CHAPTER ONE. WHAT PROMISES ARE LEGALLY ENFORCEABLE AND WHY?

Contract – a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.

Promise - a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

I. Some Theories of Promissory Liability

§71 Requirement of Exchange; Types of Exchange
(1) To constitute consideration, a performance or a return promise must be bargained for.
(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
(3) The performance may consist of
   a. An act other than a promise, or
   b. A forbearance, or
   c. 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. It may be given by the promisee or by some other person.

§90 Promise Reasonably Inducing Action or Forbearance
A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce 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.

UCC § 1-201(11) [Contract] “the total legal obligation which results from the parties agreement as affected by this Act and any other applicable rules of law.”

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

Factors to consider when deciding a contract problem
1) Promise (Was there a promise?)
2) Was the promise breached?
3) Whether in fact the breach caused some sort of damage

Modern view of consideration: consideration as equivalent to “bargain” (i.e. an exchange of promises, acts, or both, in which each party views what that individual gives
as **price** for what that individual gets) or **any factor** that will make a promise or contract enforceable. basic components: i) detriment and ii) exchange

**Buzzwords**: “good faith” and “subjective objectivity”

**BEST CONSTRUCTION CO. V. SOUTHLAND CONSTRUCTION CO.** – Southland agreed to lend Best Construction some of its plywood to help it out. → **Mutual promises are not enforceable unless consideration for them is present.**

**II. Promises That Lack Commitment**

**A. Conditional and Illusory Promises**

**Contract of adhesion** – you adhere to because you have no power to change the terms, BL

*def*: a standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms

**Quantum meruit** – the reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi contractual relationship

**DE LOS SANTOS V. GREAT WESTERN SUGAR CO.** – In De Los Santos action against Great Western Sugar Company for breach of a “hauling contract,” De Los Santos contended that he was entitled to haul until all of the beets he had been employed to haul by Great Western had been transported. → Where a promisor agrees to purchase services from the promisee on a per unit basis, but the agreement specifies no quantity and the parties did not intend that the promisor should take all of his needs from the promisee, there is no enforceable agreement.

✓ **Lack of mutuality**: An agreement which depends upon the wish, will, or pleasure of one the parties is unenforceable (no **good faith** factor in this case).

**MATTEI V. HOPPER** – Mattei purchased a shopping center from Hopper, the sale to be completed in 120 days if satisfactory leases could be obtained. → “Satisfaction” clauses do not render illusory or raise problems of mutuality of performance.

✓ An agreement based on a satisfaction clause where the performance involved on a matter dependent on judgment, **good faith** is the criteria used to determine if there mutuality of obligation.

**SYLVAN CREST SAND & GRAVEL CO. V. UNITED STATES** – Sylvan successfully bid on four contracts to supply trap rock for an airport. The contract had printed on it that cancellation by the US could be made at any time. When US refused to accept any more rock, Sylvan filed suit claiming breach. → In agreements which seems to reserve the right to cancel at any time, it is reasonable through interpretation to take the position that notice of cancellation is required, and, even though notice may be given at any time, it constitutes detriment, hence, valid consideration.

✓ If the **promisor** reserves the right to discharge his obligation by choosing between two or more alternatives, there is consideration only if each alternative would be sufficient consideration if bargained for alone. If the **promisee** can choose one of
several alternative promises from the promisor, consideration exists if any alternative would be sufficient consideration if bargained for alone.

Article §2-204
Formation in General – Even though one or more terms are left open a contract for sale does not tail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Consideration factors: 1) text of the agreement
2) Conduct and intent of parties (Pro contractus)
3) Type of community
4) Past relationship of parties

WOOD V. LUCY, LADY DUFF-GORDON – Wood received the exclusive right for one year to endorse designs with Lucy’s name and to market her fashion designs for which she would receive one-half the profits derived. D broke the contract by placing the endorsements on designs without Wood’s knowledge. → While an express promise may be lacking, the whole writing may be instinct with an obligation – an implied promise – imperfectly expressed so as to form a valid contract.

✓ Implied promises: Mutuality is satisfied if a promise can be implied in fact or in law from a party’s words or actions. A common type of implied promise involves a promise to use one’s reasonable or best efforts to perform.

✓ Class note: Cardoza uses the Pro Contractus approach in contract determination. However, the extreme usage of Pro Contractus approach may cause contracts to be found more than necessary.

p. 449 Uniform Commercial Code:
§2-306. Output, Requirements and Exclusive Dealings
(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

CHARTER TOWNSHIP OF YPSILANTI V. GENERAL MOTORS CORP. – Ypsilanti sought to enjoin GM from closing an auto manufacturing plan on the basis that GM had promised continued employment in order to obtain a tax abatement from the town. → A manufacturer’s expression of expectations for future employment in the context of soliciting a tax abatement does not create a binding promise.
Hyperbole and Puffery Language: Expressions that convey unreasonable expectations or hopes do not provide reasonable reliance for consideration for a promise.

KELLER V. HOLDERMAN – As a result of banter and frolic, Keller gave Holderman a $300 check in exchange for a $15 watch. → If neither party to a contract intends it to be binding, it is unenforceable and no contract is deemed to exist.

Banter and Frolic: One party cannot covert what both parties knew was only a joke into a serious transaction simply claiming on it.

BROWN V. FINNEY – Brown and Finney ostensibly entered into a agreement after they had accidentally met while at a bar. → Where a party has no expectations that his remarks will be taken as legally binding, no contract exists.

Class notes: When deciding if an agreement is made in jest the court look at: time, place, and surrounding circumstances and conduct of parties involved in the agreement.

III. Interpretation of Vague and Indefinite Promises
   1. Words are Ambiguous

FRIGALIMENT IMPORTANT CO. V. B.N.S. INTERNATIONAL SALES CORP.
*chicken case* - P ordered a large quantity of “chicken” from D, intending to buy young chicken suitable for broiling and frying, but D believed in considering the weights ordered at the prices fixed by the parties, that the order could be filled with older chicken, suitable for stewing only, and termed “fowl” by P. → The party who seeks to interpret the terms of the contract in a sense narrower than their everyday use bears the burden of persuasion to so show and if that party fails to support its burden, it faces dismissal of its complaint.

Multiple Meanings: If the expressions of the parties are capable of two different and equally reasonable interpretations, and neither one negligently misled the other, there is no contract.

2. No Contract is Complete
3. Intention is a Fiction
4. Objective Manifestation of Assent Also as a Fiction
5. Time Washes Away All Things
6. Many Contracts are Best Left Incomplete Deliberately
7. The Lawyer as Interpreter
8. Positive Law Sometimes Determines Meaning
9. The Challenge is to Construct a Coherent, Persuasive Interpretation

§2-202 Final Written Expression: Parol or Extrinsic Evidence
Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be
contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented.
(a) by course of dealing or usage of trade trade (Section 1-205) or by course of performance (Section 2-208); and
(b) by evidence of consistent additional term unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

BERG V. HUDESMAN – A landlord and tenant disputed the terms of their lease agreement regarding how to compute net rentals, and the tenant sought to introduce extrinsic evidence to explain the intent of the parties. → Extrinsic evidence regarding the circumstances of the making of the contract is admissible to ascertain the intent of the parties whether or not there is ambiguity on the fact of the agreement
✓ Extrinsic evidence is admissible as to the entire circumstances under which the contract was made as an aid in ascertaining the parties’ intent. Sources of extrinsic evidence: 1) situations and relations of parties, 2) the subject matter of the transaction, 3) preliminary negotiations and statements made therein, 4) usages of trade, 5) the course of dealing between the parties, and 6) duration of time.

§2-207. Additional Terms in Acceptance or Confirmation
(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly mad conditional on assent to the additional or different terms.
(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
   (a) the offer expressly limits acceptance to the terms of the offer;
   (b) they materially alter it; or
   (c) notification of objection to them has already been given or is given within reasonable time after notice of them is received.
(3) Conduct by both the parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with an supplementary terms incorporated under any provisions of this Act.

