I. MUTUAL ASSENT – OFFER AND ACCEPTANCE – Contract Formation

1) Mutual Assent

RESTATEMENT
- Must be manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to bargain is invited and will conclude it. (manifestation of intent to be legally bound)
- A manifestation of willingness to enter into a bargain is not an offer if the person addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made further manifestation of assent

*UCC 2-204 – does not have to be definite, or exact time determined when assent, just mutual assent.*

OBJECTIVE TEST

Whether there is assent is determined by asking what a reasonable person in the position of one party would be led to believe by the words and conduct of the other party. This is usually a question of fact. However, if reasonable persons can reach only one reasonable conclusion, it is a question of law.
- If parties actions and words make it clear that there is intent to be bound, court will usually find a way to enforce the k
- If parties make it clear that they do not intend to be bound, there is no contract

Intentions to be Bound in Future

- If the parties reach basic agreement on a transaction but agree that they will not be bound unless and until they sign a formal agreement, they will not be bound until that time. If they intend the future writing to be merely a convenient memorial of their prior agreement, they are bound whether or not such a writing is executed. Intent is often a question of fact.

Embry v. Hargadine
Court found that there was a contract, b/c of the expressed intention of the boss. No reasonable man would construe the boss’ answer to be anything but a contract. Objective test. Outward manifestation was yes, there was a contract. So contract was upheld, even though the employer claimed he did not intend one.

Lucy v. Zehmer
- 2 drunks, selling farm – Court finds there is a k, because k was rewritten, long discussion, etc. therefore, outward manifestations of the intent for a k –
  - HOWEVER- Bad for a contract: drinking, refusal of down payment (consideration), refection or repudiation (negative signal). Why the 5 dollars? A downpayment—consideration to hold the promise open. By refusing, I told you don’t rely, if you do, that’s your fault. Argument that there’s more than silence, there’s an act of refusal to signal non-reliance. You have to think about what’s actually being promised. Here, it’s not the land, it’s to go into a deal in the future, so was court right result, wrong result? If D could have proven joking, than maybe not, because of sale of land, damages for reliance might be diff. to prove?

Cohen v. Cowles Media
- News. conf. promise – Court holds News did not have ability to put legal obligations on moral/ethical relationship
2) Offer

RESTATEMENT
A manifestation of willingness to enter into a bargain is not an offer if the person addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made further manifestation of assent

MUST BE DEFINITE ON:
Who can accept, how they can accept, price and subject matter

**********PRICE is IMP ➔ IF NO PRICE ➔ WATCH OUT!**********

1. Offer creates in other party the power to form a contract by acceptance
   a. WHAT IS AN OFFER?
      Generally, there is an offer if the words or actions would lead the REASONABLE PERSON to believe that there was an offer
      1. ALMOST ALWAYS INVOLVES A PROMISE TO DO OR REFRAIN FROM DOING
   b. WHAT IS NOT AN OFFER???
      o Prelim. negotiations are not offers
      o Price Quotes, Invitations, Solicitation of Bids, Expression of Intentions/Wishes
      o Very Indefinite ads to general public – no price terms, no quantity, no det.
         ▪ I.E. catalogs EXCEPTION ➔ See Lefkowitz and Carbolic

2. Certainty of Offer – Restatement
   a. not an offer if not reasonably certain – REASONABLY CERTAIN means
      1. provide basis for determining existence of a breach and giving app. remedy
      2. One or more terms left open may show that there is not intent to be bound yet
      1. Goes to determining whether OFFER or just prelim negotiations

3. ***Even if offers are not definite, certain things can be filled in by UCC "gap fillers"*****
   a. UCC can fill uncertain terms if THERE IS MANIFESTATION OF INTENT – 2 -204
   b. sale of goods
      1. if parties intended contract and court can reasonably fix uncertain terms "gap-fill" for reasonable basis for remedy (or if later negotiation filled in gaps, offer is offer)
      1. often can fix price, time and place for delivery, BUT NOT quantity

SEE MORE FOR INDEFINATENESS ➔ Insufficient Formulation
   o Indefiniteness and Material Terms
      ▪ Material terms must be so definite so that the performances req by each party are reasonably CERTAIN – (more indef. terms = less likely parties intended k)
   o WHAT ARE MATERIAL TERMS??
      ▪ subject matter, price, payment terms, quantity, quality, duration and work to be done

UNILATERAL OFFER DIFFERENTIATION
   If offer is unilateral, offeree is not bound until offerer performs (accepts) at which point the offeree is bound to what offered for performance (promise for performance v. promise for promise)

Lonergan v. Skolnick - If intentions of parties are not intended as expression of fixed purpose to make a def. offer, no offer of k has been extended (ad and invite for bids on property) (negotiations between parties –preliminary)
Lefkowitz - advertisement as offer because of definiteness of offer, patron accepted, thus k was formed - Offer (advertisement) did not leave anything open for negotiation, was clear, explicit, definite, not to entire pub., but first who showed up
Southworth v. Oliver
   - Explicitly named parties, reasonable person test – Would think there was an offer – SO THERE IS AN OFFER- K
   - Language used, specification to parties, definiteness
### 3) Acceptance

The offer creates the power of acceptance. The acceptance creates a contract and terminates the power of revocation that the offeror ordinarily has.

1. Since offerer is the master of offer – can stipulate any requirements for acceptance (means)
   i. **LaSalle National Bank v Vega** – k clearly stated that method of acceptance subject to execution by trustee, was not met so no acceptance (cond. not met)

2. Offer terminates at end of specified time or reasonable time

3. If no specific method of acceptance is mentioned, the court generally will deem any "reasonable manner and medium" as acceptance. (beginning of performance acceptable)
   i. **Ever-Tite Roofing** – P had begun performance, which was acceptable means of acceptance before the D withdrew the offer, so there was acceptance, thus k

4. UC 2-206 – Prompt shipment of goods = acceptance (not non-conforming good)
   i. ** Corinthian Pharmaceuticals v. Lederle** – Shipment of non-conforming goods is not acceptance, merely accomodation, counter offer in this case because D gave P chance to cancel order bc it was subject to diff terms

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**General Requirements for ACCEPTANCE…must be**

- voluntary
- accepted by authorized party/agent
  a. 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.
     i. To bind the principal (to agents actions) the one dealing with the agent must prove that the principal was responsible for the appearance of authority by doing something or permitting the agent to do something which reasonably led others, including Π, to believe that the agent had the authority that the agent had authority he purported to have.
  - have knowledge of offer and intent to accept
    a. **Glover v. Jewish War Veterans** - cannot accept an offer if offeree does not know of offer, even if performance req. by offer is performed- impossible for there to be acceptance if the offeree does not know of offer (offer must come first) - REWARDS
    - communicated to offerer
      a. **Hendricks v. Behee** - D made an offer to P to sell land. P signed the offer, but before D knew of the acceptance, he notified the agent of P that he withdrew the offer. There is no contract until acceptance of the offer has been communicated to the offeror

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**ACCEPTANCE BY PERFORMANCE**

- if Acceptance by performance - must give notice of performance to offerer – (gen. unilateral)
  a. **ACC to Restatements** - If the offeree has reason to know that the offeror has no adequate means of learning of performance with reasonable promptness and certitude, failure to exercise reasonable diligence in giving notice discharges the offeror from liability, unless the offeror otherwise learns of performance within a reasonable time or the offeror expressly or by implication indicates that notification is not necessary - no contract is consummated unless and until notice of performance has been sent
  b. An offer that invites acceptance by performance will be deemed accepted by such performance unless there is a manifestation of intention to the contrary.
    i. **Ever-Tite (again)**
    ii. **Carbolic Smoke Ball** –Ad was definite and enough to be an offer, which invited acceptance by performance, and thus there was a k, and D owes P since performance of the condition was enough, even if D not notified
    iii. **Industrial America v. Fulton** Contract to broker a merger. P responded to an offer to buy a company and helped put together a deal, only to be denied his commission. Court finds that his **beginning performance constituted an acceptance**, since the **offer invited acceptance in this manner.**
SPECIFICS TO BILATERAL ACCEPTANCE

1. Acceptance by Silence
   a. The offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with the expectation of compensation.
      1. An implied contract exists where two parties have engaged in business for a long time without an agreement and one party is benefited by the relationship
   b. If previous dealing show that silence is in fact acceptance
      2. Smith Scharf Paper – P kept xtra inventory for D, benefits of dealings, and when D did not buy more, P was stuck with good (special) could not mitigate, court finds acceptance by implied k because of previous time when D bought all extra (Also, D benefited)
      3. Ammons. v. Wilson – Since in previous dealings, silence = acceptance, than in this case, the P was right to assume acceptance and court finds there was accept. of offer
   c. In presence of one another, if acceptance is not heard, than no acceptance, even if offerer has reason not to have heard, and offeree KNOWS or had reason to know such

2. Acceptance by ACTS OF DOMINION OVER GOODS
   d. except if goods are unsolicited, and rec'ver may treat them as gift

   4. Russell v. Texas - P offers a revocable license to allow D to use his land. D continues to use P’s land for mining, which the court rules constitutes acceptance because D was exercising dominion over land, rec’d benefits Tortious exercise of dominion over land or goods. The offeror can treat this as an acceptance if the offeree manifests an intention not to accept.

3. Mailbox Rule – When is Acceptance Effective
   o If the medium of communication is reasonable, the acceptance will be effective when sent and even if it is lost or delayed.
      ▪ It is likely to be reasonable if it is the same medium used by the offeror (unless the offeror specified otherwise) or it is customary in similar transactions at the time and place the offer is received. However a communication will not be effective when sent if proper care has not been taken in transmitting it (e.g. incorrectly addressed).
      ▪ Under the Restatement (Second), even if an unreasonable means is used or care is not taken in transmission, the acceptance nonetheless will be effective when sent, provided it is received within the time a seasonably dispatched acceptance sent in a reasonable manner would normally have arrived.
      ▪ GENERALLY – Certain Situations
         • Offer/Counter offer – When rec’d
         • Revocations – When rec’d
         • Acceptance – When sent (leaves acceptors possession)
   o Power to negate mailbox rule –
      ▪ If offerer stipulates in offer that acceptance is only good when and if received
   o When Offeree Sends a Rejection First and Then an Acceptance
      ▪ An acceptance dispatched after a rejection has been sent is not effective until received and then only if received prior to the rejection.
   o When Offeree Sends Acceptance First but Rejection Is Received Before Acceptance
      ▪ The usual holding is that a contract is formed, but if the offeror relies on the rejection before receiving the acceptance, the offeree will be estopped from enforcing the agreement.
   o Risk of Mistake in Transmission by an Intermediary
      ▪ The mistake discussed here is not made by a party or an agent, but by an intermediary; e.g. a telegraph company. Lost messages are governed by the mailbox rule and the present discussion has nothing to do with them. The topic has to do with a message that is received but is garbled or otherwise incorrectly transmitted. The majority view is that the message as transmitted is operative unless the other party knows or has reason to know of the mistake. The minority view is to the effect that there is no contract if the offer or acceptance is not the message authorized by the party.
         ▪ Adams. V. Lindsell - only matters when left acc. possession – doesn't matter when or if the offeror receives the acceptance
4) Counter Offer

-OLD RULE – "Mirror Image" that acceptance had to be the exact terms of offer – COMMON LAW

- common law -The offeree could only accept the offer made in its exact form.
- If it modified the offer to accept it, it was the equivalent of a rejection of the offer.
- The acceptance then became a counter-offer which had to be accepted by the offeror.
- Offerees cannot accept some and reject others - among the terms. The offer is dead and can’t be revived
  • Minn & St. Louis RY v. Columbus Contract for iron rails. Once the offeree modified the price term of the offer, the contract was dead and could not be revived. It was up to the original offeror to accept the counter-offer.

VS.

NEW RULE – UCC 2-207 –more flexible, somewhat negates the mirror image rule - less strict – UCC

1. A definite and seasonable expression of acceptance is still an acceptance even if it states additional terms or different terms than those offered or agreed upon.
2. The additional terms are proposals and become part of the contract, unless the offer materially alters it. ****Most importantly, only the terms the parties agree upon become part of the contract*****
3. Material alterations include disclaimers of warranty and mandatory arbitration clauses.
   a. For terms the parties do not agree upon, the UCC will fill the gaps. This is the knockout rule. Conflicting causes knock each other out.
   5. These often arise in purchase order or acknowledgment form situations.
   6. This is to combat the battle of the forms and the advantage the person who sends the last form gets by the fact that most businesspeople don’t read boilerplate agreements.
3. Before the Counteroffer is accepted, the Counterofferee must expressly assent to the new terms, or no contract is formed.
   7. Pevar v. Evans Issue over disclaimer added to the contract. The disclaimers are just extra terms which the other party had to agree to, ISSUE of fact for jury whether the terms materially alter the k – The k are terms which they agree on, and those they do not agree will be gap filled by UCC
4. UCC 2-209: An agreement to modify needs no consideration to be binding. (Modifying a contract under which the parties are already bound.)
5. Must be made BEFORE ACCEPTANCE. (Counter offer terminates the power of acceptance. Specific rejection.)
5) Termination of Revocable Offer

1. To become an offer – offer must be accepted before offerer revokes = Acceptance must precede revocation
   a. Peterson v. Pattberg – even though revoke right before acceptance, court held that it was BEFORE acceptance – ALSO – By selling prop to 3rd party, D acted inconsistent with offer – which is suff. notice of revocation

2. Acc to Restatement – power of acceptance can be terminated by
   a. Rejection by offeree
   3. once offer is rejected – back to the beginning – no power to accept
   b. Death of Offerer (of lack of capacity of offerer – adjudication of incapacity)
      4. If the offeror dies between the making of the offer and the acceptance, the offer is terminated even if the offeree is unaware of the offeror's death. Under a minority view, death terminates the offer only if the offeror is aware of it.
         1. Millcreek v. Simmons – Dead Guarantor
   c. Lapse of acceptable time for acceptance (offer becomes dead)
      5. Measured time – if none spec., UCC says reasonable time
      6. Face to Face – Direct negotiations – Offer term. when conversation ends
      7. Effect of a Late Acceptance
         1. The late acceptance is an offer which in turn can be accepted only by a communicated acceptance.
         2. The original offeror may treat the late acceptance as an acceptance by unilaterally waiving the lateness.
         3. If the late acceptance is sent in what could plausibly be considered to be a reasonable time, the original offeror has a duty to reply within a reasonable time. Failure to do so creates a contract by silence.
   d. OFFERER REVOKES OFFER
      1. Indirect Revocation
         1. A communicated revocation terminates the offeree's power of acceptance and is effective when it is received except in a few states where statutes provide that it is effective on dispatch –
         2. Common law - even if the offer says it is irrevocable, it is still revocable unless consideration or the equivalent is given for the promise of irrevocability.
      2. Equal Publication
         3. i.e. when offer is made to many people (advertisement) equal notice must be given for revocation – if sp. people – must be comm. to sp. people
      3. Indirect Revocation
         4. When offeree knows by reliable info that offeror has acted in such was that indicates to reasonable person that offer has been revoked –(again, Dickinson, and Patteberg)
      4. Unilateral K – Special Rules – 3 views
         5. 1) The traditional rule is that the offer can be revoked at any time until the moment of complete performance.
         6. 2) A bilateral contract is formed upon the beginning of performance.
         7. 3) Prevailing view - once the offeree starts to perform, the offer becomes irrevocable. (An irrevocable offer is synonymous with an option contract). This rule requires the actual beginning or tender of performance and not merely preparation. Extensive preparation for performance might, however, trigger a finding of promissory estoppel.
      5. Death or Destruction of Essential
      8. Any person or thing essential to performance of the k
      6. Illegality
      9. If k becomes illegal before acc. offer is revoked
   3. What about 2 binding k for same thing?
      e. Usually first acceptance gets the goods – if first knows 2nd guys accepted, than too late to accept, even if offer was to him first
         Dickenson v. Dobbs – as soon as offeree knows of revocation, revocation is effective, promise to keep offer open is NOT BINDING without considerations
6) Irrevocable Offers and Option Contracts

