**Contracts Outline Table of Contents (note: need to update before final – during dead days, also update checklist)**

1. **Is there a contract? 2**
	1. Basic Definition of Contract 2
	2. Consideration 2
	3. Contracts Enforceable w/o Consideration 3
	4. Promise to Pay Past Indebtedness 3
	5. Promise to Compensate for Past Benefit Received 3
	6. Bargain 4
	7. Mutual Assent/Mutual Obligation 4
	8. Basic Principle of Mutuality 4
	9. Did the parties intend to contract? 4
	10. Output/Requirements/Exclusive Dealing Contracts 5
	11. Conditions 6
	12. Form 6
	13. UCC Sale of Goods Form 6
	14. Statute of Frauds 7
	15. Negotiable Instrument 7
	16. Donative Promises 8
	17. Reliance 8
	18. Promissory Estoppel 8
	19. Estoppel in Pais 8
	20. When a Contract is Unenforceable – Special Circumstances 8
	21. Illusory Promise 9
	22. Pre-Existing Legal Duty 9
	23. Against Public Policy 10
	24. When a Contract is Voidable 11
	25. Duress 11
	26. Unconscionable 12
	27. Changes to the Original Contract 13
	28. Waiver 13
	29. Modification 13
	30. Accord & Satisfaction 14
	31. Substituted Contract 15
2. **What Does the Contract Consist of? 16**
	1. What did the parties intend the contract to mean? 16
3. **Is there a Breach of Contract? 17**
4. **What are the Damages/Remedies? 17**
	1. Available Remedies 17
	2. Purpose of Remedies 17
	3. Expectation Interest 17
	4. Damages for Breach of a Contract to Perform Services 17
	5. Breach by the Person who Has Contracted to Perform Services 17
	6. Breach by the Seller 18
	7. Breach by the Buyer 21
	8. Cases that Override the General Rule of Expectation Interest 24
	9. Mitigation 25
	10. Foreseeability 26
	11. Certainty 27
	12. Limitation on Damages Recoverable for Mental Distress 28
	13. When the Contract has a Liquidated Damages Clause 28
	14. Under-Liquidated Damages Clauses 29
	15. Specific Performance 29
	16. Reliance Interest 31
	17. Restitution Interest 32

**CONTRACTS OUTLINE – Updated December 9, 2008**

* **QUESTION 1 – IS THERE A CONTRACT?**
	+ **Contract**
		- **A promise** (expression of intention to act or refrain from acting in a certain way, made such that it justifies the person to whom the promise is made believing that a commitment has been made to them) **for the breach of which the law gives a remedy or the performance of which the law in some way recognizes a duty.** (Rstmt. Contracts §1 and 17)
		- **A contract requires a bargain in which there is manifestation of MUTUAL ASSENT to the exchange and sufficient CONSIDERATION, with some exceptions.**
	+ **Consideration**
		- **A performance, either an act other than a promise, a forbearance** (refraining from enforcing a right, obligation or debt), **the creation, modification or destruction of a legal relation, or a return promise that must be bargained for.** (Rstmt. Contracts §71 and 79)
			* **A waiver of a legal right at the request of another party is sufficient consideration** (Hamer v. Sidway)**, even if waiving the legal right is beneficial to the promisee** (Davies v. Martel Laboratory Services, Inc.).
			* **Consideration may be in the form of a detriment on the part of the promisee** (giving up something which immediately prior thereto the promisee was privileged to retain, or doing or refraining from something which he was privileged to do, or not to refrain from doing). (Davies v. Martel Laboratory Services, Inc.)
			* The making of the promise shrinks the realm of choice of the promisor – this reduced choice is enough for it to be a detriment.
		- **It is bargained for if it is sought by the promisor** (person who makes a contract) **in exchange for his promise and is given by the promisee** (person to whom a promise is made) **in exchange for that promise.**
		- **Performance or return promise may be given to the promisor or to some other person.**
		- **If requirement of consideration is met, there is no additional requirement of a gain, advantage, or benefit to the promisor or a loss, disadvantage or detriment to the promisee or an equivalence of values exchanged.**
		- **Consideration is generally not sufficient if it is nominal** (has the form of a bargain, but not the substance)**, unconscionable, a moral promise, made on a legally groundless claim or something that occurred in the past.** (Scnell v. Nell)
		- Policy underlying requirement of consideration:
			* Bargains facilitate trade and private economic planning through risk allocation. Enforcing bargain promises furthers this purpose.
		- **A promise may be implied or express.**
			* An implied promise to use reasonable efforts to bring profits and revenues into existence, from which both parties will benefit, is an enforceable promise. No additional express promise is necessary. (Wood v. Lucy, Lady Duff Gordon)
		- **There are some promises that will be enforced even though there is no consideration.**
			* **Types: debts barred by the statute of limitations, debts incurred by infants, debts of bankruptcy, a promise by an adult to pay a debt incurred when they were under the legal age, for certain types of past benefits received, and other cases where there is a pre-existing duty.** (Mills v. Wyman)
			* **Promises to pay past indebtedness will be enforced.**
				+ Promise to Pay Indebtedness; Effect on the Statute of Limitations (Restatement (Second) Contracts §82)

“(1) **A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.**

(2) The following facts operate as such a promise unless other facts indicate a different intention:

(a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or

(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or

(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.”

* + - * + Promise to Pay Indebtedness Discharged in Bankruptcy (Restatement (Second) Contracts §83)

**“An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.”**

* + - * **Some promises to pay for past benefit received will be enforced.**
				+ **In general** (Restatement (Second) Contracts §86)**:**

**“(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.**

**(2) A promise is not binding under Subsection (1)**

**(a) If the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or**

**(b) to the extent that its value is disproportionate to the benefit.”**

* + - * + **Where the promisee has cared for, improved, or preserved the property or person of the promisor, there is sufficient consideration for the promisor’s subsequent agreement to pay for the “service” because of the material benefit received. Saving the promisor from death or serious bodily harm is sufficient consideration.** (Webb v. McGowin)
	+ **Bargain**
		- **A party is generally not relieved from the terms of a contract simply because he made a bad bargain, as long as there is valid, bargained for consideration and mutual assent.** (Hancock Bank & Trust Co. v. Shell Oil Co.)
	+ **Mutual Assent and Mutual Obligation**
		- **“A promise against a promise will maintain an action upon the case.”**
		- **Principle of mutuality**
			* **General rule is that both parties must be bound or neither party is bound.**
				+ Exception for a unilateral contract (where parties exchange an act for a promise), because the person doing the act is not bound to do anything until he actually acts.
				+ Exception when the contract is voidable by one person because of a defense under the Statute of frauds or defense of incapacity.
			* **In a contract for sale, mutuality of obligation exists when there is an agreement to sell on one side and an agreement to purchase on the other. The agreement must be specific by quantity.** (Wickham & Burton Coal Co. v. Farmers’ Lumber Co.)
			* **Where an agreement is executory and completely terminable at will, there is no mutuality of obligation.** (Miami Coca-Cola Bottling Co. v. Orange Crush Co.)
			* Mutuality isn’t addressing the adequacy of consideration – it is addressing whether there really is consideration, of if it is an illusory promise.
		- **Assent – Did the parties intend to contract?** (Embry v. Hargadine)
			* **Restatement (Second) Contracts §20 – Effect of Misunderstanding**
				+ **“(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and**

**(a) neither party knows or has reason to know the meaning attached by the other; or**

**(b) each party knows or each party has reason to know the meaning attached by the other.**

* + - * + **(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if**

 **that party does not know/has no reason to know of any different meaning attached by the other, and the other knows/has reason to know the meaning attached by the first party.”**

Note: here “does know” is subjective, while “has reason to know” is objective if you say that this is based on the standard of what a reasonable person would know

“one person must be more wrong than the other” (Colfax Envelope Corp. v. Local No. 458-3M)

* + - * **The mental assent of the parties is not requisite for the formation of a contract. The Court will look to the outward expressions of a person as manifesting his intention rather than to the secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.** (Lucy v. Zehmer)
			* Subjective v. Objective Measure of Intent
				+ Why not just subjective?

Because then there would be no set standard of what assent means for purposes of contracting and anyone could later say that they didn’t intend to create a contract.

* + - * + Why not just objective?

Because this only looks at the content of the contract – doesn’t consider at all what the parties intended to get out of the contract.

* + - **Contracts for Output, Requirements and Exclusive Dealings**
			* **Requirements Contract:**
				+ **A seller promises to supply all of the buyer’s requirements of a defined commodity at a stated price over a designated period of time, and**
				+ **The buyer promises to purchase all of his requirements of the commodity during that time from the seller at the stated price.**
			* **Output Contract:**
				+ **A buyer promises to buy all of a seller’s output of a given commodity at a stated price over a given period of time, and**
				+ **The seller promises to sell all of her output of the commodity during that time to the buyer at the stated price.**
			* UCC §2-306 – Output, Requirements and Exclusive Dealings
				+ **“A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.**
				+ A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.”
			* **There is mutuality of obligation because the buyer/seller is required to use good faith** and both the buyer and seller are giving up freedoms to contract with others.
			* Even though UCC §2-306 only applies to the sale of goods, most courts hold that all requirements and output contracts have consideration.
	+ **Offer/Acceptance**
		- **Mode of Assent: Offer and Acceptance( Restatement (Second) Contracts §22)**
			* **“(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party and parties.**
			* **(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.”**
		- **Preliminary Negotiations**
			* **Difference between contract negotiations and the offer acceptance hinges on two things –**
				+ **Whether the parties believed they had concluded the bargaining process or**
				+ **If instead, they believed they were still in preliminary negotiations.**
			* **Preliminary Negotiations (Restatement (Second) Contracts §26)**
				+ **“A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”**
		- **Offer**
		- **Basic Definition: “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”** (Restatement (Second) Contracts §24)
		- **The Court will consider every communication between the parties to decide when the offer was made and when it was accepted. Must have clear manifestation from both parties to enter into contract with given specific terms.** (Lonergan v. Scolnick)
		- **Types of Offers/Situations**
			* **Advertisements**
				+ **General rule is that an advertisement is not an offer – it is an invitation to bargain.**
				+ **Test to determine whether an advertisement directed toward the general public creates a binding obligation is “whether the facts show that some performance was promised in positive terms in return for something requested” – must be clear, definite and leave nothing open for negotiation.** (Lefkowitz v. Great Minneapolis Surplus Store)
				+ The advertiser has the right at any time before acceptance to modify his offer, but he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. (Lefkowitz v. Great Minneapolis Surplus Store)
			* **Death or Incapacity of Offeror before Acceptance**
				+ **Under traditional contract law, the death or incapacity of an offeror terminates the offeree’s power of acceptance if the offer is revocable when the death or incapacity occurs.**
				+ Rule applies even when:

The offeree accepts at a time when he neither knows nor has reason to know of the offeror’s death or incapacity

In the absence of the rule, the offeror’s death would not excuse her estate from performance.

* + - * **Termination of Offer**
				+ **Methods of Termination of the Power of Acceptance (Restatement (Second) Contracts §36 ):**

**“(1) An offeree’s power of acceptance may be terminated by**

**(a) A rejection or counter-offer by the offeree, or**

**(b) lapse of time, or**

**(c) revocation by the offeror, or**

**(d) death of incapacity of the offeror or offeree.**

**(2) In addition, an offeree’s power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.”**

* + - * + **Rejection (Restatement (Second) Contracts §38)**

**“(1) An offeree’s power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.**

(2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.”

