OUTLINE FOR KIEFF’S CONTRACTS CLASS

Introduction to the Study of Contract Law

§ 1.1 Preliminary Survey of Subject and Sources

I. Why contracts are followed
   i. Fear of legal sanctions
   ii. Fear of private sanctions (such as refusal to deal or boycott).
   iii. People feel it’s the right thing to do.
   b. Enforcing contracts facilitates trade by promoting present reliance on future promise.
   c. The private contract is a powerful tool for diffusing power in a society; by entering into a binding contract, they make law for themselves.

II. Important questions to ask myself
   a. Which promises will be enforced? What are the conditions which must be met for enforcement?
   b. When enforceable, what is the scope and content of promissory obligations? How will courts interpret contracts?
   c. How ill the promises be enforced? What remedies are available when a contractual promise is breached?
   d. Which of the foregoing answers can the parties contract around? And what contractual language will be sufficient to produce a particular result?

III. According to Posner, law of contracts performs three economic functions.
   a. The law of contracts exists, basically, to facilitate exchange.

IV. Reasons not to enforce a contract:
   a. Proof of some defect in the contract.
   b. Some incompetence with the party again whom the agreement is to be enforced. (This is strictly limited.)

V. Remedies to breach of enforceable bargain:
   a. Breach of contract gives the non-breaching party the option of suspending its performance or canceling the contract. Breaches do no allow non-breaching party to suspend his performance.
   b. Monetary damages are preferred over performance (ie-jail for contempt).
   c. Basic assumption is that the aggrieved party should recover both net gains prevented by the breach (expectations) and out-of-pocket expenditures associated with the performance (reliance). Recovery is not limited to the value of the aggrieved party’s performance up to the breach. The purpose of damages is to put aggrieved party where it would rightfully have been.
d. Deterrence is not a primary objective (economic reason).
   i. A court under the uncertainty rubric can, for example, limit liability for claims for non-economic loss, i.e., mental anguish.

e. The provable losses must be reasonably foreseeable to defendant.

f. Plaintiff has to make all reasonable efforts to avoid consequences of the breach.

g. Parties have power to expand or decrease remedies normally available for breach of contract.

h. Victorious party may recover interest on sums of money withheld and, in the discretion of the court, the costs associated with the litigation.

VI. Types of Enforceable promises or contracts
   i. American law recognizes four types of enforceable promises or contracts.
      1. promise plus consideration
      2. promise plus antecedent benefit
      3. promise plus un-bargained-for reliance
      4. promise plus form.

VII. Party-based theories
   a. Will Theories
      i. Maintain that commitments are enforceable because the promisor has “willed” or chosen to be bound by his commitment.
      ii. Depend for their moral force upon the notion that contractual duties are binding.
         1. Enforcement is not morally justified without genuine commitment by the person who is to be subjected to a legal sanction.
      iii. An inquiry into subjective intent would undermine the security of transactions by greatly reducing the reliability of contractual commitments.
      iv. A will theorist must explain the enforcement of the objective agreement where it can be shown that the subjective understanding of a party differs from her objectively manifested behavior.
   
   b. Reliance Theories
      i. Explain contractual obligations as an effort to protect a promisee’s reliance on the promises of others.
         1. Explains why persons may be bound by the common meaning of their words regardless of their intentions.
ii. Based upon the intuition that we ought to be liable in contract law for our assertive behavior when it creates “foreseeable” or “justifiable” reliance on others.

iii. Ultimately does no more than pose the crucial question that it is supposed to answer: is this a promise that should be enforced?

iv. By providing an overly expansive criterion of contractual obligation, any theory that bases obligation on detrimental reliance begs the basic question to be resolved by contract theory: which potentially reliance-inducing actions entail legal consequences and which do not? A person’s actions in reliance on a commitment are not justified – and therefore legally protected – simply because she has relied. Rather, reliance on the words of theirs is legally protected because of some as yet undefined circumstances.

c. The problem with party-based theories
   i. Both theories must resort to definitions of contractual enforcements that do not follow from either will or reliance, but are based on more fundamental principles that are left unarticulated. By failing to distinguish adequately between those commitments that are worthy of protection and those that aren’t, both fail.

VIII. Standards-Based Theories
   a. These evaluate the substance of contractual transaction.
   b. Efficiency Theories
      i. According to this view, legal rules and practices are assessed to see whether they will expand or contract the size of this pie.
      
      ii. Typically, efficiency analyses focus on the real world problems of forced exchanges (tort law) in an effort to make legal solutions to these non-market transactions approximate market solutions as closely as possible.

      iii. Efficiency analyses of voluntary exchanges (contract law) typically focus on issues other than the source of contractual obligation itself, such as appropriate remedies and other enforcement mechanisms, and assume, rather than demonstrate, the enforceability of all voluntary commitments.

      iv. Economic analysis may suggest that demonstrated consent plays an important role in the law of contract, provided that efficient allocation of resources is a social activity that should be facilitated by a legal system.

         1. From this perspective, the “transaction costs” created by a requirement of consent are no worse from an efficiency standpoint than any other cost of production. The costs of
negotiating to obtain the consent of another may be resources well-spent because such negotiations serve to reveal valuable information.

v. Three conclusions from negotiating costs are possible

1. In the absence of a consensual demonstration of preferences, we do not really know if the exchange is worthwhile or not.

2. The inefficiency of government legal institutions that needlessly raise transaction costs may be principally responsible for making these consensual transactions prohibitively expensive. If so, the government may be responsible for preventing exchange and appropriate response is to eliminate the true source of inefficiency.

3. Several alternative ways exist to generate info without negotiation.
   b. Form a new company by merging
   c. Combine products into a single package.

c. Substantive Fairness Theories

   i. Assumes that a standard of value can be found by which the substance of any agreement can be objectively evaluated.

      1. Has yet to be articulated and defended

   ii. Tends to focus all their attention on a small fraction of commitments.

      1. On the other hand, such theories tend to become process based.

   iii. Fails to approach: which *conscionable* agreements should be enforced and which should not?

   iv. This approach provides neither meaningful standards nor predictable results.

d. Problem with Standards-based theories

   i. Identifying and defending the appropriate standard by which enforceable commitments can be distinguished from those that should be unenforceable.

   ii. Standards-based contract theories are types of what Novick calls “patterned” principles of distributive justice.

IX. Process-based theories

   a. Shift the focus of the inquiry from the contract parties and from the substance of the parties’ agreement to the manner in which the parties reached their agreement.
b. Bargain theory of consideration
   i. Where consideration is present, an agreement ordinarily will be
      enforced. And, most significantly, where there is no consideration,
      even if the commitment is clear and unambiguous, enforcement is
      supposed to be unavailable.
   ii. **Restatement (2d) §71** of contracts
      1. To constitute consideration, a performance or a return
         promise must be bargained for.
      2. A performance or return promise is bargained for if it is
         sought by the promisor in exchange for his promise and is
         given by the promise in exchange for that promise.
   iii. It is difficult to get to being between being too restrictive and being
        loose.
   iv. The most recognized problem with bargain theory is that it appears
      to have erred too far in the direction of under-enforcement. The
      bargain theory suffers in a more fundamental way from its purely
      process-based character.

c. The Problem with Process-based theories
   i. They place insurmountable obstacles in the way of minimizing
      such difficulties of enforcement.
   ii. P-based theory’s exclusive focus on the process that justifies
      contractual enforcement conceals the substantive values that must
      support any choice of process. By obscuring the values, p-based
      theories treat favored procedural devises as ends, rather than as
      means. Then, when the adopted procedures inevitably give rise to
      problems of fit between means and ends, a process-based theory
      that is divorced from ends cannot say what this has occurred or
      what is to be done about it.
   iii. The b-theory fails to ensure the enforcement of certain reasonably
        well-defined categories of un-bargained-for, but “serious”
        commitments.

d. Good stuff about process-based theories
   i. Can better protect both the contractual intent and the reliance of
      both parties than one-sided party-based theories, provided it
      identifies features of the contractual process that normally
      correspond to the presence of contractual intent and substantial
      reliance.
   ii. They can better provide the traditionally acknowledged advantages
      of a system of generally applicable laws.
   iii. Significant administrative advantages of process-based theories
1. Specific improvements in procedures governing contract formation that is appropriate in the event that previously adopted procedures have created well-defined problems of under-enforcement.

2. These principles might serve to deprive certain procedurally immaculate agreements of their normal moral significance, thereby ameliorating identifiable problems of over-enforcement.

X. Example case(s)

a. **Bailey v. West** (3) [the horse and the horse farm] For an implied contract, there has to be one D and particularized intent. Prongs of quasi-contract: (1) conferring a benefit from P to D (2) D appreciate benefit (3) D accept and retain the benefit → obligation is imposed despite intent.

b. **Hamer v. Sidway** (4) [promise from the grandfather to act saintly] Consideration is reciprocity between the parties; detriment to P counts as benefit to D. Consideration can be the waiving of civil rights.

c. **Ricketts v. Scothorn** (6) [pledge from grandfather got her to quit her job] The grandfather desired the plaintiff to quit work and the plaintiff followed his wish. In doing so, she assumed that the note would be paid. Because she was in a place less desirable after the grandfather gave her the note, she relied on his promise to his detriment. Even though there was no bargaining or consideration, it would be inequitable to not enforce the contract given the grandfather’s obvious wishes and the detriment of the plaintiff.

d. **Williams v. Walker-Thomas Furniture Co.** (7) [tricky installment plan] There are severely unequal bargaining positions in this case. The court found a lack of meaningful choice.
   i. Procedural Unconscionability – Some kind of deception or overreaching that constitutes an abuse in the process of bargaining.
   ii. Substantive Unconscionability – Some sort of objectionable or oppressive clause that may have been knowingly and voluntarily assented to.
   iii. A mixture of both types of unconscionability is most likely to win in court.

e. **Williams v. Walker-Thomas Furniture Co.** (9) [tricky installment plan] When unconscionability is present when the contract is made, the contract should not be enforced. When a party of little bargaining power, hence little real choice, signs a commercially unreasonable contract (substantive) without knowledge of its elements, it isn’t really consent.

f. **Sullivan v. O’Connor** (11) [botched nose job] Types of damages: (1) Expectation damages (2) Reliance damages (3) Restitution
THE BASES OF PROMISSORY LIABILITY

2.1 Bargain Contract: Promise Plus Consideration

XI. Bargain requirements
   a. Performance or a return promise must be bargained for.
   b. Performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and vice versa.
   c. Performance may consist of: act other than a promise OR forbearance OR creation modification, destruction of a legal relation.
   d. Performance or return promise may be given to the promisor or to some other person. It may be given by the promise or by some other person.

XII. Formal Contract approach

XIII. Consideration
   a. A valuable consideration may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.
   b. Should we care whether the stuff that is the consideration turns out, later, not to be worth anything?
      i. If contracts could be valid based on value, when value might change later, contracts would be unstable.
         1. When you have a case like this, you have to tell the judge that what you got was, at the time, useless.

XIV. Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law

XV. Pervading the complex field of fine-spun theories of consideration are two inconsistent ideas.
   i. Consideration is said to be only a form.
   ii. Consideration assures a fair exchange.

b. In substantiation of the first view and in virtually absolute negation of the second stands the age-old formula that mere inadequacy of consideration is never a bar to enforcement of a contract.

XVI. In addition to the outlawing of fraud and duress as bargaining pressures, the courts have refused enforcement of advantages gained by exercise of a power resulting from fortuitous circumstances not within the ethical range of accepted economic practice.
   a. Question: to what extent should the court protect people from bad contracts?
i. Answer: standard response of the common law is that apart from instances where there is some impropriety involved, the court take a “hands off” attitude.

XVII. Pre-existing duty rule
a. The performance or the promise to perform a pre-existising duty does not constitute consideration
   i. If a sheriff apprehends a violent criminal who has a reward out for his arrest the sheriff is not eligible for the reward because catching the criminal is part of his job. However, if the sheriff does more than his job requires, detriment has been incurred and he gets the reward.

XVIII. Mutuality of obligation
a. In a bilateral contract “both parties must be bound or neither is bound.”
   i. A bilateral contract is void if there is no mutuality of consideration.
      1. If one party to a the contract hasn’t made a promise, the performance of which would be detrimental, neither party is required to perform.
   ii. When there is no mutuality, once side has not considered and the contract is not valid. UCC, § 2-204(1) – A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

XIX. Example case(s)
a. Kirksey v. Kirksey (17) You have to have an exchange in which the items are bargained for, they can’t just be coincidental to each other.

b. Langer v. Superior Steel Corp (19) If contract was created, it was based on a consideration, and must have been the result of an agreement bargained for in exchange for a promise. We look to see whether someone has acted to his own detriment, because people wouldn’t do something to their own detriment unless it was for something.

c. Bogigian v. Bogigian (20) The elements of estoppel: 1.) a representation or concealment of material facts. 2.) Representation must be made with knowledge of the facts. 3.) Party to whom it was made must have been ignorant of the matter. 4.) Must have been made with the intention that the other party should act upon it. 5.) The other party must have been induced to act upon it to his detriment. David failed to establish that the release was made with the intent that David acted upon it; therefore he failed to establish Hazel should be equitably estopped.
   i. Kieff wants to create legislation that says the people who don’t pay attention get penalized. What makes that unfair?
d. **Thomas v. Thomas** (22) Because rent was being paid by the widower, there is consideration. However, had the rent been paid by the will the contract would be unenforceable.

e. **Haigh v. Brooks** (24)

f. **Apfel v. Prudential-Bache Securities, Inc.** (25) The necessary idea in order for a contract to be valid is whether the idea had *value*, not whether it was novel.

g. **Jones v. Star Credit Corp.** (28) UCC §2-302 enacts the moral sense of the community into the law of commercial transactions. It authorizes the court to find, as a matter of law that a contract or a clause of a contract was “unconscionable,” at the time it was made, and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result.

i. It is the general rule that inadequacy of consideration, exorbitance of price or improvidence in a contract will not, in the absence of fraud, constitute a defense. Inadequacy is rarely an avowed reason for relief from a bargain, but it may be grounds for denying specific performance.

ii. Kieff has a bone to pick with this. The court does, too, but says that the price increase was so outrageously high, it couldn’t’ be tolerated.

h. **In re Greene** (30) There was no consideration between the deceased and the ex-girlfriend. A man may promise to make a gift to another, and may put the promise in the most solemn and formal document possible; but, barring exceptional cases, such, perhaps, as charitable subscriptions, the promise will not be enforced. The parties may shout consideration to the housetops, yet unless consideration is actually present, there is not a legally enforceable contract. (The $1 exchange here is considered nominal.) THERE ARE SUCH THINGS AS NON-PEPPERCORN DISTRICTS (KIEFF).

i. **Fiege v. Boehm** (32) The promise of a woman who is expecting an illegitimate child that she will not institute bastardy proceedings against a certain man is sufficient consideration for his promise to pay for the child’s support, even though it may not be certain whether the man is the father or whether the prosecution would be successful, if she makes the charge in *good faith*.

XX. The cases all fit together. *Apfel* found the consideration value not disputable by the court. *Jones* found the consideration unconscionable, therefore it was not sufficient. However, *Greene* finds the consideration nominal because perhaps there are illegal overtones. Meanwhile, *Fiege* finds consideration because there was good faith.

a. **Levine v. Blumenthal** (34) Where the renters ask the landlord for reduced rent during the Depression for fear of going bankrupt, the landlord is
under no obligation to allow this even though he does not want them to go out of business

b. **Alaska Packers’ Association v. Domenico** (36) To permit the plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong. That a promise to pay a man for doing that which he is already under contract to do is without consideration is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it.

c. **Angel v. Murray** (37) Under the circumstances, the city agreed to modify the garbage collectors contract. The increase of housing units went beyond the previous expectations.
   
   i. **UCC, § 2-209** – An agreement modifying a contract for the sale of goods needs no consideration to be binding. However, such modification obtained by extortion without a legitimate commercial reason is unenforceable (must be in good faith).
   
   ii. Who is the best cost bearer in this case? Who had the ability to best foresee the increase in prices.

XXI. The modifications cannot be made in the first case because the court ruled that the consideration was not valid because the parties had already agreed to do it. Meanwhile, the circumstances in Alaska Packers were founded under duress and the modifications are not enforceable regardless. In Angel, modifications can be made under the UCC rule which is adverse to the Common Law (but is this an exchange of goods)? Apparently, there can be modification under certain changed circumstances.

a. **Rehm-Zeher Co. v. F.G. Walker Co.** (39) One side has the power to enforce the contract; the other has none. Therefore, the entire contract is unenforceable. The language “unforeseen reason” is what makes this contract null.

b. **McMichael v. Price** (40) Plaintiff was bound by solemn covenant of the contract to purchase all the sand he was able to sell from defendant and for a breach of such covenant could have been made to respond in damages. The argument of the defendant that the plaintiff could escape liability under the contract by going out of the sand business is without force. The contract is upheld here.
   
   i. Requirements Contracts – “Whatever my requirements are, I’ll buy from you.”
   
   ii. Outputs Contracts – “Whatever my output is, I’ll sell to you.”
   
   iii. **UCC, § 2-306(1)** – A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no
quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

c. **Wood v. Lucy, Lady Duff-Gordon** (41) The plaintiff’s promise that he would pay the defendant’s one-half of the profits and revenues is an implied (Cardozo district) promise to use reasonable efforts to bring profits and revenues into existence.

   i. **UCC, § 2-206 (2)** – A lawful agreement by either the seller or buyer for exclusive dealing in the kind of goods concerned impose unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

d. **Omni-Group, Inc. v. Seattle-First National Bank** (42) The promise is not illosory because it is reasonable for Omni to want to checkout the property before signing. The implied duty of good faith is enough of consideration. MUTUALITY IS PRESENT IF A CONDITION HAS BEEN APPROPRIATELY WORDED.

XXII. Comparison of Cases – *Rehm* contract is not upheld because of the “unforeseen reason” clause; however, *McMichael* contract is upheld because the implied contract provision is that the buyer would be doing business (and the seller must sell; the plaintiff can’t just get out of the contract). In *Lucy*, Cardozo implies the mutuality, which is allowed under the UCC (but this isn’t a UCC case). Meanwhile, *Omni* furthers that mutuality is present when there is an express provision must be upheld.

2.2 **Moral obligation: promise plus antecedent benefit**

XXIII. Restitution and the Scope of Quasi-Contract, and The Historical Roots of the “Moral Obligation” Doctrine

   a. The defendant must have made a promise, express or implied in fact, to a promise and the claim must be asserted within clearly defined contexts.

   b. The promise may seek restitution

      i. as an alternative remedy for defendant’s breach of contract, § 373

      ii. To recover a “new benefit” retained after the defendant has been fully compensated for the plaintiff’s breach, § 374

      iii. To “mop up” after a contract fails to satisfy the Statue of Frauds, § 375.

XXIV. Elements of a quasi-contract, or a contract implied in law are:

   a. The defendant received a benefit

   b. An appreciation or knowledge by the defendant of the benefit
c. Under circumstances that would make it unjust for the defendant to retain the benefit without paying for it.
   i. The recovery here is the amount of benefit conferred on the defendant, not the amount of detriment incurred by the plaintiff.

XXV. Elements of a contract implied in fact:
   a. the defendant requires the plaintiff to perform work
   b. the plaintiff expected the defendant to compensate him or her for those services
   c. the defendant knew or should have known that the plaintiff expected compensation.

XXVI. A promise not supported by consideration but motivated by a past benefit conferred is enforceable as a contract when not enforcing it would lead to an injustice upon the promise.
   a. A promise is not binding when
      i. The promise conferred the benefit as a gift or for other reasons the promisor has not be unjustly enriched.
      ii. To the extent that its value is disproportionate to the benefit.

XXVII. Example case(s)
   a. **Mills v. Wyman** (45) If there was nothing paid or promised for it, the law leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity.
      i. Restatement, Section 86 – A promise not supported by consideration but motivated by a past benefit conferred will be enforceable when (1) a promise made in recognition of a benefit previously received by the promisor form the promise is binding to the extent necessary to prevent injustice, (2) a promise is not binding, if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched, or to the extent that its value is disproportionate to the benefit.
   b. **Manwill v. Oyler** (47) A rule generally recognizes that moral obligation surrounding a contract does not offer an enforceable contract when the benefits were bestowed before the contract was drawn. If a mere moral, rather than a legal, reason was sufficient for valid consideration, the necessity for finding consideration in contracts would disappear.
   c. **Webb v. McGowin** (48) It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor. This is probably a minority view.
      i. Past consideration doesn’t count…unless it’s of the benefit type.
d. **Harrington v. Taylor** (50) Even though the defendant should feel compelled to pay the plaintiff her damages, a humanitarian act voluntarily performed is not sufficient consideration that would entitle recover in courts.

e. In *Mills* and *Manwill*, there is no material benefit gained so there are no damages to be paid. However, in *Webb* the defendant definitely received personal benefits, which he wanted to pay (he was paying them). Meanwhile, the *Harrington* defendant received benefits, but did not fully show that he was willing to pay for them. **THERE IS A DISTINCT LEVEL OF WHAT A COURT WILL FIND REQUIRES AFTER-THE-FACT COMPENSATION (PERSONAL AND AT THE SEVERE SUFFERAGE LEVEL).**

2.3 Promissory Estoppel: Promise Plus Unbargained-for Reliance

XXVIII. Equitable Estoppel: The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

a. It is available only as a ‘shield’ or defense, while promissory estoppel can be used as a ‘sword’ in a cause of action for damages.

