another way to think of that is mistake. The best time this works is when the other side knows you’re mistaken. Then, you can also try unilateral mistake – you’ve got a great argument when you can’t find fault because the reason you’re mistaken is because I caused you to be mistaken. All mistake will do is get you out of your obligation – you don’t get to sue for breach.

Whether there has been mutual termination (DISCHARGE)…
  o If payment is tendered and accepted to discharge an un-liquidated debt or a disputed claim? ✓
  o If there has been accord and satisfaction where: involves an agreement to settle a claim followed by its performance discharging the claim? ✓
    • Accord a.k.a executory accord.
  o If there has been accord and satisfaction involving immediate discharge of a claim by a new contract? ✓
    • A.k.a substituted contract
    • Usually the liquidation of an un-liquidated claim or the existence of a good faith dispute provides consideration.

Whether D is liable for PUNITIVE DAMAGES (a.k.a. “exemplary damages”)
  o If a tort accompanies the breach? ✓
    • (“I’m on it” = GFY)
  o If there is a blurring between criminal and private law? ✓
    • Example: rolling back the odometer.

Whether injured can sue for CONSEQUENTIAL DAMAGES…
o If D could reasonably foresee risk of harm to P?  ✓
o If D has duty to P and negligence is cause in fact creating extensive damage?  ✓
  ▪ Un-foreseeability does not necessarily insulate D from liability.
o I the fact of loss and its amount cannot be proved with reasonable certainty?  ❌
  ▪ Alternatives where expectancy is uncertain: protection of reliance interest – where the aggrieved party cannot establish the lost expectancy interest with sufficient certainty, the aggrieved party is permitted to recover expenses of preparation for and of part performance as well as other foreseeable expenses incurred in reliance upon the contract.
  ▪ If d can show that the contract would have been a losing proposition for P, an appropriate deduction will be made of the loss that was not incurred.
o If P is unable to use D’s promised performance, either because D failed to perform or because performance did not conform to the contract, and losses are foreseeable, cause in fact, and there is proof with reasonable certainty and the requirements of damage mitigation.  ✓
o If P does not attempt to mitigate the damages?  ❌
o If P attempts to educate the contracting party about foreseeable losses?  ✓
o If at the time the contract was made, the seller had reason to foresee that the consequential damages were the probable result of breach?  ✓
  ▪ Hadley v. Baxendale: Under the rule of H v. B, “special” or “consequential” damages (as opposed to “general” damages that so obviously result from a breach that all contracting parties are deemed to have contemplated them) will only be awarded if they were in the parties’ contemplation, at the time of contracting, as a probable consequence of a breach of contract.
o If the breach was of a specific performance that was envisioned when entering the contract, where provider could have reasonably anticipated what happened as a result of breach?  ✓
  ▪ Hadley test: was it foreseeable that late shipment would cause P to suffer damages?
o If losses were foreseeable to the breached but not the breacher?  ❌
o If P would have lost had the contract been enforced?  ✓
  ▪ D pays P’s investment (reliance damages) and then argues to reduce it by whatever he can show that the buyer would have lost had the contract been enforced.
Whether LIQUID DAMAGES will be enforced by the court …

- If (1) the injury caused by the breach is difficult or impossible to estimate accurately; (2) parties intend that the agreed payment be for the loss, rather than as a deterrent to breach; (3) the stipulated amount of damages is a reasonable estimate of the probable cause? ☑

- If the provision fixing damages for breach constitute a reasonable mechanism for estimating the compensation which should be paid to satisfy any loss from the breach? ☑

- If damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof? ☑

- If (1) the fixed amount is a reasonable forecast of just compensation for the harm that is caused by the breach, and (2) the harm caused by the breach is incapable or very difficult of accurate estimation? ☑
  - That’s the two-prong test of liquidation damages. You have to satisfy both prongs.

- If the clause is unconscionable so as to “shock the conscience”? ❌

- If the limitation fails its essential purpose? ❌

Whether an INJUNCTION may be enforced as an equitable remedy …

- If without such relief P would suffer irreparable harm? ☑

- If there is a substantial probability of success on the merits? ☑

- If others will be injured by the injunction? ❌

- If the injunction is consistent with public interest? ☑

- If the liquidated damages provision is valid and the contract provides that is the exclusive remedy? ☑

- If there is no exclusive remedy clause and liquidated damages wouldn’t be enough for the employer? ☑
  - The employer can’t have both, but if injunction is enforced, she can sue for actual damages between the time of the breach and the date the injunction was issued.

