Contracts Outline

I. WHAT IS A CONTRACT?
   A. Definition - a promise or a set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
   B. Types of Contracts
      1. Express or Implied
         a. quasi contracts - a way to avoid unjust enrichment
      2. Bilateral or Unilateral
         a. bilateral - exchange of promises (promise for a promise)
         b. unilateral - exchange of an act for a promise.
            1. If offeror clearly indicates that performance is the only manner of acceptance
            2. offer to the public clearly contemplating acceptance
         c. most contracts are bilateral.
      3. Void or Voidable and Unenforceable
         a. Void - no legal effect from the beginning (cannot be enforced)
            1. example - agreement to commit a crime
         b. Voidable - one that a party may elect to avoid or ratify (party may elect to enforce it)
            1. example - contract by a minor
         c. Unenforceable - otherwise valid but for which some defense exists
            1. example - statute of frauds
   C. Creation of A Contract
      1. Three Elements Needed to Create a Contract:
         a. mutual assent (offer and acceptance)
         b. Consideration
         c. No defenses to formation

II. OFFER AND ACCEPTANCE
   A. Why have offer and acceptance rules?
      1. enable court to draw dividing line between preliminary negotiations and closing of a bargain
      2. ensure parties had agreed on minimum quantity of terms so the court could find they actually had made a deal
      3. give court reliable method to determine content of their deal.
   B. What constitutes an offer?
      1. Manifestation of a present willingness to enter into a bargain, made in such a way that a reasonable person could believe that she could conclude a bargain by giving assent in the manner required (words/act)
a. Two elements:
   1. Intent to enter into bargain (promise, undertaking or commitment)
      a. Offer vs. Invitation to deal
         not offer if clear that it is only an intent to bargain or begin negotiation
         1. words that suggest negotiations
            a. are you interested, would you give, I would consider...
         2. words that suggest offer
            a. I will sell, I will buy, I offer, I bid
      3. Things to look at: language, prior relationship surrounding circumstances, method of communication (broader is less likely an offer), custom in industry and degree of definiteness of terms
   2. Certainty and definiteness of terms
      a. Identify offeree or class of offerees
      b. Must be clear:
         1. Real Estate-land and price
         2. Sale of Goods-quantity must be capable of being made certain
         3. Employment-duration must be specified
      b. Even if one of these are missing, if evidence shows intent to conclude a bargain, can still be considered offer.
      c. Certain missing terms may be reasonably inferred
      d. A vague term may defeat formation unless accept or partial performance makes it clear
   3. Communicated to the Offeree
      b. Special Rules
         1. Advertisements—generally invitations rather than offers
            a. Rationale:
               1. usually indefinite quantity and terms
               2. seller ought to be able to chose who they deal with
               3. Typically addressed to general public so it could be overaccepted (exceed # of items)
            b. Exceptions: offer if:
               1. Definite in terms AND
               2. a. circumstances clearly show intent or b. advertisement invites to take a specific action without further communication or
c. overacceptance is unlikely
   example: rewards for lost item

2. Offering circulars
   a. general mailings sent out by merchants to a # of
      potential customers, setting forth terms in which
      ready to deal, generally not an offer but may be
   b. test-whether a reasonable person would think it
      had been addressed to him individually or a number
      of recipients

3. Auctions
   a. bid is an offer, can be withdrawn until accepted
      by being hammered down
   b. each new bid automatically discharges earlier bid

4. Contracts out for bid
   a. general rule-not an offer but bids submitted are

C. Legal Significance of an Offer
   1. Offer creates power of acceptance in offeree, and offeree
      can conclude a bargain and enter into contract and bind offeror by
      proper assent.

D. Termination of Power of Acceptance
   1. Termination by the Offeror-
      a. Revocation of an Offer-must directly communicat revocation or
         act inconsistently with a continued willingness to maintain offer
         and offeree gets correct information from a reliable source.
   1. .general rule-an offer can be revoked until it has been
      accepted
   2. time of revocation:
      a. traditionally-could revoke before time of expiration
         even if promise not to do so (if it lacks consideration
         or detrimental reliance.)
   3. Limitations on power to revoke:
      a. firm offers-Restatement-once there is reliance on
         promise not to revoke, offeror loses power to revoke.
      b. option contract supported by consideration
      c. Detrimental reliance and offeror could reasonably
         expect reliance
      d. Unilateral contract, offeree has started performance

2. Termination by the Offeree-lapse of time or rejection
   a.Expiration or Lapse of the offer
      1. If time is fixed in the offer (time runs from day of receipt
         unless offeree knew or should have known of the delay, then
         when it would have been received)
2. If no time for acceptance is fixed in the offer-reasonable time
   a. Reasonable time depends on the circumstances
      a. Face to face and telephone-ordinarily no longer than end of conversation unless intention contrary
         ex: If says, think it over, then shows contrary intention
      b. By mail-by midnight on day of receipt is timely, may even be if sent later, provided reasonable time
         1. Mail-box rule- when letter of acceptance is placed in the mail, contract formed, both bound.
   b. Through rejection by offeree
      1. Express rejection-statement that he intends not to accept the offer, then power of acceptance is terminated
      2. Through counter-offer (rejection and new offer)
         a. Concerns same subject matter but differs in terms
      3. Not terminated by inquires or request for different terms
         a. Test-whether a reasonable person in offeror’s shoes would think that it was itself an offer
   c. By Operation of Law
      1. Death or insanity of either party
      2. Destruction of contract’s subject matter
      3. Suprevening Illegality

