Kieff Fall 2002 Contracts

I. Introduction
   A. Preliminary Survey
      1. UCC vs. common law – UCC newer take on law
      2. more emphasis on fairness in modern law
      3. default vs. immutable laws
      4. basic questions
         a) which contracts enforced?
         b) scope of obligation?
         c) how enforced?
         d) which rules can we contract around?
   B. Introductory Cases
      1. Bailey v. West – alternatives to formal contracts (lame horse w/out a home)
         a) contracts implied in fact – infer the elements of contract from circumstances
         b) contracts implied in law – ignore the elements and enforce in equity (quasi-contract) – elements:
            (1) benefit conferred
            (2) appreciation of benefit
            (3) acceptance and retention of benefit where injustice would result if not compensated
      2. Hamer v. Sidway – consideration (kid gives up smoking, etc.)
         a) consideration consists of either benefit to promisor or detriment to promisee (either-or test)
         b) Restatement (2d): 1) act, 2) forbearance, or 3) creation/destruction/modification of legal relation
         c) must be bargained-for performance or return promise (bargained-for test)
      3. Ricketts v. Scothorn – estoppel (woman gave up work after promised $)
         a) inducement of detrimental reliance may replace consideration
         b) equitable estoppel – based on representation of past or present facts – no damages
            (1) can’t say ‘X’ then go into court and say ‘not X’
         c) promissory estoppel – based on promise (future), as here – can get damages
         d) “I have the present intent to…” – statement of fact, not a promise
      4. Williams v. Walker-Thomas Furniture Co. – Unconscionability (no items paid off until all are)
         a) adhesion contract – contracts where parties are unequal in bargaining power
         b) unconscionability – terms so unfair and one-sided that courts won’t enforce them
            (1) determine at time of contracting
      5. Sullivan v. O’Connor – measure of damages – three ways to compute (botched nose job)
         a) compensatory or expectation – puts $ where she would have been if K performed
         b) reliance – return of expenditures made which flowed naturally from contract
         c) restitution – return of benefits conferred to other party
   6. Notes:
      a) preference for monetary damages over specific performance
      b) point is to make $ whole, not to punish
   II. The Bases of Promissory Liability – need offer, acceptance, & consideration for contract
      A. Bargain Contract: Promise Plus Consideration
         1. Bargain Requirement
            a) Kirksey v. Kirksey – gratuitous promise not enforceable (woman moved w/ kids in reliance)
               (1) would be enforced in equity today
            b) Langer v. Superior Steel – forbearance=consideration (pension given ‘for’ noncompetition)
               (1) fact that $ really wanted what it got in return distinguished from gift
               (2) also enforceable in equity today (promissory estoppel)
            c) Bogigian v. Bogigian – must have consideration (ct. rejected release of judgment – no consid.)
            d) Thomas v. Thomas – ct. doesn’t assess adequacy of consideration (1£ & repair for house)
(1) this is problematic – seems nominal – old case
e) *Hamer v. Sidway* – see I.B.2. (what constitutes consideration)
f) Notes:
(1) look to cultural context when considering what is valuable consideration
(2) look to objective evidence – did promisor/ee get and expect to get something?

2. Sufficiency of Exchange – ct. usually refuses to consider – wants parties to decide what valuable –
peppercorn theory of consideration – peppercorn is enough if bargained for
a) *Apfel v. Prudential-Bache Securities, Inc.* – novel idea not required (computerized bond trades)
(1) in reality, courts often look at adequacy of consideration – consider the following exceptions
b) exception for equitable relief – must show adequate consideration to get specific performance
c) exception for fraud, duress, mistake, unconsc. – insufficient consideration may be evidence of
these
(1) *Jones v. Star Credit Corp.* – consid. so disproportionate→unconscionable ($1200 freezer)
d) exception – nominal consideration – appearance of a gift
(1) *In re: Green* – nominal consideration (adultery case - $1 for promise to pay much more)
(a) saying ‘good and valuable consideration’ meaningless if nothing given
(b) stuff done before and illegal stuff don’t count as consideration
(2) exception to exception: option contracts – nominal consideration ok
(3) *Fiege v. Boehm* – promise to forgo baseless lawsuit (bastardy – π thought Δ father, wasn’t)
(a) no consideration, but enforced for p.p. – encourage settlement – only when good faith
(b) if a legitimate dispute, then something of value was surrendered – not nominal
e) preexisting duty rule – performance of duty already owed ≠ consideration
(1) *Levine v. Blumenthal* – payment of debt already owed ≠ consid. (rent owed)
(a) if Δ had expressly agreed to forego bankruptcy → consideration (forgo legal right)
(2) *Alaska Packer’s Association v. Domenico* – performance of work already due ≠
consideration (duress – no other labor available)
(a) workers were playing hold-up game – this rule designed to prevent exactly this
(3) exception for changed circumstances *Angel v. Murray* (trash removal contract)
(a) no consideration needed for modifications made in good faith – elements:
(i) modification must be before full performance
(ii) underlying circumstances unanticipated
(iii) modification fair and equitable
(b) no holdup game here b/c voluntary (no duress)
(4) exception – promise to pay barred legal obligation – enforceable
(a) obligation barred by s.o.l. or bankruptcy
(b) can only enforce amount of new promise – must have written promise if barred by s.o.l.
f) mutuality of obligation requirement – both sides must be bound
(1) *Rehm-Zeiher Co. v. F.G. Walker Co.* – illusory promise (whiskey seller ‘unforeseen reason’)
(a) unlimited discretion=not bound=no consideration
(2) *McMichael v. Price* – requirements contracts (agreed to furnish all sand that P could sell)
(a) valid because quantity ascertainable – tacit assumption: Price would stay in business
(3) *Wood v. Lucy, Lady Duff-Gordon* – implied promise (exclusive endorsement contract)
(a) court can imply a duty of good faith effort to render mutuality (Cardozo)
(4) *Omni-Group, Inc. v. Seattle-First Nat’l Bank* – “satisfaction” as condition precedent (sale
contingent upon property found satisfactory for development)
(a) condition precedent ≠ lack of mutuality, so long as a question of fact, determinable
   (i) condition may be objective or subjective, if determinable
   (ii) duty of good faith again

B. Moral Obligation: Promise Plus Antecedent Benefit
1. **Quasi-contract** – alternative to contract (Restatement emphasizes this as alternative to moral obligation = consideration, which is problematic b/c every promise is a moral obligation)
   a) elements: (3)
       (1) \( \pi \) conferred benefit on \( \Delta \)
       (2) \( \Delta \) accepted/acknowledged/retained benefit (promise given, in below cases)
       (3) injustice would result if no compensation
           (a) measure of damages – either unjust enrichment \( \Delta \) or detriment to \( \pi \)

2. **Mills v. Wyman** – Moral obligations not sufficient consideration (cared for \( \Delta \)s sick son)
   a) exception: legal obligations rendered unenforceable can be renewed by written promise

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

   a) material detriment and benefit moral consideration sufficient – note this is not normal consideration because it wasn’t bargained for – two ships passing in the night – note that material benefit is the most important part

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

C. Promissory Estoppel: Promise plus Unbargained-For Reliance
1. elements: (3)
   a) promise made which might foreseeably induce reliance
   b) reasonable reliance causing substantial detriment to promisee
   c) injustice would result if no enforcement

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

3. **Allegheny College v. National… Bank…** no consideration needed for charitable donations (charitable donation to college) – therefore no need for p.e. here
   a) Cardozo implied a promise to perpetuate name of donor – today enforced by prom. est.

