CONTRACTS OUTLINE – LINZER FALL 2008

1. INTRODUCTION
   1. What is a Contract?
      1. A contract is formed in any transaction in which one or both parties make a legally enforceable promise. A promise is a commitment or undertaking that a given event will or will not occur in the future and may be express or implied from conduct or language and conduct. A promise is legally enforceable where it:
         1. was made as part of a bargain for valid consideration;
         2. reasonably induced the promisee to rely on the promise to his detriment; or
         3. is deemed enforceable by a statute despite the lack of consideration.
   2. Types of Contracts
      1. Contract may be of the following types:
         1. Express – an agreement manifested by words
         2. Bilateral – both sides make promises (exchange of promises)
         3. Unilateral – one which involves an exchange of the offeror’s promise for the offeree’s act. That is, in a unilateral contract the offeree does not make a promise, but instead simply acts.
         4. Implied
            1. Implied-in-fact – an agreement manifested by conduct
            2. Implied-in-law ("quasi-contract") – not a true contract but an obligation imposed by a court despite the absence of a promise in order to avoid an injustice
   3. Sources of Contract Law
      1. Common Law – in most jurisdictions, contract law is not codified, and thus the primary source of general contract law is caselaw.
      2. Restatement – written by the American Law Institute to provide guidance to the bench and bar, the Restatement of Contracts (currently in the second edition) has no legal force but nevertheless provides highly persuasive authority.
      3. Uniform Commercial Code (UCC) – created under the auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, has been adopted by every state except Louisiana. Proposed revisions to Article 2, governing contracts for the sale of goods, have been finalized and presented to the states for enactment.
      4. United Nations Convention on Contracts for the International Sale of Goods (CISG) – ratified by many of the leading trading nations including the United States and China (but not the United Kingdom and Japan), it governs many transactions for the sale of goods between parties with places of business in different nations.
      5. UNIDROIT Principles of International Commercial Contracts – non-binding authoritative text similar to the Restatement.
      6. Uniform Computer Transactions Act (UCITA) – addresses issues arising out of computer licensing but has only been enacted in Virginia and Maryland.
      7. Uniform Electronic Transactions Act (UETA) – adopted by most states, this act does not affect basic contract doctrine but governs the use of electronic communications. It applies to "transactions," defined as "the conduct of business, commercial or governmental affairs." Thus, it does not govern contracts such as those between family members or with non-profit institutions.
      8. Electronic Signatures in Global and National Commerce Act (E-Sign) – this federal law allows states to preempt it by enacting the UETA.
   4. Contracts for the Sale of Goods
      1. [1] Application of UCC
         1. Article 2 of the Uniform Commercial Code covers all transactions for the sale of goods other than securities (article 9) and leases (article 2A). It applies to any party; it is not limited to merchants although individual provisions may be.
      2. [2] "Goods" Defined
         1. Under the UCC, a "good" is any *tangible thing* that is *moveable*. [[UCC § 2-105](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-105)(1)] In addition to manufactured products, "goods" include:
            1. growing crops or timber, unborn young of animals and other identified things attached to land (other than minerals or the like or structures), regardless of who severs them from the land provided that they can be removed without causing material harm to the land
            2. currency exchanged as a commodity (as opposed to the medium of payment for a good)
            3. minerals or the like or a structure or its materials to be removed from realty that are *to be severed by the seller*

The term "goods" does not encompass:

intangible rights such as intellectual property

investment securities

money which is the medium of payment for goods

minerals or the like or a structure or its materials to be removed from realty that are *to be severed by the buyer*

* + 1. [3] "Sale" Defined
       1. [UCC § 2-106](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-106)(1) defines "sale" as the transfer of title for a price. Contracts that involve both goods and services must be evaluated to see which constitutes the primary purpose of the contract, with the secondary purpose being treated as incidental. If the primary function of the contract is to provide a service, the UCC does not apply, even if an incidental sale of goods occurs.
    2. [4] "Merchant" Defined
       1. A "merchant" is one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill particular to the practices or goods involved in the transaction" or who employs an agent or broker in such occupation. [[UCC § 2-104](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-104)(1)]
    3. [5] "Good Faith" Defined
       1. Every contract for the sale of goods imposes an obligation of good faith dealing on all parties in its performance and enforcement. [[UCC § 1-203](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+1-203)] All parties, including non-merchants, are subject to [UCC § 1-201](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+1-201)(19) which defines "good faith" as "honesty in fact in the conduct or transaction concerned." Merchants are subject to an additional good faith standard, set forth in [UCC § 2-103](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-103)(1)(b), which requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."
    4. [6] "Record" Defined
       1. *The proposed revision of Article 2 reflects the contemporary use of electronic communications by substituting all prior references to "writing" with "record," defined in proposed UCC § 1-201(33a) as "either a writing or a retrievable information in a computer's memory, a computer disk, or the like."*
  1. Types of Law
     1. Classical Contract Law (Legal Formalism): Samuel Williston (Arthur Corbin held different views)
        1. Preference for clear rules over general standards
        2. Expressed an indifference to issues of morality and social policy.
        3. Williston was in charge of the R(1)K, with Corbin as his 2nd in command.
        4. So the R(1)K is almost schizophrenic in nature, b/c Corbin and Williston had differing ideas.
     2. Modern Contract Law (Legal Realists): Arthur Corbin and Karl Llewellyn (wrote the UCC)
        1. Legal Realist: Believes that the law is not “out there”, but that the judge makes the law.
        2. Corbin wrote the R2K.
        3. Rules are always working…never Permanent!
        4. Conceptual; considers real life issues.
        5. Llewellyn: “Covert tools are always bad tools!!” b/c the next lawyer will use them differently.

ENFORCING PROMISES

* 1. R(2)K: A contract is a legally enforceable “promise or…set of promises.”
     1. Lon Fuller’s 3 Substantive Bases of Contractual Liability:
        1. *Private Autonomy* – people willingly contract to do something, the court should honor this b/c it has something to do with the autonomy of people. (ex. Gift (Gratuitous) Promises are Not Contracts – autonomy should be protected b/c they didn’t really intend or mean to promise it.)
        2. *Reliance* – People make plans in preparation of a contract; therefore, you should not be able to get out of contracts b/c someone else has relied upon you.
        3. *Unjust Enrichment* – One side gets away w/ something by breaching a contract and the other side was not enriched, or even suffered a detriment. This is not fair. (If I give a watch to a jewelry shop to fix it and they haven’t returned it or fixed it, they have been unjustly enriched)
     2. Enforcement of a Promise Requires:
        1. Consideration – something given in exchange for the promise
        2. Promissory Estoppel – reliance on the promise
        3. Restitution– unjust enrichment.

1. MUTUAL ASSENT - *For a contract to be formed, the parties must reach “mutual assent.” That is they must both intent to contract, and they must agree on at least the main terms of the deal.*
   1. INTENTION TO BE BOUND/Intent to Contract (OBJ. THEORY)
      1. Objective theory – in determining whether the parties have reached mutual assent, what matters is not what each party subjectively intended. Instead, a party’s intentions are measured by what a reasonable person in the position of the other party would have thought the first party intended, based on the first party’s actions and statements.
      2. Question 1: Is there Contract Formation Here?
      3. *Ray v. William G. Eurice & Bros., Inc.* – (I didn’t read it…but, I signed it)
         1. *(Revised plans were attached to a contract which was read and signed by Eurice. Eurice also signed each spec individually at the bank. Subsequently, Eurice refused to perform, and Ray sued for breach. D contended he never saw the specifications referred to by the contract and believed the contract referred to his own specifications. Refuse to honor “promise”.)*
            1. “Duty to Read”
            2. “Meeting of the Minds” – was the law in the 18th Century, but in the 19th century it’s not about the mind.
         2. TOOL: Mutual Manifestation of Assent
         3. R2K §21: A party does not have to intend for a promise to be binding for it to be enforceable.
         4. R2K §19(3): The conduct of the party may manifest his assent, even though he does not assent. In these cases, the contract may be voidable b/c of fraud, duress, mistake, or other invalidating cause.
         5. The signed piece of paper is “objective manifestation of assent” according the court.
         6. Rule: If a party signs a K that a reasonable person would’ve understood to mean one thing and the party did not intend to agree to that thing, the contract is still enforceable. If there is a “mutual manifestation of assent”, unless both of the parties enter into the contract by mistake, fraud, or duress, the contract is valid and both parties are bound. The intent of the parties to be bound is irrelevant.
      4. *Park 100 Investors, Inc. v. Kartes* – (Signing in Hurry – Fraud)
         1. *(The Kartes (D) negotiated with Park 100 (P) to lease space for their business. A lease agreement was signed which did not include any provisions for a personal guaranty of the lease and a personal guaranty was never mentioned. A representative of Park 100 caught the Kartes as they were late to their daughter’s wedding and fraudulently obtained their signatures on a personal guaranty.)*
      5. Two types of Fraud:
         1. Fraud in the Execution (Fraud in the Factor): Have a blind man sign a blank check.
         2. Fraud in the Inducement: By Park 100’s silence, they let the Kartes’ believe that it was the original lease agreement agreed upon.
         3. Fraud is an exception to the basic “Duty to Read” and “Manifestation of Assent” rules.
      6. In order to use Fraud as an escape:
         1. The charged party must have known of the fraud (he was silent for a reason)
         2. The fraud must have been relied upon by the complaining party (they signed)
         3. The fraud must have cause injury ($)
      7. Rule: A contract entered into by fraudulent means is not valid.
      8. Linzer: These two cases are CONSISTENT! They follow the same rule, but the Park 100 case is an exception to the rule b/c fraud was involved.
   2. OFFER & ACCEPTANCE
      1. Offer - An offer is a manifestation of an intent to be contractually bound upon acceptance by another party. An offer creates in the offeree the power to form a contract by an appropriate acceptance. [[Restatement § 24](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(24)&source=2ndary;contr2&view=fu)]
      2. Acceptance – an 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
      3. Hohfeldian Analysis:
         1. Right: Something the govt. will enforce.
         2. Duty: The “correlative” of Right. (If I have a right against you, you have a duty to me. You have a duty not to violate my right.)
         3. No-Right: Opposite of Right
         4. Privilege: Absence of Duty
         5. Right 🡨--------🡪 Duty

↕ ↕

No-right🡨--------🡪Privilege

* + - 1. Power: The Ability to change legal relations with another person. (“power of attorney”)
      2. Liability: The person is subject to the one with the power (“My power is your liability”)
      3. Disability: Opposite of Power
      4. Immunity: If they can’t change legal relations then you are immune.
      5. Power 🡨--------🡪 Liability

↕ ↕

Disability 🡨--------🡪Immunity

* + - 1. If I say: “I’ll give you $100, if you walk the bridge”
         1. You are giving me the “Power” to ACCEPT.
    1. BILATERAL – both sides make promises
       1. *Lonergan v. Scolnick* – (The “Snail Mail is Too Slow” Case)

*(After Lonergan (P) had made several inquiries concerning some advertised land; Lonergan sent a letter stating he wanted the property, but it had been sold to another several days before. He alleged a valid contract had been formed while Scolnick said they had merely negotiated in the letters sent back and forth.)*

* + - * 1. An Ad is usually an “invitation for an offer”
        2. This case shows us what an offer IS NOT!
        3. Their minds didn’t meet.
        4. Mailbox Rule: You put it in the mailbox, the deal is done. i.e the offer/acceptance is binding on you.

This applies to email.

* + - * 1. Rule: If from a promise, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making the offer (offeror) does not intend it as an expression of his fixed purpose until he has given further expression of assent, he has not made an offer.
      1. *Izadi v. Machado (Gus) Ford* – (The exception to the “AD is not an offer” Rule)

*(Izadi (P), attempted to purchase a 1988 Ford Ranger Pick-Up by giving the dealership $3,595 in cash, and a trade-in. The dealership refused to recognize Izadi’s interpretation of their ad, which specified in small print that the minimum $3,000 trade in value (no matter how much the trade-in was actually worth) only applied to the purchase of “any New ’88 Eddie Bauer Aerostar or Turbo T-Bird in stock”, and that the other trade-ins mentioned in the ad would have to be worth $3,000.)*

* + - * 1. Machado intentionally intended for the customer to be fooled.
        2. The more specific you are, the more likely it will be considered an offer.

Williston: The test of true interpretation…is what a reasonable person in the potion of the parties though it to mean.”\

Corbin: Ad is an invitation to make offers (R2K §26)

* + - * 1. Rule: A deliberately misleading advertisement that intentionally leads the reader to the conclusion that a binding offer exists can be considered an “offer”.

If an ad contains specific words of commitment, especially a promise to sell a particular number of units, then it may be an offer.

* + - * 1. Generally ads are not offers to sell.
    1. UNILATERAL – one side promises while the other acts (on the promise)
       1. Definition: Offeror offers to give offeree something if the offeree performs – the ball is in the offeree’s court, the offeror is not bound unless the offeree performs.
       2. Brooklyn Bridge Hypothetical:
          1. Mutuality of Obligation: “Offeror was not bound, until the offeree completed the act.”
          2. Wormser says since the promisee is not bound to complete, then “both must be bound or neither should be bound”.
          3. Unilateral K is formed WHEN he walks across the bridge, so anytime before that offeror can revoke.
          4. There can be Consideration without Mutuality and without Obligation, therefore not a valid contract.
          5. UNILATERAL: “I’ll pay you $100 if you find my dog”
          6. BILATERAL: “I’ll pay you $100 if you promise to find my dog”

Now if he promises and doesn’t find your dog, then he has breached the contract.

