CONSIDERATION

3 Approaches [General Rule = mutuality of obligation required in bilateral contracts—BOTH parties must be bound]

a) For UNILATERAL contracts, do NOT discuss mutuality of obligation, as only 1 party is bound - Wilma promises to pay Bamey $300 if he cuts down a tree - it's specifically specified that ONLY THE ACT WILL DO, not a promise to cut down the tree

b) Benefit/detriment approach - benefit received by promisor, or detriment to promisee

c) Enforceable factor approach - including reliance on a promise by the other party, promises given in return for nonbargained-for acts/promises; waiver of nonmaterial conditions of the bargain, promises under seal - these promises are NOT bargains but ARE enforceable

2) Bargain approach - stage 2 of ^ treat consideration as equivalent to bargain - an exchange of promises, acts, both relative to price of what's received; it's an exchange of promises - 1 party's promise/performance is the cost of the other's. A BARGAINED-FOR PROMISE IS ENFORCEABLE.

a) Bargain = negotiation resulting in voluntary assumption of an obligation by 1 party upon the condition of an act or forbearance by the other.
   (1) Performance can be: an act other than a promise, a forbearance, or the creation, modification or destruction of a legal relation

b) Equal value is NOT required
   i) Barring unconscionability, courts don’t look @ whether bargain contains commensurate values in subject matter
      (1) BUT gross disparity can be evidence to support defenses = fraud, duress, etc.
      (2) * Equity normally requires a showing of FAIRNESS or substantial EQUIVALENCE

c) Substitutes for Consideration
   i) Promissory Estoppel (But usually going for a full-out contract argument is better)
   ii) Writing
   iii) Part performance
   iv) Some cases use a seal as a substitute

d) Bargains that are NOT CONSIDERATION [UNENFORCEABLE]
   i) Nominal consideration - a bargain in form, but not in substance
      (1) Donative promises are NOT ENFORCEABLE w/o consideration
         (a) Options = promises to hold an offer open for a fixed amount of time. These ARE ENFORCEABLE
         (i) Common law → options are enforceable w/nominal consideration, as long as it’s in writing & uses fair terms
         (ii) UCC 2-205 = firm offers → MORE LENIENT. An offer is

irrevocable for the period of time stated in offer/reasonable time if none stated **without any consideration, even nominal.**

(b) Guarantees = promise to answer for another party’s debt/performance on contract. **NOMINAL CONSIDERATION will bind a guaranty (if in writing)**

(c) *** Courts are more willing to enforce options & equities b/c they serve public commercial purposes - BUT, barring reliance/UCC/Statute, they still need @ least nominal consideration

ii) **Promise of forbearance** that is **unreasonable or not made in good faith** (or both)
   (a) Written release of rights is **SOMETIMES** consideration... even without reasonableness/good faith
   (b) Forbearance of right to sue is **consideration** if party forbearing had an honest intention to prosecute litigation which is **NOT FRIVOLOUS, VEXATIOUS or UNLAWFUL**
   (c) If no time limit is specified on forbearance, courts will allow for a **reasonable time**.

iii) **Bargains involving an illusory promise** → no mutuality of obligation
   (a) Meaning... a statement in the form of a promise, but not a real promise in substance. Promise does not limit one’s future options; it’s an apparent commitment that leaves a **free way out**
   (b) EFFECT: if 1 party makes an illusory promise in exchange for another party’s real promise, **NEITHER** party is bound.
   (c) Common forms:
      (i) Promise to act “if I want to” – promisor has not limited options, free way out just by deciding you don’t want to do your part.
      (ii) Right to terminate @ will without notice = lack of **mutuality of obligation**, and **voids** the contract for lack of consideration
         1. **UCC 2-309**: termination by 1 party, except in the event of an agreed event happening to terminate agreement, requires **reasonable notification** of the other party, and an agreement dispensing with notification is **invalid** if it would be unconscionable.
   (d) If the promise is found to be **REAL**, not **ILLUSORY**, lack of mutuality of obligation is **NOT** a defense, no matter how limited the promise may be.
   (e) If the promise is **voidable by law**, it is **NOT ILLUSORY**
      (i) Ex) minor is not bound by contract as a matter of law, but he HAS made a real promise, so he can enforce the promise but the promise can’t be enforced against him
      (f) Conditional promises = to perform only if a condition occurs, are **enforceable**, a real commitment b/c future options are limited

iv) **Bargains violating** **LEGAL DUTY RULE**
Bargains where 1 party promises to do only what she is already legally obliged to do
(a) Public official promising to perform act within scope of official duty = NO CONSIDERATION
(b) If it’s not within scope of official duties, promise is enforceable – difference between official duty & promised performance must be real, not contrived to make contract enforceable
(c) Other public duties – telling the truth on the witness stand, etc. – not enforceable.
(d) Payment of lesser amount on debt → NOT enforceable unless there’s separate consideration – if A owes B 10,000 and promises to pay 9,000 in return for acceptance & clearing of the debt, B can take the 9 and sue for the other 1, because his 9 was NOT consideration, as it was already a legal duty
(i) It IS enforceable if performance is different, like if A paid BEFORE the deadline
(ii) Also may be enforceable if there’s dispute about how much is owed (payment is consideration)
1. UCC 3-311: Entire claim discharged if debtor tenders check in good faith as full satisfaction of a debt, the check contains a CONSPICUOUS STATEMENT saying this, and the amount of the debt is uncertain or disputed
(iii) If debt is uncertain, debtor’s payment IS CONSIDERATION even if creditor thinks he owes more, even if debtor admits this is not the full payment – keep separate contracts/transactions separate.
(iv) Payment of lesser debt IS CONSIDERATION if debtor has foregone right to claim bankruptcy in return
(e) EXCEPTIONS:
(i) Fair & equitable modification in light of unanticipated circumstances IS enforceable—if there are unanticipated circumstances, nonperformance is not excused *** check on whether promisor’s new obligation varies in any way – if promisor gave new/different consideration
   a. UCC 2-209: modifying for sale of goods contract is binding without consideration – legal duty rule is not applicable to sale of goods contracts, good faith still needed
(ii) Pre-existing duty owed to third party: If A owes a duty to B and C contracts for that same duty, all contracts are enforceable
(iii) Some states allow writing to substitute for consideration
(iv) Performance – once contract has been performed, legal duty rule is inapplicable and promisor can’t take money back
unless she was under duress/fraud, etc.
1. if promise is made under economic duress – no reasonable alternative – and contract is for existing legal duty, payment in excess of contract can be recovered
2. if there’s performance despite a defense, like lack of mutuality for original contract, this IS CONSIDERATION

v) Alternative Promises = enforceable ONLY IF each alternative would have been consideration if bargained for alone (for $500, A will paint either B’s garage or his porch = enforceable)
   (a) But if promise has the option to choose, then promise is consideration if ANY ONE would be consideration
   **** BE SURE TO SEE WHO GETS TO CHOOSE!!!
(2) Omitted terms – general rule: if omitted term is MATERIAL, promise is ILLUSORY
   (a) EXCEPTIONS:
   (i) If material term is set, but 1 party has power to alter/modify the term, promise is NOT illusory, imparts duty of good faith (which limits the free way out)
   (ii) A price term can be absent if term is relative to an objective measure – where sale price must be charged by the seller to all other buyers or the price is related to market value or posted price in an area
   (iii) If NEITHER party can set missing term, law will imply one so consideration/illusory are FINE... BUT contract still may be too indefinite
   (b) UCC: 1-203 imposes obligation of good faith on every party w/respect to performance of contract obligations
   (c) If a party is given right to set price term, UCC 2-305 explicitly contradicts common law – these contracts are ENFORCEABLE if it’s what parties intended; good faith is again implied
(3) Implied promises (in fact or in law) satisfy mutuality through words/actions
   (a) Reasonable/Best Efforts – Wood v. Lucy-Lady Duff, contract was enforceable b/c promise to market was IMPLIED
   (b) UCC codified this case: unless parties agree otherwise, an obligation is imposed in goods dealings by the seller to use best efforts to supply goods & buyer to use best efforts to promote sale
(4) Requirements/Output Contracts = Requirements – buyer agrees to buy all he requires of a given commodity from seller; Output – seller agrees to sell all of his output of a commodity to the buyer, buyer agrees to buy that amount.
   (a) Traditionally illusory; but modern times = enforceable.
   (b) UCC assumes enforceability, imposes good faith, and quantity
limitation – can’t be unreasonably disproportionate to stated estimate or otherwise comparable prior output/requirement

(c) Going out of business – not a breach of good faith if it happens for reasons other than profitability under the contract – if it is, it might be a good faith violation

3) **ACCORD & SATISFACTION**
   a) **Accord** = when 1 party to an existing contract agrees to accept, in lieu of the performance that she is supposed to get, instead of the original performance – still keep an eye out for legal duty rule.
   b) **Satisfaction** = the performance of the accord by the promisor. So if accord is performed (promisor tenders performance he promised to render under the accord & promisee accepts performance), there is satisfaction. This discharges the accord and the original contract
   c) **Executory Accord** = an accord that has not been executed/satisfied
      i) Effect → accords are NOT ENFORCEABLE until they’ve been satisfied
         (1) Tradition is behind this: although an accord is a bargain it is not enforceable till satisfied
         (2) Modern rules bring executory accords more in line w/ consideration
            (a) Accord = substitute contract discharging the original, when there is evidence of intent (like if original contract was disputed, uncertain, hadn’t matured, involved unfulfilled performance, if original promise was NOT TO PAY MONEY)
            (b) Even where original contract is NOT discharged....
               (i) Promisee cannot sue the promisor on the original contract during period in which promisor is supposed to perform accord
               (ii) If promisor fails to perform under accord, promisee can sue under either the old contract or the accord

4) **WAIVER**
   a) **Waiver** = intentional relinquishment of a known right – where a party excuses nonoccurrence/delay in fulfillment of a condition to her duty to perform under the contract
   b) These are enforceable if given in exchange for separate consideration or if 1) waived condition was not material part of agreed-upon exchange, and 2) uncertainty of occurrence of condition was not an element of the risk assumed by the party who gave the waiver
   c) These can be retracted if ALL 4 ARE MET:
      i) Waiver wasn’t given for separate considerations
      ii) Other party hasn’t changed position in reliance on waiver
      iii) Relates to a condition to be fulfilled by the other party to the contract rather than a 3rd party
      iv) Retraction occurs before time that waived condition was supposed to occur AND party who gave waiver either 1) gives notice of intention to retract while there’s still time for fulfilling condition, or 2) provides
reasonable extension of time in which to perform.

5) **Unrelied-Upon Donative Promises (Gifts)**
   a) GENERAL RULE = donative promises are unenforceable because of lack of consideration
      i) EXCEPTIONS = may be enforceable if it is relied on, or perhaps if it’s under seal in some states; emerging rule that moral obligation to compensate for previously received benefit makes such a promise enforceable
   
   b) Effect of a Seal → common law says this makes it ENFORCEABLE unless changed by statute; most states have abolished binding effect or made presumption of consideration where there is one.

   c) Effect of a writing → absent statute, a donative promise is NOT enforceable just because it’s in writing (again in some states do presumption of consideration)

   d) Nominal Consideration → peppercorn theory – donative promise is falsely put by parties in the form of a bargain = selling a car for $1, etc… authorities are split, but trend is that merely a peppercorn is NOT ENOUGH!

   e) Conditional Donative Promise → no more enforceable than a regular donative promise (A gives B the TV if B comes & gets it) - *** watch to make sure that fulfillment of the condition does not constitute foreseeable reliance

6) **Promissory Estoppel – Relied-Upon Donative Promises**
   a) If donative promise induces reliance by the promisee in a reasonably foreseeable manner, the promise should be legally enforceable, at least to the extent of reliance. So, PE = PROMISE + UNBARGAINED-FOR RELIANCE. The ELEMENTS ARE:
      i) There was a PROMISE.
      ii) Promisor could have reasonably expected to induce reliance
      iii) There was actual reliance
      iv) That reliance was substantial (?) Restatement 2 says reasonable expectation of reliance inducement is enough...
      v) Can injustice be avoided only by enforcement of the contract?
      vi) [Red Owl Case] → D knew P was relying big time. If you’re ARGUING PROMISSORY ESTOPPEL, YOU CAN ONLY GET RELIANCE, NOT EXPECTATION

   b) Remedies
      i) Restatement 1 → expectation damages (full amount promised)
      ii) Restatement 2 → reliance damages (extent of reliance MAY be the limit, as justice requires)

7) **Moral/Past Consideration**
   a) Happens when promisor’s motivation for making promise was a past benefit to him or detriment to promisee that gave rise to moral, but not legal obligation

   b) Traditional rule is that these are UNENFORCEABLE, moral/past
consideration doesn’t matter, it’s just a donative promise

i) EXCEPTIONS:

(1) **Promise to pay debt** - even if statute of limitations is on, new promise can be enforced even without new consideration; new promise need not be explicit – **courts will imply this with an acknowledgement of the debt or from part payment after statute has run** if ↔ **IMPLIES A PROMISE**; also some states have writing requirement. Statute of limitations begins again from date of new promise.

(2) **Promise to perform a voidable obligation** - promise to perform VO is enforceable despite lack of new consideration if new promise is not subject to same defense making original obligation voidable

(a) Like a minor who re-promises once an adult without consideration, someone who acknowledges fraud but still opts to perform anyway, these **DO NOT NEED NEW CONSIDERATION & ARE ENFORCEABLE**

(3) **Promise to pay debt discharged by bankruptcy** - treat this like Exception 1, except acknowledgment & partial payment are NOT promises, & most states do **NOT require writing**

c) **Modern rule**: moral obligation promises **ARE ENFORCEABLE** if promise was based on a **material** (usually economic - but not necessarily) **benefit** conferred by the promisee upon the promisor

d) Restatement 2 - enforceable to prevent injustice... this is still emerging so some courts don’t use it

i) Promises to repay for lat-out GIFTS are not enforceable

ii) If promisor did not get material benefit, courts will usually **NOT ENFORCE**, even if promisee has detriment

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**CONSIDERATION CASES**

Hamer v. Sidway: Uncle promises kid $5000 if he doesn’t smoke drink or swear till his 25th B-Day (filed suit that agreement lacked consideration)

RULE → This **IS ENFORCEABLE**. Party’s forbearance of rights show that there was consideration for the $$, and no definite proof that he didn’t confer a benefit on the uncle anyway

Langer v. Superior Steel Corp.: company promises guy a pension for the rest of his life after he retires if he doesn’t work for competitors, then they stop

RULE → corp. got advantage of P not working for competitors, also **promissory estoppel** could have substituted for consideration – P reasonably relied to his detriment

Bogigan v. Bogigan: wife signed away her rights on house (husband says she signed away her duties too so there was consideration).
RULE→ new view on knowing what you’re signing – there wasn’t consideration b/c she wasn’t aware of the benefits/detriments. Bargaining didn’t seem to have taken place – watch the process. [AND MAJORITY OF COURTS TODAY SIDE w/DISSENT: wife’s forfeiture helped EVERYONE – it WAS CONSIDERATION]

Bailey v. West: P took care of horse w/o contact w/owner, then sought restitution – there was no contract, D never agreed to what was going on (this was NOT a contract implied-in-fact or a quasi-contract)
RULE→ for a quasi-contract to exist, behavior must look like a contract: understood terms & consideration, benefits conferred/detriment… this didn’t.

Fiege v. Boehm: affair b/n man & woman results in child, man says he’ll pay child support in return for woman’s promise not to sue him for bastardy. Turns out kid wasn’t his, he stops paying
RULE→ for a forbearance of right to count as consideration, the claim forfeited needs to be reasonable, based on honest intention to prosecute litigation that’s not frivolous, vexatious or unlawful. There was NO such case here, so NO consideration → NO contract

Alaska Packers’ Assn. v. Domenico: fishermen who get to Alaska, then demand wage increase or they won’t fish. It’s a holdup.
RULE→ watch consideration in holdups, it’s usually under duress/coercion. Here the D was under economic duress – stranded in Alaska & couldn’t possibly have gotten anyone else

Angel v. Murray: citizens v. city finance board that agreed to give trash man a raise (citizens say trash man’s pre-existing duty outweighed the extra work behind his asking for a raise)
RULE→ unanticipated/unexpected difficulties = exception to pre-existing duty rule. Extra work looks like consideration for more money
→ For contract modification, look for: changed circumstances, voluntary agreement, agreement PRIOR to PERFORMANCE, & the equity of the delay

Rehm Zeiher Co. v. F.G.Walker Co: whiskey buyer/trader vs. distillery, contract excused both sides—if distiller couldn’t make enough or if buyer didn’t need as much as distiller had made – distiller eventually failed to meet requirement & didn’t pay damages, so buyer sued
RULE→ there was an illusory promise here because a party could choose not to want & the other couldn’t do anything about it– there was a lack of mutuality of obligation, there was NO OBLIGATION to put it bluntly

Wood v. Lucy, Lady Duff-Gordon: D gave P exclusive rights to place her endorsements on fashion designs, sell & market them. D stepped out & did
stuff on her own, claiming no consideration b/c P wasn’t giving up anything or conferring some benefit

**RULE:** contract was enforceable [note implied duty of P to do his best to market]; P was getting D profits she didn’t have before = conferring a benefit

Mills v. Wyman: PAST MORAL CONSIDERATION – P nursed sick son of D, D wrote P promising compensation but didn’t pay – son was 25 & died after receiving care

**RULE:** Knowing acceptance of benefit was missing @ time it was incurred… court really didn’t want to hastily find contracts where there weren’t any

- A promise made recognizing previous benefit is binding to extent necessary to prevent injustice
- A promise in ^ situation is not binding if promisee conferred benefit as gift/for other reasons the promisor has not been unjustly enriched OR to the extent that its value is disproportionate to the benefit

Webb v. McGowin: P employee fell w/block getting injured bad to avoid injuring D, D agreed to care for P the rest of his life then died & his estate refused to continue care. Enforce?