E. Acceptance
   1. Who may accept
      a. The person to whom the offer was addressed or if in the class to whom addressed has power of acceptance
   2. Acceptance must be unequivocal
      a. Common Law-mirror image rule-acceptance must mirror terms of offer, no omissions or additions. If they do have then may be counteroffer
      b. UCC-need not mirror terms. Any acceptance that indicates intention to enter into a contract is valid unless it is made conditional on the acceptance of new or different terms.
   1. Terms of Contract
      a. Non merchants (1 not)-terms of offer
      b. Merchants-additional terms become party of K
         1. Exceptions
            a. acceptance expressly limited to old terms
            b. materially alter agreement
            c. offeror already objected to add’l terms
3. Generally Acceptance Must Be Communicated
   a. Mailbox Rule-If acceptance is by mail or similar means and properly addressed and stamped, it is effective at moment of dispatch (If improperly sent, it is effective upon receipt)
      1. Limitations to rule
         a. offer stipulates not effective until receipt
         b. option contract
         c. offeree sends rejection then acceptance, whichever arrives first.
         d. if sends acceptance then rejection acceptance is effective unless rejection arrives first and offeror detrimentally relies on it
   2. Acceptance By Unauthorized Means is effective if it actually is received by the offeror while the offer is still in existence
   3. Crossing Offers-since an offer is effective upon receipt, offers stating same terms that cross in mail do not give rise to a contract.
   4. Exception-Acceptance without communication
      a. an executory bilateral contract may be formed without communication of acceptance where:
         1. there is an express waiver of communication of offer
         2. the offer requires an act as acceptance
         3. offeree silently takes the offered benefits

D. Unilateral or Bilateral Contract
   1. Interpreting a contract as unilateral or bilateral
      a. Unilateral-offeree accepts by performing an act
      b. Bilateral-offeree accepts by promising to do an act
      c. Modern courts-bilateral unless its terms clearly warn that an act is required for acceptance
      d. UCC and Restatement-if offer is ambiguous, allow an act or a promise
   2. Formations Problems
      a. Unilateral-generally must act with knowledge of offer and be motivated by it. Duty to give notice if offeror requests it, otherwise no duty
      b. Bilateral-ignorance of certain terms may be a defense oppressive terms or against public policy may prevent formation, blanket form recitals will not prevent court from holding no contract if reasonable person would not understand.
III. CONSIDERATION

A. Introduction
1. courts will only enforce a contract if it is supported by consideration or a substitute for consideration

B. Elements of Consideration- bargain and legal value
1. Bargain-must exchange something. (promises or promise for act)
   a. gift- no bargain involved (no consideration) in gifts
      1. Exceptions
         a. act or forberance by promisee will be sufficient if it benefits the promisor
            1. example: uncle gives nephew (namesake) money for not cussing, drinking, etc. considered consideration because benefited his name.
         b. Economic Benefit Not required (peace of mind or gratification may be enough)
   b. Past or Moral Consideration-promise in exchange for something already done is not a bargain
      1. Exceptions-if new promise made in writing or partially performed

2. Legal Value
   a. General Rule- adequacey or fairness of consideration not examined.
      1. if no value, then no consideration.
      2. sham consideration (in contract, not actually paid) may also be insufficient.
      3. if possibility of value then consideration even if value never comes into existence
   b. Legal Benefit and Legal Detriment Theories
      1. Majority-a party must incur detriment by doing something he is not legally obligated to do or by refraining from something he has a legal right to do (example: boy not cussing)
      2. Minority-benefit on other party is sufficient

3. Specific Situations
   a. Preexisting Legal Duty
      1. General Rule-insufficient consideration
         a. Exceptions
            1. new or different consideration is promised
            2. promise is to ratify a voidable obligation (promise to ratify minor’s contract after reaching majority)
3. preexisting duty owed to a third person
4. honest dispute as to duty
5. unforeseen circumstances sufficient to discharge
6. UCC-any good faith agreement modifying a contract subject to the UCC needs no consideration to be binding

b. Forbearance to Sue-promise to refrain from suing on a claim may be consideration if the claim is valid or claimant in good faith believed it was valid.

C. Mutual and Illusory Promises-Requirement of Mutuality
1. Consideration must exist on both sides of contract. If only one party is bound to perform, it is considered an illusory promise and will not be enforced. However, implied promises may exist to infer mutuality.
   a. Examples of Mutuality Requirement:
      1. Output and Requirement Contracts
      2. Conditional Promises
      3. Contracts where a party has a right to cancel
      4. Voidable Promises
      5. Unilateral and Option Contracts
      6. Gratuitous Suretyships promises
   b. Language is Important
      “all the widgets I require” or “all you produce” is okay but “all the widgets I want” or “all you want to sell me” is illusory.
2. Right to Choose Alternative Courses
   a. illusory unless every alternative involves legal detriment to promisor.