* + - * 1. Wormser also says the burden should be on the offeror, not the offeree.
      1. Requirements Contract: If you give me a good price, I’ll buy all I need from you.
         1. Buyer may stop using the product, therefore no longer needing it and not being obligated to buy any more.
      2. Option Contract: I will buy everything you can make.
         1. No “mutuality of obligation” – Seller did not have an obligation as long as they didn’t sell to anyone else, they could close the factory.
      3. *Patterson v. Pattberg* – (Dang it, I should’ve slid the money under the door!)

*(Pattberg (D) offered to discount the mortgage on Petterson’s estate on the condition that it be paid on a certain date. Petterson had showed up at Pattberg’s door, announcing he was going to pay him, only to be told the mortgage had already been sold to another. Petterson sues for breach of contract.)*

* + - * 1. Classical Court: There was no “tender” (handing over of the money) before the offer was revoked.
        2. Williston: The offeror may see the approach of the offeree as contemplated…
        3. Hard (harsh) cases can’t make bad cases.
        4. Rule: If the defendant withdraws his offer before the act of the promisee was completed (which would’ve made the promise binding), no contract was ever mad and revocation is allowed.
        5. \*\*\*\*\*ON a test argue the classical *Patterson* view (you can revoke at any time before he tenders money) and modern R2K §45 part Performance View …if oferree starts performance, the oferror can’t revoke the offer, but his duty to pay does is contingent on him actually completing performance.
      1. *Cook v. Coldwell Banker* – (I think you owe me a bonus!)

*(P, Cook, said she had accepted Coldwell’s, D, offer of a bonus by substantial performance. The bonuses were to be paid at the end of the year, but Coldwell changed the conditions a few months later and moved the pay time to March of the following year. Cook stayed with Coldwell until the end of the year in reliance of the original offer, but she was not paid.)*

* + - * 1. Courts are now using unilateral contract analysis to enforce liability, rather than to avoid liability.
        2. R2K §45 – Option Contract: “If you start walking, I promise not to withdraw the offer.”

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 the beginning of it.

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. (This rule protects the offeree in justifiable reliance on the offeror’s promise.)

Cook had created an underlying option contract under 45. She should get her whole promise, even if she does not stay until March. You cannot change or modify a contract in this way. Coldwell cannot change the terms as she “was walking across the Brooklyn Bridge.”

* + - * 1. Rule: In the context of an offer for a unilateral contract, the offer may not be revoked when the offeree has accepted the offer by substantial performance.
        2. Llewelyn: The only true unilateral K is one in which the oferror would not want a return promise – real estate brokers, offer of rewards, b/c there is not 100% assurance that they will make good on that promise.
    1. When is the Offer Effective?
       1. Receipt of offer - An offer is not valid until *received* by the offeree or his agent. [[Restatement § 68](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(68)&source=2ndary;contr2&view=fu)]
       2. Duration of offer
          1. If the offer has a stated time within which the acceptance must be made, any attempted acceptance after the expiration of that time will fail and will merely constitute a counter-offer by the offeree. If no specific time is stated within which the offeree must accept, it is assumed that the offeror intended to keep the offer open for a reasonable period of time, to be determined based on the nature of the proposed contract, trade usage, prior dealings and other circumstances of which the offeree knows or should know.
          2. Generally, the time for accepting an offer begins to run from the time it is received by the offeree. If there was a delay in delivery of the offer of which the offeree is aware, the usual inference is that the time runs from the date on which the offeree would have received the offer under ordinary circumstances.
          3. Generally, courts hold that in telephonic or face-to-face communications in which an offer is made, the offer lapses when the conversation terminates in the absence of a clear indication that the offer remains open beyond the conversation.
    2. VALIDITY OF PARTICULAR KINDS OF OFFERS
       1. Offer made in jest – an offer which the offeree knows or should know is made in jest is not a valid offer. Thus even if accepted, no contract is created.
       2. Preliminary negotiations – if a patry wishes to solicit bids, this is an invitation to Make offers.
       3. Advertisements –see Izadi
       4. Auctions – an item that is put up for auction usually not an offer but a solicitation of offers from the audience. So unless the sale is expressly said to be /out reserve, the auctioneer may w/draw the goods form the sale even after the start of bidding UCC 2-328(3)
    3. Types of Contracts as to Validity
       1. Void contract
          1. One that is totally w/out any legal effect from the beginning (ex. Agreement to commit a crime)
       2. Voidable contract
          1. One that one or both parties may elect to avoid or to ratify (ex. Contracts w/ infants or mentally ill parties)
       3. Unenforceable contract
          1. An agreement that is otherwise valid, but that may not be enforceable due to various defenses extraneous to contract formation such as the statute of limitations or statute of frauds.
  1. ACCEPTANCE
     1. Who may accept: an offer may be accepted only by a person in whom the offeror intended to create a power of acceptance.
     2. Offeree must know of offer:
        1. An acceptance is usually valid only if the offeree knows of the offer at the time of his alleged acceptance
           1. Rewards – if a reward is offered for a particular act, a person who does the act w/out knowning about the reward cannot claim it.
     3. Manner of Acceptance:
        1. Traditional Approach
           1. Traditionally, the nature of the contract dictated whether the offer could be accepted by a return promise or by actual performance of the promised act.
           2. [a] Acceptance by Performance; Unilateral Contracts

In a unilateral contract, the offer empowers the offeree to only accept by complete performance of the promise. The offeree's failure to perform does not constitute a breach since no contract is formed until the offeree renders full performance.

* + - * 1. [b] Acceptance by Return Promise; Bilateral Contracts

In a bilateral contract, the offers empower the offeree to only accept by return promise. Bilateral contracts are formed upon the giving of the promise to perform an obligation in the future, and failure to fulfill such promise results in breach.

* + - 1. Modern Approach
         1. Under the modern approach, an offer invites acceptance *by any means reasonable* under the circumstances, unless otherwise indicated by language or circumstances. [[UCC § 2-206](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-206); [Restatement § 30](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(30)&source=2ndary;contr2&view=fu)(2)] This approach reflects the fact that many offers do not specify whether acceptance is to be by full performance or promise. A contract may be formed even if an offer clearly indicates that acceptance is to be by promise if:

the offeree begins to perform, in lieu of making the required promise; and

the offeror learns of the commencement of performance and acquiesces to such manner of acceptance.

* + 1. Method of Acceptance
       1. The offeror is the “master of his offer.” That is, the offeror may prescribe the method by which the offer may be accepted (ex. Telegram, letter, by mailing a check, etc)
          1. Where method not specified: if the offer does not specify the mode of acceptance, the acceptance may be given in any reasonable method.
          2. Acceptance of unilareral contract: an offer for a unilateral contract is accepted by full performance of the requested act
          3. Offer invites either promise or performance – if the offer does not make clear whether acceptance is to occur through a promise or performance, the offeree may accept by either a promise or performance

Shipment of goods – if buyer of goods places purchase order that doesn’t specify method of acceptance, seller may accept by promising to ship, or just by shipping the goods.

* + - * 1. Notice of acceptance of unilateral contract – where an offer looks to a unilateral contract, most courts now hold that the offeree must give notice of his acceptance after he has done the requested act.
        2. Acceptance by silence – generally an offer cannot be accepted by silence, unless:

Reason to understand – silence can constitute acceptance if the offeror has given the offeree reason to understand that silence will constitute acceptance and the offeree subjectively intends to be bound

Benefit of service – an offeree who silently receives the benefit of services (but not goods) will be held to have accepted a contract for them if he: 1. Had a reasonable opp. To rejet them; and 2. Know or should have known that the provider of the services expected to be compensated

* + - * 1. Acceptance by dominion – where the offeree receives goods, and keeps them, this exercise of dominon is likely to be held to be acceptance.
    1. Acceptance Varying from Offer
       1. Common law “mirror image rule” – under common law, the offeree’s response operates as an acceptance only if it is the precise mirror image of the offer. If the response conflicts at all w/ the terms of the offer, or adds new terms, the purorted acceptance is in fact a rejection and counter offer, not acceptance.
       2. UCC view – UCC rejects “mirror image rule”, and will often lead to a contract being formed even though the acceptance diverges form the offer.
       3. Battle of the forms
          1. General – UCC 2-207(1) provides that any expression of acceptance or written confirmation will act as an acceptance even though it states terms that are additional to or different from those contained in the offer
          2. Acceptance expressly conditional on assent to changes – an expression of acceptance does not for a contract if it is expressly made conditional on assent to additional or different terms. So if the purported acceptance contains additional/different terms form the offer, and also states something like, “this acceptance of you offer is effective only if you agree to all of the terms listed on the reverse side of this form,” there is no contract formed by the exchange of documents.

Limited – crts reluctant to use this. Only if form makes clear that party is unwilling to proceed w/ the transaction unless the other party agrees to this party’s changes.

* + - * 1. Additional term in acceptance – where the offeree’s resonse contains an additional term, the consequences depend on whether both parties are merchants.

At least one party not merchant – if one party is not a merchant, the additional term does not prevent the offeree’s response from giving rise to a contract, but the additional term becomes part of the contract only if the offeror explicitly assents to it.

Both merchants – if both parties are merchants, then the additional term automatically becomes part of the contract, as a general rule. However,

Materiality – the addition will not becomes part of the contract if it is one which materially alters the contract. Ex. Disclaimer of warranty

Objection – If the offeror objects to having the additional term become part of the contract it wont.

*Brown Machine v. Hercules Inc.* (I EXPRESSLY said No more terms…but then we ACTED like we had a K!)

*(Brown is suing Hercules for indemnification. Brown submitted proposal, Hercules sent purchase order (offer) that said “expressly limits acceptance to the terms stated herein…any additional or different terms proposed by the seller are rejected unless expressly agreed to in writing” and “sellers actions shall constitute an acceptance of the above terms”. Brown sent back an order acknowledgement with an additional term – an indemnity provision. Brown wins at trial court level.)*

Browns order acknowledgement acted as an “Acceptance” with additional or different terms from the offer.

Rule: UCC §2-207 (2). Even if Brown had applied their “express limitation of acceptance on new offers”, §2-207(3) says if they act like they had a contract, then they had a contract, w/o the indemnification clause. (?)

Revised §2-207 threw everything out. What you agreed on was your contract, if you didn’t agree it was filled in by one of the UCC’s default rules.’

* + - * 1. Acceptance silent – if an issue is handled in the first doc. (offer) but not in the sec doc (acceptance), the acceptance will be treated as covering all the terms of the offer, not just those which the writings agree.
        2. Conflicting terms in documents – if an issue is covered one way in the fofering doc and another conflicting way in the acceptance, most courts apply the knock out rule. That is, the conflicting clauses “knock each other out” of the contract, so that neither enters the contract. Instead, a UCC gap-filler provision is used if one is relevant, otherwise, common law.
        3. Response diverges too much to be acceptance – if a purported acceptance diverges greatly from the terms of the offer, it will not serve as an acceptance at all, so no contract formed.
        4. Contract by parties’ conduct – if divergence occues, the parties’ conduct later on can still cause a contract to occur. UCC 2-207(3) provides that 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 contract.

Buyer’s failure to return goods – ex: shrink wrap (see below)

* + - * 1. Confirmation of oral contract – if parties initially reach an oral agreement, a doc later sent by one of the memorialize the agreement is called a confirmations

Additional terms in confirmation – if the confirmation contains additional terms, they become apart of the contract unless either 1. The additional term materially alters the oral agreement or 2. The party receiving the confirmation objects to the additional terms

Different term in confirmation – if a clause contained in the confirmation is different from a term on the same issue reached in oral agreement, the new clause probably does not become apart of the contract

* + - * 1. Last shot rule - Buyer sends out P.O. with terms A + X, sellers send back acknowledgement saying A+Y, this acts as a counter-offer. A party impliedly assents to and thereby accepts a counter-offer by conduct indicating lack of objection to it. Tended to favor Sellers over Buyers b/c Sellers normally “fire the last shot” (send the last form).
      1. Ask yourself 3 Questions:
         1. What was offered?
         2. What was accepted?
         3. What is the contract?
      2. Knock-out Rule: Conflicting terms cancel each other out UCC 2-207.
      3. Mirror-Image Rule: Gives a “varying” acceptance the effect only of a counter-offer, preventing the contract from being made on the terms of the original offer. Both sides have to have the completely same terms. *Poel v. Brunswick*
      4. Last-Shot Rule: Buyer sends out P.O. with terms A + X, sellers send back acknowledgement saying A+Y, this acts as a counter-offer. A party impliedly assents to and thereby accepts a counter-offer by conduct indicating lack of objection to it. Tended to favor Sellers over Buyers b/c Sellers normally “fire the last shot” (send the last form).
      5. UCC §2-207: Worst written statute ever, b/c its based on the notion that you actually read boilerplates but nobody does.
         1. (1) If an acceptance is made that contains additional or different terms, then the those terms are treated as proposals for additional terms, and the acceptance is still good, UNLESS acceptance is expressly made conditional on assent to the additional or different terms. (Negates Mirror-Image Rule!)

All sellers put this in their acknowledgments

* + - * 1. (2) Additional terms are to be treated as proposals for addition to the contract. B/w merchants such terms become part of the contract unless:

(a) the offer expressly limits accepts to terms of offer (every decent lawyer will put this into a buyer’s form)

(b) the terms materially alter the contract

Comment 4 – examples of what material alters a K.

Linzer says Arbitration is material, although some cases say it is not

(c) notification of objection of additional terms has already been given (a) or is given within reasonable time after notice is received (but didn’t we say no one reads these form contracts?)