**RULE:** P was injured + D was materially benefitted = CONSIDERATION. Enforce.

Harrington v. Taylor: 3rd party gets in the middle of violent couple’s fight to stop harm, gets cut with axe & husband said he would repay, stopped

**RULE:** HUMANITARIAN ACTS voluntarily performed aren’t protected for enforceability – but watch for statutes; also watch for written confirmations/reaffirmations that a debt is owed - this could show quasi-contract!

-----PROMISSORY ESTOPPEL-----

Ricketts v. Scothorn: Grandpa promises girl she’s going to get his $$, she won’t have to work. @ Grandpa’s death, his executor wanted to apply her $$ toward his debt

**RULE:** without consideration/quid pro quo, gifts can be enforced where they intentionally induce a reasonably foreseeable path of action that would be a detriment if promise wasn’t kept

Feinberg v. Pfeiffer Co. P = pharmacist, resigned under impression she’d get pension for the rest of her life after retiring. When D stopped paying, she sued on PE, D said gift.

**RULE:** Resigning employment in anticipation of a fulfilled $$ promise is justifiable, reasonable – here it’s virtually impossible for her to find employment, much less a comparable position, so there’s definitely detriment
Cohen v. Cowles Media Co.: P gave unfavorable political info on D reporter promises that his name would be kept confidential - D identified the P, P sued on PE

**RULE:** court allowed older compensatory damages to stand - PREVENT INJUSTICE, don’t just DO JUSTICE. This was a broad one.

All-Tech Telecom v. Amway Corp.: there was a **warranty** involved that had not held

**RULE:** a warranty can induce reasonable reliance & warrant PE, BUT here there was a **real contract with consideration involved**. DO NOT LET PE be a “second bite at the apple” where breach of contract fails - there was a full, fair opportunity for contract here... so PE shouldn’t be evoked... and here there actually WAS a contract!

----- **Mutuality of Assent**

Embry v. Hargadine, McKittrick Dry Goods Co.: P, employee needed renewal of contract for next year, D said “you’re all right; get your men out and don’t let that worry you” P took as deal

**RULE:** even though D didn’t mean to re-employ, language used **objectively** seems to say it was employment - there was also reliance. The test is what the reasonable man would think of the language used.

Lucy v. Zehmer: Drunk guys, 1 sells the fam

**RULE:** does away with the “meeting of the minds” idea & formalizes modern idea that contracts are based on EXPRESSION, objectiveness

Cohen v. Cowles Media Co. - see again. Where interactions are not normally governed by contract, the transaction is not legally operative unless **expressions of a party make it so.**
OFFER & ACCEPTANCE

1) MUTUAL ASSENT
   a) Use **objective** standard - the reasonable person. It is **NOT** interpreted
      according to what was subjectively meant by the person expressing
      assent or what the person addressed subjectively understood it to mean
      (in most circumstances)
      i) Modern contract law rejects the old **meeting of the minds**
         interpretation - we need predictability, security & certainty in
         transactions, so each party should be able to rely on other party’s
         **manifested** intent (Think Lucy v. Zehmer, drunk sells the farm @ the bar
         with contract written on napkin)
      ii) There’s sufficient manifestation of assent when a party uses an
          expression that he knows/should know that other party will interpret as
          offer/acceptance, and other party does interpret it as such (REST. 2d § 19)
   b) **Express & Implied Contracts**
      i) **Express** = explicitly manifested in words/writing
      ii) **Implied-in-fact** = promises inferred from acts/conduct or from words
          not explicitly words of agreement - **these are true contracts, even
          though it’s implied** - mutual assent is REAL, not fictional - it’s like
          enforcing DESPITE THE FACT that there’s no record of the agreement,
          but **THERE WAS AN AGREEMENT**
          (1) Ex. A asks B to fix roof, B does & implied-in-fact contract says B
              should be paid for doing so; auctions
          (2) Facts indicate a contract even though there wasn’t one.
              (a) REQUIREMENTS:
                  (i) D requested P to perform work
                  (ii) P expected D to compensate him for services
                  (iii) D knew/should have known that P expected compensation
      iii) **Implied-in-law** = 1 party is to compensate the other for a benefit
          conferred to **avoid unjust enrichment** - these are **NOT TRUE
          CONTRACTS**, assent is NOTa basis
          (1) Ex. Dr. saves pedestrian, then bills him - to avoid unjust enrichment,
              ped. should pay, it’s implied in law
          (2) **Quasi contract / unjust enrichment** - there’s a non-contractual
              obligation to be treated procedurally like a contract, DESPITE THE
              FACT THAT THERE IS NO CONTRACT-NO AGREEMENT. **avoid unjust**
enrichment!
(a) Important elements of a contract are often missing; contract could have been possible
(b) **if it seems like parties had ripe opportunity to contract but did NOT, then THERE’S PROBABLY NOT a quasi-contract**

(c) **REQUIREMENTS:**
   (i) Benefit conferred upon D by P
   (ii) Appreciation by D of such benefit
   (iii) Acceptance/retention by D of such benefit
   (iv) Circumstances = it would be inequitable for D to retain benefit without payment of its value

2) OFFERS
   a) First step in contracts = determine if an offer was made
   b) **It creates a power of acceptance**, so addressee has power to conclude bargain & bind offeror by assenting
   c) **Offer** = expression of present willingness to enter into a bargain, made in such a way that reasonable person would believe she could conclude it merely by giving assent in manner required
     i) Essential elements = **intent** to enter and **definiteness** of terms
        (1) **INTENT** \(\rightarrow\) Watch for language: “I would consider, would you give, are you interested…” look like **preliminary negotiations or invitations to deal**; “I offer, I will sell/buy…” look like **offers**
           (a) Remember ads are **USUALLY just invitations to deal** (indefinite as to quantity/other terms; not directed @ specific person)
           (i) **EXCEPTION**: An ad can be an offer if clear intent to bargain, invites addressee to take specific action w/o further communication, or overacceptance is unlikely
        (2) **DEFINITENESS OF TERMS** \(\rightarrow\) generally needs to make clear:
           (a) Subject matter of proposed bargain
           (b) Price
           (c) Quantity involved
           BUT when there’s intent/court can fill-in, these can be missing
     ii) **Special rules**
        (1) See ^ for **ads**; know REWARDS are usually offers - clear intention, only 1 can accept
        (2) **Offering circulars** = invitations to deal, unless reasonable person would think it was sent to him individually
           (a) this is where a “quote” could be an offer, if it was individually solicited & responded to, acceptance is all that’s needed
        (3) **Auctions** - (typically with reserve)
           (a) Putting item on block is invitation for offers – auctioneer can withdraw item even after bidding has begun unless auctioneer has hammered down (accepted) a bid
(b) Bidding is an offer - can be revoked anytime before hammered down

(c) Each new bid automatically discharges all earlier bids

(d) If announced item is WITHOUT RESERVE, it can NOT be withdrawn once on the block, but bids work the same - auctions assumed to be with reserve (normal terms)

4) Contracting out for Bids

(a) Formally publishing that a company is contemplating contracting for certain performance (NOT an offer) - invites bids; bids in response ARE OFFERS.

ii) Termination of Power of Acceptance - OCCURS DUE TO.......

  i) lapse/expiration of offer

      (1) TIME FIXED IN OFFER → unless otherwise provided, time runs from day of receipt of offer, at least if offer wasn’t clearly delayed in transmission

          (a) With DELAY: if offeree knew/should have known, then offer is to have run from date offeree would have received the offer - if offeree didn’t have reason to know, receipt rule applies

      (2) NO TIME FIXED → power of acceptance lasts a reasonable time (this depends on circumstances - subject of offer, price fluctuations, medium thru which offer is made)

          (a) Face-to-face / phone bargains: offer ends @ end of conversation, unless offeror expresses contrary intention (“well think it over...”)

          (b) Mail: acceptance mailed by midnight on day of receipt is timely unless otherwise indicated - stay reasonable

  ii) rejection by offeree

      (1) Rejection terminates offer even though power of acceptance wouldn’t have lapsed - watch for options, though - some courts say that offeree has contractual right to have offer held open, but still offeror would be protected if he relied

  iii) counteroffer by offeree - concerns same subject matter as original offer, differs in terms - terminates offeree’s power of acceptance, creates new power of acceptance in original offeror

      (1) inquiries/requesting different terms → NOT counteroffers, use the reasonable person test to decide

      (2) In option, counteroffer does NOT terminate

iv) Qualified/Conditional acceptance by offeree - adds/changes terms of the offer

      (1) except w/sale of goods, conditional/qualified acceptance generally terminates power of acceptance - MIRROR IMAGE RULE → it can’t vary AT ALL. NOT EVEN IMMATERIALLY. A conditional acceptance is LIKE A COUNTEROFFER - original offeror can accept & it’s binding.
(2) Requests - I wish you’d get a new door but I accept - don’t kill the offer
(3) Grumbling acceptances ARE ACCEPTANCES
(4) If condition just spells out something implied, like marketable title, then acceptance is OK
(5) UCC 2-207 [GOODS - but courts can apply it to form contract issues in general] = a definite & seasonable expression of acceptance operates as an acceptance even when it states additional/different terms from those agreed upon, unless acceptance is expressly made conditional
(a) Be mindful that acceptance is DEFINITELY EXPRESSED, especially where material terms are different (doesn’t really work for price/quantity)
(b) If acceptance is expressly made conditional, it’s a counteroffer
(i) 2-207(3) says that conduct recognizing existence of contract is sufficient to establish contract, too. Then, the only terms of the agreement are the ones on which parties agreed - pre-printed ones drop out
(ii) Additional terms should be construed as proposals for additions to contract. IF BOTH PARTIES ARE MERCHANTS [dealers in goods of the kind], they get incorporated, UNLESS:
1. Offer expressly limits acceptance to terms of offer
2. If additional terms would materially alter contract
3. Offeror notifies offeree within reasonable time of his objection
(iii) Different terms aren’t addressed by UCC → majority uses knockout rule: new terms knock out old ones. Otherwise treat them like additional, or drop them out
(6) With pre-printed form contracts → @ common law, last form sent is a conditional acceptance/counteroffer
v) valid revocation of offer by offeror = retraction of offer by offeror – this terminates offeree’s power of acceptance provided offeree hasn’t accepted
(1) Effective only when received by offeree (contrast to acceptance, which is effective on dispatch) [minority view goes w/dispatch]
(2) Needs to be communicated by offeror to offeree - if public offer, it needs to be revoked in same medium as offer. This terminates it even for those who saw offer but not revocation
(3) Also revoked if offeree gets reliable information indirectly that offeror has taken action showing he’s changed his mind (Dickinson v. Dodds) – so it’s better to be in the dark!!
(4) Revoking firm offers - left open for period... usually done the same as regular offer (since there’s no consideration to the promise to hold the offer open), but IMPORTANT EXCEPTIONS
(a) **Options** - a firm offer w/ consideration given for promise to hold offer open
   (i) In an **OPTION**, conditional acceptance DOES NOT KILL THE OFFER!!!!!
(b) **Nominal Consideration** - if offer is in writing & proposes an exchange on fair terms, nominal consideration is enough to make firm offers irrevocable.
(c) **Reliance** - if offeror should have reasonably foreseen that offer would reduce reliance by offeree prior to acceptance and such reliance occurs
   (i) Promises to keep offers open CAN BE IMPLIED - Restatement again looks to avoid injustice
(d) **UCC 2-205**: firm offer written by a merchant is NOT REVOCABLE for lack of consideration for time stated/reasonable. 3 MONTH LIMIT - must be **written & signed, offer must state it is irrevocable, deal w/ goods & be offered by MERCHANT.**

(5) Revoking unilateral contracts ➔ modern rule says offer not revocable after performance has begun, unless performance not completed w/in reasonable time (Restatement 2d §45)
   (a) Preparation? - this doesn’t make the offer irrevocable, but entitles performing party to **reliance damages** if reliance is found, as opposed to **expectation damages** if offer was revoked

vi) **by operation of law**
   (1) Power of acceptance dies with offeror or with incapacity, whether or not offeree knows of death/incapacity - **EXCEPTION = OPTION!** ➔ option to buy property is binding on decedent’s estate
   (2) Unilateral contracts - power of acceptance NOT terminated once offeree has begun performance
   (3) Supervening illegality of proposed contract/ **destruction of its subject matter terminate offeree’s power of acceptance**

vii) **death/incapacity of offeror/offeree**

3) **ACCEPTANCE**
   a) Intro ➔ Question #2 = was there an acceptance? **Unilateral or Bilateral?**
      i) What kind of acceptance is required (promise or act)?
      ii) When can silence operate as acceptance?
      iii) What is the effect of purported acceptance that deviates from terms of offer?
   b) Acceptance of **bilateral contract offer** (offer that requires acceptance by a promise)
      i) General rule = promissory acceptance required, not act (though sometimes promise can be implied from act...)
         (1) Possible exception = **full performance** prior to offeror’s termination - Restatement 2d made this more uncertain because offeror should be master of offer
ii) Modes of promissory acceptance
   (1) Implied by offeree’s conduct – nodding your head YES – immediately beginning performance in sight of offeror
   (2) Act designated by offer to signify a promise (NOTE: THIS IS NOT CONSIDERATION) – and can’t be an act offeree is likely to do anyway
   (3) SILENCE sometimes works as acceptance

iii) Communication of acceptance of offer
   (1) MAILBOX RULE!!! → where use of mail/telegrams/etc is reasonable mode, acceptance is normally effective when dispatched, even if acceptance gets lost in the mail, doesn’t reach offeror
   (2) Offeror can also expressly waive communication – this would FORM a contract, but notification of contract is necessary to make contract enforceable within reasonable time

c) Acceptance of unilateral contract offer (Offer requiring acceptance by performance of act – NOT a promise)
   i) Again general rule is that contract is FORMED when performance is complete, but offeror’s obligation is subject to notification of offeree’s performance within reasonable time. A diligent attempt @ giving notice will work (like if it gets lost in the mail)
      (1) Implied notice exceptions when offeror waives, when performance would come to offeror’s attention w/in reasonable time & offeror hasn’t required notice quickly, or performance actually comes to offeror’s attention
      (2) UCC 2-206: where beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of beginning of performance may treat offer as having lapsed before acceptance (For REASONABLE TIME)
   ii) Subjective intent of offeree – different if offeree DOESN’T KNOW about offer vs. has OTHER MOTIVES than offer for performing
      (1) If offeree does NOT know about offer, performance & notification DOES NOT FORM A CONTRACT → Jewish case… you can’t collect a reward when you didn’t know about it even if you perform the act [absent statute/minority JD] – and if performance is INVOLUNTARY – like confessing to cops—no enforceable reward
      (2) Even if offer is not principal motive for performance, there is a contract formed w/completion of performance
   iii) Obligation of offeree – bilateral: binds both parties, unilateral: offeree’s beginning performance binds offeror to hold offer open but doesn’t bind offeree to finish
      (a) EXCEPTION = where offeree’s partial performance makes offeror worse off than if he had never begun – there is an implied promise to complete → again watch reliance principle.
   iv) Subcontractor’s bid → the contractor’s use of subcontractor’s bid in his
own bid is not acceptance b/c it’s not communicated to him - the act of using the bid is NOT ACCEPTANCE → watch for STATUTES

d) Differences b/n bilateral & unilateral
  i) Mode of acceptance - bilateral = promise for a promise; unilateral = promise for performance
  ii) Revocability - bilateral = beginning to perform before making a promise won’t hold the offer open; unilateral = beginning performance holds it open

e) Where acceptance can be either by promise or act
  i) Restatement - where there’s doubt either promise or performance will work (restatement 1 assumed bilateral - open revocation led to unfair results)
  ii) UCC 2-206(1)(a) is consistent - offer ambiguous to mode of acceptance invites acceptance in any manner reasonable in the circumstances; part (b) says that if nonconforming goods—those not meeting specifications in offer—are shipped as acceptance, they’re both acceptance and breach unless shipper notifies buyer that nonconforming goods are offered as an accommodation to buyer, no breach (AND IS A counteroffer)

f) SILENCE AS ACCEPTANCE
  i) General rule = silence is NOT acceptance → we don’t want to hold offeree to having to take an action to avoid becoming liable in a contract
  ii) Kieff in Class →
  iii) Silence = acceptance in following cases only:
      (1) Where offeree takes benefit with reasonable opportunity to reject & knowledge that benefits offered with expectation of compensation
      (2) Where offeror states that silence/inactivity will = assent/acceptance
      (3) Previous dealings indicate that silence is mode of acceptance
  iv) Exceptions - usually these are NOT IN VOLUNTARY ways offeree gets in the situation
      (1) Where offeree leads offeror to believe that silence will constitute acceptance
      (2) Where silence is coupled with subjective intent to accept → where offeror has said silence will mean acceptance & offeree remains silent
      (3) Exercise of dominion over goods sent (Not just mere inspection), statutory exceptions too
      (4) Solicitation of offer by offeree - where offeree has drafted its terms, reasonable interpretation that offer was deemed to be accepted unless notified of rejection AND offeror relies reasonably - like door-to-door salesmen taking ORDERS - these are really the homeowners OFFERING & assuming offers accepted by companies unless they hear otherwise
(a) If P applies for insurance & Co. holds it an unreasonably long time, P gets hurt in the meantime, P can win b/c insurer should have known reliance

