CONTRACTS OUTLINE:

No more than 21,500 characters (approx 10 pgs)

Definitions:
Merchant – a person who deals in goods of the kind

OFFER
1. Was there a manifestation of intent to be bound with clear and definite terms (can’t be secretive)?
   a) What would a reasonable man have inferred?
   b) Intent is gleaned from the actions and words used.
   c) Would a reasonable man have relied on the intent?
   d) Watch for “immediate acceptance” – implies offer
   e) Language MUST CONTAIN clear, definite, and explicit – leaves nothing open for negotiation
   f) Does offeror make clear an intention to grant the offeree the power of acceptance?
   g) Offeree must be clearly identified

2. Was there really an offer or was it merely a request to another party to begin the bargaining process?
   a) Look to language. Does it imply an intent to make an offer?
   b) Interest in selling does not imply offer
   c) Courts look to actions/intent/interest in receiving an acceptance
   d) If it is or should be obvious that other people are being given the power to make an offer, then the initial question is not an offer. There can only be one offer for each item at a time.
   e) Did the Δ convey the power of acceptance on the π?

3. Fixed Purpose Test
   Was further assent necessary on the part of the offeror to create a binding agreement?
   a) Did the offeror manifest a willingness to enter in a bargain?
   b) Did this manifestation invite a reasonable person to believe that he was given the power of acceptance?

4. Offer can be withdrawn before acceptance
5. Generally ads are not offers, merely invites to make an offer, UNLESS the ad implicitly grants performance upon further action by the offeree (Lefkowitz & Carbolic)
6. Mailbox Rule for Offers – offer is good when received by the offeree
7. Restatement, § 24 – manifestation of a willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reasons to know the person making it does not intend to make a bargain until he has made a further manifestation of assent.
8. Invitation to continue negotiation – if offer is not definite, it may constitute merely this – price range?

ACCEPTANCE – manifestation of assent to the terms of the offer
1. Automated, ministerial act cannot constitute an acceptance (Corinthian)
2. Unilateral Contract - Acceptance by performance, express acceptance no change in terms, Bilateral Contract – Acceptance by return promise
3. Must know that offer exists in order to accept (public rewards).
4. If an offer provides specific means by which an acceptance must be made, any deviation from those specifics constitutes no acceptance even if normally it would be considered an acceptance.
5. Uncommunicated intention to accept an offer is not an acceptance
6. Unless offer is supported by consideration…an offeror may withdraw his offer at any time “before acceptance and communication of that fact to him” To be effective, revocation of an offer must be communicated to the offeree before he has accepted
7. General rule is that an offer proposed can be withdrawn before its acceptance and that no obligation is incurred thereby. This is not without exceptions: Power to create a contract by acceptance of an offer terminates at the time specified in the offer, or if no time is specified, at the end of a reasonable time. The reasonable time is a question of fact depending on the exact circumstances
8. Two Types
   1) Expression by words
   2) Acceptance by conduct or silence

   Test of Acceptance by Silence – Generally courts are hesitant to create a legally enforceable document under such a minimal manifestation of assent.
Whether or not the offeror was reasonably led to believe that the act of the offeree was an acceptance
1) Previous dealings – offeree has given the offeror reason to believe that silence = acceptance

9. Mailbox Rule:
   - Offer, counteroffer, and revocation are all valid when received by offeree
   - Acceptance binding when mailed
10. Power of acceptance is terminated when the offeree has reliable information that the offeror has taken definite action showing an intention to revoke the offer.
11. Mirror Image Rule – Common law rule, acceptance must “mirror” the offer
12. UCC §2-207 – definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable amount of time operates as an acceptance.
   a) Additional terms or slightly different terms – still acceptance unless acceptance made conditional on assent to new terms
   b) Additional terms = proposal … NOT counteroffer
   c) §2-207(1) Acceptance which requests a change or addition to the terms of the offer is NOT a counteroffer, unless the acceptance is made to depend on an assent to the changed or added terms.
   d) §2-207(2) If two merchants are dealing, additional terms automatically become part of the contract unless these terms (a) materially alter the contract, or (b) the offeror objects to the terms within a reasonable time
      Whether a term is material is a question for the jury
   e) §2-207(3) If there is offer + acceptance with materially altered terms, which would normally not be a contract, but both parties conduct themselves as if they were in a binding contract, then a binding contract is assumed by the courts. In such cases where the conduct creates a binding contract yet the terms are different in the various written materials, the court will use “filler” terms based on the UCC to construct a “new” contract.