XXIX. Promissory: *Restatement, § 90* – A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

a. *Restatement (2d) § 90* provides: “A charitable subscription…is binding without proof that the promise induced action or forbearance.”

   i. § 90 eliminates the first Restatement requirement that the reliance be “definite and substantial” and provides that the “remedy granted for breach may be limited as justice requires.” Thus, the promise “is binding if injustice can be avoided only by enforcement” and the remedy may be limited “as justice requires.”

b. The damages you get in promissory estoppel contracts are more limited than those you get in regular contracts. The difference is the amount of your reliance.

c. You have to show some reliance. The amount of recovery will be limited to the amount of the reliance; or, at least, to the amount of the reliance that’s reasonable.

d. You have to show why there was reliance, and why the reliance was reasonable. The other side will say that there wasn’t reliance, if there was reliance it wasn’t reasonable, if it was reasonable it wasn’t worth anything, if it was worth something it was only worth a very little.
e. Relevant factors: policies implicit in the transaction type, the reason for the non-performance, the degree of disproportion associated with enforcement of the promise, and any historical patterns of enforcement associated with the transaction type.

f. Protecting the expectation interest is a surrogate for protecting reliance in the bargain contract. Thus, in a non-bargain contract, the assumption should be that the court will protect the reliance interest, with expectation damages awarded only when necessary to insure that “hidden” reliance is fully compensated.

XXX. Example case(s)

a. **Allegheny College v. N.C.C.B.J.** (51) The promise and the consideration must purport to be the motive each for the other, in whole or at least in part; it is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. At the time that the College accepted the gift, the College knew that it had a duty to appropriate the naming rights to the scholarship. Because the College was to do this in return for Ms. Johnston’s money, bargaining was entered into (bi-lateral agreement). Therefore, Ms. Johnston breached and the College is allowed to recover. (Cardozo.)

b. **Feinberg v. Pfeiffer Co.** (53) There is no language in the resolution that the contract conferred upon the plaintiff had any consideration on the part of the plaintiff. However, the defendant, when making the promise, could reasonably expect that the plaintiff would rely on the pension. The plaintiff did so to her detriment as she was unable to get employment at another company after the defendant pulled her pension. **THERE WAS NO BARGAINING IN THIS AGREEMENT, THE PLAINTIFF JUST ASSUMED THAT SOMETHING WOULD HAPPEN REGARDING HER PENSION.**

c. **Grouse v. Group Health Plan, Inc.** (56) The contract, although non-existent in fact, can be upheld on the basis of promissory liability. When Group Health told the pharmacist that he had a position, they knew that the pharmacist would promptly give his two-week notice to his current employer. In doing so, the pharmacist relied on Group Health’s promise to his detriment. It would be unjust to not award him damages based on what he thought would be true. **PROMISSORY ESTOPPEL IS APPLIED HERE WITHOUT REGARD TO THE EMPLOYMENT-AT-WILL DOCTRINE BECAUSE EMPLOYEE’S MUST BE GIVEN A CHANCE TO PROVE THEMSELVES.**

d. **Cohen v. Cowles Media Co.** (58) Because the governmental worker relied on the confidentiality agreement, he is eligible for compensatory damages under promissory estoppel. **HOWEVER, THIS COULD HAVE BEEN ANALYZED THROUGH SIMPLE CONTRACT THEORY.**
XXXI. *Ricketts* and *Feinberg* are based solely on promissory estoppel theory, whereas *Allegheny*, *Grouse*, and *Cohen* could have been analyzed under plain contract theory. It depends on the court whether they will imply contract or are comfortable with promissory estoppel.

THE BARGAIN RELATIONSHIP

3.1 The Agreement Process: Manifestation of Mutual Assent

XXXII. Ascertainment of Assent: The “Objective Test”

a. Two primary objectives of contract
   i. Reach agreement on a proposed exchange of economic or other resources and then satisfactorily to complete the exchange. (I.e.-agreement and performance.)
      1. Whenever the options of the parties are subject to their own choice rather than predetermined by law or circumstances, negotiation (or bargaining) is likely to occur.

b. We are looking at what happens when you get real close signing the contract, but it never gets signed. Or, when you’re about to sign and then a major detail is changed (such as the price you’re agreeing to). When does “the bell” ring? Does it “ring” at the beginning of discussion, end, middle of the discussion? Why does it continue ringing if the bell has never run?

c. Bargain relationship is generally perceived to have two parts
   i. Offer
   ii. Acceptance.

d. Shifts towards greater acceptance of the objective theory protects the stability of contractual relationships by enabling one to act upon reasonable appearance.
   i. It is not the subjective thing known as meeting of the minds, but the objective thing, manifestation of mutual assent, which is essential.
   ii. Consequences of the “objective” approach: if the court and jury find that the plaintiff’s expectations based upon what was said or done were reasonable and the other requisites for contract formation are present, those expectations are protected.
   iii. A broader consequence is that the “objective” test affords the courts an opportunity to control or regulate individual exchange behavior through use of the “reasonable” person.

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

b. **what are the other things that can make an offer terminate?**
   
i. Its own language and make it terminate.
   
ii. An unreasonable lapse of time might destroy an offer.
   
iii. Revocation by the offeror is one way to kill an offer, provided that it follows certain procedures.
   
iv. Death of the offeror kills the offer.
   
vi. Offeree says “no.”
   
   1. Once any of 1-7 occurs, the offer is dead. So, if you’re going to accept, you better go ahead and do it as soon as possible.

c. The function of an auction is to generate price competition that there is, therefore, some risk that the property will be withdrawn before being sold.
   
i. Prospective buyer should know this, thus, the law supports the seller.
   
   1. **UCC §2-328(2)** Unless otherwise agreed, the offer is accepted when the auctioneer “so announces by the fall of the hammer or in other customary manner.”

d. **Public contracting:** Sealed bidding must be utilized if 1.) Time permits.
   
2.) The award will be made on the basis of price and other price-related factors
3.) it sin to necessary to conduct discussion with the responding sources about their bids.

4.) There is a reasonable expectation of receiving more than one bid.

e. Unfolding: 1.) prepare an invitation to bid (IFB). 2.) IFB is distributed or publicized widely enough. 3.) Bidders prepare and submit their bids.

4.) Bids are opened and evaluated by the government. 5.) Award is made.

XXXIV. **Acceptance: Exercise of power of acceptance**

a. **Method and Communication of Acceptance**
   
i. Offeror’s Mastery of Offer
   
   1. The offeror may stipulate the terms upon which he or she is willing to bargain
2. She has power of acceptance which is conferred upon the offeree and can expressly limit the ways in which the power may be exercised.

XXXV. Acceptance by Performance under Restatement (2d)

a. The rule of construction operates to give an offeree a choice among reasonable methods of acceptance and by expanding the power to create a contract protects the offeree’s reasonable reliance.

b. The Restatement (2d) charted a middle ground for acceptance between assent expressed by words of promise and assent expressed by completing a performance that the offeror required exclusively for acceptance.

c. When does an agent have authority?

i. As defined by the Restatement of Agency, authority is “the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him.”

ii. This actual authority may be express or implied.

iii. Apparent authority results from the principal’s manifestation to third person.

XXXVI. Nature and Effect of Counter-Offer

a. Counter-offers and Electronic Contracts.

i. The acceptance must be a mirror of the offer. If it’s anything more (or less), it isn’t an acceptance; it’s a counter-offer, which kills the original offer.

ii. To accept with additions that don’t count as a counter-offer, you can say, “listen, I hear your offer, I’m not rejecting it, I’m trying to think about it, decide how I feel about it. I’m curious; can we talk about something different?” The more independent the subject matter, the more likely it will be seen as an independent subject proposal

1. This is difficult, because the law wants to keep you from accidentally entering into a contract.

b. Battle of the forms

i. In Company A’s purchase order, Company A offers to buy something with the warranty that the thing is going to work forever. In the reply document, Company B says that they will sell the thing, but it will never work right.

c. Get used to working it through the mirror image rule, and through the different parts of UCC § 2-207. Even though there are many branches, what matters is that you attach each of the break points and understand
them. The results don’t matter as much. Make sure you understand all the branches and all the routes.

d. Gains from trade: Society cares about the pie, and you care about getting the best/biggest piece of the pie.
   i. If we’re spending time haggling about how we’re going to split the pie, society is going to say “we’re not going to treat that as a contract.” Society doesn’t want to provide people with incentive to always try to get more, because that’s wasted effort on the margin.

e. Standard Forms, Standard Terms and Revised Article 2
   i. Draft of Revised Article 2 dealt specifically with problems created by the use of standard forms and standard terms in contract formation in 2 ways.
   ii. If all or part of the agreement is contained in a standard form, defined in UCC 2-102(a)(Nov)...and the other party has signed the form or appeared to assent to it by conduct, that party is not bound to terms in the form if there was no manifestation of assent to it.
      1. At minimum, a party manifesting assent must have had an opportunity to review the form...
      2. If one party manifests assent to the form, he or she is bound by terms included therein unless the terms are unconscionable.
      3. A higher standard of care of assent is required for consumers.
   iii. If only part of the agreement is contained in a standard form, there is a risk that other records containing varying terms will be exchanged by parties dealing at a distance.
   iv. In the classic “battle of the forms” setting, where the parties focus on the negotiated terms such as price, quantity, payment, time and delivery rather than the boiler plate, the risk of unfair surprise and strategic game playing is the highest.
      1. UCC 2-207(a)(Nov) required express agreement to those varying terms before they are included in the agreement.
   v. THE DRAFTING COMMITTEE ELIMINATED ALL REFERENCES TO STANDARD FORMS AND STANDARD TERMS IN UCC 2-203, 2-205, 2-207
   f. January, 1997 revision of UCC 2-207 said terms
      i. Subject to subsection (b) and Section 2-202, if a contract is formed as provided in Sections 2-203 and 2-205, the terms are:
      ii. Those terms on which the records of the parties substantially agree;
1. Those terms to which the parties have…otherwise agreed;
2. Those terms supplied by usage of trade, dealing, performance, and
3. Any supplementary terms incorporated under any other provision of this Act

iii. If a contract is formed under 2-205(a)(1) and the acceptance contains terms that vary the contract, the following terms are not part of the contract.
1. Terms in the acceptance that materially vary the contract; and
2. Conflicting terms.

XXXVII. Termination of Offer: Destruction of Power of Acceptance
a. When is the offer still out there, how do we know?

XXXVIII. Irrevocable Offer: Non-destructible Power of Acceptance

XXXIX. Effect of rejection by optionee:

a. Where an offer is supported by a binding contract that the offeree’s power of acceptance shall continue for a stated time. The offeree has a contract right to accept within time. The optionee may complete a contract by communicating his acceptance despite the fact that he has previously rejected the offer.
   i. Where, however, before the acceptance the offeror has materially changed his position in reliance on the communicated rejection, as by selling or contracting to sell the subject matter of the offer elsewhere, the subsequent acceptance will be inoperative.

   b. Restatement (Second) § 37: “The power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of contractual duty.”

   c. Option varieties.
      i. Restatement (Second) § 25: “option contract is a promise which meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer.
         1. Usually a conditional contract to sell.
            b. The offeror has no power to revoke, and any attempt to do so is ineffectual.

   d. Irrevocability by Statute: certain offers are made irrevocable by statute.
   e. The “mailbox” rule and acceptance under an option contract.
i. Since the option contract provides for irrevocability of the offer, the primary reason for the rule and its progeny is absent.

ii. In the absence of an expression of contrary intention, it should be held that the notice must be received.
   1. It should not be extended to notice of acceptance in already binding option contracts.

f. A valid option contract makes an offer irrevocable for the agreed upon time. When a person does not have actual knowledge that the person who made the offer has done some act inconsistent with the offer, then is the offer irrevocable?? Partial performance makes an offer irrevocable. When there is reliance on a subcontractor, an offer by that subcontractor is irrevocable (reliance is what reconciles Baird and Drennan). When a contractor decides to use subcontractors bid, offer is irrevocable once bid is placed.

g. Arguments to make to show that your bid is enforceable based on Baird, Drennan, and ECM?
   i. By placing a bid, you get an increased chance of getting a job. That is consideration. Of course, that’s only if you take my bid seriously, that’s only if there really is an increased chance that you’ll get the deal. To the extent that you’re getting something out of the deal, you have an obligation to stick with your bid. If there’s no consideration, your promise isn’t enforceable. What is this promise? It’s the promise to keep the offer open. If we can find a promise to keep the offer open, then we can accept my promise as long as your promise is open.

h. Formation in General – UCC 2-204 A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy

XL. Example case(s)
   a. Embry v. Hargadine, McKittrick Dry Goods Co. (62) The rule is that if the jury believes the plaintiff’s facts to be true, then the only test is that when discovering the intention of the parties it is necessary to consider only their expressed intention. Further, even if the employer did not intend to employ the manager, it can be reasonably inferred from the conversation between the two men that a reasonable man would assume that he still has a job.

   b. Lucy v. Zehmer (63) When a contract is formed, the intention of the parties is based on the outward presentation of that intent.
c. **Lonergan v. Scolnick** (67) The language within the letter merely served as preliminary negotiations. This was not an offer.
   i. **Restatement, § 24** – The manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

d. **Lefkowitz v. Great Minneapolis Surplus Store** (68) The test for a binding offer in advertisements addressed to the general public is whether the facts show that some performance was promised in positive terms in return for something requested. Further, the offer depends on the legal intention of the parties involved, i.e., nothing must be left unclear. The mink stoles indicated (1) who could receive the stoles and (2) the value of the stoles.
   i. The owner CANNOT modify the contract terms after performance.
   ii. Kieff – This is a contract because it is the store owner’s duty to deal, which he did. Further, there is consideration here because the customer showed up (detriment) at the store owner’s store (benefit).
   iii. Hypo – “Guitars $15.” This is not an offer because we do not know who can accept. However, in some jurisdictions, there must be reasonable supply available. “Guitars $15, first come, first served.” This is an offer. For this reason, most companies won’t put this information in an ad.
   iv. Kieff – Price is a lynch pin. If it is left out, courts get fidgety about finding an offer.

e. **Southworth v. Oliver** (70) Even where words are used a contract includes not only what the parties said, but also what is necessarily to be IMPLIED from what they said. Only manifested intent matters to a court regarding the circumstances.
   i. The guide for finding an offer is:
      1. reasonable man’s inference concerning surrounding circumstances
      2. language used
      3. determination of the party to who the offer was addressed
      4. definiteness of the proposal.
   ii. Death of an Offer – Kieff: When an offeror dies, so does the offer. When an offer is changed by the acceptee, it is dead.

XLI. The cases all illustrate different points of the offer. They all demonstrate that manifested intent rules. The department store case stipulates what must be present in general public offers, whereas *Southworth* stipulates what circumstances are important in finding an offer.
a. **La Salle National Bank v. Vega** (75) There can be no acceptance unless the offer is accepted by the authorized party. Also, an offer is intent to be manifestly bound, unless you say “I do not intend to be bound by this contract.” The offeror is the master of the offer.

b. **Hendricks v. Behee** (76) Acceptance is not valid until it is communicated to the offeror.
   i. If the offeror repudiates BEFORE he is aware of the offeree’s acceptance, the offer is dead.
   ii. There needs to be separate consideration (in the contract) for the offer to be irrevocable.

c. **Ever-Tite Roofing Corp. v. Greene** (78) Generally speaking, the court will interpret the language against ehe people who drafted the contract. The court contemplates that, if the contract indicates that the notice is by performance, then the actual notification doesn’t matter as much as when the workers start doing the work. An offeror must revoke the offer before acceptance (here performance) begins.
   i. The power to create a contract by acceptance of an offer terminates at the time specified in the offer, or, if no time is specified, at the end of a reasonable time (Restatement).
   ii. The reasonable time period is stipulated by the circumstances of the case.

d. **Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories** (80) An offer is not accepted, if the offeree stipulates that the goods delivered is merely an accommodation of the order.
   i. UCC, Section 2-206 – An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

e. **Carhill v. Carbolic Smoke Ball Co.** (81) Acceptance by performance without alerting offeror is allowed. If the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is sufficient acceptance without notification.

f. **Glover v. Jewish War Veterans** (82) There can be no contract unless the claimant when giving the desired information knew of the offer of the reward and acted with the intention of accepting such offer (otherwise there is no mutual assent). DOES THERE HAVE TO BE SUBJECTIVE OR OBJECTIVE INTENT HERE?
g. **Industrial America** (84) There is no occasion to notify the offeror of the acceptance of such an offer, if the doing of the act is sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer.

h. **Adam v. Lindsell** (86) Restatement, Section 63 (Mailbox Rule) – Unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession without regard to whether it ever reaches the offeror. ADOPTED BY MOST JURISDICTIONS.

i. **Russell v. Texas** (87) Acceptance is made by action, even though it may not be intended.
   
   i. **Restatement, §72** – Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If the circumstances indicate that the exercise of dominion is tortuous the offeror may at his option treat it as an acceptance, thought the offeree manifests an intention not to accept.

j. **Ammons v. Wilson & Co.** (88) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence of or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.
   
   i. **Restatement, § 72** – Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others, where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence of/or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.
   
   ii. **Restatement, § 69** – Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: (a) where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation, (b) where the offeror has stated or given the offeree reason to understand that the assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer, and (c) where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

k. **Smith-Scharff Paper Co. v. P.N. Hirsch & Co.** (90) The contract is enforced without specific acceptance of the offer because the contract was
at the convenience of the offeror. The goods made were specially made for the offeror and were not suited for the use of others; therefore, the offeror must buy the stock.

1. **Harris v. Time, Inc.** (92) Absent notification of acceptance, the offer cannot be enforced.
   i. Case Comparison – All of these cases fit together to illustrate the rules of acceptance. Each case demonstrates its own rule (except for Harris).

m. **Minneapolis & St. Louis Railway Co. v. Columbus Rolling-Mill Co**
   (94) When acceptance is on new terms, the offer is dead. When the buyer accepted a quantity outside of the range of the offer, the offer was then dead and a counter-offer was created.
   i. **Mirror Image Rule** – To absolutely insure acceptance without counter-offer, you must simply say, “I accept.”
      1. The problem with the mirror image rule is clear in *Leonard.*
   ii. Requests – Although a reply which purports to be an acceptance but which adds qualifications or requires performance of conditions is not an acceptance, but a counter-offer, Restatement Section 59, an acceptance which requests a change or addition to the terms of the offer is not invalidated unless the acceptance is made to depend on an assent to the changed or added terms, Restatement Section 61.
   iii. Kieff alludes that the mirror image rule sucks because of the costs of re-drafting. TIME COSTS PERIOD.

n. **Leonard Pevar Co. v. Evans Products Co.** (95) UCC, Section 2-207
   There are three ways to find a contract: (1) oral agreement with confirmation memoranda, (2) writings which do not contain identical terms, but constitute a seasonable agreement, and (3) conduct of parties recognizing an existence of a contract.
   i. Definition of Merchant – UCC, Section 2-104 “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
   ii. UCC, Section 2-207 – A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. The additional terms are to be
construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (1) the offer expressly limits the acceptance to the terms of the offer; (b) they materially alter it, or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consists of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act. SECTION 2-207 IS INTENDED TO ELIMINATE THE MIRROR IMAGE RULE OF COMMON LAW.

o. **Step Saver v. Wyse** (handout) The disclaimer of the “box-top” license did NOT become part of the parties’ agreement. The test requires that the offeree demonstrate an unwillingness to proceed with the transaction unless the additional or different terms are included in the contract. The producer exhibited no such intention or action.

i. Definition of Good – UCC, Section 2-105 “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 1-107). Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell. There may be a sale of a part interest in existing identified goods. An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interesting the bulk be sold to the buyer who then becomes an owner in common.

   1. Last Shot Rule – The terms of the party who sent the last form, typically the seller, would become the terms of the parties’ contract.

p. **ProCD** (handout) Shrinkwrap licenses are enforceable unless their terms are objectionable on ground applicable to contracts in general. Any buyer that chooses not to accept can return to the seller. The Box-top stuff is in because, on the box, it says that there are additional terms within the box, and the person should have return the box if he didn’t accept the offer.
i. This is not a material alteration of the contract because the sale contract was conditional on his acceptance of their additional terms.

ii. UCC, Section 2-606 A buyer accepts goods when, after an opportunity to inspect, he fails to make an effective rejections.

q. **Hill v. Gateway** (handout) A vender, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes. Here, the consumer could have returned the computer before the 30 days were up.

r. **Brower v. Gateway** (handout) The court agrees with the Hill holding, but finds the contract unconscionable because of certain terms in the arbitration contract.

s. **Mortenson** (handout) A notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable, may be a means of doing business valuable to buyers and sellers alike.

XLII. Case Comparison – Minneapolis demonstrates that there needs to be acceptance of the exact terms. Leonard Pevar states that acceptance can be indicated by conduct (and notes the other three ways).

a. **Dickinson v. Dodds** (101) There is no meeting of the minds because the buyer knew that the seller had sold the property before he had issued his acceptance. **THE POWER OF ACCEPTANCE HAD BEEN TERMINATED.** There is a big difference between when the offeror says, “the offer will end by this time,” and “the offer is good through this time.”

   i. Restatement, § 42 – Where an offer is for the sale of an interest in land or in other things, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, before he has exercised his power of creating a contract by acceptance of the offer, the offer is revoked.

   ii. You do the Dickinson\'Dodds analysis when you’re dealing with a sale that could only be done once (i.e. sale of a unique good). If the sale is not unique, the offeree doesn’t care where the offeror gets the time from, so the fact that he sold to someone else doesn’t matter.