(5) **Late acceptance** has legal effect of **counteroffer** - it COULD be considered an acceptance though if it’s sent w/in reasonable time & original offeror doesn’t respond

(6) **Implied-in-fact contracts** (like auction bid being accepted, plumber coming & working for expected/reasonable rate – both OFFER and ACCEPTANCE needn’t be verbally communicated OR written – points to yard, nods

(a) UCC 2-207 (3) even w/o writings establishing contract, conduct by both parties that recognizes existence of contract establishes one

(7) **UNJUST ENRICHMENT / QUASI-CONTRACT** - Elements:
  (a) Benefit has been conferred
  (b) Benefit was conferred with the expectation that he would be paid its value
  (c) D knew/had reason to know of P’s expectation
  (d) D would be **UNJUSTLY ENRICHED** if he maintained the benefit and P wasn’t compensated
  (e) **watch for allowing something to happen**

(4) **TIME @ WHICH COMMUNICATIONS BETWEEN OFFEROR & OFFEREES BECOME EFFECTIVE**
  a) **General** = where parties aren’t orally negotiating, **all communications except acceptance are effective on receipt; an acceptance is effective on dispatch**
  b) **MAILBOX RULE** = acceptance is effective on dispatch if sent **TIMELY & PROPERLY** → encourages contracts @ distance via security of offeree; creates contract @ earliest possible moment
     i) A few JDs say exercise of acceptance in **option** is valid upon receipt, most don’t
     ii) **REQUIREMENTS TO SATISFY MAILBOX RULE**
        (1) Timely dispatch - within reasonable/specifed period of offer (offer starts @ receipt by offeree)
           (a) Some authority says acceptance must be **received** by date specified if it’s an **option**
        (2) Proper manner
           (a) Appropriate care = properly addressed
           (b) Medium of communication - watch for offeror suggesting/prescribing means of communication/acceptance
              (i) Where no medium is prescribed → offeror impliedly authorizes medium by which offer was sent; whatever is **reasonable** in the circumstances (UCC 2-2061a; Rest. 2d §30) – look @
1. Mail is usually fine no matter what, unless reason for speed like rapid price change

(ii) Where medium is explicitly suggested, that medium is approved, other mode MAY be unreasonable → acceptance is not effective unless it actually arrives

(iii) Where offeror prescribes mode, no contract will be formed unless that form is used – suggest vs. prescribe is INTERPRETATION

iii) CONSEQUENCES

(1) Crossed acceptance & revocation → if acceptance is sent before revocation is received, a contract is formed

(2) Lost in the mail → RISK IS ASSUMED BY OFFEROR. Acceptance is still valid. Offeror’s duty to perform is conditioned on receipt of notice that he is to begin performance

(3) Contract is governed by state law where contract was formed – state from where acceptance was dispatched

iv) NEGATING → providing in offer that acceptance will be effective only on receipt – this must be in clear language

v) REJECTION

(1) Offeree sends BOTH rejection & acceptance
   (a) if acceptance mailed first, contract is FORMED regardless
       (unless offeror receives rejection first & detrimentally relies → PE)
   (b) Rejection mailed first – if offeror gets rejection first, contract is OFF; if acceptance arrives first though, a contract is formed.
   (c) Offeror can regard a later-arriving rejection as a repudiation, and then offeree will be estopped from enforcing contract

vi) REPUDIATION – happens after offeree has accepted, he tells offeror that he does not intend to be bound by the acceptance

(1) Stick w/mailbox rule if acceptance is mailed first, repudiation doesn’t void contract

(2) If offers cross randomly (A offers b 40,000 for his ranch and B offers to sell it to A for 40,000) then NO CONTRACT, unless it had been previously discussed & terms are identical

5) INTERPRETATION

a) In applying objective theory, assume that reasonable person knows what addressee knows

b) Major exceptions to objective theory

i) PEERLESS rule – where expression is subject to 2 equally reasonable interpretations, and each party understands the expression differently → NO CONTRACT IS FORMED. If 1 interpretation is more reasonable, go with that & form the contract

ii) If both parties subjectively attach the same meaning to a term, that’s the governing term even if it’s not reasonable
iii) If A knows that B attaches a certain meaning to an expression and B doesn’t know that A attaches a different meaning, the meaning that B applies will prevail – even where As meaning is more reasonable.

c) Extrinsic evidence

i) Now more liberal – allow EE to show what parties intended by their words without regard to PLAIN MEANING – allow context – TRAYNOR says context is what gives words meaning!!! Situations, evidence, etc. words can almost never be plain except in context.

(1) Before, the Plain Meaning Rule said that when parties sit down & contract, we should take their words as they’re written – don’t use context & evidence, etc. just look @ the CONTRACT.

ii) Course of Performance → actions under a party’s agreement are the best indication of what the meanings were (GIVEN THE MOST WEIGHT)

iii) Course of dealing → look @ conduct prior to contract/previous contracts to establish interpretation

iv) Usage → a habitual/customary practice – if both parties knew about it, it is interpreted into agreement; also TRADE USAGE for dealing w/trade

6) THE PAROL EVIDENCE RULE helps problem of 1 party citing an earlier or contemporaneous oral agreement not included in the writing but intended as part of the contract. (NOTE: to APPLY the rule is to BAR extrinsic evidence)

a) THE RULE = parol evidence will not be admitted to vary, add to or contradict a written contract that constitutes an integration

i) An INTEGRATION is where parties intended to integrate their agreement into the writing – contract was to be the final & complete expression of their agreement. Make sure that integration clause isn’t unconscionable—procedurally or completely!! Tests for integration:

(1) Formal intent test → does the writing have the form of a complete instrument? Leads to broad application of parol evidence rule, frequent exclusion of parol evidence

(2) Actual intent test → did parties actually intend for instrument to be an integration? Courts will consider any relevant evidence to determine this. Leads to narrower application, more allowance of parol evidence

(3) Merger clauses are statement that contract is an integration – doesn’t allow parol evidence

b) PAROL EVIDENCE: if there’s an integration, parol evidence is an earlier oral or written agreement or a contemporaneous oral agreement within the scope of the writing. The ***PAROL EVIDENCE is the outside agreement. ** don’t apply it to later agreements!!!! It must be collateral, AKA relevant to the agreement, must not contradict the written agreement, and it must be something that the parties ordinarily would not embody in the contract

i) EXCEPTIONS

(1) Separate consideration makes parol evidence admissible even if
writing is an integration

(2) **Collateral agreements** - related to subject matter but not part of the primary promise - doesn’t conflict... THIS IS NOT HELPFUL - circular

(3) **Naturally omitted terms** admitted as long as they don’t conflict and **concerns a subject that would not ordinarily be expected to be included** in the written agreement

(a) Use formal v. actual intent to decide whether subject would have naturally been omitted - formal = use reasonable person; actual (WILLISTON) = consider individual circumstances (CORBIN)

(b) If parol agreement terms are **inconsistent** with writing, it’s inadmissible →

(i) **LOGICALLY CONTRADICTS** - would writing have been internally inconsistent if parol agreement had been originally included?

(ii) **REASONABLY HARMONIOUS** - stricter.

(4) **UCC = parol evidence is admissible unless matter covered in parol agreement certainly would have been included in the written agreement**

(5) **PARTIAL INTEGRATION** - where a writing is not a complete integration - it controls on subjects in writing, but does **not bar parol evidence on subjects it doesn’t cover**

(6) **Lack of consideration** - parol evidence is ALWAYS allowed to show lack of consideration

(7) **Fraud, duress or mistake** - also allow parol evidence to show these

(8) **Condition precedent to effectiveness of written agreement** - allow PE if there was condition precedent to legal effectiveness of a written agreement

(9) **Evidence to explain/interpret terms of written agreement** -- allow to show what parties meant by words used, course of performance, usage

(a) **UCC**: these are **PART OF THE AGREEMENT, not even parol evidence at all! Allow, even where contradictory, as long as no logical inconsistency**

c) **FILLING IN GAPS** → modern courts allow parol evidence to fill in gaps under the interpretation exception

i) **Modifications**: a later oral agreement modifying a previously existing contract **DOES NOT FALL WITHIN RULE** - so it’s not **UNENFORCEABLE**

(1) Needs consideration

(2) Must comply with statute of frauds

(3) Watch for contractual requirement of modifications in writing → common law, these have **NO EFFECT**; **UCC gives them effect though**

(a) **UCC 2-209(4)** says though, that the oral modification operates as
Offer & Acceptance Cases

------Creation of power of Acceptance
Lefkowitz v. Great Minneapolis Surplus Store: Ad for fur coats, to first come first served, quantity available identified, price mentioned
RULE→ this, unlike most ads, WAS AN OFFER because it was directed @ a specific party (first come) with specific price & quantity(?) available, also called for some action from offeree

Southworth v. Oliver: Neighbor sent neighbor memo in response to inquiry - with price, etc.
RULE→ price quotations make discussion lean toward offer - where it’s paired with context of language seeming to intend to enter a bargain, party is reasonable in believing it was an offer. Look for circumstances surrounding, promissory words, and specificity, exchange leading up to contract

-----------Acceptance by Promise
Hendricks v. Behee: Escrow case, D made a written offer, then withdrew it b/c Ps had not communicated an acceptance
RULE→ this was an ESCROW case - though there’s mailbox rule, THIS court says that where acceptance is a PROMISE, it is important to communicate the acceptance to the offeror - until then, it is not valid.

Ever-Tite Roofing Corp. v. Green: Homeowner had offer for re-roofing of his residence; contract to become binding either on signing or beginning performance. P loaded up trucks & went to the home where there was another company doing the work.
RULE→ acceptance commenced w/loading trucks & driving over—an outward manifestation. D stressed timeliness, but there was no mention of the importance of timeliness in the contract; there was no unreasonable delay. Court gave them damages for cost of loading truck AND for profit – but this looks like a double dip.

UCC 2-206 Corinthian Pharmaceutical Systems, Inc. v. Lederle: price change in drugs; p called in order the day before it was to happen, then D said policy is price on shipment, not order. D shipped 50 @ lower price with not that said they could cancel balance – P wanted SP
RULE→ P’s first order was an offer - remember order forms are usually offers. D never communicated acceptance, and the shipment was seasonably
notifying buyer that it was an accommodation – therefore the note invites acceptance = Deal #2. § for D

---------Acceptance by Performance
Carlill v. Carbolic Smoke Ball Co.: ad has $100 reward to any person who catches cold after using smoke ball, $100 was in the bank. P caught cold, wanted reward.  
RULEÆ guarantee looked sincere, & like Lefkowitz there could have been consideration created w/inconvenience of 1 party @ the request of the other - inhaling the smoke.

Glover v. Jewish War Veterans of US: P reported info about murder to cops, next day she heard there was a reward out for the info she’d given, she wanted the reward
RULEÆ there cannot be acceptance unless offeree knows of existence of offer. No mutual assent where 1 party expects to buy & the other expects to give. This was a unilateral contract.

Russell v. Texas Co.: P submitted offer of use of his land to D saying that its continued use would constitute acceptance of terms for use
RULEÆ without contrary intention, the exercise of dominion over benefits is considered an acceptance.

Ammons v. Wilson & Co.: usually, P had ordered, D had accepted w/ performance no more than a week later - when they didn’t perform or communicate & said they had declined offer b/c price had gone up, P sued.
RULEÆ P wins here – silence is acceptance where because of previous dealings/otherwise, offeree has given offeror reason to understand silence/inaction as an intended manifestation of assent, and the offeror does so understand.

Textile Unlimited, Inc. v. BMH & Co: P ordered 38 times from D, D kept adding terms to invoice saying that acceptance of goods was acceptance of full terms of sale – arbitration agreement included
RULEÆ if acceptance is expressly conditional on the offeror’s assent to new terms, the acceptance operates as a counteroffer. Offeror needs to give specific assent to new terms or there is no contract under 2-207(1). Then we go to 2-207(3), where terms not agreed upon drop out

Hill v. Gateway 2000: P, unhappy w/computer sues for racketeering b/c he can’t get relief from Dell due to arbitration clause included in a list of terms considered accepted absent the return of computer
RULEÆ This clause is OK because P had 30 days to review... BUT where there was only 5 days, it was NOTOK. 2-207 applies to acceptance/
confirmation, NOT a form before a provision becomes effective.

---------SPECIAL CASE = E-CONTRACTS
Specht v. Netscape Communications Corp.: P downloads browser unaware that activity would be monitored/eavesdropping – no mention of the tracker that would be installed with the browser

RULE→ a consumer downloading software does not assent to terms that the offer did not make clear were being assented to with download. Clarity & conspicuousness are key

--------Termination of Offer
Dickinson v. Dodds: D offered sale of estate to P, saying he would hold offer open till Friday @ 9AM. P, thinking he had time, didn’t say anything – when acceptance was communicated Friday before 9, property had already been sold

RULE→ offers are NOTBINDING, nudum pactum, no authority says offer has to be explicitly withdrawn absent such a term in the contract – until both parties are bound, neither are. This was NOT AN OPTION!! That would have yielded a different result.

--------Contractors
Drennan v. Star Paving Co.: D put in a bid based on a mistake, P accepted but D refused to perform since acceptance came after revocation

RULE→ P’s reliance can make D’s revocable offer irrecovable... this was a BAD CASE. You have to work really hard to show reliance

--------THE PEERLESS CASE
Raffles v. Wichelhaus: 2 parties agreed to have cotton shipped via ship Peerless; there were 2 different ships Peerless, each leaving @ different times, each party in good faith referring to different ones

RULE→ where there’s mutual mistake in the formation of the contract – in its subject matter – the contract is unenforceable. Holmes said it wasn’t a mistake issue, that P offered 1 thing & D accepted another – contract works only if 1 party knows what the other means

--------Issues in formation of Contract
Konic International Corp. v. Spokane Computer Services, Inc: P sold electrical device to D, D’s employee had misunderstood the cost of the device and also was not qualified to accept the offer b/c of his employee position

RULE→ This contract is unenforceable in 2 ways. Both beliefs of price were equally reasonable → no contract; but also, because D employer got the facts & made prompt effort to disaffirm, P should have stopped performing, taken device back
Varney v. Ditmars: P’s employer promised him a raise & a fair share when the books were closed in January in exchange for more work. P missed some work due to illness & 1 disagreement, then came back & deal was off – he wanted his fair share

**RULE:** contract was WAY TOO INDEFINITE. It was executory in nature, requiring future performance so you can’t recover for past performance.