COUNTEROFFER
1. Immediately terminates an offer and establishes a new offer
2. Common law - To constitute a counteroffer, any part of the original offer is changed
3. If π is not a merchant, buyer must expressly assent to new or additional terms

OPTION CONTRACTS
1. Creates two distinct obligations
   a) To keep available the option to purchase for a fixed period of time
   b) To negotiate in good faith for the second contract
2. Must have consideration on both sides for option contract to be established
   - Offeree must give consideration that bears some proportionality to the sought-after contract.
   - Offeror’s consideration is the period of time that the option contract will be available.
3. The option contract cannot be destroyed for that fixed period UNLESS
   a) The offeree rejects the offer and
   b) The offeror acts in reliance on the rejection and sells the item elsewhere
4. Any counteroffer after the option contract has been established is viewed as negotiation for the price of the object
5. Any negotiation has to be done in GOOD FAITH bargaining. If the negotiation is not done in good faith – offeree can sue under the theory that the bargaining was not done in good faith and ask for specific performance or damages.
6. Any offer to form a contract that has the possibility of being impossible creates an option contract whereby the offeror is ONLY required to perform when the offeree completes performance (real estate agent) – the part-performance by the offeree creates an option contract.
7. Firm Offer Contract – UCC 2-205
   a) Between merchants, in a signed writing by offeror – gives assurance that offer will be held open
   b) No Consideration needed during time stated, and if no time stated – reasonable period of time
   c) Only a 3 month ceiling. No matter what the writing says.
   d) Watch out for writing without an express promise
BID CONTRACTS
1. If there’s a provision in the bid for a method of acceptance of the offer (acceptance is contingent upon the bid being accepted by a third party) then the revocation of the offer before acceptance by a third party can take place, constitutes a destruction of the offer.
2. BUT if there is no provision for how the acceptance is to occur, then reliance on the bid to the offeree’s detriment constitutes acceptance of the offer and as such the offeror is bound to the offer.

A bid contract works like this: *(Drennan v. Star Paving Co.)*
Sub-Contractor → offeror (responsive bid)
General Contractor → offeree
Courts use a promissory estoppel type analysis where no consideration to create an option contract + no acceptance + no bilateral contract.

Under Restatement §87(2) says that where “An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character by the offeree before acceptance and which does induce such action or forbearance is biding as an option contract to the extent necessary to prevent injustice.”

Creates an option contract if the general contractor relies on the sub-contractors bid in establishing the general bid for the work. This option contract has to be accepted within a reasonable time after being awarded the job.

OUTPUT CONTRACTS – Everything I make, I’ll sell to you
1. If there’s some restriction on both sides, then the promise is valid.

REQUIREMENT CONTRACTS – Everything I need, I’ll buy from you

CONSIDERATION – bargained for exchange between the parties that is something of legal value
Legal value – the exchange must be of some benefit to the promisor or some detriment to the promisee
These things must be given in exchange for each other
1. Every contract MUST HAVE consideration from both parties
2. Concept of bargaining – both parties must receive and give something
3. Each party is motivated by the consideration of the other party
4. Guarantees to pay for someone else’s goods constitute consideration
5. In a contract for sale of goods, when two parties’ consideration are EXTREMELY disproportionate, the UCC grants power to the court to either strike down the entire contract as “unconscionable” or modify in such a way as to create a more appropriate contract. *(Jones v. Star Credit – refrigerator)*
6. Nominal Consideration vs. Peppercorn theory
   Nominal – not allowed
   Peppercorn – court finds that any peppercorn of consideration is enough

PROMISSORY ESTOPPEL – substitution for consideration
1. Although gratuitous (without consideration), it is the type of promise that might foreseeably induce the promissee to rely on it.
2. Restatement §90: If A makes a (1) clear and definite promise to B which should (2) reasonably be expected to induce reliance from B, and B (3) does rely on this promise to his detriment, then the court will consider the promise binding if the injustice can only be avoided by enforcement of the promise.
   • Contract substitute = reliance damages = court finds that there was not a contract per se, but that the π relied to his detriment on a “clear and definite promise” – is reliance reasonable?
   • Consideration Substitute = expectation damages = court finds consideration where there may not be sufficient consideration and finds an enforceable contract
   REMEDY: limited as justice requires
4. Party is entitled to recover for a breach of contract only damages that:
   (a) Arise directly and naturally in the usual course of things from the breach itself
   OR
   (b) Are the consequences of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made