1. What Terminates Irrevocable offer?
   a. ONLY - lapse of time, death or destruction of essential, illegality

2. What makes an offer irrevocable ????
   b. Consideration
      1. i.e. "$50.00 to keep it open to the end of the week"
         a. Humble Oil v. Westside – II $50 to keep offer open, and then sent letter with add. terms – Court det. that P could still exercise option b/c. the neg. were part of a new k, and original offer still open – Neg. do not invalidate power of acceptance
   c. Statute - UCC 2-205
      1. Empowers offeror to create irrevocable offer w/out consideration – REQUIRES
         1. (1) a signed writing;
         2. (2) language assuring that the offer will be held open;
         3. (3) the offeror must be a merchant;
         4. (4) the period of irrevocability may not exceed three months
         5. (5) if the language of irrevocability appears on the offeree's form it must be separately signed by the offeror part performance (unilateral)
   d. Partial Performance – Unilateral K
      1. If the conditions of the offer are partly performed, a contract can result.
      2. To avoid hardship to the offeree, if an offeree begins performance an option contract is created - The condition (or option) is the full performance by offeree.
      3. RESTATEMENT - “Where an offer invites an offeree to accept by rendering performance, an option contract is created when the offeree begins the invited performance.” RSC §45
      4. The option aspect is that the completion of the contract is dependent on continued performance
         a. Marchionda v. Scheck, Broker sues seller for partial performance in producing a buyer. Seller claims it revoked the offer and full performance never occurred. Offer irrevocable b/c the broker has already begun work
   e. Promissory Estoppel (DETRIMENTAL RELIANCE) - DEPENDS – some say yes, some say no…
      a. Baird v. Gimble Brothers Construction case: sub under-bid the job. GC relied on it and used it in his bid. Gets job, but sub revokes his bid. Revoked before acceptance of the bid bc D informed GC that wrong - Conditional that when GC used it in bid, that was acceptance because it was acting upon the offer. But bid said “acceptance AFTER g.c. awarded.” Promissory estoppel—GC relied on the contract. Hand disagreed, saying no Promissory estoppel - only good for avoiding harsh results, this result not that harsh.
         1. (Mutuality problem—gc doesn’t have to use lowest bidder, so what’s the consideration for the sub? Should they have the ability to revoke? Maybe, but they should agree with contractor that, “ok, I’ll bid, but only if provided you use my bid and get the job, I get the job.” Important part—“I’m going to rely” or “you’re going to benefit.” )
      b. Drennan v. Star Paving Same as Baird, except that GC made SC aware that he was relying on bid and that SC would be accepted after the fact. GC suffers detriment and SC benefits. Court finds for GC because SC’s bid induced action and they suffered a detriment. This was an irrevocable offer and SC is bound to it. Includes the subsidiary promise language; that if part of the requested performance is given (in this case acceptance), there’s an implied performance that the offeror won’t revoke. Should GC have been better at screening or evaluating the value of SC’s bid??
      c. ECM v. Maeda: In this the situation is reversed. SC sues GC for breach and PE. In this case, the GC basically convinced the SC to make a bid it did not want to make. SC contends that the offer was accepted. However, the AC finds that the use of a SC’s bid does not constitute acceptance and therefore imposes no obligation upon prime contractor. But, there was detrimental reliance or consideration – ECM’s submission of a bid for which GC benefited and SC did not have to do.

3. Nature of an OPTION CONTRACT – Irrevocability
   f. An option k is a k and and offer – the k is the binding promise that offer will stay open, and the offer is that the offeree can accept by exercising option
II. CONSIDERATION and EQUIVALENTS – Bases of Promissory Liability

1) Intro PROMISES
   - Not all promises are enforced, generally, enforceable promise must be supported by consideration, so, for gratuitous promises to be supported, must meet PE requirements, or in some, moral obligation, of course, there are exceptions for some promises in some jurisdiction (statute or seal)

2) Consideration Defined — (Restatement)
   
i. a performance or return promise must be bargained for
   ii. 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 promisee in exchange for that promise (promise must induce detriment, detriment must induce the promise – The BARGAIN)
   iii. the performance may consist of
       1. an act other than a promise, or
       2. a forbearance, or
       3. the creation, modification, or destruction of a legal relation.
       4. The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

   **consideration can be found in a benefit gained by promisee, detriment—lost out on other work, etc (reliance on what one party thought was a promise) (does not have to be in economic form******

Kirksey Following the death of his brother, D promises to give sister-in-law a place to live if she “comes down to see” him. She leaves her place and comes to him, suffering some travel expenses. After a while he kicks her off the land. Court rules there was no consideration, because the promise was a mere gratuity P gets a benefit and suffers some detriment, but D gets nothing. He just wanted to make the offer out of free will. NO CONSIDERATION

Langer v. Superior Steel: P is retiring and D promises him a pension for his continued loyalty, as long as he does not work for a competitor. D says there is not contract because it is a gratuitous offer. There is consideration, b/c P suffered some forebearence and D received a benefit (could also be P E)

Bogigian v Bogigian - Husband owes wife, wife signs a release of D from obligations, Wife wants judgment reinstated - The main issue is whether their second agreement cancels out the first. The majority - no release from the first contract because the two parties did not actually bargain. THERE WAS NO DISCUSSION and NO EXCHANGE OF PROMISES. Dissent – Fault of P for not reading. Consideration exists whether spelled out or not
3) **Sufficiency of Consideration**

i. **Motive and Past Consideration**
   1. Motive does not necc. mean consideration
      1.) **Thomas v. Thomas** – English Dwelling – Wishes of the testator are not valid consideration, however, the exchange of 1 lb. / year for upkeep was so court finds consideration on that, but not on motive aspect
      2.) **Consideration cannot be for something that has already occurred**
         i. Since the promise does not induce action since action has occurred
      1. ie baby naming

ii. **Adequacy of Consideration – HOW MUCH IS ENOUGH?**
   1. Any detriment, usually, so long as it has been bargained for
   2. **HOWEVER, Sham/ Nominal Consideration- NO WAY**
      1.) If $ is less than worth, significantly, court usually finds that it indicates that k was not really intended – merely a token to seem like consideration
         i. Restatement 2 argues that no real bargain occurs
      1. However, many dissent on that since why shouldn't one be held to a k if they are trying to make it look like a K?
      2. Although courts usually will not find nominal cons. enough
      3. Blackacre for $1,
         ii. If promised payment "in consideration" is not made, than false consideration I.E. I promise you $100 in consideration for keeping offer open, but never give the money = No consideration

**For support of nominal consideration**

It is desirable because the doctrine overcomes an unintended consequence which resulted from the abolishment of the seal. Allows people to make gratuitous promises binding.

- **Peppercorn theory**—mere inadequacy of consideration is never a bar to enforcement of a contract. A peppercorn is enough.
- There is no requirement that there be an equivalence in the values exchanged.
- You look for consideration in the subjective exchange of whether each party believed there was consideration.
- **Doctrine of Fair Exchange**—enforcement denied when there’s unfair disparity, or gross inadequacy

**Apfel v. Prudential**— COMP BOND TRADING- there was consideration—they distinguished from precedent that said that no consideration was present when idea was not novel. (Different here because they did not know the idea already, it just became known in time to others.) So there was value here, in cost to compete, knowledge, skill was unique

**Jones v. Star Credit**—concern for uneducated/poor who become victims of gross inequality of bargaining power. Void contract because it was unconscionable due to unequal bargaining

**Fiege v. Boehm.** In this case the court decides there is consideration, because the father in the bastardy case paid the mother support for 1.5 yrs to avoid being sued for bastardy charges. Clearly avoiding this rap had some value for him, and he in good faith thought he was the father.

**In re Greene.** Mistress case in which the guy offers to support his mistress in exchange, at least implicitly for her keeping quiet about the relationship. There is no consideration because he receives absolutely no benefit.
4) **Pre-Existing Duty**

   i. **Pre-Existing Duty Rule**—the performance or the promise to perform a pre-existing duty does not constitute consideration. The general common law rule was that an agreement to discharge an existing obligation and an agreement to modify an existing contract does not constitute consideration. (much criticism, exceptions formed.) UCC 1-107, 2-209 (1)

   **1. EXCEPTIONS** – Enforced if….the parties voluntarily agree and:

   1.) Promise modifying original contract made b/f contract fully performed on either side,
   2.) Underlying circumstances prompting modification were unanticipated by parties, and
   3.) Modification is fair and equitable

   Levine v. Blumenthal. P lease store with option to renew for an increase in rent. The two parties form another contract, adjusting the rent total. Contract is not valid, because it lacks consideration as the two parties have already bargained for the arrangement.

   APA v. Dominico: Two fish packers wait till they are far away in Pyramid Bay to argue new terms on their contract. Court says this is an unjustifiable advantage and the new contract did not have consideration.

   Angel v. Murray ENFORCES DUTY—performance of pre-existing contractual duty (to collect all city’s garbage for increased payment (b/c of additional units from which to collect). Criteria for “fair and equitable” met (1) not fully performed by either party, (2) unanticipated changes, (3) substantial difficulties external to the parties.

5) **Mutuality of Obligation**

For a contract to be enforceable, both sides must be bound to performance. If one party can back out without performing, then the obligation of that party was illusory and there’s no consideration for the promise. bc NO MUTUALITY OF OBLIGATION

   1. Bargain, negotiate, agree to price and terms, intent of both parties to enter into a contract which would be mutually binding. Must discuss any possible “unforeseen events” and what reasonably result in those occasions, come to a mutual understanding.

   2. 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.”

      1.) Each party must furnish some consideration to the other or the entire agreement is not enforceable by either.
      2.) The issue arises when one party states that the other’s promise was not adequate consideration for its promise.
      3.) Illusory promises - If one party is free to perform or withdraw from the agreement at his own unrestricted pleasure, the promise is illusory. Sounds like you’re making a promise, but you’re not really promising anything

   Rehm-Zeher v. F.G. Walker: P agrees to buy a certain amount of whiskey from D, but the contract allows P to take less whiskey if it desires. P took less whiskey for a number of years and then sued D when it wanted more and D would not supply it (because of a price increase.) There is not mutuality of obligation because P was not obligated to take any amount of whiskey and the contract was not enforceable by either side.

   McMichael v. Price: Contract was enforceable because both parties had an obligation to transact sand. D was bound to sell all the sand which it could and P was bound to purchase all the sand D could sell. There is mutual of obligation.

   Omni v. Seattle-First: A condition precedent to P’s duty to buy requiring receipt of a satisfactory feasibility report (subjective) does not render P’s promise to buy the property illusory. CONTRACT ENFORCEABLE because feasibility report is an OBJECTIVE measure, so D did not really have way of backing out of

   **Wood v. Lady Duff** *****P gets exclusive rights to D name to fashion design – Lady Duff claimed no mutuality of obligation b/c Wood was not obligated to sell her name – Court finds obligation of best efforts

   - UCC 2-306 (3) – “A lawful agreement by either the seller or 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.

**IMPLIED PROMISE can serve as obligation, even if it is not too definite**
6) Moral Obligation

The issue is whether promises made in recognition of a benefit that has been received in the past have consideration. For the most part, the answer is no.

i. A person who performed unrequested services for another does not thereby acquire a right to compensation or restitution, even though the former incurred a loss and the latter gained a benefit.

ii. In the Common Law, moral obligation was considered sufficient consideration, but this has changed slightly.

iii. Even if the beneficiary of the voluntary service subsequently promises to compensate the volunteer for the value of the benefit received, this promise may not be binding.

iv. Must consider the voluntary nature of the action taken, if voluntary, less likely b/c Δ had no option to refuse, if you are performing a voluntary act, no expectation of repayment, why should you be paid? IS there a REAL benefit?

v. Remember – Would the actor have acted the same way involuntarily, is there much choice?

PROMISE made in Recognition of Prior Moral or legal obligation NOT enforceable BUT EXCEPTIONS (page 164)

1. Pay a liquidated debt
2. Fixed amounts for previously requested services
3. Fixed amount for services not requested
4. Debts discharged or rendered unenforceable
5. Voidable Duty
6. Statute of Frauds
7. MISC. etc

RELATED → QUASI – CONTRACT – Restitution

1.) Did A confer a measurable benefit on B with expectation of compensation? (Defendant received a benefit)
2.) If so, did A give B an opportunity to decline the benefit before it was conferred? If no, A cannot recover in quasi-contract unless there is a reasonable excuse for failing to do so. (D knew of the benefit)
3.) Circumstances would make it unjust for D to retain the benefit without paying for it.
4.) Common law rule: Moral obligation not enough, must have legal consideration or quasi-contract elements.

**But more recently, moral obligation is a sufficient consideration if the promisor rec’d a material benefit, which he subsequently expressly promised to pay.

Mills v. Wyman: Father promises to compensate volunteer for taking care of older son who later dies. There is no consideration, because there is not preexisting obligation.

Manwill v. Oyler: A moral obligation is not enough to create consideration, even though - RSC states that a promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice, but it’s not binding if the promisee conferred the benefit as a gift and the promisor has not been unjustly enriched. However, when the promisor has received some material benefit (i.e., life, money, goods), a moral obligation is sufficient consideration for a subsequent promise to pay.

Webb v. McGowin: One worker saves another’s life and cripples himself in the process. The saved worker promises to pay the other a pension, but when he dies his estate stops paying. Court holds that this is a contract, because the saved worker received a material benefit – his life. Even if he did not request it, he would have, given the choice. vs. HARRINGTON (argument is the nature of the act, not as voluntary here)

In re Greene: Mistress case in which the guy offers to support his mistress in exchange, at least implicitly for her keeping quiet about the relationship. There is no consideration because he receives absolutely no benefit.
7) **Promissory Estoppel**

i. Promise plus Unbargained for Reliance; "A promise which the promisor would reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

1.) detriment undertaken by the promisee, implied consideration. Substitute for consideration. DETRIMENTAL RELIANCE

2.) REMEDIES ARE RELIANCE – NOT EXPECTATION – Only so much as to avoid injustice

ii. **Equitable Estoppel**—founded on equity and fair dealing.

A person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment.

1. A representation or concealment of material facts
2. The repres. must have been made with knowledge of the facts
3. The party to whom it was made must have been ignorant to the matter
4. It 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 her detriment

**Rickets v. Scothorn**: A grandfather persuades his granddaughter not to work anymore with the promise to pay her $2k plus interest. There is not requirement that she quit her job. She does quit, but is forced to work again when the estate won’t pay. There is not consideration, but the promise prompted her to act to her detriment. SO, promise is enforceable because niece relied to her detriment

**Kirksey v. Kirksey** – Would be a good case for PE because of her move, but what would be the remedies for such case? Keep house? Housing until new home is found...Would it be a Q for the jury for what remedies necc to avoid injustice?

**Allegheny College v. Nat’l Chautauqua Bank**: Johnston promises P a $5000 gift if they name a fund after her. She pays 1K and then retracts the promise. Ct holds that when the promisor requires that the promisee do something in exchange for the promise, there is adequate CONSIDERATION when dealing with charitable contributions, because consideration is not measured by its economic worth. However, even if there was not consideration, there was PE because the College acted to detriment by making flyers, advertising etc.

**Feinberg v. Pfeiffer**: D promised to pay P an annuity when she retired. P quit, although she did not have to, and the court found that D had to pay P because she relied on this promise to her detriment and injustice could not be avoided.