4. **Feinberg v. Pfieffer Co.** – ex. of p.e. (gratuitous pension plan, sick \( \pi \))
   a) probably no injustice here if \( \pi \) still able to work – but wasn’t so p.e.

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

6. **Cohen v. Cowels** - ex. of p.e. (agreement not to disclose identity of source – poss, 1st A. issue)

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

2. The Statute of Frauds (UCC)
   a) most oral agreements valid, but some must be written: (MY LEGS)
      (1) Sureity contracts – promise to guarantee the debts of another to a creditor
          (a) exception: if the guarantor is seeking to benefit himself, then no writing required
      (2) contracts incapable of being performed in one Year
          (a) indefinite duration – C.R. Klewin v. Flagship (performance likely to take 3-10 years)
              (i) contracts of indefinite duration are outside the SOF and enforceable, unless they are by definition impossible to perform in less than a year
          (b) over a year w/ termination provision – North Shore Bottling Co. v. C. Schmidt
              (i) ok b/c they could have terminated w/in a year
          (c) exception – fully performed on one side – Mason v. Anderson (payments made on loan)
              (i) here the loan was full performance, repayment taking over a year shouldn’t bar claim

      (3) contracts for sale of Goods over $500 (UCC)
          (a) all tangible moveable property – not stocks, securities, services
          (b) exceptions:
              (i) buyer has partially accepted goods
              (ii) buyer gives part payment
              (iii) special goods for buyer
(iv)b/w merchants, written confirmation sent and no object w/in 10 days
(v) contract admitted to in court
(4) contracts for sale of Land – leases, etc. as well
(5) contracts in consideration of Marriage
(6) Executor – can’t be held personally liable for debts of deceased without a writing
b) writing must contain the following to be satisfactory (under common law):
   (1) parties
   (2) subject matter
   (3) terms and conditions
   (4) recital of the consideration
   (5) signature of party sought to be charged
c) UCC: writing must only contain indication of a contract for sale, quantity only necessary term
d) Crabtree v. Elizabeth Arden Sales Corp. – ‘writing’ composed of multiple documents ok
   (employment contract on several memos)
e) effect of statute:
   (1) contract voidable (SOF is a waiveable defense)
      (a) unless performed already
      (b) only to the extent the contract was not admitted to by the other party
   (2) third parties may not raise as a defense
   (3) enforceable against signing party even if not enforceable against other party
   (4) quasi-contract (unjust enrichment) and estoppel (if party represented they would waive SOF,
      may be estopped from later relying on it) are still options
f) DF Activities Board v. Brown – one contract denied, may not force further denials in hopes
   of tripping up the witness (contract for sale of Frank Lloyd Wright chair)
   (1) written affidavit is sufficient to deny

III. The Bargain Relationship
A. The Agreement Process: Manifestation of Mutual Assent
1. Ascertainment of Assent: The Objective Test
   a) Embry v. Hargadine, McKittrick Dry Goods Co. – subjective test incorrect (‘go ahead, you’re all right’ employment dispute)
      (1) mutual subjective intent unnecessary – would a reasonable person think a contract formed?
      (2) subjective test – asks ‘was there a meeting of the minds’, not ‘was there a m.of m.a.?
   b) Lucy v. Zehmer – offers made in jest can be valid (‘high as a Georgia pine’)
      (1) offers made by a drunk are valid too – look to objective acts
   c) Cohen v. Cowles Media Co. – revisited – this was the original decision
      (1) ct here claimed the parties never intended to contract – looked to trade practices
2. Offer: Creation of Power of Acceptance
   a) definition: manifestation of the offeror’s intent to be bound creating in offeree power to accept
   b) elements of an offer:
      (1) manifestation of present contractual intent – not negotiation
         (a) must consider words used, circumstances, addressee, definiteness, discussion of formalizing later
      (2) certainty and definiteness of terms
      (3) communication to the offeree
   c) Lonergan v. Scolnick – ‘to first buyer’ not an offer (exchange of letters over real estate deal)
   d) Lekkowitz v. Great Minneapolis Surplus Store – ad to public an offer b/c terms sufficiently definite – ‘first person’ (ad for $1 fur stole, ‘bait advertising’)
      (1) usually ads are invitations for offers, not offers
   e) Southworth v. Oliver – use of word ‘offer’ not necessary (sale of neighbor’s ranch)
      (1) it can be very difficult to distinguish between an offer and negotiations
definiteness – 2 similar approaches – concern is over ability to fix damages

(1) Restatement – contract must cover (expressly or impliedly)
   (a) parties
   (b) subject matter
   (c) time
   (d) price

(2) UCC
   (a) omission of critical terms ok – will imply so long as basis for remedy

3. Acceptance: Exercise of Power of Acceptance

a) elements of an acceptance (common law): - UCC varies
   (1) only offeree may accept
   (2) must be unequivocal and unqualified
   (3) unilateral vs. bilateral – affects mode of acceptance and ability to revoke
      (a) unilateral – accept by commencing performance (old rule – must complete performance)
      (b) bilateral – accept by giving return promise
      (c) if it is unclear which the contract is, construe as bilateral

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

c) auctions: normally just invitations to offer, unless without reserve–must sell to high bid

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

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

f) Ever-Tite Roofing Corp. v. Green – acceptance must be w/in reasonable time (weird contract allowing acceptance by writing or commencement of performance)
   (1) no time set → must allow reasonable time – here performance was begun, so it’s a moot point

g) Corinthian Pharmaceutical Systems v. Laderle Laboratories – partial shipment ≠ acceptance
   (increased price of drug – accommodated)
   (1) common law – shipping goods = acceptance
   (2) UCC – shipment of nonconforming goods ≠ acceptance if seller tells buyer ‘accommodation’