1. **How about if, instead of learning that the unique object had been sold, we learn that the object had been hit by lightning (and obliterated)?** Unavailability because sold to someone else is the same as unavailability due to obliteration. All that matters is that it’s gone!

2. **Imagine that you’ve heard, from a notorious liar, that it’s been sold.** There is no information value when you know
that what the person says doesn’t mean anything. You have to verify the information. The offeror, who’s trying to get out of the deal, will say that he heard it from a reputable source; the offeree will say that he heard it from an irrefutable source.

b. **Humble Oil & Refining Co. v. Westside Investment Corp.** (103) Under an option, the act necessary to raise a binding promise to sell, is not, therefore, an acceptance of the offer, but rather the performance of the condition of the option contract. If this is true, then the rule peculiar to offers to the effect that a conditional acceptance is, in itself, in every case, a rejection of the offer, is not applicable to an option contract, supported by a consideration and fixing a time limit for election. By negotiating, the buyer did not surrender or reject the option. In this case, the seller had an obligation to keep the offer open.

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

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

iii. Casebook, p. 353 – Generally, acceptance of the offer must be RECEIVED to be valid under an option contract.

c. **Petterson v. Pattberg** (105) An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person.

d. **Marchiondo v. Scheck** (106) Partial performance of the consideration may make such an offer irrevocable and that where the offeree or broker manifests his assent to the offer by entering upon performance and spending time and money in his efforts to perform, then the offer becomes irrevocable during the time stated and binding upon the principal according to its terms.

i. Restatement, § 45 – If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered
within the time stated in the offer, or if no time is stated therein, within a reasonable time.

e. **James Baird v. Gimbel Brothers, Inc.** (108) An offer could become a promise to deliver only when the contractor promised to take and pay for it (sub-contractor case).

f. **Drennan v. Star Paving Co.** (109) In this case, there is an implied contract to keep the offer open, so there is consideration. When there is reliance by the contractor, the subcontractor must pay (Restatement, § 90 of promissory estoppel). The purpose of § 90 is to make a promise binding even though there was no consideration. The burden of the mistake should fall upon the party who caused the mistake to occur. D’s mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled P as to the cost of doing the paving. The loss resulting from the mistake should fall on the party who caused it.

g. **ECM, Inc. v. Maeda** (111) If the contractor should decide to use the subcontractor’s bid, then he is obligated to accept no other bid for the same work, should he get the contract.

§ 2.3 Formalities in Contracting: The Statute of Frauds

XLIII. Formalities in Contracting: promise plus seal or other form

a. Seal – There is trend that a seal does not automatically produce a binding contract.

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

   ii. **Restatement, § 95** In the absence of statute a promise is binding without consideration if (a) it is in writing and sealed, and (b) the document containing the promise is delivered, and (c) the promisor and promisee are named in the document or so described as to be capable of identification when it is delivered.

b. **UCC 1-107 – Waiver or Renunciation of Claim or Right After Breach**

   i. Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by written waiver or renunciation signed and delivered by the aggrieved party.

c. **UCC 2-205 – Firm Offers**

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

XLIV. The Statute of Frauds: General Scope and Effect

a. The Statute of Frauds is modified through the UCC § 2-201

   i. (1) Except as otherwise provided…a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

   ii. (2) Between merchants if within a reasonable time in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after its receipt.

   iii. (3) A contract which does not satisfies the requirements of subsection (1) but which is valid in other respects is enforceable

       1. (a) If the goods are to be specially manufactured for the buyer and couldn’t be sold to someone else, if the buyer doesn’t warn of rejection before the seller has made either a substantial beginning or commitments for their procurement, or

       2. (b) If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but he contract is not enforceable under this provision beyond the quantity of goods admitted; or

       3. (c) with respect to goods for which payment has been made and accepted or which have been received and accepted.

b. Current Update

   i. § 2-201 of the July, 1996 Draft of revised article 2, Sales, repeals the statute of frauds, including the “one year” clause, for contracts for the sale of goods.

   ii. A move to restore the statute of frauds has been made and the ultimate outcome is unclear.

XLV. The Statute of Frauds: “Within the Statute:” The “One year” clause
a. Even if you have all the other stuff of formation, the failure to satisfy the statute of frauds is a defense to formation. If the statute of frauds doesn’t apply, you don’t get a formed contract.

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

c. A merchant is a DealerIGOoodsofTheKind → DIGOTeK and sells to a BuyerIntheOrdinaryCourseOfBbusiness → BIOCOB

d. The basic rule is § 2-402: whatever I sell you, I must own…except if that guy was a DIGOTeK.

e. § 2-201: Applies to a contract for the sale of goods worth more than $500. Rental does not apply because it’s a service, not a sale.

f. § 2-205 – Merchant’s firm offer is an offer that stays open. You don’t need consideration because a merchant’s firm offer stays open.

1. During the time stated.

2. If no time stated, a reasonable time. In no event more than 3 months.

g. What is “realty?”

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

ii. A contract for the sale apart from the land of growing crops of other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract of the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

iii. The test for inclusion or exclusion is whether their predominant factor, reasonably stated, is the rendition of service, with goods incidentally involved or is a transaction of sale, with labor incidentally involved.
iv. July 1996 Draft of UCC 2-201(a) purported to repeal the Statute of Frauds as it applied to contracts for the sale of goods, including the “one year” provision.

h. If it falls within MY LEGS, it falls within the statute of frauds.
   i. Marriage-Promise-that-may-not-be-performed-within-one-Year LandExecutorGoodsover$500Surity → MY LEGS
      1. What counts as a good has to be more than $500
      2. Promises that, by their terms, must be done within one year.
         b. If it’s less than a year, it doesn’t have to be in writing.
      3. If it’s a promise made in consideration for marriage
      4. If it’s a promise to sell land.
      5. Promise by executor to pay for the debts of the estate
      6. Promise to pay for the debts of someone else.

ii. Use of the statute.
   1. Plaintiff never has something in writing, so her first argument is “I don’t need to have a writing, we still have a contract.”
   2. Defendant says “because it’s not in writing, we don’t need to continue this lawsuit.”

XLVI. 1-year clause example case(s)
   a. C.R. Klewin, Inc. v. Flagship Properties, Inc. (117) Contracts of uncertain duration are excluded from the statute of fraud’s one-year rule. Further, contracts where completion within one-year of the contract is not
barred are excluded from the statute of fraud’s one-year rule (even if the completion within one-year may seem physically impossible.)

b. **North Shore Bottling Co.** (119) The one-year only applies to contracts that expressly stipulate that they are not to be performed within a year. It does not apply to an agreement which appears to be capable of performance within the year, nor to cases in which the performance of an agreement depends upon a contingency which may or may not happen within one-year.

c. **Mason v. Anderson** (121) When a party indicates that he fully intended to pay off his loan, then that contract is enforceable, even though the terms indicated that the loan was to be for more than one-year, because the loan could have been paid off in one-year. This is an exception to the statute of frauds.

XLVII. Compliance with the statute: the “one year” clause

a. Flow chart for once it’s within the statute of frauds:

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Have the requirements of the statute been satisfied?

YES – No formal barriers to enforcement

NO – agreement is not enforceable unless other grounds (waiver, admission or estoppel) can be established
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XLVIII. What it takes to be within the statute

a. Example case(s)

i. **Crabtree v. Elizabeth Arden Sales Corp.** (123) The Statute of Frauds does NOT require that the written agreement be in one document. The contract can be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion.

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

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

XLIX. Under UCC, what constitutes a writing (p. 217)

a. Printing, typewriting or any other intentional reduction to tangible form.

b. Computer storage media, such as floppy or hard disk, are a tangible form that comprises ‘intelligence’ or ‘information.’
   i. The printout constitutes a tangible representation of the intelligence or information

c. EDI print-outs will usually not be accepted, but may be.
   i. UCC recommends that, to be on the safe side, parties agree in advance to adopt as signatures some electronic identification, consisting of a symbol or a code, to be affixed to or contained in each document transmitted.

    1. UCC § 1-201(39) says “…The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.”

L. Effect of Non-compliance

a. An oral contract that doesn’t satisfy the Statute of Frauds is merely unenforceable at the option of the party against whom enforcement is sought.
   i. Defense may be waived
   ii. If there has been complete performance there is no cause to “undo” the transaction.

b. Defense is easy to raise
   i. Admit for the sake of the argument the existence of an oral agreement while insisting upon its non-enforceability.
      1. prominent under UCC § 2-201(3)(b)
      2. Eventually, this may remove “all remaining vestiges of the bar of the statute of frauds where a valid oral contract existed, save for the party willing to commit perjury by denying the existence of the contract in his pleading, testimony, or otherwise in court”

LI. Example case(s)

a. DF Activities Corp. v. Brown (125) Where the defendant swears in an affidavit that there was no contract, there is no point in keeping the lawsuit alive.
i. **Restatement, § 139** – A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires. In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution, (b) the definite and substantial character of the action or forbearance in relation to the remedy sought, (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence, (d) the reasonableness of the action or forbearance, and (e) the extent to which the action or forbearance was foreseeable by the promisor.

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

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

LII. Contracts must expressly state that the performance is to take more than one year in order for there to be a Statute of Fraud claim (*Klewin* and *North Shore Bottling*). However, even if it is stated, if one has made payments toward the performance, then the Statute is not valid and the contract is enforceable (*Mason*). The writing making the contract can be pieced together through various memoranda (*Elizabeth Arden*). Further, if the defendant swears during deposition that the contract was not entered into, then the Statute may be upheld.

LIII. Hypothetical

a. A store offers to sell plants and to service them for an unlimited length of time, what is the buyer getting?

b. When you buy a record, what do you get?

c. You pay to download music, what do you get?
d. Software Hypothetical: You pay $600 for a CD-Rom. It’s not a contract for a good even if you’re getting something movable (moving the box from the shelf). What predominates is the software, not the box and the disk on which the software is written. When does the statute apply? When does the statute not apply?

i. (On a side note, For this reason, some people think that the software industry is out of balance, and there’s been a proposal to add an article (b): software sets. called the UCITA: Uniform Computer Information Technology Act)

ii. Article 2-207 is a different result than the mirror rule. In the future, do I want the mirror image rule to apply, or do I want a more common law, like the UCC, to apply?

iii. What is the difference between the courts view for over-the-counter sale versus online sale?

LIV. Exceptions to the statute of frauds, in which a contract in writing is not necessary?

a. If the goods are to be specially manufactured to buyer and couldn’t be sold to another, and seller without knowledge of refusal, has made a substantial beginning or commitment for their procurement.

§ 3.2 Insufficient or defective formulation of agreement: indefinite, incomplete, and deferred terms

LV. If withdrawing party has explicitly conditioned a willingness to deal upon the other party’s clear agreement to material terms and the other has failed or refused to agree, no liability should attach.

a. Note: you will observe a shift from a strict view that no contract can be formed until clear and complete agreement is reached on material terms to more flexible standards, such as those announced in UCC 2-204 and § 33 and § 34 of Restatement (Second). There are several explanations for this shift from “rules to standards.” (1) Different perception (2) for long-term relationships, the parties may wish to have the protection of contract but be unwilling or unable to articulate all terms of the future exchange in an initial agreement.

LVI. Indefinite Agreements

a. Restatement (2d) § 33 sets forth a standard for judging the impact of indefiniteness and open terms.

i. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
ii. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

iii. The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

LVII. **Incomplete and Deferred Agreement**

a. Ways the contract can go:

i. To get out of the contract, D says, “I saw the contract as X and I did X.” P replies, “That’s not what the contract said. The contract said Y.” D will respond, “Goodness, I thought it said X and you thought it said Y; clearly, we don’t know what it says. If we can’t tell what the court says, it is indefinite, so it’s not a contract and we both have to walk away.”

ii. After which, D says “but I tried, it just didn’t work,” P says, “you’re not trying hard enough.”

   1. He does this by showing that D is acting in a way that other equals would not act. P says, “The agreement was to act in good faith and you’re not acting in good faith.”

iii. D will respond, “This is good faith; other people would pay this price.”

iv. P responds, “oh yeah? Show me. And it has to be a buyer at arms length.”

LVIII. Agreement to negotiate in good faith.

a. Unlike an agreement to agree, which does not constitute a closed proposition, an agreement to use best efforts or to negotiate in good faith is a closed proposition, discrete and actionable.

b. Even if preliminary agreement is not binding, one may be able to base promissory estoppel claim on promise to negotiate in good faith.

LIX. Contract to bargain.

a. Stresses that unjustified withdrawals will give rise to appropriate contract remedies but that essential obligations are met by bargaining in good faith for as long as may reasonably be required under the circumstances.

LX. Written contract intended

a. If the parties have explicitly stated that they do not intend to be bound until the writing is signed, there is no contract. The writing is a condition precedent to liability.

b. Several factors that help determine whether the parties intended to be bound in the absence of a document executed by both sides
i. Whether there has been an express reservation of the right not to be bound in the absence of a writing

ii. Whether there has been partial performance of the contract

iii. Whether all of the terms of the alleged contract have been agreed upon

iv. Whether the agreement at issue is the type of contract that is usually committed to writing.

LXI. UCC Perspective on indefiniteness and open terms

a. Courts have been disinclined to fill gaps in the manifestations of the parties by enforcing some judicially approved standard. Despite evident intention to be bound, so-called agreements to agree have generally been held to be unenforceable.

b. UCC breaks decisively with the traditional approach.

i. §2-204(3) states the basic principle as to open terms agreement underlying other sections: Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy”

   1. Two standards: (1) Parties must have intended to make a contract. (2) There must be a reasonably certain basis for giving an appropriate remedy

   ii. The agreement may be too indefinite to warrant specific performance but not money damages, or, as in Oglebay, the court may, in the exercise of its equitable jurisdiction, appoint a mediator and order the parties to negotiate.

   iii. Damages measured by loss expectations may be unwarranted, but not damages measured by costs reasonably incurred in reliance upon the other’s promise.

   iv. P should have a restitutionary remedy for the value of benefits conferred on the defendant through past performance.

LXII. The effect of an “Agreement to Agree” under the UCC and Restatement (2d)

a. With regards it quantify, the general standard of UCC §2-204(3) applies: “Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

   i. Trade usage or prior dealings with both parties is required to support the inference of intent.

b. Statute of frauds, § 2-201(1) limits enforcement to the quantity of goods shown in the writing, and the problems of determining a reasonable quantity term in the absence of some agreement are virtually insuperable.
i. Lack of agreement on the quantity term should support a conclusion that the contract failed “for indefiniteness.”

c. Price term standard is supplied by §2-305. If the parties intend “not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract.”

LXIII. Contract to bargain

a. In agreements where the parties have reached agreement to such a degree that they regard themselves as bound to each other, neither can withdraw for an unjustified reason yet neither can be compelled to perform if, after good faith bargaining, actual agreement cannot be reached.

b. According to Knapp, by applying the contract to bargain framework, the court could take notice of, and give effect to, the parties’ intention to create a relation which was, at least to some extent, legally binding. It would also save the court from inserting “reasonable” terms in the agreement where the terms are of such importance that they should only be decided by the parties. Finally, if would direct the attention of the court to another important fact in the case.

LXIV. Remedies where agreement incomplete or indefinite

a. UCC 2-204(3); Restatement (2d) §33(1)

i. Even though the agreement is presumptively enforceable because the parties “intended” to contract, the contract will fail for indefiniteness if the court is unable to determine whether there has been a breach or find a “reasonably certain basis for giving an appropriate remedy”

ii. If the incomplete or indefinite agreement is enforceable by whatever test, the plaintiff may seek to protect the expectation interest through specific performance or damages.

1. If these remedies are not available because of indefiniteness in the agreement, alternative remedies protect the reliance and, if all else fails, the restitution interests.

iii. Protection of the expectation interest depends upon an enforceable bargain.

iv. Exceptions

1. When P’s part performance is under a severable rather than an entire contract or when the plaintiff has made a down payment which the defendant, in all fairness, ought not retain.

b. Once we decide that a contract is not definite enough, we have to decide what to do to remedy the problem.

i. Treatment options
1. If it’s too indefinite, it’s not a contract → somebody gets to walk away.
   
   b. What results when the court won’t fill gaps?
      
      I. Hoffman

2. Fix it by making it more definite. The court can decide what the indefinite terms should be.

   b. Say, “There is no such thing as a contract that is too indefinite. When the contract is less definite, we just fill in the gaps.”

3. You can be definite, you can be somewhat indefinite and the court will fill gaps; you can be too indefinite and the court won’t fill gaps.

LXV. Example case

LXVI. Example case(s)

a. Raffles v. Wichelhaus (130) This is the Peerless case. One party meant the October Peerless, while the other party meant the December Peerless. There is no contract because there was no meeting of the minds.
   
   i. Restatement, Section 20 – Effects of misunderstanding. There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party know or has reason to know the meaning attached by the other, or (b) each party knows or each party has reason to know the meaning attached by the other. The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if (a) that party does not know of any meaning attached by the first party, or (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.
   
   ii. Kieff – This is not a mistake case. Mistake occurs when you think X is true, but X turns out to not be the case. This does not happen in Peerless. There is defective contract formulation, NOT mistake.
   
   iii. Who is in the better position to resolve the ambiguity in these cases?
   
   iv. Peerless: one way to put yourself at fault is to represent something that is not true; in that case, the other side gets to walk away. Representations are one way to create some of that fault.

b. Konic International Corp. v. Spokane Computer Services, Inc. (131) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and neither knows or has reason to know the meaning attached by the other. Even though the parties manifest mutual assent to the same words of agreement,
there may be no contract because of a material difference of understanding as to the terms of the exchange. *The doctrine applies only when the parties have different understandings of their expression of agreement. The doctrine does not apply when one party’s understanding, because of that party’s fault, is less reasonable than the other party’s understanding.*

i. Parol evidence is admissible to establish the facts necessary to apply the rule.

ii. Kieff: If we decide for the seller, then this might mean that the buyer will be more careful in the future about checking the goods, but we’ll also be stuck with a lot of contracts that we don’t think are good – sellers will go out of their way to be ambiguous.

iii. If the process of interpretation is inconclusive, the court may, as a last resort, prefer the understanding “which operates against the party who supplies the words or from whom a writing otherwise proceeds.” (Restatement (2d) § 206)

c. **Varney v. Ditmars** (133) For the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to. The contract here cannot be enforced because the profit clause cannot be easily quantified.

i. Dissent – Cardozo implies that there are profit terms using gap-filling devices. He believes that indefinite offers must be enforced to finally get definite offers.

ii. Majority – There is no contract. The plaintiff may be able to claim under quantum meruit theory.

iii. Kieff – The view is that the more indefinite a contract is, the more likely a court is to NOT uphold an agreement.

d. **Metro-Goldwyn-Mayer, Inc. v. Schneider** (136) The only essential term not expressed is the starting date of the filming, which can be inferred from industry custom. When objective criteria are available that will establish an ambiguous term that is not in the agreement itself, it can be found in commercial practice or other usage and custom. INCOMPLETE TERMS CAN BE INFERRED FROM INDUSTRY PRACTICES.

i. In contract cases, damages are the ordinary remedy and you need to show extraordinary circumstances before you can get an injunction. The ordinary remedy is damages. If you want something other than damages, you gave to say, “hey, Judge, this is a special case.”

e. **Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher** (137) Definiteness is necessary to complete a contract. If the lease or renewal offered any
suggestion on how rent might be calculated, the agreement may have been enforceable at that price.

i. Dissent – If the renewal stated the tenant can establish its entitlement to renewal under the lease, the mere presence of a provision calling for renewal at rentals to be agreed upon should not prevent judicial intervention to fix rent at a reasonable rate in order to avoid forfeiture.

ii. The parties could have contracted around this by putting in a clause stating that fair market value could have been used if there was no price agreement.

f. **Oglbay Norton Company v. Armco. Inc.** (140) There is ample evidence that parties intended to contract. There is credible evidence to determine the market price for iron ore. The parties must negotiate price via a mediator when damages are too difficult to calculate because contract is long term. The court steps in and enforces when the price mechanism fails to enforce a price, as long as all the other evidence around indicates that the parties intended to be bound.

i. **Restatement, § 33**: The actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain. An offer which appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of agreement to the contrary. **THIS HOLDING IS REASONED THROUGH THE RESTATEMENT BECAUSE THIS IS NOT A GOODS CONTRACT.**

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

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

iv. **Restatement (2d) § 92**: An offer which appears to be indefinite may be given precision by usage of trade of by course of dealing between the parties. Terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of an agreement to the contrary.
g. **Empro Manufacturing Co., Inc. v. Ball-Co. Manufacturing, Inc.** (144) This case involves a TINALEA (This Is Not A Legally Enforceable Agreement). Objective intent governs whether parties intended to be bound. Such intent can be found by parol evidence, but there is none in this contract. This contract did no more than set the stage for the negotiations of details. Further, Empro had no reliance on the contract other than basic inquiry costs.