**Grouse v. Group Health Plan**: D hired P, forcing him to turn down other job offers, but then rescinded its offer. There’s no consideration, but P did act to his detriment. This was an at-will contract though, so theoretically he could be fired at any time But there is an implied good faith clause that he had would at least have a chance or opportunity to show he was a good employee.
IV. DEFENSES TO VALIDITY – FORMULATION

1) INSUFFICIENT FORMULATION – Indefinite/Incomplete

1. Defects in expressions of agreement and formation of k, not k itself, justifies withdrawal or avoidance of k even though k may meet all normal requirements, these errors may void altogether (basically, no k)

2. These types of errors make k Void – (non-existent) Not even formed!! NO K!
   a. Diff. from in mistake, fraud etc. => formed but unenforceable [voidable]

3. Indefiniteness and Material Terms
   a. Material terms must be so definite so that the performances req by each party are reasonably CERTAIN – (more indef. terms = less likely parties intended k)
   1. terms are reas. certain if they provide basis for WHEN IS THERE BREACH???
   b. WHAT ARE MATERIAL TERMS??
      2. subject matter, price, payment terms, quantity, quality, duration and work to be done
         a. Peerless – the "good ship" – each party thought of diff. ship of same name, materially different, no way to poss. gap full here

4. RULE – RESTATEMENT - Effect of Misunderstanding
   a. (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other or (b) each party knows or each party has reason to know the meaning attached by the other
   b. (2) 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 different meaning attached by the other, and the other knows the 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
      a. Konic v. Spokane – 56.20 v. 5620 – term was ambiguous and material term to which 2 diff. meanings were attached, so there is no k

5. Types of Indefiniteness Problems
   a. Where the parties have purported to agree upon a material term but have left it indefinite
      1. there is no room for implication and the agreement is void
        a. Varney v. Ditmars – "fair share" of profits for work too indefinite and court cannot find any way to compute, so D not bound to "fair share" – but P may have claim of action under quasi-k/unjust enrichment for the work performed measured by diff. in salary received and reasonable value of services
   b. Where the parties are silent as to a material term
      1. …or discuss it but do not purport to agree upon it, it is possible that the indefiniteness can be cured through the use of a gap-filler or from external sources including standard terms, usage, course of dealing and, according to some cases, by evidence of subjective intention.
      2. A gap-filler is a term supplied by the court because it thinks that the parties would have agreed upon this term if it had been brought to their attention, or because it is a term "which comports with community standards of fairness."
        a. MGM v. Scheider: When parties have completed their negotiation of what they regard as essential elements and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even if the parties have left elements to be determined in the future. The court will use some objective criteria, if available like agreement itself or commercial practice
   c. Where the Parties Agree to Agree
      1. Modern cases - there is a duty to negotiate in good faith even though there is no such provision in the agreement. The UCC and the Restatement (Second) are generally in accord with the modern view on questions of agreement to agree.
         1. Martin Deli v. Schumacher: Contract for lease of real estate. Provision called for renewal of lease at “rentals to be agreed upon.” This contract is unenforceable, because it is impossible to determine what this term means and thus neither party is bound by any set price
         2. Oglebay v. Armco: Contract to ship steel, with an indefinite term about how to set the future price. The pricing mechanism breakdown and D argues there is no contract, b/c it did not want to be bound if the mechanism failed. The court looks to previous dealings between the two to find an intent to be bound and a reasonable price term.
            i. Contracts to bargain, characterized by “subject to” language makes the contract not binding, because there is no manifestation of intent The point of this language is to make it easy for one side to bail out; thus the contract is not binding because both parties should be free to bail
               Empiro v. Ball-Co: Example of the above \(\rightarrow\) subject to asset purchase agreement –putting in writing
WHAT ARE THE REMEDIES WHEN K FAILS FOR INDEFINITENESS???????
> If the incomplete contract is enforceable, P may seek to protect expectation interests of specific performance.
> If the contract is too indefinite, other remedies will protect P’s reliance upon the contract or at the very least restitution.

*****This basically comes down to PROMISSORY ESTOPPEL remedies. Promises which the promisor should expect to induce action of definite character and which does induce such forebearance is binding**************

- **Hoffman v. Red Owl** P wanted to open a franchise and acted to his detriment in leaving his business and making preparations to open a franchise only to have the contract taken away from him. P gets reliance damages.

*****Indefiniteness may be cured by the subsequent conduct or agreement of the parties*****

**UCC and INDEFINITENESS**

- The provisions of the Uniform Commercial Code relating to indefiniteness are of two types. There is a very important general provision and there are provisions relating to specific problems which can be generally categorized under the heading of gap-fillers

- **Specific Gap–Fillers**
  - The Code has specific provisions that supply reasonable terms in various circumstances. These include price, time for delivery, place of delivery, shipment, payment, duration of contract, and specification of assortment

- **General Provision**
  - Even if 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. (UCC § 2-204(3)). The test is not certainty as to what the parties were to do nor as to the exact amount of damages due to the plaintiff. Rather, commercial standards on the issue of indefiniteness are to be applied

- **Discussion of General Provision**
  - Designed to prevent, where it is at all possible, a contracting party who is dissatisfied with the bargain from taking refuge in the doctrine of indefiniteness to wriggle out of a contract. This section is designed to change the traditional common law approaches. Thus, a gap-filler would be available even though the parties purported to agree upon a term or made an agreement to agree with respect to it. But the section goes beyond gap-fillers and permits a court to use any reasonably certain basis for giving an appropriate remedy.

- **Questions of Fact and Law**
  - Whether the parties intended to contract is a question of fact. Whether there is a reasonably certain basis for giving an appropriate remedy is a question of law

- **Restatement and Indefiniteness**
  - The Restatement is in general accord with the Uniform Commercial Code, but Article 2 of the UCC applies only to a contract for the sale of goods. (Sometimes it is applied to other types of contracts by analogy.) The Restatement (Second) applies to all types of contracts.
V. AVOIDANCE/REFORMATION – Misconduct and Mistake – Defenses to K Validity

1) Capacity  2) Mistake  3) Fraud  4) Duress  5) Unconscionability  6) Illegality

note:

Void vs. Voidable
Void  →  no legal obligation on promisor – no contract ever created
Voidable  →  When one or more parties has power to elect to AVOID legal relations or ratify [extinguish power of avoidance] INCLUDE lack of capacity, fraud, duress, mistake, misrepresentation, undue influence

1) Legal Capacity

iii. INFANTS

- Who Is an Infant?
  i. A person remains an infant until the first moment of the day preceding his or her 18th birthday and remains an infant despite emancipation and despite marriage.

- Is Infant's Promise Void or Voidable?
  i. A contract made by an infant is voidable at the option of the infant.

  ii. However, the infant may not disaffirm certain contracts because public policy or a statute so provides or because the infant has done something or promised to do something which the law would compel even in the absence of contract (e.g. support his out-of-wedlock child).

- Tort Liability
  i. An infant may avoid a contract, but is liable for torts. At times, it is difficult to distinguish tort liability from contractual liability, such as in the area of fraud and warranty.

- Avoidance and Ratification
  i. Avoidance
    1. The infant may avoid (disaffirm) the contract at any time prior to ratification. The avoidance may be made during the period of infancy and once made is irrevocable.
      a. In the case of real property, however, the majority rule is that the infant's promise may be avoided only after majority.

  ii. Ratification
    1. The infant may ratify (affirm) the contract after reaching majority. This may take place in three ways:
      a. express ratification,
      b. conduct manifesting an intent to ratify (retention and enjoyment of benefits and services), and
      c. failure to disaffirm within a reasonable time after majority.

- Effect of Misrepresentation of Age
  i. According to the majority view, infants may disaffirm even if they misrepresented their ages. The authorities are about evenly split on the question of whether infants are liable in tort for misrepresenting their ages.

- Restitution After Disaffirmance
  i. Infant as Defendant
    1. Upon disaffirmance, infant is liable for return (or value) of any tangible benefits the infant has received and still has.

  ii. Infant as Plaintiff
    1. If upon disaffirmance an infant sues for the return of the consideration the infant has supplied, under the now prevailing view the infant's recovery is offset by the value of use and depreciation of any property obtained from defendant. The more traditional view is that only property the infant still has need be returned.

  iii. Necessaries
    1. An infant is liable in quasi-contract for the reasonable value of necessaries the infant has received.

Bowling v. Sperry – 16 year old bought car, and sued to return the money, Π infant tried to enforce b/c necessity, but court found not a necessity, but court found k was voidable and disaffirmed, that $ was returned to the Π and car returned to Δ
VI. AVOIDANCE/REFORMATION – Misconduct and Mistake – Defenses to Validity

Mental Incapacity

Tests of Mental Incompetency

i. Where there is no prior adjudication of incompetence,
   1. the great majority of the cases utilize the test of
      a. whether the party was able to understand the nature, purpose, and consequences of the act at the time of
         the transaction.
   2. The more modern view adopts in addition the test of
      b. whether "by reason of mental illness or defect" a person "is unable to act in a reasonable manner in
         relation to the transaction, and the other party has reason to know of this condition."

ii. Under either test, the promise of the incompetent is voidable.

iii. If, however, the party had been adjudicated as incompetent prior to the transaction and a guardian had been
     appointed, the transaction is void [no contract to begin with]

Restrictions on Power of Avoidance

i. The promise of an unadjudicated incompetent that is still executory is voidable; but executed transactions are not
   voidable (contrary to infancy cases) unless the incompetent can restore the other party to the status quo ante.

ii. If the incompetence was obvious, however, the incompetent must make restitution only to the extent that tangible
    benefits remain.

- Necessaries
  i. As in the case of infants, incompetents are liable for the reasonable value of necessaries furnished them.

Heights Realty v. Phillips – Presumption of competency, party claiming incompetence must overcome presumption [burden to show clear and convincing evidence that party is incompetent and could not enter into k]

FACTORS ➔ physical condition, adequacy of consideration, relation and trust btw parties, weakness of mind as judged by other
acts within reasonable time period prior. TEST ➔ if a person is capable of understangin in a reasonable manner the nature and
effect of the act which person is engaged

NOTE ➔ INTOXICATION ➔ see mutual assent – may be a defense to mutual assent
2) MISTAKE (sections 151-158 of Restatement)

Failure of the parties to possess sufficient or accurate information about a basic assumption on which the contract was made makes the contract voidable. For avoidance, the mistake must relate to a basic assumption as to a vital existing fact.

MUTUAL MISTAKE

A. Failure of both parties to possess sufficient or accurate information about a “basic assumption on which the contract was made” undermines our confidence that the bargaining process will produce an equitable or efficient outcome. (Harder to enforce and harder to understand.)

B. Rules of §152 of Restatement—Basic Assumption and Material Affect

A. 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 performance, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.

   A. Beachcomber Coins v. Boskett: Seller sold a coin supposedly worth $500 that was in fact a fake. Because there was a mutual mistake, there is not contract.

   A. However, the buyer was an expert, so should he be held to a higher standard?

1. Where the parties are uncertain or consciously ignorant of a vital fact there is no right of avoidance.

2. There is an critical difference between the value and the nature of the property

   a. Courts will often not allow rescission when the mistake is related only to the value of the good/property.

      A&M Land Dev v. Miller

   i. However, when the parties are mistaken about the very nature of the character of the thing to be traded as consideration, courts are more likely to allow rescission.

      1. Rose the 2d of Abelone (Mistake Cow – The parties would not have made the contract if they had known the cow was pregnant)

         a. Sometimes, courts will not grant rescission in every case in which there was mutual mistake.

            Lenawee Cty Board of Health v. Messerly: The existence of an “as is” clause mitigated some of the risk, and put the onus on the buyer to make sure the property was as they thought it was.

UNILATERAL MISTAKE

A. Courts much more reluctant to enforce this, but allow it if exceptions (see below) are met

   A. RST §153—Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, 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 knew or had reason to know of the mistake or his fault caused the mistake.

CONDITIONS – Boise v. Mattefs

1) Must be material, basic assumption
2) enforcement would be unconscionable
3) mistake is not a violation of duty / negligence (fault of party making mistake by intent/neg.)
4) party not prejudiced except by the loss of bargain
5) PROMPT notice once adversely affected party is aware of mistake
3) **MISTAKE** - continued

**UNILATERAL MISTAKE cont.**

- **Unilateral Palpable Mistake**
  1. A mistake by one party of which the other is, or ought to be, aware is grounds for avoidance. Cases of this kind are cases of fraudulent non-disclosure. [see mis-representation]

- **Unilateral Impalpable Mistake**
  1. Avoidance is allowed for unilateral mistake if
     a. the mistake is computational, clerical or something of that sort, rather than a mistake in judgment;
     b. enforcement of k would be oppressive, resulting in an unconscionably unequal exchange of values;
     c. avoidance would impose no substantial hardship on the other.

- **The offeree’s actual knowledge of a mistake is an important factor in granting relief to a mistaken party.**
  1. The remedy is usually rescission, which invalidates the contract.
  2. I.E → if a bid is way below all the others, the person excepting the bid should recognize that there is a mistake.
    a. *Boise v. Mattefs*: D, a SubC made a mistake in determining a bid for P, a public university. The court rules that the mistake was material, it did not result in culpable negligence and that allowing the contract to continue would be unconscionable, because D would lose substantial amount of money

**REMEDY FOR MISTAKE**

- The remedy for mistake is usually rescission, but the courts will sometimes reform the contract
- Usually if the mistake is in the formulation of the agreement, the remedy is rescission
- But if the mistake is in the expression (writing) of the contract, reformation is an option but there is a heavy burden on the plaintiff to show that this is the right result.

**MISTAKES IN TRANSMISSIONS OF OFFERS/AcCEPTANCES**

- In general, the party who selects the method of transmission bear the loss created by any mistakes in that transmission
  o *Ayer v. Western Telegraph*: P sent a message to buyer offering laths at a certain price. D messed up the message. Court finds that the party who selected the means of communication bears the loss.

**DEFENSES TO AVOIDANCE OR RECOVERY FOR MISTAKE**

1. **Change of Position**
   a. A contract cannot be avoided, or the value of a performance recovered, for mistake, if the other party has detrimentally changed position in reliance upon the contract.

2. **Affirmance of the Transaction After Discovery of the Mistake**
3. **Failure to Avoid the Contract With Reasonable Promptness After Discovery of the Mistake**

**REFORMATION FOR MISTAKE**

Reformation of a writing for mistake is available if:

1. **There must be a written agreement.**
   Reformation is not available if the parties mutually intended to omit or misstate the term. Reformation is available on grounds of misrepresentation, if one party, without the consent of the other, intentionally omits a term that has been agreed upon.

2. **There must have been a prior agreement to put the agreement in writing.**
   The prior agreement may have been oral or written. An indefinite or tentative agreement suffices. If by error, rather than by modification, clauses earlier agreed upon are misstated or omitted, the writing may be reformed.

3. **There is a variance between the prior agreement and the writing caused by mistake.**
   Frequently, the variance is an arithmetical error. Sometimes, it is a mis-description of the subject matter, as a typist's error in a metes and bounds description of real property. At times, the parties mistake the legal effect of their writing. Reformation is available in each of these circumstances.
4) **FRAUD & MISREPRESENTATION – Duty to Disclose**

1. A misrepresentation is an assertion that is not in accord with existing facts.
2. Avoidance may be based on a negligent or even an innocent misrepresentation.
   - Intentional misrepresentation [Fraud] need not be material.
   - Unintentional misrepresentation must be material.

- **A representation is material if**
  - 1) it would influence the conduct of a reasonable person; or
  - 2) The person using the words knows that it would likely influence the conduct of the other party.

- **Reliance**
  - The party must have relied upon the representation in the sense that the party regarded the representation as an important fact and that it influenced the decision to enter into the transaction.

- **Justification**
  - The old idea that a party could not avoid a contract for fraud unless there was a "right to rely" has largely been superseded by the idea that avoidance will be allowed even "to the simple and credulous." The law is in flux on the question, but if the representation is purely factual (as opposed to a misrepresentation of fact and opinion or fact and intention), the modern law regards reliance as justified in almost every case. A party is justified in relying even if negligent in investigating or not investigating the facts.

- **Injury Not Usually a Requisite**
  - Even if a party gets something as valuable as, or more valuable than, the performance promised, the party may avoid the contract. The reason is that the party's autonomy has been tinkered with when presented with untrue information that prevents the exercise of good judgment. A major exception is that most cases hold that where a purchaser of land misrepresents the purpose for which the purchase is made, avoidance is not permitted unless the seller owns adjacent land, the value of which will decrease because of the intended use.

- **The Misrepresentation Must Be of Fact and Not Opinion or Law**
  - A party is not justified in relying on a statement merely of opinion. Nonetheless, many statements of opinion also imply factual assertions. Although one may not rely on what is merely an opinion, one may rely on the implied facts contained in an opinion if it is reasonable to do so. The following are categories of cases in which such reasonableness is likely to exist. In each case it is assumed that the other elements of avoidance (deception, reliance and justification) exist.
    - The representer is or claims to be an expert.
    - The representer has superior access to the facts upon which the opinion is based.
    - There is a relationship of trust and confidence between the parties.
    - The opinion intentionally varies radically from reality.
    - The representation is of the law of another jurisdiction.

- **Misrepresentation by a Third Party**
  - If a party, prior to contracting, has received false or otherwise incorrect information from a third person who is not an agent of the other party, the deceived party cannot avoid a contract induced by that information unless the other party learned of the misrepresentation prior to contracting. This is a variant of the bona fide purchaser for value principle.

- **Cure of a Misrepresentation**
  - If, after a misrepresentation is made, the facts are brought into line with the representation before the deceived party has avoided the contract, the contract is no longer voidable.