D. No Requirement that All Consideration be Valid
1. No requirement that each promises given be sufficient as consideration (one promise may be defective and another sufficient)

E. Substitutes for Consideration
1. Promissory Estoppel or Detrimental Reliance
   a. Promissory Estoppel
      1. Promisor should reasonably expect her promise to induce action or forbearance
      2. of a definite and substantial character
      3. such action or forbearance is induced
   2. Modifications Under UCC-consideration is not necessary to a good faith modification of a contract
3. Promises to Pay Legal Obligations Barred By Law-If legal obligation is not enforceable under law a new promise to fulfill the obligation is enforceable if in writing only according to new terms.
IV. NO DEFENSES TO FORMATION CAN EXIST

A. Defenses to Formation

1. Absence of Mutual Assent
   a. Mutual Mistake- a mistake by both parties is defense if
      1. mistake concerns a basic assumption on which made
      2. mistake has a material adverse effect on agreement
      3. adversely affected party did not assume the risk
         1. assumption of risk-when both parties know their
            assumption is doubtful (conscious ignorance) mutual
            mistake is not a defense
         2. Mistake in value-generally not a defense, as courts
            assume parties assume risk of determining value but
            there are exceptions such as reliance on third party to
            determine value
   b. Unilateral Mistake-generally insufficient to make a contract
      voidable.
      1. Exception- if nonmistaken party knew or should have
         known of the mistake, it is voidable by mistaken party.
   c. Mistake by Third Party (Intermediary, Transmission)-
generally will be operative as transmitted unless party receiving
   it had reason to know of mistake.
   d. Latent Ambiguity Mistakes-If ambiguous term, depends on
      awareness:
      1. neither party aware-no contract unless both parties intend
         same meaning
      2. both parties aware-no contract unless both parties intend
         same meaning
      3. one party aware-binding based on what ignorant party
         reasonably believed to be meaning of ambiguous words
      4. Ambiguity-intent taken into account
   e. Misrepresentation and Fraud-
      1. valid defenses because they
         prevent mutual assent.
      2. Must go to a material factor in the contract.
      3. If fraudulent mis.-actual reliance
         If innocent mis.-must be reasonable reliance
4. Fraud where party tricked into assenting without understanding the significance of her action-no contract
5. Fraud as to underlying transaction-contract voidable by frauded party
2. Absence of Consideration-lacks bargaining or legal detriment, no contract exists
3. Public Policy Defenses-Illegality of Contract
   a. If consideration or subject matter of contract is illegal, contract is void.
      1. Example-contract to commit a murder.
      2. Exceptions
         a. \( \Pi \) is unaware and \( \Delta \) knows
         b. Parties not in pari delicto (one party not as at fault as other)
         c. illegality is failure to obtain license for revenue raising purposes rather than for protection of public
   b. If purpose behind contract is illegal, contract is voidable by party who was unaware of purpose or aware but did not facilitate purpose and does not involve serious moral turpitude (like murder)

B. Defenses based on Lack of Capacity
   1. Under age 18-voidable by minor but not by adult
   2. Insane Persons-when insane, voidable, if lucid, then has capacity
   3. Intoxicated Persons if other party knows of intoxication
   4. Duress and Coercion

C. Defenses to Enforcement
   1. Statute of Frauds-must be in writing
      a. executors or administrators to pay debts out of own funds
      b. answer for debt or default of another
      c. marriage
      d. land
      e. cannot be performed within one year
      f. sale of goods for 500 dollars or more
      g. Requirements of Statute-identity of parties, subject matter, terms and conditions, consideration recited and signature of party to be charged or his agent
      h. Several pieces of writing btn parties sufficient
      i. Only party to be charged (sued) must sign.
      j. Noncompliance renders it unenforceable.
   2. Unconscionability-Voidable if clauses are so one sided as to be unconscionable. (risk shifting provisions and contracts of adhesion)
      a. tested at time contract was made not later
VI. RULES OF CONTRACT CONSTRUCTION AND PAROL EVIDENCE

A. Rules of Contract Construction
1. construed as a whole according to the ordinary meaning of words.
2. If inconsistency between provisions written prevail over printed
3. Ambiguities construed against party preparing the contract absent evidence of intent of parties
4. Courts look to custom and usage
5. Courts generally try to reach decision that contract is valid and enforceable

B. Parol Evidence Rule
1. Evidence of prior or contemporaneous negotiations and agreements that contradict, modify, or vary terms is inadmissible if written contract is intended as the complete and final expression of the parties. A merger clause (recital that contract is complete) strengthens presumption that written contract final.
   a. Exceptions—evidence is admissible:
      1. formation defects (fraud, duress, mistake, illegal)
      2. condition precedent to contract
      3. intent regarding ambiguous terms
      4. consideration problems
      5. prior valid agreement which is incorrectly stated in writing
      6. collateral agreement if it does not contradict or vary
      7. subsequent modifications