LXVII. Case Comparisons – When there is objective intent to be bound, incomplete contract terms can be calculated through reasonable industry standards. However, when the contract is extremely vague, it will not be enforced at all (Empro).

a. **Hoffman v. Red Owl Stores, Inc.** (146) There is no requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promise.

   i. Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor’s promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Promissory estoppel is used to make the offer definite enough.

   ii. The contract remedy under *Red Owl* and similar cases has usually been limited to protection of the reliance interest. Profits that would have been earned if the contract had been formed have not been allowed.

   iii. Kieff – You can’t breach a representation. If there is not a certain level of definiteness (i.e., when contract has only gone into pre-negotiation stages), then tort liability is induced.

**AVOIDANCE OF A CONTRACT**

LXVIII. Courts will sometimes refuse to enforce contracts because of:

   a. Impermissible parties to the agreement
   b. Impermissible defects in the bargaining process
   c. Impermissible terms in the agreement

§ 4.1 **Capacity to contract: Infancy; Mental Incompetence**

LXIX. A person must have legal capacity to contract.

LXX. Questions to consider in deciding whether person has capacity

   a. Is the contract void, or voidable?
   b. What must be done to effectively rescind a “voidable” contract?
c. What are the appropriate remedies available to both parties involved in the transaction?

LXXI. Infancy

a. A minor’s contracts are voidable; obligation may be avoided by timely and appropriate disaffirmance. The other party, if an adult, is bound, reflecting the risk of contracting with one who is under age.

b. The condition of the item is taken into consideration: what is furnished to the infant must be suitable, not only to his condition in life, but also to his actual requirements at the time. To be liable for articles as necessaries, an infant must be in actual need of them, and there might be some enforcement. If they’re not necessary, the contract won’t be enforceable.

   i. Gives comfort to the seller that, if they deal with minors over some necessity, they get some exception; the defense won’t apply to you, to some extent quasi-contract type remedy, and it’s restitution for the value.

      1. Insurance contracts, student loan contracts, are almost always excepted by the infancy defense.

LXXII. Legal Responsibility of emancipated minor

a. The contract of a minor, other than for necessaries, is either void or voidable at his option.

   i. Exceptions

      1. Statutory, or

      2. Involve contracts which deal with duties imposed by law such as a contract of marriage or an agreement to support an illegitimate child.

   ii. The general rule is not affected by the minor’s statutes as emancipated or un-emancipated.

b. Prevailing view in favor of restoration. The minor is obligated to return what he or she still has.

   i. There is no obligation to account for use or depreciation or to return an equivalent of what was received.

c. Disaffirmance and ratification

   i. NJ, 1954: An infant cannot affirmatively ratify until he comes of age. After that date any manifestation by him of an intent to regard the bargain as binding will deprive him of the power to avoid the contract….mere silence or inaction by a former infant does not amount to ratification…however, an infant should be required to disaffirm within a reasonable time after coming of age….disavowal of a contract by an infant need not be by any prescribed form or ceremony…
d. Recovery for Necessaries furnished
   i. If necessaries are involved, recovery is limited to unjust enrichment.

e. Effect of misrepresentation of age: tort; estoppel
   i. There are a range of solutions
      1. One extreme is the MA rule which states that minors are not liable.
      2. In the middle are cases which hold that misrepresentations will not estopp the minor from disaffirming but will justify damages in tort.
      3. The other extreme is estoppel: when a minor has reached stage of maturity and enters a contract falsely representing himself to be of age, he is estopped to deny that he is not of age when the obligation of the contract is sought to be enforced against him

   b. Codified by Indiana.

LXXIII. Mental Incompetence

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

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

c. The more common rule is that the incompetent should be able to avoid the contract provided that he can restore the other party to his pre-contract position.
   i. Depends upon whether the other party acted in “good faith” and was unaware of the incapacity and stands “in stark contrast to the rule usually applied in cases of avoidance by minors, who are permitted to rescind a contract upon returning whatever depreciated value remains in their hands.”

LXXIV. Inadequacy of consideration plus something else
a. There must be something else besides the mere inadequacy of consideration or inequality in the bargain, to justify a court in granting relief by setting aside the contract.

LXXV. Incapacity due to intoxication

a. The drunkenness of a party at the time of making a contract may render the contract voidable, but it does not render it void; and to render the contract voidable, it must be made to appear that the party was intoxicated to such a degree that he was, at the time of the contracting, incapable of exercising judgment, understanding the proposed engagement, and of knowingly what he was about when he entered into the contract sought to be avoided...there must be some evidence of a resultant condition indicative of that extreme impairment of the faculties which amounts to contract incapacity. (Ala.1980)

i. See Restatement (2d) § 16

LXXVI. Example case(s)

a. **Bowling v. Sperry** (151) The contracts of minors are voidable and may be disaffirmed. It is not necessary that the other party be placed in the status quo, nor is it necessary that the minor tender back the money or property given by him to the adult.

   i. Under voidability rule, the person lacking capacity (minor) can get out of the contract, but the other side is bound.

   ii. Kieff says this is an exception that is not consistent with the consideration rule.

b. **Heights Realty, Ltd. v. Phillips** (153) The test of mental capacity is whether a person is capable of understanding in a reasonable manner the nature and effect of the act in which the person is engaged. The law presumes that every person is competent. To show the contrary, the burden of proof rests on the person asserting lack of capacity to establish the same by clear and convincing proof.

   i. Restatement, Section 15

   ii. Kieff—Courts will consider if the other side knows of the mental incompetence, how incompetent is the contractor, and how fair is the other side when determining capacity to contract. He also thinks that the mental incompetence rule encourages extreme irrationality during negotiation.

   iii. The necessity exception applies here, for the same reason that it applies for minorities.

   iv. Ratification is a fix for a contract that is voidable – Drunk guy sobers up and ratifies, so it’s now binding. (This applies for infancy, too.) Upon age of majority, and upon sobering up,
express disaffirmance gets the incompetent out, or the minority out.

§ 4.2 Defects in Bargaining Process

LXXVII. In the absence of mistake or misunderstanding, a breach of contract after the parties have complied with the paradigm of “offer-acceptance” and “consideration” is likely to trigger remedies designed to protect the value of the bargain.

a. When one party seriously disrupts the bargaining process through acts or omissions, a court may be persuaded to give relief from the bargain even though the traditional conditions of promissory liability have been met.

LXXVIII. Unilateral and Mutual Mistake

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

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

LXXIX. The Effect of bidder negligence

i. Many courts have found that the fundamental question is whether a bidder made an honest or good faith mistake and any question of gross or extreme negligence of the bidder should be considered only as evidence of the bidder’s lack of good faith.

b. Mistakes in bids and federal government contracting

i. Relief from a mistake is more difficult to obtain after the award of the contract → one is obligated to show by clear and convincing evidence either mutual mistake or a unilateral mistake of which the contracting officer had actual or constructive knowledge. For such mistakes, agencies are authorized to rescind the contract or reform the contract so as to delete the items involved in the mistake, or to increase the price of the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids.

LXXX. Mistaken admissions (i.e. college)

a. A letter of admission may be considered a binding contract.

LXXXI. Reformation
a. Like rescission, is an equitable remedy.

b. Designed to restore the efficacy of a writing which does not reflect the earlier agreement of the parties, frequently oral, which they apparently intended to be reflected in the writing.

   i. On the other hand, if the mutual mistake is in the formulation rather than the reformation of the contract, the proper remedy is rescission rather than reformation of the contract.

c. In the classic case for reformation, P must show by clear and convincing evidence that the parties had actually reached agreement over the term at issue, that both intended the term to be included in a subsequent writing, and because of “mutual mistake” in expression, the term was not included.

d. The “fault of P in not carefully reading the writing before signing or of an agent selected to reduce the agreement to writing will not bar reformation if P can otherwise demonstrate that both parties believed that the writing expressed their true agreement.

LXXXII. Fraud and the Duty to Disclose

a. Misrepresentation, Rescission and Restitution

   i. A misrepresentation is “an assertion that is not in accord with the facts.” Restatement (Second) § 159

   ii. The aggrieved party may sue to rescind the contract because of the other’s deceptive language or conduct. In general, the misrepresentation must be an assertion or affirmation of an existing fact upon which the other party justifiably relies in entering the contract. The misrepresentation may be fraudulent or innocent. Moreover, the misrepresentation may be the assertion of a “half truth” or consist of the concealment of a fact or even the failure to disclose. Finally, the usual effect of wrongful misrepresentation is to render the contract “voidable,” but courts have identified a kind of fraud in the “execution” which precludes the formation of any contract at all.

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

   iv. Restatement 2d § 159(b): One remedy for misrepresentation is to rescind the contract.

      1. The purpose of rescission, whether through a legal or equitable action, is “restitutionary;” i.e., there is a dissolution or “undoing” of the contract and a restoration of the parties to their pre-contract position (status quo ante).
v. If P demands a relatively mild remedy – rescission – he may be given relief even if he does not show actual intent to deceive by D. On the other hand, if he seeks a harsher damages measure, many courts will require him to show such intent.

LXXXIII. Fraud and the Duty to Disclose

LXXXIV. Duress

a. Every state has legislation, modeled generally upon Section 5 of the Federal Trade Commission Act, prohibiting “unfair” or “deceptive” trade practices or acts. (UDAP)

b. Although these “unfair and deceptive acts or practices” laws vary from state to state, one can identify some common features; notably vague criteria and private remedy.

   i. First, proscribed actions are described in general terms; e.g., “deceptive;” “unfair”; “unconscionable.”

   ii. Second, a private remedy is provided.

      1. At a minimum, actual damages may be recovered and this includes, in appropriate situations, consequential damages. In addition, provision is made in many of the statutes for a recovery of multiple damages, double or triple. Finally, most of the laws permit the recovery of attorney’s fees and costs.

LXXXV. RICO

a. 1970 – Congress enacted the Racketeer Influenced and Corrupt Organizations Act, which one writer has characterized as “perhaps the most powerful federal criminal enactment in American law.”

b. The potential of the statute in more ordinary commercial litigation is enormous and affords a defrauded party a civil remedy far more effective than that traditionally provided by, for example, federal securities law.

c. Criticism

   i. Critics insist that the application of RICO to ordinary commercial disputes far exceeds Congressional intent.

   ii. SUM: RICO’s broad language and draconian penalties help increase uncertainty in the marketplace and tend to discourage legitimate business activity.

d. Proponents

   i. Congress clearly intended the statute to be sued against any criminal “enterprise,” not just organized crime.

   ii. RICO is expressly designed to supplement those federal and state fraud laws which were perceived to be inadequate.
LXXXVI. Duty

a. Normally, duress by physical compulsion prevents formation of a contract, Restatement (2d) § 174, whereas duress by threats make a contract voidable. Restatement (2d) § 175 provide: If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”

LXXXVII. Unconscionability – Consumer Transactions

a. Ask yourself: how do the different tools for deciding whether a contract is not enforceable. Given that we’ve got some of them, do we need all of them? In which case, which ones do you like? The law is, they’re all there, to some extent, but you should understand that the law is what we decide it is. You need to start developing your own views about what it should be. You want to think to yourself: why are the cases achieving what they are achieving? You want to wonder how reproducible each of this stuff is. Ask yourself: what power do I want to give the judge? Do I want her to have to discipline herself when she makes the decision, or do I want her to just pick a side? Notice, with the illegality stuff, how uncomfortable you feel, depending on which case you like. If you have the rule available in case 1, it might make case 2 go a different way.

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

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

c. A key question in the controversy concerns the extent that the prevention of “oppression and unfair surprise” adds to the evolving doctrines of fraud and duress and the expanding category of agreements or terms violative of public policy.
i. Principle task is to identify the transaction types and the critical factors that increase the chances that a court will, at the very least, insist that there be a hearing on the unconscionability issue.

d. Unconsciousness is likely to be a transitional device in the movement, in a particular problem area, from lesser to greater legal control.

e. Underlying assumptions about unconscionability
   i. The expansion of demand/availability for consumer credit resulted in more transactions between individuals who purchased or borrowed for personal family or household purposes and professional sellers or lenders.
   ii. The perfection of the so-called “contract of adhesion.”

f. Indicators of procedural unconscionability
   i. Lack of knowledge
   ii. Lack of voluntary-ness

g. Indicator of substantive unconscionability
   i. When the terms of the contract are of such an oppressive character as to be unconscionable.
      1. A one-sided agreement that is really bad for the other side.
   ii. Ordinarily, a party will plead unconscionability as an affirmative defense.
      1. UCC § 2-302 (2) guarantees the right of the parties to present evidence of the contract’s commercial setting, purpose, and effect. This may be of particular importance to one who seeks to defend against unconsciousness, for evidence of commercial context may demonstrate that a contract or clause which superficially seems to be one-sided in character is actually quite reasonable when viewed in the totality of the circumstances.

h. Burden of proof is on the one who claims unconscionability.
   i. That person must give evidence for a prima facie case.
      1. Done by showing a substantial disparity between the value of the bargain as measured by the price agreed for the described goods or services and the value of the bargain when the seller invokes a particular contract term against the consumer.
      b. In most cases, material disparity will turn upon the impact of the assented clause upon the consumer’s bargain as measured by the agreed price for described goods or services.
ii. Once the person has given evidence of a prima facie case, the burden shifts to the other party to persuade the court that the contract or clause was conscionable at the time of contracting.

1. Failure of the professional to justify its behavior as commercially reasonable would result in a judgment for the consumer.

i. Remedies

i. The court “may refuse to enforce the contract, or

ii. Enforce the remainder of the contract without the unconscionable clause, or

1. Thus, after striking an unconscionable clause, a court may then award damages for breach of the contract without that clause.

iii. Limit the application of any unconscionable clause so as to avoid any unconscionable result.

1. Essentially, the aggrieved party is limited to defensive weapons.

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

LXXXVIII. Unconscionability - Commercial Transactions

a. To date the “merchant” has not been notably successful in raising the defense.

b. Neither the Code nor case law specifically limits UCC 2-302 and the principles underlying it to consumer transactions and, as illustrated in the materials to follow, commercial entities can sometimes derive protection from unconscionability theory.

LXXXIX. Adhesion contract

a. A contract that’s drafted by one person, of substantially greater bargaining power, where there’s no negotiation, it’s a “take it or leave it” deal.

b. Think of it as one “flavor” of unconscionability.

XC. Example case(s)

a. Boise Junior College District v. Mattefs Construction (157) One who errs in preparing a bid for a public works contract is entitled to the equitable relief of rescission if he can establish the following conditions: (1) the mistake is material, (2) enforcement of a contract pursuant to the terms of the erroneous bid would be unconscionable, (3) the mistake did not result from violation of a positive legal duty or from culpable negligence, (4) the party to whom the bid is submitted will not be prejudiced except by the loss of his bargain, (5) prompt notice of error is given.
i. This is a unilateral mistake case.

ii. Kieff alludes that this is the wrong result because it would provide incentives for opportunistic behavior in the construction industry.

b. **Beachcomber Coins, Inc. v. Boskett** (159) Restatement (2d) § 502:

Where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the act been as the parties believed it to be…

Negligent failure of party to know or to discover the facts as to which both parties are under a mistake does not preclude rescission or reformation on account thereof.

i. Negligent failure of a party to know or to discover the facts as to which both parties are under a mistake does not preclude rescission or reformation on account thereof.

ii. This is a mutual mistake case. Both parties believed that the coin was authentic.

iii. Who was best able to figure out the problem and avoid it?

iv. One thing you could do is actually make the buyer go out and get someone to appraise, or have “as is” clause that says “with respect to its origin coming from the United States mint…”

c. **Lenawee County Board of Health** (161) There is a mistake, but it has no legal significance. The party that assumed the risk of loss should bear the outcome of the contract. Here, there is an indication that the parties considered that, as between them, such risk as related to the present condition of the property should lie with the purchaser. In cases of mistake by two equally innocent parties, we are required, in the exercise of our equitable powers, to determine which blameless party should assume the loss resulting from the misapprehension they shared. The court should look first to whether the parties have agreed to the allocation of the risk between themselves.

i. The Barren Cow Case – There is no contract when the contract was not for what you got.

ii. Kieff – There are three different analyses in mistake cases: (1) What is reasonable in the industry? (2) Who have the parties allocated risk to?, and (3) Who has the best way to get information to avoid mistake?

iii. Reformation, like rescission, is an equitable remedy. Reformation is designed to restore the efficacy of a writing which does not reflect the earlier agreement of the parties, frequently oral, which they apparently intended to be reflected in the writing. ON THE OTHER HAND, IF THE MUTUAL MISTAKE IS IN THE
CONTRACTS


d. Ayer v. Western Union Telegraph Co. (164) Between the seller and the buyer, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. Hence, the loss transfers to the telegrapher because the seller was obligated to deliver at the price the telegrapher established.

i. Western Union could have avoided the mistake in the first place.

XCI. Case Comparisons (Boise, Beachcomber, Ayer) – A contract will be rescinded if the mistake is material and prompt notice of error is given (Boise, Beachcomber). However, in Lenawee a different result is reached because the mistake is held to be not legally significant because the parties allocated the risk of mistake. Generally speaking, a mistake in value is not enough; it has to be a mistake in a fundamental thing. Unilateral mistake is generally non-enforceable, but if the non-mistaken party should/should have known that there was a mistake, the mistaken party will have a better chance of getting out. Finally, in Ayer the contract is reformed to the intended terms by making Western Union pay because they could have avoided the mistake (third-party mistake). In mistake by intermediary, whomever picks the intermediary may be stuck, unless the other party should have known that there was a mistake.

a. Morta v. Korea Insurance Corp. (166) There is no fraud in this case when the insurance claimant agreed to the release of all claims and subsequent problems arose. Was he engaging in opportunistic behavior? Did he fully understand what he was releasing?

i. Actual vs. Constructive Fraud – Constructive fraud is above actual fraud. In order to find constructive fraud, the parties must have duties to each other (confidential trust relationship).

ii. For Fraud, there has to be an intentional misrepresentation of fact AND reasonably induced detrimental reliance.

iii. Majority: Although there might have been some input, there wasn’t undue influence; the more he did research on his own, the less he can argue undue influence.

iv. You have a duty to read and try to understand. If you didn’t do that, it’s not a mistake.

b. Laidlaw v. Organ (167) Suppression of material circumstances within the knowledge of the vendee, and not accessible to the vendor, is equivalent to fraud, and vitiates the contract. However, it is NOT fraud to remain silent about circumstances (the vendor should ask questions).

i. Rule: you don’t have to share information, but if you do share and there’s a misrepresentation and there’s a reliance on it, there can be a fraud problem. Since there is no duty to inform, you can remain
silent and it is the other side’s reasonability to discern the meaning of the silence.

c. **Vokes v. Arthur Murray, Inc.** (169) A statement of a party having superior knowledge may be regarded as a statement of fact although it would be considered as an opinion if the parties were dealing on equal terms.

XCII. In contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, **IF HE UNDERTAKES TO DO SO HE MUST DISCLOSE THE WHOLE TRUTH**

a. **Hill v. Jones** (170) Any provision in a contract making it possible for a party thereto to free himself from the consequences of his own fraud in procuring its execution is invalid and necessarily constitutes no defense…parol evidence is always admissible to show fraud, and this is true, even though it has the effect of varying the terms of a writing between the parties.

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

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

iii. **Restatement § 161(d)**: A party may…reasonably expect the other to take normal steps to inform himself and draw on his own conclusions.

iv. Kieff: Silence, here, can turn access to a fraud argument. Instead of being silent, say something like: “hey, that’s a great question; you need to investigate that for yourself before you decide to go forward with the deal…I think this is a perfectly appropriate deal, but only you know what you want and what your needs are…”

b. **Austin Instrument, Inc. v. Loral Corp.** (175) – A contract is voidable on the ground of duress when it is established that the party making the claim
was forced to agree to it by means of a wrongful threat precluding the exercise of his free will.

i. The existence of economic duress or business compulsion is demonstrated by proof that immediate possession of needful goods is threatened.

ii. A mere threat is not proof of duress; it must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate.

iii. Kieff: If you can show that D’s threat deprived P of his free will, you have shown duress.

c. Machinery Hauling, Inc. v. Steel of West Virginia (177) There was no continuing contract between the plaintiff and the defendant; therefore, the demand by the defendants that the plaintiff pay $31,000 for defective steel was not coupled with a threat to terminate an existing contract.

i. Furthermore, the plaintiff did not accede to the defendants’ demand and pay over the money.

ii. D’s threat to do what D has a legal right to do is not enough for a duress argument.

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

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

v. Normally, duress by physical compulsion prevents formation of a contract, whereas duress by threats makes a contract voidable.