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

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

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

k) Adams v. Lindsell – mailbox rule – acceptance effective date sent (letter delayed in mail)
   (1) EDI (Electronic Data Interchange) – treat as face to face – offers valid on receipt

l) Russel v. Texas Co. – accept and retain benefit offered = acceptance (revocable license offered for continued use)
   (1) test: where offeree exercises substantial dominion, acceptance if offeror led to believe so
      (a) exception – tortious exercise of dominion – offeror may treat rejection as acceptance

m) silence as acceptance – general rule is no
   (1) Ammons v. Wilson & Co. – pattern of conduct + silence = acceptance (orders accepted by silence in the past – creates reasonable belief of acceptance)
   (2) Smith-Scharff Paper Co. v. P.N. Hirsch – course of dealing + silence = contract (bags)
      (a) specially made goods an exception to the statute of frauds – no writing required
      (b) companies had long course of dealing
(3) Harris v. Time, Inc. – junk mail advertising=offer (full offer hidden by envelope)
   (a) ct found a contract but only damage was opening a letter – law disregards trifles
4. Termination of Offer: Destruction of the Power of Acceptance
   a) common law: (mirror image rule – acceptance must be mirror image of offer)
      (1) may terminate by rejection
      (2) if equivocal or qualified acceptance ➔ counteroffer ➔ rejection
         (a) Minneapolis & St. Louis Railway v. Columbus Rolling Mill (answered quote w/ lower qty. than allowed by offer)
      (b) note: ‘grumbling acceptance’ ok
   (3) ‘conditional’ acceptance ok only if condition already implied in original terms
   b) UCC: (battle of the forms 2-207)
      (1) acceptance w/ changes is valid, unless acceptance made contingent on assent to changes
      (2) additional terms seen as proposed additions. for merchants, terms ➔ part of contract unless:
         (a) offer expressly limited acceptance to terms of offer
         (b) material change
         (c) notice of objection already given or given w/in reasonable time
      (3) if parties don’t expressly agree to new terms, conduct may imply a contract – areas of disagreement or material difference will be covered with gap fillers
   c) Leonard Pevar Co. v. Evans Products Co. – ex. (dispute over sale of plywood)
      (1) K results under c.l. or UCC – continued dealings indicate the parties thought they had a K
      (2) typical example of nonmatching boilerplate forms
   d) reading packet
      (1) Step Saver Data Sysyms v. WYSE Technology (box-top contract – ‘open=accept terms’)
         (a) ct found this clause invalid b/w two merchants, who had a separate agreement
         (b) limitation of liability is a material alteration – 2-207 used to exclude
         (c) buyer had twice refused to sign another document with additional terms
      (2) ProCD Inc. v. Zeidenberg (box-top (‘shrinkwrap’) contract prohibited resale of data)
         (a) ct found box-top a valid agreement, since there were no other contracts (Zeidenberg was not a DIGOTK (merchant), but an end user
         (b) shrink-wraps enforceable unless violate immutable rule or unconscionable
      (3) Hill v. Gateway (dispute over terms in box re: arbitration - 30-day trial period)
         (a) ct found contract valid – not merchants here, but no other form, just a phone call
      (4) Brower v. Gateway – (terms in box limited remedies to arbitration in Chicago)
         (a) ct found this term unconscionable b/c unduly burdensome on consumer
      (5) M.A. Mortenson v. Timberline Software – (software screwed up bid – end user)
         (a) ct found purchase order not integrated – thereby able to be modified by additional terms
         (b) ct found limitation of consequential damages conscionable
            (i) substantively – not ‘shocking to the conscience’ at time of formation
            (ii) procedurally – terms weren’t hidden
   (6) memorandum from Kieff:
      (a) first determine if a good or service (must be good for UCC)
      (b) UCC doesn’t require all material forms to find a contract – can be implied or admitted to
      (c) telephone orders viewed as offers
      (d) where additional terms are viewed as proposals to modify:
         (i) non-merchants: must assent – mere silence not enough
         (ii) b/w 2 merchants: terms become part of contract if assented to, and become candidates unless material, etc.
            (a) performance under orig. term ≠ consent, but ➔ contract ➔ 207 determines terms
   e) means of termination other than counteroffer (see above for c/offers)
      (1) lapse of reasonable time, if no time specified (begins to run on receipt)
      (2) revocation
(a) can be by words or conduct
(b) must be communicated to offeree
   (i) Dickinson v. Dodds – (learned of third party’s acceptance of offer)
      (a) communication of revocation can be by 3rd party – if it puts a reasonable
          person on notice
      (b) acceptance by other party a problem only if good unique or limited supply
   (c) effective when received
(3) destruction of subject matter
(4) death or insanity of offeror or offeree
(5) intervening illegality

5. Irrevocable Offer: Nondestructable Power of Acceptance
   a) general rule: offers are revocable even if offeror promises to keep open
   b) exceptions:
      (1) firm offer b/w merchants (UCC) – signed written offer – valid for no more than 3 months
      (2) option contract – consideration given to hold open (possibly just recital of consideration?)
         (a) Humble Oil v. Westside Investment Corp. (exercised option and proposed modification)
            (i) counteroffers don’t terminate options
         (ii) mailbox rule doesn’t apply to options in most jurisdictions – valid on receipt
      (3) revocation of unilateral contract after part performance
         (a) old rule – Patterson v. Pattberg (mortgage was to be discounted if paid before set date)
            (i) offer of unilateral contract revocable up to full performance
         (b) new rule – Marchiondo v. Scheck (withdraw from brokerage after buyer found)
            (i) part performance creates an option contract
            (ii) other options for enforcement include implied promise, equitable estoppel,
                 conversion into a bilateral contract
   (4) detrimental reliance
      (a) old rule: James Baird Co. v. Gimbel Brothers (contractor relied on bid withdrawn)
         (i) detrimental reliance ≠ acceptance – relier could still have revoked → no mutuality
      (b) new rule: Drennan v. Star Paving Co. (same as above, but diff outcome)
         (i) court expanded notion of detrimental reliance to make bid irrevocable
      (c) Electrical Construction & Maintenance v. Maeda Pacific Corp. (promise to use low bid)
         (i) contractor held to promise to use low bid since it induced sub

B. Insufficient or Defective Formulation of Agreement: Indefinite, Incomplete, and Deferred Terms
1. Defective Formulation and Expression of Agreement
   a) Raffles v. Wichelhaus – latent ambiguity (the two ships peerless)
      (1) contracts subject to two interpretations which the 2 parties interpret differently, do not give
          rise to mutual assent → no meeting of the minds → no contract
   b) Konic International v. Spokane Computer Services – 2 understandings of price (surge protector)
      (1) no contract here either – consider whether either party had more reason to suspect a
          different meaning

2. Indefinite Agreements
   a) Varney v. Ditmars – traditional approach – don’t imply terms (promise to give ‘fair share’)
      (1) could still recover in equity for services already rendered in reliance on terms
      (2) Cardozo dissented saying terms should be implied
   b) modern rule is to enforce indefinite agreements to incentivize definiteness – imply terms