Linzer says this isn’t likely b/c Llewelyn says no one read this stuff so they are not aware of the additional terms.

* + - * 1. (3) Conduct by both parties recognizing the existence of a contract is sufficient to establish a contract; but the contract consists of those terms on which the writings of the parties agree.

Contradictory terms are knocked out b/c they are basically objections to each other, so they will be replaced with gap fillers.

* + - 1. Sidd’s take on Definite Expression of Acceptance §2-207
         1. IF Offer = A + Not X and Acceptance = A+X; then the K= A+Not X
         2. If there was express conditionality in the offer, you can only accept A (express terms in offer)
         3. If there was no express conditionality and

If you are not a merchant 🡪 Specific Acceptance of Terms (Klocek v. Gateway)

If you are a merchant 🡪 Other terms are integrated, UNLESS the new terms are material alterations. (non-material altercation are ok and will not get knocked out)

* + - 1. Revised UCC §2-207:
         1. Revised 2-207: Terms of Contract; Effect of Confirmation

If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record which contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to Section 2-202, are:

terms that appear in the records of both parties,

terms, whether in a record or not, to which both parties agree, and

terms supplied or incorporated under any provision of this [Act].

This is a double knock-out rule. Different terms are acceptable if in the written form records of both parties. This is not so under existing 2-207. Material differences would have to be expressly made.

BIG PICTURE!!!!

* Who made the offer?
* Was there an acceptance or counter-offer?
  + If acceptance – what terms got in?
    - Last-shot rule.
    - Mirror-image rule (classical)
    - Brown Rule – UCC 2-207.
  + If counteroffer –
    - Did other party accept either through either express or implied-in-fact consent, in that case what terms got in?
    1. DURATION OF THE POWER OF ACCEPTANCE
       1. For an acceptance to be valid, it must become effective while the power of acceptance is still in effect. So where there is doubt about whether the acceptance is timely: 1. Poinpoint the moment at which the acceptance became effective; and 2. Ask whether the power of acceptance was still in effect at that moment.
       2. Ways of terminating power of acceptance
          1. Rejection by the offeree

Exceptions – 1. the offeror indicates that the offer still stands despotie the rejections; or 2. The offeree states that although she is not now accepting, she wishes to consider the offer further later.

* + - * 1. Counter-offer by offeree
        2. Lapse of time

Acceptance terminates at the end of a reaosnbale time period

Face-to-face convos – acceptance terminates at the end of convo usually

* + - * 1. Revocation by the offeror

Effective upon receipt i.e. received by offeree

* + - * 1. Death or incapacity of offeror or offeree
      1. Irrevocable Offers – usually an offer is revocable at the will of the offeror. However, there are some exceptions:
         1. Standard option contract - first, the offeror may grant the offeree an “option” to enter into the contract. The offer itself is then referred to as an option contract

Common law requires consideration – the traditional common law view is that an option contract can be formed only if the offeree gives the offeror consideration for the offer (i.e. ill pay you $5 and you hold the offer open for 3 days)

Modern (Restatement) approach – modern approach, is that a signed option contract that recites the payment of consideration will be irrevocable, even if the consideration was never paid

* + - * 1. “Firm Offers” under the UCC – UCC is even more liberal in some cases: it allows formation of an irrevocable offer even if no recital of payment of consideration is made. 2-205, an offer to buy or sell goods is irrevocable if it 1. Is by a merchant; 2. Is in a signed writing; and 3. Gives explicit assurance that the offer will be held open. Even w/out consideration or recital.

Three month limit – no offer can be made irrevocable for any longer than three months unless consideration is given

Forms supplied by offeree – if the firm offer is on a form drafted by the offeree, it is irrevocable only if the particular firm offer clause is separately signed by offeror.

* + - * 1. Part performance or detrimental reliance – the offeree’s part performance or detrimental reliance may transform an otherwise revocable offer into a temporarily irrevocable one

Offer for unilateral contract – for a unilateral contract, the beginning of performance by the offeree makes the offer temporarily irrevocable. As long as the offeree continues diligently to perform, the offer remains irrevocable until he has finished.

Preparations by offeree – if the offer is for a bilateral contract, the offeree’s making of preparations will cause the offer to be temporarily irrevocable if justice requires. “An offer which the offeror should reasonably expect to induce action or forbearance of 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.

Offers by sub-contractors to general contractor will often become temporarily irrevocable under this rule

* + - * 1. An 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
    1. Limiting the Offeror’s Power to Revoke
       1. *James Baird Co. v. Gimbel Bros., Inc.* – (The Sub-Contactor Bid Error – No Reliance)
          1. *(Gimbel (D) submitted an offer to Baird, but there was a mistake as to the actual amount of linoleum needed, causing Gimbel’s prices to be about half the actual cost. Gimbel telegraphed all contractors of the error, but the communication was received by Baird just after Baird submitted its lump sum bid relying on Gimbel’s erroneous prices. Gimbel refused to recognize a contract.)*
          2. No Promissory Estoppel/ No Reliance
          3. No Bilateral Agreement
          4. A contractor does not “accept” the sub-contractors when he uses it b/c the sub-contractor couldn’t sue for BoK if he chose someone else.
          5. Hand saying §90 shouldn’t apply to commercial transactions since businesses should be able to take care of themselves.
          6. Hand opinion was the most widely used until the 60s (DRENNAN case)
          7. Rule: If the sub-contractor did not say they meant for the contractors to rely on his quotes when making their bids, then their bids are not considered offers for acceptance.
       2. *Drennan v. Star Paving Co*. – (The Sub-Contractor Bid Error – Reliance)
          1. *(Drennan (P) was preparing a bid on a public school construction project. On the day the bid was to be submitted, Star (D) phoned in its bid of $7,131.60 for paving. Star’s bid for paving was low and used by Drennan and the contract was awarded to Drennan the same evening. The next day, Star refused to do the paving for less than $15,000.)*
          2. Most Important Contract Case of the 20th Century!
          3. Just like Cardozo changed the law in Allegany College, Traynor changed the Law in Drennan.
          4. Traynor uses §45 as an anology - §90 (bilateral) & §45 (unilateral) are two sides of the same coin!
          5. §45 comment – implied promise in every offer that if part performance is made, the offer can’t be revoked if injustice…
          6. Sub-contractor is bound to keep their contract and allow the general contractor the chance to accept.
          7. This case made §90 applicable to not only donative promises.
          8. Rule: Promissory Estoppel now applies to commercial transactions, and unless the sub-contractor specifically says he does not want general contractor to rely and he can revoke, he is bound.
       3. *Pop’s Cones Inc. v. Resorts International Hotel, Inc.* – (TCBY franchisee got screwed by Big Hotel)
          1. *(Pop’s (P), a vendor of TCBY, negotiated with Resorts (D) to lease a location in its resort hotel. Relying on Resorts’ advice and assurances that an agreement had been reached, Pop’s ended its lease at its other location, placed its equipment in temporary storage, and retained an attorney to finalize the terms of the lease. Resorts later withdrew its offer)*

Only asked for “Reliance Damages”, which will make her whole.Great Lawyering here.

Reliance appears to look like a Tort and it is taking over the Code!

Classical Contract would say that Resorts could revoke, b/c no K, no bargain, no offer, but there is an argument that §90 applies.

* + - * 1. *Hoffman v. Red Owl Stores Inc.* (Illustration 10 in §90):

Objective Test: “reasonably should’ve expected” is different than “expected”

* + - * 1. *Malaker* - “seemed to have heightened the amount of proof required to establish a ‘clear and definite promise’ by searching for ‘an express promise of a clear and definite nature.’”
        2. Mere expressions of intention, coupled with a prediction are not sufficient assurances.
        3. Rule: Promissory Estoppel (§90) is not only triggered by an explicit promise, but by *assurances* and *representations* made that induce someone to rely to his detriment producing injustice if not enforced. A promise is a clear and definite promise if a reasonable person would expect someone to rely on their assurances and representations.
    1. When an Acceptance Becomes Effective
       1. Mailbox Rule – acceptance is effective upon proper dispatch
          1. Offer provides otherwise – mailbox rule doesn’t apply if offer provides otherwise
          2. Lost in transmission – if acceptance is lost or delayed, it depends on whether the communication was properly addressed (if it was, then acceptance is effective at dispatch, if it wasn’t then only effective if it is received w/in a normal amount of time had it been properly dispatched.)
       2. Both acceptance and rejection send by offeree – if the offoree sends both an acceptance and rejection, depends on which one is sent first
          1. If rejection is sent first but acceptance is received first, then acceptance will be affective
          2. If acceptance is sent first it is accepted at dispatch and doesn’t matter if rejection is received first
       3. Option contracts
          1. Acceptance of an option contract is effective upon receipt by the offeror, not upon dispatch!
          2. Risk of mistake in transmission

A contract is formed on the terms of the offer as received by the offeree.

If the offeree knows or has reason to know that the terms of offer are a mistake, the offeree cannot “snatch up” the offer

* + - 1. In transactions governed by the CISG, the acceptance becomes effective when it reaches the offeror.
    1. Late Acceptance
       1. A number of approaches are applied to communications that are intended as an acceptance but sent after the offer expires:
          1. the communication may qualify as a counter-offer;
          2. the offeror may waive the lateness and honor the acceptance;
          3. if the acceptance is nevertheless sent within a reasonable time, albeit after the offer's stated expiration, the acceptance is valid and results in the formation of a contract if the offeror does not reject it within a reasonable time
    2. Electronic Contracting
       1. Contracts of Adhesion: A form contract that consumers can’t do anything to change. We can’t get rid of them b/c it’s a practical matter, we want them for mass transactions. If you don’t like the terms of one company…go to another company.
       2. R2K §211(3) – Reasonable Expectation
          1. “Where the other party has reason to believe that the party manifesting such assent would not do so if he knew tha the writing contained a particular term, the term is not part of the agreement.”
          2. Frequent in insurance law; Insurance companies make their money on the investment of the premiums, not by just the premiums.
          3. No way to run business w/o standard form contracts; if you don’t like it you go to a different company…not reading is not an excuse.
       3. E-commerce: Increasing the amount of Standard Form language b/c its not inconvenient to have a lot of pages.
       4. UCITA:
          1. §202 C.4: Mutual Assent

You can’t fix terms of the contract when you make contracts last for 20 yrs.

“Rolling Terms” – Terms after the fact

* + - * 1. §209 requires more than R2K §211(3)

UCITA §209 a term is not part of the K if it is unconscionable (bad surprise)

* + - * 1. R2K §211(3) just requires a surprise
        2. So, an argument that is valid under §211(3) isn’t necessarily valid under §209 b/c §209 requires more than a surprise.
      1. AIL and NCCUSL debate to disapprove the “assent” approach in UCITA, AIL voted to disapprove these provisions, so it was left freestanding under UCITA.
      2. UCITA is now essentially dead.
      3. Amendments to UCC §2-103:
         1. Is Software a good? – A good is a moveable thing – so software could go either way!
         2. information is not a “good”, but doesn’t tell you what information is.
      4. *Hill v. Gateway* – (Sorry Easterbrook, LINZER SAYS YOU’RE WRONG!!)
         1. Vendor made offer, buyer accepted
         2. Easterbrook said that you had to have (2) forms…§2-207 does not require (2) forms.
         3. §2-207 also applies with oral agreements
         4. This case was decided WRONG!
         5. This court finds that Gateway was the master offeror and can determine the manner in which offeree can accept.
         6. Rule: Terms sent in a box saying you are bound unless you return the computer w/in 30 days…you are bound! i.e. Shrinkwrap
      5. *Klocek v. Gateway* – (It wasn’t part of our offer-acceptance)
         1. Rule: If P is not a merchant, additional or different terms contained in the “acceptance” do not become part of the parties’ agreement unless the plaintiff expressly agreed to the terms.
         2. Difference b/w two cases is when the offer was made. Case 1: Vendor was offeror. Case 2: The Buyer was the offeror.
         3. What can we do about this problem?

Strengthen 211(3) by not requiring the party writing the K to have known that you would reject it. Gateway should not have to anticipate that their buyers would be unhappy with the terms.

Either govt. will have to fix or big businesses will; right now big businesses are doing it, but you might want the government to do it b/c you don’t want one party to dictate the terms for both parties.

* + - * 1. Argument that there is no freedom in contracts of adhesion so we need to the courts to give us freedom.
      1. *Brower v. Gateway 2000, Inc.* (arbitration clause valid, but find cheaper way)
         1. P bought computer from D. included in the packaged w/ the computer was an agreement that said any dispute was to be settled by arbitration.
         2. You are bound b/c you accepted the terms when you kept the product after 30-days. Crt said however that the arbitration clause w/ the ICC was prohibitively expensive and remanded to trial court for appropriate substitution of an arbitrator to reduce the costs.
         3. Shrinkwrap -see below
      2. *Register.com, Inc v. Verio Inc* (you use my info, you obay my rules!)
         1. P sued D to stop using their lists to send spam. As part of the process of obtaining the lists a user must click through an agreement not to use the lists for spam. D said didn’t agree. Crt said it did by using the info.
         2. Rule – a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit w/ knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which become binding on the offeree. i.e Clickwrap
      3. Shrinkwrapped Warranties
         1. Cases are divided on whether a purchaser is bound by an arbitration clause contained in a limited warranty that is packed within the product box and shrinkwrapped at the factory where the purchaser is unaware of such clause.
         2. Similarly, when a shrinkwrap package containing a software program contains a printed warning to the effect that unwrapping the package constitutes consent to the terms of the license contained therein, jurisdictions are split as to the binding effect of such license terms on the purchaser.
         3. *Brower v. Gateway*

Shrinkwrapped package contained arbitration clause. P didn’t want to go to arbitration but had to b/c of it.

