What is a Contract?

- A promise or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
- Three types of contracts:
  - Express Contracts: formed by language (oral or written)
  - Implied Contracts: formed by manifestations of assent other than oral or written language (i.e. by conduct)
    - Contracts implied in fact
    - D requested P to perform work
      - Will assume the request in some instances, such as emergency medical care
    - P expected D to compensate him for those services
    - D knew/should have known that P expected compensation
    - Remedy: reasonable market value or the price intended by the parties, if ascertainable.
  - Quasi-Contracts: not really contracts at all. Constructed by the Courts to avoid unjust enrichment by permitting Ps to bring actions in restitution to recover the amount of benefit conferred on D. Only relationship to actual contracts is historical.
    - Benefit conferred with the expectation that there would be compensation.
      - D knew or should have known that P expected to be paid
    - Benefit is useful and appreciated by the benefited party
    - Benefit is accepted such that it would be inequitable not to require them to pay (D would be unjustly enriched)
    - Remedy: value of the benefit conferred on D (not detriment to P)
  - Bailey v. West: no contract existed between P and D for P to care for D’s horse. Not implied because P did not know D owned the horse, could not assume the request to care for it. Not Quasi-Contract because D did not accept/appreciate the benefit conferred by P; he returned the bills and denied ownership
- Variations as to acceptance
  - Bilateral Contracts: the traditional contract, exchange of mutual promises.
    - Promise for a promise
    - Each party is both promisor and promisee
  - Unilateral Contracts: acceptance by performance
    - The offer requests performance, not a promise
      - Offeror-promisor promises to pay on completion of the requested act by the promisee
      - Once the act is completed, the contract is formed
      - Revocable by offeror at any time prior to completion. Starting performance does not create the contract!
    - One promisor and one promisee
  - Modern view is that most contracts are Bilateral
    - All offers are “doubtful”, which may be accepted by promising or performing, unless otherwise indicated by language or
circumstances. Therefore, acceptance of a bilateral contract may be made by performance or start of performance

- Unilateral Contracts are limited to 2 circumstances
  - Where the offeror clearly indicates that completion of performance is the only manner of acceptance
    - Offeror is master of the offer and can create the offer in this fashion
  - Where there is an offer to the public (e.g. reward), which so clearly contemplates acceptance by performance rather than a promise, only the performance requested in the offer will manifest acceptance.

- Test for Determining Between Unilateral/Bilateral Contracts
  Considers whether, at the time the contract was formed
  - Each party as a right and a duty (Bilateral) or
  - One party only has a right and the other party only has a duty (Unilateral)

- Option Contracts:
  - Confers on the offeree a right to complete the performance that has been commenced if he chooses to do so.
  - Means by which to convert many unilateral contracts to bilateral contracts BUT
    - Only ends up binding the offeror once performance is commenced
    - Offeree can stop performance at any time and will not be in breach

- The four major questions we ask in relation to Contract Law
  - Have the parties behaved in such a way as to create legally recognizable expectations in one another?
  - If they have, how should those expectations be characterized and understood?
  - Was that understanding faithfully carried out by the parties or somehow thwarted?
  - If the understanding was thwarted, what should the law do about it?

**What are the different theories of Contractual Obligation?**

- Party-Based Theories
  - Will Theories protect the promisor
    - Promisor has to have chosen to be bound by the commitment; look at state of mind at formation
    - Exercise of promisor’s will justifies enforcement against him
  - Reliance theories protect the promisee
    - Makes promisors liable when their assertive behavior creates justified reliance in others
    - Protects people when they rely on commitments that will be legally enforced

- Standards-Based Theories
Efficiency theories focus on economic efficiency
- Consider whether the “size of the pie” is increased or decreased by a contract to determine enforceability
- Assumes that all contracts are enforceable, the focuses on remedies and enforcement
- Only looks at the consequences
- Is efficiency really the only goal of the law?

Substantive Fairness Theories
- No predictable standard of enforceable vs. unenforceable contracts
- Requires constant interference with personal preferences

Process-Based theories look at how the agreement was reached between the parties
- Bargain Theory of Consideration
  - Consideration provides the distinction between enforceable/unenforceable contracts
  - Focus on voluntary assumption of obligation
  - Provides neutral formality, legal protection for the exchange, structure and protection for market transactions, and fuller development of remedies to protect expectations.
  - Problem is that it fails to enforce certain important, but unbargained-for commitments

**THE BASES OF PROMISSORY LIABILITY**

**Consideration: The Bargain Requirement**
- *A bargained-for* change in legal position between the parties; required for enforceability of bilateral contracts (with exceptions)
- Elements of Consideration
  - Bargained-for exchange
    - Reciprocal and Mutual; must be connected!
    - The promise induces the detriment
    - The detriment induces the promise
    - Each party views what she gives as the *price* for what she gets
  - Whatever is bargained for must constitute a benefit to the promisor or a detriment to the promisee
  - Performance can be in the form of:
    - An act other than the promise
    - Forbearance
    - Creation/modification/destruction of a legal relation
  - The performance or the return promise can be given to the promisor or to a third party; may be given by the promisee or a third party
- Gifts (i.e. donative promises)
  - Act or forbearance by promisee must be of benefit to the promisor
    - Promisor’s motive must have been *to induce the detriment*
- If the detriment was merely a condition, then there is no consideration; there has to be benefit and detriment in gift contracts
- The act or forbearance must be something that the promisee was already legally obligated to do/not do.
  - Economic Benefit is not required
    - Peace of mind
    - Posthumous Remembrance: Allegheny College v. National Chautauqua County Bank of Jamestown: Seeking to enforce donation; not just a gift because college had an implied obligation to set up a scholarship in donor’s memory. Enforceable; estate has to pay.
    - Gratification of influencing the mind of another person is enough as long as the promisee was not already obligated to perform the requested act.
  - Promissory Estoppel: The promise may be enforceable if it was relied on (or under seal)
    - If a donative promise induces reliance in a manner that the promisor should reasonably have expected, then the promise will be legally enforceable, at least to the extent of the reliance.
    - Reliance is viewed either as consideration or as a substitute for consideration.
  - Conditional donative promises are also not enforceable even if the condition has been fulfilled
    - Unless the fulfillment of the condition constitutes reliance.
  - Hamer v. Sidway: uncle to pay nephew not to smoke, drink, or gamble. Consideration is satisfied because uncle got what he bargained for. Performance = forbearance.
  - Ricketts v. Scothorn: Grandfather pays granddaughter in hopes that she will no longer have to work. Since she quit her job in reliance on that gift, estoppel prevents grandfather from not paying b/c he intentionally influenced her to quit her job; he got what he wanted.
  - Ricketts and Hamer are exceptions to the rule! Usually donative promises within families are not enforceable!!!
  - Langer v. Superior Steel: promise to pay former EE to not work for a competitor. Benefit/consideration is that EE won’t hurt the ER. Detriment is not working for certain ER. Enforceable Contract.
- Kirksey v. Kirksey: man invites dead brother’s widow and kids to come live with him and will give them a place to live. Court decides it was a mere gratuity, not enforceable b/c he got nothing out of the exchange; she would not have been in breach if she had not gone there in the first place.
- Consideration Substitutes:
  - Reliance
  - Past or moral consideration
  - Waiver of nonmaterial conditions of the bargain
  - Promises made in special legally recognized forms
Sufficiency of Consideration

- Adequacy of Consideration is normally not examined (but courts of equity might look at the relative values of the promises/performances and deny an equitable remedy where they find a contract to be unconscionable)
  - **Thomas v. Thomas**: promise to pay $1#/year and maintain residence as consideration for living on land. Good enough…don’t ask how sufficient consideration is.
  - **Token Consideration** (has no value)
    - Usually not legally sufficient (i.e. under Restatement)
      - If there is a mixture of bargain and gift, it is only enforceable to the extent of the bargain
    - Indicates a gift rather than bargained-for consideration
    - **In Re Greene**: contract says there is consideration, but nothing ever paid.
  - **Sham Consideration**
    - Recital of a sum paid in consideration, which often is not paid at all and was never intended to be paid
      - Will not make donative promises enforceable
      - *Will* make options and guaranties enforceable
        - UCC Firm Offers: don’t even need a recital of consideration to be enforceable.
        - Guaranties are promises to answer for someone else’s debt
    - Courts may look to evidence to see whether it was paid, or if there was some other consideration
    - **In Re Greene**: Contract for man to pay his ex-mistress money to release him from his promises to pay her taxes and stuff, but now he won’t pay and she wants the money. No contract b/c no consideration: he owes her nothing, and the consideration (the services he got from her while they were together, presumably) is something in the past, and you can’t make a contract for something you’ve already done. Once the contract was made, she did nothing.
  - **Possibility of Value**
    - If there is a possibility of value in the bargained for act, even if the value never comes into existence, consideration will be found to be adequate
    - **Apfel v. Prudential-Bache Securities, Inc.**: contract to pay P for use of ideas. Enforceable even though D claims the ideas had no value. However, actions indicate that it was valuable, was new to D; doesn’t matter that ideas are intangible. P kept quiet for 2 years while D did research, etc. Benefit: more information, options, future earnings. Detriment: confidentiality.
    - **Fiege v. Boehm**: man promises to pay woman child support; he promises not to do paternity tests. When he quits paying, he...
claims there was no consideration b/c he knew he wasn’t the father. Contract is enforceable…why would he have paid if he knew he wasn’t the father? As long as her claim was in GF, then it’s enforceable.

- Legal Benefit and Legal Detriment Theories
  - Legal Detriment to the Promisee:
    - Does something he is not under legal obligation to do
    - Refrains from doing something he has a legal right to do (surrender or forbear from asserting a legal claim) and:
      - The promisor’s belief in the validity of the claim is either reasonable or held in good faith
    - Need not involve any actual loss to promisee or benefit to promisor
  - Legal Benefit to Promisor is whatever the detriment to the promisee was
  - **Majority Rule**
    - Detriment to the promisee is the exclusive test of consideration
    - Benefit to the promisor alone is not sufficient consideration
  - Minority and First restatement
    - Detriment or benefit to the other party is sufficient consideration
  - Second Restatement
    - Doesn’t consider benefit/detriment at all
    - Only asks whether something was bargained for and given in exchange

**Pre-Existing Duty Rule**
- The performance or promise to perform a pre-existing duty does not constitute consideration
  - The promise of an official to perform an act that falls within the scope of his official duties is not consideration, and neither is the actual performance of the act.
  - Performance of a public duty required by law, other than an official duty, is treated the same as performance of an official duty (e.g. promise to tell the truth on the stand as a witness)
  - **Alaska Packers’ Association v. Domenico**: contract price modification not enforceable. EE’s were already under obligation to do their jobs; demanding a higher price was in bad faith, new contract formed under duress. No consideration for ER to pay more.
  - **Levine v. Blumenthal**: contract to lower rent not enforceable because T didn’t do anything in exchange.
  - Payment of a lesser amount as discharge of a debtor’s full obligation is not consideration
    - Creditor’s promise to accept the lesser amount as full payment is not enforceable
    - Exceptions:
      - If the debtor did something different than required (e.g. pay the lesser sum before the payment was due; render a service in lieu of paying money)
- If there is an honest dispute as to the debt, payment of a lesser amount than claimed by the creditor is consideration for a promise to discharge in full
- If the amount of the obligation is unliquidated, then payment of an amount that is less than the creditor claims is consideration for full discharge.

- Exceptions to the general rule:
  - New or different Consideration is Promised
    - Promisee gives something in addition to what is already owed in return for the promise
    - Promisee has in some way agreed to vary the pre-existing duty, such as accelerating performance
    - It is usually not important how small the change is as long as there is a change!
  - Modification has to have new consideration
    - Parties must voluntarily agree to the modification
    - Modification must be fair and equitable
    - The modification must be made before the original contract was fully performed on either side
    - The circumstances which prompted the change must have been unanticipated by both parties
    - The obligations of both parties have to be varied (modification for the benefit of one party is unenforceable unless it falls under the good faith exception)
      - Angel v. Murray: garbage collection services for 10 years; city grows beyond what parties expected, and D asks city council to pay him more. City council agrees. P sues saying the modification is not enforceable b/c there was no new consideration. Held: enforceable b/c unforeseen circumstances justified the request; D is doing something beyond what was expected when the contract was formed. (not fully performed yet, fair and equitable, circumstances were unforeseen).
  - Voidable Obligation
    - A promise to perform a voidable obligation (ratification) is enforceable without new consideration
    - E.g. infant ratifies contract upon reaching majority; no need for new consideration; promise to perform a contract made under mutual mistake
  - Preexisting Duty Owed to Third Party
    - Did not used to be able to enforce a promise when you already owed the same duty to another party
    - The majority view now, though, is that you can still enforce the second promise because you did not owe a duty to the second party under the original contract; now you owe the same duty to both parties
- **UCC 2-209**: an agreement modifying a contract for the sale of goods is **binding without consideration**. (No legal duty rule)
  - Fairness is not explicitly required, **but** the modification is subject to the duty of good faith.
  - Note: a waiver of a right has to have consideration
- Once the contract has been fully performed, the legal duty rule has no application and the promisor can’t recover the extra money paid unless she paid under duress.
  - A threat to breach is not economic duress unless it leaves the promisor with no reasonable alternative.

**Mutuality of Obligation**
- Both parties must be bound for a contract to be enforceable
- If one party can terminate the contract without breach, then there is no contract
  - Examples of “illusory” contracts:
    - Promise to do something “if I want”
    - Right to terminate at will and without notice
      - **UCC 2-305**: requires reasonable notification;
        - an agreement dispensing with notification is invalid if its operation would be unconscionable.
        - Might not be illusory, then, because the provision is invalid.
  - **Rehm-Zeiher Co. v. F.G. Walker Co.**: D provides whiskey to P. D gets out if the whiskey or the bottling room is destroyed. P gets out if it can’t use the whiskey “for any unforeseen reason.” *No contract* because P has unfettered discretion, not really bound. Only D is bound.
- Courts are interested in making contracts enforceable, though…
  - Exclusive Distributor Contracts have an **implied obligation to use reasonable efforts**
    - **Common Law**: *Wood v. Lucy, Lady Duff-Gordon*: P is exclusive distributor of D’s goods and endorsements; D can only go through P. D starts doing stuff **not** through P, claims P not bound. *Held*: P has an implied GF obligation to use his best efforts to sell her designs and endorsements; he **is** bound by the contract. She must have thought that when she entered the contract b/c if he didn’t make money off her stuff, she wouldn’t get any money either.
    - **UCC 2-306(2)**: unless the parties agree otherwise, there is an obligation to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.
  - Requirements and Outputs Contracts include an **assumption of good faith in how much you will require/produce**:
    - **UCC 2-306(1)** assumes that requirements/output contracts are enforceable:
      - Quantities may not be unreasonably disproportionate to any stated estimates or normal or prior output or requirements
• Promisee is protected if Promisor changes the quantity in an unforeseeable fashion, even if it was changed in GF.
• Not illusory just because one party might go out of business, because there is an implied promise to remain in business.
  o No breach if one party goes out of business for reasons other than the profitability of the contract
  o Breach if the shutdown was motivated by the unprofitability of the contract in question

- **Modern rule** enforces requirements/output contracts even if one party does not have an established business because the parties have limited their options
  - At common law, if one of the parties does not have an established business, the promise was illusory because there is no basis for estimating the quantity that will be produced/required.

- **McMichael v. Price**: Good faith in requirements and outputs contracts. *Are* mutually binding
  o Contracts conditioned on one party’s satisfaction have an *implied good faith basis for satisfaction/dissatisfaction*
    - **OMNI**: Implied good faith in satisfaction with property that they don’t have to buy if they aren’t satisfied. Mutual obligation exists.
  o Voidable promises (i.e. made by a minor) are not void for lack of mutuality.
  o Conditional promises are not void for lack of mutuality even if the condition is within the promisor’s control.
  o Alternative promises:
    - If the promisor can choose between means of discharging his obligation, then *each* of the performances available must be consideration
    - If the promisee can choose, then there is consideration if *any one* of the alternatives would be consideration alone.
  o When the agreement allows one party to supply or determine a missing term:
    - **Common Law**: if the term is material, the promise is illusory
    - **UCC**:
      - The discretion is not unlimited because of the implied duty of GF, therefore it is not illusory (1-203)
      - The contract will be enforceable if the parties intended it to be so. (2-305)

- Mutuality is not required for unilateral contracts (the promisor is only bound if the promisee, but the promisee is under no obligation to perform)

**Moral Obligation**
- See also Quasi-Contracts, Implied Contracts
• *Past Benefit* is not sufficient to meet the bargain requirement because performance was not made in exchange for the promise when it was made
  o Exceptions to the general rule
    ▪ Debt barred by a technical defense, e.g. statute of limitations, bankruptcy
      • New promise will be enforced
      • New promise has to be in writing or has been partially performed
    ▪ Promise to pay for Past Requested Act
      • If an act has been previously performed by the promisee at the promisor’s request, a new promise will be enforceable
      • Extended to unrequested acts, such as emergency medical treatment
      • Terms of the new promise are binding, not the prior understood terms
      • Only binding to the extent needed to prevent injustice
  o Past material (i.e. economic) benefit plus moral obligation will qualify as consideration for a promise to compensate someone who suffered detriment to confer a benefit on the promisor
    ▪ Only binding to the extent necessary to prevent injustice
    ▪ **Webb v. McGowin**: Man who hurt himself falling to save the other guy’s life and the guy whose life was saved promises to pay him a weekly sum: contract is enforceable (benefit conferred upon saved man). *Past consideration counts if it was a benefit* (preservation of life, health).
    ▪ Not binding if promisee conferred the benefit as a gift or if, for other reasons, there has not been unjust enrichment (P mowed D’s lawn while D was out of town, knowing D did not want his lawn mowed. P cannot recover b/c it was done in bad faith)
    ▪ **Mills v. Wyman**: Father promises to pay for care of his dead son after his son has died. Doesn’t pay, caretaker sues. No contract b/c no consideration; father didn’t benefit (son was adult). Care was not given as a response to the promise to pay.
    ▪ Doesn’t matter if the promisee incurred expenses; if there was no material benefit to the promisor, it’s not enforceable.