When does Promissory Estoppel Not Apply??
1) When the claimed actionable reliance was bargained for (where there was an actual contract)
Pre-Existing Duty Rule
1. In the case of a pre-existing contract, a party is obligated to perform those actions that they contracted to perform, and any modification to the contract must also contain additional consideration or else the modifications are null and void.
2. Both parties have to give more consideration from both sides to be valid
3. I.E. Painting House conversation

Modification of Existing Contract
This is legal if:
1) Both parties VOLUNTARILY agree
2) Modification must occur before the contract was fully performed on either side
3) Underlying circumstances which prompted the modification were unanticipated
4) Modification is fair and equitable (protect against unconscionable modifications)
(Garbage collector case)

QUASI CONTRACT – RESTITUTION – Not contract law, equitable remedy
I.
Quasi Contract = contract implied in law
Elements:
1) π confers benefit on Δ with reasonable expectation of compensation
2) Δ has reasonable time to reject benefit but chooses not to (unless there’s an emergency)
3) Δ has appreciation/knowledge of the actual benefit but chooses not to pay
4) It would be unjust for the Δ to retain the benefit without paying
Remedies (Restitution remedies): Value of the benefit conferred on the Δ, and NOT the value of the detriment conferred on the π
OR the reasonable value of the π’s services.
1. The court wants to place the Δ in the place he would have been had the benefit not been conferred.

II.
Quasi Contract = contract implied in fact; Contract established by conduct
1. Necessary for the Δ to have requested the benefit
2. Elements:
   a) Δ requested a benefit from the π
   b) π expected compensation for this benefit
   c) Δ knew or should have known that π expected compensation
   d) π performed benefit, Δ refuses to pay
3. Remedies: The amount parties intended as contract price, or if that is unexpressed the reasonable market value of the π’s work
4. The damages are greater because the work was requested and as such, the court awards the market value of the work done.
Court treats the remedy as if there had actually been a contract and breach had occurred.

MORAL OBLIGATION
Promise for benefit already received
§86 of the Restatement
1. A promise made in recognition of a benefit already received is binding to the extent necessary to prevent injustice
2. A promise is NOT binding under section 1 if
   a) The promisee conferred benefit as a gift or for other reasons the promisor has not been unjustly enriched
   b) Or to the extent that its value is disproportionate to the benefit

Unilateral & Mutual Mistake in the Bargaining Process
Parties who make a mistake in the bargaining process can have the contract voided if:
1. Mistake is material
2. Enforcement of the contract would be unconscionable
3. Mistake did not result from negligence, or a violation of a legal duty
4. Other contracting party cannot prove any hardship as a result of the breach except the loss of a good deal
5. Prompt notice of error is given

Defenses to Formation (Illegality, Lack of Capacity, Lack of Consent, Lack of Mutual Assent)
1. Illegality
1. If consideration or subject matter of contract illegal → void
2. If purpose behind contract is illegal → voidable by a party who was:
   a) Unaware of purpose, or
   b) Aware of purpose but did not facilitate it and the purpose would not have involved serious moral turpitude, such as murder
- Important question in determining Illegality: Whether the statute is meant to prohibit the contract being sued upon.
- A party cannot sue for breach of a contract where the effect of an affirmation by the court would be against public policy. (Child support case)

2. Lack of Capacity:
   *Infancy (Under 18 years of age)*
   1. Contracts entered into by minors are voidable unless the item is considered a “necessary” - a good or service that is reasonably necessary for the proper and suitable maintenance of the infant in view of his social position and situation in life, the customs of his social circle, and his fortune
   2. Once that infant comes of legal age, any indication of assent to the contract will be considered a “ratification” of the contract – which in essence makes the contract binding, unavoidable by defense of infancy. Silence does not amount to ratification. An infant is required to disaffirm within a reasonable period of coming of age.
   3. Infants are only required to return that consideration that they still possess.
   4. If the contract is found to be null and void, the π may be able to proceed on a theory of quasi-contract, or unjust enrichment

   *Intoxication:*
   1. May lack capacity if completely intoxicated and other party has reason to know of the intoxication

   *Mental Incapacity*
   1. Avoid contract duties by reasons of mental illness or defect if:
      a. Unable to understand consequences of transaction
      b. Unable to act in reasonable manner in relation to transaction and other party knows this
   2. If contract is made on fair terms and other party unaware of mental defects the power of avoidance
      a. Terminates to the extent that contract has been performed in whole or in part or the circumstances have changed that avoidance would be unjust. A court may grant relief as justice requires