MGM v. Scheider: D agreed orally to do movie & accompanying TV shows, but start date for TV series wasn’t mentioned

**RULE:** if objective criteria exists to fill in the gaps, prove custom & practice in industry, and parties know this—those terms are NOT NECESSARY for a binding contract

Joseph Martin, Jr. Delicatessen v. Schumacher: P was leasing from D, with renewal available on terms to be agreed upon

**RULE:** especially in real property, an agreement to agree is not enforceable where it’s too indefinite – like here, no reference to market value or appraisal & D used it as an opportunity to charge an outrageous price & then contract got voided – the DISSENT WOULD NOT HAVE LET THE WHOLE THING BE VOIDED THIS EASILY. UCC probably would have gap-filled this

**DEFENSES: UNENFORCEABLE CONTRACTS**

1) **INDEFINITENESS:** either its terms are so incomplete/uncertain that they show that parties didn’t regard themselves as having a contract; OR terms so indefinite that a court can’t determine its material terms w/reasonable certainty or fashion appropriate remedy for breach

   a) **Implication of Terms** can ease gaps, keeping contracts enforceable (i.e.,
marketable title, reasonable time – where reasonableness can be implied

b) **Part performance** might cause a court to enforce a contract where there was probably sufficient indefiniteness to render it unenforceable.

c) **RECURRING OMISSIONS**
   i) **Price** → if court feels comfortable that parties intended to contract and there is some objective standard for price, court will fill the gap – this is relatively modern.
      1. **Indefinite standard provided** → like “reasonable price,” courts will imply UCC standard of reasonable price @ time of delivery 2-305 (1) – even if contract isn’t for goods, modern courts use this standard again watching for **intent to contract**.
   ii) **Time for Performance** → reasonable time implied (depends on nature of contract, custom, usage, prior dealings)
      1. **Special cases:** employment contracts are terminable @ will by either party (need personal relationship, etc)
         a) These are really for protecting employee – court will enforce limitations on employer’s power to fire or where circumstances clearly indicate that PERMANENT employment is really intended → **handbooks ARE ENFORCEABLE**
   iii) **UCC GAP FILLERS!!!!!** → 2-204 says that a contract for sale of goods doesn’t fail for indefiniteness if the parties have intended to make a contract & there’s reasonably certain basis for giving appropriate remedy – contains designated terms **THERE IS NOT ONE ON QUANTITY! NOTE THIS.**
      1. **PRICE:** reasonable price @ time for delivery – NOTE if parties only intend to be bound if price is determined then there is no contract.
      2. **PLACE:** seller’s place of business
      3. **TIME:** reasonable
      4. **DURATION:** reasonable (2-309)
         ** if too much is missing, court is likely to find that parties were engaging in preliminary negotiations & didn’t intend to make binding contract
         ** NOTE TREND TOWARD LIBERALIZATION - IMPLY A CONTRACT IF IT SEEMS REASONABLE**
   iv) **Part performance** – indefinite contracts may be enforced if performance has already begun. It shows parties intended a contract, prevents injustice, may show what parties believed relevant term was
   v) **RELIANCE** works too – Red Owl Store case – try for PP first
   vi) Keep an eye on GOOD FAITH too in negotiation
   vii) **Bargains capable of being made certain** – where parties reference an objective standard to set missing terms, there’s no problem [like a market price, requirement/output, custom/usage – what’s normal in community
viii) **Agreement to agree** → if term is material, traditionally contract is UNENFORCEABLE – it’s not the courts job to write contracts.
   (1) If such a term is MINOR, agreement to agree is fine
   (2) **UCC** is again liberal, restatement is heading this direction

ix) **Bargains Subject to Power of 1 Party Concerning Performance** – where a party has reserved power concerning performance, conflict...
   (1) Common law = UNENFORCEABLE for lack of consideration where 1 party retains unlimited power to decide nature/extent of his performance
   (2) **UCC 2-305**: these are enforceable, as long as terms are set in good faith; if it’s not, the other party can cancel contract or set reasonable price himself
   (3) **Alternative promises** – watch for consideration – make sure if promisor gets to pick, BOTH options are consideration; if promisee gets to pick, EITHER can be. these are usually enforceable
   (4) **PROMISE dependent on ability to perform** ARE ENFORCEABLE because it can be objectively determined

x) **Agreement Contemplating Future Written Contract** – it may just be a written memorial of negotiations...

xi) **Preliminary Agreements**
   (1) Those contemplating formalization – agreement is reached on terms of negotiation, so IT IS ENFORCEABLE, just not in formal terms parties have decided on
   (2) Contemplating further good faith negotiations → parties CAN bind themselves here if it’s clear, but it looks more like there’s no binding agreement
      (a) Express are enforceable, implied have been enforced too... an express or implied agreement to negotiate in good faith is enforceable - so you can’t really enforce the deal but you can stop a party from backing out in bad faith

2) **MISTAKE**
   a) **MUTUAL MISTAKE**
      i) A mistaken assumption shared by both parties as to the conditions of the outside world
         (1) Old test → Sherwood v. Walker barren cow case, contrasted SUBSTANCE & IDENTITY; a barren cow was substantively different than a healthy one, so contract was not enforceable
         (2) New test → basic assumption of fact? Contract is voidable by adversely affected party if mistake has a material on the exchange; ex) contracting to sell a horse that died the night before, neither party knew it
      ii) Watch for assumption of the risk of mistake – where parties knew relevant assumption was doubtful, contract is still enforceable; mistake in judgments are no defense.
b) **UNILATERAL MISTAKE**
   i) Mistake by 1 party = **mechanical error** concerning basic assumption, usually computation, perception etc.
   (1) If non-mistaken party KNEW OF ERROR/should have known, **mistaken party can void the agreement, as mistake is palpable.**
   (2) If non-mistaken party was UNAWARE of error, there is a **binding contract** - modern: if mistaken party notifies other, no reliance made, contract can be rescinded.
   (a) If mistaken party refuses to perform, non-mistaken party is entitled to **expectation damages**

   c) **MISTAKE IN TRANSCRIPTION**
   i) Mistaken party is entitled to **reformation** correcting term that got mistranscribed so it conforms to oral agreement - there needs to be **clear evidence** that mistranscription happened

   d) **MISUNDERSTANDING** - where expression is susceptible of 2 different/equally reasonable interpretations = **NO CONTRACT IS FORMED**

   e) **MISTAKE IN TRANSMISSION**
   i) Offeree aware → no contract
   ii) Offeree unaware → majority says: it’s the offeror’s problem - it’s a tough choice, especially where offeree started the bargain with an inquiry, but too bad. There is still a contract, but intermediary might be liable for negligence for loss

3) **CONTRACTS INDUCED BY MISREPRESENTATION, NONDISCLOSURE, DURESS OR UNDUE INFLUENCE**

   a) **Misrepresentation**
   i) FRAUDULENT: party makes assertion to induce agreement either knowing/believing it’s untrue, lacks confidence but presents it as fact, or says/implies a basis for assertion when one doesn’t exist. Contract is **voidable by innocent party.**
   ii) MATERIAL make contract voidable even if not fraudulent if **party justifiably relied on it & agreed to contract as a result.**
      Misrepresentation is material if:
      (1) Assertion would probably induce reasonable person to agree OR
      (2) Misrepresenting party knows assertion will make particular person agree
   iii) **Opinions of professionals are treated as fact** - so them LYING (like to the old lady ballerina) IS A DEFENSE

   b) **Nondisclosure**
   i) General Rule: you don’t have to disclose affirmatively facts about contract’s subject matter, UNLESS parties **are in a fiduciary/trust/confidence relationship.** Disclosure also required where 1 party’s special position brought fact other party couldn’t get thru normal diligence

   c) **Duress = consent induced by wrongful threats, contract is VOIDABLE**
i) ECONOMIC → Elements:
   (1) 1 party threatens a wrongful act that would place the other in position that would seriously threaten property/finances unless contract is entered
   (2) No adequate means available to prevent threatened loss other than entering into contract
   (3) Entails “demonstrated by proof that immediate possession of needful goods is threatened”
   (4) **Business Compulsion** → show wrongful/unlawful act/threat and resulting deprivation of threatened party’s will

d) Undue influence – relationship b/n 2 parties makes 1 susceptible to domination, contract is VOIDABLE by victim
   i) Discussion of transaction @ unusual/inappropriate time
   ii) Consummation of transaction in unusual place
   iii) Insistent demand that business be finished @ once
   iv) Extreme emphasis on consequences of delay
   v) Multiple persuaders against single servient party
   vi) Absence of third-party advisers to servient party
   vii) Statements that there is no time to seek prof. advice

e) UNCONSCIONABILITY
   i) **UCC 2-302:** if contract/any clause was unconscionable @ time of contracting, court can refuse/limit enforcement → **courts adopt this for non-goods too**
      Rest.2 208. It says NOTHING ABOUT RECOVERING DAMAGES THOUGH!!!!!!!
   (1) Procedural → unconscionability during bargaining PROCESS (unfair surprise) – usually a term 1 party knows the other isn’t expecting, didn’t call attention to it
      (a) P. 570: age, education, intelligence, business acumen & experience, relative bargaining power, who drafted contract, whether terms were explained to weaker party, whether alterations in printed terms were possible, and whether there were alternative sources of supply for the goods in question
      (b) **ADHESION CONTRACTS** → unequal bargaining positions, take it or leave it, common w/form contracts where you either sign or don’t get what you want – based on reasonable expectations as to conspicuous language & visibility, nature of what’s on there
         (i) These contracts are **unenforceable only where you can show affirmative participation by drafting party in causing misunderstanding**
         (ii) It’s a standard form, prepared & submitted by 1 party on a take it or leave it basis (bargaining power is NOT TRULY EQUAL)
(iii) CA→ adhesions are not enforceable; other JDs use them as proof of procedural unconscionability but they may be unenforceable still.

(c) Old rule = duty to read, you have full responsibility for what you signed; now, *party is bound only by those provisions that are not unfairly surprising*.

(d) Court may refuse to enforce, enforce contract w/o clause, or limit clause so as to avoid unconscionable result.

(e) Includes *lack of knowledge* or *lack of voluntariness* (lack of time to understand, inconspicuous writing, NO bargaining power b/c of market or other conditions).

(2) **Substantive** → terms are unconscionable/totally fucked. Usually completely overcharged. UCC doesn’t really like this – don’t disturb allocation of risk due to superior bargaining power → *merchants can’t use unconscionability as a defense - go w/economic duress if you think*

(a) P.570: *commercially reasonable* is the test.

(b) In light of general commercial background/needs of a particular situation, is the clause so one-sided as to be unconscionable under circumstances @ time? The purpose is NOT to mess w/distribution of risk/superior bargaining power, it’s to prevent oppression/unfair surprise.

(c) US Ct. of appeals watched out for bargaining power, but it’s uncomfortable. We don’t want to make sweeping statements that poor/black people can’t make contracts on their own.

ii) **Unconscionable provisions**

(1) **Exculpatory clauses** are clauses releasing 1 party from liability for injury caused by his actions – violates public policy/illegal are easy to void, NEGLIGENCE is harder (indemnifying clause). Courts disfavor them - they’re strictly construed against the party they benefit. STILL WATCH THE PROCESS, make sure there was good faith, etc. Courts can blue pencil scratch off the offending clauses & enforce the contract otherwise.

(a) Injury to person → usually unconscionable for public policy, unless activity is dangerous.

(b) To property → usually upheld.

(c) Injury to person negligently caused is unenforceable IF

(i) Term exempts employer from liability to an employee in scope of employment.

(ii) Term exempts 1 charged w/duty of public service from liability.
to whom that duty is owed for compensation for breach of that duty
(iii) The other party is similarly a member of a class protected against the class to which the first party belongs

(2) Disclaimers/limitations of warranty liability
   (a) UCC 2-312 implies good title to the goods; 2-314 implies goods are merchantable (basic standards for ordinary purpose), fit for particular purpose
      (i) Disclaimers **must mention merchantability, be conspicuous**
      (ii) For fitness, they **must be in writing, conspicuous**
      (iii) **ALL IMPLIED WARRANTIES ARE OFF** if you **CLEARLY DRAW ATTENTION** → “AS IS”
   (b) Limiting buyer’s remedies (i.e., consequential damages) for breach of warranty to repair/replace
      (i) **EXCEPTIONS**: when exclusive remedy fails on its purpose, where there’s personal injury

4) **STATUTE OF FRAUDS** → requires certain agreements to be written, requires signature of party against whom enforcement of contract is sought. If contract must be written, it is **within the statute** (absent some exception). If the agreement is within the statute, it’s unenforceable against a party who hasn’t signed writing of material terms – unless exception takes it **out of the statute**, which makes it enforceable
   a) **Policy** = reduces fraudulent assertions of promise... potential P should protect herself by demanding an oral promise be written before relying on it.
   b) **Required in writing**:  
      i) **MYLEGS** (marriage consideration, year, land, executors/administrators of an estate, goods $500+, surety [guaranteeing the debt of another])
      ii) **LAND** sale of land or any interest therein must be in writing (leases = usually over a year)
         (1) Part performance → seller who has already conveyed can recover purchase price without writing; for purchaser PP takes contract out of statute for equity - statute does NOT apply to action against seller @ law though
         (2) **Reliance could usually be used to estop other side from using Statute**
      iii) **GOODS** $500 or more (UCC 2-201). GOODS = all tangible/movable property, not intangible securities or services.
         (1) **Exceptions** = will be enforced if not in writing:
            (a) Buyer receives & accepts all/art of goods → contract enforceable as to goods accepted
            (b) Buyer makes part payment for goods → enforceable for part paid for
            (c) **Special manufacture** – goods not suitable for sale to others &
buyer makes **substantial beginning** or **commitment** to getting materials

(d) **CONTRACT BETWEEN MERCHANTS** → written confirmation will suffice sent to seller; if buyer doesn’t hear objection of confirmation back in 10 days it’s a done deal

(e) Admission - if party against whom enforcement is being sought admits there was a contract.

(f) What about a mixed deal? UCC applies ONLY to goods – what if it’s services and goods? **Judgment: predominant factor**

iv) **CONTRACTS IN CONSIDERATION OF MARRIAGE** - keep an eye to make sure that MARRIAGE is the consideration

v) **ONE YEAR RULE** - contracts that, by their terms, can’t be performed within one year of making (not between start & finish of performance) are WITHIN THE STATUTE & must be in writing - if it is possible, it’s taken out of the statute/likeliness is irrelevant. It must be IMPOSSIBLE for contract to be performed & concluded within a year.

(1) Usually a completed performance exception

vi) **Answering for the debt of another person** - promising the debtor is out of the statute, but promises made to **creditor need to be in writing**. - this is assumption of debt, not third party beneficiary

c) Essential terms in writing → IDs of contracting parties, description of subject matter, terms & conditions [**UCC 2-201 (2)** just requires **quantity term** in writing, all else can be filled in] typing/initials are fine - party to be held liable MUST have signed

d) Several documents can be integrated as long as each refers/incorporates the others - or are physically attached

e) **EFFECT** → usually means unenforceable, but not void - it’s valid for all other purposes & can be put in writing to satisfy; **restitution is usually allowed**, though, for a party that’s conferred a benefit on a contract that falls within the statute, even though statute can’t be enforced

f) **exceptions of part performance in land contracts or sale of goods can recover on the contract** for expectation damages, rather than just for restitution or on quasi contract for value of benefit conferred

g) **Documents** can be **assembled** if it’s a series - they need to reference each other though

5) **LACK OF CONTRACTUAL CAPACITY**

a) Minors → **voidable** - minor can enforce it but it can’t be enforced against the minor.

i) Usually minor not liable for benefits received under contract unless he disaffirms - then must return what he still has; **is reliable in restitution for the reasonable necessities furnished to him**

b) Mental Incapacity → person must lack understanding of the nature, purpose & effect of transaction – conditions must DEPRIVE person of UNDERSTANDING of WHATHE IS DOING (Restatement is more liberal →
he’s unable to act in a reasonable manner & other party has reason to know of his condition) **liable for necessities like minor**

i) Contracts are usually voidable by handicapper but not other party

ii) Sometimes this makes contracts **VOID** if person has been adjudicated

iii) Drunk/drugged = individual consideration w/same standard

c) **ILLEGALITY** - unenforceability on grounds of public policy

i) If contract becomes illegal in process, it’s terminated as matter of law or discharged if it’s already been concluded

ii) Consideration or object of contract can make it illegal; if performance will indirectly aid in accomplishment of illegal act not involving serious crime or great moral turpitude, it’s still enforceable - you can also get restitution for benefit conferred the same way

iii) A promise/term is unenforceable on grounds of legislative mandate making it illegal or still if it’s clearly outweighed by a public policy against the enforcement of such terms - it’s about WEIGHING - purpose served in denying enforcement & restitution when contract is against

iv) **RESTITUTION** - balance - you can MAYBE get your $$ back after factoring

(1) Seriousness of crime
(2) Knowledge of illegality
(3) Extent of hardship/forfeiture

v) **Licensing** = if purpose of license is for public protection, contract w/an unlicensed person is NOT LEGAL → not enforceable; if it’s for fiscal regulation, then it’s OK

**Defenses Cases**

\---**Duress**

Machinery Hauling Inc. v. Steel of West Virginia: P = steel buyer delivering it to third party; when 3rd party said steel was not merchantable, D still wanted to get paid - threatened to pull out of business if didn’t get the $$

**RULE** → just because a party drives a hard bargain doesn’t mean you’re in duress - if there was no inducement of assent, you probably don’t have duress - and only future business that didn’t exist yet was being threatened

\---**UNCONSCIONABILITY**

Fleet v. US Consumer Counsel, Inc.: people @ darkest financial hour were charged 195-260 for service that amounted to referring them to lawyers.