XCIII. Case Comparison – The two cases work to show what will and will not constitute duress. Kieff alludes that duress is difficult to prove (and should be). Aren’t most of these examples just hard bargaining by one party?
a. **Cutler Corp. v. Latshaw** (180) When a party to a contract seeks to bind the other party with the unyielding thongs of a warrant of attorney/confession of judgment, a device not ordinarily expected, the inclusion of such provision must appear in the body of the contract and CANNOT be incorporated by a casual reference with a designation not its own.

b. **Williams v. Walker-Thomas Furniture Co.** (7) There are severely unequal bargaining positions in this case. The court found a lack of meaningful choice.

   i. Procedural Unconscionability – Some kind of deception or overreaching that constitutes an abuse in the process of bargaining.

   ii. Substantive Unconscionability – Some sort of objectionable or oppressive clause that may have been knowingly and voluntarily assented to.

   iii. A mixture of both types of unconscionability is most likely to win in court.

c. **Jones v. Star Credit Corp.** (28) The court found the contract unconscionable due to the incredibly high price, but there was evidence that the buyer was aware of the high price. The court may do more than simply refuse to enforce the contract or clause; the court, in effect, reformed the contract by holding that the amount due was to be equal to the amount already paid.

d. **Weaver v. American Oil Co.** (183) When parties make contracts exculpating one of his negligence and providing for indemnification, it must be done knowingly and willingly as in insurance contracts made for that very purpose. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting.

   i. It is much more difficult for merchants, rather than consumers, to prove unconscionability (or make a viable case).

   ii. The court focused on Weaver’s lack of education. Reasonable parties may have entered this agreement, particularly if Weaver really wanted the service station and this was the only way he could get it.

e. **Zapatha v. Dairy Mart, Inc.** (183) The basic test for unconscionability is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

XCIV. Case Comparison – The first three cases are consumer protection cases and all illustrate that courts will protect a consumer when it believes the consumer
has been wronged. Meanwhile, *Weaver* and *Zapatha* are commercial contracts, which courts are less likely to protect. It seems the only reason that Weaver’s contract was found unconscionable was due to Weaver’s lack of education.

§ 4.3 Illegality: agreements Unenforceable on Grounds of Public Policy

XCV. Denying enforcement and restitution when the contract is against public policy.

a. **Restatement § 512**: A bargain is illegal … if either its formation or its performance is criminal, tortuous, or otherwise opposed to public policy.

   i. Similarly, where both parties are equally involved in the illegality, the effect is that neither can “recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value.” **Restatement § 598**

b. The statute, regulation or other source of public policy may say nothing about contracts and their enforceability.

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

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

d. Reasons for denying judicial relief:

   i. Principle: discourage illegal bargaining.

   ii. Encourages opportunism with regard to substantively illegal agreements.

   iii. To preserve the court’s institutional integrity.

e. **Restatement (2d) § 320**: In the final analysis, it is the function of a court to balance the public and private interests in securing enforcement of the disputed promise against those policies which would be advanced were the contractual term held invalid. Enforcement will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh ‘the law’s traditional interest in protecting the expectation so the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement’ of the contested term.

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

b. Exceptions:
   i. A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.
   ii. A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if:
      1. the term exempts an employer from liability to an employee for injury in the course of his employment
      2. the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty; or
      3. the other party is similarly a member of a class protected against the class to which the first party belongs.
   iii. A term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability.

c. Where the agreement is of an adhesion type between parties with disproportionate bargaining power, there may be a conceptual overlap of “illegality” and “unconscionability.”

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

e. **Restatement (2d) § 195(3):** for a term exempting seller of a product from his special tort liability for physical harm to a user or consumer...unless the term is fairly bargained for and is consistent with the policy underlying that liability.
   i. Comment (c) states that the exception is for the “rare situation in which the term is consistent with the policy underlying the liability.
   ii. i.e., there is no public policy against these risk allocation devices, but, at the very least, they must be fairly bargained for.

XCVII. **Covenant not to compete and the concept of Partial Illegality:**

a. In general, the courts focus upon two aspects of the covenant: (1) whether it protects some legitimate interest of the promise; (2) whether it is reasonable in scope.
b. Courts tend to be more favorably disposed to those covenants which are ancillary to the sale of a business, because they’re usually seen as protective of the good will being sold, than to those which restrict an employee’s competitive activities.

XC VIII. Mitigation of strict rule by allowance of restitution
a. To avoid the strict rule:
   i. Establish that the parties are not equally at fault.
   ii. One may be able to establish a lack of parity of blame by showing one’s ignorance of the illegality, the other party’s fraud or deception, or membership in a class the public policy is designed to protect.
   iii. Or… by withdrawing from the contract before its illegal purpose has been attained. → “locus poenitentiae”

XC IX. The illegality spectrum
a. A bargain is “illegal” if it contravenes “public policy.”

C. Example case(s)
a. Sinnar v. Le Roy (187) Illegality, if of a serious nature, need not be pleaded. If it appears in evidence the court of its own motion will deny relief to the plaintiff. The defendant cannot waive the defense if he wishes to do so. If the court suspects illegality, it may examine witnesses and develop facts not brought out by the parties, and thereby establish illegality that precludes recovery by the plaintiff. If, however, the illegality is not serious, and neither public policy nor statute clearly requires denial or relief, courts refuse to give effect to facts showing illegality unless those facts are essential to establish a prima facie right of recover or are pleaded by defendant.
   i. There is no restitution as a general rule with some exceptions: (1) the denial of restitution causes disproportionate forfeiture, (2) the plaintiff was excusably ignorant of factors or of legislation of a minor character, in the absence of which the promise would be enforceable, (3) the plaintiff was not equally in the wrong with the promisor, and (4) the plaintiff did not engage in serious misconduct and he withdraws from the transaction before the improper purpose has been achieved.
   ii. Kieff points out that D is allowed to keep the funds here. Doesn’t this encourage illegal activity? Kieff thinks that we should make both sides of the illegal agreement suffer.

b. Homami v. Iranzadi (188) A contract must have a lawful object. A contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void.
i. The nature of the promise is not illegal, but what the receiver is doing with the money is illegal.

ii. By not enforcing this contract at all (defendant is not allowed to keep the funds), Uncle Sam gets nothing. Is this the result that we want?

iii. Kieff makes analogy to waitress who does not report her tips; does that mean that she should not be able to bring suit against her employer if he refuses to pay her for her labor?

c. **Patterson v. McLean Credit Union** (189) Contracts have an implied duty not to interfere with the plaintiff’s performance. The right to make contracts does not extend to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.

   i. Kieff - The courts need to find intent. It is likely that the defendant was hedging her bets when entering this contract.

d. **Data Management, Inc. v. Greene** (191) If an overbroad non-compete clause can be reasonably altered to render the contract to be conscionable, the court shall do so unless it determines the covenant was not drafted in good faith.

   i. This rule encourages opportunistic drafting. If employers think that a court will scale back the non-compete clause, they will draft it in greater terms.

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

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

   iv. Today, people will say “X amount of time [comma], or whatever amount of time is okay in this jurisdiction.”

Cl. Example case(s) of the basic premises of the legal and social systems

a. **Watts v. Watts** (193) The illegality associated with cohabitation does not bar claims in contract when the relationship breaks up.

   i. The strongest case for illegality is to view this as a contract for sex. The WI court says, “that’s not the purpose of this contract…the illegal part is such a small part of it, the contract is not to be voided.”

      1. IL wouldn’t enforce this contract.

   ii. In jurisdictions like WI, you need to paint a picture that there’s a lot of other stuff going on, because then you contract will be enforced. Otherwise, the court will say, “that’s against public policy; your contract isn’t enforceable.”
CII. Case Comparisons – Courts will find illegality, even if it is not pleaded, when a statute is broken. Restitution is probably not available in most cases, unless it is shown that one side didn’t participate in the illegal action (see exceptions). Courts tend not to interfere as much in employment type contracts and moral illegality contracts. The strongest case for illegality was the *Sinnar*: I’ll pay you to do something that you can’t do legally.

**PERFORMANCE OF THE CONTRACT**

**Determining the Scope and Content of Obligation**

CIII. The modern trend is toward informality in the formation of contracts.

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

b. The basic questions are whether one party may prove prior or contemporaneously agreed terms or conditions which alter or add to the writing and how a court determines the meaning of language in dispute which is admittedly part of the bargain.

i. Parol evidence rule: Provides that where there is a fully integrated contract, parol evidence will not be allowed into evidence to vary, add to, or contradict the terms of the writing.

1. Integration: the final and complete expression of their agreement. There is disagreement, however, on how intent is to be determined.

   a. Some say intent based on the “face of the instrument.” → objective test

   b. Many or most courts following “any relevant evidence” test: a writing is deemed to be an integration if the parties actually intended it to be an integration. The court will consider any relevant evidence to determine whether the parties actually intended the writing as the final and complete expression of their agreement. → individualized test, leads to narrower application of the parol evidence rule and leads to the admission of parol evidence.

   I. The validity of the contract and formation defects can always be shown by looking towards the evidence. Conditions precedent; interpretation – you can bring in evidence to figure out what the words mean, you can bring in evidence to show there was no consideration
c. Modern & UCC trend is that we can add consistent additional terms. Courts are more willing to add stuff than take stuff away. If it would have been in at the time of the writing, it shouldn’t be allowed to be added in later.

2. Parol evidence: If there is a writing that is an integration, evidence of an alleged earlier oral or written agreement that is within the scope of the writing, or evidence of an alleged contemporaneous oral agreement that is within the scope of the writing, constitutes “parol evidence.”

CIV. Integrated writings and the Parol Evidence Rule

a. Evidence of nonexistence or invalidity of agreement

i. Evidence establishing invalidity of the purported agreement, such as lack of consideration, fraud, mistake, duress or illegality, is readily admitted.

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

b. Effect of merger clause in commercial sales

i. Integration clauses are indicative of the intention of the parties to finalize their complete understanding in the written contract…that there was no other prior or contemporaneous agreement not included in the written contract.” Thus, the court should consider “the circumstances surround the making of the contract…to discover whether the integration clause in question does, in fact, express the genuine intention of the parties to make the written contract the complete and exclusive statement of their agreement.”

c. Effect of Merger Clause in Consumer Sales

i. The merger clause can be a potent weapon in the hands of the seller who uses it in a boiler plate.

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

d. Warranties, Disclaimers, and the Parol Evidence Rule

i. A warranty made may be very difficult to take away by a disclaimer. In the case of express warranties it is impossible: if words or conduct creating an express warranty and words or conduct “tending to negate or limit warranty” cannot be construed as consistent with each other, “negation or limitation is inoperative
to the extent that such construction is unreasonable.” UCC 2-316(1) To protect an implied warranty, the court should insist upon the same level of detail and conspicuousness in the manifestation of intent to integrate the writing as UCC 2-316(2)

ii. Affect on parol evidence rule: If a disclaimer is effective, the parol evidence rule is irrelevant. Parol evidence rule does not apply if the representation was fraudulent.

iii. In some cases, the oral representation may not be excluded if the buyer was surprised by an “unexpected and unbargained for” exclusion.

e. The parol evidence rule can be gotten-around, such as in cases like *Masterson*, where you can sue and enforce separate contracts. You need to show the separate contract is supported by consideration. If it’s separate, it’s not a problem, under the parol evidence rule.

f. Contract interpretation is always an exercise in looking at all sorts of evidence about what words and clauses mean. If we do it in the name of contract interpretation, we can look at a whole host of contract interpretation outside of the document.

CV. Hypothetical

a. You and I write a contract, and then after writing the contract, we have an oral agreement. Is there a parol evidence problem?

CVI. Example case(s)

a. *Mitchill v. Lath* (198) For an oral agreement received to vary the written contract at least three conditions must be present: (1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing.

   i. Dissent - Adopts the three condition rule PLUS the comparison rule; must compare the writing and the negotiations before determining whether they were in fact covered.

   ii. Categories of agreements: (1) complete agreement, (2) collateral agreement, (3) completely independent.

   iii. The majority decides that the icehouse is not part of the contract because the written contract includes so many things; it just looks complete.

b. *Masterson v. Sine* (199) When the parties to a written contract have agreed to it as an integration – a complete and final embodiment of the terms of an agreement – parol evidence cannot be used to add to or vary its terms. When only part of the agreement is integrated the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.
i. California cases have stated that whether there was an integration is to be determined solely from the face of the instrument…and that the question for the court is whether it appears to be a complete agreement.

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

iii. UCC, Section 2-202 – If the additional terms are such that the evidence would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact. (Everything else will be allowed.) The dissent argues that this adopted rule is overbroad.

1. *Notice the different elements in the Restatement versus the UCC.

c. Alaska Northern Development v. Alyeska Pipeline (202) Oral terms that are inconsistent with the written agreement are NOT valid. In the end, it comes down to the question of how integrated the contract is, with respect to that issue.

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

      1. The court defined inconsistency as used in § 2-202 as “the absence of reasonable harmony in terms of the language and respective obligations of the parties.”

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

d. Luther Williams v. Johnson (203) All circumstances need to be considered surrounding the acceptability of parol evidence, even if an integration clause exists. The case upholds the inconsistency rule via dicta.

   i. Kieff: In this case, there’s a clear, strong, full, complete integration clause that the court ignores, because the courts says, “but it looks to us like there was a judicial precedent: you were going to get your financing before you got the contract, and the
contract doesn’t say there are no conditions preceding.” Based on that, the court finds that there was a condition preceding.

ii. The case concerns evidence of a condition precedent. This almost goes to contract formation analysis, where parol evidence is allowed.

1. **Restatement, Section 211(3)** – Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

e. **Case Comparison** – *Mitchill* and *Masterson* discuss various conditions that must be meant in order to admit parol evidence. Meanwhile, *Alaska Northern Development* and *Luther* uphold the inconsistency rule, while also looking at circumstances of the case.

**Interpretation**

CVII. The interpretation Process

a. The standard criterion for determining the existence of requisite assent in a contract is not subjective, but objective. One is bound by the reasonable impression created in the mind of the other party.

b. While the avowed purpose of interpretation is the ascertainment of the contracting parties’ intention, it is not actual subjective intention which is sought, but expressed or apparent intent.

i. Primarily this involves consideration of the language used, be it oral or written, taken in the context in which it is found.

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

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

i. That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

ii. That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

e. **Restatement (2d) § 202:**
i. Words and other conduct are interpreted in the light of all the circumstances, and if the principle purpose of the parties is ascertainable it is given great weight.

ii. Writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

iii. Unless a different intention is manifested.
   1. Where language has a generally prevailing meaning, it is interpreted in accordance with that meaning
   2. Technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

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

v. Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other.

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

g. The significant Code provision relative to course of dealing and usage of trade is UCC 1-205.

h. When you analyze the access, consider the following factors: (1) the nature of the negotiation process leading up to the agreement (2) the type of evidence which the court admits as relevant; (3) the various “maxims,” if any, employed by the court to assist in ascertaining meaning; (4) the “test,” if any, employed by the court to determine whether P’s or D’s understanding of what the language meant is to be preferred and the role of the jury in the process.

i. Extrinsic Evidence
   i. Under traditional contract principles, extrinsic evidence is inadmissible to interpret, vary or add to the terms of an unambiguous integrated written instrument.
CVIII. Example case(s)

a. **Pacific Gas and Electric Co. v. G. W. Thomas Drayage & Rigging Co.** (204) Extrinsic evidence must be admitted to determine the parties’ intent, because if we interpret the contract one way, the phraseology says “to anybody,” but if we interpret the phrase the other way, it means: “I’ll indemnify anybody but you.” It’s completely outcome determinative.

b. **Kemp Fisheries, Inc. v. Castle and Cooke, Inc.** (206) Parol evidence is not admissible because the contract terms aren’t reasonably susceptible.
   
   i. **UCC, § 2-202(a)** – The terms which are not contradicted because of the finality of the writing may be explained or supplemented by course of dealing or usage of trade or by course of performance.

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

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

c. **Frigaliment Importing Co. v. B.N.S. International Sales Corp.** (209) There is a two step process for interpreting ambiguous terms: (1) the court must check for signs that might aid in interpretation; (2) the court must look to trade usage. P has the burden of coming up with reasonable fact for contract.
   
   i. Bringing up interpretation issues is a good way to get parol evidence heard by the court.

d. **Gray v. Zurich Insurance Co.** (210) In an adhesion contract, ambiguous terms must be treated in a way that a reasonable consumer would so expect.
   
   i. This seems to be a case where the court wants to find against the insurance company, in part because the insurance created the contract, and it’s possible for you to make out the case that the public had no way of knowing what the insurance company meant.

   → Similar to the substantive unconscionability analysis.

e. Case Comparison – **Pacific Gas** and **A. Kemp** use the same rule, the courts simply disagree on what how confusing a term must be to bring in parol evidence. **Frigaliment** offers steps on how to interpret, while **Gray** limits how an ambiguous term may be used in adhesion contracts.

CIX. Adhesion Contract

a. **Gray** is illustrative of a growing number of cases which have provided a measure of protection for the insurance consumer by not interpreting the
policy according to strict letter but in light of overall “reasonable expectations.”

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

### § 5.2 Allocation of Risk: Conditions and Warranties

**CX. Express Conditions**

a. An express condition is an express statement in the contract providing either (1) that a party to the contract does not come under a duty to perform unless some state of events occurs or fails to occur; or (2) that if some state of events occurs or fails to occur, the obligation of a party to perform one or more of his duties under the contract is suspended or terminated.

b. An express condition is a provision whose fulfillment creates or extinguishes a duty to perform on the part of the promisor under a contract.

c. **Nature and Effect:** conditions precedent must be satisfied before a contractual duty of this type comes into existence; the effect of the occurrence of a condition subsequent is to extinguish or discharge a duty.

d. **Conditions subsequent** (rare in contracts)

**CXI. Example case(s)**

a. **Dove v. Rose Acre Farms, Inc.** (213) P cannot recover because he failed to meet the condition for work which he agreed upon when signing the contract. Since the requirement was worded as a condition, rather than a liquidated damages clause, the court doesn’t ask whether the arrangement is fair; it is a condition of the requirement and that’s all that matters.

b. **Wal-Noon Corp. v. Hill** (214) An implied condition precedent can be outlined in the language of a contract, particularly in duty to repair responsibilities of a lessor/lessee relationship.

   i. Unexpressed provisions may be inferred from the writing of the contract.

   ii. Keep in mind least cost avoiders and information asymmetries when implying conditions.

   iii. The court also rejects providing a quasi contract because there is already a contract in play. Q-C is not filled in when the original contract says “there is no contract.”

c. Case comparisons: In both cases, you see the court saying that, if the contractors agree on one thing, and you don’t come through with that
entire thing we agreed to, (the text of the agreement, that’s what matters), you get nothing.

d. **Jacob & Youngs v. Kent** (216) The court uses the weighing method to decide if the condition not fulfilled can be mitigated to avoid total forfeiture.

   i. The majority allows mitigation
   
   ii. The dissent claims that the payor ought not be compelled to pay unless that condition upon which they agreed be performed.
   
   iii. The duty to pay is conditional to performance. The default is that one party’s promise to perform is conditional on the other party’s. You say “we have a contract, and I did my end. Now, the other side has to do his end.” Performance is a condition of performance.
   
   iv. The potential for opportunism exists on both sides – surely, perfect performance can’t be the rule, or one of the sides will comb through everything the other side has done in his course of performance and find something off, no matter how small, and say that condition is precedent on the sides performance, so he gets a complete walk away. *Jacobs and Young* goes in between.

e. **In re Carter** (217) The language in the contract is used to determine whether a provision is conditioned or warranted.

   i. Condition – Creates or eliminates obligations where if the parties move beyond the breach of such obligations, they cannot argue about the failure of the condition later during the contract life. WAIVER – one can choose whether to go ahead with the contract or not.
   
   ii. Warranty – A duty that, if breached, can break the entire contract. One can sue, but there is a risk of collecting.

f. Case Comparison – *Dove* defines an express condition, while *Wal-Noon* examines an implied condition. *Jacob & Youngs* looks at how far a condition must be met to be satisfied, while *Carter* investigates the differences between conditions and warranties and their different remedies.

CXII. Excuse of Conditions

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

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

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

CXIII. Example case(s)

a. Clark v. West – Waiver is a way to get out of a condition.
   i. Definition – The intentional relinquishment of a known right.
   ii. To constitute a waiver, there must be more than mere silence

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

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

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

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

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

e. Historical Development Constructive Conditions of Exchange: In the old days, in the absence of an agreement that the owner shall tender before the price was due, it was thought that the vendee “relied upon his remedy, and did not intend to make the performance a condition precedent.” The legal result was that the exchange of promises, although mutual, was presumed to be independent rather than dependent.

CXV. Independent and dependent promises

a. The parties exchange promises for promises, not the performance of promises for the performance of promises. A failure to perform an independent promise does not excuse non-performance on the part of the adversary party, but each is required to perform his promise and, if one does not perform, he is liable to the adversary party for such nonperformance.
b. Promises are mutually dependent if the parties intend performance by one to be conditioned upon performance by the other. Mutually dependent promises may be:
   i. Precedent
   ii. Subsequent
   iii. Concurrent

CXVI. Presumption of Dependency
   a. Dependency “offers both parties maximum security against disappointment of their expectations of a subsequent exchange of performances by allowing each party to defer his own performance until he has been assured that the other will perform.”
   b. Dependency “avoids placing on either party the burden of financing the other before the latter has performed.