IV. INTERPRETATION AND ENFORCEMENT OF THE CONTRACT

A. Introduction
Two questions:
1. Is there a present duty to perform (absolute promise or have all conditions been met or excused?)
2. Has the duty to perform been discharged?
   a. If yes—done
   b. If no-nonperformance will be a breach of contract

B. When has a promise become absolute?
1. Difference Between Promise and Condition
   a. Promise—commitment to do or refrain from doing something
   b. Condition—an event the occurrence or nonoccurrence of which will
create, limit, or extinguish the duty to perform (promise modifier)

c. Interpretation of Promise or Condition

1. Basic Test is intent of parties as judged by words, prior exchanges, custom in business (when in doubt courts prefer promises)
d. Condition or Promise-may be promise for one party and condition for another. (example-second parties duty to pay is conditioned on first party’s performance). May also be both for same party as where a pty is under duty to reasonably ensure that a condition comes about (secure financing)
e. Failure of promise-breach –vs– failure of condition-relieves other party of obligation to perform

2. Classification of Conditions
a. Time of Occurance

1. condition precedent-condition must occur before performance is due from other party
   a. Example-agreement to pay $ if my house is sold by April 1.
   b. Effect of occurrence-performance due
2. condition concurrent-conditions to occur at same time
   a. Example-agreement to pay $ for blackacre
   b. If condition has occurred, performance of the other is due
3. Condition subsequent-condition cuts off already existing duty
   a. Example-agreement to pay $ for blackacre unless zoning is changed
   b. Effect of occurrence-duty to perform is excused

b. Express, Implied, and Constructive Conditions

1. Express-in contract stated clearly
2. Implied-those to be inferred from evidence of parties’ intention
3. Constructive-without regard to parties intention in order to ensure parties get what they bargained for (time of performance, who performs first)

3. Have the Conditions Been Excused?

a. Excuse of Condition by Failure to Cooperate-if a party wrongfully prevents a condition from occurring will not get benefit of it
b. Excuse of Condition by Actual Breach-Actual, material breach by one party excuses other’s duty of counterperformance (minor breach may suspend duty but not excuse it)
c. Excuse of Condition by Anticipatory Repudiation
   1. must be unequivocal
   2. only if executory (unperformed) duties on both sides of bilateral
   3. Four alternatives for nonrepudiating party
   a. treat contract as repudiated and sue immediately
b. suspend his own performance and wait until performance is due to sue
c. Treat repudiation as an offer to rescind and treat contract as discharged
d. Ignore repudiation and urge performance

4. Repudiation may be retracted until the nonrepudiating party has accepted or detrimentally relied upon it.

d. Excuse of Condition by Prospective Inability or Unwillingness to Prfrm.
   1. party might have reasonable grounds to believe the other party will be unwilling or unable to perform when performance is due.
   2. Different from anticipatory repudiation because this only raises doubts and is not unequivocal.
   3. Conduct to show Inability or Unwillingness
      a. reasonable person standard

4. Effect of Prospective Failure
   a. innocent party may suspend own performance until she gets assurances of performance. If not coming then may treat failure as repudiation.

5. Retraction is possible but may not be effective if other party has changed position in reliance on prospective failure.

e. Excuse of Condition By Substantial Performance
   1. If party has almost completely performed his duties, but has breached in some minor way, the rule of substantial performance avoids forfeiture of a return performance
   2. Applies to constructive conditions, usually not applied if breach was willful.
   3. Damages Offset-Sub. performance may still require to offset damages for incomplete performance
   4. UCC-perfect tender rule but is subject to exceptions.

f. Excuse of Condition by Divisibility of Contract
   1. If party performs one of units of divisible contract, she is entitled to equivalent for that unit even though she fails to perform other units.
   2. What is a divisible Contract?
      a. performance of each party divided into 2 or more parts
      b. number of parts due from each party same and
      c. performance of each part by one party is the agreed equivalent of the corresponding party by the other party.
   3. Installment Contracts-UCC-contract that authorizes or requires delivery in separate lots is an installment contract. Can only claim total breach if defects are such to materially impair the entire contract.
g. Excuse of Condition By Waiver or Estoppel
1. Estoppel Waiver—indicate that he will not insist upon the condition, but the waiver may be retracted at any time unless other party detrimentally relies upon it.
2. Election Waiver—If condition is broken, party who was to have its benefit may either terminate his liability (exit) or continue on contract. If he does second, he is deemed to have waived condition.
3. condition that may be waived—if no consideration given for waiver, it must be one that is ancillary or collateral to main purpose of contract. Otherwise, waiver is gift and not enforceable.  
4. Rights to Damages for Failure of Condition—waiving a condition does not waive rights to damages for other defects in performance.