- **Merger Clauses**
  - Despite a merger clause or a "there are no representations" clause, parol evidence is admissible to show that a misrepresentation was made. An "as is" clause excludes warranties, but does not exclude evidence of representations.
5) FRAUD & MISREPRESENTATION – Duty to Disclose

- Non–Disclosure
  - We start with a general rule that there is no duty to disclose facts that would tend to discourage the other party from entering into a proposed deal. This general rule is being eroded by a group of exceptions.
  - Exceptions:
    - Concealment (positive action to hide) is the equivalent of a misrepresentation.
    - Where partial disclosure is misleading.
    - Where changing circumstances cause an assertion to no longer be true or if the representer discovers that a representation made innocently is incorrect.
    - Where one party becomes aware that the other is operating under a mistake as to a vital fact.
    - Where there is a confidential relationship.
    - Statutory disclosure rules, such as S.E.C., Truth–in–Lending, etc.

- Election of Remedies
  - If the misrepresentation and ensuing deception, reliance and injury constitute a tort, the deceived party must elect between either a tort action or the exercise of the power of avoidance followed by a restitutionary action. Under the UCC both remedies are available but items of recovery cannot be duplicated.

- Restoration of Status Quo Ante
  - Where restitution is sought at law in a quasi-contractual action, the plaintiff must, before suing, offer to restore any tangible benefits received under the contract, but not if what has been received has perished because of its defects, is worthless, or consists of money that may be offset. However, in an equitable action no prior offer to restore is required, but the equitable decree can be conditioned upon such restoration. An equity action is available if something other than, or in addition to, a money judgment is sought; e.g., cancellation of a deed.

- Fraud-in-the-Factum
  - Where a party signs a document that is radically different from that which was represented and the circumstances are such that a reasonable person similarly situated would have signed it, the document is void.

Morta v. Korea Insurance Corp
Later found out he had a blood clot in brain and sued and claimed fraudulent misrep. by Δ and wants release unenforceable – claims release is subject to recission if evidence of any fraud, undue influence, mistake or deceit, court found none and Δ had no duty to the Π, "at arms length", and not reading does not become mistake, so Π's release is not recinded, NO DURESS

Laidlaw v. Organ
Π Organ (buyer) w/ Δ Laidlaw (seller) for tobacco  ⇒ However, there is arg. that silence is fraudulent misrepresentation if by silence you are withholding information, but only if a "duty to disclose" by relationship  ⇒Since Π did not demand a reply, Π may have waived his entitlement to the information

Vokes v. Arthur Murray
Court looks to fact that although generally to be actionable, misrepresentations must be of fact and not opinion, However, court holds that these misrepresentations were fact because the Δ had superior knowledge, so although under normal circumstances it would be considered to be opinion, here it is fact. Plus it was so obviously a fact, that the Δ did misrepresent  ⇒ Even in contractual situations where a party has no duty to disclose, if they do, must disclose whole truth.  ⇒ So, if they had not been telling her how wonderful…etc., would k be voidable?

Hill v Jones (termites)
HOLDING – Buyers did have duty to disclose material fact, and whether termite damage is material fact is matter for jury, so remand for trial  ⇒ Integration clause does does not shield from liability for fraud  ⇒ Modern view is that vendors have duty to disclose in some circumstances  ⇒ correct the mistake of the other party as to basic assumption (good faith and fair dealings)
  - Under some circumstances there is a duty, and not to do so equals fraud or misrepresentation, and one case is material facts affecting the value of the property known to the seller but not reasonably capable of being known to the buyer
    - Π had no way of knowing, even by termite reppt bc Δ did not disclose to inspector either
  - WAS TERMITE DAMAGE MATERIAL FACT
    - fact to be determined by jury, so case must go to trial
6) **DURESS**

- Any wrongful act or threat that is the inducing cause of a contract constitutes duress and is grounds for avoiding the contract so formed.
  - party under duress is left with no reasonable alternative

- **What Constitutes Wrongful Conduct?**
  - Violence or Threats of Violence
  - Wrongful Imprisonment or Threat of Imprisonment

- **Economic Duress**
  - Where the coercion involves economic pressure, rather than a threat of personal injury or the like, however, duress is usually not present unless the party coerced can show that there was no reasonable alternative but to assent.
    - Wrongful Seizure or Withholding of Property, Including the Abuse of Liens or Attachments
    - The Abuse of Legal Rights or the Threat Thereof
    - Breach or Threat to Breach a Contract
      - mere threat not enough, must also appear party could not obtain goods elsewhere

- **Coercion by a Third Party**
  - If the wrongful pressure is applied by a third person, the transaction can be avoided if the other contracting party knows of the coercion, or does not give value. If the other party gives value without notice of the wrongful conduct, the coerced party cannot avoid the contract.

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**Austin Instruments**

Yes, there was duress and therefore K are voidable and remands for computation of damages. K are voidable by duress if party making claim was forced to agree to it by means of a wrongful threat precluding the exercise of free will, ECONOMIC – if immediate possession of needful goods is threatened. Δ was under eco. duress because the goods were necc. if want to avoid damages (nonperformance of subcontract is not excuse for default on main contract) and maintain military K and also they could not have gotten the goods from elsewhere, so they had no choice but to pay the higher price, which preclude exercise of free will.

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**Machinery Hauling Inc. v Steel of WV**

No – Π free will was not hindered and Π did have reasonable alternative b/c there was no existing K with the Λ. No K w/Λ, so therefore there was no threat to end an existing K, so really there was no detriment to Π if they did not do what Λ asked, and they did not, so their free will was not hindered.

The Π cannot have a claim on future expectancy to which it had no legel right, since there was no K with Λ. "A party cannot be guilty of economic duress for refusing to do that which it is not legally required to do"

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7) **UNDUE INFLUENCE**

- *Unfair persuasion rather than coercion [as in duress].*
- Persuasion is unfair in two classes of cases.
  1. Where a person uses a position of trust and confidence to convince the other to enter into a transaction that is not in the best interests of the persuaded party.
  2. Where a person uses a position of dominance to influence a transaction against the best interests of the subservient party. The foremost indicator of undue influence is an unnatural transaction resulting in the enrichment of one of the parties at the expense of the other.
    - Morta
    - Arthur Murray -
8) **UNCONSCIONABILITY**

"no sensible man would make and no honest and fair man would accept"

******** Looks at time k was formed**************

i. Legality – UCC 2-302

**Unconscionable Contract of Clause** - give courts power not to enforce under code

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 k, or it may enforce the remainder of the k without the unconscionable clause as to avoid any unconscionable result

2. When it is claimed or appears to the court that the k 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 decision

ii. Focus on FAIRNESS / EQUITY

3. Not intended to relieve parties of bad bargains, but to ensure that elements of oppression and unfair surprise were not

iii. Question of Law – not for trier of fact?

**TWO TYPES OF UNCONSCIONABILITY**

Courts generally require showing both kinds to find a k unconscionable an absence of meaningful choice on the part of one of the parties, together with terms that are unreasonably favorable to the other party – most usually appear together anyway – If one is present, other usually may be

i. **Procedural (Unfair Surpise)** – how k came to be

1. lack of knowledge or understanding due to

   1. inconspicuous print, legalistic language, lack of opp. to read or ask q's

      i. relavence of illiteracy or lack of sophistication

   2) Lack of Bargaining Power because of disparities in power (terms non-negatiatable)

   ADHESION k – "take it or leave it"

   -Drafted by dominant party and presented on "take it or leave it" basis

   -not objectionble on own, but provide evidence of procedural unconscionability

ii. **Substantive (Oppression)**

1. actual k or clauses in k which are oppressive or overly harsh

   1.) To determine whether susb. uncon. is present **courts look to provisions which**

      i. that **deprive one party of the benefits of agreement** or leave that party **without remedy** for non-performance

      ii. bear **no reasonable relation** to business risk involved

      iii. to the **substantial disadvantage of one party** without producing a similarly equal benefit on the other

      iv. excessively large **DISPARITY** btw cost and selling price of subject matter of k with not objective justification
UNCONSCIONABILITY continued…

Consumer Transactions

**Cutler Corp v. Latshaw** - Contract for repair—back side of contract sheet, a warrant for attorney. Court wrestles with front and back of sheet issue. Ultimately decides unconscionable because if you’re going to use a big deal thing like a warrant of attorney, it would have to be **clearly marked (large/with heading)**, so that **everyone can read, notice, understand**. Problem—where do you draw the line with this? Do warranties have to be in bold/up front?

**Williams v. Walker-Thomas Furniture**
Contract deemed unfair, because P did not realize the charges would accrue as they did and result in enormous credit charges and replevin of goods. **However**, this tends to go against the general rule that the law holds people to contracts they have signed, whether they have read them or not.

**Jones v. Star Credit (freezer)**
Court takes into account both the outrageousness of the price term and the relative disparity in the bargaining power of the two parties in determining that a contract to buy a $300 fridge for $1400 was unconscionable.

Commercial Transactions –

1.) **Defense of unconscionability is not limited to consumer cases**, although it is difficult for merchants to show that there was a gross discrepancy in bargaining abilities. However, unconscionability can be raised as a defense if there **is no showing of a voluntary, knowing or understanding release of rights.**

**Weaver v. American Oil**
Contract that included a hold harmless clause—substantive unconscionability-- objectionable or oppressive clause in the contract. clause three, indemnified the D. —we had to read it at least twice to get it. Attendant hadn’t completed high school. (Exulpatory and indemnifying) The court found the contract to be unenforceable because it was grossly unenforceable and there was an unequal bargaining power. The party seeking to enforce such a contract has to show (burden of proof) that the provisions **were explained** to the other party and there was in fact a “**real and voluntary: meeting of the minds.**” Public policy and in re: Parol Evidence – yield to equity

**Zapatha v Dairy Mart** (franchise agreement termination)
- there is a requirement for reasonable notice, but court finds that termination clause, and every element, both procedural and substantive are not unconscionable and enforces the termination of franchise agreement
Illegality

Unenforceable on grounds of PUBLIC POLICY (meets all qualifications of k, i.e. offer, acceptance and consideration)

i. An illegal contract is one which may not be enforceable because the contract violates public policy. The contract will be formed, but the bargain itself, its performances are “illegal” and thus the contract is not enforced. The most obvious example of this is a contract for murder, etc.

1. The result sometimes in an unenforceable contract is that the P is denied restitution of any of the benefits conferred upon the D by performance.

ii. A promise is unenforceable if it goes against a clear legislative mandate, but it can also be unenforceable if there is not any existing legislation

*****Then there is a balancing test to determine if the interest in enforcing the contract is outweighed by the interest of public policy*****

Restatement—weighs:

1 - the strength of that policy as manifested by legislation or judicial decisions,
2 - the likelihood that a refusal to enforce the term will further that policy,
3 - the seriousness of any misconduct involved and the extent to which it was deliberate,
4 - the directness of the connection between that misconduct and the term

*****Courts usually lean towards favoring enforcement when in doubt*****

*****Court can also take the step of reforming a contract that violates public policy*****

Sinnar v. LeRoy – P wants money back that gave to D for illegal license, and court says no because will not help to enforce a contract or restitute if k was illegal purpose for $ - Sometimes court will if not too much illegality, but in this case, court found illegality, fraud ag. state agency, pretty illegal, so tough luck, P out of his money

Homami v. Iranzadi – The P wants $ from the D in interest, although k for interest was oral so P did not have to claim for tax purposes, and court finds that it will not enforce oral k because P's purpose was illegal

*COURTS will not usually enforce if P cannot make its claim without exposing illegality (type of test of extent of illegality maybe?

Paterson v. McLean – Court will not apply a federal statute in racial discrimination because did not affect her right to k, or right to enforce k, ESP since she is able to go to court to try to enforce (but refers to other causes of action not related to federal k law, (state k law, civil rights)

Data Management v. Green – Example of court exercising power to reform part of the non-compete clause which was ag. public policy – NON-compete clauses – must consider factors and if ct. can reform to be able to enforce, ALTHOUGH – mentions that courts can also not enforce or "blue-pencil" as other approaches

Watts v Watts- court does not believe that it is ag. public policy since k was not for sex or kids, and although may still undermine sanctity of marriage, does not violate, and P may have claim for unjust enrichment, maybe for implied in fact? – Court believes that not ag. public policy enough to dismiss claim and allows P "day in court"
9) "Duty to Read"
Generally \(\rightarrow\) Assent to a document that purports to be a contract or other consensual transaction implies assent to the terms contained therein.

- **Exceptions**
  - If the Document or Particular Provision Is Not Legible
  - If the Provision Is Placed in Such a Way That It Is Not Likely to Come to the Attention of the Other Party
  - **Fraud**
    - Fraud in the Execution
      - Where one party materially misrepresents the contents of a writing, the modern cases permit the defrauded party, despite a failure to read, to avoid the contract if the party was deceived and relied upon the representation. Alternatively, the contract may be reformed to conform to the representation.
    - Fraud-in-the-Factum
      - A contract is void where the misrepresentation goes not only to the content of the document but also to the nature of the document and the document is radically different from the kind represented and it was not unreasonable for the party to sign it.
  - **Mistake**
    - Unilateral Mistake
      - If only one party assents to a document under the mistaken belief that it contains, or does not contain, certain provisions, this party is generally bound by the document. In two situations, however, relief may be granted.
        1. Palpable Mistake
           - If the other party is, or ought to be, aware of the mistaken belief, the mistaken party may avoid the contract or have it reformed to conform to this belief.
        2. Impalpable Mistake
           - If the other party has no reason to know of the mistake, the mistaken party cannot have reformation but may, however, avoid the contract if enforcement would result in an unconscionably unequal exchange of values, and avoidance would impose no substantial hardship on the other.
        3. Mutual Mistake
           - If both parties share the same mistake as to the contents of a writing, it will be reformed to conform to their belief.
  - **Unconscionability**
    - For analytical purposes two kinds of unconscionability are distinguished: unfair surprise and oppression. The second category is unrelated to "duty" to read because even if an oppressive clause is read and comprehended it can be voided by a court. The first category goes to the heart of this topic. Modern cases scrutinize burdensome, unexpected clauses that have not been read by, or explained to, a party adhering to a form contract. Sometimes such clauses are held to be void.

10) **Affirmance or Ratification**
- Affirmance and ratification are equivalent terms. Upon discovering a misrepresentation or mistake and on escaping duress or undue influence, a party has choices. One of these choices is to continue to accept the obligations of the contract. A manifestation of intent to continue with the transaction is an affirmance. No consideration is required for an affirmance. After affirmance, the power of avoidance and the right to seek reformation are lost.

- **Affirmance by Conduct**
  - Exercise of Dominion
    - After a party's power to choose between affirmance and avoidance ripens, the continued exercise of dominion over property received under the contract or the continued acceptance of benefits under the contract affirms the contract.
  - Delay
    - An affirmance occurs if a party fails within a reasonable time to avoid the contract after the power to do so has ripened. What is a reasonable time is normally a question of fact. Three factors dominate the determination of reasonableness of time to avoid: (1) reliance by the other, (2) speculative benefit gained by stalling, and (3) fault.