3. Incomplete and Deferred Agreement
   a) Metro-Goldwyn-Mayer v. Schneider – enforcement if missing essential term? (a pilot show)
      (1) the court may look to industry custom for essential terms
   b) Joseph Martin Jr. Deli v. Schumacher – need indication of intent (price term ‘to be agreed on’)
      (1) agreements to agree unenforceable without course of dealings, etc, to hint at terms
   c) Oglebay Norton v. Armco – court may imply price (mechanism in long term K failed)
d) *Empro Manufacturing v. Ball-Co Manufacturing* – letter of intent not enough (letter ‘subject to’ later formal agreement never reached)
   (1) this case illustrates the problem of determining whether negotiating or came to agreement

e) UCC – court may imply any term but quantity and complete a contract

4. Remedies Where Agreement Incomplete or Indefinite
   a) *Hoffman v. Red Owl Stores* – detrimental reliance may be compensated for even in absence of a contract!
      (1) this extended the doctrine of promissory estoppel – best applied when one party refuse to complete bargaining in good faith

IV. Avoidance of Contract
A. Capacity to Contract: Infancy, Mental Incompetence
   1. Infancy
      a) minors are liable for necessaries, but other contracts are completely voidable
         (1) *Bowling v. Sperry* – (minor purchased a car)
         (a) necessary strictly construed here
   2. Mental Incompetence
      a) insane/senile people’s contracts are voidable, except for necessities (estate responsible for)
      b) *Heights Realty v. Phillips* – voidable even though terms reasonable
         (1) the court may look outside the 4 corners for evidence of incompetence
         (2) was the person in a window of lucidity?
   3. These Ks are ratifiable by the infirm parties when the infirmity lifts
      a) if disaffirmed, minor need only return what they still have, if still intact or not – no restitution
      b) for mental infirm, if K is fair it is valid to extent already performed

4. Minor who lies about his age gets off – public policy incentivization – this one of several approaches – others include tort liability, estoppel to deny not of age → K good

B. Defects in Bargaining Process
   1. Unilateral and Mutual Mistake – only mistakes as to reality at time of King matter
      a) *Boise Junior College v. Mattefs Construction* (mistake in bid w/ actual notice before acc.)
      b) Mutual Mistake – K voidable if neither party knew – but risk of mistake may have been assumed (must be aware of to assume)
         (1) *Beachcomber Coins v. Boskett* – (both parties thought fake coin was genuine)
         (a) voidable by prejudiced party
         (b) mistake was on a basic assumption of the contract – mere value enough? – must also be material
         (2) *Lenawee County Board of Health v. Messerly* (both parties thought house habitable)
         (a) mutual mistake here, but one party assumed risk with ‘as is’ clause acceptance
      c) Mistake in transmission – person who selects telegraph as means of communication must bear risk of loss
         (1) *Ayer v. Western Union Telegraph* (telegraph company sent wrong price)
         (a) telegraph company was held responsible for the difference between price offered and price transmitted to buyer
   2. Fraud and the Duty to Disclose
      a) consent induced by fraud, duress, or mistake=defense against K liability
         (1) fraud = misrep + detrimental reliance (Kieff)
      b) *Morta v. Korea Insurance* - bad result ≠ fraud (general release signed)
         (1) barring evidence of undue influence/bargaining power, the ct won’t protect from a bad deal
      c) *Laidlaw v. Oregon* - no duty to disclose external circumstances (seller knew of treaty that would chance price of tobacco)
         (1) knowledge was equally available – general rule – caveat emptor (buyer beware)
d) *Vokes v. Arthur Murray* - misrepresentation must usually be of fact (lady told she could be great dancer)
   (1) misrepresentation of opinion accepted here because:
      (a) parties not dealing at arm’s length
      (b) one party (Vokes) was of inferior knowledge

e) Misrepresentation may also be made by conduct as well as by words
f) *Hill v. Jones* duty to disclose in some circumstances (termite infested house)
   (1) prevent previous assertion from being fraudulent
   (2) disclosure would correct a mistake as to basic assumption or meaning of a writing
   (3) relationship of trust and confidence

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

3. Duress
   a) removal of free will to contract is a defense
      (1) normally economic duress is no defense, unless other party responsible
         (a) *Austin Instruments v. Loral* (subcontractor refused to deliver unless price increased)
            (i) economic duress found here, but same decision reachable by finding of modification
                in bad faith, or c.l. preexisting duty rule
   b) threat of loss of future business not duress
      (1) *Machinery Hauling v. Steel of West Virginia* (mnfr. demanded wrongful payment, threatened
         no business in future)
      (2) a threat to exercise a legal right does not constitute duress

4. Unconscionability
   a) options of the court
      (1) refuse to enforce
      (2) enforce minus unconscionable clause (‘blue pencil’ approach)
      (3) rewrite (reasonably alter)
   b) liquidated damages clauses, if too large, void as a penalty
   c) limitation of consequential damages may be unconscionable, and limitation for personal injury
      from consumer goods is prima facie unconscionable
   d) substantive vs. procedural unconscionability
      (1) procedural – unfair surprise – also absence of meaningful choice, via lack of knowledge or
         voluntariness
      (2) substantive - oppression
   e) *Cutler Corp. v. Latshaw* – oppressive terms in form contracts (power of attorney in fine print)
      (1) most unconscionability cases involve unfair surprise
   f) *Williams v. Walker-Thomas Furniture*
      (1) after this case, cts have required absence of meaningful choice and commercially
         unreasonable term
   g) *Jones v. Star Credit Corp.* – price unconscionability hard to claim – though successful here
   h) *Weaver v. American Oil Co.* – disproportionate bargaining power (guy had high school ed.)
      (1) limitation of liability was found unconscionable here
   i) *Zapatha v. Dairy Mart* (clause allowed termination without cause)
      (1) guy here was uneducated businessman, no unconscionability found
j) **adhesion contract** – a contract where one party has **disproportionate bargaining power** – may be conceptual overlap b/w illegality and unconscionability here

C. Illegality: Agreements Unenforceable of Grounds of Public Policy

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

2. **Sinnar v. LeRoy** – violation of public policy (bribe paid for liquor license, suit to recover)
   a) bribe not illegal, but no enforcement b/c was intended to avoid licensing – contra p.p.

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

4. **Patterson v. McLean Credit Union** – postformation discrimination not a Federal claim (woman claimed wrongful discharge)
   a) was allowed to pursue in state court, but not under 42 U.S.C.