CXVII. Example case(s)
   a. Aetna Casualty v. Murphy – Condition can be nullified if deemed immaterial.
      i. Restatement, Section 229 – To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange
   b. Kingston v. Preston (223) When parties’ intent is mutual performance of a condition, the condition is described as condition precedent and one party does not have to perform until the other is ready with his promise.
      i. Prior to this case, if you were upset with the other side’s performance, you had to sue. After this case, you have the right to not go forward with the contract.
   c. Goodison v. Nunn – Duty of performance is conditioned upon your ability to perform.
      i. One does not need to fully perform; one only needs to show that one could have fully performed; if you can’t give that proof, it is hard to argue that the other side has to perform. What’s important is that the court decided that P & D’s promises are dependent and subsequently asked whether P performed his side.
   d. Palmer v. Fox – Courts will construe covenants to be dependent, unless a contrary intention clearly appears.
      i. Restatement, Section 234 – Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extend due simultaneously, unless the language or the circumstances indicate the contrary. Where the performance of only one party under such an exchange requires a
period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

ii. Even though the promises weren’t expressly dependant, the court implies that the promises are dependent, and henceforth treats them as dependent (Kieff calls this a “slight of hand.”) Once they’re dependent, that changes the landscape of the contract.

CXVIII. Leases
a. Restatement (2d) of Property § 7.1: The modern view in both residential and commercial leases is that the promise to pay rent is dependent upon such lessor covenants as repair, habitability or assignability and that the lessee may withhold rent or terminate the lease if “deprived of a significant inducement to the making of the lease.”

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

CXX. Example case(s)
   a. O.W. Grum Roofing and Construction Co. v. Cope (227) There is no substantial performance when one completely has to replace the disputed goods.
      i. When a provision is very important, it is treated as a condition. When a provision is minor, it is treated as substantial performance.
      ii. In J & Y the result was to go for change in value. Here, the result is to go for cost of performance: the cost of getting a new roof done with uniform tiles. The court asks what it will take to perform, and they make sure that P will have money to do so.

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

CXXII. Trivial Breach: Trivial breach is not enough to give lessor right to terminate, but certain words would have been sufficient to make the trivial breach a condition of the contract.

CXXIII. Substantial Performance
a. Some places say there is a perfect tender rule. The alternative is substantial performance rule. Or, you can have unconditional contraction to pay. One problem with the perfect tender rule is that there might be forfeiture.

b. The test is whether the performance meets the essential purpose of the contract. Among the factors to be considered are the extent of the contracted-for benefits that the innocent party has received, the extent to which damages will be an adequate compensation for the breach, the extent to which a forfeiture will occur if the doctrine is not applied, and the extent to which the breach was wrongful or in bad faith.

   i. Construction contracts: The doctrine of substantial performance has been applied primarily in cases involving construction contracts, where it would be unjust to allow an owner to retain the value of a building free of charge just because the contractor made some small deviation from the agreed specification.

CXXIV. Divisible Contracts

a. A contract is said to be divisible if it is possible to apportion the party’s performances into matching or corresponding pairs that the parties treat as equivalents.

   i. If a contract is divisible, 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.

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

CXXV. Willful breach

a. At one time, the majority view was that if a breach was willful, the breaching party could not recover restitution damages for the benefit conferred. Modern courts are increasingly inclined to allow even a willfully breaching P to recover on this theory, in order to prevent unjust enrichment of D.

CXXVI. Example case(s)

a. Lowy v. United Pacific Insurance Co. (229) Lowy v. United Pacific Insurance – When a contract provision is very important, payment for the part performance can be made if the contract is divisible.

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

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

iii. Kieff contemplates that, by allowing us to make the divisibility argument, we’ll always make it, and then we’ll go to the substitutability argument. In the end, this means that we never really have to do what we’re contracted to do.

b. Britton v. Turner (231) Laborers are allowed to recover for services rendered under substantial performance if they breach their employment contract before its terms are completed.

   i. When there is no contract remedy and the outcome seems unfair, apply quasi-contract analysis.

   ii. *Quasi-contract analysis applies when the parties had no opportunity to bargain. However, courts will use it regardless when the issues concern survival.

c. Maxton Builders, Inc. v. Lo Galbo (232) The person who breaches the contract can’t get restitution. Reasons: (1) This is a willful decision by D to walk away from the contract. Willfulness is an important part of the analysis; (2) This is the way land contracts are done.

CXXVII. Representations and Warranties of Quality

a. Modern corporate contracts are carefully structured around (1) conditions precedent to each side’s performance and (2) the representations and warranties of each side.

   i. By warranting that an existing fact is true or promising that a future event will happen, a party can expose itself to breach of contract damages if the warranty fails – and thus can better assure the other side of its performance.

b. Express warranty

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

c. Implied warranties

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

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

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

d. Limitations of Warranties and Remedies: Contracts of Adhesion?

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

e. *What can you do if someone breaches a representation?* You could argue that you don’t have a duty to perform because you’re excused because of a failure of condition – if you’ve already performed, you’ve waived that condition. You can try to argue no formation, fraudulent inducement. Another way to think of that is mistake. The best time this works is when the other side knows you’re mistaken. Then, you can also try unilateral mistake – you’ve got a great argument when you can’t find fault because the reason you’re mistaken is because I caused you to be mistaken. All mistake will do is get you out of your obligation – you don’t get to sue for breach.

CXXVIII. Example Case(s)

a. **Henningsen v. Bloomfield Motors** (235) Disclaimer in car warranty against personal injury is held unconscionable or at least not enforceable. (The car contract is a clear adhesion contract.)

i. Illegality and unconscionability arguments make the court decide that the adhesion contract clause is not valid, but is this economically correct?

ii. **UCC, § 2-719 and 2-318** – Consequential damages include damages resulting from a seller’s breach “injury to person and property proximately resulting from any breach of warranty. Agreements excluding liability for personal injuries are prima facie unconscionable.

b. **Murray v. Holiday Rambler, Inc.** (236) The court says that where the warranty is failing in its essential purpose, it is no good – this is when you go back to alternative warranties.

**Breach of Contract and Permissible Remedial Responses**
6.1 Right to Suspend Performance or Cancel Upon Prospective Inability or Breach

CXXIX. Relevant factors for distinguishing Material from Minor Breach
   a. The extent to which the breaching party has already performed.
   b. Whether the breach was willful, negligent, or the result of purely innocent behavior.
   c. The extent of uncertainty that the breaching party will perform the remainder of the contract
      i. When the circumstances or the promisor’s words or conduct create doubt whether the performance will be forthcoming as agreed but do not amount to a breach, the promise has a more limited remedy. In the proper circumstances, the promise may suspend performance and demand adequate assurance from the promisor. If assurance of due performance is not forthcoming, the promise may treat it as a repudiation and resort to the usual affirmative and defensive remedies. Even if the promisor has breached, the promise may decide just to suspend performance, reserving any claims for damages, and seek to resolve the dispute by agreement. If so, this action is justified and increases the chance that the dispute can be resolved and the bargain preserved.
   d. The extent to which, despite the breach, the non-breaching party will obtain (or has obtained) the substantial benefit bargained for.
   e. The extent to which the non-breaching party can be adequately compensated.
   f. The degree of hardship.
   g. The contract itself may expressly or impliedly make the time, manner, or other detail of performance a matter of bargained-for importance as to one party or the other. If so, deviations from the agreed performance that otherwise would be regarded as only minor breaches will instead be considered material.
   a. “Time is of the essence” provision: Most courts hold that where the contract contains a provision that “time is of the essence,” even a slight delay in performance will constitute a material breach.
      i. Liberal view: To avoid forfeitures, some courts hold that if the overall circumstances indicate that the date set for performance was not of great importance to the parties, a minor delay will not constitute a material breach even though the contract contains a provision that time is of the essence.

CXXX. Repudiation
   a. A repudiation consists of words or conduct that a reasonable person would interpret as an expression of refusal to render any further performance.
An act that would otherwise constitute only a minor breach will be treated as a material breach if accompanied by a repudiation.

i. Repudiation need not be by words. A voluntary act that disables the promisor from performing will also constitute a repudiation.

ii. Insistence on terms that are not contained in a contract is anticipatory breach. Similarly there is an anticipatory breach if a party to a contract demands a performance to which he has no right under the contract, and states that unless his demand is complied with he will not render his promised performance.

iii. Requirement of Unequivocal Repudiation: Only a positive, unconditional refusal to perform as promised in the contract will constitute an anticipatory repudiation. A mere expression by the promisor of “doubt” that he will be able to perform is not sufficient to constitute a repudiation. Such expressions may, however, constitute a prospective inability to perform, permitting the other party to suspend counter performance.

iv. Retraction: The general rule is that a repudiating party may retract his repudiation at any time prior to the date set for his performance, unless the innocent party has either accepted the repudiation or has changed her position in detrimental reliance thereon.

b. Declaratory Judgment – you ask the court to declare the rights and entitlements of the parties. In order to do so, we must find that there really is a controversy and that there’s a reasonable apprehension that there will be a suit. This allows the party to (a) pick the time of the law suit (b) pick the place of the law suit.

CXXXI. Effect of Breach

a. Material Breach: A material breach has two effects. (1) gives rise to an immediate cause of action for breach of the entire contract. (2) Excuses further performance by the innocent party.

b. Minor Breach: a minor breach of contract also gives rise to an immediate cause of action for whatever damages were caused by the breach. However, a minor breach does not give rise to a cause of action on the entire contract. A minor breach may suspend, but it does not excuse the other party’s duty of further performance. Therefore, if a breach is minor, the breaching party is still entitled to enforce the contract, subject to an offset for whatever damages resulted from the minor breach.

CXXXII. Response to breach

a. Material breach: A may (1) sue B for damages resulting from the breach but let the contract continue (2) terminate the contract and sue B for breach of the whole contract (“total breach”)
b. Minor breach: If B’s breach is not material, A can sue B for damages resulting from the breach. However, A cannot terminate the contract. In fact, if A terminates the contract, A will be in total breach, and B can sue A. Therefore, a decision by A as to whether a breach by B is material or minor is fraught with danger, because if A guesses wrongly that the breach is material and terminates the contract, A will end up owing substantial damages to B.

CXXXIII. Example case(s)

a. **Hochster v. De La Tour** (239) An announcement that services are not needed is an immediate trigger for the ability of a promise to sue for damages.
   
   i. Efficiency (holder’s) Rule – If one party has to sit around wasting resources waiting for an actual breach, the party may be able to sue for repudiation right away. One must prove that there is opportunity cost!
   

b. **Taylor v. Johnston** (240) In order to anticipatorily repudiate, the repudiating conduct must make the contract’s performance IMPOSSIBLE.
   
   i. If the repudiation waxes and wanes, you must sue at a time when repudiation is on the table. You must also make sure that you are not the one creating the impossibility (you breeding the horses and impregnating them)
   
   ii. Keiff: P used his horses efficiently and mitigated the circumstances by finding alternative stud service, but, at the same time, he frustrated his contract with D.

c. **AMF v. McDonalds** (243) When insecurity of adequate performance arises, the insecure party can demand (in writing, which apparently can be parol evidence, i.e., memos) assurance and repudiate if adequate assurance is not given.
   
   i. UCC, Section 2-609 – (1) A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return. (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards. (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance
of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

1. UCC § 2-609 gives us an avenue to pursue that would have been helpful in *Taylor*. Provides a means to ensure assurance. (If the answer you get is inadequate, then you have a right to go elsewhere to get out.)

ii. Kieff: McDonald’s is doing a good job working the code and skipping parts that doesn’t work with McDonald’s cause.

d. *Plotnick v. Pennsylvania Smelting and Mining* (244) Circumstances of a case determine whether breach was material enough to warrant cancellation. There is an issue of remedies here: if repudiation is not allowed, does buyer get to keep goods because seller cancelled? The constructive condition is based on the performance of the other party. The court applies a 2-prong test: (1) reasonable apprehension (2) you can tolerate the breach. The code is a 1-hurdle test.

i. There is some level of degree that is small enough that repudiation won’t be available. Small variations can give no rise to an action for a breach. Large variations, material breaches, may excuse because there is no substantial performance from the other side; they may give a right to sue right away.

ii. Breach by failure to pay – UCC, § 2-612: The seller may cancel where the buyer fails to make a payment due on or before delivery if the breach is of the whole contract.

iii. If the breach doesn’t justify cancellation, instead of walking away, I write a letter requesting adequate assurance (UCC § 2-609) and then if I don’t get a reply, I can sue or walk away.

1. Right to suspend deals with a contract that has not yet been completed.

§ 5.3 Changed Circumstances: Impracticality

CXXXIV. Questions to ask yourself:

a. What was the nature of the risk event and what was its impact on the contractual relationship? What the nature of “event” in relation to the contract?

b. Was the party seeking relief at “fault” in that it caused the vent or failed to take reasonable steps either to avoid it or to minimize the impact?

c. If the party seeking relief was not at “fault,” did the agreement allocate the risk of the vent to one or the other or both parties?

d. If there was no agreement, express or implied, allocating the risk, how is the court to fill the “gap” in risk allocation? Options:

i. Court refuses to impose any risk allocation terms on the parties.
ii. Restatement (2d) § 261: Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

e. What is the nature and scope of the relief when the conditions of § 261 or UCC 2-615(a) are satisfied?

f. If one side offers to modify the contract, would the modification be enforceable? If the advantaged party refused to negotiate over a proposed modification, would that ever be bad faith?

g. General Rule: Performance of a contract will normally be excused if the performance has been made “impossible” – more accurately, impracticable – by occurrence of an event whose nonoccurrence was a basic assumption on which the contract was made, unless the adversely affected party has explicitly or implicitly assumed the risk that the contingency might occur.

h. The term “impossibility,” for the purposes of contract law, includes impracticability, and should be so understood. The impracticability must involve the occurrence of an event whose nonoccurrence was a basic assumption on which the contract was made, and the adversely affected party must not have assumed the risk of that event occurring.

CXXXV. Example case(s)

a. **Mineral Park Land Co. v. Howard** (248) Impracticability does not mean impossibility, but availability only at great costs.

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

   ii. Impracticability goes to the difficulty of delivery or performance. Mistake goes to the actual existence of the contracted good or service.

b. **US v. Wegematic** (250) Impracticability must be viewed in light as to all costs and recuperation by the seller. Failure to deliver on time can result in breach.

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

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

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

c. Case Comparison – Mineral Park and Wegematic both work to show how impracticability analysis will be applied by the courts. Impracticability depends on the costs to one of the parties and the assumptions of risks. In Mineral Park, there may be an argument over who is a better risk bearer, because P should know how much gravel he can provide, but D should know how much gravel he’d need, and also because it’s a requirement contract, so it’s your requirement that is driving the contract, not how much gravel P has. BUT, the court didn’t do a risk bearer analysis in Mineral Park.

CXXXVI. Tests of contracts:

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

b. The “Superior Risk Bearer” Test: Posner says that the key question is “who should bear the loss resulting from an event that has rendered performance uneconomical?” The answer to that is the “most efficient bearer of the particular risk in the particular circumstances.”

i. Risk appraisal costs are incurred in acquiring knowledge of the probability that the event will occur and the magnitude of the loss if it does occur.

ii. Transaction costs are the “costs involved in eliminating or minimizing the risk through pooling it with other uncertain events…either through self-insurance or through the purchase of an insurance policy.

CXXXVII. Supervening Impracticability

CXXXVIII. Death or incapacity of an essential person

a. Restatement, § 262: If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.
b. Basic Assumption (Common Law) – The basic assumption question is answered by determining whether the particular person is necessary for the performance of a duty. This may be determined by the agreement or, if the agreement is silent, and assessment of whether the performance was a personal matter requiring personal experience, ability, skill, and judgment.

c. Basic Assumption – UCC: Another way to determine who is necessary is to ask whether the person who dies or was incapacitated could have delegated his or her duty to a third party without the other party’s consent. The question is whether the other party has a substantial interest in having the contract performed by the particular person.

   i. The question remains whether the performance to be rendered was “so personal in nature, calling for a peculiar skill or special exercise of discretion, as to make it non-delegable.” Seitz, 510 A.2d 319

d. Supply Failure – UCC, Section 2-615(a): If the parties specify a particular source of supply in the contract and that source fails, the seller will be excused if (1) both parties assumed that the source was exclusive, (2) the seller employed all due measures to assure that the source would perform, (3) the seller turned over to the buyer any rights against the supplier corresponding to the seller’s claim of excuse.

e. Changes in Market Price or Cost of Performance

   i. In cases where the market price at the time for performance is either dramatically higher or lower than the contract price but the cost of performance is relatively stable, the courts have refused relief.

   ii. Similarly, no excuse is reached when promisor’s cost of performance dramatically exceeds the contract price due to supervening events beyond its control and without its fault or negligence.

   iii. Commercial impracticality requires an “especially severe and unreasonable loss.”

f. Frustration of purpose

   i. Even if performance of a contract is not made impracticable by changed circumstances, performance may be excused under the doctrine of frustration where 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.

   ii. Elements: The defense of frustration has rarely been allowed. It requires:

       1. An event that frustrates the purpose of one of the parties and the occurrence of this event must be the basis on which both parties entered into the contract;
2. The frustration must be total or nearly total;

3. The party who asserts the defense must not, expressly or impliedly, have assumed the risk of this occurrence nor be guilty of contributory fault.

   a. In addition, D will be disallowed if the court determines that community standards would allocate the risk of the event to the party whose purpose has been frustrated.

iii. Restitution after discharge for impracticability or frustration

   1. When a contract is discharged for impracticability or frustration the executory duties are at an end. Yet, one or both parties may have partly performed. Compensation for part performance is available in the restitutionary action of quasi-contract.

CXXXIX. Example case(s)

a. **Taylor v. Caldwell** (251) Supervening destruction or nonexistence of subject matter: A promisor’s duty to perform is excused if the subject matter of the contract or the specified means for performance is destroyed or becomes nonexistent after the contract is entered into, without fault of the promisor.

   i. These clauses could have easily been written into the contract via express or implied warranties regarding the existence of the Music Hall.

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

   iii. Kieff suggests that there should have been an implied warranty. In that case, it would be a promise that the owner would do things to decrease the risks that the fire would happen and/or the damage from fire would be as bad. Consider how you’d do that analysis. Still, though, the impossibility case is stronger.

b. **Canadian Industrial Alcohol v. Dunbar Molasses** (254) Where seller is a middleman: Ordinarily, failure of a middleman’s source of supply will not be a defense because ordinarily in a contract with a middleman no particular source of supply is contemplated by both parties. However, failure of a middleman’s source of supply may excuse the seller if: (1) the spruce of supply is shown to have been contemplated or assumed by the parties at the time of contracting the exclusive source of supply; and (2) the seller has taken all due measures to assure himself that the supply will not fail. Therefore, a refusal by a middleman’s exclusive source to supply
goods is not an excuse for a middleman who could have assured himself of supply by entering into a contract with the exclusive source, but failed to do so.

i. Market size determines why there is no implied warranty in this case.

ii. Depending on whether you imply a warranty or a condition decides who wins. This is consistent with Corodezo’s willingness to imply duties of good faith in *Lady Duff* and *Alleghany*. (Here, Cordozo implies warranty.)

c. **Dills v. Town of Enfield** (256) Where parties have allocated risk by contract, courts won’t intervene when there is no loss of a basic assumption of the contract and the risk was foreseeable.

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

ii. This is a case where the court doesn’t care who should bear the risk, what matters is that P agreed to bear the risk beforehand.

d. **Kaiser-Francis Oil Co. v. Producer’s Gas Co.** (257) Where there is a force majeure clause, there is no excuse from duty unless there is more than a decrease in market price. The purpose of take-or-pay contracts is that there has been a contracted allocation of risk between the parties. The court implies take or pay because the partial use clause defeats the purpose of a take or pay contract.

i. Courts will not find impracticability because of a mere market fluctuation.

ii. There’s a language based argument involved, but the court find that the take-pay clause trumped because it would have no meaning if any change in the clause was an excuse.

e. Case Comparison – Taylor and Canadian outline how a court will react to impracticability claims regarding market sizes. Further, the courts consider mitigation possibilities, which go to market characteristics. Enfield demonstrates that courts will not rewrite contracts even when there is impracticability if the parties have contracted for the risk. Finally, Kaiser illustrates that partial market failures DO NOT ever constitute impracticability.

f. **Pardine v. Jane** (259) When a party by his own contract creates duty or charge upon himself, he is bound to make it good, if he may,
notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

i. You can get around this. Step 1: write into the contract how to deal with stuff when bad things happen; step 2: write into the contract who will be the least cost provider.

g. **Krell v. Henry** (260) Frustration: The English court held that performance of a contract for licensing rooms from which to view a coronation procession was excused by the unexpected cancellation of the procession. There clearly was no impracticability – the rooms could still be licensed and paid for – but the whole value of the contract had been destroyed by the cancellation of the coronation.

i. Look at least cost avoider and bearer. How can you deal with the loss when it happens and how can you avoid the risk before it happens?

h. **Washington State Hop Producers, Inc. v. Goschie Farms, Inc.** (261) Unforeseeability is not necessary to hold a contract is not excusable because it lost its purpose.

i. Best Risk Avoider vs. Best Risk Bearer

ii. Courts are uncomfortable in allowing loss of value into frustration of purpose outcomes.

iii. The more you can make the case look like a destruction of subject matter contract case the better chance you can get out of it. Frustration of purpose is a tough argument to win on.

### 5.4 The Duty of Good Faith

CXL. “Fair dealing” means more than just honesty in fact.

a. UCC comment A: Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; “bad faith” violates community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

i. Comment d: subterfuges and evasions violate the obligations of good faith in performance even though the actor believes his conduct to be justified. Further, bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.

ii. Examples of “bad faith”: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance.