**Promissory Estoppel**
• An alternative for Consideration (makes a promise binding without conventional, bargained-for consideration)
  o Consideration is not required when the facts indicate that the promisor should be estopped from not performing
• Elements are:
  o Clear and unambiguous promise
  o Reliance on the promise must:
    ▪ Be foreseeable by the promisor
    ▪ Be reasonable by and detrimental to the promisee
• Actually happen and be substantial
  o The injury resulting from not enforcing the promise is “unconscionable”
  o The only way to prevent injustice is enforcement of the promise
• Feinberg v. Pfeiffer: In appreciation of past services, ER tells EE it’s going to pay her a generous pension, but hopes she’ll keep working as long as she can anyway. When she quits, she becomes unemployable, they quit paying her and she sued. No consideration b/c the pension was paid for past services, the parties did not bargain for it. Enforceable anyway b/c she relied to her detriment by quitting.
• Cohen v. Cowles Media Co.: P relied on tradition of confidentiality and promises of reporters not to reveal his name. They revealed it, P lost his job. Can’t be a normal contract b/c reporters, as agents, could not bind newspapers not to reveal name. Have to use PE. Reliance: gave info. based on fact that name wouldn’t be used. D breached that promise, detriment to P: loss of job. Public policy: protection of news sources. BUT it was unreasonable for P to rely on that promise; reporters are there to tell the news. No recovery allowed.
• Remedy is limited as justice required
  o May be the compensate for reliance
  o May only compensate for part of the reliance if it wasn’t entirely reasonable
  o Grouse v. Group Health Plan, Inc.: D told P they would hire him, so he quit his current job and turned down another. Then it turned out he didn’t meet their hiring requirements, so they didn’t hire him. Employment was to be “at will” so he only recovers damages for lost wages and OC for turning down the job b/c he could not reasonably have relied on the new job for more than one day.

**CONTRACT FORMATION**

**Ascertaining Assent**

• An offer creates a *reasonable expectation* in the offeree that the offeror is willing to be bound to the offered terms
  o Was there an expression of a promise, undertaking, or commitment to enter into a contract? Judged by RP standard, or if the one party knew or had reason to know that the other would interpret it in a certain way, then that is good enough.
    ▪ Language can show that an offer was or was not intended
      • Certain language is construed as invitation to deal, preliminary negotiations, etc.
    ▪ Surrounding circumstances (the context in which the statement was made)
      • What would a reasonable person have understood?
    ▪ Prior practice and relationship of the parties
    ▪ Method of communication
      • Broad communications Media
        o Usually just the solicitation of an offer, with exceptions
Advertisements

Industry Customs

Certainty and Definiteness of Terms

- Were there certainty and definiteness in the essential terms?
  - Enough of essential terms must be provided so that a contract including them would be capable of being enforced
  - Identity of offeree
    - *Lefkowitz*, “first come, first served” works
    - Reward offers: performance provides the ID
  - Subject matter of the offer
    - Have to be able to define it in court
    - Okay if there is an objective standard by which court can determine the missing terms
  - Requirements and Output Contracts
    - Assumption of good faith
    - Quantity tendered/demanded must be reasonably proportionate to a stated estimate or prior output or requirements
    - Requirements of new businesses are unenforceable b/c they are uncertain

- Price
- Time of payment, delivery, or performance,
- Quantity
- Nature of the work to be performed

  - Employment contracts must specify the duration of the employment, or else it’s terminable at will
  - Court will infer reasonable terms where there are none
  - If the terms provided are vague, then you can’t assume that the parties intended a reasonable term, then how do you fix it?
    - Part performance may clarify the vagueness.
    - Acceptance may clarify if there were choices for alternative performances
  - Terms to be agreed On
    - If the term is material, then the offer is too uncertain to be enforced
      - But the UCC permits a reasonable *price* to be supplied if it’s otherwise clear that the parties intended to form a contract.
  - Was there communication of the above to the offeree?
    - Can’t enforce a contract if you didn’t know about it.

- The Objective Test: Contract formation requires meeting of the minds
  - Look to intent to determine meeting of the minds
    - Intent is judged objectively; don’t need subjective (actual) agreement
    - Manifestation of mutual assent
- **Glover v. Jewish War Veterans of US:** reward offered by D for info. leading to an arrest. P gave info without knowing about the reward. Found out later and claimed the reward. Not enforceable because P did not know about the offer; her act must have been motivated by D’s promise for there to be a contract. No acceptance because she didn’t know there was an offer.
  - If a RP would have thought there was a meeting of the minds, then there was a contract.
- **Embry v. Hargadine, McKittrick Dry Goods Co.:** P was worried about extending contract another year, asked D, who said “Go ahead, you’re all right.” P wants to enforce; D says he never intended for that to mean he had another year. *Held:* enforceable b/c RP in P’s place would have thought there was a meeting of the minds.
- **Lucy v. Zehmer:** Drunk people make a contract to sell a farm; wrote down details (price, time) and signed it, didn’t take it back when P picked it up. D doesn’t want to sell, meant it as a joke. Court enforces it b/c of objective evidence; need to be careful entering into contracts!
  - What you really think does not matter; what is important is what it looks like you intend
  - *Peerless:* if it is clear that you agreed to two totally different things, and both of you were reasonable in your belief and had no reason to know what the other thought, then there is no meeting of the minds, and no contract.
- Cohesion Contracts are still *Subjective*
  - Party seeking to enforce has the burden of showing that the other party knew what he was signing, that there was a real and voluntary meeting of the minds
  - Looks beyond manifested intent because we are uneasy about unequal bargaining power
- You can also manifest your intent not to be bound
  - Circumstances can indicate intent not to be bound
  - If anything expressly says that it is not an enforceable contract, then it cannot be enforced
- Promises made in social situations are typically not enforceable because people generally are not intending to be bound by them

**The Offer**
- An offer creates a power of acceptance in the offeree and a corresponding liability on the part of the offeror
  - **LaSalle National Bank v. Vega:** P wrote and gave to D a document which, if D signed, because an offer that P could accept. P never accepted it, so there is no contract. D relinquished the right that offeror is master of the offer by using the form created by P. *The form P gave D was not an offer because it did not give D the power to accept; P had to do something else!*
Must create a reasonable expectation in the offeree that the offeror is willing to enter into a contract on the basis of the offered terms.

- Look at the communications as well as the surrounding circumstances
  - **Lonergan v. Scolnick**: D told P to act fast if he wanted to buy land b/c another offer was expected. It was unreasonable for P to think that was an offer; merely preliminary negotiations.
  - **Southworth v. Oliver**: D went to P to see if P wanted to buy land. A letter communicated market price, map, sale date, terms of sale, etc. Although the letter was in regards to property other than what P wants to buy (at least according to D), Ct. enforces it because the letter was so clear, D sought out P, and a RP would have thought it was an offer.

### An offer contains three elements

- Expression of a promise, undertaking, or commitment to enter into a contract, i.e. *intent* to enter a bargain.
  - Distinguished from invitations to deal (e.g. preliminary negotiations, “are you interested…?” “I quote…”)
  - Intent may depend on the circumstances

- Certainty and definiteness in the essential terms
  - Price, quantity, specific offeree, subject matter (problem if, for example, its value is mentioned but vaguely) Preliminary negotiations won’t cut it.
  - Omission of a term won’t preclude an expression from being an offer if:
    - The expression otherwise evidences an intent to be bound
    - The omission does not indicate a lack of such intent
    - The court can fill in the missing term by implication

- Communication of the first two elements to the offeree

### What counts as an offer?

- Advertisements: General rule is that they are not offers; customers understand that product may not be available when they get ready to buy, etc. Advertisements presumably invite negotiation; the buyer is the offeror. However, they *may* be offers in some cases
  - If they are clear and leave nothing open for negotiation
  - If they indicate that some performance is promised in positive terms in return for something requested (i.e. performance of something clearly indicated will equal acceptance)
  - **Lefkowitz v. Great Minneapolis Surplus Store**: ad for sale of fur coat *is* an offer b/c it was on “first come, first serve basis,” power of acceptance was created in the first person to be there. Second time he tries, though, he is not reasonable in thinking he can buy the coats because he knows of the store’s anti-men policy.

- Soliciting bids for a contract is *not* an offer
  - Both the price and the recipient of the contract are unclear
  - Really, soliciting bids is an invitation to *make an offer* which the person asking for bids *may or may not accept.*
General Rule: Absent special facts (e.g. history of negotiation with a particular party), a communication which advises interested parties that something is for sale not below $X merely establishes an auction, not an offer.

Promises can be offers
- When they indicate that you can rely on the promisor’s proposal both in thinking and in action
- If they justifiably induce reliance

In Dealings between merchants (Contracts to buy/sell)
- General rule is that the buyer is the offeror and the offer is made by an order
- Only when the seller clearly and expressly allows the buyer to “accept” a price quotation re: a specific quantity and it is in response to a request for that quotation can the seller become the offeror. Usually, price quotations are not offers.

Offers are interpreted in favor of the offeree
- Offeror is master of the offer
  - Stipulates the terms on which he is/is not willing to bargain
  - Prescribes acceptable methods of acceptance
- Offeree doesn’t have the chance to contribute to the language/terms, did not have any chance to draft it in his favor, so give offeree the benefit in disputes over interpretation.

An offer that does not specify a time limit remains open for a reasonable time unless it is revoked (Ever-Tite Roofing).

Acceptance
- “a manifestation of assent to the terms of an offer in the manner prescribed or authorized in the offer [through which] the offeree exercises the power given to her by the offeror to create a contract.”

  Corinthian Pharmaceuticals v. Lederle Laboratories: D gave price quotes, expressly said that they will charge the price at time of shipment and that acceptance of P’s order was conditioned upon P’s assent to D’s terms. Prices went up and P wanted the order filled at the price on the price quotes. D sent part of the order and told P that the shipment was an “accommodation” (a favor). Held: not enforceable at the quoted price b/c P knew D could change the price and accepted the deal on those terms.

  UCC 2-206 on Shipment of nonconforming goods
  - Is deemed as acceptance, and simultaneously as breach.
  - Not acceptance if seller notifies buyer that it is only an accommodation. Then the shipment is a counteroffer.

Generally, only the person to whom the offer is addressed may accept
- May be addressed to a class of persons, and any member of that class can accept
  - Carlill v. Carbolic Smoke Ball Co.: offered an award to anyone who used a smoke ball and still got sick. P did so, got sick, and wanted the money. D says there was no offer. Court finds there
was an offer b/c D intended to be bound (had money in bank to pay
claimants, terms were clear); acceptance was contemplated as full
performance; did not require prior notice.

- If it requests performance from an unlimited number of persons,
  performance by anyone knowing of the offer will cut off the power of
every other person to accept provided that:
  - the offeror desires only one performance and
  - there is no indication that he is willing to pay more than once.
- Power of acceptance can’t be assigned
  - Unless it’s an option contract, because acceptance is a right in the
    contract in that case

- General Rule: an offer that requires acceptance by a promise can be accepted only
  by a promise, not by an act.
  - Restatement Rule: Full Performance by offeree is the equivalent of an
    expressly stated promise
    - Offeree becomes bound by the terms of the offer

- Acceptance must be communicated.
  - If the offeror has an agent with actual or apparent authority, then offeree
    can communicate acceptance to the agent and it’s binding on the principal
  - Objective manifestation; subjective intent is irrelevant
    - Industrial America v. Fulton: seeking to enforce promise of
      broker’s commission for introducing 2 companies. P found
      another company and claims performance was acceptance. D says
      no because there was no notice of acceptance. Court finds that P
      accepted by performance; did not need to give notice; did not have
      to have other reasons for performing. All that matters is that
      objectively he was doing what the ad asked.
  - UCC rule: May be accepted by any “medium reasonable in the
    circumstances” unless the offer called for a specific medium.
    - However, it may still be effective if it is accepted by unauthorized
      means but it is actually received by the offeror while the offer is
      still in existence.

- Mailbox Rule:
  - Adams v. Lindsell: P sent acceptance of an offer to deliver on the same
day that he received the offer. Mail took a long time, and D refuses to
deliver b/c acceptance was too slow. Court decides that the offeror is
bound as soon as the offeree sends notice of acceptance.
  - Acceptance is effective when it is sent (if properly addressed and stamped)
    unless:
    - The offer stipulated otherwise
    - It’s an option contract…then acceptance only effective when
      received
  - If acceptance is sent late, but within a period that the offeree might
    plausibly regard as reasonable, the offeror might have a duty to notify the
    offeree that the acceptance was too late.
  - Revocation is effective only on receipt
Rejection is generally only effective on receipt
- What happens when an offeree sends both a rejection and an acceptance?
  - Rejection mailed first
    - Rejection arrives first: no contract
    - Acceptance arrives first: contract
  - Acceptance mailed first
    - Contract formed regardless of the order in which they are received (unless offeror receives the rejection first and relies on it to her detriment)
- Acceptance can be implied from offeree’s conduct or silence, or there may be an act designated as signifying a promise to perform.
  - **Ever-Tite Roofing Corp. v. Green**: Acceptance could be by signature or by commencing performance. P arrives to start performance, D has already hired someone else and tells P it revokes offer. Found to be enforceable b/c D didn’t revoke before P accepted; commencing performance was loading up the trucks and heading over to the house. Court gave expectation damages
  - The offer can’t designate as an act signifying acceptance an act that the offeree might very well do anyway.
  - Silence:
    - There might be an implied condition that notice be sent of acceptance within a reasonable time
      - Contract is formed when offeree accepts
      - Contract does not become enforceable unless the offeree gives notice of the acceptance within a reasonable time after he accepts.
    - But, communication can also be impliedly waived in cases where silence may constitute acceptance.
    - Mailing of unordered merchandise: treated as a gift by recipient. I.e. silence is not acceptance.
- Exceptions to the communication requirement:
  - Express waiver in offer
    - E.g. mail orders allow acceptance by performance
  - Performance (of a unilateral contract) would come to offeror’s attention within a reasonable time and notice was not expressly required
  - Performance (of a unilateral contract) does come to the offeree’s attention within a reasonable time.
  - The contract might call for a specific act to signify acceptance (but that act is not the performance of the contract, like in a unilateral contract!)
  - Silence can be acceptance when:
    - The offeree accepts the offered benefits
      - **Russell v. Texas Co.**: D to pay money to use P’s land, use of land is acceptance because it’s receiving the benefit of the offer.
Especially so if there is a prior course of dealings or known trade practices which create a commercially reasonable expectation by the offeror that silence represents acceptance.

- **Ammons v. Wilson & Co.** P would not pay b/c D did not deliver in stipulated time frame. However, in prior dealings, P accepted products delivered late, so silence meant acceptance here.
- **S-S Paper Co. v. PNH & Co. Stores** Long-term agreement interrupted twice. First time, D bought the back stock from P. Second time, though, didn’t do it and P sued b/c couldn’t sell to other customers (specialized product). Court finds that D has to buy back stock…stretched the meaning of prior course of dealings (this was only one prior incident)
- Then, offeree is under duty to notify offeror if he doesn’t intend to accept.

- **Acceptance of Unilateral contract offers:**
  - Offeror’s obligation is subject to an implied condition that he receive notice of the offeree’s performance within a reasonable time.
  - If the person who performs did not have knowledge of the offer, then there is no contract.
    - Contract is formed, though, if the performance was not principally motivated by the offer.
    - Might not form a contract if performance was involuntarily rendered.
  - **UCC 2-206:**
    - Where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified within a reasonable time may treat the offer as having lapsed before acceptance.

- **Termination of the power of acceptance:**
  - Expiration or lapse of the offer
  - Rejection by the offeree
    - Exception: option contracts; rejection during option period does not terminate power of acceptance unless the offeror relied on the rejection.
  - Counteroffer by the offeree
    - The counteroffer then creates power of acceptance in the original offeror
    - Option contract exception still applies.
  - Qualified or conditional acceptance by the offeree (added or changed a term)
    - **Common Law:** Mirror Image Rule made even immaterial deviations count as counteroffers, in effect.
      - Create new power of acceptance in original offeror
      - Last Shot Rule with form contracts
- **UCC 2-207:** “a definite and seasonable expression of acceptance…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 different or additional terms.”
  - Valid revocation by offeror
  - Operation of law

**Revocation and Counteroffer**

- A proposal to accept on terms different than those in the offer is a rejection and terminates the first offer
  - Offeree can’t go back and try to accept the original offer
  - Offeror can, however, renew the original offer or accept the proposed changes.
    - **Minneapolis & St.L. Railway Co. v. Columbus Rolling Mill Co.:** D sent offer (detailed price quote: quantity and price) to P, P asked for a different quantity. D never replied, then P tried to accept on initial terms. **Held:** first counteroffer rejected and terminated the original offer.