- If performance doesn’t mean anything more than economics to P? ❌

- If P says “performance means more than just a quick money fix”? ☑

- If D says “13th Amendment, I don’t want to perform”? ☑
  - Court will say, so hire someone else to perform.
o If specific performance would require extensive supervision? ☑
  ▪ Pp issue.

o If (1) damages won’t make P whole, (2) damages will be inadequate, (3) there is no possibility of accurately estimating the amount of damages, (4) D can’t get the product through another means? ☑

o When a sale of goods leads to easily calculable damages? ☑

o If an injunction would unduly interfere with D’s livelihood and inhibit free competition where there was no corresponding injury to P other than the loss of a competitive edge? ☑
§ 2-104: “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

§ 2-103(1)(b): ‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

§ 2-105: “Goods” means all things which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. “Goods” also include the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty. Goods must be both existing and identifiable before any interest in them can pass. Goods which are not both existing and identified are future goods. A purported present sale of future goods or of any interest therein operates as a contract to sell. There may be a sale of a part interest in existing identified goods. An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may be the extent of the seller’s interesting the bulk be sold to the buyer who then becomes an owner in common.

§ 2-103(1)(b): ‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

§ 1-107: Any claim or rights arising out of an alleged breach can be discharged in whole or in part without consideration by written waiver or renunciation signed and delivered by the aggrieved party.

§ 1-201(3): defines agreement as the “bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.

§ 2-107: A contract of the sale of minerals or the like or a structure or its material to be removed from realty is a contract of the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

The Statute of Frauds is modified through the UCC § 2-201: Except as otherwise provided...a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

- Between merchants if within a reasonable time in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after its receipt.

- A contract which does not satisfies the requirements of subsection (1) but which is valid in other respects is enforceable
  - If the goods are to be specially manufactured for the buyer and couldn’t be sold to someone else, if the buyer doesn’t warn of rejection before the
sells have made either a substantial beginning or commitments for their procurement, or

- If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but he contract is not enforceable under this provision beyond the quantity of goods admitted; or
- with respect to goods for which payment has been made and accepted or which have been received and accepted.
- Applies for sale of goods worth more than $500. Rental doesn’t count.

§ 2-201 (1996) Draft: repeals the statute of frauds, including the “one year” clause for contracts for the sale of goods. A move to restore the statute of frauds has been made and the outcome is unclear.

§ 2-201 Comment: the required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing affords a basis for believing that the offered oral evidence rests on a real transaction. It need not indicate which party is buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranty may be omitted. A writing includes printing, typewriting, or any other intentional reduction to tangible form.

- Courts have tended to be strict respecting the need for a statement of quantity in the writing.

§ 2-201(39): The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing (re: electronic sig.)

§ 2-202: If the additional terms are such that the evidence would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact (everything else will be allowed). *This differs from Restatement § 240(1)*

§ 2-202 - Terms with respect to which the confirmatory memoranda of the parties agree, or which are otherwise set out in a writing intended by the parties as a final expression of their agreement with respect to the terms included in the writing, may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented (1) by course of dealing or usage of trade; and (2) by evidence of consistent additional terms unless the court finds the writing was intended also as a complete and exclusive statement of the terms of the agreement.

§ 2-202(a) – The terms which are not contradicted because of the finality of the writing may be explained or supplemented by course of dealing or usage of trade or by course of performance.

§ 2-203: The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

§ 2-103(1)(b): ‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

§ 2-203: Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

§ 2-204(1): A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
§ 2-204: A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. 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.

§2-204(3) states the basic principle as to open terms agreement underlying other sections: 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:

- Two standards: (1) Parties must have intended to make a contract. (2) There must be a reasonably certain basis for giving an appropriate remedy
- The agreement may be too indefinite to warrant specific performance but not money damages, or, as in Oglebay, the court may, in the exercise of its equitable jurisdiction, appoint a mediator and order the parties to negotiate.
- Damages measured by loss expectations may be unwarranted, but not damages measured by costs reasonably incurred in reliance upon the other's promise.
- P should have a restitution remedy for the value of benefits conferred on the defendant through past performance.

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.

§ 2-205 If a contract is formed under this section, and the acceptance contains terms that vary the contract, the following terms are not part of the contract: (1) terms in the acceptance that materially vary the contract, and (2) conflicting terms.