**RULE** → this was substantive unconscionability, NO PROBLEM

Ferguson v. Countrywide Credit Industries: employee couldn’t sue for sexual harassment, retaliation & hostile work environment b/c of arbitration clause in employment contract
**RULE** this clause unconscionable in this case both **procedurally & substantively**. Both causes of action fell outside of those Ps would actually sue for & vice versa (SUBSTANTIVE); also bargaining power was stacked & no opportunity for negotiation = PROCEDURAL

Zapatha v. Dairy Mart, Inc.: franchise agreement where either party after 12 mo. w/90 days notice could terminate contract w/o cause
**RULE** clause allowing for termination w/o cause are NOT unconscionable; enforceable

Coursey v. Caterpillar, Inc.: term in commercial contract excluded seller's liability for consequential damages
**RULE** buyer has burden of proving unconscionability. There was freedom to purchase elsewhere, limit clause was conspicuous & commercially reasonable

---------- *Illegality*
Sinnar v. Le Roy: A bribe/extortion to get a liquor license didn’t come through, P sued to get his $ back; D said it was illegal & unenforceable
**RULE** this was unenforceable for illegality. The goal to be achieved is illegal, so the contract is void – NO RESTITUTION SHOULD BE RESTORED after weighing seriousness, imbalanced hardship/forfeiture, knowledge of illegality, etc.
Homami v. Iranzadi: P sued for balance on a loan that he had been charging interest for in secret so as to circumvent the IRS
**RULE** Court here says all you need is a part of illegality and the whole thing falls through for illegality

----- *Exculpatory Clauses*
Wallis v. Smith: P’s complaint was limited to seeking compensation for “economic injury”
**RULE** economic injury is NOT ENOUGH

Watts v. Watts: 12 year non-marital co-habitation results in kids, she (P) wants part of jointly acquired property, etc.
**RULE** This court rejected an IL court’s stance that it wouldn’t support illicit relationships – here it was enforceable

**Third-Party Rights & Obligations**

Does a third party have contract rights?
1) **Third Party Beneficiary** = deal involving 2 people, but at time of deal, both at that moment intend that a 3rd party will benefit from the deal. Life insurance
contract. THIS IS CONTRACT LAW, not insurance law that when person dies, 3rd party can sue insurance company on the contract even though she wasn’t a party to the contract b/c she’s the beneficiary.

a) VOCAB:
   i) **Third party beneficiary** = not party to contract, but person to be benefitted. You have to be able to tell promisors from promisees.
   ii) **Promisor** is guy whose promise goes to third party beneficiary – it’s the insurance company, the bagel store. The other contracting party is the **promisee**. 3 people are involved from the very beginning
      1) Promisor can assert defenses against promisee concerning formation/performance of contract – like if there was fraud or failure to perform
   iii) **Creditor beneficiary** – third party was previously a creditor of promisee. This person can also sue promisee on original debt. If Sharon stone is buying Epstein bagels b/c she owes him $$, he can sue her if she doesn’t OR the bagel company if they’re not delivering. **Performance will satisfy an obligation of promisee to pay $$ to the beneficiary**
      1) Can sue promisor & promisee (on -preexisting obligation)
   iv) **Donee beneficiary** – if in doubt, call 3rd party this (either a gift conferred to him or a right to performance
      1) Can sue promisor but NOT promisee – nothing is “owed” to him by the promisee since it’s a gift if A promises C to paint B’s house, B can sue A when he doesn’t perform, but NOT C.
      2) Promisee can’t sue promisor either b/c he’s suffered no injury → **specific performance** is a modern remedy
   v) 3PB rights can be terminated/changed @ anytime before they vest – vesting = 3PB manifesting assent to the promise in requested manner, bringing suit to enforce the promise, or materially changes position in reliance
   vi) **Incidental beneficiary** – CANNOT BRING SUIT – he’d be benefited but is neither of the other types of beneficiaries

b) Who can sue whom?
   i) Third party beneficiary can ALWAYS SUE PROMISOR.  
   ii) **From the time of the contract, BOTH contracting parties must intend to benefit 3rd party beneficiary.**
   iii) A 3rd PB should have power to enforce if:
      1) Allowing 3PB is necessary/important in effecting contracting parties’ performance objectives as manifested in contract & circumstances
      2) Policy/morality support it – **intention** where you can determine it

2) **Assignments**: A situation where 2 people make a deal; later 1 of them transfers the benefits of the deal to someone else. The assignor extinguishes his claim to the benefit, it lies totally in the assignee now. No consideration needed for assignment
   i) Batman contracts with Gotham to provide security. Later, Batman tells
Robin he’ll give him the 1,000 he would make from the contract. Robin can collect it.

b) **Assignor** = batman. Person that first makes the contract, then assigns the benefit
c) **Assignee** = robin. He wasn’t involved in the contract @ first, but he can collect
d) **Obligor** = Gotham. The non-assigning party to the original contract
e) **Assignee** can enforce the promise on **obligor**
f) **COMMON LAW**: you cannot make an assignment that substantially changes the duties of the obligor. ASSIGNMENT of right to payment = NOT A PROBLEM.

i) If Gotham assigns batman to defend metropolis, then batman becomes obligor; metropolis the assignee; Gotham the assignor ➔ this **SUBSTANTIALLY CHANGES the duties. NOT ENFORCEABLE**

   (a) A right can’t be assigned if the assignment would materially change the duty, materially increase the burden/risk on the obligor, materially impair his chance of obtaining return performance or materially reduce its value to him

   (i) **Personal service contracts can’t be assigned** – are personality/personal characteristics required for service (artist, lawyer, doctor, architect – NOT construction/repair)

   (ii) **Requirements & output contracts can’t be assigned**

   (iii) **Insurance policies can’t be assigned, but right to collect benefits can**

   (iv) **Right to extension of credit usually not - changes risk creditor won’t get paid back**

ii) **Revocability**:

   (1) If there’s no consideration, gift assignment is revocable UNLESS: token is exchanged to show right passing, it’s in writing, assignee detrimentally relies, there has already been performance, or NOVATION ➔ assignor’s rights & duties under contract are discharged

   (2) HOW TO REVOKE: notice, later assignment of same right, death/bankruptcy of assignor, acceptance of assignor of payment/performance by obligor

g) **FUTURE RIGHTS** - those expected to arise under existing contract/business relationship or a future one. Existing are fully assignable, continuing ones w/o contract are assignable, but **future rights under a future contract are NOT assignable** unless it’s given consideration & treated like a contract to assign

h) **Contract provisions prohibiting assignment** - These are OK, but court often interprets them as destroying the right, not the power to assign. Be careful. Unless obligor is injured, only nominal can be collected ➔ gives right to damages, but assignment isn’t ineffective
i) **WAGE ASSIGNMENT:** Court in Continental Purchasing Co. said that mere informal notice is enough to tell obligor that wages have been assigned to assignee. Obligor’s not obliged till he has notice, but this notice can be informal.

j) **IMPLIED IN AN ASSIGNMENT:** that right can be assigned, assignor can assign it, document is genuine, assignor won’t attempt a subsequent assignment

3) **Delegation:** starts as a contract b/n 2 people. Later, 1 of them gets someone else to do the work. A transfer of the duty of the contract. First contract is b/n 2 parties; later

a) Consequences

i) This is NOT a novation – if it’s not a mutually agreed upon substitution, original party can sue other original party for non-performance.

Delegating party remains liable. TEST QUESTION: show you understand similarities & differences b/n delegation & novation → Novation is a 3 party agreement where obligee discharges original obligor & accepts another in obligor’s place – a substitution of parties in contract.

(1) **DELEGATION does NOT discharge the original obligor from liability** for performance of all obligations; new obligor (delegee) is **responsible too to both parties.**

b) Limitations: some duties are NOT delegable.

i) If contract itself prohibits delegation, it’s not delegable (more strict than assignment)

ii) Subject matter: if duty requires special skills (I can’t play for the cubs), it’s non-delegable. MOST DUTIES ARE DELEGABLE though.

c) H hires P to paint his house, nothing stated about delegation. P gets X to do work instead. If X doesn’t do the work, H can still sue P. X does do the work. What result? Real issue is delegability, but general rule that most duties are delegable.

d) Personal services are not delegable w/o obligee’s consent

e) It’s not like novation or assignment – original obligor is STILL RESPONSIBLE!

f) **Obligee can enforce against delegor & delegee** - **delegor can also enforce against delegee**
PERFORMANCE & BREACH

1) **Good Faith Obligation** → **UCC 1-203** & Restatement agree: a party may not have breached any explicit provisions but still may have breached duty of good faith. **EVERY CONTRACT** imposes a **duty of good faith & fair dealing in its performance & enforcement**
   a) What is it?
      i) **UCC 1-201 = HONESTY IN FACT**, and for **merchants, 2-103(1)(b)** → **observance of reasonable standards of fair dealing**
      ii) Look more for **bad faith**, use exclusion - if it’s not **Bad Faith**, it’s OK. - actions should be reasonably within standards, custom, known by individual expectations
      iii) Making a deal without the intent of performing
   b) It can’t be disclaimed, but standards can be determined as long as they’re not manifestly unreasonable
   c) Patterns of Bad Faith
      i) Prevention, hindrance, failure to cooperate
      ii) Found in exercise of discretion, contract modifications
      iii) If it’s a **total, unfettered reserved discretion for one side**, TOTALLY unbinding to that side, then the **contract is unenforceable for lack of consideration**
      iv) Termination of contract for reasons other than breach
   d) QUESTIONS TO ASK:
      i) Is the promise subject to such a degree of discretion that its practical benefit could seemingly be withheld?
      ii) If so, does competent evidence show that parties intended to make a legally enforceable contract?
      iii) If ^ is so, has D’s exercise of discretion exceeded reasonable limits?
      iv) Is the cause of the damage complained of ^ this exercise, or does it result from events beyond the control of the other party, etc.?
   e) Violation is **NOT A CAUSE OF ACTION** - relates to performance & enforcement contexts

2) **Express Conditions** → where a party doesn’t have duty to perform until a
**condition has been fulfilled**

***In MOST CASES***, the failure of a condition is NOT BREACH!! It just gives promisor a defense. If promisor waives condition inserted for his own benefit, contract is modified & promisee’s agreement is NOT REQUIRED. PROMISOR cannot waive condition precedent to his own liability to create an obligation in himself where none previously existed – THIS would require a new contract/consideration

a) Conditions can be precedent to performance or can release duty to perform; express means explicitly provided for in contract
   i) **Precedent** – condition must occur before party has duty to perform
   ii) **Subsequent** – “unless” condition extinguishes/terminates duty to perform

b) Contrast condition/express condition w/PROMISE – condition creates or extinguishes duty of performance, promise is an undertaking to perform/refrain from performing
   i) Nonfulfillment of a promise is always a breach; if a condition isn’t fulfilled, it’s not

c) **Is it a promise or a condition?**
   i) Use parties’ intent. Courts usually construe promises when in doubt → gives rise to parties expectations
   ii) Conditions can give rise to promises: seeking govt. approval

d) Conditions of satisfaction → construe w/ regards to subject matter of contract
   i) **Subject matter** = mechanical fitness, utility or marketability that would satisfy a reasonable person; taste/judgment must meet personal satisfaction of party
   ii) If promisor didn’t examine/claimed dissatisfaction in bad faith, condition is excused.
      (1) Usually commitment to do something + general duty of good faith in performance = normally enough to provide consideration
   iii) If satisfaction of 3rd party required (engineer usually), it’s that actual personal satisfaction – good faith assumed
   iv) **Subcontracting** → most courts say contractor still must pay subcontractor when buyer is insolvent

e) **Excuse of Condition**
   i) **HINDERS**: If benefitting party gets in the way of condition it’s excused, unnecessary – requires that victim couldn’t have reasonably anticipated this interference – intent & proximate injury make this stronger
   ii) Again watch for requirements/outputs that business closing was legit, not to avoid performance
   iii) By words or conduct, party can waive a condition
   iv) **Impossibility/impracticability** excuse
   v) ****If nonfulfillment of condition would cause disproportionate
forfeiture, condition can be excused unless fulfillment of condition was a material part of agreed exchange

3) **Implied Conditions** → most common: the other party has fulfilled its duty to perform
   a) **COOPERATION**: that obligation of 1 party to perform is impliedly conditioned on other party’s cooperation in that performance
   b) **NOTICE**: condition that party give notice that performance is due, esp. where a party couldn’t reasonably be expected to know a fact that triggered his duty to perform

4) **Order of Performance** - sometimes explicitly indicated; otherwise, court has rules. Modern idea = performances depend on one another! Rules:
   a) Condition that takes time is a condition to performance that doesn’t – like paying someone to paint your house, they should paint first, as condition you pay
   b) Earlier performance is condition to later performance
   c) If performances are simultaneous, conditions are **concurrent** → tender by either party is sufficient to make the other party’s duty to perform absolute – lack of tender means other duty doesn’t have to perform – if no time set & they can occur simultaneously, concurrent conditions are assumed
   d) **ANTICIPATORY REPUDIATION** - performance that would normally be an implied precedent condition to other party’s performance is **excused if the other party repudiates** prior to time performance was to occur (Like travel guide case)
      i) Let’s not hold innocent party forever in readiness to perform
      ii) Party that’s excused MIGHT have to show that he had the ability to perform but for the repudiation
      iii) AR = **BREACH!** Even if time for performance has not yet arrived.
   e) **Prospective inability to perform** - like not being able to convey land on a contract b/c you conveyed it to someone else → excuses other party from holding self ready to perform. If it was voluntary, it’s probably **breach**.
      i) Another example = inconsistent contracts. If the duties can be performed together though, condition is not excused
      ii) Bankruptcy DOES NOT EXCUSE, can extend time
         (1) **UCC 2-609**: insolvency of either party gives the other right to demand assurance of performance before proceeding with his own performance. Applies to any situation where it’s reasonable to think performance might not happen. Restatement agrees.

5) **Substantial Performance Doctrine** → if A’s performance is a condition to Bs performance, condition will usually be satisfied by A’s substantial performance & B’s duty to perform occurs – look @ unjust enrichment
   a) This means a party can sue on the contract for expectation damages **even though he has breached by not rendering perfect performance** (remedy will be offset by damages incurred by breach of imperfect
b) What constitutes it? → does performance meet the essential purpose of the contract?
   i) Factors: extent of benefits received, extent to which damages will be adequate compensation for breach, extent to which forfeiture will occur if doctrine not applied, extent to which breach was wrongful/in bad faith (JUST A FACTOR, willful breach does NOT bar substantial performance)
   ii) UCC 2-601 BIG DIFFERENCE = PERFECT TENDER RULE. Substantial performance is NOT an excuse for a contract for the sale of goods. Seller must tender goods that perform PERFECTLY, not just substantially, to contract specifications in order to oblige the buyer to take & pay for the goods.
      (1) EXCEPTIONS = if time for performance has not yet expired
         (a) If it’s installments, buyer can’t refuse one if it doesn’t substantially impair the WHOLE contract; non-conformity can be CURED; and seller gives adequate assurance of care.
         (b) 2-508(2) – if seller reasonably believed tender was acceptable, buyer can reject but seller can notify buyer of intent to cure & re-tenders better goods, buyer must accept
         (c) **** WATCH PERFORMANCE for UCC application vs. COMMON LAW!!!!!! BIG DIFFERENCE!!!!!!!!!!!!****
   iii) DAMAGES after substantial performance → expectation damages to enforce the contract, but there’s an offset for damages resulting from imperfect performance
      (1) Cost of completion – normal measure = amount it would take to repair the deficiency in performance, or to make the work conform to the contract
      (2) Diminution in value = when repair/reconstruction would involve substantial economic waste or be disproportionate to the end served, damages are amount by which deficiency in performance diminished the value of the performance
      (3) RESTITUTION is also available even where substantial performance hasn’t been met if 1 party has received some benefit = unpaid contract price - cost of completion up to value of benefit actually received

6) Divisible Contracts = able to be apportioned into matching performance pairs – performance of parts gets contract prices for the parts, regardless of other breaches (SUBJECT TO OFFSET FOR DAMAGES RESULTING FROM BREACH). Employment contracts are divisible, recover wages for periods performed w/damages offset
   a) Entire = not divisible, use substantial

7) Material vs. Minor Breach
   a) Promisor can breach by failing w/o justification to perform what was due
(including not timely / not-conforming performance); repudiating promise by words/conduct of performance not yet due; violation of good faith

b) FACTORS in deciding:
   i) Extent to which breaching party has already performed (breach @ the outset more likely material)
   ii) If breach was willful, negligent or innocent (willful is usually material)
   iii) Extent of uncertainty that breaching party will perform remainder of contract
   iv) Extent to which non-breaching party can/will obtain substantial benefit bargained for
   v) Extent to which non-breaching party can be adequately compensated for defective/incomplete performance thru DAMAGES
   vi) Degree of hardship imposed on breaching party if considered material

c) Repudiation = expression reasonably interpreted as refusal to render any further performance. Minor will be material if it comes w/repudiation

d) TIME – minor delay won’t be material breach even if time is of the essence

e) EFFECTS:  
   i) Material Breach gives immediate cause of action for damages caused – for breach of ENTIRE CONTRACT, and excuses performance of innocent party. Innocent party can terminate contract without accompanying repudiation
   ii) Minor breach -- cause of action for damages done y breach but not whole contract – may suspend, but does not excuse innocent party’s duty of further performance – breaching party can still enforce contract subject to offset for breach damages  
      (1) Without accompanying repudiation, minor breach victim cannot terminate contract
   iii) Substantial performance is usually invoked by breaching party that wants to sue for entire contract price minus offset
   iv) Material breach is usually invoked when 1 party has breached, the other party has terminated & the breaching party wants to say the other had no right to terminate → if the original breach was minor, the terminating party breached by terminating!