- **Common Law Mirror Image Rule:** Terms accepted have to be identical to those offered
  - Different terms in the acceptance constitutes rejection and counteroffer except:
    - Statements making implicit terms explicit
    - Grumbling acceptances as long as they don’t actually dissent
    - Requests for clarification
  - **Last Shot Rule of form contracts**
    - The last form sent is deemed to be a conditional acceptance and therefore a counteroffer.
    - Shipment and acceptance of goods is deemed to be an acceptance of that counteroffer.

- **Leonard Pevar Company v. Evans Product Co.:** telephone order; P sends purchase order, D sends acceptance contingent on P’s acceptance of terms (including warranty disclaimers). Delivery and acceptance of goods occurs, but then something goes wrong with the goods. D refuses to pay based on the disclaimers. No summary judgment: have to figure out whether the telephone order was an oral contract.
  - If telephone conversation was a contract, then 2-207 applies and if D’s terms materially altered it, then they won’t be enforceable.
  - Or, if the parties’ conduct indicated there was a contract, then the contract includes the terms on which the parties agree and the gaps are filled by the UCC.
  - If P can’t prove there was an oral contract or a contract by their conduct, then P accepted D’s terms by accepting delivery.

- **UCC Rule 2-207:** proposal of new terms by offeree in a definite and timely acceptance is not rejection and counteroffer…
  - The acceptance is still effective unless:
• it is expressly made conditional on assent to the additional terms
  • Then, under 2-207(3), there may still be contract formation if the parties go ahead and perform as if they had a contract. (i.e. shipment and acceptance of goods)
  • The terms consist of:
    • The written terms on which the parties agreed
    • Plus any supplementary terms incorporated under other provisions of the code.
      ▪ Usually, only the individualized terms will agree, and both pre-printed forms drop out.
  • the response diverges from the offer in its individualized terms (e.g. subject matter, price, quantity)
    o Treatment of additional terms:
      ▪ If one party is not a merchant, the new terms are proposals only; don’t become part of the contract unless the offeror agrees
      ▪ If both parties are merchants, additional terms are automatically part of the contract unless:
        • They materially alter the original terms
        • The offer expressly limited acceptance to the terms of the offer
        • The offeror has already objected or objects within a reasonable time to the particular terms
    o Treatment of different terms:
      ▪ Majority: Knockout rule
        • Different terms negate each other
        • UCC fills in gaps
      ▪ Minority: treats different terms like additional terms
        • Usually, though, different terms materially alter the agreement and still won’t make it into the contract.
      ▪ Minority 2: different terms always drop out.
    o Are the new terms additional or different?
      ▪ Sometimes different treated like additional and you just follow the above guidelines
      ▪ Sometimes courts follow the “knockout rule”
    o Conduct can indicate a contractual relationship, in which case subsequent writings can be seen as different/additional terms, which may or may not be acceptable. (look at UCC 2-207)
  • Box Top Contracts
    o Might say that the contract was formed by the order and shipment, was not contingent upon the terms on the top of the box.
      ▪ Step-Saver v. Wyse: offer and acceptance occurred with order and shipment. BT contract was a material alteration and not enforceable.
      ▪ If there’s a notice on the box saying that acceptance depends on accepting the additional terms, then they are probably binding b/c the buyer has a duty to read them.
• **Pro-CD**: additional terms *are* enforceable because there was a notice on the box saying that acceptance was contingent on purchaser’s acceptance of those terms. Consumer has a duty to read purchase contracts.

• Esp. so if buyer has a right to return the goods if he doesn’t accept the terms; can reject the counteroffer.
  o **Gateway v. Hill**: terms in shipping box are a binding contract.

## TERMINATION OF POWER OF ACCEPTANCE

### Rejection or Counteroffer by the Offeree

### Revocation by the Offeror

- Terminates the offeree’s power of acceptance, if communicated before the offeree accepts.
  - Only effective when received by the offeree

- Methods of Revoking:
  - Direct communication from offeror to offeree
    - **Hendricks v. Behee**: D told P’s agent that he was withdrawing offer to sell before he got notice that P accepted. *Notifying agent is same as notifying principle*; offer can be revoked any time until notice of acceptance received. (MINORITY…usually whenever acceptance is sent then it’s enforceable)
  - If the offer was published, then revocation can be made through comparable means and is effective when published
  - Indirect Communication works if:
    - Offeree receives correct information
    - Info. Came from a reliable source
    - The information is as to acts of the offeror, which would tell a RP that the offeror no longer wishes to make the offer.
    - **Dickinson v. Dodds**: P wants to enforce D’s offer to sell land to him, but heard from someone else that D had sold to X before he could accept. For unique goods, learning of the sale destroys the offer because it destroys the power of acceptance. P no longer had a reasonable belief that D intended to be bound by that offer.
    - **Petterson v. Pattberg**: D promised to sell land at a discount if P paid mortgage up front. P goes to pay D in order to accept, but D has already sold to someone else and won’t take the money. Acceptance only done by complete performance, i.e. tender of the money. Not done; offeree had no way of accepting in this case.

- Offers are revocable at any time as long as they are not supported by consideration or detrimental reliance.

- Promise to leave an offer open for a certain time (without consideration) is a *nudum pactum* and is not binding; offeror can revoke it anyway.
  - If the offeror actually intended it to be irrevocable, there probably would be consideration!
Adding a deadline means *only* that the offer automatically expires at that time. Doesn’t mean it can’t be revoked before that time.

- Exceptions to the revocable at will rule:
  - *Option Contracts*: the offeree gives consideration for a promise by the offeror not to revoke an outstanding offer for a specified time
    - Counteroffer does not count as rejection
    - OE can still go back and accept the original offer because he paid for the right to have it stay open for a certain length of time
    - **Humble Oil**: buyer paid seller $50 to keep the offer open for 10 days. Buyer tried to get seller to sell under different terms, but seller refused. Seller tried to revoke the offer, but could not. Counteroffer didn’t count as a rejection because it was an option contract. Can accept original offer until 10 days is up.
  - *Firm Offers*
    - Offeror *can* revoke a firm offer because there was no consideration given for it.
      - Not revocable if consideration was given (then it’s an option)
      - Not revocable if there was nominal consideration or a recital of consideration
      - Not revocable if it was relied on in a foreseeable manner.
    - **UCC 2-205** Firm offers
      - not revocable for lack of consideration for the stated time or a reasonable time period not to exceed 3 months.
        - Written and signed by the offeror
        - Offer must state that it is irrevocable.
      - Signed writing by a merchant to leave open an offer to buy/sell goods
  - Detrimental Reliance according to the Restatement:
    - If the offeror could have reasonably expected offeree to rely on the offer before accepting it,
    - And the offeree did rely on it, then it may not be revocable
  - Part Performance by Offeree in Unilateral Contracts
    - Traditionally no contract until performance is completed
    - **Modern courts** avoid that by doing the following:
      - Once OE begins performance, she gets a reasonable time to complete performance during which time the offer is irrevocable
        - First Restatement: contract is formed at the moment performance begins, but OR has no duty to perform (i.e. pay) until the act is completed within a reasonable time/the time stated in the offer
        - Second Restatement: Start of Performance forms an *option contract*, and the offer is irrevocable for a reasonable time.
• As if part performance is consideration for keeping the offer open for a reasonable time

• **Marchiando v. Scheck**: broker negotiating sale of real estate with 6 day time limit. Starts work on same day as offer, D withdraws offer before 6 days. Broker sues. Court finds that starting performance was acceptance; D can no longer revoke the offer. (new rule, replaces *Petterson v. Pattberg*)

• If the consideration on both sides can be interpreted as distinct contracts, performance of one of the parts will bind the offeror to pay for that part.
  o OR could still revoke as to future acts/contracts

• OR might be allowed to revoke as long as OE is paid to the extent of reasonable reliance

  ▪ What is part performance?
  ▪ Not making preparations to perform (although preparations may be detrimental reliance and still make the promise binding/offer irrevocable)
  ▪ If performance requires OR’s cooperation, then if he doesn’t cooperate when OE offers part performance, that still counts as part performance
  o If the offer was indifferent as to the manner of acceptance:
    ▪ Irrevocable once OE begins performance
    ▪ Notification of start of performance may be necessary.

• Revocability of offers for unilateral contracts:
  o Not revocable after performance has begun, unless the performance is not completed with a reasonable time
    ▪ Implied promise to hold the offer open if the offeree makes a substantial beginning of performance prior to revocation (option contract created)
    ▪ Offeror’s duty to perform is conditional to completion/tender of performance by the offeree.
  o If the offeree prepares for performance: might prevent revocation even though performance has not started (Restatement)

**Termination by the Offeree**

• All rejections are effective when they are received, but the OR can “revive” the original offer and create a new power of acceptance.

• Express rejection

• Counteroffer as rejection
  o Serves as rejection *and a new offer* when:
  o A mere inquiry is not a counteroffer/rejection
    ▪ Use reasonable person test to distinguish

• Lapse of Time can terminate an offer
  o Must accept within specified or reasonable time period
  o If the time period is specified:
It starts when the offer is received
If the transmission was delayed and OE knows it, then it terminates
at the time it would have expired if there had been no delay

Termination by Law

- Death or insanity of parties
  - If either party dies/goes crazy before it’s accepted, the offer is terminated
    - Death/insanity doesn’t have to be communicated to the other party
    - BUT if the offer was made irrevocable by another rule (e.g. it was
      an option contract), then it’s still irrevocable.
    - If one party dies during performance, it’s still enforceable

- Changed Circumstances:
  - If the subject matter is destroyed, the offer is terminated
  - If the subject matter becomes illegal, the offer is terminated

Cooperative Relationship between the Parties

- The OR and OE are linked in joint undertaking of some sort, like prime and sub-contractors. Revocability is changed a little bit.
  - James Baird Co. v. Gimbel Bros.: Old Rule; Sub made a mistake in its bid
to Prime, who used sub’s price in submitting its bid. Then sub revokes
and prime tries to sue. Court says sub can revoke until prime expressly
accepts sub’s bid, acceptance not satisfied by using that bid in the price.
    - Sub’s offer can be revoked even after prime used that bid in
      submitting its own bid
    - There was no consideration for sub to keep its offer open
    - Prime’s act of using the sub’s bid was not acceptance.
  - Drennan v. Star Paving Co.: New Rule; same situation as in Baird, but the
court doesn’t let sub revoke offer based on detrimental reliance by prime.
    - There is a contract because the prime relies on sub’s offer/bid in
      making its bid.
    - There is consideration for keeping the offer open:
      - Sub gets the chance of getting the subcontract
      - Prime gets the benefit of the sub being bound; but might
        have an obligation to at least offer the sub-k to the sub if it
        uses his bid in making the big bid.
    - Sub can’t revoke until prime at least has a chance to accept sub’s
      offer after he was awarded the general contract.
    - Better to allocate the risk of mistake to the sub who made the offer
      than to the prime who relied on it.
    - Problem with this ruling is that promissory estoppel only flows one
      way
      - Sub can’t revoke his bid
      - But Prime doesn’t have to award the subcontract to the sub
        if he gets the general contract, in which he used sub’s bid.
        - Might say that (and did so in Drennan) that if Prime
          went and tried to get a better price, he waives the
right to invoke PE against Sub…have to accept immediately after getting the contract to bind Sub.

- PE is used to turn a revocable offer into an option contract
- Remedy limited as justice requires

STATUTE OF FRAUDS

What does it do and what does it cover?
- Operates as a defense to enforcement
  - Failure to comply makes a contract voidable, not void.
- Defines actions that must be in writing and signed by the party against whom action is being sought for an action to succeed.
  - A writing can consist of several writings
    - If they’re all signed by D
    - Or if they are expressly or impliedly refer to in a document that was signed by D.
  - Writings under the UCC only require 3 things:
    - (1) Quantity, (2) signature of party being charged, and (3) a writing sufficient to indicate that a contract was formed
    - Okay even if it omits or incorrectly states on of the terms
      - Only enforceable to the extent of the quantity included in the writing
      - All that is required is a quantity term, which can even be incorrectly stated
  - Writings under Common Law require that every essential term is contained within
    - Identity of the party being charged
    - Identification of subject matter
    - Terms and conditions of the agreement
    - Recital of Consideration
    - Signature of the party to be charged or of his agent
  - Crabtree v. Elizabeth Arden Sales Corp.: 2 year salary agreement; P seeks to enforce it, D says no because it’s not in writing. There are 3 documents. Payroll change form and payroll card are signed, but they only have the salary term, not enough to satisfy SOF. An unsigned memo contains the rest of the terms that will satisfy it. Court decides there is enough there b/c the documents all refer to the same transaction or to each other and collectively make a writing. Allowed parol evidence to establish connection.
- Transactions that fall under the SOF: MY LEGS
  - Promises made in consideration of Marriage must be in writing
    - Not the promise between prospective spouses
    - Marriage Settlements, prenuptial contracts with financial provisions.
  - A promise that cannot be performed within one Year must be in writing
- Even if a contract cannot be performed within one year, once it has been fully performed on one side, it is enforceable even if it is oral.
- Date runs from the *date of the agreement*, not the date of performance.
- If it is *possible* to complete it within one year, then it’s outside the SOF, even if performance *could* extend beyond one year.
- Split viewpoint on contracts that can be *terminated* within a year
  - **Majority**: nonperformance is *not* performance within a year, so it’s still under SOF.
  - **Minority (Restatement 2)**: since the contract is terminable by either party within a year, it is outside the SOF.
- A contract measured by a lifetime is outside SOF b/c a person can die any time.
- **C.R. Klewin, Inc. v. Flagship Properties, Inc.**: D and P shook hands and signed a ceremonious document whereby D hired P to manage construction on a major project; it was understood that P would oversee all phases. Then D found someone else for the later phases and P sued for breach, damages for reliance and services completed in anticipation. There was no specified performance time. *Held*: not barred by SOF because performance within one year is not *prohibited* by the contract’s terms, it is just not practical. A contract for an unspecified length of time is not under SOF, doesn’t have to be in writing.
- **North Shore Bottling v. Schmidt & Sons**: P is D’s exclusive dealer “as long as D sells beer in NY.” D hires someone else a couple years later and P sues for breach. D claims no contract b/c of SOF. *Held*: there was a contract because the relationship did not have to (i.e. by the terms of the contract) last more than one year; P could have left NY/gone out of business at any time. Contract outside SOF.
  - A promise creating an interest in Land must be in writing
    - What constitutes an interest in land?
      - Sale of real property
      - Leases for more than one year
      - Easements for more than one year
      - Fixtures
      - Minerals or structures that are to be severed by the buyer; (if they are to be severed by the seller, then it’s a contract for the sale of goods)
      - Mortgages
    - Effect of Performance on contracts for interest in land
      - If seller conveys to purchaser, then seller can enforce purchaser’s promise to pay
      - Purchaser can enforce the contract through part performance by doing at least 2 of the following:
        - Payment in whole or in part
Possession
Valuable improvements
Promises of an Executor or administrator to personally pay estate debts must be in writing.
Promises for the sale of Goods (all things that are movable at the time of identification to the contract of sale) over $500 must be in writing except:
- Specially manufactured goods that are not suitable for sale to others in ordinary course of seller’s business, and seller has made substantial beginning on their manufacture or commitments for their procurement before notice of repudiation is received
- If the party against whom enforcement is being sought admits in court that there was a contract, then it’s enforceable even if it wasn’t in writing (but not beyond the quantity admitted)
- If payment/performance has been made and accepted, then it’s enforceable to the extent of the payment/performance
- If it is a contract between merchants, and a written confirmation which satisfies the SOF as to the seller is sent, then acceptance is inferred if the buyer doesn’t dispatch a written objection within 10 days (UCC 2-201)
What are goods?
- Things that are movable at the time of identification of the contract for sale other than the money in which the price is to be paid, investment securities, and things in action.
Promises to pay the debt of another (Surety) must be in writing and
- Must be collateral to another person’s promise to pay; not a primary promise to pay
- The primary purpose must not be to serve the promisor’s own pecuniary interest, or else it’s outside the SOF
Effect of noncompliance is that the contract is unenforceable at the option of the party to be charged (i.e. lack of a sufficient writing is an affirmative defense), but if it is not raised as a defense, then it is waived.
Situations in which SOF is not applicable
Performance already rendered (in part or in full)
- Mason v. Anderson: Oral promise to pay back $5000 at $200/month without a prepayment option; can’t be fully paid back in one year. D died, P sued estate. Held: enforceable (estate has to pay) because P had already fully performed, and D had started making payments before his death.
Promissory Estoppel
- D falsely and intentionally tells P that a contract is not within SOF
- D falsely and intentionally tells P that a writing will subsequently be executed
- D’s conduct foreseeably induces P to change his position in reliance on an oral argument
If the person being charged admits that there was a contract
- **DF Activities Corporation v. Brown**: sale of a chair over $500; written confirmation, but seller did not sign it. She claims first that it is unenforceable b/c of the SOF, then says that there was no contract. If she admits there’s a contract, then it’s outside SOF, so P wants to have deposition to get her to admit it. Court doesn’t allow that; no chance to get her to change her testimony when she swore in an affidavit that there was no contract.