* + - * + **Lapse of Time (Restatement (Second) Contracts §41)**

**“(1) An offeree’s power of acceptance is terminated at the time specified in the offer, or if no time is specified, at the end of a reasonable time.**

(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

(3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in §49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.”

* + - * + **An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offeror or to take it under further advisement.** (Akers v. JB Sedberry, Inc.)
				+ **Revocation**

**Revocation by Communication from Offeror Received by Offeree (Restatement (Second) Contracts §42)**

**“An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.”**

Indirect Communication of Revocation (Restatement (Second) Contracts §43)

“An offeree’s power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.”

* + - **General rule is that a communication is effective when received – for offer, revocation, counter-offer, rejection, etc.**
		- **Acceptance**
			* **Restatement, Second, Contracts §50 – Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise**
				+ **(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.**
				+ **(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.**
				+ **(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.**
			* **Under a unilateral contract, an offer cannot be accepted by promising to perform – the offeree must accept, if at all, by performance and then the contract becomes executed.** (Ragosta v. Wilder)
			* **Form of Acceptance Invited (Restatement, Second, Contracts §30)**
				+ **“ (2) Unless otherwise indicated by the language or circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.”**
			* Reasonableness of Medium of Acceptance (Restatement, Second, Contracts §65)
				+ “Unless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received.”
			* **Invitation by Promise or Performance (Restatement (Second) Contracts §32))**
				+ **“In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.”**
			* **A person may accept an offer for a unilateral contract by rendering performance, even if he does so primarily for reasons unrelated to the offer.** (Simmons v. United States)
			* **Generally when an offer is made, it is necessary in order to make it a binding contract not only that it should be accepted, but that the offeror be notified of the acceptance. There is an exception – the offeror may receive notification of acceptance contemporaneously with his notice of the performance of the condition.** (Carlill v. Carbolic Smoke Ball Co.)
			* **To be effective, an acceptance must be definite and unequivocal. The acceptance may not impose additional conditions on the offer, nor may add limitations. An acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition.** (Ardente v. Horan)
			* **When acceptance is effective - exception to general rule for communications (MAILBOX RULE)**
				+ **Time When Acceptance Takes Effect (Restatement, Second, Contracts §63)**

**“Unless the offer provides otherwise,**

**(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession, without regard to whether it ever reaches the offeror; but**

**(b) an acceptance under an option contract is not operative until received by the offeror.”**

Special applications of Mailbox Rule:

If acceptance is sent before revocation is received, a contract is formed because revocation is effective when received and acceptance is effective when sent. The offeree may begin to perform the contract as soon as he dispatches his acceptance.

Date on which contractual liability applies – usually begins when acceptance is sent.

Interpretation of the offer – if a deadline is given, usually the acceptance has to be mailed by that date (unless stated otherwise), not received by the given date

Usually emails, faxes, etc. acceptances are effective upon dispatch

* + - * + Acceptance by Telephone or Teletype (Restatement, Second, Contracts §64)

Governed by principles applicable to acceptances where parties are in the presence of each other – acceptance is effective immediately

* + - * **Acceptance by Silence**
				+ **General rule is that silence does not ordinarily manifest assent, but the relationship between the parties or other circumstances may justify the assumption that silence indicates assent to the proposal.** (Polaroid Corp. v. Rollins Environmental Services, Inc.)
				+ **Acceptance by Silence or Exercise of Dominion (Restatement (Second) Contracts §69)**

**“(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:**

**(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.**

**(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.**

**(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.**

(2) An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.”

* + - * + Silence of the offeror as to acceptance of a late or otherwise defective acceptance operates as “acceptance” of the acceptance. (Restatement, Second, Contracts §70)
			* **What Constitutes Receipt of Revocation, Rejection or Acceptance (Restatement, Second, Contracts §68)**
				+ **“A written revocation, rejection or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.”**
			* Option Contract – Termination of Power of Acceptance (Restatement, Second, Contracts §37)
				+ “Notwithstanding [prior sections] the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.”
			* Impact on Acceptance of Delay in Communication of Offer (Restatement, Second, Contracts §49)
				+ “If communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the delay, though it is due to the fault of the offeror;
				+ but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows no has reason to know that there has been delay, a contract can be created by acceptance within the period which would have been permissible if the offer had been dispatched at the time that its arrival seems to indicate.”
			* Effect of Receipt of Acceptance Improperly Dispatched (Restatement, Second, Contracts §67)
				+ “Where an acceptance is seasonably dispatched but the offeree uses means of transmission not invited by the offer or fails to exercise reasonable diligence to insure safe transmission, it is treated as operative upon dispatch if received within the time in which a properly dispatched acceptance would normally have arrived.”
			* **Acceptance – “Shrink Wrapped Packages”, “Click to Accept”, etc.**
				+ **Language on the outside of a shrink-wrapped package with language to the effect of “opening this package or using the product inside confirms your acceptance of the following license agreement” is generally sufficient to create a contract with the consumer who opens the contract, providing the consumer has reason to expect the contents of the agreement.** (Arizona Cartridge Remanufacturers’ Ass’n. v. Lex-Mark Int’l Inc.)
				+ **A consumer may be bound by contractual terms by clicking on a download button if the offer makes it clear to the consumer that clicking on the download button would assent to the terms. The terms must be clear and visible (usually meaning that they must be placed on the screen such that they would be read before the download button is clicked). If the terms of the contract are discreet and would not be noticed/acceptance linked to the click of the download button to the normal consumer, a contract will not be formed by the consumer clicking download.** (Specht v. Netscape Communications Corp.) **If the consumer is frequently reminded of the terms, they have generally received the constructive notice necessary to be bound to the terms of the contract.** (Register.com, Inc. v. Verio, Inc.)
		- **Counter-Offers**
			* **Purported Acceptance Which Aids Qualification (Restatement (Second) Contracts §59)**
				+ **“A reply to an offer which purports to accept it but is conditional on the offeror’s assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.”**
			* **Counter-Offers (Restatement, Second, Contracts §39) Defined:**
				+ **“(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.**
				+ (2) An offeree’s power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.”
		- **Sale of Goods**
			* **Offer and Acceptance in Formation of Contract (UCC §2-206(1) )**
				+ **“(1) Unless otherwise unambiguously indicated by the language or circumstances**

**(a) an offer to make a contact shall be construed as inviting acceptance in any manner and by any medium reasonable for the circumstances.**

**(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.”**

* + - * Sale by Auction (UCC §2-328
				+ “(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance…
				+ (3) Such a sale is with reserve unless the goods are put in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale…”
	+ **“Content” necessary to create a contract, even with offer and acceptance**
		- **General**
			* **Even if the parties may manifest the intent to make a contract, if the essential terms of their agreement are so uncertain that there is no basis for deciding what the contract is for or whether the agreement has been kept or broken, there is no contract.** (Academy Chicago Publishers v. Cheever)
			* **Restatement, Second, Contracts §33 – Certainty**
				+ **“(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.**
				+ **(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.**
				+ **(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.”**
			* **Restatement, Second, Contracts §34 – Certainty and Choice of Terms; Effect of Performance or Reliance**
				+ **“(1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.**
				+ **(2) Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.**
				+ **(3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.”**
		- **Sale of Goods**
			* **UCC §2-204 – Formation in General**
				+ **“(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.**
				+ **(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.**
				+ **(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”**
		- Special Cases
			* Construction contracts - Both industry custom, as expressed in standard form subcontracts, and the circumstances surrounding the particular project, dictate the kinds of provisions the subcontractor should reasonably have expected in its final subcontract. (Crook v. Mortenson-Neal)
	+ **Option Contract**
		- **General**
			* **Option Contract (Restatement (Second) Contracts §87)**
				+ **“(1) An offer is binding as an option contract if it**

**(a) Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or**

**(b) Is made irrevocable by statute.**

* + - * + **(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.”**
			* **Option Contract Created by Part Performance or Tender (Restatement (Second) Contracts §45)**
				+ **“(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.**
				+ **(2) The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.”**
		- **Sale of Goods – Firm Offers (UCC §2-205)**
			* **“An offer by a merchant to buy or sell goods in a signed writing by which its terms give assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for reasonable time, but in no event may such period of irrevocability exceed three months, but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.”**
		- Common law v. UCC requirements for option contracts:
			* Common law – offer is freely revocable unless the promise to hold the offer open is supported by consideration.
			* UCC – a “firm offer” may be made without consideration, as long as:
				+ Offeror is a merchant;
				+ Offer is in a signed writing;
				+ Offer contains an “assurance that it will be held open” and
				+ Period of irrevocability does not exceed 3 months.
	+ **Conditions**
		- **Basic – What is a condtion?**
			* **Restatement, Second, Contracts §224 – Condition Defined**
				+ **A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.**
			* **Express Condition - an explicit provision in a contract that provides either that:**
				+ **A party to the contract does not come under a duty to perform unless and until some designated state of events occurs or fails to occur (CONDITION PRECEDENT); or**
				+ **If some designated state of events occurs or fails to occur, the duty of a party to perform is suspended or terminated (CONDITION SUBSEQUENT).**

 “To accept, the offeree must assent unconditionally to the offer as made, but the fact that the offeree makes a conditional promise is not sufficient to show that his acceptance is conditional. The offer itself may either expressly or by implication propose that the offeree make a conditional promise as part of the exchange. By assenting to such a proposal, the offeree makes a conditional promise, but his acceptance is unconditional.” (text from Rstmt.)

* + - * A condition may or may not be inside the control of one or more of the parties.
			* **Promise v. Condition** (Howard v. Federal Crop Insurance Corp.)
				+ **Courts are more likely to find something to be a promise rather than a condition because the Court will try to enforce most contracts, and it is easier to enforce a promise than a condition.**
				+ **When it is doubtful whether words create a promise or a condition precedent, they will be construed as creating a promise.**
				+ **The provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. The circumstances, intents of the parties, etc. may be considered as well as the language.**
				+ **Terms such as “if”, “provided that”, “when”, “after”, “as soon as”, “subject to”, “on condition that”, or some other similar phrase are evidence that performance of a contractual provision is a condition.**
		- **Restatement, Second, Contracts §225 – Effects of the Non-Occurrence of a Condition**
			* **(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.**
			* **(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.**
			* **(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.**
		- **Restatement, Second, Contracts §226 – How an Event May be Made a Condition**
			* **An event may be made a condition either by the agreement of the parties or by a term supplied by the court.**
		- **Restatement, Second, Contracts §227 – Standards of Preference with Regard to Conditions**
			* **(1) In resolving doubts as to whether an event is made a condition of an obligor’s duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee’s risk of forfeiture, unless the event is within the obligee’s control or the circumstances indicate that he has assumed the risk…**
		- **Satisfaction of the Obligor as a Condition**
			* **Restatement, Second, Contracts §228 – When it is a condition of an obligor’s duty that he be satisfied with respect to the obligee’s performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.**
			* Often a contract provides that one party need not pay for the performance of the other party unless the first party is satisfied with the performance. Question arises whether the first party may escape liability even though his dissatisfaction is unreasonable. Following factors would be influential:
				+ The language used – did the contract say “personally satisfied” or “satisfactory”.
				+ The degree to which it is possible to apply an objective standard to the performance in question.
				+ The degree to which the first party would be enriched at the second party’s expense if the contract is interpreted to require the first party’s personal satisfaction.
				+ The degree of forfeiture that will be imposed on the second party if the first party escapes liability to pay for the second party’s performance.
			* **The reasonable person standard is employed when the contract involves commercial quality, operative fitness or mechanical utility that other persons can judge… the standard of good faith is employed when the contract involves personal aesthetics or fancy.** (Morin Building Products Co. v. Baystone Construction)
		- **Restatement, Second, Contracts §229 – Excuse of a Condition to Avoid Forfeiture**
			* **To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.**
	+ **Form**
		- **Express contract, implied-in-fact and implied-in-law (“quasi contract”) contracts:**
			* **Express contract – the parties explicitly consent to the terms of the contract**
			* **Implied-in-fact – the parties implicitly consent to the terms of the contract through their conduct**
				+ “It arises where the court finds from the surrounding facts and circumstances that the parties intended to make a contract but failed to articulate their promises and the court merely implies what the parties really intended.” (Hill v. Waxberg)
			* **Implied-in-law (“quasi contract”) – not a contract at all; a certain kind of conduct that creates liability for unjust enrichment**
				+ One of the most common areas in which recovery on a contract implied in law is allowed is that of work performed or services rendered. BUT, there is an exception:

Ordinarily liability is imposed only when the person whose benefit they were rendered requested the services or knowingly and voluntarily accepted their benefits - “Officious intermeddler doctrine” – where a person performs labor for another without the latter’s request or implied consent, he cannot recover. (note: THERE IS AN EXCEPTION FOR EMERGENCY AID.)