Elements needed for a contract:
• Agreement
• Acceptance
• Exchange of something of value
• Fair transaction (something that reasonable business people would enter into)
• Cannot be illegal

CHAPTER TWO. REMEDIES: HOW THE LAW ENFORCES PROMISES
• Contract breach is not treated by the law as a moral fault or a crime or an occasion for punitive damages, even when there has been clear harm and deliberate failure by the party who fails to keep the contract.
• American law generally does not make people perform their promises, but instead awards as a substitute for the promised performance and the money damages often are imperfect substitute for performance.
• Equity will not compel specific performance of an agreement to lend money” because a breach “can always be compensated by damages.” And the fact that a party can avail himself in a remedy in a court of law will not preclude him from obtaining relief in a court of equity.
• Damages are measured as difference between the price agreed in the contract and the price paid in the market as a result of the breach.

I. What Do we Mean “Enforce”? Crimes and Punitive Damages

WHITE V. BENKOWSKI – The Whites contracted with the Benkowskis to supply water to their house. → Damages may be awarded for inconvenience for breach of contract, but now punitive damages may be awarded.
✓ Punitive Damages: punitive damages are not recoverable for breach of contracts.

II. Specific Performance

§2-807. SPECIFIC PERFORMANCE.
   (a) A court may enter a decree for specific performance if the goods or the agreed performance of the party in breach of contract are unique or in other proper circumstances. In a contract other than a consumer contract, a court may enter a decree for specific performance if the parties have agreed to that remedy. However, even if the parties agree to specific performance, a court shall not enter a decree for specific performance if the breaching party’s sole remaining contractual obligation is the payment of money.
   (b) The decree for specific performance under this section may include terms and conditions as to payment of the price, damages, or other relief the court considers just.

Reasons why the court usually don’t grant specific performance:
1) It does not promote economic growth
2) Places an expensive burden on supervision on Court
3) Sometimes specific performance is impossible due to external factors(i.e. no materials available to perform)

NORTHERN DELAWARE INDUSTRIAL DEVELOPMENT CORP. V. E.W. BLISS CO. – P retained D to refurbish a steel mill. Although construction lagged behind schedule, D refused to hire extra workers as rqd by the contract. → Courts of equity will not issue degrees of specific performance where such orders would require extensive supervision by the court.
Courts of equity will not issue decrees of specific performance where such orders would require extensive supervision by the court. (Specific performance will be granted in special circumstances such as public interest).

Law and Equity

AMERICAN BROADCASTING COMPANIES, INC. V. WOLF – D breached a good faith negotiation clause with P and contracted to work for its competitor. → Negative enforcement of an employment contract may only be granted, once the contract is terminated, to prevent injury from unfair competition or to enforce an express and valid anticompetitive covenant.

Remedies available to employer for breach by employment: Negative enforcement of an employment contract may only be granted, once the court has terminated, to prevent injury from unfair competition or to enforce an express and valid anticompetitive covenant. (public policies being considered are the anticompetitive covenant and the 13th amendment outlawing involuntary servitude)

III. Compensatory Damages

1. **Expectation interest:** placing the non-breached party in a position as if the contract had been performed by giving them the benefit of the bargain.

2. **Reliance interest:** placing the non-breaching party for loss caused by reliance by being put in a good position as if the contract had not been made.

3. **Restitution interest:** restoring the non-breaching party any benefit that he has conferred on the other party.

A. The Financial Equivalent of Performance

§344 Purpose of Remedies

Judicial remedies under the rules stated in the Restatement serve to protect one for more of the following interest of a promisee:

(a) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed

(b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

(c) his “restitution interest.” Which is his interest in having restored to him any benefit that he has conferred on the other party

THORNE V. WHITE – P contracted with D to have his roof replaced. → An injury party may not receive damages beyond those necessary to compensate him for the breach.

Unjust enrichment: An injured party may not receive damages beyond those necessary to compensate him the breach. (Financial equivalent of Performance)
1. Expectation Interest

FREUND V. WASHINGTON SQUARE PRESS, INC. – When D breached its contract by failing to publish D’s book, the trial court awarded P to cover the cost of publishing it himself. → When a breach of contract occurs, the law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury was foreseeable and that the amount of damages claimed be measurable with a reasonable degree of certainty and adequately proven.

✓ Speculative damages: To recover from breach the injury must be foreseeable and that the amount of damage claimed is measurable with a reasonable degree of certainty and adequately proven. (foreseeability- reasonable expectation that an action of omission would result in injury)

SULLIVAN V. O’CONNOR – D, a plastic surgeon, promised to enhance P’s beauty by performing an operation on her nose. → Where an offer promises to enhance physical beauty, breach of the contract would permit recovery for pain and suffering, mental distress, and a worsening of the condition.

✓ Specific result: If parties undertake to give to a specific result and it is foreseeable that some form of mental suffering may occur if specific result is not achieved then the defendant is held liable for the breach and pain and suffering.

2. Reliance Interest

ANGLIA TELEVISION LTD. V. REED – D contended that P could not ask for damages for wasted expenditure incurred before the contract was concluded with D because these expenditures were for P’s benefit at a time when it was uncertain whether there would be any contract or not. → In a breach of contract action, wasted expenditure can be recovered when it is wasted by reason of the D’s breach of contract.

✓ Wasted expenditures: In a breach of contract action, wasted expenditure can be recovered when it is wasted by reason of the defendant’s breach of contract.

§347. Measure of Damages in General
Subject to the limitations stated in §§350-53, the injured party has a right to damages based on his expectation interest as measured by

(a) the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential or consequential loss, caused by the breach, less
(c) any cost or other cost loss that he has avoided by not having to perform.

3. Restitution Interest

Restatement (Second), Contracts § 371 When an injured party seeks an award for money to protect his restitutionary interest, any award “may as justice requires be measured by either (a) reasonable value to the other party of what he received or (b) the extent to
which the other party’s property has been increased in value or his other interests advanced.”

**B. Avoidable Consequences**

ROCKINGHAM COUNTY V. LUTEN BRIDGE CO. – P after receiving notice that the contract was being canceled went ahead and constructed the bridge and brought suit for the full contract price. → When notice of cancellation is received while a contract is still executory, the party cannot complete it and claim the contract price.

- **Notice of Cancellation:** When notice of cancellation is received while a contract is still executory, the party cannot complete it and claim the contract price.

(avoidable consequences not applied b/c in mitigating damages, the profit made from another opportunity is only taken into account in determining the damages recoverable when the dismissal or breach pf contract enables the P to take that opportunity)

SUTHERLAND V. WYER – P was hired by D to play a part for 36 weeks. → Where an employment contract for a specified time period is wrongfully terminated, the employee may sue for the wage due under the remainder of the contract less any amounts he earned during the period or could have earned through reasonable diligence.

- **Mitigating Damages:** Where an employment contract for a specified time period is wrongfully terminated, the employee may sue for the wage due under the remainder of the contract less any amounts he earned during the period or could have earned through reasonable diligence. (avoidable consequences)

Note: There is only a duty to mitigate damages if the breach allows the non-breaching party to make reasonable efforts to find a substitute performance of the contract.

PARKER V. TWENTIETH CENTURY-FOX FILM CORP. – The film that P was scheduled to act in was canceled and she was offered a role in another firm. → A party need not accept an inferior job in order to avoid loss of damages for failure to mitigate resulting from breach of an employment contract.

- **No duty to mitigate damages:** A party need not accept an inferior job in order to avoid loss of damages for failure to mitigate resulting from breach of an employment contract but work needs to be comparable or substantially similar (question of fact to determine comparable)

§2-708. *Seller’s Damages for Non-acceptance or Repudiation*

(1) Subject to subsection (2) and to the provisions of this article with respect to proof of market price, the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this article, but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure
of damages is the profit (including reasonable overhead) with any incidental damages provided in the Article, due allowance for cost reasonably incurred and due credit for payments or proceeds of resale.

NERI V. RETAIL MARINE CORP. – D sought the recoupment of lost profits under a contract for the sale of a boat to P. → UCC §2-708 permits the seller to recover as damages the difference b/t the mkt price and the contract price plus any incidental damages incurred, but minus any expenses avoided, as long as the amt is sufficient to place the seller in as good a position as performance would have done; otherwise, the seller may recover his lost profit, plus any incidental damages and reasonable costs.