Contract of adhesion

* + - 1. Box-Top Licenses
         1. At least one court has held that if a purchaser is unaware of license terms printed on the box because the transaction was conducted over the telephone, with no mention by the seller's representative of the license terms, such terms were not binding on the purchaser.
      2. Clickwrap
         1. Where software is downloaded from the internet, with the licensee being required to click on the "I agree" button indicating agreement to the licensor's terms, such conduct is deemed to be a binding acceptance of the licensor's offer.
    1. Indefiniteness Generally No contract will be found if the parties agreement are unduly indefinite
       1. Court supplies missing term – if court believes parties intended to contract and can supply a reasonable value for the missing term, they will
          1. UCC – allows court to fill in terms for price, place of delivery, time for shipment, time for payment, etc as long as the parties have intended to make a contract
          2. Non-UCC – most courts follow the supply the missing term on a reasonable basis approach, as long as parties have intended to contract
          3. Too indefinite – if too indefinite contract, even if intended to be bound by it, is void
       2. Implied obligation of good faith
          1. Term in contract that says that every contract or duty w/in this Act imposes an obligation of good faith in its performance or enforcement.

Consistency w/ other party’s expectations – parties required to behave ina way that is consistent w/ the other party’s reasonable expectations about how the contract will work

* + - 1. Agreement to agree (LINZER HATES THIS TERM, DON’T USE IT!)
         1. Court generally will supply a missing term if the parties intentionally leave a term to be agreed upon later, and then they don’t agree.
         2. They are agreeing to bargain.
         3. Classical Contract said as long as there is mutual assent that there is another term to be agreed upon, there is no K. (K to make a K is not a K).
         4. This is not totally wrong but has been supplemented by the UCC and the modern cases.
         5. Two situations of incomplete bargaining:

*Agreement to Agree(Bargain)*:The parties have reached a decision on a number of matters but have left for future agreement one or more terms. You have NOT struck your deal! (*Walker v. Keith*).

*Enforceablility based on certainty of the terms.*

*Formal Contract Contemplated*: The parties have reached agreement in principle on at least the major provisions of their agreement but they contemplate the execution of a formal written contract. When the parties contemplate the execution of a formal contract, they often reduce their agreement in principle to a written letter of intent. Basically have struck your deal!

* + - * 1. It is possible that a fact pattern could involve both an agreement to agree and a formal contract contemplated. (Ex. The parties might reach agreement on all material terms of contract, except for delivery dates, which would be left for future agreement; the parties could express their agreement in principle in a letter of intent which contemplates the execution of a formal contract.)
        2. Charles Knapp looks at how each party would look at himself under each situation:

Under *Agreement to Agree(Bargain)*, each may regard himself as:

1) Not Enforceable. Not bound at all, free to walk away. They may argue that pencil must be put to paper before anyone is bound. This is the typical classical position. (*Walker v. Keith*).

2) May be enforceable - Not bound by this, but you are obligated to bargain in good faith.

3) Fully Enforceable and everyone is bound. An arbitrator could decide the issue in the event of a disagreement. Some way could be devised to mechanically solve open provisions (3rd party or an objective standard to fill the gaps).

Under the *Formal Contract Contemplated*, each party may regard himself as:

1) Not Enforceable, no one is bound. Perhaps the parties agree in principle, but the agreement is not binding. No reliance (the agreement could be worded this away).

2) Fully Enforceable and everyone is bound. All you have is a Letter of Intent. But, all the parties have to do is sign off, and they have the deal. Only the formal papers stand to be completed. Maybe only a board of directors has to approve.

3) Obligated to resolve problems. Letter of Intent has blanks, but these blanks can’t be used to get out of K. Good faith is not to reach an agreement but to attempt to resolve disagreements.

(Check these, Andrea says they should be the same as those of Agreement to Bargain)

*Walker v. Keith* – “RELATIONAL CONTRACT”

*(Walker (P) entered into a ten-year lease with Keith (D). The contract gave Walker an option to renew the lease for ten additional years. The parties were to agree on a fair rental at that time to be fixed based on the “comparative basis of rental at the date of renewal with rental values at this time reflected by the comparative business conditions of the two periods.” Walker attempted to renew his lease, but Keith refused. Walker brought suit for damages or specific performance. Renewal Option invalid.)*

This is “Relational” b/c the tenant has had the same landlord for 10 yrs, some property for 10 yrs, now they want to renew.

UCC 2-205: Open price term will not prevent enforcement of a K if the parties intended to be bound and their intention to be bound is evidenced by their relationship.

*Oblebay Norton Co. v. Armco, Inc.:* Although both methods agreed upon by the parties for fixing the price had become ineffective, the court declared the K effective and fixed a rate for the current year, but ordered the parties to negotiate a price for each season through the remaining term of the K.

“Rolling Contract”

Under ALL circumstances, if the two parties agree, they can make changes to their contract.

Equity cannot rewrite a contract supplying the essential terms which the parties failed to provide. The parties have merely agreed to agree. Their failure to agree renders the option/offer incapable of being accepted.

Rule: In cases of renewal options, the contract is valid if there is a reasonable substantial certainty as to the material and essential terms (rental price or method of determining the rental price in the future) and leaves nothing to be agreed upon as a result of future negotiations.

*Quake Construction, Inc. v. American Airlines, Inc.* – Letter of Intent Issue

*(American Airlines (D) hired a general contractor to prepare and accept bids and award contracts for construction of the expansion of their facilities at Airport. Quake Construction (P) was invited to bid on the employee facilities and auto shop projects. Quake was orally informed that it had been awarded the contract for the project and sent a letter of intent stating that the formal contract agreement was being prepared and would be available for signature shortly in order for Quake to provide their license number. The letter also contained a cancellation clause. American later terminated Quake’s involvement and Quake sued for the damages.)*

2 types of Bonds: Assurity Bond and Performance Bond

MOST LOIs are NOT enforceable.

“Cancellation Clause” (show the parties intent to be bound) b/c of R2K §211(3) – If AA didn’t tell Quake about it and quake didn’t interpret it as a “shop around” pass for AA and wouldn’t have signed had he known, then it would be unenforceable.

This is not a construction contract, some things can fall through and it is a big job. This LOI should not be binding!

LOI is NOT a K to give them the construction job, it is a K to “bargain” for the construction job.

“Agreement to Negotiate” – Farnsworth

“Agreement to Bargain” – Knapp

Factors to consider if LOI are meant to be binding:

1) Short time period b/w the LOI and the time you are supposed to start work.

2) The more detail there is the more intent.

3) The more money there is involved the more intent.

4) Whether the negotiations contemplated a full formal writing. ??

5) Reasons negotiations were abandoned.

Rule: Although letters of intent may be enforceable, such letters are not necessarily enforceable unless the parties intend them to be contractually binding. The fact that parties contemplate that a formal contract will be executed does not render prior agreements mere negotiations. Best way to show intent is to SAY it…We intent Paragraph 1 to be binding!

* + - * 1. Part performance

Even if an agreement is too indefinite for enforcement at time it is made, the subsequent performance of the parties may cure this indefiniteness.

1. CONSIDERATION

EXAM APPROACH TO CONSIDERATION:

Where Consideration is an issue, make sure you analyze:

1. Whether the promise involved was bargained for, i.e., was sought by the promisor in exchange for his or her promise and given by the promisee in exchange for that promise; and
2. Whether, as a result of the bargain, the relevant party or parties suffered legal detriment, i.e., he or she became obligated to do something that he or she was not obligated to do before the agreement

If you determine that the promise involved cannot meet the above test, then determine whether one of the modern “exceptions” to the consideration requirements are present:

1. The implication of “good faith” to save output, requirements, and exclusive dealing contracts, and contracts with “personal satisfaction” clauses
2. A gift promise for past benefits made enforceable via R2K §86
3. A promise to pay a debt otherwise unenforceable because of the statute of limitations or bankruptcy
4. The implication of a “notice” requirement to save termination-at-will clauses

If the promise is not supportable by consideration, then classify it properly as a promise that is unenforceable due to:

1. the gift promise rules
2. The past moral consideration doctrine
3. The unsolicited actions rules
4. The illusory promise doctrine
5. The sham consideration rule
   1. Consideration Defined
      1. Something given in exchange for the promise. (Could be a right, interest, profit or benefit given to one party and a forbearance, detriment, loss, or responsibility suffered or undertaken by the other party).
   2. \*\*Consideration is what distinguishes an unenforceable promise from a Contract.
   3. Note: UCC §2-209(a) says if the promise falls within statute then it’s enforceable w/o Consideration.
   4. Black Letter Rule: A valid contract requires valid consideration.
   5. Two Models to Prove Consideration:
      1. Tool 1: *Benefit/Detriment:* Benefit to Promisor/ Detriment to Promisee (Not the general American Rule. Invokes too many opinions and is much looser; so it is more troublesome for the courts)
      2. Tool 2: *Bargain For:* A promisor bargains for a return promise and a promise is given by the promisee in exchange for the promisor’s promise. (Courts can more clearly identify a bargain. Better than Ben/Det.)
   6. Other tools to find Consideration:
      1. Tool 3: *Promissory Estoppel*
      2. Tool 4: *Unjust Enrichment*
      3. Tool 5: *Promissory Restitution*
      4. Tool 6: *Quasi-Contract*
   7. Functions of Legal Formality: (Requiring CNS, the K to be in writing…)
      1. Evidentiary Function: provides evidence of the K.
      2. Cautionary Function: makes sure everyone is in the same state of mind when they are signing the K, serves as a check against inconsiderate action.
      3. Channeling Function: a seal ensures as a reminder of promise and induces deliberation
         1. (Whatever tends to accomplish one of these purposes will tend to satisfy the other two.)
   8. Bargain Element:
      1. Promises to make gifts – generally unenforceable b/c lacks bargain element
         1. Existence of condition – even if the person promising to make a gift requires the promisee to meet certain conditions in order to receive the gift
            1. *Kirksey v. Kirksey*

A man told his deceased brother’s wife “if you come see me, I will give you a place to stay”

The court found that the man’s offer was hardly a promise and rather a “mere gratuity,” thus being unenforceable

This is like the example where a man says if you go to the store you may purchase a coat on my account there. The mere fact that she has to walk to the store cannot be constituted as consideration

To be legally enforceable, an executory promise must be supported by sufficient, bargained-for consideration as opposed to a gratuitous charitable offer (*Kirksey v. Kirksey*)

* + 1. Occurrence of condition is of benefit to promisor – but if promisor imposes a condition, and the occurrence fo this condition is of a benefit to him, then the bargain element probably will be present
       1. *Hamer v. Sidway* – (I didn’t drink until I was 21 – If that’s not consideration, what is?!) “PERFECT BARGAIN FOR”
          1. *(Uncle Story promised to pay $5K to Lil’ Willie if he would refrain from liquor, tobacco, swearing, or playing cards or billiards for money until his 21st birthday. Nephew refrained, Uncle said ok. Story died 12 years later without paying William. William had assigned his right to the money to Hamer, and Uncle Story’s Executor, Sidway refused to pay. There was consideration.)*
          2. Perfect “Bargain For” case.
          3. An offer and acceptance, alone, do not constitute a contract. What about Consideration?

Benefit to Promisor/ Detriment to Promisee

Doesn’t say anything about there being an exchange of these.

* + - * 1. This is a detriment to the Lil’ Willie b/c it was his “legal privilege (right)” to do these things, and he chose not to do them. He was constricted from his freedom of action. This is a benefit to Uncle Story because he wanted Lil’ Willie to do this.
        2. It does not matter that the consideration actually benefited the promisee (better health), it is still considered a detriment.
        3. Ben/Det Theory is not used in the U.S., except for NY State.
        4. Why didn’t the executor just pay Lil’ Willie and avoid this suit?

b/c if he just gives away money, the next person in line for the estate can sue the executor to pay them out of his own pocket. He has to cover his own behind.

* + - * 1. R2K §71: Promisor bargain for return promise and is given by promisee in exchange for that promise.
        2. Justice Holmes says there must be a bargain for consideration. Your benefit has to be my detriment. They must be connected to one another. Something on each side is given in exchange for the other.
        3. Rule: Consideration is satisfied by a detriment to the promisee, in this case giving up his legal right to drink, smoke, etc.
    1. Altruistic pleasure not sufficient – but the fact that one who promises to make a gift expects to derive altruistic pleaure, or love and affection, from making the gift is not sufficient to constitute a bargain
       1. *Dougherty v. Salt* – (I want to take care of Charley.) “NO CONSIDERATION”
          1. *(Dougherty (P), a minor, was visited by his aunt who said she wanted to take care of him. She gave him a promissory note that carried no indication of consideration. Cardozo had nothing to work with.)*
          2. Classical Contract: The status of each side does not matter. Whether Aunt Tillie wanted Charley to have the money, has nothing to do with this.
          3. *No consideration here. Charlie does not do anything.*
          4. Charlie was a good boy (past consideration and nominal consideration are not adequate!)
          5. Ways Aunt Tillie could’ve given the money: a Trust, given a Testamentary Gift (in her will), or simply give Charlie the money (Executed Gift).
          6. Ben/Det Test would FAIL.
          7. Cardozo had nothing to work with. A lawyer could have had Charlie put in her will, a trust set up for him, etc.
          8. Rule: If a party promises to give a gift, w/o something expected or desired in return, they are not legally bound to that promise. The note must be supported by consideration to make the promise and promissory note valid.
    2. Benefit/Detriment Element
       1. *Baehr v. Penn-O-Tex Oil Corp*. – (I could’ve sued you…but I waited!) “TIGHT BARGAINED FOR”
          1. *(Baehr (P), the lessor of a gas station, learned while on vacation that Penn-O-Tex (D) had taken over and was running the station to collect money owed to them by the lessee (Kemp). Penn-O-Tex representative assured Baehr on at least two occasions that he would receive his checks for the rent, but he never did. Forbearance is proper consideration, but this was not forbearance.)*
          2. Jury found for P, but Judge granted D and judgment n.o.v.
          3. On appeal, the Supreme Court must take P’s statement as true.
          4. No evidence that D asked for that forbearance. Even if P did hold off suing, the D did not ask for it. NO BARGAIN!
          5. This is a better “Ben/Det” Case than it is a “Bargained For” Case:

D Benefit because they are having time to get their money.