11) **Reformation – For Mistake, Fraud or Duress**
Available if 3 CONDITIONS

1. Must have been prior agreement
   2.) may have been oral or written
   3.) can be indefinite or tentative
2. must have been agreement to put agreement in writing
3. B/C of mistake, there is a variance btw the prior agreement and writing
III. PROPER FORM (Writing) and INTERPRETATION - Formulations of Contracts

1) Statute of FRAUDS

UCC 2-201
Restatement § 110

Marriage – k in consideration of marriage
Year – not performable within a year
Land (sale of)
Executor
Goods OVER $500.00
Suretyship

****Basically – requirement that certain types of agreements need to be written to be enforced***

Ancient way to ensure no fraudulent k when seal was abolished –
  o avoids perjury and faulty recollection, encourages deliberation and seriousness
    ▪ Although good purpose, can now prevent oral terms, which were part of k, from being introduced as evidence, and good k not enforceable b/c of statute
    ▪ HOWEVER – Courts now "narrowly construct" and find ways to take k "outside SOF"
    ▪ For example, courts can read indefinite duration to be "possibly performed" within year, and take out of SOF

*****The Statute applies only to a promise which by its terms does not admit of performance within one year from the making thereof. If, by its terms, performance is possible within one year, however unlikely or improbable that may be, the promise is not within this section of the Statute of Frauds******

  - Klewin v. Flagship: Contract between the two parties failed to specify a time of completion, although it would most likely be more than a year. The court rules that this is a contract of indefinite duration and thus is no necessarily unenforceable under the Statute of frauds even though it will most likely take more than a year, because it could take less than a year
  - North Shore v. C. Schmidt: Agreement to serve as a beer distributor. A contract does not fall within statute if it does not expressly state that the performance will take more than a year. The statute does not apply to contracts of indefinite duration in which performance could occur within the year.
  - Mason v Anderson: Complete performance of the repayment of a loan, which was an oral agreement, takes the agreement out of the one –year provision of the statute of frauds. – Even though orig. may have taken more than year, compl. performance w/in

UCC – 2-201 – Contracts for Sale of Goods
- A contract for the sale of goods for a price of $500 or more is within the Statute
- Exceptions
  o If the goods are specially manufactured for the buyer and can’t be sold to others
  o The seller, before notice of repudiation if received, begins substantial performance of their manufacture
    ▪ this is because seller cannot mitigate damages for sp. manufactured goods, and the beginning of production of such goods is enough to show that there was some sort of agreement
  o A contract is enforceable if the party against whom enforcement is sought admits that a contract for sale was made, but the contract is not enforceable beyond the quantity of goods admitted
  o No writing is necessary as to items which have been received and accepted.
  o The writing requirement is also eliminated with respect to goods for which payment has been made and accepted.
  o *** Merchant Objection to Confirmation Letter → must object if prior dealing s

Suretyships, Executor, Marriage
- Land and Marriage, basically because of unique and sensitive nature that insurance of agreement is so imp…
- Suretyship and Executor – promises to answer for debt of a 3rd party

Property
- uniqueness, legal interest and seriousness of sale of Real Property
SUFFICIENCY OF MEMORANDUM
- Under UCC – Sale of Goods
  o 3 Requirements
    ▪ evidence a contract for the sale of goods
    ▪ be signed by the parties charged
    ▪ specify a quantity
- Thus, a memo is sufficient even though omits other essential terms – Only enf. to quantity in memo

GENERAL SUFFICIENCY – (other than sale of goods)
- The writing need not be formal or integrated. A note or a memorandum is sufficient.
- *The writing should*
  o (1) indicate that a contract has been made or that the signer made an offer;
  o (2) state with reasonable certainty
    ▪ (a) the identity of the contracting parties,
    ▪ (b) the subject matter, and
    ▪ (c) the essential terms in contrast to details or particulars
  o (3) be signed by the party to be charged.
- A signature is any mark, written, stamped or engraved, which is placed with intent to assent to and adopt (authenticate) the writing as one's own
- The party to be charged is the one against whom the claim is being made.
- A memorandum is sufficient if it is signed by an authorized agent of the party to be charged. The authority of the agent need not be expressed in writing, except in many jurisdictions under the real property provision.

Oral Evidence Offered by Defendant to Defeat Claim – PAROL EVIDENCE
  o The party sued may show that the memorandum does not reflect the true agreement and thus defeat the claim except to the extent that the parol evidence rule excludes such evidence

Oral Evidence Offered by Plaintiff
  o Evidence of an essential term orally agreed to is not admissible on behalf of the party seeking to contradict or supplement the writing and this is true whether or not the writing is an integration.
  o Oral evidence is admissible in aid of interpretation unless it is excluded under the rules of interpretation set forth above
- If the plaintiff has fully performed, the plaintiff's consideration need not be stated in the writing. Any promise that is executory must be stated
- The memorandum may be in any form.
- It need not be prepared with the purpose of satisfying the Statute except in the case of a contract in consideration of marriage.
- It need not be delivered.

More Than One Writing
  o If the essential terms are in two writings, and only one is signed by the party to be charged, the Statute is satisfied if the unsigned document is physically attached to the signed document at the time it is signed or if one of the documents by its terms expressly refers to the other, or if the documents by internal evidence refer to the same subject matter or transaction. Extrinsic evidence is admissible to help show the connection between the documents and the assent of the party to be charged.

- **Crabtree v. Elizabeth Arden** writing consisted of three different memos, only one of which was signed. The court found that this was sufficient as the three memos were necessarily linked
- **DF Activities v. Brown** Sale of Chair - A party asserting Frauds as a defense may not be deposed for the sole purpose of eliciting an admission that a contract was made. –
Other Problems Under Statute of Frauds

- **Noncompliance**
  o Under the majority view, failure to comply with the statute renders the contract unenforceable. The minority view regards the contract as void. Under the majority rule, the oral promises are valid but they may not be sued upon at law.

- **Promissory Estoppel**
  o Many recent cases allow recovery despite the Statute of Frauds when the plaintiff injuriously relied on an oral promise.

- **Estoppel in Pais**
  o If a party falsely represents that a memorandum of the contract has been signed and the other party injuriously relies on the representation, the party so representing will be estopped from relying upon the Statute of Frauds.

- **Effect of Some Promises Within and Others Outside Statute**
  o The general rule, subject to limited exceptions, is that where one or more of the promises in a contract are within the Statute and others are not, no part of the contract is enforceable.

- **Rescission of Contract Within Statute**
  o The parties may orally rescind a written executory contract within the Statute. They cannot orally rescind a transfer of property.

- **Modification of a Contract Within the Statute**
  o *If the new agreement is not within the Statute of Frauds, it is not only enforceable without a writing but also serves to discharge the prior agreement.*
  o *If the new agreement is within the Statute and is not evidenced by a sufficient writing, the former written contract remains enforceable unless the new agreement is enforced because of waiver or estoppel.*
    ▪ I.E → 2 used cars for $900, oral modification to 1 car for $450, only modification is enforceable
    ▪ Or, Original is 1 car/ 450 and modification is 2 for 900, only original is enforceable

- **Relationship of Various Subsections**
  o A promise may contravene one or more of the subsections of the Statute of Frauds and not the others. If it falls within even one subsection, a writing is required unless the case is taken out of the Statute under the theory of performance or estoppel. For example, a contract for the sale of real property that by its terms cannot be performed within one year must satisfy both the one-year and real property provisions.
2) Parol Evidence Rule

RULE:
- A total integration (a writing that the parties intend to be final and complete) cannot be contradicted or supplemented.
- A partial integration (a writing that the parties intend to be final but not complete) cannot be contradicted but may be supplemented by consistent additional terms.

If the PE rule is applicable, it excludes prior written or oral agreements entered into by the parties and contemporaneous oral agreements, but contemporaneous writings are normally held to be part of the integration.

THEORIES UNDERLYING Parol Evidence RULE
- If parties intend a writing to be final and complete, they must intend to SUPERCEDE other previous agreements
- Oral Evidence may be suspect, and if contradictory, writing is preferred over oral b/c of potential perjury
  o If both parties signed it, both parties probably mean it, [at least more than oral agreements]

FIRST MUST DETERMINE \(\rightarrow\) IS it FINAL and COMPLETE (preliminary Q for court)
- Parties may introduce evidence to determine if the writing is FINAL
- More complete and formal \(\rightarrow\) the more likely a total integration
- RESTATEMENT [page 240, blue book]
  o § 209 - 210 – Integrated Agreements and Proof of complete agreement
    - If complete on its face, may be decisive UNLESS contrary evidence, but writing itself does not prove completeness, and thus must allow inquiry into circumstances and INTENTIONS of parties

-If it is FINAL \(\rightarrow\)

Determining if an Agreement is Complete

Several Rules

1. Four Corners
   1.) if complete on its face, presumed total integration, determined solely by looking at the k, presumed to be total
2. Collateral Contract
   1.) If extrinsic evidence if of subject matter dealt with in k, than the writing is total integration (subject dealt with)
   2.) If not contradictory, may be received as evidence (however, this would be a partial integration)
3. Williston
   1.) if integration clause \(\rightarrow\) than total integration [shows intent of parties to be final and complete of all terms]
   2.) IF NO INTEGRATION CLAUSE – made by looking at the writing
   3.) If it appears complete \(\rightarrow\) total integration
      i. UNLESS reas. persons might naturally exclude alleged terms from the writing (than they may be allowed)
4. Corbin
   1.) Actual INTENT of parties
      i. ALL relevant factors allowed, including prior negotiations to determine the intent of parties agreement
5. UCC 2-202 (b)
   1.) may no be supplemented or contradicted if total integration
   2.) Presumed Partial Integration Unless parties show evidence that intended final integration, or if CERTAIN that parties would have included term (alleged oral term)
   3.) 2-202 (a) \(\rightarrow\) usage or course of dealing may be used to supply additional consistent term EVEN if total integration
6. Restatement
   1.) INTENT of Parties \(\rightarrow\) unless parties ACTUALLY INTEND total integration, than partial integration
   2.) Even if intended total integration, additional terms which are admissible
      i. if the alleged agreement is made for separate consideration
      ii. if alleged agreement is not within the scope of the integration
      iii. if terms may naturally be omitted from the writing [reasonable persons might naturally omit]
3) Parol Evidence Rule continued ..... 

Once Determined that writing is final and complete agreement of all terms

- May introduce evidence to show k is void or voidable
  - i.e. evidence of fraud, duress, illegality, mistake, or existence of condition precedent to formation

- If it’s a fully integrated contract, it’s a full and final embodiment of the parties’ understandings and terms, and discharges any prior agreement that falls within its scope. Anything outside of it is kept out because it’s parol evidence.

Oral agreements are only allowed to vary a written contract: Common Law → Cases

1) When they are collateral in form
   (i) The oral agreement has to be slightly different from the written, so that it is not so clearly connected that it should be a party of the writing.
   (ii) There can be arguments about how much a writing can cover and whether a collateral agreement should truly be part of the writing.

2) They do not contradict express of implied conditions of the written contract, but rather interpret the existing terms.
   (i) Whether evidence contradicts the writing depends on whether it is inconsistent.
   (ii) If reasonable people could differ about the two meanings and the asserted meaning of the oral evidence is not reasonably susceptible to the language of the writing, the oral term is inconsistent. AND v. Alyeska.

3) The oral agreement contains terms the parties could not have reasonably been expected to put in the writing (either because of usage or otherwise). (Restatement → naturally) (UCC → Certainly)
   (i) Mitchell v. Lath oral promise to remove an ugly icehouse

4) Conditions Precedent exist and the written contract was premised on an initial unwritten condition.

Mitchell v. Lath Icehouse → 3 conditions for admitting oral to vary written 1) collateral (at same time) 2) must not contradict express or implied provisions of written contract 3) not ordinarily expected to be included in type of written contract [i.e. not so clearly connected that nobody in their right mind would possibly leave out of the written agreement – OF NOT ALL 3 – OUT by PE Rule

Masterson v. Sine – Integration → If complete and total integration → no oral to vary the written, written trumps all, Restatement "if such agreement might naturally be made separately vs. UCC "certainly". If k does not explicitly say integrated, evidence may be introduced to determine if the k is the final embodiment of all agreement terms

AND v. Alyeska. - If k intended as final integration, and oral terms is inconsistent or contradictory, add. terms may supplement or explain final written terms [interpret] BUT MAY NOT CONTRADICT If reasonable people could differ about the two meanings and the asserted meaning of the oral evidence is not reasonably susceptible to the language of the writing, the oral term is inconsistent

Williams v. Johnson – Court may allow evidence to show that writing was not final integration → judge may hear evidence to decide the intention of the parties, conduct and language and surrounding circumstances

MISC ****
1) PE never excludes evidence of a separate oral k for a separate consideration, provided it does not contradict the written agreement
2) Never excludes evidence of SUBSEQUENT agreements
   a. unless clause in original k that states "no oral modification"
3) PE is never decided unless first decided that there is a contract
4) RESTATEMENT → Sections 212-223 (Parol Evidence and Admissible Terms)
4) Interpretation

Interpretation is the ascertainment of the meaning of a communication or a document. In interpreting, there are two fundamental questions:

1) Whose meaning is to be given to the communication—in technical language, what standard of interpretation is to be used?
2) What evidence may be taken into account?

***Distinguished from Construction [Formation] of k b/c gives meanings to manifestations of intent, construction [formation] determines what the legal effect of the manifestations of intent were.*****

VIEWS ON INTERPRETATION ➔ VARYING RULES

1) Plain Meaning Rule – Ambiguity
   a. Q of law determined by judge, if judge det. plain meaning, than no extrinsic evidence
   b. exception ➔ obscure or technical terms

2) Corbin (2nd Restatement) (Traynor in PGas)
   i. ALL EVIDENCE is admissible to determine the meaning – words never have any plain meaning
   ii. in event of different meanings the meaning of party less at fault (who knows or should have known other party attached a different meaning)

3) UCC & INTERPRETATION
   Uses sources to interpret meaning ➔ esp important in sale k
   a. Trade Usage - regular observance w/in trade which may justify expectation (chicken case)
   b. Course of dealing - how parties have acted in past CONTRACTS
   c. Course of performance – How parties have acted in performance of K at issue

→ Course of performance over course of dealing over trade usage

May all be used to help interpret the meaning even if a complete integration

→ However, not if terms are contradictory to the express written terms in the k, only if they can be shown to be susceptible (CANNOT add, detract or change, just interpret)

Pacific Gas Exclusion of relevant extrinsic evidence to determine the meanings of k cannot be justitified unless it is feasible to determine the meaning the parties gave to the words from the instruments alone unless evidence adds, detracts or changes written k (which seems to fall under PE) ➔ Words are never absolute meaning and always admissible if relevant (does not add, detract or change – just goes to interpretation/ clarification of ambiguity really)

Kemp Fisheries The test of admissibility of evidence to explain meaning of a written instrument is whether the offered evidence is relevant to prove a meaning to which the language was reasonably susceptible (open to ) ➔ Evidence is not admissible if not intended to clear up ambiguities of plain meaning, and the evidence also must be of sort which k is susceptible to (not contradictory)

Frigaliment (Chickens) Extrinsic evidence goes to the objective meaning of chicken being the Δ meaning of chicken and Π did not show that Δ had reason to know that the Π meaning of chicken was any different. -The burden is on the party who seeks to interpret the terms of the contract in a narrower fashion than their everyday use. If they fail this burden, contract stands as written ➔ The buyer also has to prove that the seller knew or had reason to know that the P intended one thing. This does come down to an objective test of did one party have reason to know that the other intended one thing – Duty of Good Faith. Example of trade/common usage

Gray v. Zurich – Doubts of meaning in insurance/adhesion k resolved ag. the insurer, or whomever has less bargaining power, unless the insurer can show that the insured was clearly aware of meaning insurers and mass dealings with public and situation where public would reasonably expect coverage, must be shown the drafter (strong party ) as plain and clear and expressly assented to
5) **Interpretation - Continued.....**

Restatement 2nd § 212: *Any determination of meaning or ambiguity should only be made in light of:*

1. the relevant evidence of the situation and relations of the parties
2. the subject matter of the transaction
3. The preliminary negotiations
4. Usages of trade
5. Course of dealing between the parties

Restatement 2nd § 201 – *Where the parties have attached diff. meanings – Whose meaning prevails*

1. Meaning attached by party who knows or reason to know that other party attached diff. meaning – Use meaning of the other party if other party had no reason to know different meaning attached by the first.
2. If neither has knows or has reason to know other attached a different meaning, neither is bound by other meaning, therefore may result in a failure of mutual assent
   a. course of dealing, common usage may be used to determine meanings, i.e. **CHICKEN**

Restatement 2nd § 202: *Rules of Aid in Interpretation § 203 – 208 Terms/Interpretation* [pages 238-239 blue book]

1. Words are interpreted in light of all circumstances → given great weight and if principal purpose is ascertainable, than that is given great weight
2. Interpreted as whole, and writings part of same transaction are interpreted together
3. Unless a different intention is manifested
   c. general prevailing meaning of language is given
   d. technical terms given technical meaning within field
4. Course of Performance given great weight
5. When reasonable, manifestations of intent are interpreted as consistent with each other and with
   i. Course of Performance, dealings and usage of trade
VI. CONDITIONS, PERFORMANCE, BREACH – Performance of the Contract