Seller’s Damages for Non-acceptance or repudiation: When there is a breach of contract by buyer through non-acceptance or repudiation, then the measure of damages for the seller is the difference between the price at the time of purchase and the unpaid contract price together with any incidental damages minus expenses saved by the breach and the buyer amount paid minus the sellers damages, seller’s receives lost profits and incidental damage

C. Foreseeability: Consequential Damages and the Effect of Procedural Rules on Contract Damages

HADLEY V. BAXENDALE - P, a mill operator arranged to have D’s company, a carrier, ship his broken mill shaft to the engineer for a copy to be made. P suffered a loss when D unreasonably delayed shipping the mill shaft causing the mill to be shut down longer than anticipated. → The injured party may recover those damages as may reasonably be considered arising naturally from the breach, itself, and, second, may recover those damages as may reasonably be supposed to have been in contemplation of the parties, at the time they made the contract, as the probable result of a breach of it.

Natural Consequences: A natural consequence is something that is more likely to occur than not if the contract is breached, therefore there is no need for special notice. Rule: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be as may fairly and reasonable considered either arising naturally, or in the contemplation of both parties, at the time the contract was made, as the probable result of the breach.

GLOBE REFINING CO. V. LANDA COTTON OIL CO. – D breached its contract to sell oil to P. P sought special damages for transportation costs and for its breach of contract with D. While there, items were not mentioned in the contract, P alleged that D had knowledge of them. → Mere notice to a seller of some interest of probable action of the buyer is not enough necessarily and as a matter of law to charge the seller with special damages if he fails to deliver the goods.

Knowledge of Consequences: To recover special damages, the plaintiff must prove that the breaching party knew the consequences and had those consequences in mind when they entered in the contract.

UCC §2-715
POSTAL INSTANT PRESS, INC. V. SEALY – Franchisor was awarded damages for future royalty and advertising fees due to franchisee’s breach of contract. → A lost future profit award to a franchisor may be awarded only where lost future profits are proximately caused by the franchisee’s breach and where such an award is neither “excessive, oppressive, [nor] disproportionate to the loss” suffered by franchisor.

✓ **Lost profits:** A lost future profit may be awarded only where it is proximately caused by the breach and where such an award is neither “excessive, oppressive, nor disproportionate to the loss” suffered by the non-breaching party.

**Speculative damages:** Damages for the breach of contract are recoverable only to the extent that they can be calculated to a reasonable certainty, without need for speculation or conjecture and when one gets into long-term contracts, one is running into the risk that the law will not find any damages for loss profits because your calculation will be viewed as speculative.

MEARS V. NATIONWIDE MUTUAL INSURANCE CO. – P an employee of D sued the company for breach of contract as a result of its failure to award him with two Benz’s as a cash prize for winning a theme contest. → A contract’s terms are sufficiently certain and enforceable if it provides a basis for determining the existence of a breach and for giving an appropriate remedy.

CENTER CHEMICAL CO. V. AVRIL, INC. – P contracted to sell its products to D which was given the exclusive right to resell the products for 20 years. After 4 years, D stopped purchasing from P. → Damages for breach of contract are recoverable to the extent that they can be calculated to a reasonable certainty, w/o the need for speculation or conjecture.

EASTERN AIR LINES, INCc. V. MCDONNEL DOUGLAS CORP. – There was discrepancy b/t what P’s expert estimated lost as a result of D’s late delivery of airplanes to P and what D’s expert estimated P lost. → In complicated or technical cases, an expert’s testimony should be cleansed of insupportable assumptions or clear errors which have less then the minimum of probative value.

**CHAPTER THREE. COUNTERVAILING INFLUENCES ON CONTRACT REMEDIES**

I. **Restitution as an Alternative Contract Remedy**

*Four alternative ways of dealing with breach of contract:*

1) The potential of contract damages to deny justified relief is limited by the presence of an alternative set of restitutionary remedies.

2) In aggravated cases courts tend to lift the matter bodily out of the conceptual framework of contract and to give it the more hospitable label of tort. By this adjustment of nomenclature, new and more generous damage rules become available.

3) Courts in many situations will permit the parties to preplan appropriate remedies by liquidated damages clauses.
4) Parties may contract their way out of the law courts altogether by arbitration agreements that give power to a new set of tribunals which apply a distinct set of rule.

- There is no coherent theory on restitution
- This cause of action must be pleaded separately from a breach of contract
- Tries to restore a party back in the position it would have been if the party would have never begun to perform the contract, instead of damages to provide the financial equivalent of performance of the contract (only one that looks backwards)
- **Elements of restitution:** i) someone has rendered services with expectation to be paid and ii) someone has been unjustly enriched by those services
- Typically occurs in cases of partial performance
- There may be cases where one recovers more than the contract price when the value of the service is higher than originally bargained for in the contract
- Remedies that are Restitution-like are: general assumpsit (regular cases involving disappointed expectations), quasi-contract, or quantum meruit

Restatement, Second, Contracts §§370, 371, 373

MOONEY V. YORK IRON CO. – P alleged that he was wrongfully discharged and prevented thereby from completing his contract with D. → If the P is wrongfully discharged, thus being prevented from completing his contract performance, he may recover the value of the material and labor already supplied.

- **Partial Performance:** If the service provider is wrongfully discharged, thus being prevented from completing his contract performance, he may recover the value of the material and labor already supplied according to the service provider (usually the market price), but if he quits, then he may only recover the value of service to the defendant (which could less than market value).

SPARKS V. GUSTAFSON – P sued D on a breach of contract claim for sale of a bldg and an unjust enrichment claim on the maintenance of the bldg after P had maintained D’s bldg, but had received no compensation. → Unjust enrichment exists where the D has received a benefit from the P which the P has not provided gratuitously, and it would be inequitable for the D to retain the benefit w/o compensating the P for its value.

- **Unjust enrichment:** exist where the defendant has received benefit from the plaintiff, which the plaintiff has not provided gratuitously, and it would be inequitable for the def. to retain the benefit w/o compensating the plaintiff for its value.

II. Tort as Alternative to Contract Remedies
- A contract breach has created certain types of expectation-sentimental or mental components –if breached may give rise to tort damages
- Where there is a warranty or guarantee theory- can give rise to contract and tort damages
- Examples of guarantee theories: Consumer goods-fraud, social types of contract, malpractice- rise to tort damages
- Factors that are taken in account to see if cases can be tried in torts and/or contracts
- When someone has been physically hurt
- If social values have been offended
- If the defendant is acting in a willful, wanton, egregious conduct, or malicious conduct is a factor whether a case can be tried in torts or contracts
- If there is a special relationship btw P and D
- Generally courts are trying to limit cases that can be brought in torts rather than contracts b/c the contracts can become more and more expensive

HARGRAVE V. OKI NURSERY, INC. – D maintained that P’s claim that certain grape vines it had purchased from D turned out to be unproductive because of disease was essentially a claim for breach of a contractual representation and could not be turned into a tort claim by applying the fraud label.

✓ where the conduct alleged breaches a legal duty which exists “independent of contractual relationship between the parties” a plaintiff may sue in tort. If there is only a breach of contract, the plaintiff may not transmogrify a contract claim to a tort claim. However, if there P suffers from the other kinds of harm, he may recover from in tort regardless if there is valid claim for breach of contract.

J’AIRE CORP. V. GREGORY – Because D did not complete the work he had contracted to do for the landlord within a reasonable time, P did not have total use of the facilities it leased from the landlord for a restaurant and thus allegedly suffered business losses.

→ Duty of care: A contractor owes a duty of care to the tenant of a building undergoing construction work to prosecute that work in a manner which does not cause undue injury to the tenant’s business, where such injury is reasonably foreseeable.

DECKER V. BROWNING-FERRIS INDUSTRIES OF COLORADO, INC. – P employees of D sued the company on the basis that they were wrongfully discharged in violation of D’s employment policies and of an express covenant of good faith an fair dealing.

→ Good faith and fair dealing: Under normal contract common law and UCC rules, there is an obligation to use good faith and fair dealing in contract practices, but if the breach of an express covenant of good faith and fair dealing will not give rise to a tort claim
JARVIS V. SWANS TOURS LTS. – P was quite distressed when his holiday turned out much differently than it had been advertised.

→ **Disappointment**: Recovery will be allowed for disappointment and loss of entertainment for breach of warranty or misrepresentations concerning a vacation.