- **Remedies if the contract is within SOF**
  - Restitution of any benefit that has been conferred (under quantum meruit, not on the contract)

**INSUFFICIENT OR DEFECTIVE FORMULATION:**

**Defective Formulation**
- **Misunderstandings**:
  - Objective test focuses on:
    - Whether one party took unfair advantage of a mistake by another
    - Underlying objective of protecting expectations
    - Disproportion that makes enforcement unfair.
  - **Raffles v. Wichelhaus**: no contract because the parties each reasonably thought that *Peerless* was a different one of two ships
  - **Restatement**:
    - No Contract when the parties meant something different and:
      - Neither knows nor should know of the meaning understood by the other party.
        - **Konic v. Spokane**: no contract when the parties understood the price, “Fifty-six twenty” to be $5620 and $56.20, respectively.
        - Not applied when, by a party’s own fault, its understanding is less reasonable than the other party’s understanding.
      - Each party knows/has reason to know of the meaning attached by the other party
  - Contract when:
    - A knows/has reason to know of meaning attached by B, but B doesn’t know/have reason to know of the different meaning attached by A

- **Indefiniteness**:
  - **Restatement**:
    - terms must have been reasonably certain for an offer to have been understood.
  - **Oglebay v. Armco**: shipping agreement with 2 pricing mechanisms, the second of which required a mutual agreement. Parties couldn’t agree. Court finds the contract enforceable because the parties had a long-term relationship, intent to be bound is clear. Had good reason
for not setting terms. Court’s assignment of a price is not arbitrary because it is according to the mechanism set by the parties.

- Basis for determining breach
- Basis for giving an appropriate remedy for breach
  - **MGM v. Scheider**: Contract to film a TV series did not state when filming would start, so D claims that it is unenforceable. Court finds that it is enforceable because industry *customs* fill in the gap.

  - When standards are insufficient/not available, then the contract can’t be enforced
    - **Varney v. Ditmars**: Contract for payment of a “fair share” of profits found to be unenforceable because it was too uncertain, subject to too many uncertain factors
    - **Martin v. Schumacher**: 5-year lease with renewal option, rent to be agreed upon. D insists on much higher lease, and P sues for breach. Court says contract not enforceable because there is no standard provided by the parties to determine the price (e.g. fair market value) and court won’t imply one.

  - If one or more terms is left open, that might show that it was not an offer in the first place
  - Agreements to agree are generally unenforceable because courts don’t want to fill in the gaps
    - **UCC**
      - A contract will be enforced despite the absence of one or more terms if:
        - the parties intended to make a contract and intentionally left terms open, and
        - There is a reasonable, objective standard for giving an appropriate remedy (e.g. fair market value)
    - **Statute of Frauds**
      - If there is no quantity shown, then the agreement is unenforceable
      - No price, then it is set at a reasonable price at the time of delivery.
    - **Gap Fillers (UCC 2-204)**
      - Price
        - If the parties tried to set a standard, but that standard is indefinite
          - **Traditional rule**: no enforcement because they did not necessarily intent to be reasonable.
          - **UCC and Modern approach**: use reasonable price at the time of delivery.
        - Contract is *silent* on price:
          - **Traditional rule**: no enforcement
          - **UCC and modern approach**: Court can supply a reasonable price if:
- Court is satisfied that the parties intended a contract
- There is an objective standard the court can use to determine the price.

- **Time of performance**
  - **General Rule**: reasonable time is implied
  - Employment Contracts: terminable at will by either party.
  - **UCC**:
    - Shipment/delivery: reasonable time
    - Payment: time and place at which buyer is to receive the goods

- **Delivery**
  - **UCC**: seller’s place of business
    - *But* if the goods are identified and the parties know they are in some other place, then that other place is the place of delivery.
  - **UCC**: goods are to be delivered together, not in installments

- **Duration of Contract**:
  - **UCC**: reasonable time, and either party can terminate at any time unless otherwise agreed
  - Reliance might make an otherwise unenforceable contract enforceable
    - **Hoffman v. Red Owl**: P relied on assertions that he could become a store franchisee. Even though there was never enough definiteness to make a contract, the court used promissory estoppel and let P’s reliance substitute for the lacking definiteness.
      - Award the injured party reliance damages
      - Invoked when one party to an indefinite agreement has relied by preparing to perform rather than beginning to perform
    - *However*, negotiations expenditures are normal and not normally grounds for reliance recovery. **Empro v. Ball-Co.**
  - Part performance might make an otherwise unenforceable contract enforceable because:
    - The parties apparently believed they were in a contract
    - Performance might fill a gap by showing what the parties thought it was.
  - Agreements to Agree
    - **Traditional rule**:
      - If the term involved is material, then the agreement is unenforceable (unless and until the parties agree on the term)
      - If the term is minor, then it will still be enforced.
    - **UCC 2-305 (Modern trend)**:
      - Agreement to agree on price is not fatal if the parties intended to form a contract
• Price is one that is reasonable at the time of delivery.
  o Agreements to negotiate in good faith:
    ▪ Enforceable and prevents the parties from:
      • Renouncing the agreed upon terms without trying to negotiate the unresolved terms
      • Abandoning negotiations without making a GF effort to consummate them
      • Insisting on terms that are inconsistent with or do not carry out the intent of the agreed upon terms.
    ▪ Implied in many situations
  o Remedies for indefiniteness disputes:
    ▪ Money Damages > Specific Performance
      • Reliance > Expectation
      • Restitution for partial performance/benefits conferred on D
    ▪ Equitable jurisdiction/appoint a mediator

DEFENSES TO CONTRACT VALIDITY

Capacity
• Infancy
  o Contracts are voidable by the infant
    ▪ The other party cannot enforce the contract against the infant
      • Bowling v. Sperry: Contract for a minor to buy a car, but he rescinded. Court would not enforce the contract even though the minor was accompanied by adults at the time of contract formation. Minor not liable for breach.
    ▪ The infant can enforce the contract against the other party
  o When the infant disaffirms the contract:
    ▪ Obligated to return whatever he still has, but no obligation to account for use or depreciation
  o Disaffirmance and Ratification
    ▪ Can affirmatively ratify when reaches age of majority
      • Afterwards, can’t rescind the contract
      • Silence is not ratification
    ▪ There is a requirement to disaffirm within a reasonably time after coming of age.
  o Exceptions:
    ▪ Contracts for necessaries
      • Damages are for their reasonable value
    ▪ Contracts for marriage
    ▪ Agreements to support illegitimate children.

• Mental Incompetence:
  o Contracts are voidable on the grounds of mental illness or defect when:
    ▪ Unable to reasonably understand the nature and consequences of the contract
• **Heights Realty v. Phillips**: Presumption of competency in adults can be overcome by testimony as to mental capacity prior to and at the time of the transaction. Look at physical condition, nature of contract, relationship of trust, weakness of mind. Here, contract to pay commission in sale of house not enforceable because D was incompetent at the time she entered the contract.

• Being so drunk you can’t exercise judgment/understand the proposal is good enough.
  - Unable to act in a reasonable manner in relation to the contract and the other party has reason to know of the condition.
  - Inadequacy of Price must be accompanied by something else to afford relief:
    - Suppression of truth/suggestion of falsehood
    - Abuse of confidence/breach of fiduciary duty
    - Undue influence
    - Taking unjust advantage of the situation.

- **Enforceable when:**
  - Made on fair terms and other party did not know of the condition
  - To the extent of partial or full performance
  - Changed circumstances make avoidance unjust
  - Ratified
  - Necessaries (for reasonable value)

**Mistake**

- **Unilateral Mistake**: mechanical error of computation, perception, or the like concerning a basic assumption on which the contract was made.
  - If the non-mistaken party either knew or should have known of the other party’s mistake, the mistake is palpable
    - Voidable by the mistaken party, unless:
      - He bore the risk of the mistake
      - The mistake was his fault
      - **Morta v. Korea Insurance Corp**: no mistake defense available in releasing liability because he did not read the contract. (His fault)
  - If the non-mistaken party neither knew nor should have known of the other party’s mistake, then there is a **binding contract**.
    - Non-mistaken party gets expectation damages
    - **Modern trend**: if the mistaken party notifies the other party before they change their position in reliance, then the mistaken party can rescind the contract.

- **Bidding Mistakes**:
  - If the contractor has reason to believe there is a mistake there is a duty to correct it or ask for verification
  - Bidder can make a correction before the contract is awarded if:
    - The correction would displace one or more lower bids
• The existence of the mistake is clear and the intended bid is clear
  ▪ Bidder can make a correction after the contract is awarded if the contracting officer knew about the mistake
  ▪ *Boise Jr. College District v. Mattefs Construction*: Doesn’t follow rules! Contract to pay a bid bond (difference in price of bid and next highest bid when bidder rejects the contract) *not* enforceable because the bid contained a mistake. Bidders are under pressure to perform quickly, mistake was not fraudulent or negligent.
  • When bid mistake is material and substantial, bidder can rescind the contract.

• Mutual Mistake makes a contract unenforceable if:
  o The whole substance and very nature of the merchandise sold is different from that which the parties bargained for *(The mistake goes to a basic assumption on which the contract was formed)*
    ▪ *Lenawee County Board of Health v. Messerly*: D bought an apartment building that ends up being condemned b/c of raw sewage, etc. Wants out of the contract, but bought subject to an “as is” clause and had the right to inspect before purchasing, but didn’t. Court finds that because of the as is clause, and because the essence of the contract was for the sale of *land*, not rental proceeds, the contract is enforceable.
  ▪ *Beachcomber Coins, Inc. v. Boskett*: contract for purchase of a coin from professional dealer by professional collector. The coin turns out to be counterfeit, and court allows P to rescind because the parties are equally experienced in the industry. Having it appraised was found not to be a trade usage, so P did all he had to do, no reason to doubt that it was as valuable as both parties thought it was. The contract was for the sale of a rare, valuable coin, not just a coin.
  ▪ Mistakes as to intrinsic value are *not* grounds for rescission *unless* both parties are experts.
    o The dollar consequences to the disadvantaged party are significant. *(The mistake makes the contract materially adverse to one party)*
    o Neither party assumed the risk of mistake (e.g. “as is” clause)

• Mistakes in transmission by an intermediary
  o If the offeree knew/should have known of the mistake, an attempted acceptance will *not* form a contract.
  o If the offeree neither knew nor should have known of the mistake, then:
    ▪ *Majority*: contract formed on terms conveyed by the intermediary
    ▪ Intermediary is an agent of the offeror
    ▪ *Ayer v. Western Union Telegraph*: Court finds that P *was bound* to sell to the buyer at the erroneous price on the telegram because the buyer would have had no way of knowing the mistake, and had no way of avoiding it since P chose the telegraph company.
- Minority: no contract because no objective or subjective agreement.
- Either way: intermediary is liable for any loss suffered by either party (via negligence)

- **Mistranscription**
  - Parties make an oral agreement which they reduce to a signed writing
  - Through a clerical mistake the writing does not correctly embody the agreement
  - The aggrieved party is entitled to *reformation* of the contract.

### Misrepresentation (i.e. Fraud)

- **Generally:**
  - Assertion or affirmation of an existing fact made by words or conduct
    - Half truth
    - Failure to disclose
      - In the absence of a duty to disclose, silence is not necessarily misrepresentation
        - *Laidlaw v. Oregon*: buyer want to enforce contract for tobacco. Price went up when war ended, but buyer did not tell seller the war had ended. Court enforces the contract because buyer had no duty to tell seller of the information. Need to give parties an incentive to get information!
      - Duty to disclose created:
        - Fiduciary or confidential relationship
        - When it is necessary to correct a previous statement or false impression
        - When it is required by good faith
          - Consider nature of facts/contract, accessibility of knowledge, trade customs, conduct in obtaining knowledge, status of relationship, etc.
    - Concealment of a fact
      - The other party relies on it in entering the contract
        - *Morta v. Korea Insurance*: court finds that insurance company, although it lied in stating that it could not give P more than $900, is not liable for fraud because P *did not rely* on their statement. He got a higher estimate from his own lawyer and in doing so ceased to rely on D’s fraudulent assertion
  - Material misrepresentation is voidable by a party who justifiably/reasonably relied on it and entered a contract because of it.
    - The misrepresenting party knows that the assertion will probably make the other party agree
    - *Hill v. Jones*: seller of house withheld info of termite damage when prospective buyer asked what it was. Court finds that silence here was fraud b/c buyer *asked*, said he would interpret silence as meaning there
was no more information; termite damage could be material in a contract
to buy a house. Sellers of real estate have a duty to disclose material facts.

- Fraudulent Misrepresentation renders the contract voidable by the party who
  relied on the misrepresentation
  - The misrepresenting party intends her assertion to induce the other party
to enter an agreement
  - The misrepresenting party either
    - Lacks confidence in the truth of the assertion but presents it as a fact
    - Knows or believes it is untrue
    - Says or implies there is a basis for the assertion when in fact such a basis does not exist.
  - **Vokes v. Arthur Murray**: Old woman bought thousands of hours of dance
    lessons because instructors falsely played up her potential/ability. She
    wants her money back, so D tries to enforce contract. Court finds contract
    unenforceable because they were experts and she reasonably relied on
    their advice; construed as fact even though under other circumstances just
    an opinion. Once they began to disclose info about her abilities, created a
duty to tell the truth, and if they had, she would not have bought all the
    lessons.

- Remedies for misrepresentation
  - Reformation
  - Rescission
    - Equitable or legal remedy; restores parties to their pre-contractual
      relationship

**Fraud and Duress**

- Wrongful Coercion
  - Seldom recognized as an intentional tort, so no action for damages
  - In contracts, usually arises as an attempt to **bar enforcement of a modification or settlement agreement**.
  - Duress by **physical** coercion makes a contract **void**.
  - Duress by **threats** makes a contract **voidable**.
  - Economic Duress is usually not sufficient, except when (Restatement):
    - One party threatens to commit a wrongful act, e.g. breach of contract, that would place the other in a position that would
      seriously threaten his property or finances unless he agreed to the contract
    - No adequate means are available to avoid or prevent the threatened loss other than entering the contract.
  - **Austin Instruments v. Loral**: D had a navy contract, P supplied
    parts to D. P refused to perform the contract unless D would
    increase the price and enter a second contract. D was unable to
    find substitute for first contract, agreed, then didn’t pay after P performed. Court does not enforce v. D because entered into under
duress:
    - Threatened breach of contract (illegal)
• Ordinary remedy for breach is inadequate because of the immediate need for performance of the contract
• No other option for the non-breaching party so that it is completely deprived of free will.

• Threatening to do something you have a legal right to do is usually not duress
  o Machinery Hauling v. Steel of WV: Threat not to form future contracts in order to induce P to pay more is not duress because D was under no obligation to continue business in the future; the threats were not to do some wrongful act.
  o Not allowed when:
    ▪ It is an unreasonable alternative to an injurious contractual demand in a bargaining situation
    ▪ Made in bad faith
      • Threat of criminal prosecution
      • Threat of civil process made in bad faith

• Undue Influence makes a contract voidable.
  o Unfair persuasion, falls short of duress
    ▪ High pressure working on mental, moral, or emotional weakness
    ▪ Approaches the boundaries of coercion.
  o Limited to certain cases:
    ▪ Relationship of confidence
    ▪ One party is particularly susceptible to pressures by the other
  o Characteristic components of undue influence:
    ▪ Discussion/consummation at unusual time/place
    ▪ Insistent demands to finish at once
      • Emphasis on problems with delay
      • Statements that there is no time for legal or financial advice
    ▪ Imbalanced numbers on either side of the bargain
    ▪ Lack of third party advisers

Unconscionability
• “An absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.”
  o Burden of proof is on the party claiming unconscionability to make a prima facie case
    ▪ Disparity between value agreed to and a reasonable value
  o Burden shifts after PF case made to the other party to prove it is not unconscionable.