3. Lack of Consent:
   *Duress and Undue Influence* – Morally offensive pressure or artifice exerted by one party against the other
   1. Voidable by burdened party if induced by severe duress or coercion
   2. Court looks to all circumstances to determine whether or not there was any undue influence or unconscionable persuasion
   3. Court focuses on whether:
      a. The threats were lawful
      b. There were reasonable alternatives
      c. The parties was deprived of his free will
   4. Duress can be purely economic
      a. Court looks to whether there was a pre-existing contractual relationship
      b. Duressor causing duress by threatening to breach contract unless the deal is sweetened
         i. Must be:
            1. Threat to breach
            2. No option to non-breaching party
         ii. Economic duress does not equal taking small economic advantage like charging high price for water during hurricane
   4. *Undue Influence* – falls short of actual duress, but it is unfair persuasion, high pressure, works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. Limited to situations where there is a relationship of trust.

   *Fraud and Duty to Disclose*
   1. Parties will never be precisely balanced in knowledge or power
   2. Misrepresentation – assertion not in accord with the facts; half truth; failure to disclose a material fact; not telling the
whole truth about a material facts

3. DUTY TO DISCLOSE MATERIAL FACTS where:
   a. Where it’s necessary to prevent a previous statement from being a misrepresentation or fraudulent
   b. Where it will correct a mistake of the other party as to a basic assumption on which that party is making the contract.
   c. When it would correct a mistake of the other party as to the contents or effect of a writing in a contract
   d. Where the other person is entitled to know the fact because of a relationship of trust and confidence.

4. A fact is material if it is one to which a reasonable buyer would attach importance in determining his choice of action in the transaction in question

5. Promissory Fraud – promissors who at the time of promising don’t intend to perform their promise. Courts impose punitive damages.
   How do we infer initial lack of intent to perform?
   1. lack of changed circumstance between time of promise & time of breach
   2. pattern of repeated breaching over time
   3. impossibility of performing at time of promise
   4. internal documents indicating no intent to perform

4. Lack of Mutual Assent
   **Mutual Mistake** in Understanding Terms to a Contract
   1. If both parties assign materially different meanings to the terms in a contract, Contract is **voidable** when:
      a. Neither party knows or has reason to know of the other party’s meanings
      b. Both parties know or have reason to know of the other party’s meanings
   2. **Exception to general rule**: if Party A has reason to know that Party B is interpreting a material fact differently, but B does not know or have reason to know the meaning that A has attached – then the contract is **valid** under B’s terms.
      a. **Party “A” Assumed the risk**
   3. Different meanings of a term must be equally reasonable
   4. Term must be a **material term** to the agreement
   5. Must be a meeting of the minds
   6. **Risk allocation** – “as is” – a party can contract around mistake, by allocating risk
      a. Where the parties know that there is doubt in regards to a certain matter, and contract on that assumption, then the risk is assumed as one of the elements of the bargain and the contract is not rendered voidable.

   **Ambiguous Terms (essential elements open to agreement)**
   1. If the terms are vague, indefinite, or uncertain they are still considered negotiable and will not be upheld in court as a completely formed contract. Minds never met.

   **Gap Fillers = Incomplete and Deferred Agreement**
   1. Where the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement if some objective method of determination is available.
   2. Test to determine whether a contract is valid
      a. Manifestation of intention to be bound?
      b. Is it possible for courts to fill in some gaps to reach a just result?
      c. If yes, then court has jurisdiction to FILL IN THESE GAPS
   3. DAMAGES: If court finds that the contract was too indefinite or incomplete, a π can still recover damages under promissory estoppel (reliance damages or possibly restitution damages).

**DEFENSES TO ENFORCEMENT**

Even if a court finds that a contract was properly formed, they will still consider two other defenses to enforcement.

1. **Unconscionability** = Absence of meaningful choice on the part of the breaching party, and terms which are unreasonably favorable to the other party (absent choice, unequal bargaining power).
   1. No Meaningfulness of the choice if gross inequality of bargaining power
   2. If breaching party had little bargaining power, they had no real choice, and if they sign a contract with little or no
knowledge of its terms – the breaching party had not consented to the bargain.