CXLI. Example case(s)
a. **Centronics Corporation v. Genicom Corporation** (264) It looks like the parties have considered non-dispersal; therefore, a decision to not disperse does not need to be scrutinized under good faith violation. You must inquire about good faith on the terms of the contract. The requirement that the act in good faith doesn’t go so far as to require me to change our contract. There is a limit of good faith.

   i. Good faith can turn into a consideration problem: if one side isn’t being held to anything (“on the hook”), then there’s no consideration. This is a good argument for a no consideration treatment, in which case there’s no contract at all.

   ii. Two tests: *Summers* and *Burden*.

CXLII. Reserved Discretion

a. There may be a question of whether there is a contract at all when, because of the reserved discretion, the apparent promise is found to be illusory, thus there is no consideration.

   i. Condition of personal satisfaction: when a promisor conditions a duty to perform upon being satisfied with the other party’s performance or “with respect to something else,” the expression of dissatisfaction must be in good faith.

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

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

CXLIII. Lender liability and the duty to act in good faith

a. Assuming that a contract exists between the parties and the contract does not clearly give the lender power to take action at any time for any reason, recurring questions include the standard of good faith to be applied and whether bad faith has been proved in the particular case.

b. At issue is the scope of the lender’s duty to act in good faith. Should the duty be subjective or objective? If objective, should it incorporate community standards of fair dealing, including concerns about racial discrimination or should it be limited to an interpretation of the contract terms, allowing the market to resolve other aspects of the dispute?

c. Different ways to interpret “good faith”: The more absolute the discretion of the lender, the stronger the bond of the borrower but the greater the incentive of the lender to behave opportunistically. Conversely, the more expansive the interpretation of the duty of good faith to control
opportunistic behavior by the lender, the weaker is the bond of the borrower and the less able the borrower is to use the bond to obtain more favorable credit terms.

d. UCC § 2-306(1) Output requirements and Exclusive Dealings: (1) A term which measures the quantity of the output or requirements as may occur in good faith except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

CXLIV. Example case(s)
a. **Neumiller Farms, Inc. v. Cornett** (267) Rejection of goods based on a claim of dissatisfaction, which is not made in good faith, is ineffectual and constitutes a breach of contract for which damages are recoverable.
   i. You can view this as a reserved digression case, where rejection has to be in good faith, or you can view it under the code.

b. **Reid v. Key Bank of Southern Maine, Inc.** (268) The privilege of acceleration is not valid. Because the documents establishing the loan defeat neither the legal obligation nor the justifiable expectation of the parties that the contract will be performed in good faith.
   i. The court reaches a different decision here than in Genicom because there is a difference in bargaining power between the parties.
   ii. Whenever you have a list, including those things is an exclusion of what you haven’t included. D says that this is a non-exclusive list. When you’re listing stuff, include “this list is intended to be representative only…,” or you might run up against an argument that in representing these, you purposely excluded the other things.

c. **Feld v. Henry S. Levy & Sons, Inc** (269) how do you test good faith? The court says economic efficiency is not the test, but economic peril would warrant. Short of the appropriate cancellation, D was expected to continue to perform in good faith and could cease production of the bread crumbs a single facet of its operation, only in good faith…good faith required continued production until cancellation, even if there will be no profit.

CXLV. Modification

a. Courts may say that, in order to show economic duress, you must show that not only was supplier going to cut off supply, but you wouldn’t be able to get the item through a different supplier.

b. Duty to modify: Most courts say that neither contract law nor the UCC imposes a duty on the parties to negotiate in response to changed circumstances.
c. Justifications for the freedom from contractual duty to modify: (1) forced altruism restricts liberty and accomplishes a redistribution of resources; (2) Contracts are not written in egalitarian, collectivist spirit; (3) Good faith doesn’t equal commercial good samaritanism; (4) lack of certainty impairs predictability.

d. Remedies: (1) disadvantaged party must propose a modification that would be enforceable if accepted by the advantaged party; (2) it must be clear that the disadvantaged party did not assume the risk of the unanticipated event by agreement, or under the test stated in UCC § 2-625(a), or otherwise. (Imposing the duty here is consistent with emerging notions of good faith performance and ALCOA’s second peg in the “new” spirit, loss avoidance.); (3) the conclusion is bolstered by what might be the imperatives of an emerging theory of relational contract law. Some argue that there are relational norms that the contract should be preserved and conflict harmonized by adjustments.

CXLVI. Mutual Termination of Contractual Relations: Discharge

a. In discharge, the duty to pay money is usually at stake, such as in a creditor/debtor relationship.
   i. Consideration for an accord and satisfaction is normally found when a payment is tendered and accepted to discharge an unliquidated debt or a disputed claim.
   ii. Accord and satisfaction: There are two kinds of accords and satisfactions. (1) Involves an agreement (the accord – also called an executory accord) to settle a claim followed by its performance discharging the claim (the satisfaction). (2) Involves the immediate discharge of a claim by a new contract. This kind of accord and satisfaction is called a substituted contract.

b. In some states, there are statutes which to some extent dispense with the necessity of consideration in the making of binding contracts.

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

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

e. When the discharge is by agreement, one must usually be prepared to meet the demands of consideration.

f. When there is accord and satisfaction, it is usually the liquidation of an unliquidated claim or the existence of a good faith dispute that provides consideration.

g. At will contract: Today approximately 30 states have held that the presumption of at-will employment can be contractually altered through statements made in employee handbooks or manuals. Other contract
theories, such as promissory or equitable estoppel, independent consideration, and implied covenant of good faith and fair dealing, have also been found to rebut the at-will presumption and thus impair the employer’s otherwise unfettered right to discharge.

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

i. 2-209 says “you don’t need find consideration. You need to find (1) consistent with reasonable standard of fair dealing; (2) consistent with desire to compensate for commercial exigencies.” You have to satisfy both, not one and you don’t comply, so it’s not enforceable.

CXLVII. Example case(s)

a. **Roth Steel Products v. Sharon Steel Corp.** (273) Sharon is allowed to modify the contract under adverse market conditions, but NOT when it refused to perform period. There is a duty of good faith regarding modifications to a contract.

i. Holding: Sharon’s attempt to modify the November, 1972 contract, in order to compensate for increased costs which made performance come to involve a loss, is ineffective because Sharon did not act in a manner consistent with Article Two’s requirement of honesty in fact when it refused to perform its remaining obligations under the contract at 1972 prices.

ii. The trier of fact must determine whether the means used to obtain the modification are an impermissible attempt to obtain a modification by extortion or overreaching.

iii. Two common law options: (1) Say “this is a contract to modify and it is supported by consideration (in that they’re both giving up opportunity).” (2) there’s a fundamental change in some basic assumption (Angle v. Murray).

b. **AFC Interiors v. DiCello** (274) UCC prevents “chisler” action in aiding creditor.

i. This clause is being modified under the current UCC.

ii. Remember that any UCC rule or general contract law rule CAN be contracted around if it was the parties’ clear intent.

iii. This is the MINORITY view. The dissenting opinion (in notes, look at it!) is the MAJORITY. The majority view is to not let this apply so broadly; in persuasive cases, UCC supercedes common law doctrine.
iv. Kieff: if fine print can really make a big difference in deals and close out all disputes between parties, it’s gonna make it hard to cash checks.

c. **Seubert v. McKesson Corporation** – Employee’s form contract, plus other evidence, precludes termination in bad faith.

d. Case Comparison – When modifying a contract, there is a duty of good faith. When discharging an agreement, there is a duty of good faith. Finally, in certain circumstances (when there is evidence that there was reliance on the continuation brought about by the promisor), in terminating an at-will contract there is a duty of good faith.

**Third Party Interests**

7.1 Assignment and Delegation

CXLVIII. In general

a. Allows someone who’s not in a position to use (w.c.) rights may transfer those rights to someone else who’s more able to enforce.

b. New view: we want people “sticking their nose in” because we want transferability.

CXLIX. UCC assigned rights.

a. For the sale of goods, the assignment of contractual rights are presumptively “unless otherwise agreed” or unless “the assignment would materially change the duty of the other party or increase materially the burden or risk imposed on him by his contract.” UCC 2-210

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

CL. Assignment of rights.

a. Irrevocable Gratuitous Assignment

i. Restatement 2d § 332(1): (1) Unless a contrary intention is manifested, a gratuitous assignment is irrevocable if (a) the assignment is in a writing either signed or under seal that is delivered by the assignor; or (b) the assignment is accompanied by delivery of a writing of a type customarily accepted as a symbol or as evidence of the right assigned.” In both parts, one expressly and the other impliedly, the pattern adopted is consistent with the requirement respecting gifts of chattels that a symbolic or constructive “delivery” is required.

ii. Restatement 2d § 321: “(1) Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an
existing right. (2) Except as otherwise provided by statute and as stated in Subsection (1), a purported assignment of a right expected to arise under a contract not in existence operates only as a promise to assign the right when it arises and as a power to enforce it.”

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

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

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

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

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

vii. UCC 9-318: “Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 9-206 the rights of an assignee are subject to (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.”
b. Assignment process versus negotiation process
   i. In the assignment process the assignor transfers a contract right to
      the assignee. The assignor’s right of performance from the obligor
      is thereby extinguished, in whole or in part depending upon
      whether it is a total or partial assignment, and the assignee acquires
      a right to such performance. Restatement 2d § 317(1)
   ii. The holder of the negotiable instrument may obtain in the
       negotiation process a right superior to that of the one from whom
       he or she receives the instrument. The extraordinary legal effect
       given to a negotiable instrument derives from the law merchant
       and is carefully delineated by statute.

CLI. Example case(s)
   a. Fitzroy v. Cave (278) Court doesn’t care about motive; assignments are
      enforceable. You have to make the argument factually show that there is a
      change, but the modern view seems to be that even though we really prefer
      assignment, if the material change is on the burden or the risk, it might be
      harder to assign.
   b. Allhusen v. Caristo Construction Corp (279) Where clear language is
      used, and the plainest words have been chosen, parties may limit the
      freedom of alienation of rights and prohibit the assignment.
      i. Courts will look at the detail of the language, and if it looks like
         court may argue “this is nothing more than an assignment not to
         assign,” courts will look at it as a breach; but, if it also says you
         can’t assign and if you do, assignment is void, courts will say
         “there’s no assignment, and that’s breach.”
   c. Continental Purchasing Co. v. Van Raalte Co., Inc (280) The court
      found that the employer had notice of the assignment, acknowledged its
      validity, and relied on it. Thus, the employer paid the employee her wages
      knowing that the money belonged to the assignee.

CLII. Delegation of Duties
   a. Restatement 2d § 318: (1) Obligor can delegate performance as long as it
      doesn’t violate p.p. or his promise. (2) promised performance can only be
      to extent that oblige has substantial interest. (3) Unless oblige agrees
      otherwise, obligor still has duty or liability of the delegating obligor.
   b. UCC 2-210(1): “A party may perform his duty through a delegate unless
      otherwise agreed or unless the other party has a substantial interest in
      having his original promisor perform or control the acts required by the
      contract. No delegation of performance relieves the party delegating of
      any duty to perform or any liability for breach.”

CLIII. Example case(s)
a. **Sally Beauty co. v. Nexxus Products Co., Inc** (281) In affirming, the court relied upon different grounds, and ruled that the contract should be treated as a sale of goods contract, governed by the UCC, Tex. Bus. & Com. Code Ann. § 2-210(a) (1968). Under that provision, the contract was not assignable without D’s consent, and the distributor could not delegate its performance thereunder, because P was a subsidiary of D’s competitor and D could not be compelled to accept a bargain it did not contract for, that is, performance by a party other than the original distributor.

i. The more the facts support the view that you’re fundamentally changing the benefit that would be conferred to the person, the better you argue that the delegation is not okay.

### 7.2 Third Party Beneficiaries

#### CLIV. Creation of Rights

a. Donee beneficiary type: If the promisee (in a 3rd party beneficiary situation) enters into a contract with the purpose of having a gift conferred upon a 3rd party, the 3rd party is a “creditor beneficiary” if the purpose of the promise in extracting the promise from the promisor is to discharge an obligation that the promise owes or believes is owed to the 3rd party.

b. Incidental beneficiary: A party who receives benefits from a promisor’s performance, but who was not intended to be a beneficiary is an incidental beneficiary and therefore has no rights in the contract.

c. Creditor beneficiary: If a promise extracts from the promisor a promise to render a performance to a 3rd person because the promise is indebted to the 3rd person, then the 3rd person is a creditor beneficiary.

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

#### CLV. Interrelationship of Third Party Beneficiary and Promissory Estoppel

a. The law pertaining to promissory estoppel and to the rights of 3rd persons to sue on contacts made for their benefit when combined has the potential for dramatic growth.

b. “Acceptance” by beneficiary

i. Majority view: the right to rescind or modify a 3rd party beneficiary contract, without the assent of the beneficiary, ceases once the contract is accepted, adopted, or acted upon by the 3rd party.
1. What is considered “acceptance”?

2. In Indiana, there is a “presumption of acceptance” in the case of an infant beneficiary, a view not supported by the drafters of the revised Restatement.

CLVI. Example case(s)

a. **Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.** (284) The court held that the evidence was sufficient to support a finding that there was a meeting of the minds that the insurance was to include liability coverage. The court also found that the injured parties were third party beneficiaries of the agreement to procure the insurance. Cal. Ins. Code § 11580, incorporated into every general liability policy, created a contractual relation which inured to the benefit of injured third parties.

   i. As long as you’re a member of the class of people who are supposed to/expected to/intended to benefit from the contract, you have some right to the contract.

b. **Hale v. Greene** (285) The court held that the complaint stated claims for damages under both theories, a claim as the intended beneficiary of the attorney’s professional contract with the client and a derivative tort claim based on breach of the duty created by that contract to the beneficiary as its intended beneficiary.

   i. There was a contractual relationship between D and the dead guy, and the contract is intended for the benefit of 3rd party. (There’s also a tort claim here.) This is very similar to Johnson insurance above.

c. **Zigas v. Superior Court, Etc.** (286) The court also held that Ps were entitled to pursue their action for breach of contract under Ds’ federal contract with HUD because they were 3rd party beneficiaries to the contract.

d. **Tweeddale v. Tweeddale** (287) You can’t change the contract between A and B without 3rd party’s consent. Third party can sue to enforce, and you can’t change the contract in a way that would hurt him without his consent. The 3rd person has to have notice and has to be asked for permission before you change it.

   i. What we’re talking about is whether you have to be consulted for the contract to be changed. This court says you do have to be consulted. Restatement says you only have to be consulted if you know about it and you relied to your detriment.

6.2 Compensatory Damages

CLVII. Basic Policies

a. Elements of a fraud claim: false representation of a present or past fact by D, knowledge of falsity in D, action in reliance thereupon by P, and injury resulting to P from such misrepresentation.
b. Traditional rule: “punitive damages are not recoverable for breach of contract.” Restatement § 342.

c. Common “rule”: breach must constitute an “independent and willful tort accompanied by fraud, malice, wantonness or oppression.”

d. Restatement 2d § 355: Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."
   i. Restatement, Section 353 – Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

e. The discretion of state courts to award punitive damages is limited by the state interest to be protected and the reprehensibility of D’s conduct.

f. A party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.

CLVIII. Example case(s)

a. **Sullivan v. O’Connor**: The interests of the promise that might be protected upon breach by the promisor: expectation, reliance and restitution.

b. **Allen v. Jones** (289) When damages incurred by P were reasonably foreseen by D, D is liable.
   i. You need to figure out what is foreseeable and for whom, when.

c. **F.D. Borkholder** (290) Punitive damages are only recoverable in contract actions where tort accompanies the contract breach. Here, the contractor told the salesmen that certain practices were going to be followed, and when they were not followed, that the problems would be corrected. The contractor was also in a position of trust. For these reasons, punitive damages were allowed.
   i. If I have no present intent, then my statement that I have present intent (i.e. “I’m on it”) is a lie. → it’s hard to prove that you don’t have that present intent. The majority’s view is that if the builder keeps saying he’ll take care of it, and then never does, the builder was lying every time he said “I’m on it.”
   ii. What about the lie in terms of Holmes’s view that a contract is really a promise to perform or pay damages?

d. **Boise Dodge, Inc. v. Clark** (291) Punitive damages (a.k.a. exemplary damages) are allowed when there is a blurring between criminal and private law. Here, the car salesman was fraudulently rolling back odometers; therefore, punitive damages are allowed.
i. Punitive damages are to deter the conduct. In these cases, the damage award must be enough to make the rollback unprofitable.

ii. You need to figure out how much punitive and how do we deal with it? How do we do our analysis of how much punitive is enough?

CLIX. Consequential damages: Foreseeability; mitigation; certainty; incidental reliance

a. If you have the Holmes view, you’re view is that it’s okay that you don’t perform as long as you pay the amount of the actual harm; if you think not delivering the ashes in the urn will do more than just not deliver the urn, then maybe you want to put some added damages and shift the pain to the shipper of the urn. The idea is that the more pain you inflict on the damager, the more you provide incentives to (1) be more careful (2) get out of the business. You want to provide enough, but not too much.

b. Tests of foreseeability:

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

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

iii. The critical point is the time of the alleged negligent conduct. If D couldn’t reasonably foresee risk of harm to P, no duty of care owed to P. If D has duty to P and negligence has been the cause in fact creating extensive damage, the unforeseeability of that damage does not necessary insulate D from full liability.

iv. Judge Friendly: The test is whether the “very risks” that made the conduct negligent produced “other and more serious consequences to such persons that were fairly foreseeable when he fell short of what the law demanded. If so, there is full liability. If the “injury sprang from a hazard different from that which was improperly risked” D might not be liable of the full consequences.
c. *Hadley v. Baxendale* Rule: “Special” or “consequential” damages (as opposed to “general” damages that so obviously result from a breach that all contracting parties are deemed to have contemplated them) will only be awarded if they were in the parties’ contemplation, at the time of contracting, as a probable consequence of breach of contract.

   i. Provides that “consequential damages resulting from the seller’s breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.

d. Consequential damages are available to a buyer of the foreseeability test is met. Sellers cannot claim consequential damages (UCC § 1-106), but frequently can get incidental damages. Buyers, too, can claim incidental damages. These include, but are not limited to, brokerage commissions, storage charges, advertising costs, and auctioneer’s fees made necessary by the other’s breach.

   i. Certainty: The fact of loss and its amount must be proved with reasonable certainty. The standard of certainty requires a higher quality of proof on the issue of damages than for other issues in a lawsuit. It is applied with special stringency to lost profits, particularly lost profits as consequential damages.

      1. Alternatives where expectancy is uncertain: Protection of reliance interest – where the aggrieved party cannot establish the lost expectancy interest with sufficient certainty, the aggrieved party is permitted to recover expenses of preparation for and of part performance as well as other foreseeable expenses incurred in reliance upon the contract.

      2. Caveat: if D can show that the contract would have been a losing proposition for P, an appropriate deduction will be made of the loss that was not incurred.

e. In sum, consequential damages result from the inability of P to use D’s promised performance, either because D failed to perform or because performance did not conform to the contract. Loss of use may result in lost profits or, in the alternative, expenditures in reliance on the promised performance. But these losses are subject of limitations of foreseeability, cause in fact, proof with reasonable certainty and the requirements of damage mitigation.

f. There seems to be an advantage to the non-breaching party to mitigate, and for the contracting party to educate the other party. You go through the process, educate each other, and then the court decides whether it’s really worth the amount that you said it was worth, they decide for how much they want to treat it.
CLX. Example case(s)

a. **Hadley v. Baxendale** – Under the *Hadley* principle, a party injured by a breach of a contract can recover only those damages that (i) should “reasonably be considered [as] arising naturally, i.e., according to the usual course of things,” from the breach or (ii) might “reasonably be supposed to have been in the contemplation of both parties, at the time the contract was made, as the probable result of the breach of it.” The two branches of the court’s holding are known as the first and second rules of *Hadley v. Baxendale*. General and consequential damages: based on this case, contract law conventionally distinguishes between general and direct damages, on the one hand, and special or consequential damages on the other hand. General or direct damages re the damages that flow from a given type of breach without regard to the particular circumstances of the victim in the breach. General damages are never barred by the principle of *H v. B*, because their very definition such damages should “reasonably be considered … [as] arising naturally, i.e., according to the usual course of things” from the breach. Reasonable foreseeability: today the principle of *H v. B* is normally restated to mean that consequential damages can be recovered only if, at the time the contract was made, the seller had reason to foresee that the consequential damages were the probable result of the breach.

   i. Foreseeability of possible damages is necessary to recover consequential damages.

   ii. Negligence is required to recover for all damages other than compensatory damages.

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

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

   v. It depends on how you ask: who’s cheaper to insure shipment? → shipper. Who’s cheaper to ensure against down-time? → sender.
1. Carriers carry the cost of shipping if they’re on notice. So, if you’re a sender, make sure that you make clear to the shipper the importance of the delivery and what the foreseeable consequences may be, being as specific as possible.