• Procedural Unconscionability
  o Deception or overreaching that constitutes in an abuse in the process of bargaining
    ▪ Seeks to prevent unfair surprise
  o 2 main indicators
    ▪ Lack of knowledge/understanding
      • Inconspicuous printing
- Cutler Corp. v. Latshaw: Warranty of attorney (contract provision letting P be D’s attorney and automatically win any dispute) was in small print on backs of pages, which were intentionally unused. No attention called to provision. Court does not enforce because of unconscionability. Not expected provision, should have been noticeable and pointed out.
  - What about duty to read?
    - Complex language
    - Unbalanced sophistication of parties
    - Lack of opportunity to study/understand contract terms
      - Lack of voluntariness in contracts of adhesion (then parties are only bound by those terms that are not unfairly surprising)
    - Imbalance in bargaining power
    - Non-negotiable terms drafted by stronger party
    - Weaker party is prevented from contracting with another party due to market factors

- Substantive Unconscionability
  - Problematic: doesn’t look at the contract at the time of formation, but as a whole.
    - Supported by restatement
    - Usually found as to price terms
  - Applies to exceedingly oppressive terms (seeks to prevent oppression)
  - One sided agreement whereby one party is:
    - Deprived of all benefits or
    - Deprived of a remedy for the other party’s breach
  - Indicators
    - Large disparity between cost and price
    - Price >>> prevailing market price
    - Terms which are not reasonably related to the business risks assumed by the parties

- UCC 2-302 applied in commercial transactions: if a contract or any clause of a contract was unconscionable at the time it was made, court (i.e. trial judge) can:
  - Refuse enforcement
  - Enforce the remainder of the contract without the unconscionable clause
  - Limit the application of any unconscionable clause so as to avoid any unconscionable result

- Damages are not expressly allowed, but may be awarded through:
  - Enforcing the contract without the unconscionable clause and rewarding damages for breach
  - Using a state’s “Deceptive Trade Practices” statute

- Unconscionability in Commercial Transactions
  - UCC still frequently applied, at least in part, by analogy
  - Uniform Franchise and Business Opportunities Act
    - Duty of good faith in performance and enforcement
- Intended to prevent:
  - arbitrary, malicious, abusive conduct
  - Conduct that deprives one party of the contract’s benefits
- Intended to protect parties’ expectations
  - **Weaver v. American Oil**: Contract b/w parties had an exculpatory and indemnification clause, releasing D of liability for even its own negligence and forcing P to pay for D’s liability. D caused injury to P. Court finds that P does not have to pay because the contract was unconscionable
    - P was uneducated vs. corporate D (bargaining power)
    - D drafted the document heavily in its own favor
    - Document was not explained to P, and he was never told to read it and never did read it.
    - Meaning of clause hidden in complex language, which P would not have understood if he had read it.
  - **Public Policy** reasons for not enforcing it
    - **No Meeting of the Minds** b/c P unaware of clause’s presence/meaning.
  - **Zapata v. Dairy Mart**: contract clause allowing either party to terminate with 90 days notice. P understood, D pointed it out, etc. Court enforces it. No unfair surprise, not substantively unfair/oppressive (D reimbursed P for expenditures not recovered). Good faith met, honest in fact, not contrary to trade customs.

- **Examples** of unconscionable provisions
  - **Exculpatory Clauses**
    - Release from liability for intentional wrongs
      - violates public policy, is illegal
    - Release from liability for negligence
      - Injuries to persons: usually unconscionable
        - Sometimes acceptable when the contract concerns especially hazardous activities
      - Injuries to Property: usually upheld if the injured party had some choice and unfair surprise not involved
  - **Disclaimers and Limitations of Warranty Liability**
    - **Implied Warranty of Merchantability** (UCC 2-314)
    - **Implied Warranty of Fitness** (UCC 2-315)
      - When seller has reason to know that buyer intends to use the goods for a particular purpose
      - Buyer is relying on seller’s skill or judgment in selection of suitable goods
    - **Disclaimers** (UCC 2-316)
      - IWM:
        - language must mention merchantability
        - If written, must be conspicuous
      - IWF:
        - Must be written
        - Must be conspicuous
• “As is” clauses and the like are valid if they make it clear that merchant is disclaiming all warranties, including implied warranties
• Limitation of Remedies (UCC 2-719)
  • E.g. repair and replacement
  • Two major exceptions
    o Exclusive remedy fails of its purpose \( \rightarrow \) UCC
    o Personal Injury. (Limiting liability for personal injuries resulting from consumer goods is prima facie unconscionable.)

Illegality
• If a contract is legal when made, but later becomes illegal, the contract is discharged
• An illegal contract is void.
• 2d Restatement
  o Courts must implement legislative mandates (i.e. laws)
    • Sinnar v. Leroy: contract to illegally obtain a liquor license. P paid D, but D failed to deliver license. Court will not enforce, will not grant restitution because doing so would encourage an illegal act, intended to be accomplished through purely illegal means.
  o Contracts can be unenforceable even if not illegal when the interest in enforcement is outweighed by public policy against enforcement
    • Enforcement:
      • Justified expectations
      • Resulting forfeiture
      • Special public interest served by enforcement
    • Watts v. Watts: Trial Ct. did not want to enforce agreement between unmarried cohabitants to divide their property because it was immoral. But, because cohabitation is statutorily legal and the contract is otherwise legal, the contract will be enforceable as long as they can prove that the arrangement was not based solely on sex (in which case it is so immoral that it is unenforceable).
  • Non-enforcement:
    • Strength of the public policy served
    • Likelihood that not enforcing the contract will further that policy
    • Seriousness of conduct; deliberateness
    • Directness of connection between misconduct and policy
      o Not illegal merely because performance will indirectly aid in the accomplishment of an illegal act, provided the illegal act is not a serious crime or great moral turpitude.
• **Homami v. Iranzadi**: seeking to enforce a side agreement to pay interest on a note which said it did not require interest payments. Court will not enforce because the purpose in structuring the arrangement in this way was to avoid paying taxes on the interest. D had to admit his own illegal/contrary to public policy purpose in order to make his case, which is what the court says is fatal to it.

• **General Rule**: no enforcement and no restitution on illegal contracts
  - Situations in which restitution will be awarded
    - Not doing so would result in *disproportionate forfeiture*
    - P was excusably ignorant of facts or of minor legislation, and otherwise the promise is enforceable
    - P not equally wrong (not “in pari delicto”) and the contract is not “malum in se” (against good morals), but is rather “malum prohibitum” (against a statute, but not contrary to morals)
    - P not guilty of serious misconduct and either:
      - P withdrew before illegal purpose was achieved
      - allowing the claim would end a continuing situation that is contrary to public situation
  - Situations in which the contract might be enforced:
    - If the statute being violated was not intended to prohibit the conduct being sued upon
      - performance of services by an unlicensed person depend on the purpose of the licensing statute (e.g. fiscal regulation v. public protection)
    - If the law was unwittingly broken
    - If not enforcing the contract will induce parties to set up their own ways to deal with disputes (e.g. gambling)

• **Pros and Cons of not enforcing illegal contracts**
  - **Pros**
    - Drives out opportunistic behavior
    - Morality
  - **Cons**
    - Public policy is not consistent
    - Hard to apply principles with certainty
    - Penalizes one guilty party and rewards another
      - Penalty usually disproportionate to offense

• **Contracting around future liability**
  - Generally not favored
    - No release from liability for intentional/reckless harm
    - No ER-EE liability releases
    - No release from liability for public service officials
    - No release from liability to members of protected classes
  - To be permissible:
    - Must be clearly expressed
    - Will be strictly construed against the benefited party
Examples when they are enforceable
- Products liability releases that are fairly bargained for and consistent with public policy underlying the liability
- Releases from liability for negligence when bargaining power is equal.
- Anti-Competition Covenants
  - Must protect a legitimate business interest of the promisee
    - Preventing sale of a business
    - Restricting EE from using trade secrets, confidential information, customer lists
      - Not okay to prohibit use of special skill/general information even if it was increased or acquired during employment
  - Must be reasonable in scope
    - Area
    - Duration
- Judicial Responses to overly broad anti-competition covenants
  - Non-enforcement
  - Blue Pencil: delete the words that make it too broad
  - Alteration to make it reasonable and consistent with parties’ intentions when it was made in good faith
    - Data Management, Inc. v. Greene: EE had anti-competition agreement, seeking injunction. Trial court found for ER. Aplt. Ct. remands to see whether the parties entered into the contract in GF, and if so, whether it could be altered so that it was not too broad (as is, 5 yrs. might be too much)

PERFORMANCE OF THE CONTRACT

Parol Evidence Rule
- Parol evidence will not be admitted to vary, add to, or contradict a written contract that constitutes an integration.
- When applicable, it renders unenforceable oral agreements entered into prior to the adoption of a written, integrated contract.
  - Is a contract integrated?
    - Completely Integrated Contract: final expression of all the terms on which the parties intend to agree
    - Partially integrated contract: final expression of fewer than all of the terms on which the parties intend to agree.
      - Will still be controlling on the subjects it does cover.
  - Majority looks at the parties intent in determining whether a contract is an integration. In determining whether a contract is integrated, look at:
    - Language (e.g. a merger clause)
      - Merger clauses are usually, but not always, conclusive evidence that the parties intended the document to be an integration
        - Commercial sales: usually conclusive
Consumer Sales:
- Can’t disclaim an express warranty
  - Restatement: not effective to integrate unexpected terms (goes back to unconscionability?)

- Circumstances
- Subject matter
- Nature of the contract

- Under the rule, evidence of an oral agreement is admissible when:
  - Restatement: if an omitted term might normally be omitted, and is consistent with the writing, then the writing is not fully integrated.
  - The oral agreement is collateral (capable of being expressed in a separate agreement)
    - Collateral agreements are related to the subject matter but not part of the primary promise
    - It is not inconsistent with the terms of the written contract
      - Majority view: is reasonably harmonious with the terms and respective obligations of the parties
        - Alaska v. Alyeska: commercial parties making a deal, both write letters of intent, price term is agreed on later and is “subject to owners’ approval.” P tries to say that it was as to fairness only, so D can’t arbitrarily object to the price. Court says they can; if the parties meant “as to fairness” they would have included it. Adding that condition is not reasonably harmonious with the written terms
      - Minority view: does not contradict or negate a term of the writing
        - Masterson v. Sine: P sold D his ranch, but reserved an option to buy it back. There was an alleged oral agreement that it would not be sold outside the family. Now P’s trustee wants to exercise the option, and D objects. Court admits PE as to non-assignment agreement; says that because the parties were silent on the matter and there was no merger clause, PE can fill in the gap. Non-assignment doesn’t contradict the terms of the agreement.
          - More focus on the parties’ intent; credibility of testimony than in Mitchill.
          - The written contract fails to fully integrate and embody the parties’ understanding.
  - The term is one that is naturally omitted from the written agreement
    - Doesn’t conflict with the written integration and
    - Concerns a subject that similarly situated parties would not ordinarily be expected to include in a written agreement.
Majority approach, though, it to look at the circumstances and determine whether the actual parties involved might reasonably have omitted the parol agreement.

- **Mitchill v. Lath**: contract to buy a house for $X. P claims that D also agreed to remove an ice shack from a different parcel of land, but that was not in the contract. Court won’t admit evidence as to the alleged parol agreement because it is so closely related to the sale of land, which contract was very detailed and spelled out all the reciprocal obligations, that it should have been included. To be admissible then, it would have to be a separate contract and would have to have its own consideration, but then it’s not PE…
  - Admissible if oral representations in a transaction were fraudulent
  - Parol evidence is admissible if the written integration and the alleged parol agreement are each supported by separate consideration.
  - Admissible to show the existence of a later oral agreement that modifies a previously existing written contract (not within the scope of the rule!).
    - Still needs consideration
    - Needs to comply with SOF
    - **Common Law**: otherwise doesn’t have to be in writing even if there is a contractual provision requiring as much
      - **UCC 2-209**: if there is a contract provision requiring modifications or rescissions to be in writing, they must be in writing.
        - but they could operate as a waiver if not in writing
        - Waiver to executory part of contract can be retracted with notification to other party unless there has been reliance and change in position because of the waiver.
  - **UCC approach to parol evidence is even more liberal (UCC 2-202):**
    - Admissible unless the matter covered in the alleged parol agreement “certainly would have been included” in the written agreement

**Contract Interpretation and Admissible Extrinsic Evidence**

- Evidence that there is no contract
  - Lack of consideration
  - Fraud, duress, mistake, illegality
- Existence of a condition precedent to the legal effectiveness of the written agreement as a whole.
  - **Luther Williams, Inc. v. Johnson**: contract with full integration clause, D says that the contract was not to be binding unless he could get financing. Court admits evidence as to that agreement because the contract does not say there are no conditions precedent.
  - **Restatement**: oral agreements (collateral to written agreements) that the writing will not be binding until a condition is met are operative unless they are inconsistent with the writing.
- Evidence to explain or interpret terms of a written agreement
Modern approach is vs. the plain meaning rule; look at what the parties meant!

- But the extrinsic evidence still cannot *contradict* what the contract says
  - **Gray v. Zurich Insurance**: Contract had an unclear term by which D didn’t have to defend P for intentional torts, and refuses to defend him in an assault case. P thought they would defend him in any case. Court finds for P:
    - P’s interpretation was reasonable
      - Unclear and unobvious exclusionary clause
      - Ambiguous b/c whether it’s intentional or not isn’t determined until after the trial
    - Adhesion contracts are construed against the writer.
  - **Kemp v. Castle**: Contract to buy a fishing boat. The contract waived all warranties (which were discussed previously), P accepted as is anyway. Court refuses to accept evidence about warranties because the contract expressly waives them; it is unreasonable to assert an interpretation of the contract containing them.
    - If the contract had been inconsistent as to the warranties, *then* extrinsic/parol evidence could have been introduced.

- Course of performance
- Course of dealing
  - **Pacific Gas v. GW Thomas Drayage & Rigging Co.**: Contract with clause whereby D will indemnify P for damage caused by D’s machinery. P’s equipment is damages, P seeks indemnification. D claims it was only intended to cover 3rd parties. T. Ct. would not hear evidence; relied on plain meaning of “all.” *Reversed.* Ct. should hear evidence to determine the meaning attached by these parties; esp. prior course of dealing to see if “all” meant “all.”
    - If the language is “reasonably susceptible” to the offered interpretation, then evidence should be considered to that effect.

- Trade Usage
  - **Frigaliment v. BNS**: The chicken case. Plain meaning: chicken does not distinguish between frying and stewing; court looks to dictionaries, statutes, *trade usage* to see whose interpretation was more reasonable. Both are reasonable within the context, but since D couldn’t prove the contract intended his narrower meaning, P wins because the contract clearly encompasses his meaning (generic chickens)

**Conditions (Allocation of Risk)**
- Conditions, Generally
  - Two possibilities
- **Condition Precedent:** (more common)
  - Event or state of the world must occur or fail to occur before a party has a duty to perform under a contract
    - *Dove v. Rose Acre Farms:* P seeking to enforce bonus provision of contract. Court refuses because not missing any work/not being late even once is a condition precedent to D’s duty to pay the bonus.
      - Substantial performance is not enough because the contract expressly required full performance (i.e. no missing work)
    - Burden of proof is on P to prove it exists and was met
- **Condition Subsequent:** (rare in contracts)
  - If an event or state of the world occurs or fails to occur, a party is released from its duty to perform under a contract
  - Burden of proof is on D to prove it exists and was not met
    - Because the event is not certain to occur, conditions allocate the risk of its nonoccurrence, and impairs the value of the contract to one party.
    - Distinguishing between conditions and promises
      - Promises give rise to breach if they are not fulfilled
        - Will not necessarily excuse the other party’s duty to perform
      - Conditions do not give rise to liability
        - Usually *will* excuse the other party’s duty to perform.
      - Sometimes a provision is both a promise and a condition
        - E.g. to deliver goods before payment is due
      - Express conditions might imply a promise
        - E.g. contract conditioned on obtaining financing \(\rightarrow\) promise to try to get financing
      - Intent controls in deciding whether a provision is a condition or promise (i.e. whether one party undertook to bring it about, or whether its occurrence gives rise to a duty). Also look at:
        - Words used
        - When in doubt, provisions are construed as promises
  - Express Conditions
    - Explicit contractual provisions
  - Implied Conditions
    - Most common: that the other party has to perform before a duty arises.
      - Failure to perform may be both breach and excuse.
    - Implied condition of notice
      - *Wal-Noon Corp. v. Hill:* P/tenant sued D/Landlord for expenditures on roof. Contract held D liable for repairs other than caused by P’s own negligence. Court finds that D doesn’t have to pay b/c P did not give D notice. D should get to investigate to determine the cause or else it’s unconditionally liable. Further, D should get to choose how to make repairs, etc. Condition never met \(\rightarrow\) no duty for D to pay.
Implied condition of cooperation

Order of Performance
- If one party’s performance will take some time and the other’s only takes a moment, the first party’s performance is a condition to the other’s duty (e.g. to pay)
  - **Kingston v. Preston**: contract for D to sell his business to P, P to put up security for the exchange. P did not offer security, so D would not sell. Court treats the duties as dependent covenants. Promise to get security was a condition precedent to the promise to sell. Not met, so D has no duty to sell.
  - **Palmer v. Fox**: contract for D to pay for a lot, and P to make improvements in the subdivision. Court finds they are dependent covenants. Because P has not made the improvements, D is under no duty to pay. Consideration (i.e. payment) was for the improved lot, not the lot as is.
- If the performances are to or can be performed simultaneously, each party’s performance is an implied *condition concurrent* to the other’s performance
  - No breach until one party tenders performance
    - **Goodison v. Nunn**: contract to sell land. P sues D on liquidated damages clause for not going through with the sale, but P never took any steps to convey the land. Court finds for D; P must show he was ready, willing, and able to perform his part or else D’s duty to buy never arose.
  - Tender by one party makes the other party’s duty absolute