3. **Reasonableness** = terms of contract considered in light of circumstances existing when contract was made

4. **Test** = whether terms are against mores and business practices at time/place

5. **UCC §2-302** → where a court finds that terms to an agreement are unconscionable (3 choices)
   a. Refuse enforcement of entire agreement → harshest, court’s don’t prefer
   b. Enforce only those terms that are not unconscionable
   c. Modify unconscionable terms to make them conscionable

**Contracts of Adhesion**
Take it or leave it contracts – usually not judicially enforced

1. Standard form
2. Prepared by one party and submitted to another party on the take it or leave it basis
3. Bargaining power of two parties unbalanced
4. No true negotiation

### 2. STATUTE OF FRAUDS §2-201

**MY LEGS**
(Marriage, Year, Land, Estate (executor), Guarantor (administrator), Surety)

1. Contract must be in writing if:
   a) For sale of goods over $500
   b) Sale of land
   c) If it is not possible for complete performance within one year

2. A writing by seller and given to buyer satisfies the statute of frauds if the buyer has received and does not object to the writing within 10 days.

3. Statute of frauds does not require a writing if the goods to be purchased are unique and specially manufactured for the buyer and not sellable in the ordinary course of business and the seller has partly performed

   Reasoning probably has to do with the fact that if the buyer breaches, courts will hold that the seller has redress under theory of inequitable reliance on the buyer's purchase

4. **Exceptions**: Statute of Frauds DOES NOT APPLY to sale of goods over $500 if:
   a) Goods are specially manufactured
   b) Contract between merchants + some written confirmation
   c) Contract is admitted in pleadings or in court
   d) Partial payment / delivery was made and accepted

5. **Is Statute of Frauds satisfied?**
   a) **Written document signed by party sought to be charged**
      i. Identifies parties
      ii. Subject matter of the contract
      iii. Terms and conditions of agreement
   b) Not all components of the contract must appear in the same documents, but if they are in separate documents there must be a sufficient connection between the papers to establish a connection between them – could be a reference to the same subject matter (*Crabtree v. Elizabeth Arden*)
   c) **Land** → description of the property + purchase price
   d) **UCC §2-201** – “writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable … beyond the quantity of goods shown in the writing.”

6. Digital Signature normally constitutes a writing – have clinic staff do more research.

   National Conference of Commissioners on Uniform State Laws approved the Uniform Electronic Transactions Act (UETA) in 1999 and proposed it for adoption by all the states. The **UETA provides that all electronic contracts are valid unless they are illegal, unconscionable or contain some other fatal flaw.** Further, an electronic signature can constitute a binding signature so long as the signature can be traced to a particular individual who took an affirmative act such as entering a password or clicking on an "I agree" button.

**E-Sign**: Electronic Signatures in Global and National Commerce Act Signed into law by President Clinton (6/30/2000) gives legal and uniform status to legal signatures
Performance

Scope and Content of Obligation

Parol Evidence Rule – evidence can be admitted into trial to prove the existence of an oral or implied agreement to the written agreement if:

a) The agreement must be a collateral one in form (can’t be contracted for)
b) Must not contradict express or implied provisions in the written contract
c) Must be something that parties are not normally expected to embody in the writing – can’t be so clearly connected with the principal transaction as to be part and parcel of it.

Parol evidence may be admitted into testimony even if there’s an integrated contract, in order to explain or supplement the written contract by showing the following:

a) Prior performance, prior dealings, custom of the trade AND
b) Even if there’s a provision explicitly stating that the contract is integrated, evidence may be admitted if the oral evidence is consistent with the integrated written terms.

Evidence that can’t be contradicted by terms in the writing intended by the parties to be a final expression of their agreement (“integrated”)

Interpretation

1. The intent of the parties is relevant in determining an interpretation of the words within the contract.
2. Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.
3. Extrinsic evidence is admissible to determine the interpretation of words within the contract, but is NOT admissible to add to, detract from, or vary the terms of a written contract – Can ONLY explain the terms within, cannot add or subtract from contract.
4. Hierarchy of interpretation: (Restatement §202)
   a) Plain meaning of term at issue
   b) Look at rest of document
   c) Look at history of drafting of document (legislative history)
      o Whoever speaks last, has the ability to change the legislative history and how interpretation will take place
   d) Course of Performance – what are we actually doing?
   e) Course of dealing – what have we done in the past?
   f) Trade usage – what have other people done? Common interpretations.
   g) Gap filling procedures
5. Court asks:
   a) Is there ambiguity? Are terms open to a reasonable set of definitions?
      o If yes…then second question
   b) How much ambiguity? Is the meaning sought by party, within a permitted range of ambiguity? Is the meaning sought by party consistent with document including all clauses?