5. **Indirect aid to illegal activity not a bar to recovery**

6. Meretricious contract - $ for illegal act – strongest case fore illegality

7. Exculpatory clauses for fraud, intentional tort are illegal, but those for negligence often upheld

8. **Data Management v. Green** – covenant not to compete (barred entire state for 5 years)
   a) non compete must be reasonable in time and scope – this wasn’t

9. **Enforcing contracts between Unmarried Persons** – against public policy
   a) minority – contracts enforceable (Watts v. Watts)
      (1) alternate theory available – unjust enrichment

10. **Surrogacy contracts** as sale of infants-illegal (Baby M)

11. Some exceptions to nonenforcement of illegal Ks
   a) disproportionate forfeiture results
   b) excusable ignorance
   c) π not equally ‘in the wrong’
   d) π didn’t engage in serious misconduct

V. Performance of Contract

D. Determining the Scope and Content of Obligation

1. Integrated Writings and the **Parol Evidence Rule**
   a) If an agreement reduced to writing is the intended final expression of the parties, then it is ‘integrated’, and parol evidence – earlier oral and written expressions – is inadmissible.
      (1) rule both defines what is admissible and what constitutes a contract
   b) Tests used:
      (1) old view – look to the 4 corners – does K appear complete and final?
      (2) new view – any evidence admissible to determine if K complete
   c) **Integration** or ‘merger’ clauses are strong evidence of completeness
   d) **Exceptions:**
      (1) To show collateral oral agreement on a separate contract supported by consideration of 1st
         (a) ok if:
            (i) terms don’t conflict
            (ii) subject is of a type not normally covered in the 1st
         (b) **Mitchell v. Lath** – ex. of type normally covered (removal of ice house on adjacent prop.)
            (i) UCC standard more forgiving: admissible unless certain to have been included in 1st
      (2) To show writing was only a partial integration
         (a) **Masterson v. Sine** – elements of agreement not reduced to writing (keep house in fam.)
         (b) **Alaska Northern Pipeline vs. Aleyska Pipeline Service** (term: K subject to final approval)
            (i) term conflicted w/ integrated portion – ‘absence of reasonable harmony’ test
      (3) To show additional consistent terms, unless would have been included
(4) To show subsequent oral agreement
(5) To prove existence of condition precedent
   (a) Luther Williams v. Johnson – (contract conditioned upon approval of financing)
     (i) here an integration clause was ignored b/c there was no contradiction in terms
   (6) To clarify ambiguities – but if too fundamental, no K – this becomes a question of
       interpreting the words in the contract

2. Interpretation
   a) Pacific Gas & Electric v. G.W. Thomas Drayage (court interprets meaning of word ‘all’)
      (1) if a word is subject to 2 interpretations, evidence is admissible as to which intended
      (2) risk here is destroying true intent of parties
   b) A. Kemp Fisheries v. Castle & Cook – limits Pacific Gas (fishing boat w/ broken freezer)
      (1) test: is the K reasonably susceptible to the meaning advanced?
   c) Frigaliment Importing v. B.N.S. International Sales (dispute over two meanings of ‘chicken’)
      (1) reference to outside reference sources is acceptable
      (2) view language in light of all circumstances, construe against draftsman
   d) Gray v. Zurich Insurance (unclear exclusion clause, co. refused to pay court fees)
      (1) exclusion clauses must be clear and conspicuous
      (2) boilerplate contracts are efficient but problematic in terms of assent

E. Allocation of Risk: Conditions and Warranties

1. Express Conditions
   a) Conditions may be precedent, concurrent, or subsequent to contract performance
      (1) precedent – must occur to create duty of performance
      (2) concurrent – ex. normal sales contract – performance on one side creates duty on other
      (3) subsequent – extinguishes duty – sim. in effect to a statute of limitations
   b) Covenants vs. Conditions
      (1) covenants are absolute duties to perform
      (2) sometimes it is unclear which terms are covenants, and which not – look to intent of parties
   c) The question with these Ks is what constitutes sufficient performance of a condition
   d) Dove v. Rose Acre Farms - strict enforcement (bonus forfeited by one absence)
      (a) terms were clear, violation was of central theme
   e) Wal-Noon Corp. v. Hill – notice condition will often be implied (repaired roof w/ no L notice)
      (1) goal is to protect expectations of parties
      (2) won’t find a quasi-contract to cover area already dealt with in existing K
   f) Jacob & Youngs v. Kent – substantial performance (built house w/ pipe other than specified)
      (1) trivial and accidental omissions overlooked, damages according to difference in value
      (2) usually courts will only apply this doctrine to implied (constructive) conditions
      (3) Kieff dislikes this decision b/c it makes no allowance for esoteric preferences
   g) In re Carter – conditions precedent, once waived or past, are no longer enforceable
      (agreement conditioned on financial status of company)
      (1) one party wanted the court to treat the condition as a warranty – no dice
   h) Clark v. West condition precedent may be waived by conduct (contract to write and not drink)
      (1) here, the writing of the book, not the abstinence, was the bargained-for consideration
   i) Aetna Casualty v. Murphy - rebuttable presumption of prejudice by violation of c.p. (dentist
      failed to meet condition of notice for insurance policy)
      (1) adhesion contract, enforcement would lead to forfeiture – strict performance may be excused
      (2) majority rule – insurer must prove prejudice
   j) grounds for excuse of a condition include:
      (1) agreement modifying
      (2) conduct waiving
      (3) changed circumstances
      (4) discharge by court
k) even a written term prohibiting modification can be altered without a writing if conduct of the other party induces reasonable reliance
(1) two opposing principles: 4 corners vs. disproportionate forfeiture

2. Constructive Conditions of Exchange (Implied Conditions)
   a) Implied-in-fact vs. Implied-in-law conditions
      (1) Implied-in-fact: reasonable person would imply as necessary to part of performance
         (a) important example – implied condition of good faith
         (b) very similar conceptually to excuse of performance by prevention
      (2) Implied-in-law: implied in the interest of fairness and justice (constructive conditions)
   b) Kingston v. Preston – dependant covenants (transfer of house conditioned on security)
      (1) (old rule) – three types of covenants
         (a) mutual and independent – breach by one no excuse for nonperformance by other!
         (b) conditional and dependant – one party liable after other performs
         (c) simultaneous – one tenders, other refuses → action for default
      c) modern view – each performance an constructive condition to others duty to perform
         (1) Goodison v. Nun – ex. of modern view – dependant covenants (established modern view)
      d) Types of conditions implied-in-law:
         (1) earlier performance condition precedent to later performance
         (2) simultaneous performance conditions concurrent
            (a) Palmer v. Fox (one side agreed to pave road, failed to, then wanted to sue for breach)
               (i) failure to perform relieves counterperformance
         (3) protracted performance condition precedent to a single act
            (a) if one side’s performance requires time, they must perform first
      e) Excuse of conditions to avoid forfeiture
         (1) excuse by substantial performance
            (a) this has been applied primarily in construction contracts – high forfeiture/unjust enrich.
            (b) UCC: no excuse by substantial tender – “rule of perfect tender”
         (2) O.W. Grun Roofing v. Cope – material breach ≠ substantial performance (roof tiles wrong)
            (a) substantial performance = good faith effort + no massive defects
         (3) Lowy v. United Pacific Insurance – divisible contracts (98% performed street work)
            (a) substantial performance may be applied to severable portion of contract
            (b) divisible only if expressly made so or reasonable interpretation
      f) Measure of Damages
         (1) if builder substantially performs – then difference in value or cost or repair/replace if not unduly expensive
         (2) if not ‘substantial performance’, then quasi-contract recovery?
            (a) majority – no recovery
            (b) minority ‘modern rule’ – recovery for benefits conferred less damages
               (i) Britton v. Turner (worked 9.5 mos. out of one year) – recovery allowed
                  (a) labor contracts are almost always divisible
                  (c) willful breach almost definitely prevents ‘substantial performance’, may impair quasi-contract recovery as well
                     (i) Maxton Builders v. Lo Galbo – retention of downpayment (buyers defaulted)