* + - * + A mentally impaired person may be held liable for necessaries furnished to him in good faith while in his helpless condition. (Sceva v. True)
		- **UCC §2-201 – Sale of Goods**
			* **Goods = “all things which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities… and things in action”**
			* **A contract for the sale of goods for the price of $500 or more is not enforceable unless there is sufficient writing to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.** (Note: A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable beyond the quantity of goods shown in the writing.) **Exceptions are if (a) goods are to be specially manufacture and not otherwise suitable for sale and notice of repudiation is received after production has begun or commitments for procurements have been made or (b) the party against whom enforcement is sought admits that a contract was made, or (c) if payment has been made and goods have been accepted or received.**
			* **For merchants, a writing of confirmation of contract may follow in a reasonable time, as long as the party receiving it had reason to know of its contents. The receiving party must give any objection within 10 days of receiving it.**
			* **Predominant Factor Test – If the sale of the good is the predominant factor in a contract and the service is merely incidental, it is governed by the UCC as a sale of goods.** (Pittsley v. Houser)
		- **Statute of Frauds – certain types of contracts are unenforceable against a party unless the contract is in writing, or evidenced by a writing signed by the party to be charged (the party sought to be held liable under the contract).**
			* **Section 4: Unless the agreement is in writing, and signed by the party to be held responsible, no action shall be brought…**
				+ **To charge any executor or administrator upon any special promise to answer damages out of his own estate** (this applies to “old debts”, not “fresh debts”)**; or**
				+ **To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person** (i.e. guarantor promise made to creditor, not debtor, where guarantor does not personally benefit)**; or**
				+ **To charge any person upon any agreement made upon the consideration of marriage** (“in consideration of marriage”, NOT “to marry”)**, or**
				+ **Upon any contract or sale of lands… or any interest in or concerning them** (unless a lease at will or under three years)**; or**
				+ **Upon any agreement that cannot be performed within one year.**
			* **“In Writing” means that there is some kind of signature/symbol used with intent to authenticate the document by party against whom enforcement is sought, identifies parties, the subject matter, and essential terms. “In writing” may be through electronic means.**
			* Courts have tended to restrict the use of the Statute of Frauds and find ways of making oral agreements enforceable.
		- **A donative promise is not enforceable because it lacks consideration. A donative promise is simple a gratuitous promise, made for reasons of affection.** (Dougherty v. Salt)
		- **Difference between a conditional bargain promise and a conditional donative promise is that in the bargain promise parties view performance of the condition as the price of the promise, while in a donative promise, parties view performance of the condition as necessary means to make a gift, not as the price.**
		- **Whether it is a donative promise or a completed gift is based on when you consider that the gift has been completed.**
			* **A completed gift is recognized by the law as a binding and legal transaction which cannot be reversed by the donor in the absence of fraud, etc.**
			* Deed of Gift occurs when a person who owns personal property makes a gift of that property by executing a signed writing in which donor and donee are identified, subject matter of gift is described, nature of interest given is specified and donor manifests an intention to make the gift by means of the instrument. **If you consider the handing over of the deed of gift (or other like thing – title, check, etc) the completion of the gift, then it is no longer a donative promise and is enforceable.**
	+ **Reliance**
		- **Promissory Estoppel** (Rstmt. Contracts §90)
			* **A PROMISE which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.**
			* **Promissory estoppel a way of enforcing a promise that otherwise lacks consideration.** (Feinberg v. Pfeiffer Co.)
		- **Estoppel in Pais** – If 5 necessary elements are present, defendant is prevented from denying the statement of fact:
			* **Misrepresentation of FACT**
			* **Intention of fraud or negligence;**
			* **Believed to be true by the person relying up in;**
			* **Person making statement must intent for it to be relied upon; and**
			* **Person relying on statement must justifiably do so and suffer a detriment.**
	+ **When a Contract is Unenforceable – Special Circumstances**
		- **Basic Answer – When it lacks bargained for consideration and/or mutual assent.**
		- **When it is based on an illusory promise** (no consideration)
			* **Illusory Promise**
				+ **A promise conditioned on the will of the promisor is an illusory promise.**
				+ **Restatement (Second) of Contracts §77 – Illusory and Alternative Promises**

**“A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless**

**Each of the alternative performances would have been consideration if it alone had been bargained for; OR**

**One of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.”**

* + - * + **An illusory promise is related to the idea of detriment – if one party can walk away without detriment and has not restricted his freedoms in any way, the promise may be illusory.**
				+ **Courts will usually find a way to enforce the contract, even if the promise appears illusory. Examples:**

A contract with an option to cancel the lease with ten-days notice is not based on an illusory promise because the lessor will receive at least ten days rent. (Linder v. Mid-Continent Petroleum Corp.)

A contract to sell a stated amount within a stated period of time with an option for the buyer to be able to cancel the order before shipment will usually be enforced – it is not illusory because there was time for the seller to ship before the buyer cancelled. (Gurfein v. Werbelovsky)

A purchase contact in which the buyer puts down a deposit and then is given a set time period to examine title and complete the purchase is not based on an illusory promise – the buyer’s duty to exercise good judgment in good faith is adequate consideration. (Mattel v. Hopper)

* + - **When it is based upon the performance of a legal duty** (no consideration)
			* **“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.”** (Restatement (Second) of Contracts, §73)
			* **If the promise of one party is to perform a pre-existing duty (whether by law or by previous contract), there is no mutuality of obligation and no consideration.**
			* **If the legal obligation has expired (i.e. past the statute of limitations for a debt), renewing the obligation can be consideration.**
		- **An illegal, unconscionable or against public policy contract is not enforceable.**
			* **When enforcing the contract would be against public policy:**
				+ **General Guidelines** (Restatement (Second) Contracts §178)

**A promise or other term of an agreement is unenforceable on grounds of public policy if:**

**Legislation provides that it is unenforceable; or**

**The interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.**

In weighing the interest in the enforcement of a term, account is taken of:

The parties justified expections;

Any forfeiture that would result if enforcement were denied; and

Any special public interest in the enforcement of the particular term.

In weighing a public policy against enforcement of a term, account is taken of:

The strength of that policy as manifested by legislation or judicial decisions;

The likelihood that a refusal to enforce the term will further that policy;

The seriousness of any misconduct involved and the extent to which it was deliberate; and

The directness of the connection between that misconduct and the term.

* + - * + **General Bases of Public Policies Against Enforcement** (Restatement (Second) Contracts §179)

**A public policy against the enforcement of promises or other terms may be derived by the court from:**

**Legislation relevant to such a policy, or**

**The need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example:**

**Restraint of trade;**

**Impairment of family relations; and**

**Interference with other protected interests.**

* + - * + **Agreements between spouses are usually not enforceable because the parties usually do not intend for them to have legal consequences.** (Balfour v. Balfour)
				+ For agreements affecting parenthood/life:

Promise Affecting Custody

“The promise affecting the right of custody of a minor child is unenforceable on grounds of public policy unless the disposition as to custody is consistent with the best interest of the child.” (Restatement (Second) Contracts §191)

Agreements entered into at the time of in vitro fertilization is commenced are enforceable and binding on the parties, subject to the right of either party to change his or her mind about disposition, up to the point of use or destruction. Notwithstanding a contract, parties must give mutual assent for the use of frozen embryos. (In re The Marriage of Witten)

In cases where parenthood is “created” by agreement, the agreement in and of itself does not create any new legal obligations for the supposed “parent” (to provide child support, etc). A separate agreement to care for the child may be enforceable. (T.F. v. B.L.)

Surrogate parenting agreements are usually void and unenforceable if the mother’s agreement was obtained prior to a reasonable time after the child’s birth or if her agreement was induced by payment of money. (R.R. v. M.H.)

Contracts for the sale/exchange of organs are unenforceable. (Note: would not include expenses for storage, transfer or care of the organ) (42 U.S.C. §274(e))

* + - **A novation requires a previously enforceable debt. A novation formed on a previous contract that is unenforceable is not valid.** (Maxwell v. Fidelity Financial Services, Inc.)
	+ **When A Contract Is Voidable**
		- **When Contract is Made Under Duress** (affecting “mutual assent” element)
			* This is ultimately an interpretation of facts by the court.
			* **If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. If manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party in good faith and without reason to know of duress either gives value or relies materially on the transaction.** (Rstmt. Contracts §175)
			* **Threat is improper if what is threatened or threat itself is a crime or tort, what is threatened is criminal prosecution or use of civil process and the threat is made in bad faith, or the threat is a breach of duty of good faith and fair dealing with recipient.** **Threat is improper if the resulting exchange is not on fair terms and the threatened act would harm the recipient and not significantly benefit the party making the threat, effectiveness of the threat is significantly increased by prior unfair dealing, or what is threatened is otherwise a use of power for illegitimate means.** (Rstmt. Contracts §176)
			* **Duress doctrine allows for a contract not to be enforced because it lacks mutual assent.** **A detriment/benefit is enough to have consideration, even under duress.**
			* **The existence of a threat of considerable financial loss or impending bankruptcy do not by themselves establish economic duress -** **the threat must be CAUSED by the party it is claimed against.** (Chouinard v. Chouinard)
			* **A threat of one party to breach the contract in and of itself does not constitute duress.** **It must also appear that the threatened party could not obtain the goods from another source and an ordinary action for breach of contract is not adequate.** (Austin Instrument, Inc. v. Loral Corp.)
		- **When a Contract is Unconscionable**
			* **If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or so may limit the application of any unconscionable term as to avoid any unconscionable result.** (Rstmt. Contracts §208, §2-302 of UCC, Williams v. Walker-Thomas Furniture Co.)
			* When it is claimed or appears to the Court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the Court in making a determination. (§2-302 of UCC)
			* **Unconscionability has both substantive** (actual content of the contract) **and procedural** (how the contract was made) **aspects.**
			* **Inadequacy of consideration, unequal bargaining positions, or an allocation of risks to a weaker party does not of itself invalidate a bargain, but a gross disparity in the values exchanged or harsh security terms may be an important factor in a determination that a contract is unconscionable.** (Maxwell v. Fidelity Financial Services, Inc.)
		- **When there has been a mistake**
			* **Restatement, Second, Contracts §151 – Mistake Defined**
				+ **“A mistake is a belief that is not in accord with the facts.”**
			* **Unilateral Mistake**
				+ **Restatement, Second, Contracts §153 – When Mistake of One Party Makes a Contract Voidable**

**Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in §154, and**

**(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or**

**(b) the other party had reason to know of the mistake or his fault caused the mistake.**

* + - * + **Restatement, Second, Contracts §154 – When a Party Bears the Risk of Mistake**

**“A party bears the risk of mistake when**

**(a) the risk is allocated to him by agreement of the parties, or**

**(b) he is aware, at the time the contract was made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or**

**(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.”**

Note: risk of mistake comes into play when the mistake results from that party’s neglect of a legal duty… ordinary negligence does not constitute neglect of a legal duty. This legal duty is generally to “act in good faith and in accordance with reasonable standards of fair dealing.” (Donovan v. RRL Corp.)