h. Excuse of Condition by Impossibility, Impracticability, or Frustration

C. Has the Duty to Perform Been Discharged?
1. Discharge by Performance or Tender of Performance
   a. duty may be discharged by complete performance or tender of performance assuming tendering party has ability to perform
   b. discharge by condition subsequent
   c. discharge by illegality
   d. discharge by Impossibility, Impracticability, or Frustration
      1. Impossibility—objective standard—after contract was made, nobody could perform according to terms
         a. examples—death or physical incapacity, new law making illegal, subsequent destruction of subject
         b. Exception—if services can be delegated, not discharged
      2. Impracticability—subjective tests—party encounters extreme and unreasonable difficulty or expense due to difficulty or expense that was not anticipated
         a. example—price increase in raw materials WILL NOT be enough to lead to discharge b/c normal risk, could have been anticipated
      3. Frustration of Purpose
         a. Supervening Event that was
         b. not reasonably foreseeable at time of contract
         c. which completely or almost completely destroys the purpose of the contract and
         d. purpose was understood by both parties
   e. discharge by recession
      a. mutual recession—both parties agree to it
      b. unilateral recession—party must have adequate legal
grounds such as mistake, misrepresentation, or duress.
f. discharge by release
  g. discharge by substituted contract
  h. discharge by lapse of time if party’s duty is a condition to the other’s duty and neither performs her duty
  i. discharge by operation of law-(contractual duty of performance is merged in court judgment for breach of duty)
j. statute of limitations-makes it unenforceable

VII. BREACH OF CONTRACT

A. When does breach occur?
  1. promisor under absolute duty to perform and
  2. duty has not been discharged

B. Material or Minor Breach?
  1. material-if as result of breach the nonbreaching party does not receive the substantial benefit of bargain.
     a. non breaching party may:
        1. treat contract as an end and
        2. immediate right to all remedies for breach including total damages
  2. minor breach with anticipatory repudiation is a material breach
  3. Test:
     a. amount of benefit received by nonbreacher
     b. adequacy of compensation for damages to injured party
     c. extent of party performance by breacher
     d. hardship to breaching party
     e. negligent or willful behavior of breacher
     f. likelihood that breaching party will perform remainder of contract

  4. Timeliness of performance—generally failure to perform by time stated is not material if performance rendered within a reasonable time
     a. exception—nature of contract makes timely perform. Essential or time is of the essence is provided in contract then it is material.

C. Remedies for Breach
  1. Damages (compensatory, nominal, punitive)
  2. Goal is to put parties in as good a position as would have been with full performance
     a. standard measure of damages—expectation

VII. REMEDIES

The law can protect the expectation, reliance, or restitution interests or some
combination of them.

DAMAGES

A. Expectation Interest

1. Goal of contract remedies—protect expectation interest
   example: UCC 1-106—“put the aggrieved party in as good a position as if the other party had full performed, but penal damages may not be had....”

2. Where the parties expected to be as the result of performance

3. Policy Reasons—no contract police, no arrests, etc to encourage performance b/c few are willing to pay for it, balance ends and costs of alternative ways and chosen to protect expectation and hope this gives an optimal level of performance at an acceptable cost.

4. Duty to mitigate
   a. remedies generally based on encouraging aggrieved party to enter a substitute contract and then award damages to make up any loss
   b. damages
      loss in value+other loss
      less costs avoided
      less loss avoided
   b. UCC—may withhold delivery, stop delivery, resell and recover damages, recover damages for non-acceptance
      1. treats buyers as if they had covered their needs from another seller and awards damages as increased cost of substitute contract.
      2. If unable to sell goods after reasonable effort to resell at reasonable price, then may recover contract price.
   c. substitute contract cannot be different or inferior examples:
      1. Mclaine v. 20th century- lead role in Western different than lead role in musical
      2. de la Falaise v. GBP-had to deduct from damages the amount she made doing radio shows-other employment has to be substantially similar
      3. Police officer had failed to mitigate damages when another officer got job at another city and this guy went to college.
      4. Bus driver-similar route nearby but no merit system did not make it inferior
   d. Loss volume seller principle-
      1. if you could sell an unlimited number, then no duty to mitigate damages
examples:
a. Neri v. Retail Marine-boats
b. car dealers?
c. contractors
e. Expenses occurred in mitigating damages are recoverable
f. Incidental Damages—costs of shipping, storing, going to market, etc. and are normally added to expectation damages
g. Liquidated Damages—provision in a contract that fixes the amount of damages in the event of a breach. Enforceable if not a penalty.

1. Enforceable if:
a. actual damages that would result in breach must be impractical or extremely difficult to estimate
b. Amount of damages must be a reasonable forecast

2. UCC—enforceable if the amount fixed is reasonable in light of the anticipated or actual harm caused by the breach.
Examples: Lake River v. Corrubundum—damages were grossly disproportionate to any probable loss