§ 2-205: An offer by merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability offferee must be separately signed by the offer.

§ 2-205: An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed 3 months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

§ 2-205: Merchant’s form offer is an offer that stays open. You don’t need consideration because a merchant’s firm offer stays open (a) during the time stated, (b) if no time stated, a reasonable time (never more than 3 months).

2d § 205: every contract imposes upon each party a duty of good faith and fair delaying in its performance and its enforcement.

§ 1-205 – A course of dealing is a sequence of previous conduct between the parties to a particular agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

2-206(b) 1996 Draft: If a consumer manifests assent to a standard form, a term contained in the form which the consumer could not reasonably have expected is not part of the contract unless the consumer expressly agrees to it.

§ 2-206(2): A lawful agreement by either the seller or buyer for exclusive dealing in the kind of goods concerned impose 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. >> implies mutuality
§ 2-206: An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

§ 2-207: There are three ways to find a contract: (1) oral agreement with confirmation memoranda, (2) writings which do not contain identical terms, but constitute a seasonable agreement, and (3) conduct of parties recognizing an existence of a contract.

§ 2-207: A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (1) the offer expressly limits the 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. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consists of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

This is intended to eliminate the mirror image rule of common law. In the future, do I want the mirror image rule to apply, or do I want a more common law, like the UCC, to apply?

§ 2-207(2): deals with how we view additional terms in the battle of the forms. This section says, “the additional terms are to be construed as proposals.” Then, it continues with stuff about whether the additional terms materially alter (such as warranty, and disclaimer warranty, or the agreement to go to arbitration). You don’t get to that part of § 2-207(2) if you don’t get past the “merchant” part of the clause, because it says, “between merchants.” If you’re not a merchant, the additional terms are just proposals.

- A merchant is a DIGOTEK and sells to the BIOCOB (Buyer in the ordinary course of business).

§ 2-208(1) – Any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

§ 2-209: An agreement modifying a contract for the sale of goods needs no consideration to be binding. However, such modification obtained by extortion without a legitimate commercial reason is unenforceable (must be in good faith).

§ 2-209(1). A party’s ability to modify an agreement is limited only by Article Two’s general obligation of good faith…In determining whether a particular modification was obtained in good faith, a court must make two distinct inquiries: whether the party’s conduct is consistent with “reasonable commercial standards of fair dealing in the trade,” … and whether the parties were in fact motivated to seek modification by an honest desire to compensate for commercial exigencies; UCC § 2-103

- You don’t need to find consideration. You need to find both (1) consistent with reasonable standard of fair dealing and (2) consistent with desire to compensate for commercial exigencies.

§ 2-210: For the sale of goods, the assignments of contractual rights are presumptively “unless otherwise agreed” or unless “the assignment would materially change the duty of the other party or increase materially the burden or risk imposed on him by his contract.
§ 2-210(1): A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

§ 2-210(2): Once a promise is due, the UCC also allows promisees to assign their rights even if the initial contract prohibits assignment – thus giving promisees an immutable option to assign rights which are no longer executory such as a right to damages for breach or a right to payment of an “account.”

§ 2-715(2): consequential damages resulting from the seller’s breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

§ 2-716 – Specific performance may be decreed where the goods are unique or in other proper circumstances. The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just. The buyer has a right of replevin (retaking of personal property) for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing.

§2-302: (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

- The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise *** and not of disturbance of allocation of risks because of superior bargaining power.

§ 2-305: If the parties intend " not to be bound unless the price be fixed or agreed and it is not fixed or a greed there is no contract"

§ 2-305(1): Where... the parties... intend to conclude a contract of the sale of goods... and the price is not settled, the price is a reasonable price at the time of delivery if...(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and is not so set or recorded.

§ 2-306(1): If words or conduct creating an express warranty and words or conduct “tending to negate or limit warranty” cannot be construed as consistent with each other, ‘negation or limitation is inoperative to the extent that such construction is unreasonable.” ← might be wrong citation, check source

§ 2-306(2): To protect an implied warranty, the court should insist upon the same level of detail and conspicuousness in the manifestation of intent to integrate the writing. ← might be wrong citation, check source

§ 2-306(1): A term which measures the quantity by the output of the seller or the requirement so the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate
or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

§ 2-306(1) Output requirements and Exclusive Dealings: (1) A term which measures the quantity of the output or requirements as may occur in good faith except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. (2) 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.