* + - * + **Limitations on Rule**

**Relief is generally not available unless agreement is completely executory or the other party can be adequately compensated.**

**The mistake must be substantial.**

**Cannot be a mistake of judgment – must be clerical, misconstruction of specifications, etc.**

* + - * **Mutual Mistake**
				+ **General:**

**Restatement, Second, Contracts §152 – When Mistake of Both Parties Makes a Contract Voidable**

**(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in §154.**

**(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution or otherwise.**

Limitations:

When there is no mistake as to the identity of the thing sold, there is not the kind of mutual mistake that justifies rescission of the contract. (Wood v. Boynton)

* + - * + **Sale of Goods:**

**Absent an assumption of the risk, if at the time of contracting for the sale of specific goods, unbeknownst to the parties, the goods never existed or are no longer in existence, no contract is made. Where the seller is negligent in having a mistaken belief, liability may be found on an implied warranty of existence or negligence theory – see UCC provisions – this may mean that the seller cannot void the contract because he bears the risk.**

**UCC §2-312 – Warranty of Title and Against Infringement; Buyer’s Obligation Against Infringement.**

**(1) Subject to (2), there is in a contract for sale a warranty by the seller that:**

**(a) the title conveyed shall be good, and its transfer rightful; and**

**(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.**

**(2) A warranty under (1) will be excluded or modified only by specific language on or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.**

**(3)… a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.**

**UCC §2-313 – Express Warranties by Affirmation, Promise, Description, Sample.**

**(1) Express warranties by the seller are created as follows:**

**(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promises.**

**(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.**

**(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.**

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

**UCC §2-314 – Implied Warranty; Merchantability; Usage of Trade**

**(1) Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.**

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unity and among all units involved; and

(e) are adequately contained, packaged and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified other implied warranties may arise from course of dealing or usage of trade.

**UCC §2-315 – Implied Warranty; Fitness for Particular Purpose**

**Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified… an implied warranty that the goods shall be fit for such purpose.**

**UCC §2-316 - Exclusion or Modification of Warranties**

**(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence negation or limitation is inoperative to the extent that such construction is unreasonable.**

**(2) Subject to (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous….**

**(3) Notwithstanding (2)**

**(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and**

**(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and**

**(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.**

* + - * **Mistakes in Transcription – Reformation**
				+ **Restatement, Second, Contracts §155 – When Mistake of Both Parties as to Written Expression Justifies Reformation**

**Where a writing evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.**

* + - * + **Requirements for Reformation:**

**There must have been an agreement between the parties.**

**There must have been an agreement to put the agreement into a record.**

**A variance between the prior agreement and the record exists.**

* + - * + **Limitations on reformation** (Chimart Associates v. Paul)

**Substantively - reformation is not available when the parties purposely contract based on uncertain/contingent events.**

**Procedurally - there is a presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties… parties seeking reformation must overcome that presumption**

* + - **Misrepresentation/ Non-disclosure**
			* **Misrepresentation – General**
				+ **Restatement (Second) Contracts §159 – Misrepresentation Defined**

**A misrepresentation is an assertion that is not in accord with the facts.**

* + - * + **Elements of Misrepresentation:**

**Misrepresentation/Fraudulent Statement**

**Concerns a Material Fact**

**There is Justifiable Reliance**

* + - * + **Whenever a party has fraudulently induced another to enter into a transaction under circumstances giving the latter to bring a tort action for deceit, the deceived party may instead elect to avoid the transaction and claim restitution. Misrepresentation or non-disclosure may render a transaction voidable even if there would be no tort cause.**
				+ **If the misrepresentation is intentional, avoidance is available regardless of the materiality of the fact.**
				+ **To recover for misrepresentation, the deceived party must establish causation – the party seeking recovery must have relied on the fact when entering into the transaction.**
				+ **Misrepresentation of fact may render a contract voidable; erroneous statements of opinion generally do not.**
			* **Non-Disclosure**
				+ **General rule is that there is no duty to disclose. Exceptions are:**

**Where a statute/regulation requires disclosure.**

**There is a difference between non-disclosure and concealment – concealment can be considered misrepresentation.**

**Disclosure is generally required if the matter is material (one that a reasonable person would attach importance in determining his choice of action in the transaction). Failure to disclose is misrepresentation.** (Hill v. Jones)

**Where partial disclosure is made, lack of full disclosure may constitute misrepresentation.**

**Where a party has made a true statement in good faith and supervening events make it no longer true, there is a duty to disclose the discovered truth if the representor knows that the other is relying on it.**

**Relationship between the parties – fiduciary, confidential, etc. – there is a duty to disclose material facts.**

* + - * + **Restatement (Second) Contracts §160 – When Action Is Equivalent to Assertion (Concealment)**

**Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.**

* + - * + **Restatement (Second) Contracts §161 – When Non-Disclosure is Equivalent to an Assertion**

**A person’s nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:**

**(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.**

**(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.**

**(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in party.**

**(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.**

* + **Changes to the Original Contract**
		- **Waiver**
			* Difference between a modification and a waiver: **a modification is a change of the promise, while a waiver is a change of a condition.**
			* **A condition precedent may be expressly waived.**
				+ **GENERAL** - Promise to Perform a Duty in Spite of a Non-Occurrence of a Condition (Restatement (Second) Contracts §84)

“(1) Except as stated in Subsection (2), **a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless**

**(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or**

**(b) uncertainty of the occurrence of the condition was an element of risk assumed by the promisor.**

(2) **If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if**

**(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and**

**(b) reinstatement of the requirement of the condition is not unjust because of a material change or position by the promisee or beneficiary; and**

(c) the promise is not binding apart from the rule stated in Subsection (1)”

* + - * + **SALE OF GOODS** – UCC §2-209(5)

**“(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.”’**

**Note: waiver may also occur through course of performance**

* + - **Modification of the Contract**
			* **GENERAL Definition of a Modification** (Restatement (Second) Contracts §89)
				+ **“A promise modifying a duty under a contract not fully performed on either side is binding if:**

**(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or**

**(b) the promise is made binding by statute; or**

**(c) [promissory estoppel would apply]”**

**Note: must also have consideration**

* + - * **SALE OF GOODS Definition of a Modification** (UCC §2-209)
				+ **Agreement of modification needs no consideration to be binding.**
				+ A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
				+ **Statute of Fraud requirements must be satisfied.**
				+ Although an attempted modification or rescission does not satisfy previous requirements, it can be a waiver. Waiver can be rescinded unless retraction would be unjust due to reliance.
			* **What kinds of contracts can be changed without consideration?**
				+ **UCC Sale of Goods**
				+ **When the change is affecting a waiver** (therefore not a modification)**, not a change of the promise/original consideration**
		- **Accord & Satisfaction**
			* **Accord & Satisfaction** (Restatement (Second) Contracts §281)
				+ **An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty. Performance of the accord discharges the original duty.**
				+ Until accord is performed, it is executory.
				+ **Performance of the accord discharges the original duty.**
				+ **Before performance of accord, the original duty is suspended unless:**

**Breach by obligor:**

**WILL discharge the new duty of the obligee to accept the satisfaction. If this happens, the obligee may choose to enforce either duty – original or under the accord.**

**Breach of obligee:**

**Does NOT discharge the original duty. Obligor may sue for specific performance of accord in addition to any damages for partial breach of the original contract.**

* + - * **Accord & Satisfaction by Use of Instrument (UCC §3-111)**
				+ **“(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona-fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.**

Note: “in good faith” means that if it is tendered with deceit, etc, it cannot be an accord.

Note: “bona-fide dispute” means that the parties must disagree as to the debt or obligation owed at the time of the accord

* + - * + **(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as a full satisfaction of the claim.**

Note: The statement must be visible, understood and clear, written such that a reasonable person against whom it is to operate ought to have noticed it.

* + - * + (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1)[claimant sent notice that the instrument should be sent to a designated person and the instrument was never received]

(2)[The claimant sent within 90 days a repayment of the instrument to the person against whom the claim is asserted, unless (1) applies]

* + - * + A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant… having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.”
		- **Substituted Contract**
			* **Definition:** (Restatement (Second) Contracts §279)
				+ **“(1) A substitute contract is a contract that is itself accepted by the obligee in satisfaction of the obligor’s existing duty.**
				+ **(2) The substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the oblige a right to enforce the original duty.”**
			* **Original contract is immediately discharged upon formation of substituted contract. Suit can only be brought under the new contract.**
			* Distinction between accord & satisfaction and substituted contract – with an accord & satisfaction, the original duty is not discharged until the satisfaction is complete; with a substituted contract, the contract itself discharges the original duty
* **QUESTION 2 – WHAT DOES THE CONTRACT CONSIST OF?**
	+ **What did the parties intend for the contract to mean?**
		- “Old Contract Law” = objective intention only, “New Contract Law” = subjective intentions of parties matters
		- **When Contract is Lacking a Term/Disagreement as to Term**
			* **General**
				+ **Restatement, Second, Contracts §201 – Whose Meaning Prevails**

**“(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.**

**(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made**

 **that party did not know/had no reason to know of any different meaning attached by the other, and the other knew/had reason to know the meaning attached by the first party.**

**(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.**

* + - * + **Restatement (Second) Contracts §204 – Supplying an Essential Omitted Term**

**“When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the Court.”**

* + - * **Sale of Goods – “Gap Fillers”** that are used to fill gaps the parties leave in a contract for the sale of goods; are default rules that the law reads into a contract in the absence of the parties’ actual agreement on the issues.
				+ **UCC §2-305 – Open Price Term**

**“(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if**

**(a) nothing is said as to price; or**

**(b) the price is left to be agreed by the parties and they fail to agree; or**

**(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.**

**(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.**

**(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.**

**(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract.** In such a case the buyer must return any goods already received or if unable to do so must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.”

* + - * + **UCC §2-308 – Absence of a Specified Place for Delivery**

**“Unless otherwise agreed**

**(a) the place for delivery of goods is the seller’s place of business or if he has none his residence; but**

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.”

* + - * + **UCC §2-309 – Absence of Specific Time Provisions; Notice of Termination**

**“(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.**

**(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.**

**(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.”**

* + - * + **UCC §2-310 – Open Time for Payment or Running of Credit; Authority to Ship Under Reservation**

**“Unless otherwise agreed**

**(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and**

**(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract; and**

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.”