1) CONDITIONS

a. WHAT IS A CONDITION:
   i. § 224 Rst. - an event, not certain to occur, which must occur, unless it non-occurrence is excused, before performance under a contract becomes due
      i. must occur before a performance under a contract becomes due, or (precedent)
      ii. which discharges a duty of immediate performance. (cond. subsequent)
      iii. May be conditional or unconditional (independent)

b. Types of Conditions
   i. Express and Implied in Facts - In relation to the promise → by Parties into agreement
      i. Conditions Precedent must occur before other party performance becomes due
         a. esp in unilateral → duty to pay conditioned on performance
      ii. Conditions Subsequent discharge duty of immediate performance
      iii. Conditions Concurrent must be tendered before or at same time as other parties
   ii. Constructive or Implied in Law Conditions – imposed by the court for justice/fairness reasons
      i. supplied by court as reasonable in the circumstances (§ 226)
      ii. SO → event may be made a condition by the parties or supplied by court
         a. SEE CONSTRUCTIVE CONDITIONS (substantial performance)

c. Effect of Non-occurrence § 225
   i. performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused
   ii. unless excused, non-occurrence of a condition discharges duty when condition can no longer occur
   iii. NOT A BREACH UNLESS he is under a duty that the condition occur
   iv. BASICALLY → discharge of duty to perform, imposes no liability, and therefore only results in inability to enforce a promise of performance by the other side - NO obligation for compensation or part performance

d. Distinguishing from Promises
   i. Language
      i. CONDITIONS
         a. i.e. "subject to", provided that, on condition that, if, subject to
      ii. PROMISES
         a. I will, I promise, I warrant → all promises
   ii. Ambiguous Terms → court uses rules of interpretation
      i. § 227 – Standards of Preference with Regards to Conditions (page 246 blue book)
         a. preferred interpretation which will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indication that he has assumed the risk of it's non-occurrence
      b. Interpret to be consistent with other terms of the k

e. MAJOR DIFFERENCE FROM WARRANTY
   i. if condition → no action for breach, but other party discharge from duty to perform
   ii. if WARRANTY → breach of warranty → action for breach of k and damages

Dove v. Rose Acres If party accepts conditions of an agreement, bound to perform all such conditions before other party – Non performance discharges other party from obligation to perform
BONUS → Δ stated clearly the terms and the Π did not have to accept such terms, so by not adhering to all terms, the Δ did not have duty to perform (payment)

Wal-Noon v. Hill – If an agreement contains an implied condition precedent, such as notification, notification /condition must be performed before other party has duty to perform (Here – notification of need for repairs, IMPLIED IN FACT condition precedent (not in k, but logically necc. condition to Δ having to repair (knowing of repairs needed)

Jacob & Youngs v. Kent Reading Pipe instead of another → If condition precedent is substituted in such trivial way that is therefore not necc. condition precedent --?> SUBSTANTIAL PERFORMANCE of cond. precedent does not necc. discharge duty of the other party

In Re Carter – condition v warranty → Seller says condition, buyer says warranty → Court says condition because k expressly stated that only warranted up to time of purchase, so after that, tough luck → Interpreted as consistent with other terms in the k
2) **EXCUSE OF CONDITIONS**

*Waiver and Discharge of Conditions*

*a.* Conditions can be excused. If an express condition has failed, the promisor can be discharged from the contract without an obligation to pay promisee for part-performance.

*b.* But, if the promisor is not actually prejudiced by the failure and the promisee has engaged in part performance, the promisor may still be bound

   i. **Prevention**

      i. Condition is excused by prevention, substantial hinderance or failure to cooperate provided that the conduct (of prevention) is wrongful

         a. Duty to Cooperate → constructive condition that one will not wrongfully prevent or hinder other party's performance (and if so, condition is excused)

   ii. **Estoppel or Waiver**

      i. Equitable estoppel – where one party has misrepresented fact and other party has injuriously relied on it (even if innocent)

      ii. **WAIVER** - A waiver is often defined as an intentional relinquishment of a known right. Conditions, not rights, can be waived. Waivers are often unintentional.

         a. Not all waivers, however defined, are effective.

            i. **Waiver Before Failure of Condition** -

               1. A waiver of a condition that constitutes a material part of an agreed exchange is ineffective in the absence of consideration, its equivalent, or an estoppel.

               2. A waiver of a condition that is not a material part of the agreed exchange is effective but it may be reinstated by notice prior to any material change of position by the other party.

               3. An effective waiver disables the party from canceling the contract but does not discharge the waiving party's right to damages.

            ii. **Waiver After Failure of Condition – conduct or promise**

               1. A waiver after an express or constructive condition has failed is an election. An election may take place by conduct or by promise. No consideration is needed for an election and, according to the majority rule, an election once made cannot be withdrawn.

               2. If parties waive conditions repeatedly, reasonable for other party to assume such conditions will be waived in the future

   iii. **Discharge by Courts - FORFEITURE**

      i. Courts will discharge conditions for things like materiality and presence of unfair bargaining

         a. *Aetna v. Murphy:* The court still allowed Murphy’s insurance claim to stand, even though he was delayed in giving notice, in violation of a condition of the contract. The P just has to show that the delay did not prejudice the insurer.

      ii. **RSC §229** “To the extent that 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..

   iv. **Impossibility**

      i. Impossibility excuses a condition, if the condition is not a material part of the agreed exchange and if a forfeiture would otherwise occur.

         a. *Clark v. West:* The publisher in this case waived the condition that the writer not drink, because it knew the write had been drinking, but still accepted the manuscript without objection. The consideration was for the finished work, not for the writer to abstain from drinking
3) **SUBSTANTIAL PERFORMANCE AND CONSTRUCTIVE CONDITIONS**

**a. Constructive Conditions. Two main issues.**

i. What is the order in which agree exchange is to be performed? One party’s performance is a condition precedent to the other’s

ii. How much performance must the first party render before the other party has a duty under the contract?

   i. a la partial performance

**b. Express and Implied VS. Constructive Conditions in re: Partial Performance**

i. express and implied in fact must be performed in full, HOWEVER

ii. Constructive Conditions need only be substantially performed

   i. if substantial performance, other party is not necessarily discharged from duty

   a. see. Jacob, Youngs – reading pipe

**c. Substantial Performance v. Material Breach**

i. VERY RELATED

   i. i.e if material breach, than cannot have substantially performed, and vice versa, if substantial performance is found, than cannot find a material breach, BUT can be neither material breach NOR substantial performance

**d. Dependent vs. Independent Promises**

i. Independent

   i. They are independent of each other if the parties intend that performance by each is not conditioned upon performance by the other.

   ii. The parties exchange promises for promises, not the performance of promise for the performance or promise.

   iii. Failure to perform an independent promise does not excuse non-performance by the other party

   iv. Independent parts of the contract do not need to have separate consideration.

   v. This depends chiefly on the intention of the parties. – When was performance intended –

      a. **Kingston v. Preston**: D did not have to perform in handing over the business because P did not find adequate security which was a condition precedent 3 kinds of covenants 1) mutual and independent [either may recover regardless of others performance] 2) conditions and dependents [performance of 2nd depends on performance of 1st] 3) mutual conditions at same time [if one is offered and ready and other is not, ready may bring action for breach – must be ready to perform at time of offered performance]

ii. Dependant

   i. They are dependent if performance by one party is conditioned on performance by the other. Failure of one party relieves the other of performance.

   ii. The presumption is that mutual promises in a contract are dependent.

      a. **Goodison v. Nunn**: Suit to get down-payment on property back. These are dependent agreements. The buyer must tender his own performance (paying the money) before D’s failure to act is considered a breach.

      b. **Palmer v. Fox**: Contract to buy land with a condition that the area would be paved. This is a dependent contract, because the buyer would not have bought the land if it were not to be paved.

iii. Some conditions are not material or not significant enough to create the need for full damages in case they are not met. Placing values on different types of conditions

   i. **Jacobs & Young v. Kent**: Contract to build a house. There was a condition that the builders had to use a specific pipe. They builders did not use that type of pipe. Because fixing the situation would involve ripping up the entire house and rebuilding it, Cardozo says the damages are only the difference in value between the pipes which are nominal

   ii. The court will be slow to impute the purpose of the conditions where the significant of the default is way out of proportion to the cost of the forfeiture.

   iii. The opposing view in the dissent, is that the builder did not meet the contract and should be liable.
4) SUBSTANTIAL PERFORMANCE AND CONSTRUCTIVE CONDITIONS

1) Avoiding Forfeiture
   a. Is substantial performance enough to avoid forfeiture?
      i. “Where the performance of only one party under an exchange requires a period of time, his performance is due first unless expressly bargained for.” RSC §234.

2) Substantial performance may be enough
   a. In order to show substantial performance, a party must show that it 1) intended to comply in good faith with obligation and 2) deviations from obligations were 3) unintentional and 4) relatively insignificant
      1. *Grun Roofing*, the roofer failed to do this because the mistake with the roofing tiles materially altered the roof, only remedy was entire new roof, damages for new roof
      2. However, the remedy problem in Jacobs appears again, because the only solution is tearing up the room which comes at a great cost.

3) DIVISIBLE CONTRACTS
   a. A contract is divisible if the performances of each party are divided into two or more parts and the performance of each part by one party is agreed in exchange for a part by other party
      i. If divisible portion is substantially performed, recovery may be had for that portion despite a material breach of the overall contract
         1. *Lowy v. United Pacific*: D did 98% percent of a job, but was prevented from doing the other 2% by the actions of the P. The court allows D to recover from the work done in the first phase, even though no work was done in the second phase. - DIVISIBLE

4) DOCTRINE OF SUBSTANTIAL PERFORMANCE PERMITS RECOVERY.
   a. A willful breacher – What about Unjust Enrichment → Two views
      i. The defaulting party may still be allowed to recover on a contract, even though he defaulted for any benefit the other party received – restitution, unjust enrichment
         1. *Britton v. Turner*: Laborer can recover for work done, even though he left the job, because the other has been unjustly enriched and the performance of the whole is not a condition precedent. The person is paid for every day in which he works
         2. However in *Maxton Builders*, the buyers of a house who canceled the contract could not get their down payment back, because they improperly cancelled the agreement, LD clause in RE agreement, usually down payment is kept in case of breach unless k states otherwise

5) RST → RSC says that restitution is not available if the breach was willful and deliberate.
   a. The cases and RSC disagree. Britton says that a P can recover in restitution for the net benefit retained by the D, but

6) CONDITION vs. PROMISE – Differences of Interpretation and Effects
   Failure of Condition and Breach of Promise

   EXAMPLE
   Say that A agrees to charter vessel to B, and B agrees to pay when it arrives. In k, it says that "Vessel to sail on or before "date". Vessel actually sales after date. How can this be interpreted?

→ Can be express condition
   B can cancel anytime before ship sales b/c B's performance is conditioned on sailing of ship, so not literally performed,
   BUT → B cannot sue b/c only a condition and A did not make promise, but only conditioned B's performance on his own – B must give A chance to perform

→ Can be a promise two possibilities – A promised vessel to sale on or before
   IF A sues B for refusing, court will likely say that A must perform before B's performance is due, and therefore HAS A substantially performed
   OR → B sues A, then issue is was there a material breach (of promise- by late sailing) If breach is material, B can cancel and sue for total breach, if not material, B must still perform (no material breach, no excuse of performance) and can recover only for partial breach.

→ Express Condition giving rise to implied promise
   B is free not to proceed irregardless of material (b/c of condition) and could sue for total breach, since both the non-occurrence of condition and breach of implied promise – So B is excused and B can sue for breach --
7) REPRESENTATIONS AND WARRANTIES

b. REPRESENTATION
   i. Representations are affirmations of fact that simply describe the goods
   ii. There is an express warranty that the representations are true
      i.e. This car is brand new. It really has to be brand new

c. WARRANTIES
   i. Warranties encompass representations and also include promises that a future event or coverage will happen.
   ii. If the warranty fails, the other party is liable for breach of contract

d. Two types of warranties: Express and Implied

   i. EXPRESS
      a. Any affirmation of fact or promise made by the seller about the goods
      b. Any description of the goods which is made about the bargain
      c. Any sample or model creates a warranty the goods will conform to the model
      d. Express warranties do not have to use the word “warranty” to be valid
         i. An express warranty which seeks to limit a car manufacturer’s liability and which disclaims all other warranties can be voided as against public policy.

   ii. IMPLIED – UCC 2-314, 2-315 create implied warranties. These are default rules
      a. Merchantability
      b. Fitness for Particular Purpose – Different from the ordinary purpose of a good, as foreseen specific use by the buyer that is peculiar to its business
      c. The UCC makes it very difficult to exclude implied warranties
      d. Any such exclusion must be
         i. in writing and
         ii. be conspicuous and
         iii. must use the word merchantability.

e. WHEN THERE IS NO IMPLIED WARRANTY
   a. Phrases like “as is” and “with all fault” makes it clear that there is no implied warranty
   b. If the buyer has inspected the goods and approved of them, there is no implied warranty

f. Damages.
   i. If the limited remedy called for in the contract fails of its essential purpose, the limitation is disregarded and default UCC remedies go into place that allow the P to sue for any damages
      a. Murray v. Holiday Rambler, the limited remedy is trying to fix the RV. When this fails however, the limitation is disregarded and the P can sue for total damages – ANY OTHER UCC REMEDIES if limited remedy fails
VIII. **BREACH AND DEFENSES TO BREACH** – [Excuse of Performance]

1) **Breach and Right to Suspend or Cancel [Repudiation]**

1. **BREACH – failure to perform promise**
   i. A promisor commits a breach when he or she fails without justification to perform when a promised performance is due

   1. **REMEDIES**
      a. **IF PROMISEE has FULLY PERFORMED**
         i. remedies are sue for breach [damages] OR
         ii. specific performance
      b. **IF PROMISEE still has DUTIES left to perform**
         i. If material breach
            1. Defensive Remedy ➔ may discharge remaining duties
            2. Affirmative Remedy ➔ AND sue for breach
         ii. If not material breach
            1. partial performance, does not discharge promisee's duties

2. **BREACH - Repudiation**
   i. When party by words or conduct repudiates a performance [refuses] not yet due under agreed exchange – Anticipatory Breach
      1. i.e. also insistence on terms not part of the contract
   ii. **RST§ 250-257 Prospective Non-Performance**
      1. **UCC 2-610, 2-712**

2. Promisee still as affirmative and defensive remedies [which can be invoked BEFORE performance is due] IF ➔
   a. **SUSPEND PERFORMANCE**
      i. The other party can suspend its own performance, which preserves the contract for future action, but gives the repudiator the chance to retract, thus mitigating the remedies available.
   b. **SUSPEND AND SEEK DAMAGES**
      i. Cancellation of the contract, which discharges all obligations on either side.
         1. **Hochester v. De La Tour**: D hires P as a companion for a trip but then backs out. D argues that P can not sue before the date on which contract is breached. Court says that a party that renounces its intention to perform can not complain if the other party, instead of waiting until performance is due elects to sue immediately for breach.
   c. **CONTINUE PERFORMANCE**
      i. If one party continues to act and ignores the repudiation of the other party, the contract is ma still be in force.
         1. **Taylor v. Johnston**: D repudiated the contract for stallion mating services, but P did not accept the repudiation and kept acting.
   d. **DEMAND ASSURANCE**
      i. demand adequate assurance from promisor of performance
      ii. **IF NO ASSURANCE ➔ breach and discharge of duties**
2) Breach and Right to Suspend or Cancel [Repudiation] continued

1. **WHAT if Party Only Creates DOUBT of Performance [no repudiation]**
   i. **UCC §2-609**: When reasonable ground for insecurity arise with respect to performance of either party the other may in writing demand adequate assurance of due performances and until he receives such assurance suspend any performance.
   1. The reasonableness of ground for insecurity are determined by commercial standards
   ii. **Limited Remedies**
      1. suspend performance
      2. demand assurance in writing
         a. adequate assurance is q of fact (what is adequate assurance)
         b. **IF NO ASSURANCE**
            i. SAME REMEDIES as Material Breach
            ii. THEN remedies for breach and no duty to perform [cancellation]
               1. **AMF v. McDonald’s**: McD’s sought assurance from AMF about a computer system. AMF did not give that assurance and McD’s cancelled the contract. The court said they were justified in doing this, because there was reasonable ground for insecurity – Also, found in the writing that no problem if there's enough to show that other party KNEW first was demanding (here, there was memo)

2. **Being slow on performance/payment may not be enough to constitute reasonable apprehension.**
   i. In installment contracts, nonpayment for one part of the total contract/shipment may not constitute a breach
   1. **It only constitutes a breach when it is shown that**
      a. the buyer’s failure to pay made additional performance unreasonably economically burdensome for seller or create such reasonable apprehension in the seller’s mind that seller should not have to be burdened with the risk
      i. **Plotnick v. PA Smelting and Refining** (ct holds that buyer did not breach because it offered to make up the withheld funds it was withholding because of seller’s delay.
3) **Impracticability – Events that Excuse Performance**

1. **APPROACHING EXCUSE by CHANGED CIRCUMSTANCES – Questions**
   1. What was the nature of the risk even and what was its impact on the contractual relationship?
   2. Was the party seeking relief [discharge] at "fault" in that it caused the event or failed to take reasonable steps to avoid it or minimize the impact?
   3. If party seeking relief was not at fault, did the agreement allocate the risk of the event to one or the other or both parties?
   4. If there was no agreement [allocation of risk] how is the court to fill in the Q of risk allocation?
   5. What is the nature and scope of relief when conditions of impracticability [discharge] are satisfied?
   6. What about bad faith and modification in re: to Impracticability

2. **Impracticability is Not Necessarily a Defense**
   i. The general rule is that the promisor must perform or pay damages for failure to perform no matter how burdensome performance has become even if unforeseen changes have created the burden.