3. Policy Considerations—
a. against penalties—compensatory damages should be enough to deter inefficient breaches and penal damages could deter efficient breaches
b. for penalties—willing to agree to clause makes promise more credible, adds value, parties themselves will weigh costs and benefits, paternalist

h. Special Contracts
a. Sale of Goods—difference between K price and mkt price when seller tenders or buyer learns of breach
b. UCC—if buyer breaches, seller may withhold or stop delivery resell goods and recover the difference or ordinary damages for nonacceptance. If buyer has already accepted goods, buyer may recover contract price.
c. UCC—if seller breaches, buyer may reject nonconforming goods, cancel, cover, recover goods, specific performance, or recover damages for nondelivery
b. Sale of Land—Difference between K price and fair market value
c. Employment—full contract price less wages actually earned elsewhere after breach. If breached by Ee—whatever it costs to replace them
d. Construction—by owner-builder gets profits plus expended costs. By builder—cost of completion plus reasonable comp. For delay
e. Installment payments-only partial breach if a payment not made, can get only missed payment.

i. Consequential Damages-special damages above and beyond general damages. Typically lost profits. Given if a reasonable person would have foreseen at the time of entering the contract that such damages would result from the breach
   1. Can recover only those damages that arise naturally in the usual course of things or that both parties contemplated at the time of the contract
      example: Hadley v. Baxendale-didn’t tell messenger of crank shaft would put their business on halt, therefore not liable for lost profits.
   2. General Rule-consequential damages can be recovered only if at the time the contract was made, the seller had reason to forsee that the consequential damages were probable result of the breach.
   3. Policy consideration-would the party have agreed to it when faced with original possibility (true assent)

j. Punitive and Nominal Damages-generally not awarded unless breach but no actual loss is proven then nominal

k. Liquidated Damages-valid if damages were difficult to ascertain at the time of contract and the amount agreed upon was a reasonable forecast of compensatory damages. If amount is unreasonable, will be seen as penalty and not enforced.
   1. UCC-court can consider actual damages incurred in determining whether a liquidated damage clause is valid

l. Proof of Damages with Reasonable Certainty
   1. General Rule-Damages can be recovered only if the amount is reasonable certain of computation. (not speculative)
      a. Lost profits
         1. Existing Business-future profits can be reasonably estimated from past profits
         2. New Business Rule-no lost profits because inherently speculative
            example: new drive in movie theater
            Today- examine each case on own merits and Could possibly compare with similar business
            In same area
      b. Trend today-not to cut off damages of uncertainty unless uncertainty is fairly severe (UCC-damages are at best approximate and must be proved with
whatever definiteness the facts permit but no more)
c. Policy considerations
   1. Unfair to deny \( \Pi \) meaningful recovery for lack of a sufficient track record where \( \Pi \) had been prevented from establishing a record because of \( \Delta \) actions.

B. Reliance Interest
1. Based on aggrieved parties costs (including opportunity costs)
2. Purpose to put party in position as if the promise had not been made (1. Reliance costs, 2. Opportunity Costs)-status quo examples:
   1. buyer orders special steel which machine will process but seller defaults and doesn’t give machine. Buyer must pay to cancel steel contract with supplier or resell steel at lossee.
   2. buyer does not seek other contracts from other sellers, and costs them chance to find others like Mcaine
3. If you can’t get expectation, try reliance:
   a. if profits are uncertain
   b. no unjust enrichment
   c. some reason you cant get expectation
4. Injured party can recover:
   a. out of pocket expenses
   b. worsening of conditions (dif in value)
   c. pain and suffering beyond what was bargained for
5. If \( \Delta \) can prove the contract was losing one for \( \Pi \) then \( \Delta \) doesn’t have to pay. Contract must be shown to at least break even.

C. Restitution (Unjust Enrichment)(quasi-contract)
1. Reasonable value of a benefit gained by someone.
2. Found commonly in three situations:
   a. Party gives benefit under unenforceable contract because of some defense like SofF
   b. Enforceable contract and breach but contract was losing one for innocent party
   c. no contract formed but benefit gained in precontractual stage
3. Must show
   a. other party has received a benefit
   b. wrong/unjust for party to have that benefit
4. Conditions one always sues for breach of contract, not breach of conditions.
   a. failure of condition-defense and often ends obligation to
perform a qualified promise (other party can EXIT)

1. Effect of failure of condition must be substantial to exit (discharge). If other party has substantially performed, can’t exit but you have claim for damages
2. If you exit, you can’t recover

b. Concurrent conditions - promise on one side is same as condition on the other (my duty to perform is conditioned on their tender and vice-versa)

c. Tender - if you don’t want to exit, you must tender (be ready and willing to perform) then can sue for breach
d. If a contract calls for one performance which by its nature takes time and another which can be done instantly the one that takes time must be done first.

5. Examples:
   a. Colonial Dodge v. Miller - man buys car, no spare tire, didn’t meet all conditions, was allowed to discharge)
   b. Plante v. Jacobs - built house not all specifications, no material failure to perform, he got contract price minus damages they could prove
   c. Oliver v. Cambpell - if substantial performance, no restitution

6. Measurement -
   a. Fair market value of benefit (what it would have cost for someone else to do same thing) OR
   b. Increase in value

**D. Surrogates for Normative Choices**

1. Peevyhouse - in a coal mining lease, when lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period (to clean up) and the contract is fully performed except for remedial work, the measure of damages is the reasonable cost of performance of the work.