* + - **Interpretation of Contract Terms**
			* Parol evidence v. extrinsic evidence – extrinsic evidence is broader than parol evidence because extrinsic evidence includes not only evidence of other agreements but also evidence of surrounding circumstances, evidence of subjective intention, usages, course of dealing and course of performance.
			* **Parol Evidence**
				+ NOTE: IF THE UCC APPLIES, there is no need to go through a parol evidence analysis for usage of trade, course of performance, course of dealing, etc – they are always admissible if the UCC applies.
				+ **Comes into play when there is a written agreement between the parties and a party seeks to admit oral evidence to aid in interpretation/for terms of the contract.**
				+ **2 parts – whether a term agreed upon prior to or contemporaneously with the writing or other record should be received in evidence when there is an integrated writing or other record AND what extrinsic evidence is admissible in interpreting a writing or other record.**
				+ General - Restatement, Second, Contracts §213 – Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

* + - * + **Parol evidence is always admissible to determine whether or not parol evidence of substantive issues to the contract should be admitted:**

**Restatement, Second, Contracts §214 – Evidence of Prior or Contemporaneous Agreements and Negotiations**

**Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish**

**(a) that the writing is or is not an integrated agreement;**

**(b) that the integrated agreement, if any, is completely or partially integrated;**

**(c) the meaning of the writing, whether or not integrated;**

**(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;**

**(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.**

Restatement, Second, Contracts §215 – Contradiction of Integrated Terms

Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.

* + - * + **1st Question is whether or not the agreement is integrated – did the parties intend it to be a final agreement in writing? If integrated, fully or partially integrated?**

**Completely v. Partially Integrated Defined** (General – note: sale of goods is different – see below)

**Restatement, Second, Contracts §209 – Integrated Agreements**

**(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.**

(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

**(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.**

**Restatement, Second, Contracts §210 – Completely and Partially Integrated Agreements**

**(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.**

**(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.**

(3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

**The agreement may be completely integrated in whole or only a portion of it – in that case, the integrated and non-integrated sections will be considered separately.** (Masterson v. Sine)

**TEST FOR WHETHER IT IS COMPLETELY INTEGRATED:**

**If there is a merger clause, this declaration conclusively establishes that the integration is total, unless**

**The document is obviously incomplete, or**

**The merger clause was included as a result of fraud or mistake or any other reason sufficient to set aside a contract.**

**But, even a merger clause will not prevent enforcement of a separate agreement supported by a separate consideration.**

**If there is not a merger clause, look to the writing – does it appear to be a complete and exclusive agreement or is it obviously incomplete?**

**If it IS completely integrated, are the terms within the scope of the agreement?**

**In determining whether or not an oral term is one that ‘naturally’ would have been included in the writing, the trial court is not limited to a consideration of the face of the document. This court has recognized that ‘the surrounding circumstances, as well as the written contract, may be considered’, like relative bargaining power of parties, apparent completeness and detail of the writing itself, etc.** (Hatley v. Stafford)

**If within the scope of the agreement, then parol evidence is NOT admissible.**

**If not within the scope of the agreement, then does the additional term contradict with the terms of the agreement?**

Note: this includes an analysis of both explicit and implicit terms of the agreement.

**If it does contradict, then parol evidence is NOT admissible.**

**If it does not contradict, then parol evidence IS admissible** (so admissible if not within the scope and not contradicting)**.**

**If it is NOT completely integrated, then parol evidence IS admissible, even if within the scope of the agreement, as long as it doesn’t conflict with a term of the written agreement.**

* + - * + **Restatement, Second, Contracts §216 – Consistent Additional terms**

**(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.**

**(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is**

**(a) agreed to for separate consideration, or**

**(b) such a term as in the circumstances might naturally be omitted from the writing.**

* + - * + Special Circumstances – Integrated Agreements/Parol Evidence

Many written contracts contain provisions that state that the written contract is the final, complete and exclusive contract between the parties (“merger” or “integration” clauses). Treatment varies by jurisdiction.

There is an exception to the parol evidence rule that evidence of speech or conduct that occurred prior to or contemporaneous with the adoption of a writing is admissible if the evidence shows an “invalidating cause” of the written agreement (promissory fraud – when a party makes a promise with the intent not to perform it), etc), even if there is a merger clause or the agreement is otherwise thought to be completely integrated.

There is an exception to the parol evidence rule that the rule does not apply to a parol agreement under which the occurrence of some state of events is a condition to making the written agreement binding or effective (idea is that before the condition occurs, there is no contract, so parol evidence may be freely applied).

Parol evidence rule does not apply to a later agreement that modifies an integration – it only applies to agreements made before or contemporaneously with a written contract that constitutes an integration. A written contract may contain a “no oral modification” clause; these are generally enforceable under common law.

* + - * **The intention of the parties as expressed in the contract is the source of contractual rights and duties. The exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument is justified only if it is feasible to determine the meaning the parties gave to the words from the instrument alone.** (Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.)
			* **General Interpretation of Contracts:**
				+ **Restatement (Second) Contracts §202 – Rules in Aid of Interpretation**

**“(1) Words and other conduct are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.**

**(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.**

**(3) Unless a different intention is manifested,**

**(a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;**

**(b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.**

**(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.**

**(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.”**

* + - * + When the intent of both parties does not coincide on a material term, then there is not a contract unless one of the parties is more guilty than the other for the difference in meaning attached. (Mayol v. Weiner Companies, Ltd.)
				+ **In the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties’ intent, and the contract will not be terminable at will. Where the parties have not clearly expressed duration in a contract, the courts will imply that they intended performance to continue for a reasonable time.** (Haines v. New York)
				+ **The contract should be interpreted, with a view to the material circumstances of the parties at the time of execution, in light of the pertinent facts within their knowledge and in such a manner as to give effect to the main end designed to be accomplished.** (Spaulding v. Morse)
				+ **Restatement (Second) Contracts §222 – Usage of Trade**

**“(1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. It may include a system of rules regularly observed even though particular rules are changed from time to time.**

(2) The existence and scope of a usage of trade are to be determined as questions of fact. If a usage is embodied in a written trade code or similar writing the interpretation of the writing is to be determined by the court as a question of law.

**(3) Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.”**

**Note: express agreement prevails over use of trade**

* + - * **Sale of Goods**
				+ **UCC §2-202 – Final Written Expression: Parol or Extrinsic Evidence**

**“Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented** (even if the agreement is final)

**(a) by course of performance, course of dealing, or usage of trade; and**

**(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.”**

Note: more emphasis is placed on intent of parties in deciding if agreement is final than whether it contains all the terms.

Note: this section applies to the sale of securities

* + - * + **UCC §1-205 – Course of Dealing and Usage of trade**

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question…

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

 **(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.**

**Note: means order is:**

**1) express terms of contract**

**2) course of performance (see §2-208 below)**

**3) course of dealing**

**4) usage of trade**

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

* + - * + **UCC §2-208 – Course of Performance or Practical Construction**

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

**(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).**

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver of modification of any term inconsistent with such course of performance.

* + **Form Contracts**
		- General Rule is “mirror image” rule – terms of acceptance must mirror offer, or it is not an acceptance but a counter-offer. EXCEPTION IS FOR SALE OF GOODS.
		- Concern is the enforceability of preprinted terms and the import of preprinted terms in determining whether a form sent in response to an offer constitutes an acceptance.
		- Provisions of a contract can be divided into performance and nonperformance terms:
			* Performance terms specify the performance each party must render.
				+ Includes description of the subject-matter of the contract, quantity, price, delivery terms and payment terms.
			* All other provisions are normally nonperformance terms.
				+ May include how and when notice of default must be given, limitations on warranties, excuse, etc.
				+ Most preprinted terms are nonperformance terms that concern low-probability future risks.
		- Typically the most important performance terms will be custom-tailored to each transaction, but the less important terms will typically be preprinted.
		- **UCC §2-207 – Additional Terms in Acceptance or Confirmation**
			* **(1) A definite and seasonable (timely) expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.**
			* **(2) The additional terms are to be construed as proposal for addition to the contract. BETWEEN MERCHANTS such terms become part of the contract unless:**
				+ **(a) the offer expressly limits acceptance to the terms of the offer;**
				+ **(b) they materially alter it** (“material” usually means economic significance or it would be likely to affect a party’s decision to enter into the contract)**; or**
				+ **(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.**
			* **(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act** (generally meaning the “gap filler” provisions of the UCC)**.**
			* Note: in most cases, under §2-207 the offeror has sent a form to the offeree; the offeree has returned to the offeror another form whose individualized (non-preprinted) terms match the individualized terms of the offer; virtually no other terms match; and the courts have explicitly or implicitly held that the return form nevertheless constitutes an “expression of acceptance” under §2-207.
			* Note: Some courts say §2-207 has no application in a situation where an order is placed and accepted by telephone where seller sends a record with additional terms. Others would apply §2-207.
		- **Inquiry is whether the offeree clearly and unequivocally communicated to the offeror that its willingness to enter into a bargain was conditioned on the offeror’s assent to additional or different terms. 2-207 only applies to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror’s assent to the additional or different terms. Whether this has occurred is dependent upon the commercial context of the transaction.** (Gardner Zemke Co. v. Dunham Bush, Inc.)
		- **UCC §2-207 Analysis:**
			* **Was the arguable acceptance DEFINATE and TIMELY?**
				+ **If “acceptance” differs on dickered terms (description of the goods, price, quantity and delivery terms), then it is not definite – it is not an acceptance, but a counter-offer.**
				+ **If “acceptance” is not timely, then it is not an acceptance but a counter-offer.**
				+ **If yes, then is the arguable acceptance expressly conditioned on assent to the additional or different terms?**

Note: A clause stating “subject to all the terms hereof, all of which are accepted by the offeror” does not make acceptance conditioned on the terms. For it to be expressly conditioned on assent, it must state that the acceptance is conditioned on the offeror’s assent.