P Detriment because he held off from doing something he could’ve done and he isn’t getting his money.

*NO Quid Pro Quo* (“one thing in return for another”) b/c they didn’t ask for his forbearance in bring suit.

* + - * 1. Ben/Det Test is unclear as to how “tight” the exchange has to be.
        2. Here, they applied the “Bargained For” test very tightly.
        3. R2K §71: Requirement of Exchange; could’ve been used to describe this.
        4. Rule: Only if consideration (forbearance) “bargained for”, mentioned in the agreement, and known by both parties, then does it count as consideration for a promise.
      1. *Newman and Snells Bank Case –* (Poor Widow) “BEN/DET TEST”
         1. *(Widow (D) was sued by the bank to enforce her promise to pay her late husband’s debt to the Bank (P); in exchange for her promise, the bank had surrendered to her his promissory note evidencing the debt. D would not have been personally liable unless she voluntarily obligated herself to pay.)*
         2. Note was worthless so its surrender could be NO Detriment to the P and its receipt NO Benefit to the D.
         3. If we took the “Bargain For” approach: The widow got what she bargained for – her hubby’s promissory note.
         4. Legal Realism: Under either test, judgment for the bank could have been rationalized by any court if they wanted to.
         5. The Bank had overreached and that’s why they didn’t enforce the Widow’s promise to pay.
         6. Rule: If there is No Detriment to the Promisee and No Benefit to the Promisor, then the promise is NOT valid.
    1. Adequacy not considered – court will not inquire into the adequacy of the consideration just as long as the promise suffers some detriment and the promisor has some benefit
       1. *Batsakis v. Demotsis* – (I made a BAD deal!) “UNEQUAL CONSIDERATION”
          1. *(During WWII, where US currency would not have been good, Batsakis (P) loaned Demotsis (D) 500,000 drachmae, $25 in American money, in return for the D’s promise of $2000 in American money. D refused to pay, claiming lack of consideration.)*
          2. There was an “unequal” consideration.
          3. Classical Consideration is subjective, so we don’t have to put a value on it.

Problem with Classical Contract Law: Sham CNS/ Inadequate CNS…makes CNS meaningless.

R2K handles Sham CNS, but not Adequacy. (what about R2K §79)

* + - * 1. “If you need $.25 for the meter, but you only have a $20 and they will tow your care if you don’t put money in the meter, and you exchange your $20 for my $.25, this is very fair and a valid consideration.
        2. Batsakis made a hard bargain, she went for it and signed, she is liable to pay amount owed.
        3. R1K had no caveat against consideration that is “grossly inadequate”, however courts usually kept an out for it. §81(e) mentioned it and §234 provided for the avoidance of a contract is there was a “gross disparity in the values exchanged.”
        4. R2K §79: Adequacy of Consideration
        5. Rule: The inadequate or “unequal” consideration does not make a contract void if the consideration was carried out and became a valid obligation. Only complete LACK of consideration will void a contract.
    1. Past consideration - is no consideration
       1. *Plowman v. Indian Refining Co.* – (I *WAS* a good employee.) “PAST CONSIDERATION”
          1. *(The Ps were told that because of their past service, they would be retired at half pay. The length of such payments was in debate. The payments were made for one year and then discontinued. The Ps said a contract had been made to pay them for life. The D said there was a lack of consideration for such a contract. This is Past Consideration.)*
          2. Stopped paying the men b/c Plowman was acquired by Texas Co. (Texaco)
          3. Very Straightforward Classical Opinion
          4. *Past Consideration:* You can rely on it or bargain for it.
          5. When the offer to pay them this half pay was made, the employees were not asked for anything in return. The employees said they had given years of faithful service.
          6. There is no benefit/detriment—the men did not give anything back, and the company did not benefit.
          7. The fact that the company asked them to pick up their checks is merely a condition of the offer.
          8. Williston’s Tramp: “if you go around the corner to the clothing shop there, you may purchase an overcoat on my credit.”

The walk is merely a necessary condition to get to the store.

He is not trying to bargain with the tramp here. It’s not like a bargain, a walk across the bridge.

* + - * 1. Father/Daughter Tiffany’s Ring: What about an estranged father who tells his daughter to be at Tiffany’s at a set time so he could buy her a ring and reneges when she arrives?

The travel to get there may be more than a necessary condition of his buying her the ring. He may have used the offer to get her there, so benefit/detriment may be present.

* + - * 1. Rule: Neither the morality of the promise, nor the appreciation of past services or pleasure afforded in the past (“Past Consideration”) constitutes valid consideration of a promise.
  1. Pre-existing Duty Rule
     1. If a party does or promises to do what he is *already legally obligated* to do, or if he forbears or promises to forbear from doing something which he is *not legally entitled to do*, he has not incurred a "detriment" for purposes of consideration. This is the *pre-existing duty* rule.
        1. Modification: This general rule means that if parties to an existing contract agree to *modify* the contract for the sole benefit for one of them, the modification will usually be unenforceable at common law, for lack of consideration. Be on the lookout for this scenario especially in *construction* cases.
           1. Restatement: The Second Restatement, and most modern courts, follow this general rule, but they make an exception where the modification is "fair and equitable in view of circumstances *not anticipated* by the parties when the contract was made."
        2. Extra duties: Even under the traditional pre-existing duty rule, if the party who promises to do what he is already bound to do assumes the *slightest additional duties* (or even *different* duties), his undertaking of these new duties *does* constitute the required "detriment."
        3. UCC: For contracts for the sale of goods, the UCC *abolishes the preexisting duty rule*. Section 2-209(1) provides that "an agreement modifying a contract … needs no consideration to be binding." But there must be good faith, and any no-oral-modification clause must be complied with.
  2. Promises binding w/out consideration
     1. Promises to pay past debts – most states require it to be in writing
     2. Promise to pay for benefits received – promises to pay for benefits or services already received are generally enforceable
     3. Modifications of sales contracts – under the UCC, a modification of a contract for the sale of goods is binding w/ out consideration.
        1. But a no-oral-modification clause will normally be enforced, and then no oral modifications can be made
     4. Promissory Estoppel (see below)

1. PROMISORY ESTOPPEL
   1. Promises which foreseeably induce reliance on the part of the promisee will often be enforceable w/out consideration
   2. R2K Sec 90 - A promise which the promisor should reasonably expect to induce action or forbearance on the apart 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.
   3. General approach: Promises which foreseeably induce *reliance* on the part of the promisee will often be enforceable without consideration, under the doctrine of *promissory estoppel ("P.E.")*. Rest.2d, § 90’s definition of the doctrine is as follows: "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*."
   4. Example: *A* promises to pay for *B*’s college education if *B* will attend school full time. *A* intends this to be a gift. *B* gives up a good job and enrolls in college, incurring a liability of $5,000 for the first year. *A* then refuses to pay the bill. Under the doctrine of P.E., *B* would be able to recover at least the value of the lost job and first-year tuition from *A*, even though *A*’s promise was a promise to make a gift and was thus not supported by consideration.
      1. 1. Actual reliance: The promisee must *actually rely* on the promise. (*Example*: On the facts of the above example, *B* must show that without *A*’s promise, *B* would not have quit his job and attended college.)
      2. 2. Foreseeable reliance: The promisee’s reliance must also have been *reasonably foreseeable* to the promisor.
   5. B. Possible applications:
      1. 1. Promise to make a gift: The P.E. doctrine is most often applied to enforce promises to *make gifts*, where the promisee relies on the gift to his detriment.
         1. a. Intra-family promises: The doctrine may be applied where the promise is made by one member of a *family* to another. (*Example*: Mother promises to pay for Son’s college education, and Son quits his job. Probably the court will award just the damages Son suffers from losing the job, not the full cost of a college education.)
         2. 2. Charitable subscriptions: A written promise to make a *charitable contribution* will generally be binding without consideration, under the P.E. doctrine. Here, the doctrine is watered down: usually the charity does not need to show detrimental reliance. (But *oral* promises to make charitable contributions usually will not be enforceable unless the charity relies on the promise to its detriment.)
         3. 3. Gratuitous bailments and agencies: If a person promises to *take care of* another’s property (a "gratuitous bailment") or promises to carry out an act as another person’s *agent* (gratuitous agency), the promisor may be held liable under P.E. if he does not perform at all. (However, courts are hesitant to apply P.E. to promises to *procure insurance* for another.)
         4. 4. Offers by sub-contractors: Where a *sub-contractor* makes a *bid* to a general contractor, and the latter uses the bid in computing his own master bid on the job, the P.E. doctrine is often used to make the sub-bid temporarily irrevocable.
         5. 5. Promise of job: If an employer promises an *at-will job* to an employee, and then revokes the promise before the employee shows up for work, P.E. may apply.
            1. Example: *A* offers a job to *B*, terminable by either at any time. *B* quits his established job. Before *B* shows up for work, *A* cancels the job offer. A court might hold that even though *B* could have been fired at any time once he showed up, *B* should be able to collect the value of the job he quit from *A*, under a P.E. theory. [*Grouse v. Group Health Plan*]
         6. 6. Negotiations in good faith: A person who *negotiates* with another may be found to have a duty to *bargain in good faith*; if bad faith is found, the court may use P.E. to furnish a remedy.
            1. a. Promises of franchise: The use of P.E. to protect negotiating parties is especially likely where the promise is a promise by a national corporation to award a *franchise* to the other party. (*Example*: P, a national company that runs a fast food chain, promises *B* a franchise. *B* quits his job and undergoes expensive training in the restaurant business. If *A* then refuses to award the franchise, a court might use P.E. to enforce the promise, at least to the extent of reimbursing *B* for his lost job and training expenses.)
   6. C. Amount of recovery: Where P.E. is used, the damages awarded are generally limited to those necessary to *"prevent injustice*.*"* Usually, this will mean that the plaintiff receives *reliance* damages, rather than the greater expectation measure. In other words, P is placed in the position he would have been in had the promise never been made.
      1. Example: If *A* promises *B* a franchise, and *B* quits his job in reliance, the court will probably award *B* the value of the lost job, not the greater sum equaling profits that *B* would have made from the franchise.
   7. Possible applications
      1. Promise to make gift – most often applied
      2. Promises w/in the Family
         1. General rule is that they are not applicable b/c they lack the bargain for exchange, but thereare exceptions
         2. *Kirksey v. Kirksey* – (Sister Antillico: I want to take care of you.) “PRE – §90”
            1. *(Sis-n-law (P) received a letter from her bro-in-law (D) telling her if she moves down, she will have a place to raise her family. She moved sixty miles, and did not secure the land she lived on, which she would have had she stayed. After two years, he required her to leave. She contended the loss she sustained in moving was sufficient consideration to support the D’s promise. Yes, it was.)*
            2. Judges think this is a “gratuitous promise” and her coming down is a condition to receive the gift.
            3. Gift—A transfer of property to another person that is voluntary and which lacks consideration.
            4. Classic “Williston’s Tramp” scenario. He could not get her gift, if she did not come see him; so it was a condition.
            5. The dissenter J. Ormand makes a good point for “Reliance” – It was an inconvenience to her to move her family down, she left her “preference” for her land (although, bro-in-law told her not to do that). (100 yrs before R2K §90 (1926))
            6. You can also argue this was a “Bargain”, b/c he got happiness, she got to live there; and they both gave up something.
            7. No black and white answer.
            8. *Rickets* case—A grandfather promises his granddaughter a note that will take care of her financially. This is a gift. (He does not say, “If you will quit, I will give you this note.”) She quits her job. Eventually the grandfather, in bankruptcy, has to stop payment. She relied to her detriment. No consideration but promissory estoppel.
            9. Rule: A “gratuitous gift” does not constitute valid consideration; therefore there is no valid contract.
         3. *Wright v. Newman* (D has to pay child support even for his non biological son)
            1. P sought to recover child support for two children, one of which was not D’s.
            2. Rule – b/c the mom relied on D (he had put his name on birth certificate and held himself out as father), she should be able to receive child support from him.
      3. CHARITABLE SUBSCRIPTIONS:
         1. A written promise to make a charitable contribution will generally be binding w/out consideration, under PE. Usually charity doesn’t have to show detrimental reliance unless it was an oral promise.
         2. *Alleghany College v. National Chautauqua County Bank* – (Famous Cardozo – “Stretching Consideration”)
            1. *(Johnston promised the college (P) $5000 to be paid 30 days after her death. She stated that the money be used to fund a scholarship in her name. She gave $1000 as a down payment. She later attempted to revoke the request. After her death, the college submitted a $4000 claim to her executor who refused the request. The trial court found no consideration. Cardozo finds a “bargained for exchange”.)*
            2. Note that Johnston’s attorney, Robert Jackson, was so arrogant that he may have gotten Cardozo upset, but that is highly doubtful.
            3. R2K § 90 was added in part by the decision in this case.
            4. Holmes: The mere fact that someone relied should not be enough. The promisor has to want him to rely on it.
            5. This case loosened the concept of consideration sufficiently from the Holmes idea. (§75 and §71 much looser consideration, on the same wavelength as this case.)
            6. Separate the detriment that is merely a consequence of the promise from the detriment which is the motive or inducement of the promise.
            7. Cardozo could’ve used the “Reliance” idea, but instead he chose to analyze this using “Consideration”.
            8. Sign Posts:

*Siegel v. Spears:* Siegal relies on Spear to transfer his insurance to the storage location. Spears forgets, storage location burns down, Siegel’s belongings are not protected. Spears is negligent.