2. If we have a contract in which we go so far into negotiations that we say the cost of breach will be X, will clauses like that be enforceable? → liquidated damages clause.

b. **Spang Industries, Inc., Fort Pitt Bridge Division v. Aetna Casualty & Surety Co.** - The court held that knowledge of the consequences of default was imputed to P after the delivery date was set and reversed awarding interest because appellant had demanded interest in its counterclaim.

   i. The contractor can claim consequential damages from late delivery of the steel because it is specific performance that was envisioned when entering the contract. The provider could have reasonably anticipated what happened as a result of their lateness.

   ii. Apply the *Hadley* test. Was it foreseeable that late shipment would cause P to suffer damages? Court says it was foreseeable because D should have been aware of the possibility of damages.

   iii. Does the foreseeability question help us with how to avoid damages? You can view the duty to educate the other side of the deal as a way to mitigate damages before the contract is even formed, by telling the other side of the deal, “take better precautions.” P has a duty to educate D about how much P cares, so that D can better avoid the bad act.

   iv. Arguably, then, the good lawyer thinks through all of this. What will happen if there’s breach, how much effort you want the other side to expend… Then the question becomes how much thinking you want the other side to do and if you’ve done all that thinking, shouldn’t the court enforce that?

c. **Hydraform Products Corp. v. American Steel & Aluminum Corp.** – held that the t.c. properly held that a limitation of damages clause was ineffective to bar the claim for consequential damages. The record supported the t.c.’s conclusion that the circumstances in this case did cause the exclusive remedy clause to fail of its purpose because the limitation clause did not address the problem of late shipment at all. The court found that the trial court did err 1) in allowing the jury to calculate lost profits on the basis of a volume of business in excess of what the contract disclosed and for a period beyond the year in which the steel was to be supplied; 2) in allowing the jury to award damages for the diminished value of the woodstove division of the purchaser's business; 3)
in allowing the purchaser's president to testify as an expert witness; and 4) in failing to d.v. for D on the misrepresentation claim because considering the evidence in the light most favorable to the purchaser, a reasonable jury could not find that the element of false factual representation had been proven.

i. The jury cannot consider both a claim for diminished value and lost profits (double recovery). Further, there is no evidence that the business was sold for less than it is worth.

ii. Losses need to be foreseeable to the other side of the contract, not the side who stands to lose. One way to make it foreseeable is to write it into the contract. You can’t say “and as much as we need,” because that doesn’t provide concrete foreseeability. As P’s lawyer, you could at least put some evidence in on that issue; the more evidence you can put in as a matter of fact, the more able you’ll be to convince the court that your additional number is not speculative but, rather, quite certain.

1. The type of evidence we’re talking about is two types: (1) actual knowledge that is anticipated (2) everyone in the industry expected it is evidence of what she should have known.

d. L. Albert & Son v. Armstrong Rubber Co. – Dismissal of P’s complaint was affirmed because the contract was a single contract, and D was entitled to reject all four machines because the delay in delivery was too long considering the changes in market conditions. P’s quasi contract recovery was affirmed, with the addition of interest, because D’s use of a motor was a conversion but did not constitute acceptance of all goods delivered. By modification of the ruling, D was allowed to set off expenses incurred, with interest, in preparation for P’s performance subject to P’s privilege to deduct from that set off any sum that it could prove defendant would have lost on the contract.

i. It should not be the seller’s responsibility to ensure the buyer’s venture; however, breach of a contract should not throw a duty upon the buyer to prove that the value of the performance would have been less than the buyer’s outlay. The seller should pay the buyer’s investment and may reduce it by whatever he can show that he buyer would have lost had the contract been enforced.

ii. Restatement, Section 351 – A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.
iii. Essential vs. and incidental reliance – These two concepts may find expression between general and consequential damages. This case finds the essential reliance to be recoverable.

iv. In order to award damages for the failure, you have to make a logical argument that ties that damage to the breach.

v. D argues that there was no way to know how the venture would go, and P should be happy there wasn’t a sale because that opens them to be able to find a better price elsewhere. D wants to argue that, had there been performance, P’s business would have operated at a loss, and we can’t prove how much of a loss it would have operated as, so the reliance shouldn’t be refunded, paid for, by us; even had we performed, they would have had to spend that reliance and they wouldn’t have made a profit and we can prove that, in this alternative world, they wouldn’t have made the profit (hard to prove), so the amount of reliance damages ought to be decreased by the loss.

1. Step one: amount of profit unknown, unforeseeable, you, the non-breaching party can’t get expectation. Step 2: whatever damages you do get has to be reduced because I can prove your damage would have been a loss, otherwise, my breach ensures your success in your venture.

vi. RULE: If the breacher can prove that the other side wouldn’t have made the profit she gets to make this argument and we’ll deduct this from the reliance damages.

### 6.5 Effect of Agreement Liquidating Damages or Altering the Scope of Liability or Remedy

CLXI. The traditional criteria of a liquidated damages clause are: (1) injury caused by the breach must be difficult or impossible to estimate accurately; (2) parties must have intended that the agreed payment be for the loss, rather than as a deterrent to breach; (3) the stipulated amount of damages must be a reasonable estimate of the probable cause.

a. If the court won’t approve of a liquidated damages clause, it is a penalty clause. Courts won’t enforce a provision if it operates as a penalty or forfeiture clause.

b. Courts uphold contractual provisions fixing damages for breach when the terms constitute a reasonable mechanism for estimating the compensation which should be paid to satisfy any loss flowing from the breach.

c. Criticisms that suggest current rules governing liquidated damage clauses are too restrictive:

i. Assumption of rationality entails that a party will not accept a clause for which he is inadequately compensated. Thus, if parties are “rational,” no contract should require performance when the
expected costs to party A of performing exceed the expected benefits to party B of receiving it.

ii. Criticism on limitations on liquidated damages lies in the informational advantage that the parties have: At the time of contracting the parties are likely to have better information about any idiosyncratic damages that might be incurred than a court will have at or after the time of breach...if the law seeks to promote efficient decisions to perform or not, then allowing parties to estimate damages in advance will induce more appropriate decisions in this respect than court-imposed rules.

iii. Implicit distributional bias: it forces the parties to allocate some risks in a particular way.

d. “Time of contracting” Test is the prevailing rule.

CLXII. Liquidated damages under the UCC and Restatement 2d

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

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

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

CLXIII. According to one court, “where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.

CLXIV. Exculpation and under liquidated damage clauses
a. In commercial transactions, contract clauses exculpating one party from the consequences of negligence are enforceable if they clearly and conspicuously set out the purpose of the drafter.

b. The exculpation may be against p.p. when attempted by a party who is “under ea public duty entailing the exercise of care,” such as common carriers or public utilities, or is in a position of superior bargaining power, such as a hospital exacting a release from an entering patient.

CLXV. Example case(s)

a. **Southwest Engineering Co. v. United States** – The court held that no damages were withheld for the excusable delay caused by D because D had already given P credit for those extensions of time. Further, in situations where damages could reasonably be anticipated at the time of contracting, proof of actual damages was not required to sustain an action for liquidated damages unless the contracts so provided.

   i. *Two prong test:* Two requirements to determine whether the provision included in the contract fixing the amount of damages payable on breach is an enforceable liquidated damages clause rather than an unenforceable penalty clause: (1) the fixed amount must be a reasonable forecast of just compensation for the harm that is caused by the breach, and (2) the harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation.

      1. One way to view the test is: is it a penalty or a non penalty? Another way to view it is: is it unascertainable but nevertheless a good guess, then it’s not a penalty, otherwise, it’s a penalty.
      2. It’s a reasonable forecast of something that can’t be forecasted. If you fail that test, the court will call it a penalty.
      3. You gotta satisfy both prongs

   ii. It is ok to hold a party to its agreement if damage prove less than expected (because in some cases they may prove more).

b. **United Air Lines, Inc. v. Austin Travel Corp.** – The held that at the time the contract was entered into, the damages provided for were reasonable, and the fact that the same damage amount applied to every breach did not render the damages a penalty because the clause applied only to substantial breaches. P did not violate antitrust laws because whether the relevant market was local or national, P did not wield monopoly power.

   i. When the amount of liquidated damages is fair and reasonable, they will be enforced. When not redeploy-able, 80% seems fair.
ii. Consider the cases when liquidated damages are low. There will be no disincentive to breach because of legal fees (they will be more than the lawsuit).

1. Kieff: On the one hand, the liquidated damage clauses help make sure that the contracted remains with the contract. On the other hand, shouldn’t the customer be able to change to a program that she prefers? The fear is that liquidated damages clauses prevents switching, prevents competition.

2. Should liquidated damages clauses be enforced when they harm consumers? Probably not. We want there to be competition. Liquidated damages should be considered regarding the market industry to which they are applied (says Kieff).

c. Leeber v. Deltona Corp. – The court vacated the judgment as to the liquidated damages issue, finding that, under Florida law, the clause was enforceable because Ps failed to show that it was unconscionable. The clause was reasonable on its face and not a penalty, and the developers were therefore allowed to retain the full amount of the deposit.

   i. For a liquidated damages clause to be unenforceable, the clause must be so unconscionable that it would “shock the conscious.”

      1. Why would a party agree to a liquidated damages clause when it shocks the conscious? Consider cases where there is no meaningful choice, other than a deal is a deal.

   ii. If you apply the two-prong test, you would have to hold the clause unenforceable as a penalty, even though it doesn’t look like a penalty and looks like a great deal.

   iii. The court says that deciding it’s not penalty is just the first part. Then, they need to see whether it “shocks the conscience.”

CLXVI. Agreed Remedies

a. UCC 2-719 [UCC 2-810 (1997)]:

   i. Subject to the provisions of subsection (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

      1. The agreement may provide for remedies in addition to or in substitution of those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
2. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

ii. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act,

iii. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

CLXVII. Example case(s)

a. Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable and Cold Storage Co. – The court remanded the award of consequential damages because the t.c. failed to make a separate determination of unconscionability under Wash. Rev. Code § 62A.2-719(2), which was the governing provision on the issue of consequential damages exclusion.

i. The agreement outlining rescission as the only available remedy and a limitation excluding consequential damages is not valid if the limitations failed their essential purpose.


CLXVIII. If the court decides that D did something wrong, the default rule is that D has to take out his checkbook and write a check. Below, we look at when the court asks you do to something else, an equitable remedy.

a. Equitable remedies make it possible for P to obtain the actual performance promised by D rather than damages. The court has power to issue a personal order to D, directing conduct of a specific sort, and to punish noncompliance by either a fine or imprisonment for contempt. An injunction is the main form of this personal, coercive order issued by the court. In a breach of contract action, the injunction may prohibit D from taking a specified course of action or compel specific performance of the contract or both. Here, the order is directed to the person, i.e. in personam, and denies D the choice to perform the contract or pay damages. The real purpose is to coerce performance.

b. Performance is “largely a discretionary remedy to prevent substantial injury where no adequate remedy at law obtains”

c. Questions to keep in mind: (1) What is the inadequacy in the legal remedy asserted by P to justify equitable relief? (2) How can a court enforce performance when the standards are aesthetic, or the agreement is indefinite? (Courts have found it easier to order D in a personal service contract to refrain from doing rather than to perform.) (3) Are there any
questions of fairness associated with enforcing the contract or problems of morality associated with P’s conduct? (4) May P recover damages in addition to equitable relief? If the requested equitable remedy is not available, may the court award damages in lieu of specific performance, or must it remand the case for further consideration?

CLXIX. Injunction against breach

a. Traditionally, the courts have considered four flexible and interdependent factors: (1) Without such relief, will P suffer irreparable harm? (2) Is there a substantial probability of success on the merits? (3) Will others be injured by the injunction; and (4) Will the injunction be inconsistent with or further the public interest?

1. In addition, the injunction may be denied unless the facts as stated justify a specific performance decree.

b. The “clean up” problem: If P is entitled to equitable relief, the court may, in the specific performance decree, “clean up” the litigation by using UCC 2-716(2). And even if specific performance is denied, some courts, where legal and equitable powers are merged, have retained the case to grant the legal remedy, provided that the action does not impinge upon D’s right to a jury trial and the evidence adduced in the hearing otherwise supports the claimed legal remedy.

c. The Lumley principle was adopted in America, and expanded equity jurisdictions in two ways: first, by enforcing the negative covenant where the direct promise was not specifically enforceable, and second, by granting P an injunction where comparable relief was not available to D. This principle has found its home in sports and entertainment law.

d. If the liquidated damages provision is valid and the contract provides that is the exclusive remedy, the employer is not entitled to injunctive relief. It must take the money and run. In the absence of an exclusive remedy clause, however, the employer has a choice: enforce the liquidated damage clause or seek an injunction. The employer cannot have both. If the employer obtains an injunction, however, the employer may recover any actual damages caused between the time of the breach and the date the injunction issues.

e. P. 963: preliminary injunction explanation: it’s more aggressive to ask the court to enter an injunction right away, and the earliest thing you can do is a temporary restraining order. The way a tro works is that you can ask for one and the other side doesn’t have to be in court (ex parte). Tro’s are usually short and just long enough for the court to get the other side into court to get a hearing on a preliminary injunction order, which is generally throughout the suit, until the final order, in which case P will be asking for an injunction. You need to (1) show reasonable likelihood of success on the merits of the case, and (2) why you’d suffer harm in the absence of an injunction.
f. P. 964: difficulty of getting alternative remedy. Different courts will look at the factors differently. Which should matter and which shouldn’t matter?

CLXX. Example case(s)

a. Curtice Brothers Co. v. Catts – Where no adequate remedy at law exists specific performance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land. If it should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to assume to interfere, but the very existence of such contracts proclaims their necessity to the economic management of the factory.

   i. The better argument to get an injunction is *I really need this; this is what gives me personhood and if I have to spend a year not canning, I’m gonna feel like a schmuck and money won’t make things perfect. I’ll never be made whole, so there’s no adequate remedy.* Until P says “this means a lot to me,” the court probably won’t enter the injunction.

   ii. Also, not having the tomatoes would have widespread affect. The widespread affect matters because it’s hard to estimate the damages in that case (also, pp issues). We could try to figure out the additional cost by considering the cost of restarting the following year, which includes restarting the bonus, rehiring workers, training, moving bonus.

   iii. D says, 13th Amendment: I don’t wanna work for that guy, I don’t gotta work for that guy. The court says, *ok, hire someone else to pick the tomatoes.*

b. Laclade Gas Co. v. Amoco Oil Co. – The court concluded that there is mutuality of consideration within the terms of the agreement. Stated that there was a valid, binding contract between the parties as to each of the developments for which supplemental letter agreements have been signed.

   i. There is no law that both parties be mutually entitled to the remedy of specific performance in order that one of them be given that remedy by the court.

   ii. A court may refuse specific performance because enforcement would require extensive supervision, this is up to the court’s discretion when public interest is involved.

      1. Restatement, Section 370 – Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.
2. UCC 2-716 – Specific performance may be decreed where the goods are unique or in other proper circumstances. The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just. The buyer has a right of replevin (retaking of personal property) for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing.

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

iii. Here, the court is affected by the argument that the Laclede Gas customers will be affected by the decision (left without heat) and decides that is a better case for injunction.

iv. Things the court looks into: (1) the extent to which damages will make P whole, (2) the extent that damages will be inadequate, (3) the possibility of accurately estimating the amount of damages, (4) whether D can get the product through another means (so they’re not made to do anything).

1. Kieff: If, as a matter of fact, there’s a limit in the gas supply, this is hardly helping the public; it’s just helping one portion of the public to the detriment of other portion of the public. It helps the public that’s represented and doesn’t consider the public that’s not represented.

v. One of the arguments that the court puts aside is the mutuality of remedy argument. The result seems to be that the courts are saying that they used to ask whether both sides could get the same remedy. Now, the courts make some type of mutuality inquiry in some context, and that context is whether there was mutuality in formation.

c. Northern Indiana Public Service Co. v. Carbon County Coal Co. – The court held that any violation of the statute was harmless, the frustration doctrine did not excuse performance of a fixed price contract, and the damage remedy was adequate.

i. When a sale of goods leads to easily calculable damages, there will be no injunction.

ii. One move that D tries to put on the table: you have to feel badly for the other people. In this case, the court doesn’t look at those other people. With this case on the books, if you were the lawyer
for the miners, having seen the workers lose here, you’d want to have the minors ask for a promise in their employment contract that says that if the employer leaves the business but gets damages in a contract case that covers the company’s damages for the year, the minors should get a piece of that recovery.

iii. Remember, the final outcome of the case just sets the bargaining position of the parties; it’s not an ultimate end – negotiation by the players can change the way the entitlements line up after the lawsuit. So, we ask ourselves: do we want swaps to happen? If so, do we want to alter results so that swaps will happen? If what we don’t want is for the coal to come out of the ground, it would be dumb to make the order to pull the coal out if we don’t think a swappage will occur. We’re starting to think through whether the party will be able to squeeze the product from somewhere, and who they’ll be able to squeeze if from.

d. **Walgreen Co. v. Sara Creek Property Co. Promise:** The court engaged in an extended discussion of the costs and benefits that must be weighed in deciding whether to grant an injunction, and determined that the t.c. had engaged in a proper cost-benefit analysis. The injunction was within the bounds of permissible choice under the circumstances.

i. Determination of damages here would be costly and indefinite. If an injunction is allowed, it will allow Walgreens to pay to keep out Phar-Mor if they really want them kept out of the shopping center. The damages will be better estimated by the parties.

ii. Even if we decide the case barring Phar-Mor from coming in, Phar-Mor may still come in, and the way they would come in is that money would flow around to Walgreens. Coase Theorum.

e. **American Broadcasting Companies v. Wolf** – The court held that D had breached the clause, but that an injunction would not lie for simple breach of personal services contract after D was no longer obligated to provide services, absent a covenant not to compete, or other factor such as the need to protect trade secrets. The court noted that the law generally disfavored anticompetitive covenants in contracts, such covenants were rarely implied in law, and an injunction would operate therefore to apply disfavored policy. The court refused to grant an injunction that would unduly interfere with D’s livelihood and inhibit free competition where there was no corresponding injury to P other than the loss of a competitive edge.

i. When employment is involved, equitable relief is only available to prevent injury from unfair competition or similar tortuous behavior.

ii. Coasian Analysis – With zero bargaining costs, if an injunction is given, an equitable result will be reached.
iii. Restatement, § 367 – It is undesirable to compel the continuation of a personal relationship after a dispute has undercut confidence and loyalty. The difficulties inherent in passing judgment on the quality of what frequently is a subjective performance are too great. An award requiring performance may impose a form of involuntary servitude that is prohibited by the 13th Amendment to the Constitution.

f. Case Comparison – The cases each outline when an injunction is possible regarding fairness, equity, calculability, and employment

6.3 Prevention, Hindrance, and the Duty of Cooperation

I. If the bargain is enforceable and D’s non-performance is not justified by such things as the failure of an express condition, some recognized excuse or P’s misconduct, liability for “breach” does not require P to establish fault. P is not required to prove either negligence or willful misconduct to establish liability.

II. In contract, the rights and duties arise from the exchange relationship – a relationship that requires a certain quantity and quality of agreement before liability can attach and rewards informed consent by the parties. In contracts, the duty arises because of consent.

III. Think of prevention, hindrance, and the duty of cooperation in terms of duties imposed by the courts upon parties to exchange relationship in the absence of any, and maybe, in spite of an expression of contrary agreement.

IV. UCC

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

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

V. Restatement

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

VI. Example case(s)

a. Blandford v. Andrews – D has to show that there was not any default in him, and that he did as much as in him lay to procure it; otherwise he didn’t serve his obligation; and when P cussed out X, at one time only, are not such an impediment to the marriage to say P has frustrated to agreement.

i. D would have to: argue (1) P interfered w/ability to get the deal done, (2) P did everything P could do to get the deal done. He’d also have to prove both (1) and (2)
ii. Big picture: bad faith performance can be treated as breach.

b. **Patterson v. Meyerhofer** – P was entitled to recover the amount he would have recovered if the contract had been performed because D impliedly agreed by entering into the contract that she would do nothing to prevent him from acquiring the property and D violated the agreement. The court held that where a party stipulated that another shall do a certain thing, she thereby impliedly promised that she would not do anything that may have hindered or obstructed the other party in doing that thing.

   i. The courts need to find intent.

   ii. What he’s suing for is payment for his work. He’s suing for his expectation damages – the price he expected to get minus the amount he would have had to spend for the property.

c. **Iron Trade Products Co. v. Wilkoff Co.** – Although P’s actions made D’s performance difficult, P’s actions did not prevent D’s performance and mere difficulty of performance did not excuse D’s breach. Additionally, damages were properly calculated because P was entitled to the benefit of the bargain, even though P resold the rails.

   i. In this case, it doesn’t look like the buyer knew it would be impossible for the broker. Not knowingly interfering satisfies the duty of cooperation.

   ii. We learn to ask: was the behavior not only frustrating, but did they have some level of knowledge or intent to frustrate, in order to excuse the broker from her duty?

   iii. To make the argument that the other guy interfered, you have to “hum a few bars more” than she went out and made it harder and she should have known that it would make it harder.

d. **Billman v. Hensel** – holding that the Ds were not excused from performance. The "subject to financing" clause imposed upon the Ds an implied obligation to make a reasonable and good faith effort to satisfy the condition. The evidence supported the t.c.’s conclusion that the P carried their burden of proof by establishing that the Ds had not made a reasonable and good faith effort to secure the necessary financing and, therefore, could not rely upon the condition to relieve their duty to perform.

   i. The parties must use good faith efforts to complete the contract. (This is an implied obligation).

   ii. The more you do, the better your argument will be that you cooperated, and you at least have to take some reasonable steps.

e. Case Comparison – Parties have a duty to act in good faith in the completion of their contracts. The parties must not interfere with each other’s performance and must overcome difficulties in performing.