**If yes, then it is not an acceptance, but a counter-offer. The new “offer” may be accepted by the original offeror and a contract formed with the terms of the counter-offer. If new offer is not accepted, there is no contract by the exchange of forms.**

**If not expressly conditioned, then contract will be formed based on the original offer. What are the terms** (note: UCC §2-207 expressly applies to additional terms – differing opinions of whether different terms should be treated as additional terms for §2-207 analysis)**?**

**See UCC §2-207 – are they merchants?**

**If not merchants, the terms of the contract will be the original offer, unless the offeror expressly assents to the additional terms.**

**If merchants, then has the offeror expressly assented to the additional terms?**

**If yes, the contract contains new terms provided by offeree in acceptance.**

**If no, does: (a) the offer expressly limit acceptance to the terms of the offer?, (b) the additional terms materially alter the terms of the contract?, or (c) has the offeror made a timely objection to the additional terms?**

**If yes to any of the above, then terms are those of the original offer.**

**If no to all the above, then additional terms become part of the contract.**

* + **Contracts for at-will employment** (Wagenseller v. Scottsdale Memorial Hospital)
		- **Originally doctrine of at-will employment allowed an employer to fire an employee for any reason at all. This has changed with three general exceptions:**
			* **Public Policy Exception – permits recovery upon finding that the employer’s conduct undermined clearly mandated and important public policy – firing for bad cause, one against public policy, is not a right inherent in at-will employment**
			* **Proof of an implied-in-fact promise of employment for a specified duration, as found in the circumstances surrounding the employment relationship, including assurances of job security in company personnel manuals or memoranda – manuals or memoranda may become part of the employment contract.**
			* Implied-in-law covenant of “good faith and fair dealing” – most courts reject this
		- **In the absence of a contractual provision to the contrary, an at-will employee may be fired for good cause or no cause, but not for “bad cause”.**
* **QUESTION 3 – IS THERE A BREACH OF CONTRACT?**
	+ **First, what was the order of performance of the exchange of consideration?**
		- **If A and B have a contract, and under the contract A’s performance is to precede B’s performance, then B is not obligated to perform until A has performed. This is MUTUAL DEPENDANCY OF PERFORMANCE.**
		- **General**
			* **Restatement, Second, Contracts §233 – Performance at One Time or in Installments**
				+ **(1) Where performances are to be exchanged under an exchange of promises, and the whole of one party’s performance can be rendered at one time, it is due at one time, unless the language or the circumstances indicate the contrary.**
				+ **(2) Where only a part of one party’s performance is due at one time under (1), if the other party’s performance can be so apportioned that there is a comparable part that can also be rendered at that time, it is due at that time, unless the language or the circumstances indicate the contrary.**
			* **Restatement, Second, Contracts §234 – Order of Performance**
				+ **(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.**
				+ **(2) Except to the extent stated in (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.**
			* **Example – construction contract where there are installment payments** (K&G Constr. Co. v. Harris)
				+ **If the performing party has breached the contract, the other party may delay or cease payments. Unless the missed payments are a substantial breach of the contract, the contractor is not justified in stopping performance. This is a matter of what is considered a breach.**
		- **Sale of Goods**
			* **UCC §2-507 – Effect of Seller’s Tender; Delivery on Condition**
				+ **(1) Tender of delivery is a condition to the buyer’s duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.**
				+ **(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.**
			* **UCC §2-511 – Tender of Payment by Buyer; Payment by Check**
				+ **(1) Unless otherwise agreed tender of payment is a condition to the seller’s duty to tender and complete any delivery.**
				+ **(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.**
				+ **(3) Subject to the provisions of this Act on the effect of an instrument on an obligation, payment by check is conditional and is defeated as between the parties by dishonor of the check on due punishment.**
			* **NOTE: §§2-507 AND 2-511 MAKE PERFORMANCE SIMULTANEOUS**
		- **Where performances are to be simultaneous, neither party can recover damages unless he has done something to put the other party in default. This would usually mean making a definite offer to perform and having at the time the capacity to carry out the offer.**
	+ **Was there a breach of the contract?**
		- **Material v. Total Breach**
			* **A material breach is a breach that justifies the suspension of performance and the term “total” breach describes a breach that justifies cancellation of the contract.**
		- **Restatement, Second, Contracts §241 – Circumstances Significant in Determining Whether a Failure is Material**
			* **“In determining whether a failure to render or to offer performance is material, the following circumstances are significant:**
				+ **The extent to which the injured party will be deprived of the benefit which he reasonably expected;**
				+ **The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;**
				+ **The extent to which the party failing to perform or to offer to perform will suffer forfeiture;**
				+ **The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;**
				+ **The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.**
		- **Restatement, Second, Contracts §242 – Circumstances Significant in Determining When Remaining Duties are Discharged**
			* **In determining the time after which a party’s uncured material failure to render or to offer performance discharges the other party’s remaining duties to render performance under the rules stated in §§237 and 238, the following circumstances are significant:**
				+ **Those stated in §241;**
				+ **The extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;**
				+ **The extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party’s remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.**
		- **Note: there is no “material breach” under the UCC because of the perfect tender rule really, but look at warranty sections**
	+ **Was there substantial performance of the contract?**
		- **General**
			* **The substantial performance doctrine provides that where a contract is made for an agreed exchange of two performances, one which is to be rendered first, substantial performance, rather than exact, strict performance by the first party on the terms of the contract is adequate to entitle the party to recover it.**
			* **For the doctrine to apply, the part unperformed must not destroy the value or purpose of the contract.**
			* **An omission, both trivial and innocent, will sometimes be compensated for through damages and will not always be a breach of a condition to be followed by forfeiture. Such a substantial performance of the contract is not a breach and the non-breaching party cannot rescind the contract or seek damages for breach of contract.** (Jacob & Youngs v. Kent)
			* **The inquiry in determining substantial performance is not whether the breach was willful, but whether the party comports with standards of good faith and fair dealing.** (Vincenzi v. Cerro)
			* **Mere deviations v. aesthetic deficiency**
				+ **In a construction contract, evidence that the materials used where in the same quality, appearance, market value and in cost as the brand stated in the contract may supply a basis for determining that the defect was not material. (Jacob & Youngs v. Kent)**
				+ **Where there is a mere incompleteness or deviation which may be easily supplied or remedied after the contractor has finished and the cost to the owner is not excessive and readily ascertainable, the court will usually find substantial performance. Where the part of the contract not performed is aesthetic and a material part of what was bargained for, the court will usually find that substantial performance did not occur.** (O.W. Grun Roofing & Constr. Co. v. Cope)
		- **Sale of Goods**
			* **Buyer’s Rights – “Perfect Tender” Rule**
				+ **UCC §2-601 – Buyer’s Rights on Improper Delivery**

**Subject to the provisions of this Article on breach in installment contracts and unless otherwise agreed under the sections on contractual limitations of remedy, if the goods or the tender of delivery failed in any respect to conform to the contract, the buyer may**

**(a) reject the whole; or**

**(b) accept the whole; or**

**(c) accept any commercial unit or units and reject the rest.**

* + - * + **UCC §2-608 – Revocation of Acceptance in Whole or in Part**

**(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it**

**(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or**

**(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances.**

**(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.**

* + - * + **UCC §2-612 – “Installment Contract”; Breach – NOTE: THIS IS NOT THE PERFECT TENDER RULE**

**(1) An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause “each delivery is a separate contract” or its equivalent.**

**(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.**

**(3) Whenever non-conformity or default with respect to one or more installment substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.**

* + - * **Seller’s Right to Cure**
				+ **“UCC §2-508 – Cure by Seller of Improper Tender or Delivery; Replacement**

**(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and then within the contract time make a conforming delivery.**

**(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.”**

**Note: Courts are more concerned with the reasonableness of the seller’s belief that the goods would be acceptable rather than with the seller’s knowledge or lack thereof of the defect.** (T.W. Oil, Inc. v. Consolidated Edison Co.)

* + - * + **A “cure” which endeavors by substitution to tender a chattel not within the agreement or contemplation of the parties is invalid.** (Zabriskie Chevrolet v. Smith)
	+ **Material Breach v. Substantial Performance**
		- If a party has substantially performed, then any breach she may have committed is not material; if a party has committed a material breach, her performance cannot be substantial.
		- The doctrine of substantial performance concerns the question, when can a party who has breached a contract nevertheless bring suit under the contract. The doctrine of material breach concerns the very different question, when can a party who has not breached a contract (i) invoke the sanction of terminating the contract for the other party’s breach, and (ii) bring suit for damages for total breach.
	+ **Was there a breach of good faith and fear dealing?**
		- **In every contract there is an implied understanding on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part.** (Patterson v. Meyerhofer)
		- **General:**
			* **Restatement (Second) Contracts §205 – Duty of Good Faith and Fair Dealing**
				+ **“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”**
		- **Sale of Goods**
			* **UCC §1-201(19) – “Good faith” means honesty in fact in the conduct or transaction concerned.**
			* **UCC §1-203 – Obligation of Good Faith**
				+ **Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.**
		- **Good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. When one party to a contract is given discretion in the performance of some aspect of the contract, the parties ordinarily contemplate that the discretion will be exercised for specific purposes. If the discretion is exercised for purposes not contemplated by the parties, the party exercising discretion has performed in bad faith.** (Best v. United States National Bank)
		- **One party merely making the contract more difficult to perform will not excuse a breach of contract by the other party, but the conduct of one party which prevents the other from performing may be an excuse for nonperformance.** (Iron Trade Products Co. v. Wilkoff Co.)
	+ **Did an unexpected circumstance affect performance?**
		- **Impossibility**
			* **If (a) performance is impossible, (b) due to the non-existence of a necessary element of the contract, then (c) the parties are excused from performance.**
			* **In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.** (Taylor v. Caldwell)
		- **Impracticability**
			* **General**
				+ **A thing is impossible if it is impracticable – when it can only be done at an excessive and unreasonable cost.** (Mineral Park Land Co. v. Howard)
				+ **3 step impracticability analysis** (Transatlantic Financing Corp. v. United States)**:**

**A contingency – something unexpected – must have occurred.**

**If the event that is the basis of the claim is reasonably foreseeable, the defense may be lost because the promisor should have provided for the contingency in the contract.**

**Risk of the unexpected occurrence must not have been allocated either by agreement or custom.**

**Occurrence of the contingency must have rendered performance commercially impracticable.**

Note: to justify relief there must be significant variation between the expected cost and the cost of performing the available alternative

* + - * + **5 Basic Categories where performance is excused**

**Destruction, deterioration or unavailability of the subject matter or tangible means of performance** (see Taylor v. Caldwell)

**Failure of the contemplated mode of delivery or payment** (see UCC §2-614)

**Supervening prohibition or prevention by law**

**Failure of the intangible means of performance – by “an act of God, the law, or the other party”.**

**Death or illness (if personal performance is required).**

* + - * + **There is a difference between impracticability that exists before the contract is made and impracticability that is supervening –**

**Party seeking to use the doctrine when impracticability existed at the time the contract was made must show the absence of knowledge or reason to know the facts that made performance impossible. (Knowledge would create assumption of risk).**

**Existing impracticability results in a void contract whereas supervening impracticability discharges a contract that has already arisen.**

* + - * + **Restatement (Second) Contracts §261 – Discharge by Supervening Impracticability**

**Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an even the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.**

* + - * + **Restatement (Second) Contracts §262 – Death or Incapacity of Person Necessary for Performance**

**… is an event the non-occurrence of which was a basic assumption on which the contract was made…**

* + - * + **Restatement (Second) Contracts §263 – Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance**

**… is an event the non-occurrence of which was a basic assumption on which the contract was made**

* + - * + **Restatement (Second) Contracts §264 – Prevention by Governmental Regulation or Order**

**If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.**

* + - * + **Restatement (Second) Contracts §266 – Existing Impracticability or Frustration**

**(1) Where, at the time the contract is made, a party’s performance under it is impracticable without his fault because of a fact of which he had no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.**

**(2) Where, at the time a contract is made, a party’s principal purpose is substantially frustrated without his fault by a fact of which he had no reason to know [then same effect as in (a)].**

* + - * + **Restatement (Second) Contracts §267 – Effect on Other Party’s Duties of a Failure Justified by Impracticability or Frustration**

**(1) A party’s failure to render or offer performance may, except as stated in (2), affect the other party’s duties under the rules stated in §§237 and 238 even though the failure is justified under the rules [regarding impracticability].**

**(2) The rule state in (1) does not apply if the other party assumed the risk that he would have to perform despite such a failure.**

* + - * + **Restatement (Second) Contracts §268 – Effect on Other Party’s Duties of a Prospective Failure Justified by Impracticability or Frustration**

**(1) A party’s prospective failure of performance may, except as stated in (2), discharge the other party’s duties or allow him to suspend performance under the rules stated in §§251 and 253 even though the failure would be justified under the rules [regarding impracticability].**

**(2) The rule stated in (1) does not apply if the other party assumed the risk that he would have to perform in spite of such a failure.**