3. **Risk Allocation and Impracticability**
   i. § 261 RTS [UCC 2-615] ⇒ Doctrines of "Impossibility" (Corbin says ⇒ impossible, frustration of purpose, impracticable)p. 735
   1. Where, after a k is made, party's performance is made IMPRACTICABLE without his FAULT by the occurrence of and 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
      a. **TEST ⇒**
         i. no fault of party seeking relief
         ii. no language allocating risk
         iii. basic assumption
         iv. event must make performance IMPRACTICABLE
            1. literally impossible
            2. commercially impracticable (unreasonably and excessive cost)
   ii. **WHO IS THE SUPERIOR RISK BEARER**
      1. court often ask who can most efficiently bear risk [What is FAIR?]
         a. 3 FACTORS
            i. knowledge of magnitude of loss
            ii. knowledge of prob. that it will occur (foreseeability)
            iii. other costs of self, or market insurance (allocation of risk)

4. **WHAT IS A BASIC ASSUMPTION? page 723 k book ⇒**
   i. Courts look to the circumstances surrounding the subject
      a. foreseeability at the time of k
      b. Relative bargaining power
      c. relative ease of allocating risk , i.e. clause
      d. Effectiveness of the market in spreading risks [i.e. - Middleman who has opp. to adjust prices to cover changes]
5. TWO KINDS OF IMPRACTICABILITY – *Existing and Supervening*

*i. EXISTING impracticability*

1. a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made
2. similar to mistake → basic assumption of what k was made is not correct, so performance is discharged
3. A thing is impossible when it is not practicable and a thing is impracticable when it can only be done at an excessive and unreasonable cost.
   a. *United States v. Wegematic*: The contractor has assumed the risk that production was impossible and thus takes responsibility if the product is not made. The risk should not fall on the purchaser.
   b. *Mineral Park Land Co. v. Howard*: Dirt mining example. Ds were not binding themselves to take dirt that was not there. D was excused from performing because such performance would have been so much more expensive than contemplated that it would have been impracticable to complete.
4. Determining whether the non-occurrence of a particular even was or was not basic assumption depends which party assumed the risk of its occurrence. This comes down to a foreseeability issue.
   a. If the event was unforeseeable, it seems that its nonoccurrence was a basic assumption.
      i. Example is unknown subsurface conditions that cannot be known until performance has begun

*ii. SUPERVENING Impracticability*

1. What Assumptions Are Basic vs. Risks
2. There are certain understood risks assumed by the parties. These include:
   a. market shifts,
   b. interruption of supplies (unless caused by war, embargo, or the like), and
   c. financial capability.
3. EVENTS → Where, however, the difficulty in performing is caused by certain supervening events, it is sometimes held that a basic assumption is violated:
   a. destruction of the subject matter or of the tangible means of performance;
   b. death or illness of a person essential for performance;
   c. supervening illegality or prevention by law;
   d. Reasonable apprehension of danger to life, health or property.
      i. *Taylor v. Caldwell*: The burning down of the music hall released the charterer from paying rent, because both parties are free from their promises. D could have mitigated the risk by insuring the hall or finding a replacement. The other issue is does P assume the risk by renting a cheaper, less fire resistant hall?

6. Parties must make all efforts to avoid impracticability and find other means of fulfilling the contract if possible to meet its obligation

   a. *Dunbar Molasses*: D, acting as a middleman, had to find alternative molasses sources when the refiner it worked with could no longer supply the product. When the promisor is responsible for the event which makes performance impossible, he is not excused. (rule from Chemetron Corp, page 731)

7. Foreseeable risks

   a. will not excuse performance, especially when the parties have taken steps to allocate the risk or the risk itself is a part of the bargain → The event upon which the obligor relies on to excuse performance cannot be an event that the parties foresaw at the time of the contract.
   b. However an event can be foreseeable but still be an event that both parties assume will not occur.
      i. *Dills and Kaiser-Francis Oil*: In both cases, the obligor’s performance is not excused because a foreseeable event occurred which prevented performance, but it was an event that both parties contracted for; not getting financing for a construction project and market prices going up. Language in K
      ii. *Force Majeure clauses*: Not intended to buffer parties against normal risks of contracts; just against major unforeseen disasters.
      iii. *A Take or Pay Contract*: The whole point of this is to lock in a price for the buyer and to lock in a buyer for the seller (take what you can use, pay for all of it).
4) **Frustration of Purpose**

1. **In General**
   1. Where the object of one of the parties is the basis upon which both parties contract, the duties of performance are constructively conditioned upon the attainment of the object. Performance is practicable, but the performance one party contracted for has become valueless (or nearly so).

2. **Character of Non-Occurrence**, according to Krell v. Henry
   1. "of such a character that it cannot reasonably have been in the contemplation of the parties when the K was made, and that they are no to be held bound by general words which, though large enough to include, were not used with reference to the possibility of a possible contingency which afterward happened.

3. **Elements**
   1. an event that frustrates the purpose of one of the parties and the non-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.

4. **Restitution After Discharge for Impracticability or Frustration**
   1. When a contract is discharged for impracticability or frustration, the executory duties are at an end. Compensation for part performance is available in the restitutionary action of quasi contract.

5. **Compared to Impracticability and Mistake**
   1. Frustration vs. Impracticability
      a. unlike impracticability, performance is practicable, but the purpose of at least one of parties is frustrated to the extent that performance contracted for has become more or less of no value.
   2. Frustration and Mistake
      a. very similar, in frustration, mistaken as to a FUTURE EVENT
         i. presence of unjust enrichment is key factor in

*Krell v. Henry* Because the coronation did not happen the whole purpose of renting the apartment was obviated and the renter was excused from the contract

*Goschie Farms:* Hop base contract. The government changed the law, so the permits would not be needed in the future. The court excused performance because the need for permits was the entire basis of the contract

*Price changes are not enough.*

In this case, it was the irrelevance of hop base and not decline in the market price that tipped the court in one direction.

*In addition, the court considers that foreseeability is just one factor and it is not dispositive whether P saw this move coming.*
5) Duty of Good Faith

RST § 205, UCC 1-203

1. every contract imposes upon each party an implied duty of good faith and fair dealing in its performance and enforcement (upon formation of a k) – HONESTY IN FACT [subjective]

2. BUT → What is good faith performance and What are remedies for bad faith?

MERCHANTS and BUYERS – Higher Standard

a. Good Faith → UCC 2-103 [FAIR DEALING]
   i. honesty in fact (SUBJECTIVE GOOD FAITH)
   ii. observance of reasonable commercial standards (OBJECTIVE GOOD FAITH – reas. person st.)
      1. courts look at the actual practices in the industry or trade and may reject practices which are not reasonably fair and substitute "gap-fill" with fair practices to meet reasonable standards of fair dealing
      2. faithfulness to an agreed common purpose and consistency with the justified expectations of the other party
      3. REMEDY FOR BAD FAITH VARIES

BAD FAITH – Acc. to UCC 2-103 comment d

a. subterfuges and evasions, even if believed to be justified
b. may be 1) overt or 2) inaction
   i. judicially recognized bad faith
      1. evasion of the spirit of the bargain
      2. lack or diligence and slacking off (dragging heels, per se?)
      3. willful rendering of imperfect or bad performance
      4. abuse of power to specific terms [abuse of discretion]
      5. interference with or failure to cooperate in other party’s performance

WHERE DOES GOOD FAITH FIT IN?

1) Good Faith In Formation
   (a) refrain from misrepresentation, fraud, duty to disclose material facts which may induce party into k, mislead
   (b) no duress, obviously
   (c) mutuality issues [i.e. illusory promises, Omni, satisfactory condition, court can impose "good faith"

2) Good Faith In Interpretation
   (a) honesty, no perjury
   (b) court can impose "implied" conditions, etc, in accordance with good faith dealing
   (c) What terms are meant for, imply a good faith standard
      a. Reid v. Key Bank: “Demand” provision of a loan agreement that allows that bank to demand repayment of the loan in full at any time. This could be seen as violating good faith, especially since the bank did not pay out all the money before it demanded it back and there was evidence of racial animus.

3) Good Faith In Discharge
   (a) at-will employment
      a. Suebert v. McKesson – seems like the rule is that there is a duty to good faith discharge of at-will employment unless the k is otherwise explicitly stated and fully integrated, court will imply a duty of good faith in discharge → no discrimination, arbitrary, must BE FOR CAUSE
   (b) modification of original duties, good faith reasons
6) Duty of Good Faith continued…..

4) Good Faith In Performance
   (a) observe reasonable discretion, to deprive other party of substantial value of bargained for k value
      a. There has to be discretion though for good faith to be an issue. In Centronics, in which the parties agreed that
         money in an escrow account would stay there until after arbitration there was no duty of good faith in regards to
         discretion, because D had no discretion. The terms were explicit in the contract.
   (b) wrongful rejection of goods ➔ [i.e. Chippable potatoes]
      a. Neumiller Farms Claims must be made in good faith, rather than to avoid a bad bargain. UCC §1-204.
   (c) output and requirement k ➔ must "give best efforts", and stay in business in "good faith"
      a. However, good faith cessation by either because of economic necessity (the purchase or production of the goods
         is no longer economically feasible) has been recognized as an excuse to performance.
         i. Feld v. Henry Levy: Court finds that there is a substantive question of fact about whether a defendant could
            cease production of the output good in good faith on the basis that producing bread crumbs is no longer
            economically feasible for them. Yes: D can not continue to make it without economic damage; it’s not as if
            they are selling it to a higher bidder No: D still has to follow the contract, because it’s not as if their entire
            business is falling apart SEE ALSO ➔ Wood and Lady Duff, Sand Case, Bread Crumbs
   (d) agree to agree and good faith negotiation

5) Good Faith In Modification
   (a) threats to breach or modify
      a. not under common law duress
      b. but under UCC violation of good faith requirement
   (b) Whether the party’s conduct was consistent with reasonable commercial standards of fair dealing
   (c) Whether the parties were in fact motivated to seek modification by an honest desire to compensate for commercial
      exigencies
      a. Roth Steel v. Sharon. Seller forced buyer to modify their contract with a price increase. When the buyer has the
         right to enforce an initial agreement, the modification must be looked at with for formation defects, like
         procedural and substantive unfairness In this case, the buyer made the contract because it could not get steel
         from anywhere else, also, not truthful. NOTE ➔ also economic duress, but there could not be economic duress
         unless there is also bad faith, same effect, the modification is voidable

Duty of Cooperation

1. Whenever the cooperation of the promise is necessary for the performance of the promise, there is a condition implied that the
   cooperation will be given
2. Breach by prevention or hindrance or failure to cooperate excuses aggrieved party from any duty to continue performance and gives
   cause of action for damages
3. Failure to act is not breach if no promise or duty to act
   • Blanford v. Andrews – Marriage k (P called lady a whore, Can D still perform) Court finds that D must show that he did everything
     to procure the deal Seems to go ag. duty of coop, because the P hindered the D performance
   • Patterson v. Meyerhofer – Rules 1) Where a party stipulates that another shall do a certain thing, he may thereby impliedly promise
     that he will himself do nothing when may hinder or obstruct that other thing in doing that; 2) Party who causes or sanction breach is
     thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract
   • Iron Trade v. Wilkoff - If a party seeking to secure all the merchandise of a certain character which he could, entered into a k for a
     quantity of the req. goods, and sub. made performance of the k by the seller more difficult...his conduct would furnish no excuses for
     refusal to perform the prior k. (diff of performance does not excuse breach of K)
   • Billman v. Hensel - Subject to financing clause implied an obligation to make a reasonable and good faith effort to satisfy conditions
VIII. DISCHARGE AND TERMINATION – 3rd Parties of K

1) DISCHARGE and TERMINATION of Rights and Duties
   i. Many methods of discharging a contractual duty are discussed elsewhere; for example,
      1. non-fulfillment of a condition, condition subsequent
      2. anticipatory repudiation,
      3. impossibility of performance or frustration
      4. disaffirmance for lack of capacity
      5. supervening illegality
   ii. Mutual Discharge
      1. Recission by mutual agreement
         a. Within limits, parties to a contract are free to end the obligations of the contract by agreement. The limits are imposed by the doctrine of consideration. One must distinguish three situations:
            i. (1) the rescission occurs before any performance;
            ii. (2) the rescission occurs after part performance by one or both parties;
            iii. (3) the rescission occurs after full performance by one party.
            1. In the first two situations, consideration is found in the surrender of rights under the original agreement by each party. In the third situation the rescission is void for want of consideration.
         b. Cancellation Versus Recission
            i. In the face of a material breach the injured party may properly cancel the contract. In canceling, this party may inartfully use an expression such as "I rescind." According to UCC § 2-720, which restates the sounder common law cases, "unless the contrary intention clearly appears, expressions of cancellation or 'rescission' of the contract or the like shall not be construed as a renunciation or discharge of any claim for damages for an antecedent breach."
      2. Modification – discharges partial terms of original contract
      3. Accord and Satisfaction
         a. Mutual Agreement to Discharge Existing Contract by acceptance of other performance
         b. An accord and satisfaction is formed either by
            i. (1) performance of an executory bilateral accord or by acceptance of an offer to a unilateral accord, or
            ii. (2) creation of a substituted contract.
      4. Release and Waiver
         a. writing manifesting an intention to discharge another from an existing or asserted duty.
         b. A release supported by consideration discharges the duty.
         c. At common law, a release, without consideration, under seal, also effectively discharged a duty.
            Today, the effectiveness of a release, without consideration, is largely dependent upon local statutes.
         d. UCC § 1-107
            i. "Any claim or right arising out of an alleged breach can be discharged in whole or part without consideration by written waiver or renunciation signed and delivered by the aggrieved party."
   iii. Unilateral Discharge or Termination of Contracts
      1. Franchise, etc.
         a. however, usually a duty to discharge in good faith, abide by terms, etc.
      2. At-will employment
         a. subject to many exceptions
1. Damages - Compensatory / Consequential

1) The goal of damages is for the "injured party" to receive "gains prevented", (expectancy interest) plus "losses sustained" (reliance/restitution interest) subject to limitations of

2) Basic damages awarded are Expectation Damages – benefit of the bargain

3) If Expectation Damages can not be proven – Reliance Damages - actual losses in reasonable reliance – Since Expectation usually more, usually ceiling of recovery,

4) Expectation usually more than reliance

LIMITATIONS ON DAMAGES 1) Foreseeability 2) Certainty 3) Mitigation

1) FORESEEABILITY –

1) Contract damages cannot be recovered unless they were foreseeable to the parties at the time of contracting.

2) "General Damages" are those foreseeable to reasonable persons similarly situated and are calculated by the standardized rules discussed below.

3) "Special" or "consequential" damages are those that are foreseeable because, at the time of contracting, the party in breach knows that in the event of breach no substitute performance will be available. AT TIME OF K FORMATION – not time of breach

a. GENERAL = Arise naturally as probable consequence of breach = reasonably foreseeable because natural course [contract price-market price]

b. CONSEQUENTIAL = Arise special circumstances = knowledge of special circumstances [difference between profits after breach and profits if no breach]

i. i.e must be aware of special situations that other party is in, i.e. one supplying materials for another to produce for 3rd k, which has liq. damages clause, so therefore the breach of party A causes party B to lose money for being late with goods, but A is not liable unless he was aware of the clause, which B must prove that the damages were foreseeable bc A knew of the damages that would result from breach

***NOTE*** if UCC Art. 2 applies, seller will be responsible for damages foreseeable at time of k or time of breach

1) CERTAINTY

1. The fact of loss and its amount must be proved with certainty.

2. The standard of certainty requires a higher quality of proof on the issue of damages than on other issues in a lawsuit.