Bailment: Transfer of your property to another person

Sign-post to promissory estoppel even though it’s a tort cause of negligence.

*DeCicco v. Schweizer*

* + - * 1. In charitable subscriptions, promissory estoppel is the equivalent of consideration.
        2. Some say P.E. has weakened the rigor of Consideration, but perhaps it is part of consideration, not an exception.
        3. Public Policy: We want to encourage private education / charities.
        4. Think back to *Dougherty*: Cardozo didn’t have the facts to work with or he wasn’t willing to go that far.
        5. Johnston made an implied offer, and when they accepted the $1000, they impliedly gave consideration by the implied bargain.
        6. Can’t use P.E. here b/c there is not Reliance?
        7. Rule: Consideration is found in a “bargained for exchange” when the promisor is bound to conform to the promise and the promisee has assumed the duty to conform to the terms of the condition set forth in the contract.
      1. *King v. Trustees of Boston University* – (I want my dead husband’s papers back!!)
         1. *(Coretta Scott King (P) sued BU (D) for conversion of papers that MLK had deposited with BU. The jury determined King had made a promise to give absolute title of the papers to BU in a letter signed by him, and that the promise was enforceable as a charitable pledge supported by consideration or reliance.)*
         2. Charitable Pledge:

Charitable: charity; no obligation needed.

Pledge: to secure an obligation

* + - * 1. R2K §90(2) – Charitable subscriptions should be binding without proof that the action induced action or forbearance.
        2. “Relational Contract” – court have been sympathetic to the idea of the enforceability of Charitable Subscriptions.
        3. King did not absolve them from negligence; they have a duty to use scrupulous care.
        4. If he made a promise, there could be consideration by them impliedly accepting the duty to use scrupulous care.
        5. Language can be ambiguous: “In the event of my death…all *such* material…deposited.”

Such could have referred to all of the materials, OR materials he had already designated to become BU’s property.

* + - * 1. A promise need not be in words, it can be in the form of an action.
        2. The “bailor-bailee” relationship established in the letter could be viewed by a rational fact finder as a security for the promise to give a gift in the future of the bailed property, and thus as evidence in addition to the statement in the letter of intent of the donor to be bound.
        3. Duty of scrupulous care assumed by the bailee. But this duty was not bargained for and was only assumed. So there is no “bargain for” consideration.
        4. The *statute of wills* does not prevent a person form making a contract or a promise to take effect at his death. The letter could have been read to contain a promise supported by consideration or reliance and the issue of the transfer of ownership was properly submitted to the jury.
        5. Reliance—Boston University had been taking care of the documents, they trained staff to care for the papers, they held a big ceremony to commemorate the papers. Reliance does not have to be that great. Most courts have not dispensed with reliance, but it is confined.
        6. Rule: If the person receiving a gift assumes a duty purported by the donor then that is probably sufficient consideration to make the promise enforceable. A valid contract must have either consideration or reliance.
    1. COMMERCIAL CONTEXT:
       1. *Katz v. Danny Dare, Inc.* - (Family over a Pension Check)
          1. *(Due to personal injuries suffered as Katz tried to stop a robber at work, he became ineffective, so his brother-in-law, Shopmaker, president of Danny Dare sought to induce Katz’s retirement by paying him pension benefits. Katz retired in reliance of the pension. After Katz retired, he received his pay for some time, but his eventually was reduced to 50%. Katz sued, contending Dare was estopped from denying the enforceability of the agreement. Dare contended Katz did not give up anything by retiring, and he was going to be fired anyway.)*
          2. Can be looked at “bargain and exchange” theory b/c Danny Dare didn’t have to look bad for firing Katz who got beat up, while Katz could also get his pension.
          3. The general understanding is that all promises must be supported by consideration to be enforceable in the absence of consideration based upon promissory estoppel. In this case, it was the detrimental reliance reasonably based on the promise to pay which enforced the pension agreement.
          4. Katz acted to his detriment—he retired.
          5. “Legally entitled” test – He wasn’t legally entitled to the pension so he had to rely on promissory estoppel.
          6. Rule: To invoke the Doctrine of Promissory Estoppel there must be a: 1) promise; 2) a detrimental reliance on such a promise; and 3) injustice can be avoided only by enforcement of the promise.
       2. *Shoemaker v. Commonwealth Bank* – (I thought you bought the insurance!!)
          1. *(The Shoemakers (P) obtained a mortgage from Commonwealth (D). When the Shoemakers’ insurance policy expired, the Bank sent a letter telling them that if they did not purchase more insurance, the bank may be forced to purchase it for them and add it as a premium to their loan balance. Shoemakers assumed the insurance had been obtained for them. After the home burned down, they found out it was uninsured, and they sued the bank for fraud, promissory estoppel, and breach of contract)*
          2. As long as there was a plausible thing she could have done (pay the insurance herself), then reliance may be present.
          3. The reliance is an omission, but it is to their detriment.
          4. You must factor in the reasonableness of the reliance, which now alters the Promissory Estoppel standard a lil bit.
          5. Rule: If the promisor make a promise that he should have reasonably expected would induce action or forbearance on the part of the promise, and the promisee actually took action or refrained from taking action in reliance on the promise, then the promise is enforceable if injustice can be avoided only by enforcing it.
    2. Gratuitous bailments and agencies
       1. If a person promises to take care of another’s property or promises to carry out an act as another person’s agent, the promisor may be held liable under PE if he doesn’t perform at all.
    3. Offers by sub-contractors
       1. Where a sub contractor makes a bid to a general contractor, and the latter uses the bid in computing his own master bid, the PE doctrine is often used to make the sub bit temporarily irrevocable.
    4. Promise of job
       1. If an employer promises an at-will job to an employee, and then revokes the promies before the employee shows up for work, PE may apply.
    5. Negotiations in good faith
       1. A person who negotiates w/ another may be found to have a duty to bargain in good faith, if bad faith is found, the court may use PE to furnish a remedy

1. RESTITUTION
   1. Definition: When the opposite party receives a benefit and in the process is “unjustly enriched”.
   2. Broader than Quasi-Contract:
      1. Restitution is based on unjust enrichment and has no particular relationship to contract.
      2. Restitution has equitable remedies such as “constructive trust” or “accounting”, while quasi-contracts only had damages.
      3. R2K rejected the term Quasi-K and adopted the theory calling it restitution.
   3. Basis of Liability:
      1. A person who has been *unjustly enriched* at the expense of another is required to make restitution to the other.
   4. Principles of Unjust enrichments
      1. Unreasonable amount of benefit to one party; unjustly enriches the husband.
      2. Unjust enriched by keeping an unreasonable amount of money
      3. Promissory restitution analysis.
         1. Johnny and the Car Hypo: Johnny asks uncle for $1,000 so that he can buy a car. He ends up paying $500. Wilston says he can get the whole $1,000 because a promise is a promise.
   5. ABSENSE OF A PROMISE:
      1. One party has received benefit from another, but has made no promise to pay for that benefit.
      2. *Credit Bureau Enterprises, Inc. v. Pelo* – (Sorry Sir, you have to Pay…b/c you needed our services)
         1. *(Pelo was making threats to hurt himself, so his wife called the police and they took him to the Hospital. They made him sign a release that said either he or his insurance would pay, doctors found that he had bipolar disorder, but they could not detain him involuntarily, so they let him go. Pelo was release but refuses to pay)*
         2. There was benefit conferred upon the defendant by the plaintiff.
         3. Implied-in-law – obligation imposed by the law w/o regard to either party’s expression of assent either by words or acts.
            1. Doesn’t arise from bargaining
            2. Instead arises from a theory of unjust enrichment
            3. Not real K, but quasi-K
         4. Person seeking to use unjust enrichment, he must prove that the other person did not have the benefit forced on them.
         5. Rule: If a person is otherwise not fully mentally competent, a person rendering necessaries or professional services is entitled to recover from such person although the person expresses an unwillingness to accept the services. (R2K §116)
      3. *Watts v. Watts* – (But, he told me I was his wife!)
         1. *(Sue (P) and James Watts (D) accumulated property during their 12 year non-marital relationship and produced two children. D persuaded P to quit her job and move into an apartment paid for by him. During their relationship, she contributed child care, homemaking services, personal property, worked in his office as a receptionist, and started a business from which he barred her after she moved out of their home. Her claim was based on five theories, one being unjust enrichment.)*
         2. Lines b/w Implied-in Fact Contract (through his conduct) and Restitution are very vague.
         3. Restitution and Implied-in-Fact Contract often overlap!
         4. Unreasonable amount of benefit to one party; unjustly enriches the husband.
         5. 3 Elements of Restitution:
            1. Benefit conferred
            2. Appreciation or knowledge of the benefit by the D
            3. Acceptance or Retention
         6. Rule: Unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.
         7. Implied-in- law and unjust enrichment is also available to same sex marriages.
   6. PROMISSORY RESTITUTION:
      1. Recipient makes a promise to pay for the services, AFTER the services are received.
      2. No classical consideration b/c there is no past consideration.
      3. NO RESTITION IF PROMISE IS EXPRESSLY MADE BEFORE THE K!!!
      4. Restatement of Restitution §1
      5. *Mills v. Wyman* – (I helped your son, you promised to pay, now pay!) CLASSICAL
         1. *(Mills (P) nursed and cared for Levi Wyman, the son of the D. Upon learning of this, Wyman (D) promised to repay Mills for his kindness and expenses incurred. Later, Wyman reneges on his promise.)*
         2. Court seems to be thinking more about bargain than benefit/detriment – they say you can’t bargain for past consideration.
         3. Exceptions where Moral Obligation is sufficient consideration: SOL has run, but you pay anyways, Minor Contract (remake a promise that made when you were a minor), and Bankruptcy
            1. PP: lets people do good on their name and rebuild their credit.
         4. Rule: Past Consideration is NO consideration; moral obligation is limited to three exception cases and does not apply.
      6. *Webb v. McGowin* – (I saved his LIFE!) MODERN K LAW
         1. *(Webb (P) was clearing a floor at work which required him to drop a 75 lb. pine block form the upper floor of the mill to the ground. Just as he was releasing it, he noticed J. McGowin below, so in order to divert the block, he fell with it, breaking an arm and leg and ripping his heel off. In return for his act, McGowin promised to pay Webb $15 a week for the rest of Webb’s life, but when McGowin died 8 yrs later the payments stopped.)*
         2. McGowin promised to pay after the fall, but if Webb would’ve asked 1 second before he dropped the block, McGowin would’ve said YES then too. (“Temporal Perception”)
         3. Past Consideration is allowed b/c of the benefit conferred.
         4. Consistent with *Mills v. Wyman*, b/c in this case the promisor had a material benefit, Mills did not receive a material benefit.
         5. Rule: A moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.
      7. R2K §86
      8. NOTE: Reliance, Moral Obligation, and Restitution are STRETCHING the Classical Consideration Concept.

1. STATUTE OF FRAUDS
   1. Contracts that fall w/in the statute of frauds are unenforceable unless in writing!
   2. Requirements: Must be in writing and signed by the party to be sued
   3. Six categories
      1. Executor-administrator provision
         1. Contract of an executor or administrator to answer for a duty of his decedent
         2. Executor personally orally guarantees creditors so that they will not sue the estate, but since it is not in writing it is not enforceable.
      2. Suretyship
         1. Contract to answer for the debt of another
         2. Main purpose rule – if the proisor’s chief purpose in making his promise of suretyship is to further his own interest, his promise does Not fall w/in the S of F
      3. Marriage
         1. Contract made upon consideration of marriage
            1. Ex. If A says to B, if you promise to marry me, ill give you my beach house and B says Ok and no document is sign; if A changes his mind, B cannot sue to enforce either promise to marry or for beach house b/c the consideration for both was for the marriage taking place.
      4. Land Contract
         1. Contract for the sale of land
         2. Part performance
            1. Even if an oral contract for the transfer of an interest in land is not enforceable at the time it is made, subsequent acts by either party may mike it enforecebale

Conveyance by vendor – if the vendor under an oral land contract makes the contracted for conveyance, he may recover the contract price

Vendee’s part performance – the vendee under an oral land contract may in reliance on the contract take actions which 1. Show that the oral contract was really made; and 2. also create a reliance interest on the part of the vendee in enforcement. Such a vendee may then obtain specific performance even though the contract was originally unenforceable b/c oral.