* + - * + **Restatement (Second) Contracts §269 – Temporary Impracticability or Frustration**

**Impracticability of performance or frustration of purpose that is only temporary suspends the obligor’s duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.**

* + - * + **Restatement (Second) Contracts §270 – Partial Impracticability**

**Where only part of an obligor’s performance is impracticable, his duty to render the remaining part is unaffected if**

**(a) it is still practicable for him to render performance that is substantial, taking into account of any reasonable substitute performance that he is under a duty to render, or**

**(b) the obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered.**

* + - * + **Restatement (Second) Contracts §271 – Impracticability as Excuse for Non-Occurrence of a Condition**

**Impracticability excuses the non-occurrence of a condition if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result.**

* + - * **Sale of goods**
				+ **UCC §2-615 – Excuse by Failure of Presupposed Condition**

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

**(a) Delay in delivery of non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been MADE IMPRACTICALBE** (note: this is commercial impracticability) **BY THE OCCURRENCE OF A CONTINGENCY THE NON-OCCURRENCE OF WHICH WAS A BASIC ASSUMPTION ON WHICH THE CONTRACT WAS MADE…**

(b) Where the causes mentioned in (a) affect only a part of seller’s capacity to perform, he must allocate production and deliveries among his customers… he may also allocate in any manner which is fair and reasonable.**”**

Three things are required under UCC §2-615

Basic assumption of both parties

No assumption of the risk by party seeking to use defense of impracticability

Impracticability

* + - * + **UCC §2-616 – Procedure on Notice Claiming Excuse**

**(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts, then also to the whole,**

**(a) terminate and thereby discharge any unexecuted portion of the contract; or**

**(b) modify the contract by agreeing to take his available quota in substitution.**

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under §2-615.

* + - * + **Allocation of Risk**

**UCC §2-509 and UCC §2-510**

**It is a reasonable assumption for a purchaser to make that a manufacturer has already been created or will be created – the risk of the product’s non-occurrence is not assumed by the purchaser.** (United States v. Wegematic Corp.)

* + - * + **UCC §2-614 – Substituted Performance**

**(1) Where without fault of either party… the agreed manner of delivery… becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.**

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligations unless the regulation is discriminatory, oppressive or predatory.

* + - **Frustration**
			* **See above Restatement sections.**
			* **Restatement, Second, Contracts §265 – Discharge by Supervening Frustration**
				+ **Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.**
			* **Four requirements to use doctrine of frustration:**
				+ **Object of one of the parties entering into the contract must be frustrated by a supervening event.**
				+ **Other party must also have contracted on the basis of the attainment of this object. (Basic assumption of both parties)**
				+ **Frustration must be total or nearly total**
				+ **Party seeking to use the defense must not have assumed a greater obligation than the law imposes (assumed the risk)**
	+ **Effect of one party’s breach on the other party**
		- **Breach of Condition v. Breach of Promise** (Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.)
			* **If a party has substantially performed the promise there is no breach. If there is no substantial performance, there is a breach.**
			* **As a general rule, a condition must be exactly fulfilled before liability can arise on the contract. Substantial performance has no bearing in conditions – if there will be relief, it will be through excuse of the non-occurrence of the condition to avoid forfeiture.** (Harmon Cable Communications v. Scope Cable Television)
		- **Restatement, Second, Contracts §237 – Effect on Other Party’s Duties of a Failure to Render Performance**
			* **Except as stated in §240, it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.**
		- **Restatement, Second, Contracts §240 – Part Performances as Agreed Equivalents**
			* **If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party’s performance of his part of such a pair has the same effect on the other’s duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.**
* **QUESTION 4 – WHAT ARE THE DAMAGES/REMEDIES?**
	+ Restatement (Second) Contracts §345 – Judicial Remedies Available
		- “The judicial remedies available for the protection of the interests stated in §344 include a judgment or order:
			* Awarding a sum of money due under the contract or as damages,
			* Requiring specific performance of a contract or enjoining its non-performance,
			* Requiring restoration of a specific thing to prevent unjust enrichment,
			* Awarding a sum of money to prevent unjust enrichment,
			* Declaring the rights of the parties, and
			* Enforcing an arbitration award.”
	+ **“The Plaintiff is entitled to be whole and no more.”**
	+ **Purposes of Remedies** (Restatement (Second) Contracts §344)
		- **“Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:**
			* **(a) his “expectation interest”, which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,**
				+ Note: This is the preferred interest to promote because it encourages people to contract because they will receive the “benefit of the bargain” whether or not the contract is performed. This encourages more efficient contracting.
			* **(b) his “reliance interest”, which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or**
			* **(c) his “restitution interest”, which is his interest in having restored to him any benefit that he has conferred on the other party.”**
	+ **Damages given to address the expectation interest:**
		- **Damages for Breach of a Contract to Perform Services**
		- **Breach by the Person who has Contracted to Perform Services**
			* **2 Types of Damages Given:**
				+ **Difference/Diminution in Value or Cost of Performance**

Restatement (Second) Contracts §348(2)

“If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on:

The diminution in the market price of the property caused by the breach; or

The reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.”

* + - * + **Proper measure of damages in a contract where a certain portion is not performed is ordinarily the reasonable cost of performance of the work, however, where the contract provision breached was incidental to the main purpose of the contract and the economic benefit that would result from full performance is grossly disproportionate to the cost of performance, the damages that may be recovered are limited to the diminution in value resulting to the property, etc because of the non-performance.** (Peevyhouse v. Garland Coal & Mining Co)
				+ **The fact finder is thought to be in the best position to determine whether the owner will actually complete performance, or whether he is only interested in getting the most money he can. This will be considered when determining what kind of damages are given.** (Advanced, Inc. v. Wilks)
			* Examples:
				+ Where a surgeon makes a contract with a patient for a certain surgical outcome through a statement of guarantee, the proper measure of damages is the difference between the promised outcome and the value of the organ in its present condition after the operation is completed. (Hawkins v. McGee). The extent of the patient’s suffering is usually not a part of damages – the suffering is part of the consideration given in making the contract for the operation. If suffering was greater than what was bargained for, it factors into the condition due to the treatment. (McQuaid v. Michou)
				+ When a vendor is unable to perform a prior contract for sale because of a subsequent sale of the same property, he should pay as damages to the original buyer the profit in the subsequent sale. The seller becomes a trustee for the original buyer. This is to protect the expectation interest of the original buyer in receiving property that is worth more than they would have paid. (Coppola Enterprises, Inc. v. Alfone)
				+ Where one party does not suffer a measurable loss from a breach of contract by the other party and the defendant’s breach is deliberate and willful, damages limited solely to diminution in value of what the party should have received may sometimes be seriously inadequate and other damages should be given. (Laurin v. DeCarolis Construction Co.)
		- **Breach by the Seller**
			* **Buyer’s Remedies fall into two broad categories – specific relief** (buyer is awarded actual goods) **and damages.**
			* **Two times when damages are given:**
				+ **When the seller fails to deliver or the buyer properly rejects the goods or rightfully revokes his acceptance; OR**
				+ **When the buyer has accepted the goods and cannot/does not want to revoke his acceptance, but the goods are defective.**
			* **When the seller fails to deliver or the buyer properly rejects goods/revokes his acceptance:**
				+ **Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods** (UCC § 2-711(1))

**“…the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as he has paid**

**(a) ‘cover’ and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or**

**(b) recover damages for non-delivery as provided in this Article (Section 2-713)”**

* + - * + **“Cover”; Buyer’s Procurement of Substitute Goods** (UCC §2-712)

**“(1)… the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.**

**(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined, but less expenses saved in consequence of the seller’s breach.**

**(3) Failure of the buyer to affect cover within this section does not bar him from any other remedy.”**

* + - * + **(No Cover/”Hypothetical Cover”) Buyer’s Damages for Non-delivery or Repudiation** (UCC §2-713)

**“(1) Subject to the provisions of this Article with respect to proof of market price, the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article, but less expenses saved in consequence of the seller’s breach.**

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.”

* + - * + What the buyer chooses to do with his newly-made bargain (i.e. what extra costs he may pass on to subsequent buyers, etc) is not relevant to the determination of damages. (KGM Harvesting Co. v. Fresh Network)
			* **When the buyer has accepted the goods and cannot/does not want to revoke his acceptance, but the goods are defective:**
				+ **Buyer’s Damages for Breach in Regard to Accepted Goods** (UCC §2-714)

**“(1) The buyer… may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable.**

**(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.**

**(3) In a proper case any incidental and consequential damages under the next section may also be recovered.”**

* + - * + **Buyer’s Incidental and Consequential Damages** (UCC §2-715)

**“Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and other reasonable expense incident to the delay or other breach.”**

* + - * + Buyer may receive damages for both lost profits and additional out-of-pocket expenses, as the calculation of lost profits does not take into account the expenses specifically caused by the “bad goods” provided by the seller. (Delchi Carrier SpA v. Rotorex Corp.)
			* General Calculation of Market Value:
				+ Proof of Market Price: Time and Place (UCC §2-723)

“(1) … any damages based on market price shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

* + - * + Admissibility of Market Quotations (UCC §2-724)

“… reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence.”

* + - * **Breach by the Buyer**
				+ Insurable Interest in Goods; Manner of Identification of Goods (UCC §2-501(1) )

“(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers to even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale or for the sale of crops to be harvested within twelve months or if the next normal harvest season after contracting whichever is longer.”

* + - * + **Seller’s Remedies in General** (UCC §2-703)

**“Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may:**

**(a) withhold delivery of such goods;**

**(b) stop delivery by any bailee as hereafter provided;**

**(c) proceed under the next section respecting goods still unidentified to the contract;**

**(d) resell and recover damages as hereinafter provided;**

**(e) recover damages for non-acceptance or in a proper case the price;**

**(f) cancel.”**

* + - * + Seller’s Right to Identify Goods to the Contract Not-withstanding Breach or to Salvage Unfinished Goods UCC (§2-704(1))

“(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstratably been intended for the particular contract even though those goods are unfinished.”

* + - * + **Seller’s Resale Including Contract for Resale** (UCC §2-706)

**“(1)… the seller may resell the goods concerned or the undelivered balance... Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article, but less expenses saved in consequence of the buyer’s breach.**

(2) Except as otherwise provided… or unless otherwise agreed resale may be at public or private sale…

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

**(6) The seller is not accountable to the buyer for any profit made on any resale.** A person in the position of a seller or buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest.”

* + - * + **Seller’s Damages for Non-acceptance or Repudiation** (UCC §2-708)

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

**(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit which the seller would have made from full performance to the buyer, together with any incidental damages provided in this Article, due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.”**

**In the case of a lost-volume seller** (where inventory is not unique)**, the proceeds of the resale should not be credited to the seller in calculating damages.** (Teradyne, Inc. v. Teldyne Industries, Inc.) (note: not all circuits follow this)

* + - * + **Action for the Price** (UCC §2-709)

**“(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price**

**(a) of goods accepted or of conforming goods lost or damages within a commercially reasonable time after risk of their loss has passed to the buyer; and**

**(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.**

**(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control expect that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.**

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated, a seller who is held not entitled to the price under this section may nevertheless be awarded damages for non-acceptance under the preceding section.”

* + - * + Seller’s Incidental Damages (UCC §2-710)

“Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.”