3. Representations and Warranties of Quality
   a) 3 ways to create express warranties:
      (1) affirmation of fact (representations) or promise made (warranties)
      (2) description given
      (3) model or sample used to describe
   b) implied warranties of merchantability and fitness for particular purpose (see above IV.B.2.g.)
   c) Henningsen v. Bloomfield Motors – disclaimer of warranty (small print limits warranty on car)
(1) implied warranty of merchantability is only a default rule, but must be clearly disclaimed
   (a) warranty of fitness also only a default
(2) here it was in small print
(3) agreements excluding liability for personal injury are prima facie unconscionable
d) Murray v. Holiday Rambler – limited warranty (exclusive remedy → repair, repairs failed)
   (1) if limited remedy fails of essential purpose, then limitation is disregarded
   (2) possible remedies then found in UCC: right to revoke, consequential damages
F. Changed Circumstances: Impracticability
1. Existing Impracticability – Same situations also allow for voiding by mutual mistake
   a) Mineral Park Land Co. v. Howard (needs contract to remove gravel, gravel below water table)
      (1) 10 times greater cost considered impracticable
   b) United States v. Wegematic (contract to deliver computer system)
      (1) engineering difficulties ≠ impracticability
      (2) holding otherwise would allow risk free gambling by subs
2. Supervening Impracticability
   a) Taylor v. Caldwell – destruction of subject matter (fire destroyed leased music hall)
      (1) performance excused – where performance depends on existence, condition implied
      (2) look not to what parties actually intended, but what reasonable person contracting would have intended the implied conditions to be
   b) Death or illness in a personal services contract → discharges performance
   c) Temporary Impossibility → suspends performance
   d) Failure of Supply → does not discharge performance
      (1) Canadian Industrial Alcohol v. Dunbar Molasses (supply contract, supplier’s supplier failed)
         (a) foreseeable risks do not excuse performance if under the control of one of the parties
         (i) parties must take all possible steps to avoid the ‘impossibility’
         (b) impracticability is really about assumption of the risk
      e) Dills v. Town of Enfield – futility ≠ impracticability (2 conditions warring for 2 outcomes)
         (1) inability to obtain financing doesn’t excuse performance of a condition made futile
         (2) elements of impracticability:
            (a) event made performance impracticable
            (b) nonoccurrence was a basic assumption of the contract
            (c) impracticability not the fault of the party seeking to be excused
            (d) party didn’t assume the risk
      f) another test for impracticability: who is the better risk bearer?
      g) Kaiser-Francis Oil v. Producer’s Gas (take or pay contract for oil)
         (1) drop in demand/loss of profitability not a force majeure event
         (2) take or pay clause was intended to allocate risk
3. Frustration of Purpose- performance possible but pointless
   a) elements:
      (1) supervening act/event
      (2) unforeseeable
      (3) avowed purpose known and recognized by both parties at time of contracting
      (4) act/event totally or almost totally destroys purpose
   b) Paradine v. Jane (apartment overrun by Prince Rupert’s army)
      (1) no discharge of lease b/c party assumes the risk of its own nonperformance/ inability
      (2) few courts will grant relief from lease for frustration
   c) Krell v. Henry (rented room to see coronation)
      (1) purpose known to both parties vs. 4 corners
      (2) attainment of performance becomes an implied condition precedent
d) *Washington State Hop Producers v. Goschie Farms* (gov’t reg. ceased, bids for hop base)
   1. termination of government program = supervening cause
   2. very few cases rely on frustration of purpose

G. The Duty of Good Faith

1. Scope and Content of Good Faith Duty
   a) *Centronics v. Genicom* – **Good faith doesn’t supercede terms of contract** (disputed escrow)
      1. bad faith as an attempt to recapture bargained-away economic opportunities

2. Reserved Discretion
   a) *Omni Group v. Seattle-First Bank* see II.2.f.4
   b) *Neumiller Farms v. Cornett* (contract for chipping potatoes)
      1. **without good faith** this contract would be **illusory** b/c the party who reserved discretion could not be bound
   c) *Reid v. Key Bank* **loan agreements – no arbitrary cutoffs** (bank refused rest of credit line)
   d) *Feld v. Henry S. Levy & Sons* – **good faith renders output Ks mutual** (supply – breadcrumbs)

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

4. Mutual Termination Contractual Relations: **Discharge**
   a) most courts require consideration for an agreed discharge of duties – but easy if bargained for
   b) *AFC Interiors v. DiCello* (creditor crossed out ‘payment in full’ on debtor’s check)
      1. **common law: need consideration**, then finds accord and satisfaction when creditor accepts the offered partial performance
      2. **UCC:**
          a) creditor may expressly reserve rights and accept performance without giving up claim to remainder of debt
          b) **no consideration needed for discharge**, just a signed writing
      3. here the court found an express reservation in the crossing out of the words

5. Unilateral Termination of Contractual Relations
   a) see *Zapatha v. Dairy Mart* at IV.B.4.i.
   b) *Seubert v. McKesson* (salesman fired for failing a quota due to returned defective computers)
      1. **no termination without cause** if there exists a policy providing for termination on certain conditions
      2. **modern trend is to limit power of termination** (through statute and case law)