CHAPTER FOUR. Limits on Promise Imposed by the Law’s Command or in the Name of Overriding Relationship

- Contract law is influenced by society
- Contract law cannot be contrary to public policy or illegal
- Can have relationships that affect and give meaning to the promises
- Restatement 2nd of Contracts(Section 178): When a term is unenforceable on grounds as public policy
- 1) a contract is unenforceable on grounds of public policy if legislation states that it is or the interest of its enforcement is clearly outweighed in the circumstances by public policy
- 2) In weighing the interests in the enforcement of a term, account is taken of
  - a) the parties’ justified expectation,
  - b) any forfeiture that would result if enforcement were denied and
  - c) any special public interest in the enforcement of the particular term.
- 3) In weighting a public policy against the enforcement of a term, account is taken of
  - a) the strength of that policy as manifested by legislation or judicial decisions,
  - b) the likelihood that a refusal to enforce the term will further that policy,
  - c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
  - d) the directness of the connection between that misconduct and the term

I. Positive Law as a Limit on Contract

MCCONNELL V. COMMONWEALTH PICTURES CORPORATION – P and D agreed that if P should negotiate successfully with a motion picture producer whereby D would get distribution rights to motion pictures, D would pay P $10,000 plus a percentage of the profits. P succeeded and was paid but did not receive his profit percentage because he allegedly obtained the right through bribery.

→ **Immoral and Illegal Conduct**: A party will be denied recovery even on a contract valid on its face if he has resorted to gravely immoral and illegal conduct in accomplishing its performance, but there must be a direct connection between the illegal transaction and the obligation sued upon.

§ 178 When a Term is Unenforceable on Grounds of Public Policy
(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of
   (a) the parties’ justified expectations
   (b) any forfeiture that would result if enforcement were denied, and
   (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account taken is of

PENDLETON V. FIREMAN – Husband appealed from the trial court’s award of spousal support, notwithstanding the couple’s premarital agreement waiving the parties’ right to spousal support, on the basis that the parties’ agreement was unenforceable per se as a matter of public policy.

→ Spousal Support: Spousal support waivers in premarital agreements are not contrary to public policy and not per se unenforceable. (circumstances may make a difference in whether it is considered as a violation of public policy i.e education level, financial status- ability to care for self-sufficient, and if there is children)

II. Relationships That Limit and Give Meaning to Promises

WOODS V. FITTH-THIRD UNION TRUST CO. – Woods stated on a number of occasions that she would “pay” or “take care of” her son for the services he had performed for her.

→ Family/Friendly relationships: An explicit agreement or other extrinsic evidence of the existence of binding agreement is required before promises between family members or friends will be enforced. The court does not like to get involved family relations and assumes that services performed for a family and friends are done out of familial duty or gratuity unless proven otherwise with clear and convincing evidence.

FAVROT V. BARNES – P and D entered into an agreement before marriage that sexual intercourse would be limited to about once a week, however P claimed that D later sought intercourse more frequently.

→ The law does not authorize contractual modification of the “conjugal association” except in relationship to property.

WATTS V. WATTS – P, upon the termination of her nonmarital cohabitation with D sought an odre for an accounting of the person and business assets accumulated during the parties’ cohabitation and a determination of her share of that property.

→ Unmarried cohabitants: Unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain unreasonable amount of property acquired through both efforts and if one wants to recover through quantum meirit, then it is measured by the reasonable values of the services rendered to the benefiting party.
MAGLICA V. MAGLICA – D appealed from a jury award of $84 M granted to P on breach of fiduciary duty and quantum meruit causes of action. → Recovery in qm is measured by the reasonable value of services rendered to the benefiting party.

-quasi–contract – the parties have not entered a contract, but they should be treated as if they entered a contract; (Black’s) an obligation imposed by law because of the conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched; an implied-in-law contract is not actually a contract, but instead a remedy that allows the P to recover a benefit conferred on the D

-quantum meruit – (p. 287) Latin phrase meaning “as much as he deserves,” and is based on the idea that someone should get paid for beneficial goods or services which he or she bestows on another; (Black’s) reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship

CHAPTER FIVE.  Promises Tainted by Failures of Voluntary Assent

I. Lack of Capacity

Notes:
- (2 competing interests) Courts want to protect the sanctity of making of contracts in good faith and protect the people who don’t have the capacity to make a decision.
- The courts try to protect people who may be disadvantaged like a person w/ a mental illness or less educated b/c bargaining power is quite different and the standard is therefore different
- the duty to read does not mean that you have a duty to understand what a person has read

Restatement §12. Capacity to Contract (p. 332)
(1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.
(2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is
   (a) under guardianship, or
   (b) an infant, or
   (c) mentally ill or defective, or
   (d) intoxicated.

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

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

ORELERE V. TEACHERS RETIREMENT BOARD OF NY – P changed her teacher’s retirement option while she was mentally ill.

→ Mentally illness: A contract is voidable if: 1) one party is mentally ill; 2) the illness renders him incapable of acting in a reasonable manner; 3) the one party knows or has reason to know the condition.

ELLIS V. MULLEN – P claimed that he was illiterate and did not know that the checks he signed were made out by D in such a manner as to purportedly operate as releases of any and all other claims P had arising from the automobile accident between the two.

→ Illiteracy: An illiterate person signing an instrument w/o request that it be read to him is chargeable w/ negligence for which the law affords him no redress, unless he has been lulled into security or thrown off his guard. Illiteracy may be used to demonstrate lack of capacity by proving that advantage taking or unfairness occurred. Generally, bound by what you sign and if don’t understand have a duty to ask someone to read the contract to them.

II. Duress

- The courts at 3 things in determine if duress exists:
  1) If the plaintiff had reasonable alternative
  2) the behavior or conduct of the defendant (specifically if the conduct was threatening according to the community standard)
  3) The impact on the victim

  a) General rule: A contract may be voided if a party’s manifestation of assent is induced by improper threat, leaving the victim no reasonable alternative (no reasonable alternative) to say that one has an alternative is to say that there is no other choice that would be equal as the current choice the person has a threat is improper if it constitutes a breach of good faith and fair dealing under a contract, if the resulting exchange is not on fair terms, or if the effectiveness of the threat is increased significantly by prior unfair dealing by the party making the threat.

S.P. DUNHAM & CO. V. KUDRA – D who stored and cleansed coats refused to return them to P’s customers unless P paid its lessee’s entire bill.

→ A party may recover money paid to another under a situation where he has no liability, but because of business compulsion he has no other choice or speedy remedy.
SELMER COMPANY V. BLAKESLEE-MIDWEST COMPANY – P in serious financial straits accepted a tended settlement sum substantially less than its claimed damages.  → Mere stress of financial conditions will not constitute duress sufficient to void a contract.

ANDREINI V. HULTGREN – P sued D claiming that a release form that he signed prior to surgery was unenforceable due to duress.  → A contract must be voided for duress if a party’s manifestation of assent is induced by an improper threat, leaving the victim no reasonable alternative.

III. Contracts of Adhesion and Unjust Terms

• 99% of all contracts are contracts of adhesion
• usually these services are essential and if they are to be provided at a reasonable cost then they must be standardized and mass produced (this the public policy for allowing these type of clauses)
• the typical consumer signs the form at the bottom and does bother to read
• the language is quite technical and not fully understood by the typical consumer
• contract of adhesion is a contract that sticks the helpless consumer with the standard form clauses that he might not have agreed to if he had actually had free choice
  a) Unconscionability (general rule): One who signs an agreement w/o full knowledge of its terms might be held to assume risk that he has entered a one side bargain.
  b) Exception to the general rule: Where, in light of the general commercial background of a particular case, it appears that gross inequality of the bargaining power between the parties has led to the formation of a contract on terms to which one party has had no meaningful choice, a court should refuse to enforce such a contract on the ground that is unconscionable

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

Two prong test for unconscionability:
1) (Procedural) In drafting the contract, whether the person put the other person in a position where they had no choice.
2) (Substantive) Look at the substance of the contract to see if the terms are so favorable to one of the parties that it makes the contract unconscionable.

WILLIAMS V. WALKER-THOMAS FURNITURE CO. – D made a series of purchases, on credit from P but defaulted on her payments.

→ **Two prong test of Unconscionable:** 1)(procedural prong) whether a meaningful choice is present and 2)(substantive prong) substance of the contract whether the terms were so favorable to one party in the contract that terms are unconscionable (oppressive terms)

K.D. V. ETS – According to P, the terms of the contract he signed in order to take the LSAT administered by D were unenforceable because it was an adhesion contract.