8) Anticipatory Breach = if either party repudiates contract before time set for performance → the other party is excused from holding himself ready to perform/performing. Repudiation is also generally a present material breach = anticipatory breach, so immediate action can be brought.

a) WORDS are NOT NECESSARY to show repudiation – ex.) making inconsistent contract with another; also insistence on terms not part of the contract constitutes anticipatory breach – demanding performance not part of the contract & stating he won’t perform his part without it

b) AI needs to be an unconditional refusal, not just doubt – with doubt/lesser may allow suspending performance, but not excusing.

c) EXCEPTION: A has completely performed. If B offers anticipatory
repudiation, A can’t seek action till there is an actual breach @ time of performance
d) **RETRACTION:** repudiating party can retract @ any time prior to date set for performance unless innocent party has accepted or changed position in detrimental reliance of repudiation – SILENCE??
i) When non-breaching party decides to acknowledge repudiation or preserve contract, the decision is final. If you demand performance & don’t change reliance position on attempted cancellation, you **nullify the attempt @ repudiation** and cannot claim it later
ii) think of repudiation as an OFFER.
e) **DAMAGES:** innocent party has **duty to mitigate damages** promptly once damages arise (indicates acceptance of repudiation)
i) **UCC Æ** recovery for seller=1) difference b/n contract price & market price @ time and place for tender; recovery for buyer =1) cover = good faith purchase of replacement goods @ reasonable time; or 2) recover damages =difference b/n market price @ time buyer learned of breach & contract price
ii) If you’re mid-performance @ time of anticipatory breach, STOP (if it wouldn’t be waste)
iii) See also **anticipated inability to perform** – if it’s voluntary, it’s anticipatory breach/repudiation

9) **Changed Circumstances - Impossibility (Impracticability) & Frustration**
a) Performance normally excused where it’s been made impossible/impracticable by an event whose nonoccurrence was a basic assumption on which the contract was made, unless the adversely affected party had expressly/impliedly assumed the risk
i) Impracticability
   (1) QUESTIONs:
      (a) When did it become impracticable?
      (b) Is party seeking relief “@ Fault” did it cause event/fail to take reasonable steps to avoid/minimize its impact?
   (2) Restatement: a promise **imposes no duty when based on current impossibility.**
   (3) Illegality
   (4) Supervening destruction/nonexistence of subject matter (without fault of promisor - i.e., Taylor v. Caldwell bumed down auditorium)
   (5) Specific source of supply fails – like failure of crop, **unless seller is a middleman**
      (a) If party expecting goods doesn’t know provider is relying on a middle man, the provider is **assuming the risk** of the middle man failing through.
   (6) Construction destroyed in progress is **NOT EXCUSABLE** generally, will get restitution for work destroyed, duty to perform on time will be excused
(7) Existing premises destroyed - no duty to perform & restitution on what was spent
(8) Modern law puts risk on seller until closing/passage of title in real estate transactions - damage/destruction of improvements excuse performance
(9) **UCC Destruction of goods**: if it's nobody's fault, the contract is OFF. 2-613. Once goods are w/carryer, it's buyer's problem unless contract says otherwise - without shipment risk of loss is on buyer
(10) **Personal services**: death of either party excuses both.
(11) Temporary impracticability suspends duty while it continues, duty reattaches only if it wouldn't make promise different/substantially increase either party's burden
(12) If performance is only partially impracticable, & it doesn't bother the rest, promisor can still render substantial performance, promisor remains bound as so modified; promisee is bound to accept it with appropriate offset
(a) **UCC 2-614(1)**: if delivery is impracticable, commercially reasonable substitute is available, substitute must be tendered & accepted
(13) **Restitution** is always available when part performance is tendered & benefit is conferred; some cases say **reliance** can be recovered too even without benefit, if justice so requires

ii) **FRUSTRATION OF PURPOSE/VALUE of CONTRACT** → Krell v. Henry coronation case, the room rented was to see the coronation - performance is excused where contract is fundamentally destroyed
(1) In ^ case, the subject matter had special qualifications - an implied condition can be the foundation of a contract. IMPORTANT QUESTIONS:
(a) What was the foundation of the contract?
(b) Was the performance of the contract prevented?
(c) Was the event that prevented performance of such a character that it cannot reasonably be said to have been in the contemplation of the parties @ contracting time

10) **Discharge**
   a) By **mutual rescission** - mutual decision to call off the contract, needs to be supported by consideration, it's binding - neither side can already have completed performance. Each party gives up its right to require further performance by the other
      i) Modification = modified duties on one/both sides, or 1 party gives up a right (probably a consideration problem with the latter though)
      ii) Once 3rd PB has vested, you can't vary obligation to 3P
   b) By **release** - maker wants to extinguish contractual rights existing in his favor, this NEEDS **CONSIDERATION**! (or writing in some JDs)
      i) **UCC 1-107**: either party can discharge any claim for breach by
signing/delivering written release to other party, no consideration required

C) Accord & Satisfaction can also discharge contract - substitute 1 performance for another - see that section (full payment checks too)

CASES

Palmer v. Fox: D bought subdivision from P - P was to make certain improvements, which P did not complete. Then D failed to make required payments and P filed suit to recover balance of purchase price

RULE⇒ court found that D's covenant to pay & P's covenant to repair were concurrent & dependent on each other - full performance was interpreted as condition for full payment

Jacob & Young v. Kent: P was building house for D, D wanted specific pipe, Redding, b/c his brother sold pipe. P didn’t use it, but used one of like quality. D refused to pay balance, thought it was a material breach

RULE⇒ there had been substantial performance, breach was NOT MATERIAL so P could collect balance due less diminution in value (if any). Since breach was not a condition of the contract, it did not excuse other party’s performance.

OW Grun v. Cope: Roofing case - P roofer installed all different crazy colors of roof shingles, the only thing that could restore uniformity is a new roof. D didn’t pay.

RULE⇒ This breach was material, a condition of the contract, and there had not been substantial performance b/c the roof would have to be completely replaced. Homeowner gets damages = contract price minus price to replace roof

------Frustration of purpose

Washington State Hop Producers v. Goschie Farms, Inc.: “Hop Base” became irrelevant because USDA terminated it, so D did not want to be bound to its bid on Hop Bases since it was no longer even used

RULE⇒ the non-occurrence of the event was a basic assumption, and object was the complete basis of the contract (the hop base) - parties agree to this - otherwise transaction would MAKE LITTLE SENSE
REMEDIES

Remedies: if the agreement is enforceable, expectation interest can be protected through specific performance or damages measured by lost expectations. If indefiniteness precludes these, remedies protect the reliance and restitution interests if all else fails.

-EQUITABLE REMEDIES ➔ SPECIFIC PERFORMANCE (injunction), NOT DAMAGES.
   -to be used where legal remedies would be inadequate

1) Basic Measures of Damages
   i) **EXPECTATION** - based on contract price ➔ place victim of breach in position he would have been in if the promise had been performed – injured party gets the benefit of the bargain
      (1) Incidental like shipping, etc., are added to expectation damages normally
      (2) Expectation damages = expected result minus actual result
      (3) Supports theory of efficient breach - assess loss vs. gain before you breach
   ii) **RELIANCE** - based on non-breaching party’s costs (INCLUDING opportunity costs) to place non-breaching party @ position he would have been in had the promise not ever been made
      (1) This is reimbursement for cost you incurred for reasonably relying to your detriment on a contract that was unenforceable
      (2) w/ repudiation, it doesn’t accelerate the time fixed for performance or change damages to be awarded as equivalent for promised performance, so NO DUTY TO MITIGATE DAMAGES
      (3) remember if you used promissory estoppel as a consideration substitute, THE DAMAGES STOP HERE!
   iii) **RESTITUTION** - aka quasi-contract damages are based on reasonable value of benefit conferred. Also puts you in position you would have been in had the promise not been made. Most commonly used where:
      (1) A party has conferred a benefit under a contract that turns out to
be unenforceable b/c of some defense
(2) There was an enforceable contract & a breach, but the non-breaching party lost out, is better off w/restitution than expectations
(3) No contract was formed but a benefit was conferred during contracting stage (like negotiations that eventually broke down)

2) Limitations on Expectation Damages
a) Hadley v. Baxendale = mine parts case: mill couldn’t recover profits lost while it was waiting extra days on a replacement part that was running late because, RULES:
   i) Expectation damages must reasonably be considered as arising naturally from the breach, or
   ii) Might reasonably be supposed to have been in the contemplation of both parties @ the time the contract was made, as the probable result of its breach
   iii) This started the branching of general damages & consequential damages
      (1) General damages = flow from given type of breach regardless of victim’s circumstances - they’re never barred, reasonably considered effects of breach
      (2) Consequential damages = flow from a breach as a result of the buyer’s circumstances (usually lost profits)
         (a) Hadley: CDs can be recovered only if, at the time of contracting, D had reason to foresee the damages as a probable (or significantly likely) result of the breach
   b) CERTAINTY – damages can only be recovered if their amount is reasonably certain to be computed – or else they’re speculative, and only nominal damages can be recovered
      i) If business is existing, lost profits can be estimated on past profits and damages are NOT SPECULATIVE
      ii) If the business is new, consequential damages for lost profits may be speculative – but if they can be shown with reasonable certainty, they’re OK – like look @ surrounding similar businesses
      iii) Don’t cut off the damages unless uncertainty is severe.
   c) Duty to Mitigate - covered earlier - you can’t recover what you could have gotten with reasonable efforts - and you CAN recover expenses used in mitigating as incidentals: UCC Æ no cover Æ no recovering consequential damages that could have been prevented.
      i) Prior repudiation = don’t run up the damages, stop performing unless it’d be waste
      ii) EMPLOYMENT -- employee has duty to seek comparable employment
      iii) CONSTRUCTION
         (1) Once owner breaches, don’t keep working
         (2) Usually NOT under duty to find other job during time he was scheduled. And if he does his profits wouldn’t reduce damages -
unless it can be shown that contractor couldn’t have worked both & made profit

3) **Specific Performance** = Equitable remedy where court orders breaching party to perform – for cases where legal remedy (damages) are not adequate
   a) Like where subject matter of contract was unique or damages cannot be measured with reasonable certainty
   b) where legal remedy (damages) would be inadequate
      i) look @ extent to which public interest is involved – court will weigh it against cost of administration, but remember **courts don’t want to babysit & watch over parties**
      ii) **Uniqueness** $\leftrightarrow$ **irreparable injury**... 2 schools of thought – that lawful remedies are NEVER good enough in our system, seems like anything short of specific performance is irreparable injury
      iii) **Injunction**: interdependent factors = 1) without such relief, will P suffer irreparable harm? 2) is there substantial probability of success on the merits? 3) Will others be injured by the injunction? 4) Will the injunction be inconsistent w/ further public interest?
     iv) **SP** $\rightarrow$ factors when considering adequacy of damages:
        (1) Difficulty of proving damages w/ reasonable certainty
        (2) Difficulty of procuring suitable substitute performance by means of $$ awarded as damages
        (3) Likelihood that award of damages could not be collected
        (4) *** can be denied in unconscionable bargain cases
        (5) Here, we paid attention to the customers (3rd party). DON’T DO THAT!

4) **Expectation Damages & Specific Performance in Context**
   a) Contracts for Sale of Goods = **UCC SECTION 2!!!!!**
      i) Breach by seller
         (1) Buyer accepted goods
            a) If buyer accepted goods that don’t conform to contract, it’s breach of warranty; usual difference is value of goods had they been warranted minus value of goods accepted – can be measured directly or indirectly
            (2) Seller fails to deliver/buyer rightfully rejects
               a) Market price of goods @ time buyer learned of breach MINUS contract price
               b) Or buyer can cover seek cost of cover minus contract price
         (3) Specific performance & replevin
            a) UCC 2-716(1): buyer has right to specific performance where goods are unique or in other proper circumstances; replevin is also given to buyer – award of possession of goods if after reasonable efforts he can’t cover for goods or circumstances reasonably indicate that such an effort till be unavailing, and the goods either were in existence when contract was made or were later identified to the contract
(4) Incidentals = inspection, receipt, transportation, care & custody of goods rightfully rejected; commissions/commercially reasonable charges; any other incidentals

ii) Consequential = needs that seller @ contract time had reason to know of & that couldn’t be reasonably prevented by cover/otherwise, injury to person or property proximately resulting from any breach of warranty. To collect consequential damages we need foreseeable + provable

a. American Tests of Foreseeability (Restatement)
   1) damages are NOT recoverable for loss that the party in breach did not have reason to foresee as the probable result of the breach when the contract was made
   2) loss may be foreseeable as a probable result of a breach because it follows from the breach:
      in the ordinary course of events, or as a result of special circumstances
   3) court can limit damages for foreseeable loss by excluding recovery for loss of profits, allowing only reliance loss, or otherwise if it deems necessary

(a)

1) LATE PERFORMANCE damages → if seller knew buyer was going to resell, then buyer can recover for damages in reduction of market price between when performance was rendered & that when it was due

iii) Breach by Buyer
   1) Market damages → seller recovers contract price of goods minus market price @ time & place for tender under contract
   2) Lost profits → if contract price is less than/equal to market price, we do lost profits - contract price minus seller’s price of purchasing goods (or minus manufacturing costs if it was a manufacturer seller); if seller resells goods, he gets contract price minus resale price
   (a) If goods were identified in the contract and seller was unable to resell, then he can get action for the price as opposed to damages
      (i) Identified to contract = in existence @ time or set aside as the goods to which contract applies (shipment, etc)

(3) Get incidentals, too

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<th>BUYER BREACHES</th>
<th>SELLER BREACHES</th>
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<tr>
<td>Buyer</td>
<td>(nonpayment)</td>
<td>(breach of warranty)</td>
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<td>accepts &amp; retains</td>
<td>Seller recovers contract price plus incidental damages</td>
<td>Buyer gets value goods would have had if they had been as warranted minus value of goods accepted + incidentals, and <strong>consequentials</strong></td>
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<td>Buyer does not accept &amp; retain goods or seller does not tender goods</td>
<td>(wrongful refusal of goods)</td>
<td>(wrongful failure to tender goods)</td>
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<td>Seller gets contract price minus market price @ time/place of tender</td>
<td>Buyer gets market price @ time buyer learned of breach minus contract price</td>
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<td>Or</td>
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<td>Contract minus resale prices</td>
<td>Recovers cost of COVER minus contract price</td>
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<td>Lost profits (If <strong>unlimited supply</strong>)</td>
<td>Gets specific performance if goods unique/other proper circumstances</td>
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<td>Or</td>
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<td>Contract price if goods have been identified to contract &amp; seller can’t resell</td>
<td>Gets possession if buyer can’t cover &amp; goods were either in existence when contract made or were later identified to contract</td>
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<td><strong>PLUS INCIDENTALS</strong></td>
<td><strong>PLUS INCIDENTAL &amp; CONSEQUENTIAL DAMAGES</strong></td>
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### i) Breach by seller

1. Normal damages are just for out-of-pocket refunds on purchase price, expenses, unless breach was in bad faith - if seller knew he had bad title or there was a deliberate refusal to perform, buyer may be able to get market value minus contract price, still restricted to out of pocket price

### b) REALTY SALES

- i)
- ii)
- iii)
(2) Remedy of **specific performance** works here – damages are inadequate because **all real property is unique**, 

ii) Breach by buyer 
(1) Seller gets contract price minus fair market value 
(2) Specific performance can be ordered too if needed for mutuality, but with respect to buyer’s formal termination in interest by foreclosure – usually SP cuts off buyer’s rights, doesn’t make them finish the contract 

c) **EMPLOYMENT CONTRACTS** 
   i) Breach by employer – employee gets remainder of her wages minus wages actually received in sub. Employment, or minus wages she would have received had she properly attempted to mitigate damages. **Remember the duty to mitigate here – get a new job you BUM. BUT REMEMBER TOO, position must be of same rank & type of work in same locale** 
   
   ii) Breach by employee – employer gets wages employer must pay replacement, minus employee’s wages 

   iii) **NO SPECIFIC PERFORMANCE** – this is unwise; courts might enjoin employee from working for employer’s competitor though 

   d) **CONSTRUCTION CONTRACTS/other services** 
   i) Breach by owner  \(\rightarrow\) contractor gets: contract price minus out-of-pocket costs remaining to be incurred by contractor @ time of breach, with an offset for amounts already paid by owner 
(1) Alternative = lost profits on contract, plus out of pocket costs prior to breach, again with offsets for what’s already been paid  \(\rightarrow\) THESE 2 USUALLY END UP THE SAME, 

   ii) Breach by contractor  \(\rightarrow\) owner usually gets difference between contract price & cost of completing the contract w/different contractor 
(1) Also an option for **diminution in value** = value of what owner would have received minus value of what he actually got 
   (a) This is for **trivial/innocent damages** – DO NOT USE IT if you need to tear apart & properly complete! 
(2) Damages for MINOR BREACH = cost of correcting the defect (a la cost of completion) or value of performance promised minus value of performance rendered (a la diminished value) 

   iii) **Again no specific performance**, COURTS DO NOT WANT TO HAVE TO SUPERVISE PERFORMANCE it mandates – but where administration is doable & remedies @ law are not sufficient, they will do it 

   iv) Carriers  \(\rightarrow\) late performance often = reasonable daily rental value of shipped goods times days of delay 

5) **Nominal Damages**  \(\rightarrow\) any breach of contract, no matter how slight, entitles aggrieved party to some damages – if party CANNOT PROVE LOSS, it’s awarded nominal damages, usually $1
6) **Liquidated Damages** = they fix amount of damages recoverable in event of breach, made when actual damages are unpredictable - if they’re a penalty, though, they are not enforceable (no matter what they call it)
   a) Requirements for a valid liquidated damages clause
      i) Damages difficult to estimate *at time contract was made* – extremely difficult/impracticable
      ii) Damages fixed must be a *reasonable forecast at time contract was made* of damages that would result from a breach
   b) If damages become knowable, old view keeps the clause, but new view says unenforceable if they’re completely disproportionate to damages P suffered → *unconscionable*. Remember case though where there WERE no actual damages, court STILL allowed liquidated damages
   c) Just make it CLEAR, engage in steps that look procedurally conscionable – buy them a lawyer, send them drafts, highlight difficult terms, make sure EVERYONE knows & UNDERSTANDS what’s going on during negotiations if you want to pay MORE because a service is WORTH MORE to you than it is to the average person
   d) Deposits work the same way ...
      i) UCC 2-718: if seller doesn’t deliver b/c of buyer’s breach, buyer can get restitution of any amount by which sum of his prior payments exceeds amount set in damages provision OR if there’s no provision, 20% of the value of performance or $500, whichever is smaller – subject to offset to extent seller establishes damages other than liquidated damages

7) **Punitive Damages** → *Generally not allowed for breach* - threatens perform or pay damages idea - can be made if violation of good faith or in tort

8) **Damages for Emotional Distress** → *generally not allowed* (unless it accompanies bodily injury/where contract was of a personal nature so reasonably person could be emotionally harmed - vacations?)