VI. Breach of Contract and Permissible Remedial Responses

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

1. Material vs. Minor Breach
   a) Criteria: extent performed, willfulness, extent of benefit/payment exchanged, hardship resulting
   b) **Repudiation is always a material breach.**
   c) **Material Breach excuses counterperformance, entitles to remedies for entire contract.**
      1. damages
      2. specific performance
      3. rescission and restitution
      4. quasi-contract
      5. tort action
   d) **Minor Breach: may suspend performance, get damages caused by breach.**
2. **Anticipatory Repudiation = present, material breach**
   a) *Hochster v. De La Tour* (repudiation of a tour guide’s contract)
      (1) can sue immediately, so that one party need not be idle
   b) This **only applies** to contracts **were neither side has performed in full yet** (executory obligations remain).
   c) Other party must mitigate damages
   d) **Duty of Counterperformance excused**
      (1) exception: **repudiator retracts** – this revives the duty of counterperformance unless rescission was accepted or repudiating has changed their position in reliance
         (a) *Taylor v. Johnson* **Repudiation must be unequivocal** (horse to be studded)
             (i) no implied repudiations
             (ii) **voluntary disablement** vs. **anticipatory repudiation**:
                 (a) voluntary disablement is **conduct**, not words, which make it look like other party is unwilling to perform
   e) Ambiguous expression insufficient
      (1) UCC: allows **right to demand “adequate assurances of performance” if “reasonable grounds for insecurity”**. Other party has 30 days to respond.
      (2) *AMF v. McDonald’s* – **no assurance=breach** (faulty computerized cash registers)
         (a) UCC interpreted loosely – need not use exact verbage
   f) **Breach must be material**
      (1) *Plotnick v. Pennsylvania Smelting & Refining* (partially performed installment contract)
         (a) **Failure to pay one installment not usually a material breach.** Consider:
             (i) does it make continued performance difficult?
             (ii) does it create a huge risk in seller’s mind?

B. Compensatory Damages
1. Basic Policies
   a) designed to give the π the benefit of his bargain
   b) monetary relief: 3 measures:
      (1) expectation: gain expected
      (2) reliance: out-of-pocket expenditures
      (3) restitution: value of breaching party’s performance
   c) punatives: no, with rare exceptions
   d) must prove loss with reasonable certainty
   e) nominals always available
   f) **duty to mitigate** → no recovery for avoidable damages
   g) provisions for damages enforceable unless punitive in character
   h) *Allen v. Jones* – **can recover for mental distress with no physical injury** (lost cremated body)
      (1) recovery here tied to tort law, but Restatement §353 allows possibility for contract law
   i) *F.D. Borkholder v. Sandock* **no punatives for breach unless tort** (leaky construction and lies)
   j) *Boise Dodge v. Clark* punitives used to deter conduct for public policy (odometer dialed back)
      (1) amount: no hard and fast rule, but **no so much as to be result of passion and prejudice**
   k) **Standard measure of damages:**
      (1) contracts for sale of goods
         (a) difference between contract price and market price at time of delivery
             (i) may collect more if loss due to a **commercially reasonable response**
                 (a) seller’s breach: buyer has a right to cover – get difference
                     (i) must cover or won’t get consequentials
                 (b) buyer’s breach: seller has a right to resell – get difference
             (b) goods already “identified” to the K – **can get full value** if can’t resell
             (c) if buyer can’t cover, can get replevin
             (d) can get consequentials as a result of breach
(2) land sale contracts
   (a) general rule: difference between contract price and fair market value
   (b) minority rule (only when vendor breaches) (English Rule): can only get lost expenses
      unless breach was bad faith

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

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

2. Breach or Repudiation by Payor
3. Breach or Repudiation by Performer
   a) Direct Damages
   b) Consequential Damages
      (1) includes damages which are reasonably foreseeable as flowing from the breach
      (2) Hadley v. Baxendale -- foreseeability of damages (broken mill crankshaft shipped)
         (a) breacher must be aware of special circumstances for damages to be foreseeable
         (i) this encourages parties to assign the risks
      (3) Spang Industries v. Aetna Casualty & Surety (steel for bridge delayed, frozen concrete)
         (a) knowledge of special circumstances determined at time date of performance set
      (4) Hydraform Products v. American Steel (steel for woodstoves, new business)
         (a) need clear evidence of foreseeability for consequential damages to be awarded
         (b) UCC test -- reasonable certainty vs. common law -- no new businesses per se
      (5) L. Albert & Son v. Armstrong Rubber Co. (contract for rubber processing machines)
         (a) recovery limited to reliance costs minus whatever breacher can show \( \pi \) would have lost
            anyway -- courts won’t force \( \Delta \) to indemnify \( \pi \) against risk of loss

C. Prevention, Hindrance, and the Duty of Cooperation
   1. prevention must be wrongful (though not necessarily bad faith) to amount to a violation of an
      implied condition precedent
   2. Patterson v. Meyerhofer -- interference with only source of supply (deal to sell 4 lots of land)
      a) parallel to notion that we won’t allow breacher to recover damages
   3. Iron Trade Products v. Wilkoff -- innocent interference making performance harder (purchase of
      rails)
      a) no clear line, but here, innocent effect on demand was not enough to count as hindrance
   4. Billman v. Hensel -- good faith duty to satisfy condition precedent (sale of house, parents scared)
      a) \( \Delta \)s here made not even one formal loan application

D. Equitable Remedies for Breach of Contract: Prohibitory Injunction and Specific Performance
   1. Consequential vs. Equitable Remedies
      a) consequential damages: money awards enforced against \( \Delta \)s property (in rem)
      b) equitable remedies: (specific performance, etc) enforced against \( \Delta \) (in personam)
   2. Requirements for specific performance
      a) K must be definite and certain
      b) remedy at law must be inadequate
      c) no undue hardship must result
      d) enforcement must be feasible
      e) mutuality no longer required: can get s.p. even if other party would not be able to
   3. Specific Performance for sales of goods - “goods unique or other proper circumstances”
      a) exception: goods necessary and unavailable
(1) Curtice Brothers v. Catts (tomatoes needed for canning)
   (a) irreparable injury to π's business would have resulted otherwise
   (b) personal service required here, but ct said it would assign a picker if need be

(2) LaClede Gas v. Amoco Oil (requirements contract to supply propane)
   (a) any restriction on right to cancel generally held to satisfy mutuality
   (b) specific performance awarded even though other party couldn’t have gotten

(3) Northern Indiana Public Service Co. v. Carbon County Coal (K to supply coal)
   (a) specific performance would result in inefficient outcome here – denied
   (b) losses of 3rd parties irrelevant to suit (workers)

(4) Walgreen v. Sara Creek Property (suit to keep out deep discount chain)
   (a) π has burden to show damages inadequate – here bilateral monopoly would result

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

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

6. Covenants not to compete:
   a) enforced in equity so long as reasonable in time or place
   b) granted only if not against public policy (aka slavery)
   c) American Broadcasting v Wolf (broadcaster switches networks)
      (1) no specific performance enforcement of a personal services contract
      (2) once K terminated, no injunction possible (injunction = negative specific performance)