→ **Voidable Circumstances:** An adhesion contract, which is entered into between parties with unequal bargaining power, is not automatically void, but the courts will usually utilize a variety of pretexts to disregard any part thereof that finds it unfair and unreasonable, these pretexts include whether the clause is ambiguous, whether the clause is against public policy and whether it only allows recovery in tort than in contracts. (if ambiguous, then it will be construed against the author, if against public policy then it will be declared unenforceable)

PERDUE V. CROCKER NATIONAL BANK – P filed a class action suit to have D’s NSF charges for the processing of overdraft checks declared unconscionable.

→ **Unenforceable Contract of Adhesion:** A contract of adhesion is fully enforceable according to its term unless certain other factors are present such as the purpose of clause, the commercial setting, and the effect of the clause, operate against established legal rules, thus making it unenforceable.

**IV. Fraud and Misrepresentation**

**Caveat Emptor:** It is the buyer’s job to examine the goods and ask for questions and the seller’s job to sell. It is a normal part of market behavior for sellers to exaggerate, puff, and leave out unpleasant bits of information, even if that makes what is said misleading. (based on the fact that is at arm’s length contract that is not based on a fiduciary duty (relationship of trust)

**The duty to give an honest answer:** a seller is not permitted to lie and must believe that what he tells the buyer is correct, but the seller is not liable if it turns out to be wrong

**The duty to give an accurate answer:** a seller must be correct in what is said, but is under no obligation to volunteer information

**The duty to give a complete answer:** a seller is obligated to give truthful and complete answers to questions asked but need not point matters not raised by the buyer.
The duty to disclose: a seller is obligated to disclose without need for an inquiry relevant information known to it that might bear on the buyer’s decision.

The duty to investigate: a seller is obliged to conduct a complete and accurate investigation and to disclose fully all material information without being asked by the buyer.

STAMBOVSKY V. ACKLEY – P sought to rescind a contract to purchase a house upon discovering that it was allegedly haunted.

→ 1. Rule of Equity: Where a condition has been created by the seller materially impairs the value of the contract and is peculiarly w/in knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care w/ respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. (there comes a point where you have to disclose because of  good faith and fairness)

2a. Measure of damages: A party seeking damages for fraud is entitled to “recover such damages as will compensate him for his loss or injury actually sustained and place him in the same position that he would have occupied had he not been defrauded.

CUSHMAN V. KIRBY – P purchased a house after being assured by D, the seller, that the well water on the property was fine, only to discover that the water was in fact sulfurous and undrinkable.

→ 2b. Affirmative duty to Speak: when one is in the position of seller and there is a disclosure containing a misrepresentation then the seller has an affirmative duty to speak to correct the misrepresentation as a matter of law.

V. Misunderstanding and Mistake

Unilateral mistake – A mistake by only one party to a contract

Mutual mistake – A mistake in which each party misunderstands the other’s intent; a mistake that is shared and relied on by both parties to a contract

Types of Mistake:

1) Mistake in Business Judgment – the courts will not intervene unless there was some type of fraud (i.e. the other party knew about it) p. 393

2) Mistake in Integration – the parties have reached an agreement, but it went astray somewhere in the process of writing it down p. 393

3) Mistake in performance – one party in his performance exceeds the agreement p. 401
4) Misunderstandings – the error occurs somewhere in the communication b/t the parties, the language reasonably used by one party to refer to something is reasonably understood by the other party as referring to something else p. 401

STARE V. TATE – P, D’s ex wife attempted to reform their property settlement agreement on the grounds that an error in computation by P’s attorney had not been disclosed by D.

→ A party who misleads another is estopped from claiming that the contract is anything but what the other is led to believe.

1. **Effects of Misunderstanding Section 20**
   (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 (Raffles v. Wiechelhaus – if there is a mutual misunderstanding, court will grant rescission of the contract due to no meeting of the minds)
   (b) each party knows or each party has reason to know the meaning attached by the other.
   (2) The manifestations of the parties are operative in accordance with the meaning 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 (Stare v. Tate- unilateral misunderstanding, the court will grant reformation of the contract to the intention of the party that misunderstood)
   (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.

2. **Mistake**
   - mistake can lead to modification of the contract or voidability
   - a unilateral mistake does not make a contract voidable
   - a mutual mistake does make the contract voidable
   - there are four types of mistake:
     (1) mistake in business judgment- ct will not intervene unless there was some kind of fraud perpetrated,
     (2) mistake in integration - parties agree to one thing but in the process of drafting agreement one party makes mistake unknowingly, the cts will try to keep the contract and modify it to what the parties intended,
     (3) mistake in performance - ex: paint the wrong house, the ct would give equitable damages on the basis of unjust enrichment,
     (4) misunderstanding - ex: one party thinks they are buying a horse and the other party thinks that they are selling the party a cow - in
most cases the ct will find that the contract is void or unenforceable due to a lack of meeting of the minds

RAFFLES V. WICHELHAUS – P contracted to sell cotton to D to be delivered on the ship “Peerless.” Unknown to the parties was the existence of two different ships carrying cotton, each named “Peerless” arriving at Liverpool from Bombay, but at different times. → see above

BEACHCOMBER COINS, INC V. BOSKETT – Neither party knew that the supposedly rare and valuable dime P bought from D for $500 had a counterfeited mintage symbol and was not rare and valuable.

→ A mutual mistake as to a basic assumption on which the contract was made provides a basis for rescission of the contract for mutual mistake of fact.

LENAWEE COUNTRY BOARD OF HEALTH V. MESSERLY – When P found a defective sewage system shortly after the Pickles purchased rental property from D and the Pickles sought rescission of their contract on the grounds of mutual mistake.

→ A court need not grant rescission in every case in which there was a mutual mistake that relates to a basic assumption of the parties upon which the contract was made and which materially affects the agreed performances of the parties.

→ **Exception:** but not always the case if the court can exercise its equitable powers to determine which blameless party should assume the loss, the courts look at “as-is” clause. “as-is” clause means—physical conditions of an item, does not immunize the owner of the property if he hides defects that can’t be seen from a reasonable inspection.

**caveat emptor** – let the buyer beware

2nd Rest §154: **When a Party bears the risk of a mistake(sometimes even mutual mistake)**

(a) the risk is allocated to him by agreement of the parties, or
(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.[Lenawee v. messerly]

**CHAPTER SIX. Consideration: Bargains and Action in Reliance**

**I. Bargain and Exchange**

- for consideration there must be an exchange of values between the parties to show seriousness of the transaction subject value to the parties not an objective measure
- bargain for means that there must be a negotiation for exchanges of value
- Consideration can be satisfied—by forbearing (give up something have right to do) or do something that you don’t have to do
Gifts or the happening of an event on which the promise is conditional, though brought about by the promise in reliance on the promise will not be interpreted as consideration.

**offer** – the act or an instance of presenting something for acceptance

**acceptance** – an

**consideration** – something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee

E.J. BAЕHR V. PENN-O-TEX OIL CORP. – P the lessor of a gas station, learned, while on vacation, that D had taken over and was running the station to collect money owed it by the lessee.

→ **Forbearance:** While forbearance to bring suit is deemed consideration, there must be a showing that forbearance was bargained for and was not merely conveniently granted unilaterally by one party.

**IV. Past Consideration—Moral Obligation**

**Past consideration** – an act done or a promise given by a promisee before making a promise sought to be enforced; past consideration is not consideration for the new promise because it has not been given in exchange for this promise (although exceptions exist for new promises to pay debts barred by limitations or debts discharged in bankruptcy).

**Equitable estoppel** – a defensive doctrine preventing one party from taking unfair advantage of another when, though false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.

PASSANTE V. MCWILLIAM – P brought suit against D and two of its board members for alleged breach of an oral contract to give P 3% of the company’s stock in consideration for the obtaining financing for the company.

→ **Past Consideration:** General Rule: there must be a bargained for new benefit and a bargained for new detriment, things that have already happened cannot be a basis for consideration. Various jurisdictions have enacted statutes where past consideration or moral obligation is sufficient to make the promise enforceable.

MILLS V. WYMAN – P took care of D’s son w/o being requested to do so and for so doing was promised compensation by D for expenses arising out of the rendered care. D later refuse to compensate P.