**Excuse of Conditions**
- Never intended to be a condition
- Modification discharging the condition
  - If the condition was material:
    - Modification must satisfy the usual rules for enforceable modification
    - Might need consideration
  - If the condition was not material:
    - Can be deleted or modified by subsequent agreement
  - Effect of provisions requiring modifications to be written
    - Can still be modified orally
      - **Majority**: must induce reliance by the other party
      - Minority: no reliance necessary if the promisor knew of the failed condition and elected not to insist on it and proceeded with performance
  - **UCC**: oral modifications are only enforceable in the face of a provision requiring them to be written if the other party in induced to reasonably and in good faith change its position in reliance.
• Waiver by the benefited party
  o **In Re Carter**: buyer’s satisfaction with financial status of company he was buying was a condition to his duty to close the sale. After buying, he wants to rescind, tries to treat the condition as a warranty. Court notes that the contract had other warranties, but that this was a condition. Once buyer purchased company, he waived the condition, accepted company “as is.”
  o Waiver normally *has to have consideration* to be valid, unless it is the waiver of a condition that was not the consideration of the contract.
    ▪ **Clark v. West**: contract to write law books with payment of bonus conditioned on P not drinking. After D accepted the first book, they said not to worry about not drinking, so P went ahead and drank, sued when D refused to pay the bonus. Court finds for P because D impliedly waived the condition
  o Note: you can’t “waive” yourself into a *new* condition

• Changed circumstances make performance *impossible* or *impracticable*

• Frustration of Purpose

• Discharged
  o Mutual Rescission
    ▪ Agreement between the parties to call of the contract
    ▪ Can only be done if the duties are executory (i.e. if one party has completed performance, you can’t have a mutual rescission)
    ▪ Needs to be in writing only if it would effect a retransfer or reconveyance of land or a sale of goods w/in SOF.
    ▪ Can’t mutually rescind a contract with 3d party beneficiaries if their rights have vested

• Release
  o Delivered and executed by the person intending to extinguish contractual rights existing in his favor
  o Must be supported by adequate consideration
    ▪ **UCC 1-107**: no need for consideration to release

• Accord and Satisfaction (i.e. substitute performance)

• Payment in Full checks (if certain conditions are met)

• Anticipatory Repudiation

• Prospective inability to perform

**Substantial Performance and Constructive Conditions**

• Implied conditions of prior or simultaneous performance are usually satisfied by substantial performance
  o The other party’s duty is not discharged
  o The party who has substantially performed can bring suit on the contract and
    ▪ recover expectation damages
    ▪ less any amount of damages caused by his failure to perform perfectly
• Normally measured by the amount it will cost to repair the deficiency or to make the work conform to the contract
• But if repair would involve substantial economic waste, or cost of completion damages would be disproportionate to the end served, then damages are the amount by which the deficiency diminishes the value of performance
  ▪ Exception: Real Estate Contracts, seller can keep down payment up to 10% even if that exceeds actual damages (Maxton v. LoGalbo)
  ▪ Jacobs & Young v. Kent: Contractor used wrong kind of pipes in building house and D withholds payment. Court awards P payment minus the diminution-in-value from the pipes. P substantially performed; the intent of the contract was fulfilled (e.g. build a house).
    ▪ Court doesn’t measure breach damages by cost of repair because that’s disproportionate in this instance.
  ▪ Substantial performance is a question of fact, asks whether the performance meets the essential purpose of the contract. Look at:
  ▪ Excuse for deviation from the contract
  ▪ Purpose intended to be served by the contract
  ▪ Extent of the benefits that the innocent party has received under the contract
  ▪ Adequacy of damages to compensate for the breach
  ▪ Extent to which a forfeiture will occur if the doctrine is not applied
  ▪ Extent to which the breach was wrongful or in bad faith
  ▪ O.W. Grun Roofing v. Cope: D refused to pay P for roofing contract because the shingles don’t match. P argues substantial performance, Court rules for D, awards them the cost of getting a new roof. Aesthetics were so central in this contract that even though the roof was functional, P did not substantially perform.
  ▪ Lowy v. United Pacific Insurance Co.: Divisible contract, P made changes increasing the cost of performance to D when D was 98% finished with phase 1. Court awards full payment – damages to D because of substantial performance on phase 1.
  ▪ Aetna Casualty v. Murphy: Third party insurer, D is seeking indemnification for damages he caused. Insurer won’t pay because D did not give notice of the claim within the stated time limit. Court says that if D can prove the following, strict enforcement can be excused to avoid disproportionate forfeiture:
   • It was a contract of adhesion
   • Enforcement will cause forfeiture
   • The other party’s legitimate purpose can be protected without strict enforcement of the condition
   • The other party was not materially prejudiced by the failure to meet the condition.
• UCC 2-601 Perfect Tender Rule:
Seller must make a tender of goods that conform *perfectly*, rather than merely substantially, to the contract specifications in order to put the buyer under an obligation to take and pay for the goods.

Exceptions to the perfect tender rule:

- **Cure (UCC 2-508)**
  - if time for performance has not yet expired, seller has the right to notify buyer of intention to cure and a right to make a conforming delivery within the contract time.

- **Installment Contracts (UCC 2-612)**
  - Buyer can’t reject an installment, even though it is non-conforming if:
    - The nonconformity of the installment doesn’t substantially impair the value of the whole contract
    - The nonconformity can be cured
    - The seller gives adequate assurance of cure

- If the seller has reasonably grounds to believe the tender would be acceptable, despite the defect, with or without a money allowance
  - Buyer can still reject, but
  - Seller can then notify buyer of intention to cure and if he does so within reasonable time, buyer must accept it.

- **Divisible Contracts**
  - It is possible to apportion performances into *matching or corresponding pairs*
  - A party who has performed one or more parts is entitled to collect the contract price for those parts even though he breaches other parts
    - E.g. Employment contracts with periodic salary payments
    - *Britton v. Turner*: Contract was for P to work for 1 year for $X. P finished the work in 9 months, and left without D’s consent, later sued D for payment. Court finds D has to pay only for the actual value of the work P did (not to exceed contract value), not the value of the contract.
      - Public policy: don’t want to incentivize ER to make their EE quit.

**Representations and Warranties**

- All representations are implied to be true, so they create express warranties
- Implied Warranty of Merchantability *(UCC 2-314)*
- Implied Warranty of Fitness *(UCC 2-315)*
- Disclaimers *(UCC 2-316)*
  - IWM:
    - Because of public policy, IWM might not be waivable
      - *Henningsen v. Bloomfield Motors*: P bought a car from D, D disclaimed IWM. Court won’t enforce the disclaimer b/c in auto industry, P is not free to bargain elsewhere, had no choice. Letting dealers disclaim IWM disincentivizes making cars safe.
IWF

“As is” clauses and the like are valid if
  ▪ they make it clear that merchant is disclaiming all warranties, including implied warranties
  ▪ it is valid to exclude implied warranties with respect to defects which should have been reasonably discovered when the buyer examined or refused to examine the goods.

Limitation of Remedies (UCC 2-719)
  ▪ E.g. repair and replacement
  ▪ Can also limit liability for consequential damages
  ▪ Two major exceptions
    ▪ Exclusive remedy fails of its purpose
      ▪ Remedy may be had under UCC
      ▪ Murray v. Holiday Rambler: P bought an RV from D. D limited remedy to replace and repair defective parts; limited Consequential Damages. RV could not be repaired. Court awards P the cost of a new RV because the exclusive remedy failed of its purpose
        ▪ Note: this court is against the UCC, and against most jurisdictions! Normally, the limitation on CD would have still been effective after the exclusive remedy failed because they were separate provisions.
    ▪ Personal Injury
      ▪ Limiting liability for personal injuries resulting from consumer goods is prima facie unconscionable.

BREACH

Material Breach
  ▪ Promisor fails without justification to perform when a promised performance is due
    ▪ Allows cancellation only when the interest protected by canceling is seriously at risk
      ▪ E.g. Future expectation interests that need to be secured elsewhere
  ▪ Remedies:
    ▪ Sue for damages for total breach
    ▪ Cancel the contract or suspend performance
  ▪ Damages
    ▪ Breaching party: full contract price – damages
    ▪ Non-Breaching party has to pay: benefit conferred - damages

Anticipatory Repudiation
  ▪ AR is an expression (words or conduct) which indicate that one party will not complete performance on the contract.
    ▪ Must be an unconditional refusal to perform as promised in the contract
    ▪ Examples:
• Insistence upon terms not contained in the contract
• Demand of performance to which a party has no right under the contract, and statement that unless his demand is complied with he will not render his promised performance
  o A performance that would normally be an implied condition to the other party’s performance will be excused if the other party repudiates the contract prior to when performance was to occur.
  • Non-repudiating party may have to prove that he was ready and able to perform
  o AR is both breach and excuse (non-repudiating party can sue)
  o If the non-repudiating party has completed performance, and the only obligation remaining is that of the repudiating party, then the innocent party must wait to sue until there is an actual breach, i.e. the other’s performance comes due.
• Retraction of repudiation is allowed unless:
  o The innocent party has accepted it (i.e. sued for breach)
  o The innocent party has changed her position in detrimental reliance on it.
  o Taylor v. Johnson: Contract for P to breed his mares with D’s stallion, but D sells stallion to someone else and repudiates. P refuses to accept the repudiation, so D arranges for the breeding to occur in KY, which ends up being really hard/inconvenient, so P sues. Court finds for D because D never breached. The repudiation was retracted when D arranged for the horses to breed in KY.
• Remedies for Repudiation:
  o In General
    • Injured party has a duty to mitigate (can’t recover for damages you could have avoided)
      • Cover
      • Stop performance (unless doing so would actually increase damages)
    • Sue for damages for total breach immediately
      • Houchester v. DeLaTour: P contracted to be D’s courier on a trip. Before the trip, D told P he would not need him. P sued for breach. Court holds that P can sue for breach before the performance was due because that promotes efficiency. Also, the repudiation ended P’s obligation, so no reason to wait.
    • Cancel the contract and suspend performance
      • Note: Repudiation discharges the other party’s duties and excuses the non-occurrence of a condition
  o UCC repudiation damages
    • In general
      • Suspend performance and wait for the repudiating party to perform
      • Suspend performance and sue for breach
    • UCC 2-708 on repudiation of contracts for the sale of goods
• Repudiation by the buyer:
  o Difference between contract price and market price at the time and place for tender.
• Repudiation by the seller:
  o Buyer can cover or
  o Recover damages equal to the difference between the contract price and the market price at the time the buyer learned of the breach.

Prospective inability to perform
• Circumstances or the promisor’s words/conduct create doubt as to whether the promised performance will be forthcoming as agreed, but is not a breach
  o If inability to perform is due to voluntary conduct, may also be anticipatory breach.
  o Examples of inability to perform
    ▪ Conveying contract goods to someone else
    ▪ Entering an inconsistent contract with someone else
• Remedies for prospective inability to perform are limited:
  o Excuses other party from holding himself ready to perform or rendering performance as an implied condition on the first party’s duty to perform
  o If a party to whom credit is to be extended goes bankrupt/becomes insolvent, then the other party is not excused.
    ▪ Can suspend performance and
    ▪ Demand remaining performance or adequate assurance that it will occur
• UCC remedies for prospective inability to perform
  o UCC 2-609: insolvency of either party gives the other the right to demand assurances of performance before proceeding further with his own performance under the contract
  o UCC 2-609: if a party has reasonable grounds to believe that the other’s performance may not be tendered, he may demand adequate assurance of performance in writing. (Restatement: same for all contracts)
    ▪ Can suspend performance until adequate assurance is given
    ▪ Unjustified failure to comply with reasonable demand for assurance within 30 days = repudiation
  o AMF v. McDonalds: P was uncertain it could fulfill contract, could not give adequate warranties, so D asked for adequate assurance. P could not meet the standards within reasonable time, parties couldn’t agree on standards, etc. D cancelled contract. Court finds for D because P’s failure to give adequate assurances was a repudiation, gave D the right to cancel.
    ▪ Note: this court waived the writing requirement, reasoning that the parties understood that performance has been suspended until assurance is received. This is not the rule!

Installment Contracts
• Remedies for buyer’s breach
• Seller may cancel if buyer fails to pay on or before delivery if the breach is of the whole contract

- Remedies for seller’s breach
  - Buyer can cancel if non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract (breach of whole)
    - **Plotnick v. PA Smelting Co.** P selling lead to D in installments; in the past they have both been late (delivery; payment). D is withholding payment for past late deliveries. P is withholding last shipment for failure to pay. Court decides for D, applies 2 prong test for breach in installment contracts (very different than UCC test of reasonable uncertainty; harder to meet)
      - Reasonable apprehension that performance is not forthcoming
        - Not met here; had accepted late payment in the past, offered alternative means of payment, had good credit, etc.
      - Impossibility of tolerating the breach
        - Not met here; had accepted late payment in the past.
  - Buyers are not excused from performance when sellers sue for total breach during performance of an installment contract if the buyer claims they only partially breached.
    - Buyer can continue performance
    - Buyer can restore seller to antecedent position
    - Failure to do either = total breach

**Right to Cancel**

- Foreclosed in contracts for the sale of goods when:
  - A repudiation is retracted before cancellation
  - Goods are not rejected within a reasonable time
  - Acceptance is not revoked within a reasonable time

- Waiver of right to cancel
  - By withholding payment and
    - asserting a non-material breach as the reason for doing so when
    - Non-breaching party relies to its detriment on the stated objection and remedies it
  - In installment contracts by
    - Suing with respect only to past installments
    - Demanding performance only as to future installments
    - Accepting a non-conforming installment without seasonable notification of cancellation

- Generic waivers:
  - Express or implied assent to continued performance without objection to a problem
  - Representation that strict compliance will not be required
  - Continuing to insist on performance even after the breach
DEFENSES TO BREACH

Impracticability

- Performance may be excused if it is made impracticable
  - by the occurrence of an event whose nonoccurrence was a basic assumption on which the contract was made and
    - **Mineral Park v. Howard**: Requirements contract for D to get all the gravel it needed from P’s land at a specified rate. D got half elsewhere b/c the rest of P’s gravel was under water, expensive to get to. Court finds for D b/c the parties assumed that the gravel would be accessible. Since it was not, D is excused from getting it all from P.
    - **Taylor v. Caldwell**: music hall that P was supposed to lease burned down, P sued D for compensation for advertising, etc. Court finds for D because performance of the contract was impossible. When the subject matter of the contract ceases to exist, both parties are excused. They assumed it would still be there, its existence was therefore an implied condition precedent.
      - the adversely affected party did not explicitly or implicitly assume the risk that the contingency might occur.
    - **United States v. Wegematic Corp.**: D contracted to provide P with a computer system. LD clause and clause allowing P to recover damages if they had to get it elsewhere were included. D could not develop the technology, so P sued for damages. Court finds for P because D assumed the risk that it would not be able to perform.
      - Note: perhaps manufacturers bidding to provide technology they have not yet developed should always assume the risk that they won’t be able to perform.
    - **Dills v. Town of Enfield**: Contract for P to do construction for D. Had to submit acceptable plans, then if he could not get financing, gets deposit back. P wants deposit back after only submitting preliminary plans because he will not be able to get financing even if he submits acceptable plans; making up plans is futile and expensive. Court rules for D because it was not impracticable, and P assumed the risk that he would not get financing; it was not a basic assumption that he would get it.
    - **K-F Oil v. Producer’s Gas Co.**: take-or-pay contract. D refuses to pay when demand drops because he could not sell for a profit; argues that market drop is a force majeure, excuses performance. Court decides the take-or-pay provision allocated to D the risk that market price/demand would drop. P has the risk that production costs will rise. Unfair to let D out b/c then P bears all the risk.
      - Market fluctuations do not constitute impracticability!
- Recurring examples of impracticability
  - Change in law or other government act makes performance illegal
- E.g. zoning ordinances, building codes, embargoes
  - Destruction or nonexistence of subject matter after the contract is entered into
- If the specific source of supply was contemplated by both parties and fails, then duty to furnish goods will be excused
  - When the seller is a middleman (UCC 2-615), failure of supply will only be an excuse when:
    - The source was contemplated by the parties as being the exclusive source and
    - Middleman took all due measures to assure himself that the supply would not fail
    - **Canadian Industrial Alcohol Co. v. Dunbar**: D was supposed to supply P with wine, but then his molasses supplier dried up. D argued impracticability because he meant to get it all from there, not from the open market. Court finds for P because D’s assumption (i.e. that supply would be there) was unreasonable, he assumed the risk that it would not be available. Further, the singular source was not contemplated by both parties.
- Construction Contracts
  - Destruction of a work in progress
    - Not an excuse, can still rebuild
    - No restitution b/c no benefit conferred on owner
    - Duty to perform on time may be excused, though.
  - Destruction of premises to be repaired
    - Will excuse performance
    - Contractor can recover in restitution the reasonable value of the work done prior to destruction of the building.
  - Land Sale contracts and destruction of improvements
    - Traditional Rule: no excuse to pay full contract price
    - Modern trend: excuses performance
- UCC on destruction of goods
  - **2-613**: The contract is avoided if
    - the goods were identified when the contract was made,
    - they are destroyed without fault of either party
    - before the risk of loss passed
    - General rule for passing of the risk is when delivery is tendered to the buyer, with special exceptions:
      - Shipped to the buyer: risk passes to buyer when seller delivers to carrier
      - Contract requires seller to deliver goods at a particular destination: risk passes when goods are tendered to buyer at that destination
      - No shipment involved and seller is a merchant: risk passes upon buyer’s receipt of the goods
- Death or Illness in personal services contracts (those that are non-assignable and non-delegable) excuses both parties.
• Temporary impracticability:
  o Duty to perform is suspended while the impracticability continues
  o Duty reattaches only if performance thereafter would not substantially increase the burden on either party or make the performance different from what was promised.