§ 2-307 – Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

2-307b: Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

§ 2-313: An express warranty is a description, affirmation of fact, or promise with respect to the quality or future performance of goods that becomes part of the basis of the bargain. The affirmation may be in words or by sample or model. An affirmation merely of the value of the goods or merely of the seller’s opinion of the goods is not a warranty.

§ 2-314: If the seller is a merchant with respect to the kind of goods in question, unless effectively disclaimed, there is an implied warranty that the goods be such as “pass in the trade under the contract description” and “are fit for the ordinary purpose for which such goods are used.”

- Perfection isn’t required, can be unacceptable up to 3%.

§ 2-315: Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316(1) mandates that whenever possible the two contractual provisions be construed as consistent with each other. If consistency cannot be attained, the disclaimer is inoperative.

§ 2-328(2): Unless otherwise agreed, the offer is accepted when the auctioneer “so announces by the fall of the hammer or in other customary manner.”

§ 2-402: whatever I sell you, I must own...except if that guy was a DIGOTeK.

§ 2-609 – (1) A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return. (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards. (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

- UCC § 2-609 gives us an avenue to pursue that would have been helpful in Taylor. Provides a means to ensure assurance. (If the answer you get is inadequate, then you have a right to go elsewhere to get out.)
§ 2-612: The seller may cancel where the buyer fails to make a payment due on or before delivery if the breach is of the whole contract.

§ 2-615: Except so far as a seller may have assumed a greater obligation delay in delivery or non-delivery is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.

  o Assumption of the risk plays a large role in impracticability cases. Courts are reluctant to use impracticability when the parties could have contracted the risk beforehand.

  o Risk bearing – Ask three questions: (1) Knowledge of the magnitude of the loss, (2) Knowledge of the probability that it will occur, and (3) other costs of self-or-market-insurance.

§ 2-615(a) provides that a seller in a contract for the sale of goods is excusable for “delay in delivery or non-deliver….if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made…”

2-715(2): consequential damages resulting from the seller’s breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

§ 2-718(1): Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused y the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as penalty.

Revised § 2-718(1), now § 2-809(a): Damages for breach of contract may be liquidated but only in an amount that is reasonable in light of either the actual loss of the then anticipated loss caused by the breach and the difficulties of proof of loss in the event of breach. If a term liquidating damages in unenforceable under this subsection, the aggrieved party ha the remedies provided in this article.

§ 3-605 covers relative to the discharge of liability on a negotiable instrument by a holder’s cancellation or renunciation.

§ 9-204(1): “[A] security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.”

9-318: “A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account.” Subsection 4: denies effectiveness to contractual terms prohibiting assignment of accounts and contract rights. An assignment would be effective even if made to an assignee who took with full knowledge that the account debt had sought to prohibit or restrict assignment of the account or of the money to be earned under the contract.

  o Comment 4: The obligor’s interest in prohibiting assignment is grounded in a concern that assignment might render the obligor’s performance more difficult. But once the obligor’s performance is due, this concern is attenuated.

UCC 9-318: “So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding
rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.”

UCC 9-318(3): “The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay for the assignor.”

UCC 9-318: “Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 9-206 the rights of an assignee are subject to (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising there from; and (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.”
Restatements

2d § 15: A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

- Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.
  - If a guardian is appointed, the problem is resolved.

§ 20: Effects of misunderstanding. There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other, or (b) each party knows or each party has reason to know the meaning attached by the other. The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if (a) that party does not know of any meaning attached by the first party, or (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

§ 25: If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

2d § 25: Option contract is a promise which meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer.

- Usually a conditional contract to sell; the offeror has no power to revoke, and any attempt to do so is ineffectual.

2d § 33: sets forth a standard for judging the impact of indefiniteness and open terms. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

§ 33: The actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain. An offer which appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of agreement to the contrary.

2d § 37: The power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of contractual duty.

§ 42: Where an offer is for the sale of an interest in land or in other things, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, before he has exercised his power of creating a contract by acceptance of the offer, the offer is revoked.
§ 45: If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or if no time is stated therein, within a reasonable time.

§ 59: A reply which purports to be an acceptance but which adds qualifications or requires performance of a condition is not an acceptance, but a counter-offer.

- Kieff thinks Mirror image rule stinks because of the costs of re-drafting. Time costs, period.