   Exception - where provision breached was incidental to main purpose and economic benefit is grossly disproportionate to cost of performance, the damages are limited to diminution in value (only $300) in this case

2. Policy considerations -
   a. If cost of performance is measurable and does not involve unreasonable economic waste, then can use it, and decrease in value is used if it would cause unreasonable economic waste.
   b. If defect in material or construction cannot be remedied without expenditure disproportionate to purpose
c. $\Pi$ could recover an unconscionable and grossly oppressive damages, contrasty to justice.
d. If $\Pi$ allowed to recover, they would get greater benefit than from full performance

E. Specific Performance
If damages inadequate, can seek specific performance
a. when damages inadequate: subject matter is rare or unique
b. Available for land and unique goods but not for services b/c of difficulty in supervision and signifies involuntary servitude.
c. Equitable Defenses available

III. CONTRACT AND CONTINUING RELATIONS
A. Spouses, Friends, Nieces, Nephews
1. Husbands and Wives
   a. Balfour v. Balfour- (promise to care for wife)-held no contract because 1.no intent to be forced into it by law 2. many promises everyday, to allow to sue would create too much litigation 3.partys didn’t intend for them to be attended by legal consequences
   b. Miller v. Miller-matters pertaining to home are not to become matters of public concern or inquiry
      1.lack of consideration
2. “Husbands and Wives who are not married”
   a. Marvin v. Marvin- adults who voluntarily live together and engage in sexual activity are as competent as any to enter into contract
3. Bait (Promises by a family member with money to influence the lives of those without it)
   a. Hamer v. Sideway- uncle told nephew he would give money if he would refrain from smoking, drinking, gambling, swearing until he was 21. He did, uncle was keeping money until ready to care for himself, uncle died, executor refused to pay, court ruled there was consideration because he gave up legal rights for a period of time.

B. Consideration
1. Consideration-
   a. benefit received by promisor or detriment incurred by promisee
   b. bargain approach-exchange in which each party views what she gives as the price of what she gets
   c. Enforceable element approach-any element that will make promise enforceable
   d. Can be an act or a promise to act if performance would be consideration
   e. exception to consideration needed is reliance.

2. Unrelied Upon Donative Promises-
   a. general rule- donative promise is unenforceable b/c no consideration.
      1. exceptions
         a. under seal
         b. relied upon
         c. moral obligation created
   2. NOT writing, nominal consideration (sell car for a dollar), conditional donative promise

3. Examples:
   a. A tells B and says, I have a gift for you, if you come over to my house, you can have it. Not an enforceable promise because coming over to house is not the price of the gift but a way to take possession
   b. uncle promises nephew $ if he refrains from smoking and drinking until 21. Enforceable b/c shows uncle was willing to pay $ for nephew’s actions -also, could be in it for his name sake

3. Relied Upon Donative Promise
   a. former rule-reliance was irrelevant, donative promise unenforc.
   b. Modern rule-if a donative promise induces reliance in a manner that promisor should reasonably expect, then it is enforceable
      1. Promissory Estoppel- (substitute for consideration)
         Restatement- if reasonably expect to induce action and does induce
         a. principle that promisor should be estopped from pleading lack of consideration when promisee has relied on donative promise
         b. enforced to the extent of the reliance
         c. Most say this is in place of consideration, some say it is a type of consideration

4. Bargain Promises
   a. general rule- a bargain constitutes consideration, therefore
a bargained for promise is enforceable.
b. Equal value not required
c. Exception-if already a preexisting legal duty to perform (antecedent duty rule)

5. Illusory Promises
   a. a statement that has the form of a promise but is not a real promise, leaves a free way out –vs- real promise-commitment that limits ones future options
   examples: I will buy insofar as I want to buy or I will buy but I may terminate my obligation
   b. general rule-if one party makes an illusory promise in exchange for another’s real promise, neither is bound
   c. Exceptions:
      1. Unilateral contracts- (promise in exchange for an act)
         example: A promises to pay B if he cuts down tree
         A wants B’s performance, not merely promise. B
         Never promises to cut down tree, but does so.
         A is bound to pay even though B was never bound
      2. Voidable Promises
         example: contract with minor, enforceable against A but not against child.
      3. Conditional Promises
         example: If A gets Chevy dealership, she will hire B as sales manager
      4. Alternative Promises
         a. general rule-each alternative must constitute consideration as if bargained for alone

C. The conditional gift
   1. Kirksey v. Kirksey-no consideration by moving to her brother in laws
   2. Ricketts v. Scothern-stopped working because grandfather was going to pay her money, her actions showed reliance upon promise, therefore enforceable

D. Statute of Frauds
   1. Certain contracts must be in writing
      a. executor/administrator
      b. answer to duty of another
      c. sale of land
      d. cannot be performed within one year from its making
      e. sale of goods in excess of certain value (UCC-500)
   2. Purpose
      a. evidentiary-prevents perjury and fraud by people who might falsely claim that contract was made when it was not
b. caution people, remind them they are making a commitment
c. symbol of commitment
d. channel behavior