• Partial Impracticability
  o If the remainder is not made materially more difficult or disadvantageous and
  o Promisor is still able to render substantial performance, then
  o Promisor remains bound to render modified performance
  o Promisee remains bound to accept it with an appropriate offset.
  o UCC 2-614: if the agreed manner of delivery becomes impracticable, the parties have to use a commercially reasonable substitute if one is available.

• Damages:
  o If either party has partially performed prior to impracticability, he is entitled to restitution

**Frustration of Purpose**

• The purpose or value of the contract has been destroyed by a supervening event that was not reasonably foreseeable at the time the contract was entered into.
  o Paradine v. Jane: L seeking to recover rent from T not paid while German army forced her off the land. Court makes her pay because otherwise L bears all the risk in the relationship. T gets benefit of casual profits, should also bear burden of casual losses. Court focuses more on impracticability analysis; it was not impossible for T to pay rent.
  o Krell v. Henry: Coronation case. Court does not force D to pay for a room because the contract was really for a room with a view of a parade. The parties assumed something which did not occur; there was no point to the contract without the parade.
  o Washington State Hop Producers v. Goschie Farms: D bought hop base from P in order to engage in market. Later, Gov. changed the rules, no longer need hop base. D wants out; court lets them out because of frustration of purpose.
    - Principal purpose of contract was to buy future interest in the market, but that no longer exists; it’s only present interest
    - Non-occurrence of the supervening event was an assumption on which the parties made the contract
      - Even if it was foreseeable, they thought the risk was unlikely; risk was not allocated to either party.
    - Frustration is substantial
      - 95% decrease in value
      - Control of hop base is now irrelevant

**Implied Duty of Good Faith**

• At a minimum, good faith means “honesty in fact in the conduct or transaction involved.”
Determined by conduct excluded:
  - Lack of diligence (i.e. slacking off)
  - Willful rendering of imperfect performance
  - Abuse of power
  - Interference with/failure to cooperate with other party’s performance

Application
  - Discretionary contracts
    - Consideration valid in contracts allowing one party to determine a term because the determination must be in GF
    - *Centronics v. Genicom*: contract for purchase of a business out of money in escrow to be released after price determined. P wants money not in dispute to be released now, sues D for bad faith in not doing it. Court finds for D; looks at 2 tests: Either way, D actually had no discretion to exercise. Under 2d test, nothing had been bargained away that could be recaptured.
      - *Summers Test*
        - Does D have a degree of discretion equal to power to deprive P of benefits? NO. (Ct. stops here)
        - If yes, did the parties intend to make an enforceable contract?
        - If yes, Has D’s exercise of discretion exceeded limits of reasonableness?
        - Is this the cause of P’s damage, or did damage result from something outside the parties’ control, against which D had no duty to protect?
      - *Burton Test*
        - Bad faith is an exercise of discretion *to recapture an opportunity forgone* at the creation of a contract
  - Duties conditioned on satisfaction
    - Subjective test: honesty in fact, whether that individual was satisfied
    - Objective Test: substitutes a RP for the actual party
      - Restatement approach
    - *Neumiller Farms v. Cornett*: P selling potatoes to D, subject to D’s approval. D rejects when market price goes up; P proves he only rejected them because of the price, not the quality. Court rules for P because there is a duty of good faith in rejecting goods based on satisfaction.
      - Could also use UCC 2-708, wrongful rejection of goods
  - Lender liability
    - Good faith is a prohibition of opportunistic behavior; intermediate approach
      - If lenders don’t have much discretion, borrowers will be less able to bargain, get different terms
If lenders have too much discretion, he is more able to behave opportunistically.

- **Reid v. Key Bank**: Bank withdrew line of credit and called in the loan pursuant to a pay on demand clause. Court decides the bank acted in bad faith. The examples of default are taken as an inclusive list, so there is no release from the duty of GF. Banks have a duty to warn the customer, give advice, etc. before calling in a loan. Bank didn’t meet subjective GF test.

  - Exclusive Dealership contracts (e.g. Requirements and Outputs)

    - Implied best efforts
      - **Feld v. Levy & Sons**: outputs contract for breadcrumbs, then D went out of business w/o giving the required notice b/c production was uneconomical. Case has to be tried to see if going out of business was done in GF. (imperil business = GF; less profit = BF)

    - Use objective standard:
      - how much could distributor have sold?

**Agreed Modification, Discharge, or Termination**

- **Agreed Modification**

  - The contract continues with:
    - modified duties on one or both sides or
    - One party gives up a right

    - Problems with consideration

  - Needs new consideration

    - Exception: sale of goods
      - **UCC 2-209**: an agreement modifying a contract for the sale of goods is binding without consideration

    - Still must meet *good faith* requirement
      - Consistent with fair and reasonable commercial dealings in the trade
      - Actually motivated by an honest desire to compensate for commercial exigencies

    - Legal duty rule not applied

    - **Roth Steel v. Sharon Steel**: contract for P to buy and D to sell steel. Market price went up, and they modified the contract so P paid more. Later sued D for BOC. Court does *not* enforce the modification because although D had a legitimate economic reason for wanting to modify (consistent w/ trade), that was not the motivation b/c D never brought that up during negotiations w/ P. Not honest in fact.

  - Duty to modify is not imposed under common law or the UCC
- However, some courts will find that a party advantaged by changed circumstances has a duty to accept a fair and equitable adjustment proposed by the disadvantaged party.

- **Discharge**
  - Mutual Rescission
  - Novation
  - Accord and Satisfaction
    - One contract or performance is substituted for another
      - Accord is the substitute performance
      - Satisfaction is the actual performance of the accord by the promisor.
        - Discharges both the accord and the original contract duty
  - Executory Accords
    - Accords that have not yet been executed
    - Unenforceable under traditional law even though it is technically a bargain.
      - Modern law: if original duty was unliquidated, undisputed, not matured, and not a duty to pay money, the A&S might be treated as a substitute contract.
    - Effect of Executory Accords:
      - Suspends the promisee’s rights under the original contract during the period in which the promisor is supposed to perform the accord
      - If promisor fails to perform the accord, promisee can sue under either the original contract or the accord

- **UCC 1-207** allows a party to retain its rights to full performance by indicating that in the A&S agreement
  - AFC Interiors v. DiCello: Court applies 1-207 to check tendered in full payment when creditor crossed out “PIF” and wrote in “payment on account.” Normally, 1-207 is not applied to checks paid in full.

- **Full Payment Checks (A and S by use of an instrument)**
  - **UCC 3-311**: if creditor cashes full payment check, the entire claim is discharged if
    - The check is tendered in GF as full satisfaction
    - The check or an accompanying writing contains a conspicuous statement to the effect that it is full payment
    - The amount of the claim that the check concerns is
      - Unliquidated or
      - The subject of a bona fide dispute
• Exception to 3-311
  o Creditor is an organization
  o Within a reasonable time before the check was
tendered, creditor sent conspicuous statement that
full satisfaction checks have to be sent to a certain
person/place
  o The check was not sent to that person/place
  o Creditor did not know within a reasonable time
before initiating collection of the check that it was
tendered in full satisfaction
• The other exception:
  o Creditor tenders repayment within 90 days
  o Creditor-organization did not sent to the debtor,
within a reasonable time before the debtor tendered
her check, statement of the special place, etc.
  o Creditor didn’t know w/in reasonable time that the
check was tendered in full satisfaction
• Unilateral Termination
  o Implied duty of GF in exercising the power of termination
    ▪ GF is narrowly defined: “freedom from coercion, intimidation, or
threat of coercion or intimidation from the other party.”
  o Common Law: right to unilateral termination at will and without notice
renders a promise illusory; no consideration.
    ▪ UCC 2-309: if a contract can be terminated by one party without
the happening of an event, it requires Reasonable notification
    ▪ An agreement dispensing with the reasonable notification
requirement is invalid if its operation would be
unconscionable.
  o Employment-at-will contracts
    ▪ Implied requirement that ER has cause for firing EE
      ▪ Unless language explicitly states otherwise
    ▪ Seubert v. McKesson Corp.: employment at will; P sues D for
firing him without cause. Court finds for P because there was no
integrated employment contract, only a provision on the
application saying he could be fired at any time. Court implies that
the ER must act in good faith when terminating the employment.

THIRD PARTY RIGHTS

Assignment
• Transfer of an intangible right
  o Extinguishes the right in the assignor and sets the right up exclusively in
the assignee
  o AE has a direct right against the obligor
    ▪ Fitzrov v. Cave: D owes debt to 5 AR, all of whom assign the debt
to P. P sues D to recover the debt. D objects that the assignments
materially increased his obligation (more likely to have to pay all at once), but court finds for P. Debts are assignable, treated like personal property.

- Contract rights are generally assignable
  - Non-assignable rights
    - Assignment would materially change the duty of the obligor
      - Personal services contracts
      - Requirements and outputs contracts
    - It would materially increase the burden or risk imposed on the obligor by the contract
      - Insurance contracts
      - Credit extensions
    - It materially impairs his chance of obtaining return performance or materially reduces its value to the obligor.
      - **Sally Beauty v. Nexxus**: D had a contract with AR to sell its products to the best of its ability. AR assigned contract to P, a competitor of D. D cancelled contract. P sued for breach. Court finds for D because it had a special interest in having AR perform (or at least in *not* having P perform). Unreasonable to expect competitor to market w/ best efforts
  - Contracts can’t be assigned if it would materially change contract terms (e.g. place of delivery)
- Partial Assignment
  - Rights can be assigned to multiple assignees, or
  - AR can assign only some of the rights and retain the balance
  - Might need to join all partial assignees as parties in a suit if feasible
- Requirements for an effective assignment
  - Manifested intention to make a present transfer of rights
  - The right that is assigned must be adequately described
  - Present words of assignment must be used
    - Test is whether the language manifests an intent by AR to divest himself completely and immediately of the right in question and transfer that right to the AE.
    - E.g. sell, transfer, convey, assign, give
  - Consideration is **not** required for an assignment
    - However, gratuitous assignments are generally revocable, except with:
      - Delivery of a tangible token representing the right
      - Assignment is made in a writing and delivered to AE
      - If AE detrimentally relies on assignment (estoppel)
      - If AE receives payment or performance from obligor
      - If AE obtains judgment against obligor by enforcing the assigned right
      - Novation (i.e. if the AE, AR, and obligor mutually agreed that the AE should be substituted for the AR.)
  - When they are revocable, here’s how you do it:
• Notice of revocation by AR or obligor
• AR’s later assignment of the same right to someone else
• Death of AR
• Bankruptcy of AR
• Acceptance by AR of payment or performance directly from obligor

• Assignment of future rights
  o under an existing contract
    ▪ Freely assignable
    ▪ but the right is conditional upon things like assignor’s performance under the contract.
  o Under a continuing business relationship
    ▪ Might be assignable
  o Under a future contract or business relationship
    ▪ Not assignable

• Wage Assignments
  o Effective even where the existing employment contract is terminable at will.
    ▪ Often subject to statutory restrictions, though

• Rights of AE v. obligor
  o Direct action allowed
  o Once obligor has notice of assignment, he must render performance to or pay AE.
    ▪ If obligor renders performance to or pays AR, he does so at his own risk.
      • Continental v. Van Raalte: an EE of D assigned her wages to P to satisfy a debt she owed. P gave valid notice to D of the assignment, and D acknowledged it. D went ahead and paid EE anyway, so P sued for the debt. Court finds for P because D knew of the assignment, paid EE at its own risk.
        ▪ If AE doesn’t object, though, the obligor is protected
  o Defenses for obligor v. AE
    ▪ The contract under which the rights arose was not validly formed
    ▪ Defenses arising under the contract or the transaction that gave rise to the contract (e.g. defective performance by AR or AE)
  o Federal Trade Commission Rule:
    ▪ A person who sells consumer goods or services on credit must include a notice in any contract or not that any AE of the contract takes subject to all claims and defenses that the consumer-debtor could assert vs. the seller.
  o Once the obligor has notice, the AR and obligor can modify the contract if:
    ▪ The right has not been fully earned by performance
    ▪ The modification was made in GF
  o Before the obligor has notice, the AR and obligor can modify if:
• Regardless of whether the right has been fully earned by performance
  • If the change was made in good faith

- Implied warranties made by the AR to the AE
  o The assigned right actually exists and is not subject to any limitations (other than those stated or apparent)
  o Anything with regard to the assignment is genuine
  o AR has the right to assign
  o AR will not attempt a subsequent assignment of the same right

- Provisions prohibiting assignments
  o Traditional view
    • Construed as promissory only
      • Destroys the right, but not the power to assign
      • Assignments will be valid even if prohibited
        o Obligor will have action v. AR for nominal damages only
    • If phrased as a condition, though (assignment makes the contract void), it will be strictly construed.
      • Allhusen v. Caristo Construction Co.: P was assigned rights under D’s construction contract by a subcontractor. The contract b/w prime and sub had a non-assignment clause, making all assignments void. Court will not enforce the assignment because of the clarity of the provision. Fairness: if AE didn’t comply to the contract, he can’t claim damages under it.
  o Modern/Restatement approach
    • If assignment of “the contract” is prohibited, then
      • Only delegation is barred.
      • Assignment of rights is okay.
    • If assignment of “rights under the contract” is prohibited, then
      • Obligor has right to damages in the event of an assignment, but assignment is still effective
      • The assignment of a right to damages for breach of the whole contract or the assignment of a right arising out of AR’s due performance of his entire obligation is not barred.
      • Not interpreted to be for the benefit of the obligor
      • Not to prevent AE from acquiring rights v. AR
      • Not to prevent obligor from rendering performance to AE as if there was no provision.

Delegation
• Appointment by a party to a contract of another person to perform that party’s contractual duties
  o Original obligor remains liable for the performance of all obligations
  o Delegee is also liable both to the obligor and to the obligee
• Any contractual duty is delegable, except contracts for personal services.
  o Attempts to delegate non-delegable duties is not a breach
• Might be sufficient to be a repudiation and anticipatory breach, though

• Rights under a delegation
  o If delegee expressly or impliedly promises to perform duties owed, then the obligee is a creditor-beneficiary and can sue the delegee for nonperformance.
  o Modern Trend:
    - If a contract is executory (wholly or partially) on both sides and is assigned, the assignment is construed to also be a delegation.
      - AE is liable both to AR and obligee in the event of nonperformance.
    - UCC 2-210: any assignment of “the contract” or “my rights under the contract” is seen as a delegation unless the language or circumstances indicate the contrary.

• UCC 2-210
  o Delegation of performance entitles obligee to demand assurances of performance from the delegee.

Third Party Beneficiaries
• Intended Beneficiaries
  o Two Types
    ▪ Donee Beneficiary: purpose of the promise is to make a gift to the third person or to give him a right v. the promisor
      - If promisor fails to perform, DB can’t sue promisee because he owed no obligation to DB
      - Promisee can’t recover damages from promisor for failure to perform
        o Modern trend lets promisee seek specific performance because legal remedy is inadequate
    ▪ Creditor beneficiary: promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary
      - CB can sue promisee if promisor fails to perform because he did owe a duty to CB
      - Promisee can sue promisor for failure to perform because that failure means promisee’s debt remains outstanding.
  o Have standing to sue on the contract (rights are enforceable)
  o Recurring Third Party beneficiary situations
    ▪ Assumption of a mortgage --> CB
    ▪ Would-be Legatees --> DB
      - Hale v. Groce: P was intended beneficiary of a will that D was supposed to execute, but failed to execute. D argues that P can’t sue, not a party to the contract. Court allows the suit b/c D and decedent intended their contract, which D breached, to benefit P.
    ▪ Government contracts under which members of the general public would benefit --> incidental beneficiary
- Exception: *Zigas v. Superior Ct., etc.*: Tenants have standing to sue under HUD contract with landlords because:
  - T, not Gov. suffers loss from breach
  - There is no procedure for dispute resolution, so litigation is not inefficient
  - L are liable w/o limitation
  - The contract was intended to benefit individuals as opposed to, e.g., a neighborhood
  - T are direct beneficiaries, not incidental
    - Subcontractors under an owner-contractor relationship --> *incidental beneficiary*.
- Incidental Beneficiaries
  - Anyone who would benefit from the contract, but is not a DB or a CB
  - Cannot bring suit on the contract
- Test to distinguish between incidental and intended beneficiaries:
  - If a third party *necessarily* must benefit from performance, then it’s intended.
    - *Johnson v. H-T Lincoln Mercury*: P got in a wreck with someone who was promised full liability insurance by D when he bought his car. D claims that P can’t sue because he was not a party to the contract. Court finds that in a full insurance contract, the parties necessarily contemplate that third parties are to be benefited (i.e. are intended beneficiaries), so they can sue when the contingency occurs.
- Vesting of third party rights
  - **Majority: Restatement 2d**
    - Rights vest only when the beneficiary
      - Brings suit to enforce the promise
      - Manifests assent to the promise in a manner invited or requested by the parties
      - Materially changes his position in justifiable reliance thereon
  - **Minority: Restatement 1st**
    - DB Rights vest immediately on the making of the contract
      - *Tweeddale v. Tweeddale*: D/son contracts with mom for mortgage. Contracted to pay mom, brother, and sister if he sold the land. Sold, settled with mom, and they rescinded. Bro/P find out about the deal and brings suit. Court finds for P/brother because his rights vested when the contract was made; D and mom couldn’t rescind without his consent.
    - CB Rights vest only when he:
      - Detrimentally relies on the contract or
      - Brings suit on the contract
Important because once a beneficiary’s rights vest, the original parties can’t rescind or change the contract without his consent.