9) **Restitution Damages** - available to recover value of benefit conferred on another where contract is unenforceable b/c of statute of frauds, impracticability, or other excuses like mistake → goal = *to prevent unjust enrichment*
   a) But BE CAREFUL - if you have reason to know that deal has become impracticable/frustrated in purpose and you perform anyway, you probably will NOT GET RESTITUTION
   b) Meant to put you in position you would have been in had the contract NEVER BEEN MADE
   c) Can also be rewarded instead of expectation damages against party who materially breached: if A & B have a contract, B commits a material breach, A can recover expectation damages on the contract, or bring action in *quasi-contract* for restitutionary damages to recover reasonable value conferred on B prior to breach – usually measured by market value of A’s performance, not necessarily benefit B gets.
i) **IN QUASI-CONTRACT**, damages are not limited to the $$$ of the contract, because YOU ARE NOT SUING ON THE CONTRACT!!! So if the quasi-contract was for $75 & you spent $80, you can get the 80.

d) **Expectation damages are usually larger & easier to prove than restitution**

e) If market value of goods P had to provide to D @ time they were to be provided was greater than the contract price – in such case, P should bring suit for restitution rather than expectation damages since it was a **losing contract**

i) **EXCEPT** → When innocent party has fully performed, damages are for contract price for performance

f) **MAKE SURE** you’ve deducted from damages/returned whatever benefit P has gotten!

g) **Plaintiff in Default** – P can bring suit even though he’s the guilty one for breach of contract, like where P’s deposit exceeds D’s damages (that he’s going to sue for); if P has committed a material breach before performing substantially

h) **Willful Breach** – modern courts will fully breaching party can recover under restitution theory to prevent unjust enrichment of D

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**REMEDY CASES**

Curtice Bros. v. Catts: Tomato canning factory that made plans on D’s supplied acreage agreed to – D didn’t come through, so P couldn’t operate effectively.

**RULE** → the business was **unique**, not an ordinary exchange; plant can’t function if contract isn’t met, so **specific performance**

Hadley v. Baxendale: Mill case – where part’s late arrival led to massive lost profits for mill waiting on it

**RULE** → if the special circumstances (i.e. here, the **NEED** for quick delivery) aren’t communicated **at the time of contracting**, consequential damages should **NOT BE AWARDED**.

Bohac v. Dept. of Agriculture: Lady fired, part of statute providing for damages in unjust termination is $$$ for “any other reasonable & foreseeable consequential damages” she wanted mental anguish/non-pecuniary damages for this.

**RULE** → Non-pecuniary damages are **NOT** foreseeable – they reflect something other than money

Boise Dodge, Inc. v. Clark: D bought car thinking it was new, as P had insisted, then when it was discovered car was not new he stopped paying & P sued for remainder. P was awarded damages but then D got punitive damages

**RULE** → don’t fuck around with punitive – breach must constitute an independent & willful tort accompanied by fraud, malice, wantonness or oppression
Hoffman v. Red Owl Stores, Inc.: P sold his bakery in reliance of pending deal for opening store. He didn’t get the store.

**RULE**: if we want to show **reliance** & get **reliance damages**, we don’t need to show elements of contract – definiteness is **not required for promissory estoppel**. BUT the more definite the promise, the more reasonable the reliance.

Peevyhouse v. Garland Coal & Mining Co.: P owned farm containing coal deposits, leased to D for mining purposes, clause that remedial work @ end of lease was necessary. There was a gross disparity between diminution of value of land & cost of completion - remedial.

**RULE**: where remedy contracted for would be a windfall/create unreasonable economic waste, it’s not gonna fly. Dissent here said clause was essentially meaningless— D knew this was how it would unfold, so P should have gotten specific performance.

----------EQUITABLE REMEDIES

Walgreen v. Sara Creek Property Co.: Walgreen’s had exclusivity clause in the mall, D was going to allow a Phar-Mor to be built. Walgreens would surely lose profits.

**RULE**: where cost of supervision would be negligible, and calculation of damages fraught w/uncertainty, damages proven inadequate **BY P**, we have a case for injunction

-keep specific performance out of personal services contracts

-We want a damages expert to testify

  **Defective formulation** → parties weren’t on the same page while making the contract, inaccurately formulating/expressing selves

  **Indefinite agreement** → vagueness could exist b/c we share a common understanding of something that is itself fundamentally vague - it’s not that we are both thinking something through in different, unarticulated ways, it’s more like neither one of us has thought it all the way through -- ~~~~

**ARGUMENTS FOR NO CONTRACT**

  **Incomplete agreement** → on one hand we agree, on the other we knowingly choose to leave some terms open. If courts think we wanted contract & knew we left terms open, they can still enforce... more likely find there is a contract here.
--------7 Basic Contracts Questions:
1) Is there a deal?
2) How do courts enforce dealing if there is one?
3) Assuming there is a deal, is there any reason for the court not to enforce it?
4) Exactly what was agreed to?
5) Did anyone not do what he agreed to do?
6) If not, did he have a legally recognized excuse?
7) Does anyone other than the 2 people who made the deal have legal rights b/c of the deal?

--------5 Basic Contracts Terms
1) **Express contract**: defined in 1 word → VERBAL. An express contract is based solely on words.
2) **Implied contract**: based at least in part on conduct—you can’t find a deal simply from the words/writings of parties— are they acting like there’s a deal?
3) **Quasi contract**: equitable remedy → it is NOT contract law, different body of law; you can’t apply contract law. It’s about doing what’s fair. If it seems like contract law takes you to an unfair relief, add a paragraph about quasi contract...
4) **Bilateral contract**: one that results from an offer that is open as to how it can be accepted— no particular method of acceptance required
**Unilateral contract**: one that results from an offer that requires performance for acceptance
5) **Executory**: means that it has not yet been performed

**WHAT IS CONTRACT LAW??**
1) Case/Common law
2) Restatement = a secondary source (like a treatise), a view of what the law is/should be; it doesn’t bind courts
3) Article 2 of the UCC
   a) When do I use Article 2? → SALE & GOODS = keywords. SALE OF GOODS
      i) goods = moveable, personal property; never for employment/services, real estate
      ii) mixed deals contain both.
         (1) it’s all or nothing: either apply Art. 2 to the whole deal or to NONE of it.
         (2) what’s the more important part of the deal, the goods or the service? Then ^^
         (a) Ex) someone buys piano; lessons thrown into the deal → the piano is what’s important
   b) Relationship b/n article 2 & common law: they OVERLAP; common law fills in the gaps

IS THERE A DEAL?
1) MOST IMPORTANT PHRASE: Manifestation of Mutual Assent
   a. Offer & acceptance = standard testing model for manifestation of mutual assent
   b. Offeror = the person who makes the offer; offeree = person to whom offer was made
   c. Revocation of an offer = offeror does this by taking the offer off the table; rejection of an offer = offeree does it by declining
2) Was there ever even a deal proposed? (Was an offer made?)
   a. Looking for a manifestation of commitment = words/conduct evidencing that a person was committed – that someone put an offer on the table
      i. We’re not looking for what’s in anyone’s heart/mind/soul/intentions – what did the person DO?
      ii. Watch for CONTENT = words such as “for immediate acceptance”
         1. MISSING/INCOMPLETE TERMS? NO longer a requirement that a communication contain ALL the material terms for an offer. There CAN be gaps
            a. Missing price problem under proposed sale
               i. Common law: price term & description are necessary for offer in real estate
               ii. Pick up goods UCC: a communication CAN be an offer even though there is a missing price term. Person here wasn’t insisting that it be on her terms, left it open.
2. **AMBIGUOUS TERMS?** → fair, reasonable, appropriate: when price/quantity described in ambiguous terms, the court will conclude no manifestation of commitment. This person is not there yet, but his attempt @ talking about it means that he wants to work that out himself → NO OFFER.

3. **REQUIREMENTS CONTRACT**: a situation involving a sale of goods where quantity is described in terms of the buyer’s needs – like an exclusivity agreement to buy all that one requires exclusively from another. **THESE are VALID, despite ambiguity.**
   a. Dramatic increase in demand → UNREASONABLY DISPROPORTIONATE rule helps. Means match what he is asking for today next time. If he previously demanded 1000 he can now ask for 2000 but no more.
   
   iii. Watch for **CONTEXT** – what’s the setting?
   1. **BARGAINING HISTORY** – if there is a preceding history from communication of bargaining, etc. it adds to the argument that commitment has been manifested
   2. **ADVERTISEMENTS** – an ad is not an offer (general rule), they’re invitations to make an offer. Exceptions focus on whether the ad is specific about how many items are available & who can accept ad.

3) Did the proposal die out/ was it terminated?
   a. Lapse of time → termination
   i. Even if no express time limit, courts will impose a reasonable one. * watch for WHEN offer was made, LENGTH of GAP before RESPONSE… if delay was more than a month, discuss that it may have terminated
   ii. When a person dies, his or her offers die with him.
   iii. **Revocation** kills an offer. Offeror makes the offer, then later changes his mind & pulls the offer back. We need to know 3 things:
      1. **How does it happen?**
         a. Words or conduct of the offeror – this is the easy part. The trick is it has to be words/ conduct of the offeror communicated to the offeree – it’s a 2-player game. Offeree must be aware.
         b. Offeree can still accept offer if subject matter is gone & she doesn’t know it… she has contract rights.
      2. When it happens
         a. Revocation must come before acceptance
      3. When it can’t
a. **Option**: both a promise not to revoke AND consideration for that promise - the promise + the payment/consideration = option, irrevocable

b. **UCC Firm Offer Rule**: a sale of goods and a writing signed by a merchant that NOT ONLY promises to buy or sell, but this writing must also **expressly promise** that offer won’t be revoked. **This has a 3 month sealing to it**: If writing says less, than that works, but 3 month steps in when longer commitment is made

c. **Reliance**: Where offer has been **relied on** (construction contracts) \( \rightarrow \) **BID=OFFER**. General contractor relying on a bid usually makes it irrevocable? DRENNAN v STAR PAVING = Traynor makes it irrevocable / JAMES v BAIRD = Learned Hand says reliance doesn’t make offer irrevocable

d. **Start of performance pursuant to an offer to enter into a unilateral contract.** Offer requires performance to accept – I will pay you 1,000 to paint my house \( \rightarrow \) you can accept this offer only by painting my house. **Watch for fact pattern: this offer can be accepted only by performance.** Once the guy starts to perform, offer is irrevocable

e. **Rejection**: offeree says no. Usually not subtle, but you won’t see direct rejection on exam; rather, 3 forms of indirect rejection...
   i. **Counter-offer.** COUNTER OFFERS KILL; you can’t mess with the offer anymore
   ii. **Conditional acceptance** - I accept it but/provided that/ = no express contract. Words may not connect up, watch for conduct...
   iii. **Additional Terms** - **Common Law only** \( \rightarrow \) I accept "AND" rules out an express contract. Common law has **mirror image rule**: acceptance can’t add anything to the offer. **UCC DIFFERENCE**: 2-207 = when 2 communications don’t exactly match up, **common law says NO EXPRESS CONTRACT**; UCC says that if all that’s happening in response is the addition (NOT INSISTENCE UPON) a tem, conclude there is **an express contract** - adding a term is **NOT** a deal breaker. **Seasonable expression of**
acceptance is the term to use - it's a response that adds/doesn’t require additional term.

1. Is the new term part of the deal?
   a. if either of the parties is NOT a merchant, then the rule is that the new term is just a proposal, not a part of the deal unless agreed to. [there’s still the original deal]
   b. If both parties are merchants, there’s the original deal. New term is part of the deal unless it is objected to or if it is a material change. ← matter of fact, doesn’t matter what conclusion you reach.

4) Was the offer accepted?
   a. Look for who is accepting
      i. It has to be a person to whom the offer was made. This also plays into mutual manifestation → offers are NOT assignable.
      ii. Offeree must know of the offer → reward situation.
   b. Look for how they’re accepting
      i. the offer can control how acceptance happens: if offer requires cash & you bring check, NO ACCEPTANCE. Offer can say that acceptance starts w/performance.
      ii. Bilateral offer can be accepted in any way; unilateral offer can be accepted only by performance. Restatement: presumption for bilateral unless offer expressly requires performance. UCC agrees.
   c. 4 recurring fact patterns on exams
      i. Mailbox rule, where parties are contracting from a distance, communicating by mail. RULE: where it is reasonable to respond to an offer by mail that the acceptance dates from the time the acceptance was dropped in the mail. Race to the finish line: offeror wants to get revocation to offeree; offeree just wants to get the letter in the mailbox.
      ii. The offer is made, in response the person starts performance, general rules:
         1. Start of performance generally constitutes acceptance creating deal, gives us manifestation of mutual assent.
         2. Exception: where the offer requires performance to accept; offer expressly requires performance to accept → performance does NOT create a contract. Painter can change his mind & walk away from the deal. Talk about
offer controlling method of acceptance – same result as below

3. The start of performance is not acceptance of the offer to enter into a unilateral contract – acceptance means doing the whole thing, not just starting to perform.

iii. Notice of acceptance, 2 rules are easy to apply
   1. If it’s acceptance by promise, that has to be communicated to offeror. Manifestation necessary.
   2. Acceptance by performance → would that person reasonably know without notice that you had performed (i.e., painting the house I live in → no notice; as opposed to painting the house I own in Alaska → give notice)

iv. Sale of goods question where buy offers to buy goods & seller sends the wrong stuff. I send in order/offer to buy a case of Vaseline; seller sends grape jelly. 2 consequences:
   1. IT CREATES A DEAL. Sending the wrong stuff is acceptance. You don’t have to keep the wrong stuff, but you now have contract rights for breach
      a. Accommodation exception: when seller sends wrong stuff with explanation → this does NOT create contract; rather a COUNTER-OFFER.