3. Components of Writing:
   a. identify contracting parties
   b. subject matter description
   c. terms and conditions of agreement

4. Effect of noncompliance with statute
   a. majority- contract unenforceable but not void
      1. suit cannot be brought but it is valid for other purposes
   b. minority view- contract void

5. If get a benefit from contract that falls within statute, other party can recover for value of benefit even if you can’t enforce (restitution)

**E. Franchises**
1. Hoffman v. Red Owl- relied on agent’s statements, sued, promissory estoppel does not require that promise sued upon be able to sustain a cause of action under contract

**IV. CONTRACTS AND SOCIAL CONTROL**

**A. Illegal Contracts**
1. If a proposed contract is legal at time of offer but becomes illegal before acceptance, intervening illegality theory terminates offer. If contract made and later illegal, discharged.
2. Illegal if either consideration or object of contract is illegal
3. Illegal contract is void and courts will not intercede to aid third party
   a. severable portion may be enforced
   b. Carroll v. Beardon-sale of brothel illegal
   c. policy considerations
      1. punishment may not fit the crime, may provide incentive to carry out illegal contract rather than back out, one party may have actually planned the act, so when equal guilt, Δ is in better position, if not equal, courts sometimes adjust

4. Comparative Fault:
   a. Gates v. Rivers construction company-didn’t pay illegal alien because claimed not allowed to make contracts.
      1. if statute imposes sanctions but doesn’t declare contract invalid specifically, look at intent of legislature
      2. contract should be enforced in this case
         a. statute doesn’t declare contracts void
b. Π knew of violation should not be allowed to benefit
c. purpose of legislature not this
b. Karpinski v. Collins-If contract is against public policy, court can
refuse to enforce (balancing test)

B. Public Policy
1. Courts can refuse to enforce contracts or provisions that are against
public policy
2. Balancing Test (balance public policy against enforcement with
interest in its enforcement)
3. Covenants not to compete
   a. Fullerton Lumber v. Albert Torborg-tests of necessity and
reasonableness. If necessary and reasonable, then covenants
not to compete are lawful.

C. Capacity to Contract
1. Mental capacity
   a. Traditional rule-lacks capacity only if mental processes so
deficient that he lacks understanding of nature, purpose, effect
   b. Restatement- if unable to act in reasonable manner and other
party has reason to know of his condition (affective test)
   c. Voidable by him but not by other party
   d. still liable for restitution
2. Drunk or Drugged Persons
   a. temporary incapacity-test is whether so drunk or drugged
to be unable to understand nature, purpose, effect
3. Made with Minors (infacy)
   a. voidable at minor’s option, minor can enforce against adult
   b. not even liable for restitution except for value of necessaries
   c. Policy reasons-protect children from own lack of judgment,
if he were able to make binding contracts, spending power would
not be constrained by present wealth, parents would have less
control

D. Duress
1. Effort to establish boundary between proper and improper advantage
taking.
2. Threats must be wrongful/illegal (no duress if threats legal)
   a. exception- employer. employee (economic duress)
3. Duress is consent induced by physical force or threats of force or
other wrongful threats
   a. economic duress-threat to withhold something another party
wants is not duress because not wrongful but it is if:
   1. one party threatens or commits wrongful act that
would seriously threaten property or finances and

2. no adequate means available to avoid or prevent the threatened loss

4. Three concerns/reasons:
   a. bargaining process is unfair
   b. leverage is bad (employment at will)
   c. promise is bad/unfair

5. Mitchell v. CC Sanitation
   where there is such an inequity in terms, sacrifices, and rights, coercion/duress can exist (threat to lose job if didn’t sign release considered duress)

6. Wurtz v. Fleischman- deal to trade real property, duty to exercise reasonable economic power in bargaining, breach if unreasonable cause if victim would not have acted same without threat, damages of restitution

7. Selmer v. Blackslee-mere stress of business conditions is not duress if Δ not responsible for conditions

E. Undue Influence
   1. Unfair persuasion of a party who is under domination of person exercising persuasion
      a. example: attorney influences elderly client to sell property at unfair price
   2. Relationships fall outside impersonal market setting (gifts and wills)
   3. Odorizzi v. Bloomfield-teacher forced to resign.- There must be a combination of undue susceptibility in the servient person and excessive pressure by the dominating person to make the latter's influence undue when there is no confidential relationship between the two parties. (narrower than Restatement)

F. Misrepresentation
   1. A material misrepresentation by one party makes contract voidable.
   2. Obde v. Schlemeyer-termites found, LL knew of them, misrepresented

G. Relationships of Trust and Control
   1. Vokes v. Arthur Murray- a statement of party with superior knowledge may be considered statement of fact even if normally opinion (old lady who was vulnerable and paid for tons of dancing lessons)

H. Policy Arguments for Paternalism
   1. Goal of promoting efficiency by reducing transaction costs
   2. If fraud committed but not proven, agreement will be enforced which is inefficient, could lower proof requirements but widespread give victims inalienable entitlement they cannot waive and therefore cannot be fraudulently induce to abandon, deception must be more likely and less easily provable here than in general