E. Effect of Agreement Liquidating Damages or Altering the Scope of Liability or Remedy
1. Liquidated Damages (versus penalty clauses)
   a) if damages would result in penalty or forfeiture, they are unenforceable
   b) terminology is irrelevant, ct looks to outcome
   c) requirements for a valid liquidated damages clause:
      (1) actual damages difficult to ascertain
      (2) amount must be a reasonable forecast of compensation for harm (how possible?)
         (a) Southwest Engineering v. United States (build stuff for airports, l.d. clause)
            (i) reasonableness determined at time K executed
            (ii) As contribution to delay factored into amount awarded
         (b) United Airlines v. Austin Travel (cancellation of computerized reservation system)
            (i) large percentages of K amount are o.k. in some circumstances (high fixed costs)
            (ii) fact that damages provide same remedy for all breaches is irrelevant
         (c) Leeber v. Deltona (15% deposit retained as liquid damages on sale of condo)
            (i) liquid damages enforced unless:
               (a) fraud
               (b) uncontrolled misfortune preventing performance
               (c) mutual rescission
               (d) benefit retained shocking to conscience of court
            d) failure to pay money rarely justifies a further sum

2. Agreed Remedies – can replace default
   a) limitations on agreed remedies include failure of essential purpose and unconscionability
   b) Lewis Refrigeration v. Sawyer Fruit, Vegetable, and Cold Storage (broken freezers, lost Freon)
      (1) limitation of consequential damages clause ok in a commercial context unless unconscionable
      (2) the court here remanded for determination of unconscionability
   c) commercial warranty package – very effective: gives (free from defects), limits, disclaims, excludes – rarely found unconscionable

F. Resolution of Contract Performance Disputes: Some Alternatives to Courts
I. The Legal Framework for Settlement

2. Dispute Resolution in Construction Contracts

VII. Third Party Interests

A. Assignment and Delegation

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

2. Assignment of Rights – transfers rights to a 3rd party or parties
   a) general rule: all contract rights are assignable
      (1) Fitzroy v. Cave motive of assignor immaterial (π driving ∆ to bankruptcy)
      (2) can’t assign if it materially alters obligor’s duty
         (a) personal service contracts – test is degree of personal nature involved
         (b) requirement and output contracts not assignable
         (c) assignment can’t alter essential terms of K: price, time of delivery, etc.
   b) manifested intention to vest a present right is sufficient
   c) gratuitous assignments revocable at will, by:
      (1) successive assignment to another
      (2) death of assignor
      (3) bankruptcy of assignor
      (4) notice of revocation
      (5) acceptance by assignor of payment directly from obligor
   d) gratuitous assignments can be made irrevocable by a signed or sealed writing, or other document
   e) assignments given for consideration are irrevocable
   f) can assign future right in existing K, but not future rights in future K
   g) affect of prohibition on assignment:
      (1) promissory – can still assign, but are liable for breach of K (destroys only right to assign)
      (2) condition – can’t assign (destroys right and power to assign)
      (3) UCC: generally holds limitations on assignment void – allows free assignment of rights, at least for account debtors and assignors
         (a) Allhusen v. Caristo Construction (subcontract to paint public schools – nonassignable)
            (i) ct upheld nonassignment clause – but result would have been opp. under UCC
      h) effect of irrevocable assignment:
         (1) rights of assignee against obligor:
            (a) right of direct action (can sue)
            (b) once obligor has notice, he pays anyone else at his peril
         (2) Continental Purchasing v. Van Raalte notice (EE assigned wages to creditor)
            (a) 1st assignment revocable → subsequent always wins
            (b) 1st assignment irrevocable
               (a) common law: priority established by:
                  (i) if one of parties has a stronger equity, they win (ex: subsequent knew of 1st)
                  (ii) if equities equal:
                     (a) majority: “New York:: rule: 1st in time wins (prior assignee)
                     (b) “English” rule: 1st to give notice to obligor wins
               (b) UCC: filling requirement – 1st to file ‘perfects’ their security interest
   i) problems with successive assignments of same right
      (1) 1st assignment revocable → subsequent always wins
      (2) 1st assignment irrevocable
         (a) common law: priority established by:
            (i) if one of parties has a stronger equity, they win (ex: subsequent knew of 1st)
            (ii) if equities equal:
               (a) majority: “New York:: rule: 1st in time wins (prior assignee)
               (b) “English” rule: 1st to give notice to obligor wins
               (b) UCC: filling requirement – 1st to file ‘perfects’ their security interest

3. Delegation of Duties – appoints duties to a 3rd party, but orig. remains liable
   a) duties delegable unless performance would vary materially from original performer’s
   b) Sally Beauty v. Nexxus Products no assignment to competitor (exclusive distribution hair prod.)
      (1) UCC: may prevent delegation if have a “substantial interest” in having original party perform
(a) no assignment for purposes of collection only???
(b) can always assign rights which are no longer executory

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

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

1. Creation of Rights
   a) sue to enforce?
      (1) old view – 3rd party beneficiaries can’t sue to enforce
      (2) modern view – 3rd party may sue to enforce
   b) test – K must be “primarily” for 3rd party’s benefit – promisee’s intent determinative
      (1) performance rendered to 3rd party?
      (2) presence of express provisions?
      (3) 3rd party expressly named?
      (4) relationship pf parties
   c) creditor beneficiary vs. donee beneficiary – look to intent again
      (1) creditor beneficiary – if promisee’s intent was to discharge a debt – even if no duty owed
         (a) operates exactly like a delegation and express assumption of duties
         (i) ex- B promises to pay As debt to C – B expressly assumes duty
      (2) donee beneficiary – if intent was even partly to give a gift
   d) Johnson v. Holmes Tuttle Lincoln-Mercury member of a class may sue to enforce (agreement to insure car, guy injured in accident w/ buyer sued)
   e) Hale v. Groce - intended beneficiary of a will may sue (lawyer failed to provide for gift)
   f) Zigas v. Superior Court beneficiaries of government contracts may sue (L violated rent cap)
      (1) difficult to determine intended beneficiaries of government contracts

2. Nature of Rights
   a) once rights have vested, beneficiary may sue
   b) promisor can assert the normal defenses to K
   c) beneficiary may retain performance given unless he knew it was a rescindable K
   d) vesting requirement:
      (1) Tweeddale v. Tweeddale vesting automatic (son beneficiary of real estate, unaware)
      (2) minority view – rights vest when detrimentally relied on
      (3) original Restatement:
         (a) donee vests automatically
         (b) creditor vests when detrimentally relied on or brings suit
      (4) Restatement (Second): no donee/creditor distinction – rights vest when:
         (a) manifests assent to promise
         (b) brings suit
         (c) detrimentally relies