3. It is rarely applied with stringency except as to lost profits, particularly lost profits as consequential damages.

Alternatives Where Expectancy Is Uncertain

(1) Protection of Reliance Interest

Where the aggrieved party cannot establish the lost expectancy interest with sufficient certainty, recovery is allowed for the expenses of preparation for and of part performance, as well as other foreseeable expenses incurred in reliance upon the contract. If it can be shown by the defendant that the contract was a losing proposition for the plaintiff, an appropriate deduction will be made for the loss that was not incurred.

(2) Rental Value of Profit-making Property

If the breach disables the aggrieved party from utilizing profit-making property, recovery of the rental value of the property is permitted.

(3) Value of an Opportunity

If a duty is conditioned upon a fortuitous event, and because of the breach it is uncertain whether the event would have occurred, the aggrieved party may recover the value of the chance that the event would have occurred.


3) MITIGATION

- Damages that could have been avoided by reasonable efforts cannot be recovered. Conversely, the aggrieved party may recover reasonable costs incurred in an effort to minimize damages.
  
  - Exceptions
    - One is not required to enter into another contract with the breaching party even if the offered contract would have minimized damages.
    - NOT necessarily applicable in cases where the relationship between the parties is not exclusive. If the aggrieved party is free to enter into other similar contracts, entry into such a contract after breach does not reduce the damages that may be recovered.
      - (juke box example – if more than one income can be generated, the loss from the breach income can still be recovered, especially in situations where, like here, more than one jukebox renter is available, and aggrieved party could have had two incomes, not just one, although exact jukebox may be used to get income)

**Hadley v. Baxendale (shaft)**

P wants damages for lost profits, D claims not foreseeable, so not resp.
- Divides damages into two categories
  - 1) those arising naturally in usual course of events from breach of k (general)
  - 2) those arising due to special facts and circumstances existing in this particular case (consequential)

Lost profits consequential because P did not inform D that shaft was necc. for mill to run, and therefore not aware of the damages that would be cause by the breach – court found that D was not liable

**Spang Fort Briggs v. Actna**
- P wants damages for the increase cost due to colder weather because the D delivered late
- Court finds D liable because should have foreseen that the weather would increase cost or slow productions, so in breaching by performing late, should be resp for those damages (consequential)

**HydraForm v. American Steel**
- P wants damages for the loss of profits that (consequential) from not selling woodstaves after D breached (materials)
- Court finds only consequential the amount reasonably foreseen and certain, limited to certain acc. to k, and since business was so new, P could not accurately predict sales above that amount, so D only resp. for damages from K, so P gets cons. damages for loss of 150 sales, diff. between the actual sold and the amt k for (mitigation inference)

**L. Albert v. Armstrong Rubber**
- rubber refiners for tires – P wants reimbursement for losses -
- Court gives damages for the foundation laid because it was in reliance of the k, and only those damages which were result of breach – and since production stop not proven to be caused by breach, court does not give those damages

**New Era Homes v. Foster**
- Breach by Payor
- Installment payments only convenience, should be treated as whole consideration and P only receives that actual amount los

**Bernstein v. Nemeyer**
- Limited partnership agreement, D breached by not loaning any more money
- D and P both lost money, so restitution is irrelevant – D was not enriched and rec’d no benefit, upon breach
Restitution

a. Goal of actions at law or in equity for Restitution - to place aggrieved party in same position prior to k

b. QUASI-K, Contract implied in law k, Unjust Enrichment

i. Three terms used interchangeably

1. Basically to avoid injustice in situation, court may give a remedy when a defendant receives a benefit from the P and P has not rec'd benefit, and thus D should compensate for benefit, but there is NO AGREEMENT

i. Δ must RESTORE Π to status quo – Δ must restore what Δ rec'd from Π – Return/Comp for benefit

1. What about expenses incurred that have not benefited the Δ?
   a. Some actions in rest. these days may allow

2. When is RESTITUTION AVAILABLE? 6 k situations

a. Total Breach
b. AVOIDANCE of K – i.e. - Incapacity, Duress, Misrepresentation, Mistake
c. No K bc of Indefiniteness, Misunderstanding, Lack of Agent authority, etc.
d. Unenforceable – i.e. Statute of Frauds, Illegality
e. Discharge – Impracticality or Frustration
f. Partial Performance

EXAMPLES
- P deposits money into D's bank account by MISTAKE, D must give P back money, (rest) otherwise D would be unjustly enriched
- A contracts with B to paint A's house, but accidentally paints C's house – C ends up selling house for more because of the accidental paint job, some courts would let A recover the net amount, but ONLY because C retained an immediate and certain benefit, however, C would have good ARG that did not ask for benefit, although under this theory, A is entitled to at least payment, if not diff. in amount C rec'd in profit
- SEE MORAL OBLIGATION for relationship
- Bernstein v. Nemeyer –
DAMAGES AND SALES OF GOODS

Sale of Goods

- **Seller's Non—Delivery**
  - Purchaser recovers difference between market price and contract price or between cover price (price reasonably paid even if in excess of the "market") and contract price.
    - **Reliance Cooperage v. Treat** – Breach by performer
      - Staves – P recovers amount which k price differs from price at **time of breach**

- **Seller's Breach of Warranty**
  - Purchaser can recover the difference between the value the goods would have had if they had been as warranted and their actual value. Value is determined as of the time and place of acceptance.

- **Buyer's Breach**
  - For total breach by the buyer as to goods that have **not been accepted**, the seller may recover the difference **between the contract price and the market or resale price**. If the seller has an unlimited supply of the goods involved, however, the seller has lost the profits on the sale, so the seller may instead recover the profit (including reasonable overhead) that would have been made from full performance. UCC § 2-708(2). JUKEBOX?
    - **Locks v. Wade** – Breach by Payor
      - JUKEBOX – damages are expectation damages, general and consequential because the D lost the cost of P payments, plus the profits, since unlimited number of jukeboxes and plenty of people to sell/lease to

- **Buyer's Liability for the Price**
  - If the buyer has accepted the goods, or if the goods are destroyed after risk of loss has passed to the buyer, the seller can recover the price. A price action is also available if the goods are identified to the contract and the seller cannot reasonably resell the goods.

- **Consequential and Incidental Damages in Sales Cases**
  - Consequential damages are available to a buyer if the **foreseeability** test is met. The UCC consequential damages test is different from the common law's test. **If the seller has reason to know at the time of contracting or at the time of breach that the buyer will not be able to cover, the seller is liable for the ensuing damages**. Sellers cannot claim consequential damages (UCC § 1-106), but frequently can get incidental damages. Buyers can also claim incidental damages. These include brokerage commissions, storage charges, advertising costs, auctioneer's fees, etc., made necessary by the other's breach.
Punitive (& Mental Distress)

i. Not available unless the breach involves an independent tort and imposing such will further public policy (i.e. deterrence)
   a. i.e. fraud, malice, misrepresentation (all ind. tort actions)
      - **F.D. Borkholder Co. v Sandlock**
        o Π and Δ entered into contract that Δ would construction of addition to Π structure Π was unable to use extension bc Δ did not construct wall in concern with moisture problems, although following complaints had told Π that problem would be fixed, however actual construction was not according to plan
      o When breach of contract involves intentional wrongful acts (torts) accompanying the breach, Π is able to recover punitive damage
        o Court found that Δ repeatedly shows proof of gross negligence, intentional fraud, deceit, misrepresentation
        o Public interest is served by awarding punitive damages because it deters builders of public buildings from fraudulently “disregarding building code requirements or those contained in the plans and specifications they have agreed to comply with.”

**Boise Dodge v Clark**

o Δ purchased auto from Π - Π had set odometer back to 0 from 6998 and represented as new when in reality the car was a demonstrator Δ gave checks for balance after trade in, but stopped payments following finding out that the car was used the jury’s award was satisfactory, and court did not err in allowing the verdict of 12500 in punitive award stand
o Although court advise juries that awards must be in reasonable relation, there are many factors such as actual damages and deterrent effect which make a mathematical ratio impossible, so jury award stands
o It is never made clear exactly what reasonable or unreasonable is
o Cases must decided on an basis of overall circumstances
o Since this was obvious calculated commercial fraud, im for public policy deterrent effect.

**MENTAL DISTRESS**

- Only in severe cases
  o **Allen v. Jones**- agreement to ship remains, but package arrived empty – allowed damages for mental suffering because of the sensitive nature of remains - Cases similar have allowed for damages fro mental distress resulting in physical illness for similar cases
    - Restatement - recognizes a cause of action for negligence in handling of a corpse
    - Acc to Prosser, one can recover from such case without physical illness as proof of mental distress because “the likelihood of genuine and serious mental distress arising from arising from the special circumstances ( mishandling of corpse) shows claim is not spurious
Liquidated (UCC 2-718)
1. clauses are valid if reasonable and in good faith estimate of harm upon breach
2. based on facts known to the parties at the time of k, if they seem like a reasonable estimate of the damage caused upon breach
3. Courts may consider the factor of diff. of determining actual damages
4. if not – PENALTY clause, and not enforceable
   a. designed to deter breach by threaten of punishment
      i. if damages are unreasonable in relation to effect of breach

Southwest Eng. v. United States – enforceable
valid intentions of parties, and actual damages are not able to be calculated, not penalty

United v. Austin Instruments – enforceable
- LD enforceable if they predict a reasonable proportion to probable loss, and actual SO – not whether better, but actually whether it was reasonable at time, (so even if actual damages differ, if LD are reasonable, enforceable

Leeber v. Deltona – enforced – (condo downpayment)
- Since the clause is reasonable and honest, not unconscionable bc standard, mitigation of damages (D resold prop) does not matter, clause is enforceable if it is reasonable

Lewis Refrig. v. Sawyer Fruit – Attorney’s fees
If stipulated, attorney fees can be recovered if the clause is enforced

Equitable Remedies

i. Specific Performance
   1. ONLY if money damages are not sufficient remedy
   2. Usually where the service/ good is
      a. UNIQUE, REAL PROPERTY, LONG TERM SUPPLY K’S, (I.E. GAS)
      b. not if performance is impossible, unconscionable, undue risk or hardship

Requirements (acc. to Laclede Gas v. Amoco) – not to order sp. performance
   1. mutuality of remedy in k
   2. if long term court sup. is necc (discretionary rule)
   3. indefinite/uncertain k
   4. other remedy is adequate

Restatement – Factors affecting adequacy of damages
   a) difficulty of proving damages with reasonable certainty
   b) diff. of procuring substitute performance
   c) likelihood that damage award will not be collected

UCC 2-716

Curtis Brothers v Catts – Specific performance – tomatoes
uncertain market, $ not adequate remedy, not plentiful ( if they were, k would not have been made)

Laclede Gas v. Amoco – Specific performance
Since gas is not plentiful and can not be obtained elsewhere, not can costs estimated in advance not ensured goods will always be readily available on market, (speculative and unsure) Gas must be supplied under k (sp. performance)

Walgreens v. Sara Creek (phar-mor)
- Injunction ag. competition – cannot determine loss any other way, parties to determine within self

ABC v. Wolf – sp. performance, personal services –
only if k is not terminated, and to prevent unfair competition, tort, or enforce non-compete clause
**ADR** – page 1031, Uniform Arbitration Act

Voluntary Dispute Resolution, parties agree to arbitrate, cannot be forced, are bound by decision,
- Arbitrators decide both fact and law
- may agree by k or may agree when dispute arises
- No review
- Binding in absence of
  - fraud, bias or process defects

**Set of practices and techniques that aim to**

1) permit legal disputes to be resolved outside the courts for the benefit of disputants
2) reduce the cost of conventional litigation and the delays to which it is ordinarily subject
3) prevent legal disputes that would otherwise likely be brought to courts

**TYPES**
- Adjudication, Arbitration, Mediation, Traditional Negotiation

**Also new hybrid forms of ADR which involve private judging, neutral fact-finding, mini-trial, settlement conferences***

**Bolton v. T.A Loving**
- Architect and Engineer in Construction Cases – What is his role?
- Not spec. as arbitrator, although k in this agreed to be bound by arch. decisions, as evidence in court

**Michael Curry v. Knutson**
- Arb. Clause was broad enough to include the issue of fraudulent inducement to amendment, so must arb.
- Court looked at language of clause to determine what parties agreed to arbitrate

**Container Tech. Corp v. Jay Gladsen**
- When parties agree to arbitration, they are bound by decision, except In very certain circumstance
- Issues of law and fact are NOT open for judicial review, only process, fraud, EXCEPTIONS, otherwise PARTIES BOUND
10) SPECIAL CIRCUMSTANCES & DAMAGES

- Employment Contracts
  o Employer's Breach
    ▪ An employee who has been discharged in breach of contract may recover the wages or salary that would have been payable during the contract term minus the income that the employee has earned, will earn, or could with reasonable diligence earn during the contract term. In the case of a long term contract, the "present worth" doctrine will be applied.
  o Employee's Breach
    ▪ If an employee wrongfully quits, the employer recovers the difference between the market value of the employee's service minus the contract price.

- Construction Contracts
  o Contractor's Delay
    ▪ Damages for delay are measured by the rental value of the completed premises for the period of delay.
  o Contractor's Failure to Complete
    ▪ Failure to complete is compensated by the additional cost of completion plus delay damages.
  o Defect in Construction
    ▪ If the breach consists of a defect in construction, the damages are the cost of remedying the defect, unless this would constitute unreasonable economic waste. (i.e. affects usability or safety of land) then difference in value of structure (where defect is trivial and innocent)
      • Rivers v Dean – Breach by performer - Damages in faulty construction awarded by market value of cost to repair and faulty construction (usability and safety)
      • American Standard v. Shectman – Breach by performer - Damages are cost of completion of what should have been done under k, not the value of property affected – (not value of prop, cost to complete)
  o Owner's Breach
    ▪ If no work has been done, the contractor recovers the anticipated profit, that is, the contract price minus the projected cost of performance. If the work has been started, the contractor recovers the anticipated profit plus the cost of labor and supplies actually expended.
  o Consequential Damages in Construction Cases
    ▪ If foreseeability is shown, consequential damages are available against a breaching contractor. If an owner's breach is a failure to pay or a repudiation, consequential damages are never available to the contractor. (See "Failure to Pay" below).

- Contracts to Sell Realty
  o Vendee's Breach
    ▪ If a contract vendee totally breaches, the vendor may recover the difference between the contract price and the value of the realty. ( k price - $ rec'd for prop or fair market)
      ▪ American Medical Corp – Breach by Payor – D breacher was real estate purchaser who breached(P land foreclosed) Court finds that D liable for full amount of P loss, (contract less amount rec'd when real estate forecloased), Was foreseeable because D knew of P financial troubles, P no time to mitigate, amount certain – NOT fmv because of foresee)
  o Vendor's Total Breach: Two Competing Rules
    ▪ English Rule
      ▪ For total breach, the vendee may recover only the down payment plus reasonable expenses of a survey and examination of title, unless the vendor was aware of the defects in title or refuses to convey.
    ▪ American Rule
      ▪ Under the "American Rule," followed in a bare majority of jurisdictions, no matter what the reason for the breach, the vendor is liable for the difference between market value and contract price. This is the same as the primary rule of damages applicable where a seller of goods totally breaches.
  o Consequential Damages
    ▪ Consequential damages against a vendor in default is a strong possibility under both the American rule and the exceptions to the English rule.
  Vendor's Delay
    ▪ If the breach consists of a delay in conveying, the vendee may recover for the rental value of the premises during the period of delay.
- Failure to Pay
  - If the breach consists in the failure to pay a debt, consequential damages are not available. The aggrieved party is entitled only to recover the debt plus interest.

- Anticipatory Breach
  - P cannot recover for future payments due in immediate cause of action. Can only recover for parts of k actually breached
    - UNLESS – Ask clearly stated that they will not perform in the future, and no assurance, then you can get damages for a material breach
      - John Hancock – Breach by payor Life insurance future payouts, D only liable for payments not made, not yet liable for those to be made in future
      - Theory of anticipatory breach, insurance only for lump sum payments, not installments

- ONLY RELIANCE DAMAGES under action for Promissory Estoppel
  - actual expenditures in reliance of the k, but no other damages.
    - use as a last resort

**NOTE:** 

1) Brokerage Contract
   - Exclusive distribution "I sell your stuff"
     - Wood, Sally Beauty
   - Article 2 only for statute of frauds

2) Sale of Land → not UCC except if land w/ goods on it, or livestock

3) OUTPUT → I buy all of what you make
   - UCC 2