Duty of Good Faith

1. UCC §1-201 definition of Good Faith = honesty in fact in the observance of reasonable commercial standards of fair dealing.
2. Types of bad faith found in courts: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party’s performance.
3. An implied duty of good faith arises in three categories of contract cases:
   a) Standards of conduct in contract formation
      Parties must refrain from misrepresentation and to correct errors if misrepresentation relies on this information in entering into the contract
   b) Termination of at-will employment
      Employer cannot fire an employee out of malice or bad faith
   c) Limits on discretion in contractual performance
      Behavior must be decent, fair, and reasonable with parties agreed-upon common purposes and justified expectations
4. Good Faith only applies to the performance of agreed terms in the contract
5. Interference with another party’s performance
   a) Patterson v. Merhofer (house auction)
      In every contract there is an implied promise on the part of each party that he will not purposefully and
intentionally do anything to prevent the other party from performing.

- Iron Trade Products v. Wilkoff (iron rail purchasing that drove up price)
  - ∆ making performance more difficult is not “interference with performance”
- Stockton v. Sowerwine (pawnshop runaround)
  - In order to constitute “interference” the ∆ must consciously and methodically obstruct the performance of π. Purpose of ∆’s actions is to hinder performance.
- When a court looks at interference, a court views facts in a light most favorably to the non moving party.

6. Reservation of Discretion
- Where there’s a “loophole” or conditional language in a contract, the promissor must use good faith in attempting to fulfill the condition. (i.e. House financing, parent’s didn’t like, kid didn’t want, used the “lack of financing” to get out even though he never really tried to get financing)
- Claim of dissatisfaction must be made in good faith rather than in an effort to escape from a bad bargain (Mr. Potato Head – don’t like ya taters)

7. Modification
- General obligation of good faith in modifying contracts:
  - Did ∆ attempt to modify the contract while being consistent with reasonable commercial standards?
  - Did ∆ seek modification by an honest desire to compensate for commercial needs that were necessary?
- Coercive conduct is evidence of a breach of good faith in modification
- Questions to ask yourself:
  - 1) Was the market change situation one that would lead most merchants to seek modification?
  - 2) Was that market change a valid motivation for seeking modification?
  - 3) Was the modification reasonable in light of current dealings in the trade?

8. Other times when a duty of good faith is implied
- In a commercial contract that has a clause granting a party the right to terminate a contract for whatever reason, a duty of good faith arises. A party cannot terminate the contract through deceptive, unfair methods, or bad faith conduct. Examples of bad faith are when the termination is a retaliatory method, discrimination, etc.

9. Employee Contracts
- No implied covenant of good faith in termination of at-will employees, a business owner has the right to hire and fire as he pleases unless it goes against public policy. (Hillsland v. Federal Land Bank Association – CEO swooped in and convinced people who were in financial trouble to sell their land to his kids)

Warranties

**Express Warranties UCC §2-313**
Representations are NOT PROMISES but are representations of EXISTING FACTS
Don’t necessarily have to use the word “warrant” or “guarantee” or have specific intention to create warranty.
1) Affirmation of fact made by seller which relates to the goods that is part of the bargain
2) Description of goods creates express warranty
3) A sample or model that creates in the buyer the impression that the actual product will be substantially similar
4) Not necessary for specific words to be used

**Implied Warranties UCC §2-314**
1) MERCHANTABILITY / USAGE OF TRADE
Goods should be merchantable is implied in a contract for their sale if seller is a merchant with respect to goods of that kind

2) FITNESS FOR PARTICULAR PURPOSE (UCC §2-315)
Goods are fit for the purpose of their sale, buyer may rely on the seller’s expertise
- If the seller has reason to know the purpose for which the goods are required (hiking boots v. snow boots), and he knows the buyer is relying on his judgment to choose between products, there is an implied warranty if the seller promotes one product over another that it shall be fit for such purpose.