§ 61: an acceptance which requests a change or addition to the terms of the offer is not invalidated unless the acceptance is made to depend on an assent to the changed or added terms

§ 63 (Mailbox Rule): Unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession without regard to whether it ever reaches the offeror (adopted in most jurisdictions)

§ 69: Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: (a) where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation, (b) where the offeror has stated or given the offeree reason to understand that the assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer, and (c) where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

§ 72: where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. IF the circumstances indicate that the exercise of dominion is tortuous the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept.

§ 72: where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others, where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.

§ 87: An offer is binding as an option contract if it is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time.

2d § 90: A charitable subscription…is binding without proof that the promise induced action or forbearance.

- Eliminates the first Restatement requirement that the reliance be “definite and substantial” and provides that the “remedy granted for breach may be limited as justice requires.” Thus, the promise “is binding if injustice can be avoided only by enforcement” and the remedy may be limited “as justice requires.”

- The purpose of § 90 is to make a promise binding even though there was no consideration.

(2d) § 92: An offer which appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of an agreement to the contrary.
§ 95: In the absence of statute a promise is binding without consideration if (a) it is in writing and sealed, and (b) the document containing the promise is delivered, and (c) the promisor and promisee are named in the document or so described as to be capable of identification when it is delivered.

1-102(1): Provides that this “Act shall be liberally construed and applied to promote” the underlying purposes and policies set forth in UCC 1-102(2), e.g., “to merit the continued expansion of commercial practices through custom, usage and agreement of the parties….Comment 1 to UCC 1-102 states that the text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved

§ 139 – 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 the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires. In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant (a) the availability and adequacy of other remedies, particularly cancellation and restitution, (b) the definite and substantial character of the action or forbearance in relation to the remedy sought, (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence, (d) the reasonableness of the action or forbearance, and (e) the extent to which the action or forbearance was foreseeable by the promisor.

   o This should give dealer hope, especially if (b)(iii) can be satisfied.

2d § 152: When mistake of both parties makes a contract voidable: (1) where a mistake of both parties at the time a contract was made as to basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.

2d § 153: When mistake of one party makes a contract voidable: if the basic assumption on which he made the contract is materially different, the contract is voidable by him if he does not bear the risk of the mistake…and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.

2d § 159: A misrepresentation is an assertion that is not in accord with the facts.

2d § 159(b): One remedy for misrepresentation is to rescind the contract. The purpose of rescission, whether through a legal or equitable action, is restitution; i.e. there is a dissolution or “undoing” of the contract and a restoration of the parties to their pre-contract position. If P demands a relatively mild remedy – recission – he may be given relief even if he does not show actual intent to deceive by D. If he seeks a harsher damage measure, many courts will require him to show such intent.

2d § 161 (1981): A vendor has an affirmative duty to disclose material facts where: (1) Disclosure is necessary to prevent a previous assertion from being a misrepresentation for from being fraudulent or material; (2) Disclosure would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing; (3) Disclosure would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part; (4) The other person is entitled to know the fact because of a relationship of trust and confidence between them.
§ 161(d): A party may...reasonably expect the other to take normal steps to inform himself and draw on his own conclusions.

§ 164(1): Where a misrepresentation is fraudulent or where a negligent misrepresentation is one of material fact, the policy of finality rightly gives way to the policy of promoting honest dealings between the parties.

2d § 164: If a party’s manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

2d § 174: duress by threats makes a contract voidable.

§ 175 – If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

2d § 175: If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

§ 176 – A threat is improper if (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property, (b) what is threatened is a criminal prosecution, (c) what is threatened is the use of civil process and the threat is made in bad faith, or (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient. A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for legitimate ends.

§ 178(f) – Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false, and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

2d § 178(1): a “promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable.” If there is no clear legislative mandate, the promise or term is still unenforceable if the “interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”

o Provides more flexibility in cases that are not so clear cut. Similarly, there is more discretion for a court to grant restitution to the plaintiff even though the bargain itself is unenforceable.

2d § 195(a): a party to a contract can ordinarily exempt himself from liability for harm caused by his failure to observe the standard of reasonable care imposed by the law of negligence.

2d § 195(3): for a term exempting seller of a product from his special tort liability for physical harm to a user or consumer...unless the term is fairly bargained for and is consistent with the policy underlying that liability.

o Comment (c) states that the exception is for the “rare situation in which the term is consistent with the policy underlying the liability.
i.e., there is no public policy against these risk allocation devices, but, at the very least, they must be fairly bargained for.