**REMEDIES FOR BREACH**

**Compensatory Damages**
- Expectation Damages: based on the contract price; put P in the position he would have been in if the promise had been performed
  - Protect to party’s expectation of gain or profit that would have been made if full performance had been rendered
  - Advantages:
    - Supports efficient exchange in competitive markets
      - Rewards risk taking
      - Deters inefficient breaches (loss to promisee > value of breach to promisor)
      - More effective planning
    - Ensures protection of reliance interest as well
      - Outer limits of recovery for actual but unprovable costs incurred in reliance
      - Otherwise, reliance may be hidden in opportunities foregone by the promisee, which might not be compensated
  - Limitations:
    - Foreseeability
    - Certainty in computation
    - Duty to mitigate
      - UCC 2-715: Cover on market
      - UCC 2-704: Stop production
      - Employment contracts: look for a new job
      - Construction Contracts:
        - Cease performance
        - No duty, however, to look for a new job (requiring him to take on new risks is unfair)
- Reliance Damages
  - Restores the parties to their pre-contractual position; what their position would have been if the promise had never been made.
  - Can be limited by whatever losses, if any, D can prove P would have suffered if D had not breached.
    - *Albert & Son v. Armstrong Rubber Co.*: although it’s unlikely D can show that P would have lost profits if D had performed, D gets a chance to do that. If he can prove it, then he can subtract that amount from the reliance damages.
- Restitution Damages
  - Pays a party back for whatever benefit it conferred before the contract was breached
- Recovery for Emotional Disturbance
  - Restatement: only recoverable when
• The breach also caused bodily harm
• The contract/breach was such that serious ED was a particularly likely result
• Most common exception is mishandling of corpses
  - Allen v. Jones: because of the nature of the contract, ED is a clearly foreseeable result of breach. No punitive damages, though!

• Punitive Damages for Breach
  - Restatement
    - Only recoverable if breach was also a tort for which punitives are recoverable
    - Breach must be an independent and willful tort accompanied by fraud, malice, wantonness, or oppression
      - FD Borkholder v. Sandock: construction contract; D knowingly strayed from construction plan, which caused the addition to be useless. D wouldn’t fix it, lied about the problem. Court awards punitives b/c D’s breach was the equivalent of fraud, misrepresentation, deceit, i.e. was tortious, and public policy requires punishment in consumer fraud like this.
    - Punitive damages awards can’t be unreasonable in relation to actual damages
      - Boise Dodge v. Clark: P sold a car to D and told him it was new, etc. D found out, stopped payment on his checks, and P sued. Court finds for D and awards punitive damages at 40 times the actual damages. Upheld as reasonable considering:
        • Effectiveness in deterring behavior, esp. in an area in which consumers have little knowledge/power.
        • Motives behind the conduct
        • Degree of calculation
        • Disregard for others rights

Consequential Damages
• Damages above and beyond general damages that flow from a breach as a result of the buyer’s particular circumstances (usually lost profits).
• Hadley v. Baxendale: P contracted with D to send a broken shaft back to be repaired. D negligently caused delivery to be delayed, which resulted in lost profits/shut down to P. P sued for lost profits, but court finds for D because:
  - The damages were not reasonably foreseeable/normally arising out of the circumstances and
  - D had no reason to know of the special situation P was in that would make those damages arise out of breach
• Were the losses a foreseeable consequences of breach at the time of contracting?
  - British Test
- Physical injury: breaching party is liable for any loss or expense which he ought to have foreseen at the time of the breach as a possible consequence
  - Different standard for economic loss
- Did the relationship provide the opportunity and incentive for a low-cost sharing of the information?
  - Potential victims can’t refrain from disclosing important info when it could easily be communicated

  - **UCC 2-715**: CD resulting from seller’s breach
    - Liable for any loss resulting from requirements/needs:
      - Of which the seller knew/should have known at the time of contracting and
      - Which could not reasonably have been prevented by cover or otherwise
        - Duty to mitigate controls scope of liability
    - Liable for injury to person or property proximately resulting from any breach of warranty

  - **Spang Industries v. Aetna Casualty**: P was to provide D with steel for a construction project. They agreed on a date, but P delivered 2 months late, so D had to use a crash plan, spent lots of money, and withheld payment. P sued for payment, D sued for damages. Court awards payment to P, CD to D. CD are foreseeable here because P was experienced in the trade, knew that late delivery would cause a rush because of cold weather, etc.

  - **Restatement 2d**:
    - CD are only recoverable if they were foreseeable
      - Flows from ordinary course of events
      - Foreseeable as a result of special circumstances that the breaching party has reason to know
    - Damages may be limited as justice requires to prevent disproportionate forfeiture
    - Could P have reasonably mitigated damages?
    - Can P prove what profits were lost with reasonable certainty?
      - New businesses
        - Traditionally could not recover lost profits because of proof problem
        - **UCC**: crucial issue is whether lost profits can be proven with reasonable certainty
      - Causation Issue:
        - Business decisions?
        - Capital structure problems?
    - If profits are too speculative, can reliance expenditures be recovered as an alternative?
      - Essential Reliance: expenditures necessary for buyer to earn the price/perform the contract
        - Damages limited to full contract price
Incidental Reliance: money spent in preparation to use the thing provided by performance

- Damages measured in terms of utility to P in his particular situation
  - Awarded whatever resulted from P’s inability to use D’s promised performance b/c D did not perform or didn’t conform to the contract
  - Limited by:
    - Foreseeability
    - Cause in fact
    - Proof with reasonable certainty
    - Mitigation duty

Steel Hydraform v. American: D promised to deliver steel to P to make wood stoves. D is repeatedly late, and P loses contracts, etc. Sues for lost profits, lost value in business (which it sold), lost future profits.

- Lost profits: recoverable up to the number of stoves specified. (i.e. 400, 250 were actually made/sold). Any number beyond that is not recoverable because there is no indication they would have demanded more.
- Future profits: uncertain; plus D didn’t drive P out of business
- Lost value of business: uncertain because dependent on future profits

Albert & Son v. Armstrong Rubber: contract for P to sell and D to buy rubber refiners. D gets ready, but P only delivers 2/4 on time, so D refuses to pay for all 4. P sues for payment, D sues for reliance, lost profits.

- No lost profits, too uncertain. No proof the venture would have succeeded
- Reliance damages recoverable, but reduced by the amount, if any, P can prove D would have lost if the contract had been performed.

Liquidated Damages

- Contract provision that specifies an amount of money that will be recoverable in the event of a breach by one party.
- If a LD term is seen as a penalty, courts won’t enforce it.
- To be enforced, it must meet 2 requirements:
  - At the time the contract was made, actual damages must have been impracticable or extremely difficult to ascertain/estimate
  - At the time the contract was made, the amount fixed in the LD provision must have been a reasonable forecast of the damages that would result from a breach.
- Examples of LD cases:
Southwest Engineering v. US: D withholds payment to P/contractor to account for LD for delay in construction. P sues to recover, claiming that D can’t claim LD because it didn’t actually suffer any damages. Court withholds LD because at the time of formation, it was a reasonable estimate of a non-forecastable harm.

United Airlines v. Austin Travel: P provided D with booking service with LD clause for early termination of the contract (payment of 80% of remainder due, 50% of average monthly booking fees for remainder of term). D challenges as unreasonable at time of formation. Court enforces the clause, though. All of P’s expenditures were at the time of formation, so it is reasonable to allow P to recover what it has already spent. The LD clause applied only to material breaches, i.e. total breaches, so it was not unreasonable in the face of minor breaches (b/c it would not apply there).

Leeber v. Deltona Corp.: P wants to recover deposit on purchase of a condo retained as LD. Court upholds the clause because damages caused by breach were unascertainable at the time, and 15% of purchase price was a good guess.

LD are a way to allocate risk; unfair to let P recover part of the 15% because if actual damages had been > 15%, D would have had no right to recover more to equal actual damages.

Subsequent Events:

Traditional view: (still majority rule?)
- LD that was valid when made will be enforceable even if subsequent conditions have made damages ascertainable or if actual damages are materially different from the LD estimate

Modern trend:
- LD clause may be rendered unenforceable despite validity at formation if it is completely disproportionate to the actual damages
  - Sometimes treated as unconscionable
- UCC art. 2: LD provisions are enforceable if it is reasonable in light of
  - The anticipated or actual harm caused by breach
  - Difficulty in proving loss
  - Inconvenience or nonfeasibility of otherwise obtaining an adequate remedy
- Restatement 2d: LD will be upheld if reasonable in light of
  - Anticipated or actual loss caused by the breach
  - Difficulties of proving loss

Exculpation Clauses

- Exculpation from negligence is enforceable if it is clear and conspicuous
- Might be unenforceable as against public policy when:
  - It exculpates a party who is under public duty to exercise care
  - A party with superior bargaining power

Underliquidated damages clauses

- Provisions limiting the amount that can be recovered in the event of breach
Agreed Remedies

- UCC 2-719
  - Parties can limit or alter the measure of damages recoverable under normal remedies for breach
    - Return of goods and refund of purchase price
    - Repair and replacement of non-conforming goods/parts
    - CD can be limited unless the limitation is unconscionable
      - Limiting liability for personal injury is prima facie unconscionable
    - Exclusion of liability for CD
      - Treated as independent of exclusive remedy provision because they are judged by different standards
        - Exclusive remedy: essential purpose
        - CD exclusion: unconscionability
      - Thus, failure of an ER doesn’t invalidate CD disclaimer
  - Agreed remedies are optional unless it is expressly agreed to be exclusive
    - If an exclusive remedy fails of its essential purpose, the remedy will be supplied by the UCC
  - Lewis Refrigeration v. Sawyer Fruit: P sold D a refrigerator, breached warranties causing D to lose profits. The contract made repair and rescission the exclusive remedies and excluded CD. P sued for payment, D sued for damages.
    - Court finds that the exclusive remedy failed because circumstances made it exceedingly impractical to carry out.
      - Because of delays, reassurances by P, inability to discover defects, etc. D had already made commitments and rescission would not remedy those damages
    - Court finds, though, that the exclusion of CD (i.e. lost profits) must be found unconscionable separate from the failure of the exclusive remedy. Otherwise, it’s valid even though the ER failed.

Equitable Remedies

- In General
  - Make it possible for P to obtain the actual performance D promised instead of damages.
  - Prohibit D from doing something (injunction) or
    - Compel D to do the promised performance (specific performance)
- Injunctions (in personam)
  - Prohibit D from doing something
  - Factors to consider:
    - W/out injunction, will P suffer irreparable harm?
    - Will others be injured by the injunction?
    - Will the injunction be consistent with or further public interests
    - For preliminary injunctions: is there a substantial probability of success on the merits?
 Specific Performance
  o Application is to Contracts which have peculiar value
    ▪ Legal remedy is inadequate
  o Availability of substitute performance
    ▪ **Curtice Brothers v. Catts**: contract for P to buy all of his tomatoes from D’s field. D refuses to perform. Court grants specific performance because of the uncertainty of the open market and the specificity of P’s needs. Court says damages would not be sufficient.
      ▪ Problem: why can’t damages suffice, assuming P was just in the business to make money?
  ▪ Difficulty of proving Damages
  ▪ Harm to others
    ▪ **Laclede Gas v. Amoco Oil**: long term contract, D provides P with oil for distribution in neighborhoods. D wants out; court rules for specific performance mostly because of public policy – doesn’t want to deprive residents of gas. It would be hard for P to get substitute performance in; hard to determine money damages.
    ▪ Likelihood that damages won’t be collected.
      ▪ **NIPSCO v. Carbon County**: D sold coal to P in a 20 year contract. Electricity became more economical, and D breached. P wanted SP. Court awards damages. Easy to calculate; breach is efficient because using coal is no longer preferred (increased costs to world); can’t consider D’s EE because they aren’t parties to the contract (should have thought about that first); parties would have bargained to the same result anyway.
  ▪ Goods are unique
  ▪ **Walgreens v. Sara Creek Property**: parties had a contract that no other pharmacies could lease in the shopping center. D wants to let another pharmacy come in. Court grants P an injunction. Not hard to enforce, lets the parties determine what it is worth to them to enforce/breach the contract. Other pharmacy could pay D more if it’s really that valuable, then D could pay P for the injunction. Also, damages are hard to measure here.
    ▪ Problems:
      ▪ Supervision
      ▪ Harder to make someone perform than to make them refrain from doing something
    ▪ Traditionally only available if it could be mutual
      ▪ Modern rule: still available even if to one party when
        ▪ SP would otherwise be appropriate
• The agreed counter performance has been substantially performed or
  o Its concurrent or future performance is assured or
  o It can be secured to the court’s satisfaction

• Restatement 2d:
  o Award of Damages can be made in addition to injunction or specific performance
  o Equitable Remedies available when damages are inadequate to protect the other party’s expectation interest
    ▪ Difficulty of proving damages
    ▪ Difficulty of procuring substitute performance by means of money damages
    ▪ Likelihood that money damages won’t be collected

• Reasons for not granting equitable Relief:
  o Unconscionable Bargains
    ▪ P has “unclean hands” (in relation to the subject matter of the parties’ relationship)
    ▪ Inadequate consideration was given for the bargain
      • Unfairness is viewed at the time of formation.
  o Lack of good faith by P
    ▪ E.g. have to try to protect your interests, mitigate
  o Personal services contracts
    ▪ Confidence has been undercut by dispute, so it is undesirable to compel the relationship to continue
    ▪ Hard to judge adequacy of performance
    ▪ 13th amendment problem of involuntary servitude
  ▪ Possibilities for personal services contracts:
    • Injunction to prevent D from performing the services for someone else
      o Can’t prevent D from making a living
      o Protects P from unfair competition
    • ABC v. Wolf: although D breached duty of GF negotiations, court doesn’t grant an injunction because his ability to work for another company is how he makes a living, and they can’t force him to keep working for P. Anti-competition would not serve any real purpose for P.

Duty of Cooperation
• Implied duties in an exchange:
  o Not to intentionally hinder or prevent the other party’s performance
    ▪ Blandford v. Andrews: contract for D to arrange a marriage for P, but P was not very nice to the girl. P sued D for breach, D argues that P made it impossible. Court held for P because D didn’t even try; no way of knowing if he could have smoothed things over.
- **Modern approach**: bad faith on the part of one party will usually excuse the other party and maybe give rise to an action for damages.
  - **Patterson v. Meyerhoffer**: D was going to buy property from P; both understood that P would get the property at a foreclosure sale. Then D bought the same property at the foreclosure sale. P sued her for damages. Court awards him the difference between what D paid and the contract price (the profit he would have gotten if she had not intervened). His payment is for effort, finding the house, etc.
  - **Iron Trade v. Wilkoff**: Contract for D to deliver and P to buy rails. P ends up buying from D’s supplier, then when D breaches, sues D. D argues that P made performance impracticable. Court finds that, w/o evidence that P intentionally caused prices in the market to rise buy buying from the supplier (decreasing supply), he is not guilty of hindering/preventing D from performing.
    - And besides, increased prices aren’t an excuse for impracticability anyway
- **Implied covenant of Good Faith**:
  - Neither party will do anything that has the effect of destroying or injuring the other party’s right to receive the benefits of the contract
  - Determining Good Faith compliance:
    - Motive
    - Risk assumption
    - Capacity
    - Nature of performance
    - Market conditions
    - What the parties knew/should have known about the exchange
  - Ways to breach duty of good faith
    - Misfeasance
      - Preventing or hindering performance by the other party
    - Nonfeasance
      - Failure to cooperate when cooperation was needed
        - Duty to take affirmative action usually will not be implied, except:
          - Special relationships
          - Promises to help
        - When there is a duty to cooperate, the party must do whatever is reasonably necessary for the other party’s performance
  - [Billman v. Hensel](#): contract to buy house conditioned on ability to get financing. Court finds
that D breached because he did not make a GF and reasonable effort to get financing. Awards LD to P.

- Remedy for nonfeasance depends on the facts
  - Excuse of condition
  - Action in damages

- Remedies for breach of Good Faith:
  - Injunction
  - Expectation damages
  - Consequential Damages
  - Punitive Damages