- **Exceptions §2-316**: Implied warranties can be contracted around by words: “as is”, etc
  - If buyer has examined goods or the sample goods and finds no defect
  - If buyer refuses examination where a simple examination would have revealed defects
  - Course of dealing (§2-316c)

- Third party beneficiaries of warranties (implied or expressed) - can sue for injury if the warranty was breached
When warranties will not be held valid

- Where a limited remedy of repair or replacement of defective parts fails its essential purpose whenever, despite reasonable opportunity for repair, the goods are not restored to a nondefective condition within a reasonable time the Buyer is able to recover under any of the available remedies within UCC. This includes the right to recover consequential damages. (Broken motor home case)
- UCC §2-719: Where a limited remedy fails its essential purpose, the buyer can look to the UCC for available remedies

Express Conditions in Contracts
1. A failure of an express condition in a contract excuses/discharges an obligation
2. Good faith must be used by both parties (Construction worker bonus issue)
3. Where a condition is based upon the non-occurrence of a specific thing, there arises an implied condition to prove the non-occurrence before the condition is satisfied. (leaky roof long argument, can’t put into words – I hate Kieff)

Conditions Precedent vs. Warranty
1. A condition precedent is an obligation only until acceptance, but once acceptance of a contract has taken place a party who breaches cannot claim damages based on a condition precedent. A warranty on the other hand can give rise to damages once formation has occurred.

When do Express Conditions fail?
1. When a party who creates an express condition, then chooses to waive the express condition by implying that it is no longer necessary, and the other party relies on this waiver - the express condition will be viewed by the court as invalid. (Drunk law professor case writing a book)

Constructive Condition of Exchange
1. Order in which agreed to exchange is to be performed
2. How much of A’s performance is necessary to spark B’s performance
3. Often courts find an implied order of performance from the language used, and as the situation demands.
4. Independent vs. Dependent Clauses in a Contract:
   - Independent: Clauses do not depend on each other in a breach of performance claim. They can be separated. Example: I’ll pay you for fixing my house and I’ll pay you for fixing my car. The fixing party can breach the house fixing clause and still be required to be paid for fixing the car.
   - Dependent: Clauses that depend on each other. Example: I’ll pay you for fixing my house. In order for one party to get paid, he must fix the house. These clauses are dependent.
5. When looking to determine whether clauses are dependent or independent, court looks to see the intent of the parties, and they assume that they are dependent unless a contrary intention appears. When the acts of the parties are concurrent, the clauses are dependent.
   - Two things courts look at:
     1. Intention – determine intent by language, prior conduct
     2. When the acts are to be performed

Avoidance of Forfeiture
If one party’s performance is going to take a long time to perform, the act that takes time should be done before the other party must perform.

Substantial Performance
1. Jacobs Young v. Kent (Redding Pipe Case) – Where substantial performance is found, and it would be economically wasteful to require a meeting of the exact performance requirements – the court awards damages as the value difference between that which was done, and that which should have been done – not value of replacement.
   - a) If court determines defect to be trivial or inappreciable, then the remedy is difference in value.
2. O.W. Grun Roofing case (different color shingles) - Material breach which goes to the essence of the contract defeats promissors claim despite part performance, but a minor breach that does not go to the heart of the contract will allow a promissor to recover despite breach

Divisible Contracts
1. Look to terms of the contract to see if it lends itself to be easily divisible – if so, then the contract is in essence able to be divided into more than one separate document and treated as such in a case.
2. In employer/employee contracts – the contracts are always day to day divisible documents, such that an employer is required to
pay up the last day of employment because he has been enriched by the work of the employee.

DEFENSES TO LACK OF PERFORMANCE

Existing Impracticability
1. Is the performance going to have an excessive and unreasonable cost?
2. If a contract is formed on an assumption and that assumption turns out to be false, then the defense of impracticability can be raised where neither party has reason to know that the barrier to practicability existed in the first place.

Supervening Impracticability
1. Event after contract formation which is not the fault of the person claiming impracticability, that makes performance impracticable, the non-occurrence of which was a basic assumption of the contract.
2. Example: Fire burns down a building set for a performance (Taylor v. Caldwell)

Frustration of Purpose
1. Frustration of purpose is when something happens that is not reasonably foreseeable and it totally or substantially destroys the entire purpose of the contract, which must be a purpose that both parties know is the only reason the contract was made.
2. Three Part Test:
   a. What was the purpose of the contract?
   b. Was the purpose prevented/destroyed by no fault of either party?
   c. Was the event that prevented the purpose contemplated at the outset?

REMEDIES (porno lode runner)

Repudiation
1. Something said or done, before the contract is supposed to be performed, indicating a prospective breach.
2. If a promisor repudiates a contract, the promisee has two options:
   a. Accept the repudiation = option to sue immediately
      i. Promissee can act in reliance on the repudiation which also counts as accepting repudiation
   b. Rejecting the repudiation = no lawsuit until actual breach
      i. If promissee rejects the repudiation, the promissor has the opportunity to retract the repudiation and actually perform on the contract. When promisee accepts retraction and allows performance, the promisee will be said to have waived the repudiation and no cause for damages will be allowed.
      UNLESS – the performance is breached in some other manner.