2d § 201(2): Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

- That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
- That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

2d § 202: … Where an agreement involves represented occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement…

2d § 205: every contract imposes upon each party a duty of good faith and fair delaying in its performance and its enforcement

2d § 211(3): Where the other party has a reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

2d § 212(b): Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

§ 216(2) – An agreement is not completely integrated if the writing omits a consistent additional agreed term which is … (b) such a term as in the circumstances might naturally be omitted from the writing

2d § 217: Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition.

2d § 228: “if it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligator would be satisfied.”

- Restatement § 228 represents the lower standard of good faith. Under the UCC, merchants are held to a higher standard. Here, we are dealing with merchants, but one merchant can't even meet the lower standard. Why do we even need to go through the good faith analysis.

§ 229: To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

§ 234 – Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extend due simultaneously, unless the language or the circumstances indicate the contrary. Where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

2d § 234(2): Under the modern view of constructive conditions, “where the performance of only one party under an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.”
I.e., a contractor has to finish his work before he is paid, unless the contract stipulates otherwise.

§ 240(1): Proof of a collateral agreement is allowed if it is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

§ 240 – Whether the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents. The process of apportionment is essentially one of calculation and the rule can only be applied where calculation is feasible.

2d § 241: The “extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing” is a circumstance relevant to the question.

§ 261 – A party claiming that a supervening event or contingency has prevented, and thus excuses, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes.

§ 262: If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

§ 263: If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

2d § 302: “(1) Unless otherwise agreed between promisor and promise, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or (b) the circumstances indicate that the promise intends to give the beneficiary the benefit to which promised performance. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.”

2d § 317(1): In the assignment process the assignor transfers a contract right to the assignee. The assignor’s right of performance from the obligor is thereby extinguished, in whole or in part depending upon whether it is a total or partial assignment, and the assignee acquires a right to such performance. The holder of the negotiable instrument may obtain in the negotiation process a right superior to that of the one from whom he or she receives the instrument. The extraordinary legal effect given to a negotiable instrument derives from the law merchant and is carefully delineated by statute.

2d § 318: (1) Obligor can delegate performance as long as it doesn’t violate pp or his promise. (2) Promised performance can only be to extent that oblige has substantial interest. (3) Unless oblige agrees otherwise, obligor still has duty tr liability of the delegating obligor.

2d § 321: “(1) Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an existing right. (2) Except as otherwise provided by statute and as stated in Subsection (1), a purported assignment of a right expected to arise under a contract not in existence operates only as a promise to assign the right when it arises and as a power to enforce it.”
2d § 332(1): (1) Unless a contrary intention is manifested, a gratuitous assignment is irrevocable if (a) the assignment is in a writing either signed or under seal that is delivered by the assignor; or (b) the assignment is accompanied by delivery of a writing of a type customarily accepted as a symbol or as evidence of the right assigned.” In both parts, one expressly and the other impliedly, the pattern adopted is consistent with the requirement respecting gifts of chattels that a symbolic or constructive “delivery” is required.

§ 342: punitive damages are not recoverable for breach of contract (traditional rule)

§ 351: A court may limit damages for foreseeable loss by excluding recovery for loss of profits by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

2d § 351: (1) damages are not recoverable for loss that the party in breach did not have reason to foresee as the probable result of the breach when the contract was made, (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know, (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

§ 353: Recovery for e.d. will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

2d § 355: punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

2d § 356(1): damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages in unenforceable on grounds of pp as penalty.

§ 360 – The factors affecting the adequacy of damages are as follows: (a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected.

§ 367 – It is undesirable to compel the continuation of a personal relationship after a dispute has undercut confidence and loyalty. The difficulties inherent in passing judgment on the quality of what frequently is a subjective performance are too great. An award requiring performance may impose a form of involuntary servitude that is prohibited by the 13th Amendment to the Constitution.

§ 370: Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.

2d § 402A: A manufacturer’s or seller’s attempt to disclaim or limit liability for damages to person or property caused by a dangerously defective product is against public policy.

§ 456: Unless a contrary intention was manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither know nor has reason to know. Impossibility is defined to include both strict impossibility and impracticability because of extreme and unreasonable difficulty, expense, and injury of loss involved.

§ 512: A bargain is illegal … if either its formation or its performance is criminal, tortuous, or otherwise opposed to public policy.
Similarly, where both parties are equally involved in the illegality, the effect is that neither can "recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value."
Restatement § 598
CONTRACTS

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