Taking possession and making improvements – if vendee pays some or all of purchase price for property and makes costly improvements on property, this combo of facts will probably induce a court to grant specific performance (i.e. giving over the land title to vendee)

Payment not sufficient – the fact that the vendee has paid the vendor the purchase price under the oral agreement is not by itself sufficient to make the contract enforceable. (Instead the vendee can simply recover the purchase price through restitution)

* + 1. One year
       1. Contract that cannot be performed w/in one year from its making
       2. Impossibility – one year provision applies only if complete performance is impossible w/in one year after the making of the contract. Fact that performance w/in one year is highly unlikely is not enough.
       3. Lifetime employment – promise to employ someone for his lifetime is probably not w/in the one year provision b/c the person could die w/in the year and the promise of lifetime employment would’ve been fulfilled.
    2. UCC
       1. Under the UCC, a contract for the sale of goods for a price of $500 or more
       2. Exceptions:
          1. Specially manufactured goods – no writing is required if the goods are to be specially manufactured for the buyer, are not suitable for sale to others, and the seller has made “either a substantial beginning of their manufacture or commitments for their procurement” Sec. 2-201(3)(a)
          2. Estoppel – writing not required if the party against whom enforement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.
          3. Goods accepted or paid for – finally, no writing is required w/ respect to goods for which payment has been made and accepted or which have been received and accepted.
  1. SOF EXCEPTIONS:
     1. (1) Main Purpose Doctrine: When you agree to a suretyship to “protect yourself” rather than only to benefit the 3rd person, then you are liable even if it is not in writing. (R2K §116)
     2. (2) Part Performance: (exception to Land K provision)
        1. Oral Contract with Part Performace: Mrs. Greiner offers her son, Frank, Blackacre, Frank comes and builds house, but mom doesn’t want to give it up. If there is part performance, even if doing it for your own benefit, the landowner can’t hide behind the land provision and it can be enforced. (*Greiner*, *Winternitz*- case wasn’t assigned)
        2. Oral Contract without Part Performance: There is a K, but it is not Enforceable.
        3. Paying money is NOT part performance.
        4. Cardozo: Part Performance must be unequivocally referable to the alleged oral agreement.
     3. (3) “Could’ve Taken Place”: (exception to One year Performance)
        1. Can be very IRRATIONAL – *Freedman v. Chemical Construction*, where the court said although the contract wasn’t performed until 9 years later, if could’ve been performed in one year.
        2. Lifetime Contract not barred by SOF b/c you could possible die within a year; do not need to be in writing.
        3. One year provision: The fact that a K can be terminated within a year is not sufficient to make it susceptible to the SOF written requirements. Contracts with Termination provisions do not count.
     4. (4) R2K §139: Enforcement by Virtue of Action in Reliance (*Alaska Democratic Party v. Rice*)
        1. §139(2): Factors for determining if injustice can be avoided only by enforcement of K.
  2. UCC §2-201 C. 1: A Memorandum signed by the charged party or if it was orally stated in court is ALL that is needed: “I made this deal w/ you, but it wasn’t in writing so it’s not enforceable!”….well you just put it in writing =)!
     1. Requirements for SOF:
        1. Evidence a contract for the sale of goods over $500
        2. It must specify a quantity; need not be stated accurately, but it limited to that amount.
        3. It must be signed by the person you are seeking to enforce the SOF against … any authentication (email, letterhead…all count as authentication)
        4. Modern Statutes of Frauds “on the whole” are consumer protection statutes.
        5. Classes of contracts now covered by the Statute of Frauds Provisions of the UCC:
           1. a contract for the sale of goods for $500 or more (§2-201)
           2. a contract for the sale of securities (§8-319)
           3. a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond $5,000 in amount or value of remedy (§1-206).
     2. *Crabtree v. Elizabeth Arden Sales Corp.* – (Arden is a B trying to get out of her K!)
        1. *(There were various signed memoranda that indicated Crabtree’s employment status and pay. Is there satisfactory evidence to piece together from separate documents a written contract within the Statute of Frauds to make the agreement enforceable?)*
        2. The two signed (or initialed) payroll cards were 1) signed with the intent to authenticate the information contained therein and 2) evidenced the terms of the contract.
        3. All the essential terms were included except for the duration. However, all that is required between the papers is a connection established by reference to the same transaction. The two payroll cards and Ms. Arden’s memo all point to the Crabtree transaction. The “salary increase per contractual arrangements with Miss Arden” is more comprehensive evidence. A contract was made.
        4. If a signed memo gives you enough of the contract information, it is good enough.
        5. Rule: Two (or more) memoranda pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion is sufficient “writing” to meet the Statute of Frauds requirement. If some writing are signed and others are not, oral testimony is admitted to show the connection b/w the documents and to establish the assent, of the charged party, to the contents of the unsigned memorandum.
     3. *Alaska Democratic Party v. Rice* – ( It’s the §90 of SOF)
        1. *(The chair-elect of the Alaska Dem. Party orally offered the executive director job to Rice for two years. The resulting obligation fell into the Statute of Frauds because it could not be performed within a year. After quitting another job and moving to Alaska, Rice was told she could not have the job.)*
        2. R2K §139(2): Lists several factors whether injustice can be avoided only be enforcement of a promise.
        3. Doctrine of Promissory Estoppel trumps of SOF based on §139.
        4. §139 is less likely to be enforced than §90…think about it in terms of “has to be in writing” v.
        5. Policy Concerns with Enforcing: SOF purpose was to prevent perjury and fraud, so the extent to which the reliance doctrine would undermine these purposes is minimal and the rights that it would protect are substantial.
        6. Rule: A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which DOES induce action or forbearance is enforceable if injustice can be avoided only be enforcement of the promise.
     4. UCC 2-201. Formal Requirements; Statute of Frauds.
        1. “A writing is not insufficient b/c it omits or incorrectly states a term agreed upon but the K is not enforceable under this paragraph beyond the quantity of goods shown in the writing.”
        2. If you make the oral deal for $1,000, §2-201 says if you don’t object you are bound by it and lose your SOF defense. Sounds like §2-207 (Gateway).
        3. If you sue on the oral agreement, the other party has to deny that it made the K. If the agree that they made the K, then SOF doesn’t apply, so you have to get them to admit they made the K!
        4. There is a general argument that R2K §139 does not apply, b/c there seems to be enough protection under 2-201.
     5. §2-201 Exceptions - If a contract does not satisfy (1) but is valid in other respects is enforceable
        1. (a) if goods are specifically manufactured for the buyer, before notice of repudiation is received, reasonably indicate goods are for buyer, substantial beginning in manuf.
        2. (b) party against whom enforcement is sought admits there was a contract made.
        3. (c) with respect to good for which payment has already been made and accepted or received and accepted.

\*\*\*VERY IMPORTANT- LINZER SAID IT WILL BE ON EXAM\*\*\*

1. PAROL EVIDENCE RULE
   1. Limits the extent to which a party may establish that discussions or writings prior to the signed written contract should be taken as part of the agreement. In some circumstances, the rule bars the fact finder form considering any evidence of certain preliminary agreements that are not contained in the final writing, even though this evidence might show that the preliminary agreement did in fact take place, and the parties intended it to remain part of the deal despite its absence from writing.
   2. Definitions:
      1. 1. "Integration": A document is said to be an *"integration"* of the parties’ agreement if it is intended as the *final expression* of the agreement. (The parol evidence rule applies *only to documents which are "integrations,"* i.e., final expressions of agreement.)
      2. 2. Partial integration: A *"partial"* integration is a document that is intended to be final, but that is *not* intended to include *all details* of the parties’ agreement.
      3. 3. Total integration: A *"total"* integration is a document that is not only a final expression of agreement, but that is also intended to include *all details* of the agreement.
   3. Statement of rule: The "parol evidence rule" is in fact two sub-rules:
      1. 1. Partial integration: When a writing is a *partial integration*, no evidence of prior or contemporaneous agreements or negotiations (oral or written) may be admitted if this evidence would *contradict* a term of the writing.
      2. 2. Total integration: When a document is a *total integration*, no evidence of prior or contemporaneous agreements or negotiations may be admitted which would *either contradict* or *add* to the writing.
      3. 3. Summary: Putting the two sub-parts together, the parol evidence rule provides that evidence of a prior agreement may never be admitted to *contradict an integrated writing*, and may furthermore not even *supplement* an integration which is intended to be *complete*.
      4. 4. Prior writings and oral agreements: The parol evidence rule applies to *oral agreements and discussions* that occur *prior* to a signing of an integration. It also applies to *writings* created prior to an integration (e.g., draft agreements that were not intended to be final expressions of agreement).
      5. 5. Contemporaneous writing: If an *ancillary writing* is signed at the *same time* a formal document is signed, the ancillary document is treated as *part of the writing*, and will not be subject to the parol evidence rule.
      6. 6. Subsequent agreements: The parol evidence rule *never bars consideration of subsequent oral agreements*. That is, *a written contract may always be modified after its execution*, by an oral agreement.
         1. a. "No oral modifications" clause: However, if the written document contains a *"no oral modification"* clause, that clause will usually be enforced by the court, unless the court finds that the defendant *waived* the benefits of that clause.
   4. UCC: Section 2-202 of the *UCC* essentially follows the common-law parol evidence rule as summarized above.
   5. ROLES OF JUDGE AND JURY
      1. A. Preliminary determinations made by judge: Nearly all courts hold that the *judge*, not the jury, decides: (1) whether the writing was intended as an integration; (2) if so, whether the integration is "partial" or "total"; and (3) whether particular evidence would supplement the terms of a complete integration.
         1. 1. Conflicting views: Courts disagree about how the judge should make these decisions. Two extreme positions are: (1) the *"four corners"* rule, by which the judge decides whether there is an integration, and whether it is total or partial, by looking *solely at the document*; and (2) the "Corbin" view, by which these questions are to be answered by looking at *all available evidence*, including testimony, to determine the *actual intention* of the parties.
         2. 2. Merger clause: Most contracts contain a *"merger" clause*, i.e., a clause stating that the writing constitutes the sole agreement between the parties. The presence of such a clause makes it more likely that the court will find the writing to have been intended as a total integration (in which case not even consistent additional prior oral or written terms may be shown)
   6. PAROL EVIDENCE RULE
      1. ORAL: |NO PAST | NO PRESENT | YES FUTURE|
      2. WRITTEN: |NO PAST | YES PRESENT | YES FUTURE|
      3. PER: The common law principle that a writing intended by the parties to be a final embodiment of their agreement (integrated) cannot be modified by evidence of earlier of contemporaneous agreements that may add to, vary, or contradict the writing. (Parties can’t bring forth extrinsic evidence to prove negotiations.)
      4. Arguments For:
         1. Preference for agreements in writing b/c memories are bad
         2. Rule is black and white and comforting in that what is in the agreement is settled and that is all that matters.
         3. It has its sister on plain meaning; reliance in words; final agreement governs.
      5. Arguments Against:
         1. Presupposes an integrated agreement.
         2. PER bars oral as well as written evidence, so the argument that memories are bad goes out the window b/c written agreements prior to the written agreement have nothing to do with memories.
         3. Words don’t have a settled meaning or don’t have just one meaning; so the final agreement should govern, but other stuff should be used to find out what that final agreement means.
      6. NOT A RULE OF EVIDENCE; BUT A RULE OF SUBSTANCE!
      7. R2K §§209-218
      8. Presupposes an integrated agreement: the parties put down their final terms of the agreement in writing.
      9. Arms Length Bargainers: Plain meaning interpretation; they clearly had a chance to draft it well.
      10. Contracts of Adhesion/Unsophisticated Parties: Allow more extrinsic evidence in to explain.
      11. Reasonable Expectations Doctrine – *C & J Fertilizer*
   7. BIG PICTURE:
      1. Is the contract integrated?
         1. Classical – look only at writing
         2. Modern – intent of parties
            1. If integrated – no evidence to show meaning is admissible b/c of PER (unless it falls within exceptions)
            2. If not integrated – PER does not apply.
   8. EXCEPTIONS to the PER: (pg. 389) PER does not apply to:
      1. 1) Explanatory Evidence - R2K §214(c)
         1. Classical courts only allow it for patent; Modern courts allow it for latent too.
      2. 2) Agreements made after the execution of the writing (PER only deals with agreements before integration)
      3. 3) Evidence to show effectiveness of agreement was subject to oral condition precedent. - R2K §217
      4. 4) Evidence offered to show vitiating factors: Fraud, Duress, Undue Influence, Incapacity, Mistake, or Illegality. – R2K §214(d)
         1. Fraud: a false statement, knowingly made with the intent for the other person to rely on it, the other person does rely to his detriment (injury).
            1. Fraud in the Factor/Fraud in the Execution: Giving a blind man a contract and having him sign it by telling him you want his autograph.
            2. Fraud in the Inducement: Selling something you don’t own; misrepresentations of fact that induce other party to enter into contract.
      5. 5) Equitable remedy – Reformation
         1. Scrivener’s error- person writing it up made a mistake that neither side noticed.
      6. 6) Evidence established to introduce a Collateral Agreements – Side agreements for separate consideration. (BEST ONE!!!)
   9. 3 PER cases from the California Supreme Court
      1. *Masterson v. Sine* – oral understanding that option could not be transferred b/c they were intended to stay in the family.
      2. *PG&E* – Traynor says plain meaning is out - if it is “reasonably susceptible” to the meaning, then it should be admitted, if not, it should be rejected.
      3. *Mooney* – Presenting evidence to the judge; you may not convince him to allow your evidence, but at least he will hear your case; he is the gatekeeper.
      4. *Trident* – Kazinski says Traynor trusts the jury too much, b/c they favor the little guy too much. Linzer says you should always argue mistake to get around PER. If anything ,words should be able to
   10. INTERPRETATION
       1. R2K §200-204!!!
       2. How do we figure out what words mean?
          1. Justice Scalia: “All you have to do is look at the words.”
       3. Two ways to determine whether or not to determine whether the contract is integrated:
          1. Classical – if it appears on its face to be complete then it is complete. A merger clause conclusively establishes this as well; if it says its complete its complete.
             1. Why is this good policy? – allowing extrinsic evidence is doing exactly what the parol evidence rule is designed to avoid.
          2. Modern – a writing itself can’t prove its own completeness. Merger clause does not alone determine integration.
             1. Allows parties to intoduce extrinsic evidence to aid in the interpretation of the contract, even if the writing is an integration.