Anticipatory Repudiation
1. Where by conduct or actions, the Δ indicates a prospective breach
2. π can only wait a commercially reasonable amount of time before attempting to resell or mitigate damages
3. For damages (§2-713): difference between contract price and market price at either the time of the breach or the time of reliance on repudiation.

Damages

Types of Damages
1. Compensatory Damages - way to put the non breaching party where they would have been absent breach
   a. **Expectation damages** – place both parties where they would be had the no breach occured
      i. damages sufficient for you to purchase substitute performance
   b. **Reliance Damages** – place non-breaching party where they would have been had contract not been formed
      i. If π can’t prove expectation damages with certainty, they will be entitled to reliance damages. Placing π in the position he would have been in had the contract never been formed.
      ii. Used in PROMISSORY ESTOPPEL
      iii. Generally not available unless expectation damages are too speculative
   c. **Consequential damages** – damages for any further losses resulting from the breach. Must be
      i. Reasonably foreseeable at the time of contracting by the average like businessperson OR
      ii. Both parties were aware of special circumstances that existed at the time of contracting which would involve a substantial amount of risk and resulting damage if the contract were breached.
2. **Punitive Damages** – policy decision, awarded for extremely offensive conduct (tortious) in non-commercial contracts.
Should be more than what a $\Delta$ could normally factor into its costs, but not enough to drive the $\Delta$ bankrupt. Wealth can be considered.

3. **Nominal Damages** – awarded where breach is shown, but no actual loss is proven.
4. **Liquidated Damages** – included in the contract in case breach occurs. $\Pi$ can sue for these damages.
   a. Enforced only if:
      i. Not excessive amount in relation to reasonably foreseeable losses at the *time of contracting* (Can’t be a penalty provision)
      ii. Result Can’t shock the conscience of the court (equity)

5. **Legal Fees** – American rule – pay to play, pay your own legal fees

**Restitution Damages** – attempt to place breaching party where they would have been had the contract not been formed
- Non-breaching party can cancel performance and sue for any benefit that he may have conferred on the breaching party that would be inequitable to allow the breaching party to retain without compensation.
- A $\pi$ can choose to sue for either expectation damages or restitution damages, whichever one is larger
- Can only seek restitution when $\Delta$ breaches after your *part-performance*

**Duty to Mitigate Damages** – even non-breaching party has a duty to mitigate damages
- If $\pi$ does not make an attempt to mitigate, the damage award may be reduced by the amount that might have been avoided

**Land contracts** – fair market value vs. contract price

**Employee Contracts**
1. If Employer breaches – normally owes full amount of contract price
2. If Employee breaches – can only claim damages based on the work done to date.

**Equitable Remedies**

**Specific Performance** – where no adequate remedy at law, courts will either give specific performance or injunctive relief
1. Goods, unique products
2. Generally courts do not grant specific performance unless:
   a. Easy to administer
   b. No harm to society
   c. Balance of hardship tips in $\pi$’s favor

**3rd Party Beneficiaries**

a. 3rd Party Beneficiaries – contact between two people, both of whom intend at that very time that a 3rd party is to benefit – life insurance contracts. All parties there in the beginning.
b. Counter Offers don’t kill offers. Counterofferors do.
c. Promisor is person whose promise goes to the 3rd party beneficiary
d. Creditor beneficiary and a donee beneficiary – 3rd party always belongs to one of these two groups. Creditor beneficiary is only when 3rd party is previously a creditor of the promisee.
e. 3rd party beneficiary can always sue the promisor.
f. If 3rd party is a creditor beneficiary, he can also sue promisee on the debt
g. Delegation of performance – consequences of a delegation. Delegating party is still liable for the breach. Limitations on delegation – some just aren’t delegable. If the contract says you can’t delegate the performance, you can’t. Or if it’s the subject matter of the contract you may not be able to. H makes contract with P, P goes and gets X to do the work instead. Is the duty delegable? General rule is yes, duties are delegable.
h. Assignment – one transfers benefit of deal to someone else. Assignee can sue the obligor if the obligor chooses to pay someone else instead.
   i. Cannot make an assignment that substantially changes the duties of the obligor.