→ **Moral obligation:** General rule: Moral obligation is insufficient as consideration.

WEBB V. MCGOWIN – P saved the now deceased McGowin from grave bodily injury or death by placing himself in grave danger and subsequently suffering grave bodily harm. McGowin, in return promised P compensation. McGowin’s executors now refuse to pay the promised compensation.
Exception: there is a moral obligation that makes a promise for a previous benefit (unjustly enriched) received enforceable.

- The court is concerned with fairness; any promise based on moral obligation should not be enforced in commercial areas.

V. Preexisting Duty

General rule: doing something that you were already legally obligated to do is not consideration for a promise to pay you more money to do it.

Preexisting duty – A duty that one is already legally bound to perform

This rule doesn’t allow for changes. Circumstances do change. The second contract will be subject to the same factors as the first one. Why would someone agree to pay more for the same thing?

A. Modification of an Ongoing Contract

General Rule: contract modification which has the effect of altering the obligation of only one of the parties is ordinarily deemed unenforceable unless supported by a new consideration. [This is because the party whose obligation has not been altered had a preexisting duty to perform in accordance with the original agreement and thus has given no consideration for the modification]

SCHWARTZRICHL V. BAUMAN-BASCH, INC. – P employment contract was renegotiated to prevent him from taking a new position.

→ Employment Contract: When an existing contract is terminated by consent of the parties and a new one is executed in its place, then the mutual promises are again consideration and where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract.

WATKINS & SONS, INC. V. CARRIG – After P encountered solid rock in the course of excavation, D agreed to raise the price in the original excavation contract.

→ Modification of a Contract: A modification made to meet the reasonable needs of standard and ethical practices of men in their business dealings with each other operates as a partial rescission of a prior contract and is thus enforceable since supported by consideration.

AUTOTROL CORP. V. CONTINENTAL WATER SYSTEMS CORP. – P brought suit against D for breach of contract, based on the theory that D’s conduct constituted a waiver of its right to terminate the agreement for failure to agree on product specifications.

→ Oral Modification: An oral modification is enforceable, even if the contract prohibits oral modifications, if the modification is supported by consideration and the party seeking enforcement relied on the modification.

Look at Selmer, Posner focuses on settlement.

Re-read p. 18 Mendez opinion shows various elements of reliance, Mendes does concede, actual reliance can in fact act as consideration when bargained, but when not bargained for it can act.
Article 209 of the UCC does allow for modification if it is placed in writing. When a contract is mutually modified then it is a contract and falls under all the rules and limitations placed on contracts. The court looks to see if there was advantage taking, duress, fraud, etc. to see exactly why the old contract was modified.

Another alternative: can use the law of gifts to get around the consideration element for the pre-existing duty rule.

UCC 2-209: Modification, Rescission and Waiver
1) No consideration is necessary to modify a contract
2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party (when modification is allowed must be in writing and signed by both parties)
3) All modifications must meet the statute of Fraud requirements
4) An attempt at modification or rescission can operate as an waiver.
5) A waiver may be retracted if reasonable notice is given and the other party has not relied on it.

Way reliance cases are approached:
1) Look at reliance as really a bargained for action. (v. Ham)
2) Look at reliance as some kind of gift that needs to be executed
3) Look at misrepresentation Messer v. Jackson
4) Typical estoppel (under §90 of the restatement of contracts) What does it really mean? What kind of general principles can you deduce from this particular situation and how do you apply it.

The extent to which estoppel can be a substitute for consideration p. 524

Restatement, Second Contracts §89

IV. ACTION IN RELIANCE
Restatement, Second Contracts § 90
Ricketts v. Scottorn – P quit her job in reliance on her grandfather’s granting of a note payable to her and sued his estate for payment on the note after his death.

→ When the payee changes her position to her disadvantage, in reliance on the promise, a right of action on the promise arises.

→ Action on Reliance: a contract is not invalid merely because it lacks mutuality of obligations. Detrimental reliance may constitute valid consideration. In other words,
when the promisee changes her position to her disadvantage, in reliance on a promise, a
right of action on the promise arises.

MAZER V. JACKSON INSURANCE AGENCY – P and other adjoining homeowners
claimed that the doctrine of promissory estoppel applied to prevent D from breaching a
promise to allegedly made that a 100-foot buffer zone would be maintained between their
homes and an office park D built.
→ An estoppel precludes a party from denying the binding nature of conduct by which he
induced another to take action in reliance thereon.

CLAUSEN & SONS, INC. THEO. HAMM BREWING CO. – P brought suit against D
for alleged breach of an exclusive distributorship contract.
→ A contract is not invalid merely because it lacks mutuality of obligation. Detrimental
reliance may constitute valid consideration to support it.

SECTION 90: HANDLE WITH CARE (Promise Reasonably Inducing Action or
Forbearance) p. 513

**Recovery:** can use promissory estoppel or equitable estoppel or quasi-contract
recovery.

**ELEMENTS OF AN EQUITABLE ESTOPPEL:**
1. That there be some conduct amounting to a representation or concealment of
material facts which are known to the party stopped and unknown to the other
party claiming the benefit of the estoppel.
2. The conduct must be done with the intention or at least the expectation that it
will be acted upon by the other
3. Conduct must be relied upon by the other who is led to act on it
4. The person must in fact act upon it in such a manner as to change his/her
position for the worse.

PROMISSORY ESTOPPEL-a promise causing reliance
EQUITABLE ESTOPPEL- conditions creating reliance, but no express promise
They have same elements except
- reliance can be a cause of action through: 1) promissory estoppel by a promises
made orally or in writing
2) equitable estoppel by conduct.
- reliance does not alleviate your duty to mitigate damages
- reliance uses the notion of fairness

**4 ways reliance cases are approached**
 a) looks at reliance as a bargain and constitutes consideration
 b) reliance as a gift that has been executed and can be symbolic for consideration
 (ricketts)
 c) reliance as a matter of misrepresentation or fraud (mazer)
 d) typical estoppels under section 90 of restatement
CHAPTER SEVEN. FORMATION: THE CREATION OF CONTRACTUAL OBLIGATION

- At arms length, Courts are more careful when examining contract
- But if had prior history- Courts are less strict on examining contract
- For common law formation-operative offer and acceptance
- Offeror can change his offer anytime until it is accepted
- For common law formation of a contract requires:
  1) Was there an offer? Or was it merely an invitation for further negotiation?
  2) Was there an acceptance?
  3) When does it become binding?
- Under common law revocation of the offer must be made in the same manner that it was first ordered. The law is moving away from that and moving towards saying that the revocation only has to be done in a reasonable manner under the circumstances
- For an offer to be operative it must be clear, definite, no room for negotiation
- Offer can expire with time
- If there is reliance or if a person has provided consideration, the offer cannot be revoked by the offeror (this is like Mattei v. Hopper)
- Arct 2-205 pg 592
- The old rule: offeror is the master of the offer has been modified in certain circumstances that the offer has been made (UCC-2-205)
- The UCC makes the formation of a contract much more contextual thing than just using the three elements it also includes the intention of the parties, the conduct of the parties, the language of conditions.

I. The Importance of Determining the Moment When a Promise Becomes Binding

II. Operative Offer or Invitation to Negotiate?

LEFKOWITZ V. GREAT MINNEAPOLIS SURPLUS STORE, INC. – D advertised one fur stole on a “first-come-first-served” basis but would not sell the stole to P who accepted the alleged offer.

→ A newspaper advertisement (for the sale of an article) which is clear, definite and explicit, and leaves nothing to negotiation is an offer, acceptance of which will create a binding contract.

→ Operative Offer: A newspaper advertisement which is clear, definite, and explicit, and leaves nothing to negotiation is an offer, acceptance of which will create a binding contract.

Topic III. Completeness as the Indicator of an Operative Offer-Open Terms

Uniform Commercial Code: March 1, 1999

Topic IV. The Duration of Offers: The Vulnerability of the Offeror and the Use of Options
A. Power to Revoke an Offer and Restrictions on It
UCC 2-203 Formation in General:
(a) A contract may be made in any sufficient manner to show agreement, including by offer and acceptance, conduct of both parties, or operations of electronic agents which recognize the existence of a contract.
(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

a) Language that expressly conditions the intention to make a contract upon agreement by the party to terms proposed prevents contract formation unless the required agreement is given or conduct by both parties recognizes the existence of a contract. However, an express condition contained in a record must be conspicuous.