* + - **Cases that Override the General Rule of Expectation Interest**
			* **Mitigation**
				+ **General:**

**The non-breaching party has a duty, once receiving notice of repudiation, to stop work and mitigate further damages of the breaching party.** (Rockingham County v. Luten Bridge Co.)

**The proper remedy for the non-breaching party is such damages as he may have sustained from the breach, including any profit which he would have received upon performance, as well as to compensate him for labor and materials expended and expenses incurred in the partial performance of the contract.** (Rockingham County v. Luten Bridge Co.)

**Restatement (Second) Contracts §350 – Avoidability as a Limitation on Damages**

**“(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.**

**(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”**

* + - * + **Sale of Goods**

**Seller’s Remedies for Buyer’s Breach**

**UCC §2-704(2) – Seller’s Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods**

**“Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purpose of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.”**

**Buyer’s Remedies for Seller’s Breach**

**UCC §2-715(2) – Buyer’s Incidental and Consequential Damages**

**“(2) Consequential damages resulting from the seller’s breach include:**

**(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and**

**(b) injury to person or property proximately resulting from any breach of warranty.”**

* + - * + **For Employment Contracts – Breach by Employer**

**The employee must mitigate losses once the employment contract is breached through attempting to find comparable or substantially similar employment.**

**The general measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer can affirmatively prove that the employee has earned or with reasonable effort might have earned from other employment.** (Shirley MacLaine Parker v. Twentieth Century-Fox Film Corp.)

**Most jurisdictions hold that mitigating employment is confined to the immediate community or neighborhood of the contracted employment or of the employee.** (Punkar v. King Plastic Corp.)

**The employee may recover necessary and reasonable expenses incurred in an effort to avoid or mitigate damages under the original employment contract.** (Mr. Eddie, Inc. v. Ginsberg)

**If the employee obtains other employment, even if different or inferior, his earnings are used in calculation of mitigation of damages.** (Southern Keswick, Inc. v. Whetherholt)

**If the employee can prove real and specific losses that resulted from the injury to their reputation by the breach of contract** (i.e. damage to reputation that hurts future opportunities, inability to practice the profession if such practice was reasonably foreseeable through the contemplation of the contract), **such damages may be recoverable.**

* + - * **Foreseeability**
				+ **The question of foreseeability limits consequential damages.**
				+ **The non-breaching party is only entitled to recover such part of the loss actually resulting that was reasonably foreseeable at the time the contract was made, either from knowledge of the ordinary course of things or through special knowledge of circumstances that would cause the loss to be higher than under ordinary circumstances.** (Hadley v. Baxendale)
				+ Test is reasonable foreseeability, not actual knowledge. It doesn’t have to be the most foreseeable consequence, just a foreseeable consequence to the reasonable person.(Hector Martinez and Co. v. Southern Pacific Transp.)
				+ **Restatement (Second) Contracts §351 – Unforseeability and Related Limitations on Damages**

**“(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a 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**

**(a) in the ordinary course of events, or**

**(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.**

**(3) A court may limit damages** for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, **or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.**

* + - * + General test used is that defendant’s breach must have been a substantial factor in bringing about the harm for it to be considered a cause.
			* **Certainty**
				+ **Damages must be certain and traceable to the breach to be awarded.** (Kenford Co. v. Erie Co.)
				+ **Restatement (Second) Contracts §352 – Uncertainty as a Limitation on Damages**

**“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”**

* + - * + **Awarding damages does not require absolute certainty – it only requires that damages be capable of measurement based upon known reliable factors without undue speculation.** (Ashland Management, Inc. v. Janien)

UCC §1-106 “Remedies to be Liberally Administered” – rejects any doctrine of certainty that requires absolute mathematical precision

* + - * + Special Cases:

If it is a new business seeking to recover loss for future profits, a stricter standard is imposed for the reason that there does not exist a reasonable basis of experience on which to estimate lost profits with the requisite degree of reasonable certainty. (Kenford Co. v. Erie Co.)

* + - * **Limitation on Damages Recoverable for Mental Distress**
				+ **Restatement (Second) Contracts §353 – Loss Due to Emotional Disturbance**

**“Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”**

* + - * + **Damages for mental distress are generally not recoverable if the primary purpose of the contract is economic in nature.** (Valentine v. General American Credit, Inc.)
				+ **If the contract is personal in nature** (ex. Care for one’s child, performance at a wedding reception, for a vacation, etc) **and it is foreseeable that a breach of contract would result in mental distress, damages for mental distress may be recoverable.** (Lane v. Kindercare Learning Centers, Inc.; Jarvis v. Swan Tours, Ltd.; Deitsch v. Music Co.)
			* **When the Contract has a Liquidated Damages Clause**
				+ **General:**

**Liquidated damages clauses are generally enforceable if:**

**They are based on a reasonable estimate of just compensation for the breach, and**

The actual harm is difficult to estimate with accuracy.

(Wasserman’s Inc. v. Middletown)

**Penalty clauses are not enforceable.**

**Restatement (Second) Contracts §356 – Liquidated Damages and Penalties**

**“(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages in unenforceable on grounds of public policy as a penalty.”**

In cases of contracts with clauses re: return of deposits:

Clauses to return a deposit in full will generally not be enforced if damages (against the deposit) could be accurately estimated at the time of contract. (Lee Oldsmobile v. Kaiden)

* + - * + **For sale of goods contract:**

**UCC §2-718(1) – Liquidation or Limitation of Damages**

**“Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.**

* + - * + **Under-liquidated Damages Clauses**

**In some cases, the parties adopt a technique to limit damages to an amount that is less than estimated actual damages. These are normally enforced.**

**UCC §2-719**

**“(1) Subject to the provisions… of this section and of the preceding section…,**

**(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and**

**(b) resort to remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.**

**(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.**

**(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”**

* + - **Meeting the Expectation Interest through Specific Performance**
			* **Specific Performance = Court orders the breaching party to perform the contract as an alternative to paying monetary damages.**
			* **General rule is that damages should be given as a remedy instead of specific performance unless damages are inadequate, but the choice between remedies requires a cost/benefit analysis of the alternatives.** **If monetary damages are difficult to calculate and enforcement of specific performance by the court is easy, then specific performance will be the remedy. If monetary damages are easy to calculate and enforcement is difficult, monetary damages will be given. Otherwise, the remedy will be a judgment call by the court.** (Walgreen Co. v. Sara Creek Property Co.)
			* **General:**
				+ **Restatement (Second) Contracts §357 – Availability of Specific Performance and Injunction**

“(1) Subject to the rules stated in §359-69, **specific performance of a contract duty will be granted in the discretion of the court** against a party who has committed or is threatening to commit a breach of the duty.

(2) Subject to the rules stated in §359-69, **an injunction against breach of a contract duty will be granted in the discretion of the court** against a party who has committed or is threatening to commit a breach of the duty **if**

**(a) the duty is one of forbearance, or**

**(b) the duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.”**

* + - * + **Restatement (Second) Contracts §359 – Effect of Adequacy of Damages**

**“(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.**

(2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.

(3) Specific performance or an injunction will not be refused merely because there is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in §357.”

* + - * + **Restatement (Second) Contracts §360 – Factors Affecting Adequacy of Damages**

**“In determining whether the remedy in damages would be adequate, the following circumstances are significant:**

**(a) the difficulty of proving damages with reasonable certainty,**

**(b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and**

**(c) the likelihood that an award of damages could not be collected.”**

* + - * + **Restatement (Second) Contracts §367 - Contracts for Personal Service or Supervision**

**“(1) A promise to render personal service will not be specifically enforced.**

**(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.”**

* + - * **Sale of Goods:**
				+ **UCC §2-716 – Buyer’s Right to Specific Performance or Replevin**

**(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.**

Note: uniqueness is measured by the entire circumstances, not just the good itself (i.e. Are the terms of the contract unique? What is the good? Is there any substitute?)

**(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.”**

* + - * Special Cases:
				+ Contracts for the Sale of Land:

The buyer can generally obtain specific performance ordering the seller to execute a deed in his favor.

The seller can generally also get a decree ordering the buyer to take title to the land and pay the agreed price by a certain time or the right of the buyer to “redeem” the land by paying the debt is to be “foreclosed”.

This is because of the uncertainty of damages measured by the difference between the contract price and the value of the land.

* + **Damages to Protect the Reliance Interest**
		- **Restatement (Second) Contracts §349 – Damages Based on Reliance Interest**
			* **“As an alternative to the measure of damages stated in §347 [measure of damages in general], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.”**
		- **Rationale for granting reliance damages: When the amount of expected profit cannot be determined, the amount of the gain which would have reimbursed plaintiff for the expenditures incurred in preparation and part performance can be determined, and those expenditures should be allowed in recovery.** (Beefy Trail, Inc. v. Beefy King Int’l, Inc.)
		- **Relief may sometimes be limited to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise.** (Westside Galvanizing Services, Inc. v. Georgia-Pacific Corp.)
		- Examples:
			* Where a contract is made with a carrier and the carrier has notice of a peculiar circumstance under which the shipment is made, which will result in an unusual loss by the shipper in case of delay in delivery, the carrier is responsible for the real damage sustained from such delay if the notice given is such that the carrier will be presumed to have contracted with reference to the special circumstances (Security Stove & Mtf. Co. v. American Rys. Express Co.)
	+ **Damages to Protect the Restitution Interest**
		- **Restatement (Second) Contracts §370 – Requirement that Benefit be Conferred**
			* **“A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.”**
		- **Restatement (Second) Contracts §371 – Measure of Restitution Interest**
			* **“If a sum of money is awarded to protect a party’s restitution interest, it may as justice requires be measured by either**
				+ **(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant’s position, or**
				+ **(b) the extent to which the other party’s property has been increased in value or his other interests advanced.”**
		- **Restitutionary Damages for Breach of Contract**
			* **Restitution damages may be given when there has been a substantial breach of the contract.** (Osteen v. Johnson)
			* **Plaintiff has the option to forego any suit on the contract (for damages to address expectation interest) and claim only the reasonable value of his performance (restitution).** (United States v. Algernon Blair, Inc.)
			* **“quantum meruit” – allows a Plaintiff to recover the value of services he gave to the Defendant of whether he would have lost money on the contract and been unable to recover otherwise. The measure of recovery for quantum meruit is the reasonable value of the performance, undiminished by any loss that would have been incurred by complete performance.** The standard for measuring the reasonable value of services rendered is the amount for which such services could have been purchases from one in the plaintiff’s position at the time and place the services were rendered.
		- **Restatement (Second) Contracts §272 – Relief Including Restitution**
			* **(1) In any case governed by the rules [governing impracticability] either party may have a claim for relief including restitution…**
			* **(2) In any case governed by the rules [governing impracticability]… the court may grant relief on such terms as justice as requires including protection of the parties’ reliance interests.**
		- **Restitution for Breaching Party**
			* **Restatement (Second) Contracts §374(1) – Restitution in Favor of Party in Breach**
				+ **“Subject to the rule stated in Subsection (2), if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party’s breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.”**
			* **The breaching party may be entitled to restitution for benefits incurred on the non-breaching party… in the case where both parties are entitled to restitution, amount of restitution due will be “netted”.** (Kutzin v. Pirnie)
		- **Difference between Restitutionary and Reliance Damages**
			* **Restitutionary damages = based on benefit conferred;**
			* **Reliance damages = based on costs incurred.**
	+ **“Punitive damages are not recoverable for breach of contract unless the contract constituting the breach is also a tort for which punitive damages are recoverable.”** (Restatement §355)