HOW DO COURTS ENFORCE DEALS?
1) Specific Performance (an equitable remedy) – employed only where legal remedies are viewed as inadequate → $$ damages is the legal remedy; specific performance is the alternative
   a. Real estate deals lend themselves here for specific performance – we recognize uniqueness of each part of land
   b. Not generally sale of goods, unless they are unique (art, antique, custom-made)
   c. NEVER FOR SERVICES CONTRACTS!!!!
   d. Negative Specific Performance = injunctive relief preventing someone who breached your contract from working with one of your competitors

2) Money Damages → focus on exam
   a. NO punitive damages
   b. Liquidated damages: describes contract provision that tries to set/fix the way of fixing damages – these are generally recognized
      i. Parties cannot set up agreement where liquidated damages are a penalty
   c. Expectation damages = general standard for damages. We are trying to make the world just like it would have been if the contract had been properly performed.
      i. 3 steps:
1. What would P now have had the contract been properly performed?
2. What does P actually have?
3. What does it take to get P from 2 to 1? → when this is complicated, just show that you understand! (like hairy hand vs. 100% perfect hand)

ii. **LIMITATIONS on expectation damages**:
1. Avoidable damages are not recoverable. 2 possible stories here:
   a. Agreement → breach → continuing performance by the non-breaching party.... Was the breach clear & unambiguous? Like bridge owner saying STOP BUILDING, IM NOT GONNA PAY YOU! [watch out for: Can it be fairly argued that continuing to perform decreases rather than increases the damages?]
   b. Employment issue: could P have gotten a comparable job? (this is fact/judge-specific)
2. Consequential Damages rule is that they are recoverable only if foreseeable by both of the parties @ the time of the contract (or in contemplation of both parties...) → Hadley v. Baxendale the milling case – to transport milling part; transport Co. took way too long & admitted this breach. Mill had to close & wait, lost all its profits. “Because you breached the contract with me, something bad happened.” This is not recoverable because it was not reasonably foreseeable @ the time of the contract. If the mill had told the transporter @ the time of contract, then it would have been within contemplation of parties @ time of contract & they could have recovered. Special situations.
3. Economic Waste: Groves v. John Wonder, Peevey House v. Garland Cohen. Involve work done on land. P had expected her land would be restored – but unrestored land has same market value as the restored land. Expectation damages = diminution of value. But if it would cost more to restore the land than the expectation damages

**IS THERE ANY REASON NOT TO ENFORCE THE DEAL?**
1) MOST IMPORTANT REASON: **Consideration**/consideration substitutes → not an “is there a deal” question; it’s an enforceability question. Steps:
   a. What is the promise in question? → is it legally enforceable? (focus on the 1 in dispute!)
b. Who made the promise? Who’s the promisee?
c. What was the promisor asking for in exchange for the promise
   i. Performance? Promise to perform? Forebearance (surrender of rights)
d. Was this thing that was bargained for a detriment to the promisee/benefit to the promisor?
e. NO STEP 5 ASKING ABOUT AMOUNT OF BENEFIT/DETRIMENT!!!!
f. WATCH OUT FOR:
   i. Past consideration - this is an oxymoron; mutually inconsistent.
      You need a bargained-for detriment & benefit
   ii. Pre-existing legal duty rule - doing something that you were already legally obligated to do is NOT consideration for a promise to pay you more $$ to do it.
   iii. Part payment on a debt that is due & undisputed is NOT CONSIDERATION for a release. Is it a new benefit? Law says NO, since person was already legally obligated to pay. Your legal right to the $$ is enough; possession doesn’t matter

2) SUBSTITUTES OF CONSIDERATION:
   a. Promissory estoppel = new, American law. 6 step approach:
      i. What’s the promise in question?
      ii. Who’s promisor? Who’s promisee?
      iii. Look for what the promisee (P) did after the promise was made.
      iv. Was this action/inaction that P did caused by the promise? Æ here, nobody has asked promisee to do what she’s doing, unlike with consideration, where promisee is fulfilling her part of the bargain.
         1. Ex) D has mortgage on P’s house. D promises P he won’t foreclose mortgage for 5 years. Now wants to foreclose. Enforceable? Looks like no consideration... the story here is that even though D didn’t ask for anything in return, because of the promise P goes out @ repairs the house - though it looks like a benefit, IT WASN’T BARGAINED/ASKED FOR, so it has to be promissory estoppels
         v. Should the promisor have anticipated this action? Was it foreseeable? Æ fact question - address it, doesn’t matter how you come out
         vi. Catch-all requirement: would it be unjust not to fulfill the promise?
   b. Moral Obligation Exception: even though stuff before the promise can’t be considered for the promise, there is a moral obligation that makes a promise to pay for a benefit previously received legally enforceable. Ex) where worker injures self saving employer’s life & employer promises to pay worker, there’s no consideration...
c. **UCC:** you don’t need consideration to modify the contract. Restatement 89 makes enforceable contract modifications made in good faith even where there's no consideration.

3) **STATUTE of FRAUDS =** matters that concerns courts for susceptibility to fraud – you need to convince the court that the deal was made.

a. **Within the statute of frauds:** this simply means that the statute of frauds applies. Doesn’t mean your problems are over → means it’s just beginning, you now have to mess w/the statute of frauds. These are **WITHIN:**
   i. Sale of goods & purchase price is $500 or more
   ii. Personal services contracts: NOT ALL SERVICES → only those personal services contracts that are not capable of being performed within a year (typically deals where there's no way it could be performed within a year – if it’s TASK-SPECIFIC, NO STATUTE OF FRAUDS!!!!!!!)
   iii. Transfers of interest in real estate – has to be real estate interest with term/duration of MORE THAN A YEAR! – a 1-yr. apt. lease NOT WITHIN IT.

b. We’re looking to **satisfy the statute of frauds.** The primary way to do this is by a writing.
   i. Look for what question tells you about contents of writing – it’s not enough that there is a writing; there are requirements for it. If it’s ANYTHING OTHER THAN SALE OF GOODS (Non-UCC... services/real estate), then writing must contain ALL MATERIAL TERMS!!!
      1. ^^ means, WHO were the contracting parties?
      2. What did each agree to do?
   ii. If it’s a sale of goods, all it has to say is quantity – doesn’t need to name PARTIES or PRICE – just quantity... how many widgets?
   iii. WHO SIGNED THE WRITING??? → not sale of goods (common law)= HAS TO BE SIGNED BY D (person agreement is being enforced against)!!
   iv. UCC rule: sale of goods $500+, 2-201, all that’s needed is writing signed by P (situation where both are merchants)

4) **CAPACITY:** agreement is **not enforceable** when party lacks capacity.
   **Keyword = disaffirm =** ability to get out of agreements that he/she has made
   a. 3 groups:
      i. Infants – matter of statutory law (usually 18). If age requirement is satisfied, they can disaffirm
         1. Exceptions:
            a. **IMPLIED AFFIRMATION:** by continuing to retain benefits of contract after gaining capacity is like agreeing to a new deal
b. **NECESSARIES** - this is not a contract obligation, but a quasi contract obligation. Even people without capacity are legally obligated on agreements for necessaries. Obligation to pay is quasi contract.

   i. Intoxication
   ii. Mental Incompetence - don’t have ability to understand what they’re agreeing to

5) How was the deal made?

   a. Duress - expanded beyond physical to **economic**:
      i. Improper threat by P; AND
      ii. D not left with any reasonable alternative
      iii. Watch for 2 fact patterns:
         1. Modifications in contracts - **holdups** like the fishermen getting to Alaska
         2. Litigation settlement → where the P seeking to enforce litigation settlement settled for less than she had earlier acknowledged that she owed.

   b. Undue influence - see the difference between this & duress
      i. UNFAIR = milder standard for the P than with duress
      ii. Tougher standard for D → has to be under the domination of the P
      iii. With economic duress, plaintiff’s mistake is stronger; unfair = undue influence. Also compare the victim. The defendant is much weaker with undue influence - they’re so weak, they were under the domination of… **not usually used with corporations**

   c. Misrepresentation
      i. Keep straight from torts → misrepresentation doesn’t need to be careless, intentional, etc. Just needs to be **material** and **relied on**.

   d. Mistake
      i. Not about language of the deal, but about the facts surrounding the deal (The pregnant cow mistake) – this case sets the standard. Where there is a mutual mistake about a basic material fact then the deal is not enforceable.
      ii. To trigger the rule, the mistake must be basic, material. If the mistake was made by both parties about what something is or the nature of the subject matter, then it’s material. If it’s a mistake about what something is worth, then no matter how big the mistake, it’s never ground for non-enforcement.

   e. Unconscionability
      i. Where does it come from? → UCC 2-302 & Williams v. Walker Thomas for common law
      ii. What are the issues we need to discuss?
1. How was the deal made? \textit{\textbf{procedural unconscionability}} = disparity/absence of bargaining power; hidden terms/unfair surprise vs. clearly expressed terms; bargaining process & its flaws in general

2. \textit{Substantive unconscionability} \rightarrow \text{it's a problem not with the process but with what the deal says, that the terms are oppressive. Unconscionability is ALWAYS DECIDED BY JUDGE, never jury, but largely fact driven. You need to cite source of law}

\textbf{EXACTLY WHAT WAS AGREED TO?}

1) \textbf{Parol Evidence Rule:} There must be a written agreement. It’s about the impact that a writing has on earlier agreements, whether the earlier agreements were in writing or verbal.
   a) \textbf{VOCAB:}
      i) \textit{Parol evidence}: evidence of some agreement made prior to the writing – does NOT NECESSARILY MEAN ORAL
      ii) \textit{Integrated agreement}: a written agreement intended by the parties to be their last word; final.
      iii) \textit{Complete integration}: it is a writing that is final & complete
      iv) \textit{Partial integration} = written, final as to what it covers, but may not be the full deal.
      v) \textit{Merger clause} – a way of saying “this is the final deal”
   b) \textbf{Where you have an integrated agreement, parol evidence can NEVER contradict it}
   c) If parol agreement simply adds terms to written agreement... depends on whether it’s a complete integration... -- SPOT THIS ISSUE & USE THE VOCAB, doesn’t really matter how you come out though.
   d) Even if it is a complete integration, parol evidence can be used to explain ambiguous terms. Hierarchy:
      i) \textit{Course of performance} = all about what these very people have previously done under this very deal. A very \textbf{persuasive form of extrinsic evidence}.
      ii) \textit{Course of dealing} = what have these very people done early under similar deals? This is \textbf{influential, good extrinsic evidence}
      iii) \textit{Custom & usage} = what different people have done under different but similar deals. Again relevant & giving some help, but not as good as ^^

2) \textbf{Gap Fillers:} common law recognizes \textbf{implied duty of good faith} \cite{Wood v. Lucy Lady Duff Gordon} – in exclusive agency cases, courts will imply obligation to use reasonable efforts – watch for a question involving ^. \textbf{UCC:} rich source of terms to fill the gap regardless of whether they’re merchants...
   a) Implied obligation of good faith
b) Implied warranty of merchantability – merchant is a strict term here, much be dealer in goods of the kind. Means it’s at least OK to use without anything bad happening (FIT for ordinary purposes)
c) OTHER GAP-FILLERS GO HERE

DID ANYONE NOT DO WHAT HE AGREED TO DO?
1) YES. If everyone did what they agreed to do, there’s no contracts question.

DID HE/SHE HAVE A LEGALLY RECOGNIZABLE EXCUSE NOT TO DO THIS?
2) Unmet condition of performance – performance was conditional & condition wasn’t met. Monthly progress payments dependent on architect certificates – carefully read fact patterns looking for express conditions – “on the condition that” or “if” “provided that” “so long as” – anything short of phrase “on condition that” needs statement saying that if there is any doubt about whether contract expresses condition – preferred interpretation is no condition.

(1) If there are conditions, they need to be strictly complied with. REDDING PIPE CASE!!! No expressed condition here; this would have had a devastating impact so court avoided it as a term of the deal & gave diminution of value

3) Non-Performance excused by other party’s breach UCC Article 2 has the perfect tender standard if it’s not a perfect fulfillment of order, the other side doesn’t have to pay/perform. Anytime the seller of goods is less than perfect, the buyer can send it back & not perform.

a) 2 big exceptions to perfect tender standard:

i) Cure: Watch for situation in which the seller sends the wrong stuff early. (requires deadline in agreement) \(\rightarrow\) if seller can get the right stuff there by the deadline, they’re OK.

ii) Installment sale contract: where parties in their agreement have agreed that there will be deliveries in several separate installments. If agreement itself provides for several separate installments, then a problem with 1 installment, so long as it is not a substantial problem, will NOT EXCUSE PAYMENT. – problem can be adjusted in future installments

b) Common law contract: we have to use MATERIAL BREACH RULE [total screwup]. When will 1 party’s non-performance excuse the other?

i) Example: H hires P to paint his house – the house is supposed to be painted 2 coats White Sherwin-Williams paint. Even though it involves buying the paint, you’re mostly paying for paintwork. The painter H hired painted the house purple. THIS IS A MATERIAL BREACH. If the painter had used white Glidden paint for the house, this is a breach w/a legal consequence, BUT THIS IS NOT A MATERIAL BREACH, so you still have to pay

ii) 2 exceptions to material breach rule:
(1) Language of condition \( \rightarrow \) if “on the condition that…” is used, it must be strictly complied with.

(2) **Divisible contract exception**: H hires P to paint huge, 20 room house, for 4,000. P only paints 3 of the 20 rooms. This is a material breach, H is excused from paying. This looks unfair though that P can’t get anything. You’ll need to look @ equity.

(a) H hires P to paint 20 rooms for 200 dollars per room - see the division here? If painter does 3 rooms, he gets 600 – NO material breach as to the rooms he DID paint.

4) **Anticipatory Repudiation** – I’m not going to perform because he said he wasn’t going to perform! It’s anticipatory before performance has happened.
   a) This is an excuse of non-performance, gives party a right to stop performance & sue immediately.

5) **Later Agreement**
   a) **Novation** = BOTH original parties agree to who will perform in a new agreement for the same task, making it a novation. So if that goes wrong, party can’t sue for non-performance of the original agreement. A agrees B will do lecture. Then A & B agree C will do lecture; C doesn’t show, A can’t sue B for non-performance.
   b) **Accord and satisfaction** = this is NOT a change in who will perform; rather in what will be done. A owes B money; instead they later agree that A will clean B’s house instead. The later agreement is the ACCORD, but we still need SATISFACTION – performance of the new performance. AND is the most important word here.

6) **Something happened after the deal**
   a) Watch for sequence: deal made \( \rightarrow \) something happened. It should be fairly obvious that what happened was totally unexpected.
   b) Harder facts to see:
      i) Whether either party had **assumed the risk** of the event/non-event.
      ii) Understand effect of post-contract occurrence on performance. Did it make performance **impossible**? [Taylor v. Caldwell \( \rightarrow \) concert hall that burned down = impossibility; non-performance excused]. H contracts with B to build house. When house 90% completed, house burned down. Relationship between event & performance \( \rightarrow \) it’s not impossibility [IMPRACTICABILITY = UCC]; but judgment call that performance is ONEROUS. **If all that happens is that there is a later unforeseen occurrence that makes performance more expensive, tough luck rule... too bad.** Performance still required.
   (1) Exceptions: D is to work @ exotic third world place for a year. She doesn’t still have to perform if there’s some crazy disease over there.

7) **Frustration of Purpose**
a) Krell v. Henry: really the only case – coronation parade rented flat to watch parade – parade cancelled. Both guys know what the purpose of the deal is, something happens after deal that affects whole reason for performance, so non-performance will be excused. NO UCC provision for frustration of purpose

**Does a Third party have contract rights?**

4) **Third Party Beneficiary** = deal involving 2 people, but at that moment intend that a 3rd party will benefit from the deal. Life insurance contract. THIS IS CONTRACT LAW, not insurance law that when person dies, 3rd party can sue insurance company on the contract even though she wasn’t a party to the contract b/c she’s the beneficiary.

a) **VOCAB:**
   i) Third party beneficiary = not party to contract, but person to be benefitted. You have to be able to tell promisors from promisees. **Promisor is guy whose promise goes to third party beneficiary** – it’s the insurance company, the bagel store. The other contracting party is the promisee. 3 people are involved from the very beginning.
   ii) **Creditor beneficiary** – third party was previously a creditor of promisee. This person can also sue promisee on original debt. If Sharon stone is buying Epstein bagels b/c she owes him $$, he can sue her if she doesn’t OR the bagel company if they’re not delivering.
   iii) **Donee beneficiary** – if in doubt, call 3rd party this

b) **Who can sue whom?**
   i) Third party beneficiary can ALWAYS SUE PROMISOR.
   ii) From the time of the contract, BOTH contracting parties must intend to benefit 3rd party beneficiary.

5) **Delegation**: starts as a contract b/n 2 people. Later, 1 of them gets someone else to do the work. First contract is b/n 2 parties; later

a) **Consequences**
   i) This is NOT a novation – if it’s not a mutually agreed upon substitution, original party can sue other original party for non-performance. **Delegating party remains liable.** **TEST QUESTION:** show you understand similarities & differences b/n delegation & novation.

b) **Limitations:** some duties are NOT delegable.
   i) If contract itself prohibits delegation, it’s not delegable
   ii) Subject matter: if duty requires special skills (I can’t play for the cubs), it’s non-delegable. **MOST DUTIES ARE DELEGABLE** though.

c) **H** hires **P** to paint his house, nothing stated about delegation. **P** gets **X** to do work instead. If **X** doesn’t do the work, **H** can still sue **P**. **X** does do the work. What result? Real issue is delegability, but **general rule that most duties are delegable**.

6) **Assignments**: A situation where 2 people make a deal; later 1 of them transfers the benefits of the deal to someone else. **Batman contracts with**
Gotham to provide security. Later, Batman tells Robin he’ll give them the 1,000 he would make from the contract. You can collect it.

a) **Assignor** = batman. Person that first makes the contract, then assigns the benefit

b) **Assignee** = robin. He wasn’t involved in the contract @ first, but he can collect

c) **Obligor** = Gotham.

d) **Assignee can enforce the promisee on obligor**

e) **COMMON LAW**: you cannot make an assignment that substantially changes the duties of the obligor. ASSIGNMENT of right to payment = NEVER A PROBLEM.

i) If gotham assigns batman to defend metropolis, then batman becomes obligor; metropolis the assignee; gothan the assignor ➔ this SUBSTANTIALLY CHANGES the duties. **NOT ENFORCEABLE.**

ii) Watch for assignments tangled w/delegation