UCC 2-303 Open Price Term.

c) The parties, if they so intend, may form a contract for sale even if the price is not agreed. In this case, the price is a reasonable price at the time for delivery if:
1) nothing is said as to price;
2) the price is left to be agreed by the parties and they fail to agree; or
3) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third party or agency and it is not so set or recorded.

d) A price to be fixed by the seller or the buyer means a price to be fixed in good faith.

e) If a price left to be fixed otherwise than by agreement of the parties is not fixed in good faith under subsection b) or fails to be fixed through fault of one party, the other party at its option may treat the contract as canceled or may fix a reasonable price.

f) If the parties intend not to be bound unless the contract price is fixed or agreed and it is not fixed or agreed, a contract is not formed. In that case, the buyer shall return any goods already received or, if unable to do so pay their reasonable value at the time of delivery, and the seller shall return any portion of the contract price paid on account.

Rest 2nd, §24:
An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

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

B. The Duration of Offers

- If the offeror has not placed a limit on the duration of the offer, then the court will determine the life span of the offer
- An offeror can revoke the offer at any time before acceptance of the offer
- The offeror revocation is limited if the offeree has relied upon the offer or provided some type of consideration for the offer.

A. Exclusive Agreements

UCC 2-306 Output, requirements and Exclusive dealings:

1) a term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disappoiontate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

GREAT NORTHERN RAILWAY CO. V. WITHAM – D agreed to supply all of P’s requirements for certain goods for a one-year period.

→ “Requirements” contracts are valid and binding.

→ A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply goods and by the buyer to use best efforts to promote their sale.

B. Options

B. Options

- An option is a promise to not to revoke another promise for a period of time(a contract for an extension of time)
- The irrevocability of an offer is neatly accommodated to the consideration requirement by making the sale of the power to revoke part of a two level bargain.
- 1) Level 1: is the basic offer, for which a price is demanded.(main contract)
- 2) Level 2: is a collateral offer to keep the offer open for a specific consideration, but for another price demanded. (option contract)
- Receipt of the price for irrevocability creates the option.

Rest 2nd §25: Option contracts

An option contract is a promise which meets the requirements for the formation of a contract and limit’s the promisor’s power to revoke an offer.

Rest 2nd §87:

1) An offer is binding as an option contract if it
   a) is in writing and signed by the offeror , recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time ; or
   b) is made irrevocable by statute.
2) An offer which the offeror should reasonably expect to induce action or forebearance of substantial character on the part of the offeree before acceptance and which does induce such action or forebearance is binding as an option contract to the extent necessary to avoid injustice.

C. Firm Offer Statutes

UCC 2-205 Firm Offers:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. (Gives notice of a price change) **In the absence of a requirements contract, each sale of a product to a purchaser carries its own contractual terms.** Note: A firm offer is an exception created by the UCCC to the common law that an offer may be made for a specified period of time not greater than 3 months.

MARSH V. LOTT – In consideration of $0.25, D sold P an option to purchase real property for $100,000 but later attempted to revoke the offer during the option period. → Any consideration, however small, paid for an option to purchase property is binding upon the seller for the option period specified, and the option agreement is irrevocable for want of adequacy of consideration.

§2-306. Output, Requirements and Exclusive Dealings p. 903

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated normal or otherwise comparable prior output or requirements may be tendered.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

C. Firm-Offer Statutes

MID-SOUTH PACKERS, INC. V. SHONEY’S, INC. – D’s at first accepted meat shipments at a price higher than it though appropriate and then deducted the amount from its payment for the last shipment. → In the absence of a requirements contract, each sale of a product to a purchaser carries its own contractual terms.

When someone asks someone to do something, and if they begin performing there are three approaches to what happens now:

1) no contract is formed until performance is completed
2) a contract has been formed the moment performance has begun
3) the moment the offeree begins to perform the offeror must complete the promise
D. Options Purchased by Beginning Performance
Restatement, Second Contracts §45
E. Action in Reliance as an Option Creator
DRENNAN V. STAR PAVING CO. – P, a contractor, in preparing his bid on a public
construction project, used the bid for paving work by subcontractor D. After P was
awarded the contract, D informed P that its paving bid was in error and that the paving
work would cost at least twice as much. P attempted to hold D to its bid but had to have
another subcontractor do the paving at a cost higher than the bid.
→ Action in Reliance as an Option Creator A promise which the promisor should
reasonably expect to induce action or forbearance of a definite and substantial character
on the part of the promise and which does induce such action or forbearance is binding if
injustice can be avoided only by enforcement of the promise
F. Additional Offer Terminators

Topic V. The Binding Event: Acceptance
BEARD IMPLEMENT CO., INC. V. KRUSA – D signed a purchase order for a combine
from P, but the order was not countersigned and D backed out of the deal.
→ The offeror may prescribe the terms of the method for acceptance including time,
place, and manner.
→ Method for acceptance: The offeror may prescribe the terms of the method for
acceptance including time, place, and manner.

A. Acceptance Must Match the Offer: Counteroffers, Modified, Qualified, Conditional
and Equivocal Acceptances
UNITED STATES V. BRAUNSTEIN – P’s acceptance of D’s offer contained offer
contained a clerical error as to price and the amount due.
→ Mirror Image Rule: An acceptance must be unequivocal, positive, unambiguous, and
comply with all requirements in the offer. Any changes in the terms of the offer which
are conveyed in an acceptance are deemed a rejection and a counter-offer. (an acceptance
must be the mirror image of the to be valid)

B. The UCC and the Battle of the Forms
If the parties actually perform for a certain period of time and then determine there is a
conflict in the terms of the contract
-no longer the BOF, has been abandoned since last July, all has been cancelled expect
subsection (3) (the only way now is to look at the conduct of the parties)

VI. Bargaining Over Distance
ADAMS V. LINDSELL – One day after P had mailed his acceptance of D’s offer to sell
to sell wool, D sold the wool to another.
→ Mailbox Rule: an acceptance of an offer is effective on the day that it is mailed.

VII. Pre-Contractual Liability
• Written agreement v. memorial-there is no clear rule whether parties were
merely negotiation or actually agreed as a memorial of the agreement.
• Makes sense every agreement in writing in terms of evidence later on, especially if its an extended arrangement that may go on for many years.

• Two views: if the written draft is viewed 1) by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect its binding force of the contract; 2) if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

• To determine which view (Restatement 2nd, 27 comment c), the court looks at these factors:
  1) whether this type of contract is usually found in writing
  2) whether it is such a nature as to need a formal writing for its full expression
  3) whether it has few or many details
  4) whether the amount involved is large or small
  5) whether it is common or usual contract
  6) whether negotiations indicate that a written draft is contemplated as the final closing of the contract
  7) if a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract

• Look objectively at language of parties and surrounding circumstances to determine if the contract is agreed to
• Reasonable reliance by the promisee
• Foreseeable to the promisor that the injuries would occur
• There is room for reliance and estoppel in business transaction

EMPROMFG. CO. V. BALL-COMFG, INC. – P contended that a letter of intent had the effect of binding P. The letter stated “Empro’s purchase shall be subject to the satisfaction of certain conditions precedent to closing including, but not limited to.”

→ “Subject to” Clause: Parties who made their pact “subject to” a later definitive agreement have manifested an intent not to be bound.

HOFFMAN V. RED OWL STORES, INC. – An agent of D informed P that he could obtain a franchise if he followed certain procedures.

→ Reasonable Reliance/Foreseeable Consequences: A promise which should be reasonably expected to induce an action or forbearance of a definite and substantial character by another and which induces such action for forbearance is enforceable where it is only the method whereby injustice can be avoided

1. Test for doctrine of promissory estoppel:
   a) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? (question of fact)
   b) Did the promise induce such action or forbearance? (question of fact)
c) Can injustice be avoided only by enforcement of the promise? (courts discretion and public policy)

2. Measure of damages in promissory estoppel: Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor’s promise, they should be only such as to in the opinion of the court are necessary to prevent injustice. These damages do not necessarily mean specific performance, damages for breach, but the amount allowed should be determined by P’s expenditures or change of his position in reliance as well as by the value to him of the promised performance. Restitution is also an ‘enforcing’ remedy based on some kind of rescission. In determining what justice requires, the CT must remember all of its powers derived from equity, law merchant, and other sources, as well as common law.

3. Corbin says: Wrong is causing P to change his position to his detriment, not depriving him the promised reward. Damages should not exceed the loss caused by change of position, which may be less than promised reward.

CHAPTER EIGHT. Performance and Breach

- Most contracts are made w/o a lawyer’s involvement and most parties prefer to work out performance problems themselves, only calling on lawyers when the situation has become a real mess.
- Promises and conditions: basic distinction is that between (a) event that is promised and (b) an even that conditions a promise
- A failure of a party to perform a breach of the contract, giving rise to legal remedies, particularly damages-promise
- The failure of an event on which a promise is conditioned operates to excuse performance of that promise –that is it terminates or at least suspends, the obligation of the contract-condition
- A breach of promise gives rise to damages; failure of a condition excuses the conditioned performance
- Every contract term can be characterized in 1 of 4 ways:
  - It may be a pure condition
  - It may be a pure promise
  - It may be both a promise and condition
  - It may be nothing and its occurrence will have no impact on the parties’ continuing obligations.

Topic I. The Impact of Events After Formation on the Continuing Obligation of Performance
A. Express Conditions

- Rest 2nd §224 allows parties to express conditions to determine if the performance will occur or not called limiting events
• An event need not be expressly described in a contract in order to operate as a condition, but may be implied by the court interpreting the deal even though it is not necessarily mentioned by the parties.
• If a condition is implied by an interpreting court, it has precisely the same legal effect as a condition that the parties themselves took into account and expressly stated in the agreement.
• The court is likely to be very strict with a party seeking to enforce harsh conditions (i.e., suppose a builder agrees to: if the building with a contract price of 15 million is only 95% complete on Dec. 10th, the owner gets it for nothing) and will sometimes grab at a rather flimsy basis for saying that the condition has been waived.
• The law abhors forfeitures and if the result of giving full effect to the condition so labeled, the court will avoid enforcing it.

Normally expressed conditions should be enforced unless they are unduly harsh, unfair risk allocation is done in a manner not equitable

Courts get around:
1) courts will not encourage forfeiture
2) waiver-expressed or implied
3) modification of contract through conduct of parties
4) look at this as an equitable manner-unfair or unjust

HOWARD V. FEDERAL CROP INSURANCE CORP. – D claimed that P’s violation of a condition precedent negated its obligation to pay.

→ Doubtful words if promise or Express condition: Where it is doubtful whether words create a promise or an express condition, they are usually interpreted as creating a promise thereby avoiding forfeiture and allowing for damages as matter of policy. (Covenant is a term put in contract but not condition for contract, not actionable if not met)

1. Limitations on Express Conditions
Restatement § 229
Excuse of a condition to avoid forbearance: To extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

MARGOLIN V. FRANKLIN – The Ds alleged that there had been a waiver of the payment due date on their note.
→ Late payments: When a lender agrees to accept late payments or continues to accept them, it cannot suddenly, without prior warning, hold the party in default for failure to make the payments on the due date.

2. Conditions Precedent, Concurrent and Subsequent

Condition Precedent: Where an event must exist or occur before a duty of immediate performance arises, the condition is said to be precedent.
Example: I promise to take your cows into shelter if it rains tomorrow. Only upon the occurrence of the conditioning event—the rain—does any obligation to perform arise. If it doesn’t rain, the promisor does not have to do anything.

Condition subsequent: Where the promisor of an event extinguishes an existent immediate duty to perform, the condition is said to be subsequent. Example: So if Seller says “I will sell you my grain for $2.00 per bushel, unless Congress raises the parity support level above $1.65,” the occurrence of the conditioning event—Congressional action raising the support level above $1.65—extinguishes or discharges the outstanding obligation to perform. If Congress doesn’t raise the support level, the promisor must sell the grain.

Condition concurrent: Where performance is promised to be concurrent, it is condition precedent to a suit by either party that there be at least a tender of performance.

Implied Conditions
UCC 1-203: requires every contract to have implied obligations of cooperation, good faith, and fair dealing
Under UCC §1-201: Good faith means “honesty in fact in the conduct or transaction concerned.”

B. Implied and Constructive Conditions
1. Promises Implied by Social Expectations and Good Faith
PAREV PRODUCTS CO. V. I. ROKEACH & SONS – P granted D the exclusive right to manufacture its product, for a period of 25 years. D was not to aid or manufacture any competitive product, but 16 years into the period it introduced another cooking oil, Kea which P claimed to be a breach of contract.

→ Negative Covenants: Where developments, since the making of a contract, present a situation not clearly, if not at all, within the contemplation of the parties at the time, the court should seek that which will most nearly preserve the status created and developed by the parties.

2. Supervening Events
3. Impossibility
ONEAL V. COLTON CONSOLIDATED SCHOOL DISTRICT NO. 306 – IN P’s action against D for discharging him from his teaching job and refusing to pay him his accumulated sick leave benefits, the D contended that P breached his employment contract with the D by not reporting for work.

→ Impossibility: Impossibility of performance of a contract may be defined not only as strict impossibility, but also impracticability arising from extreme an unreasonable difficulty, expense, injury, or loss involved (objective impossibility- no control in it)

CANADIAN INDUSTRIAL ALCOHOL CO., LTD. V. DUNBAR MOLASSES CO. WHITMAN V. ANGLUM – P placed an order w/ a middleman, D to obtain molasses for it from National Sugar Refinery.
→ **Condition of the Contract:** Unless made a condition of the contract, the failure of a supply source will not usually relieve a party his duty to perform. Failure to make efforts protect self→ assume the risk)(subjective impossibility-had some control in it)

WHITMAN V. ANGLUM – D was unable to supply milk to P because he had been quarantined and all of his cattle were destroyed.

→ An unconditioned promise to perform is not excused by the promisor’s personal inability to perform.

→ **Personal inability to perform:** Personal inability to perform does not excuse an unconditioned duty of performance. (Withman v. Anglum–Is this a question of impossibility or interpretations, is he a middle person or a producer of a milk himself)

4. **Impracticability**

- performance may not literally be impossible, but quite often will be so onerous as to impose a heavy burden on one of the parties.

MINERAL PARK LAND CO. V. HOWARD – P agreed to supply D with all of the gravel and earth necessary for him to construct a bridge.

→ **Commercially Impracticable:** performance is legally impossible when it is deemed commercially impracticable due to excessive or unreasonable costs not contemplated (foreseen) by both parties. (modern approach of doctrine of impracticibility) …

UCC § 2-615
UN Convention on Contracts for the International Sale of Goods, Article 79, p. 716

(2) If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provision of the paragraph of that paragraph were applied to him.

→(price alone is not enough must be so oppressive and burdensome to be impracticible) and no unreasonable , burdensome, unfair , and not foreseeable shift from objective to contextual ; article 2-615 always an assumption unspoken that certain events will occur and when that changes , excuse parties or modify contract

1.

UCC 2-615: Excuse by failure of Presupposed Conditions

Except as so far as seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs b) and c) is not a breach of his duty under contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
b) Where the cause mentioned in paragraph a) affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph b), of the estimated quota thus made available for the buyer.

5. Frustration of Contract

III. The Obligation of Third Parties to Respect Contract Relationships

MITCHELL V. ALDRICH – Commette sold cattle to P subject to the approval of the mortgagee. D, an appraiser sent by the mortgagee, persuaded Comette to sell to D rather than to P.

→ A third party who intentionally interferes with an existing contractual relationship is liable for all damages which result from his conduct, unless his acts were legally justified.

DELLA PENNA V. TOYOTA MOTOR SALES, U.S.A., INC. – P an automobile wholesaler, brought suit against D for violation of state antitrust laws and intentional interference with economic relations suffered as a result of his being placed on Toyota’s “offenders” list.

→ A P asserting an alleged interference with prospective contractual or economic relations must plead and prove the D not only knowingly interfered with the P’s expectancy, but also engaged in wrongful conduct other than the interference itself.

ALDER, BARRISH, DANIELS, LEVIN AND CRESKOFF V. EPSTEIN – D, a former associated attorney with P, directly contacted the firm’s clients regarding changing representation when he left the firm.

→ Attorneys unlawfully interfere with prospective and existing contract relations which they induce clients to change law firms in violation of professional responsibility standards.