If a term is ambiguous, extrinsic evidence must be allowed

Jury gets to evaluate the extrinsic evidence to determine what the term means

However, if not ambiguous, judge decides what it means, who will instruct the jury as to what the term means

* + - * 1. How judge determines existence of ambiguity

Four Corners Rule (Williston)

Judge only looks to the “four corners” of the contract to determine if a term is ambiguous and will not look at extrinsic evidence

Plain Meaning Rule

When the court goes to decide whether a term use in the agreement is ambiguous, the court will not hear evidence about the parties preliminary negotiations but will hear evidence about the circumstances, or context, surrounding the making of the agreement

Liberal Rule

Evidence of the parties statements made during their pre contract negotiations is admissible for the limited purpose of letting the trial judge determine if a term is ambiguous

* + 1. 2 Different Views of PER:
       1. Restrictive (Willistonian): Don’t want it in! PER and then determines meaning.
          1. Interprets on face, looks at four-corners
          2. There must be a showing of ambiguity before any evidence can be presented
          3. Strictest courts will only allow you to prove patent ambiguity
          4. More liberal: can show a term is ambiguous by bringing in evidence to show there is a latent ambiguity.
       2. Corbinesque: Wants to let it in! Determine meaning then PER.
          1. Can’t be interpreted on its face; we need to look at the intent of the parties.
          2. Only disallow evidence that runs counter to agreement
          3. This is one of three approaches to deciding when something is barred by the parol evidence rule. Williston says the contract must be ambiguous on its face to admit the evidence. Corbin says evidence ought to be admitted to reveal the ambiguity or problems arising in consideration of the parties’ intent.
    2. *Thompson v. Libby* – (Classic Approach to PER – Willistonian)
       1. *(Thompson (P) and Libby (D) entered into a contract for the sale of logs. The contract contained all the necessary terms. Libby later refused to pay for the logs. Thompson brought a suit for the contract price and Libby defended on the basis of a parol contemporary warranty which was allegedly breached by Thompson.)*
       2. In this case of a sale of personal property a warranty of quality is considered a part of the contract and not a collateral contract. Since a warranty is considered a contract term, it must be included in the contract.
       3. The contract in this case does not seem to be integrated, however. This court seems to find anything in writing integrated. It seems to say that if a writing is on its face enforceable, it is integrated. *Classic view of contract law*.
       4. Rule: Where a contract is complete on its face, parol testimony is inadmissible to add, contradict or vary its terms.
    3. *Taylor v. State Farm Mutual Automobile Insurance Co.* – (Modern – Corbinesque view of interpretation)
       1. *(Taylor (P) was insured by State Farm (D) when he was involved in an accident with two other vehicles. The other parties obtained combined verdicts against Taylor for about $2.5 mil. in excess of his insurance policy limits. Taylor sued State Farm for bad faith, seeking damages for the excess judgment, and claiming State Farm improperly failed to settle within policy limits. State Farm moved for summary judgment, asserting Taylor had relinquished his bad faith claim when he signed a release drafted by his attorney in exchange for State Farm’s payment of $15,000 in uninsured motorist benefits.)*
          1. Non-rigid application of PER; one of the MOST EXTREME Corbinesque style cases!

Note: If SF had won, Taylor could have sued his lawyer for malpractice b/c this was very bad drafting.

* + - * 1. Corbin: “Plain Meaning” is plain meaning to the judge and his experience and ideas, not to the parties in the agreement.
      1. Rule: The court will allow the interpretation of the agreement through parol evidence, even if the terms are clear, if the contract language is *“reasonably susceptible”* to the interpretation asserted by its proponent. But it cannot vary or contradict the term it can only interpret it. A judge must first consider the offered evidence and, if he or she finds that the contract language is *“reasonably susceptible”* to the interpretation asserted by its proponent, admit the evidence to determine the meaning intended by the parties.
    1. A list of Maxims for K Interpretation (Professor Edwin Patterson):
       1. *(1) Noscitur a socciis*—A word is affected by its immediate context.
       2. *\*\*(2) Ejusdem generis*—A general term joined with a specific one will be deemed to include only things that are like the specific one. Ex., S contracts to sell B his farm together with the “cattle, hogs, and other animals.” This would probably not include S’s dog but would include his sheep.
       3. *\*\*(3) Exprssio unius exclusio alterius*—If one or more specific items are listed, without any more general or inclusive terms, other items although similar in kind are excluded. Ex. S contracts to sell B his farm together with “the cattle and hogs on the farm.” This would exclude the sheep and S’s house dog.
       4. *\*\*(4) Ut magis valeat quam pereat*—An interpretation that makes a contract valid is preferred to one that makes it invalid.
       5. *\*\*(5) Omnia praesumuntur contra proferentem*— holds that contractual ambiguity should be resolved against the party who drafted the agreement
       6. *(6) Interpret contract as a whole*—Terms should not be isolated from the whole contract. They should be interpreted together as a whole.
       7. *(7) “Purpose of the Parties”* —This should prevail, but should be used with caution. If the purpose of the parties is obscure, the court will be forced to a plain meaning interpretation.
       8. *(8)* *Specific provision is exception to a general one*—If two provisions of a contract are inconsistent with each other and if one is general enough to include the specific situation to which the other is confined, the specific provision will be deemed to qualify the more general one, that is, to state an exception to it.
       9. *(9) Handwritten or typed provisions control printed provisions*.
       10. *(10) Public interest preferred* in interpreting a contract.
    2. *Raffles v. Wichelhaus* – (What did “ex Peerless” mean?)
       1. *(Two merchants entered into a contract for the sale of cotton to arrive “ex peerless from Bombay.” There were two ships named Peerless that were sailing from Bombay, one leaving in October and the other in December. The seller contemplated delivery by the December Peerless, and the buyer contemplated the October Peerless. When the buyer refused to take delivery in December, the seller brought suit for breach of contract.)*
       2. It was pretty clear that the buyer wanted the Oct. Peerless shipment and the seller wanted the Later shipment. The price of cotton was so unstable, so the buyer didn’t want to the price to go up.
       3. Relic of “Subjective” View of Interpretation:
          1. If the parties attributed materially different meanings to contractual language, no contract was formed. According to this view, contract formation required a meeting of the minds.
          2. Counter to this approach: *Ut magis valeat quam pereat*, holds that it is better to make deal then to let it fall.
       4. Objective Approach:
          1. Williston’s Restatement §230(b): Thinks that the words should be interpreted by a “Reasonable Observer/Person,” familiar with the circumstances, rather than in accordance with the subjective intention of either of the parties.
          2. Problem: Neither parties meaning can end up applying if the reasonable observer thinks something different.
          3. Counter Corbin: Thinks this is ridiculous – “holds justice to ridicule”. We shouldn’t enforce something neither party meant.
          4. R2K rejects this view COMPELTELY!!.
    3. *Joyner v. Adams* – (What does “developed lot” mean?)
       1. *(Joyner (P), owner of an office park contracted with Adams (D) to lease and develop property. Adams developed most of the property by the specified date, except for one lot on which sewer and water lines were constructed but no buildings were erected. Joyner asserted that his failure to properly develop the property made Adams liable for the suspended rent increases pursuant to the lease agreement. Adams disputed this interpretation, claiming that the contract did not require that buildings be constructed)*
       2. Modified Objective Approach (CORBIN): Who’s meaning should control and what is the meaning?
          1. R2K §200: The purpose of interpretation is to determine the meaning of the language.
          2. “Mutual Understanding Approach”§201(1): Parties intent rules over the “reasonable person” obj. view.

R2K §201: If B knows that A thinks Blue means Red and doesn’t tell A that Blue really means Blue, then A’s meaning will apply and Blue will mean Red.

Counter: Court shouldn’t be able to make this decision; how do they know the parties real intent.

* + - * 1. “Innocent Party Control Approach” §201(2)

The contract should be enforced pursuant to the meaning of the innocent party, the party who did not have knowledge of the other’s interpretation. If you know you mean it a different way and do not say so, this is close to fraud

Counter: both parties were equally involved in drafting the contract.

* + - 1. The trial court mistakenly based its decision solely on the fact that Adams had drafted the agreement. *Contra proferentem*—holds that contractual ambiguity should be resolved against the party who drafted the agreement. This normally takes place in adhesion contracts but is not limited to such cases.
      2. R2K §201 (3): If neither party knew or had reason to know of each other’s meaning, then the *Raffles* result – NO K b/c of lack of mutual assent.
      3. Rule: Where there is disputed contractual language it is essential to determine whether the parties knew or had reason to know of the other’s different meaning of the disputed language. R2K §20 and §201(2)
    1. *Frigaliment Importing Co. v. B.N.S. International Sales Corp*. – (What is Chicken?)
       1. *(Frigaliment (P), a Swiss corporation, and BNS (D), a NY corporation, made two almost identical contracts for the sale of chicken by the latter to the former. BNS, which was new to the poultry business, believed any kind of chicken could be used to fill the order including stewing chickens. Most of the order for the heavier birds was filled with stewers, while Frigaliment expected young chicken.)*
       2. R2K §202(4): Conduct of the Plaintiff after the 1st shipment, he still wanted the 2nd shipment.
       3. Corbin: Chicken included EVERYTHING.
       4. It doesn’t matter what the judge knows, the parties have to prove their case.
       5. Objective View – the reasonable person would’ve thought chicken was meant in the general sense.
       6. Rule: The party who seeks to interpret the terms of the contract in a sense narrower than their everyday use bears the burden of persuasion. Plaintiff had the burden of Persuasion; he had to prove that the D knew that the P wanted “young chicken”; he failed to do prove this, so his complaint was dismissed.
       7. Later, the judge said he should have used the “Raffles” approach: Neither party knew what they were talking about, so there is no K.
  1. AMBIGUITY, TRADE USAGE, COURSE OF PERFORMANCE, COURSE OF DEALING, AND REASONABLE EXPECTATIONS
     1. Course of Performance – What they do after agreement is reached, evidence of what they intended the deal to mean.
        1. One act will not constitute course of performance, but two will.
     2. Course of Dealing – Previous contract b/w these parties
        1. How the parties have acted w/ respect to past contracts
     3. Trade Usage – A course of dealing or practice commonly used in a particular trade. (arguably not good, b/c it is vague) UCC 1-303(c)
        1. 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 w/ respect to the transaction in question.
        2. You can’t split hairs – the broader trade rules.
        3. If the company does not know of the trade of the business where they are new – TOO BAD…they should know so they are bound.
        4. Amy Kastely says you don’t even have to have an ambiguity to use trade usage.
           1. Lisa Bernstein takes the opposite approach.
     4. Used to interpret even a complete integration
        1. All three above may be introduced to help interpret the meaning of a contract even if the writing is a complete integration. (I.e. not affected by PER)
           1. These customs may not be used to contradict the express terms of a contract.
     5. Priorities
        1. When more than one of these types of customs is present, the most specific pattern controls!
           1. Thus express contractual provision controls over a course of performance, which controls over a course of dealing, which controls over trade usage. UCC 1-303(e)
     6. Ambiguity is almost always an exception to the §211 rule.
        1. LINZER: Ambiguity is always bad drafting. The drafter should always avoid ambiguity. Vagueness is ok if you do it intentionally.
        2. A term is ambiguous when it has one or more reasonable meanings.
        3. “Ex-Peerless”: Latent Ambiguity; not within the 4 corners of the document
           1. You can admit objective evidence to show that there is a latent ambiguity.
        4. “Chicken”: Patent Ambiguity; ambiguity on the face of the document.
     7. How do you prove Meaning?
        1. Subjective Evidence: Actual testimony from parties saying I meant this
        2. Objective Evidence: *Raffles* testimony of dis-interested 3rd party or trade usage; permissible b/c it is not easily fabricated.
     8. Plain Meaning Rule: Plain meaning of language of a contract should govern and extrinsic evidence is admissible only if the court concludes that the term in the contract is ambiguous.
        1. Rule of Most American Jurisdictions
        2. LINZER: No such animal as the plain meaning rule!
           1. The written meaning of a word is not inviolatible.
        3. Williston: Four-Corners Test: Is the ambiguity apparent on the face of the document?
           1. May be dumb, but that’s all we have.
        4. If you believe in plain meaning, then you’re not likely to allow in extrinsic evidence, b/c it makes sense to go solely on what the parties expressed in their final written contract and nothing else.
        5. The more rigidly the court believes in plain meaning, the less likely they will be in allowing in extrinsic evidence to bring up ambiguity
           1. Problem: they would have trouble with cases with “latent” ambiguity (like Raffles).
     9. Posner Approach: Rejects plain meaning, but says you can only prove it by “objective evidence.”
        1. Middle ground b/w “plain meaning” and “letting anything in that is relevant”.
     10. Contextual Approach: Modern theory of interpretation; a court should examine all relevant circumstances in interpreting the agreement including preliminary negotiations b/w the parties.
     11. POLICY -Where on the continuum should be get off?
         1. Plain Meaning 🡪 Posner Middle Ground 🡪 Contextual Approach
     12. *Nanakuli Paving & Rock Co. v. Shell Oil Co.* – (Requirements Contract)
         1. *(Nanakuli (P) entered into a contract to purchase its concrete requirements from Shell (D). The contract was in effect for several years and renewed several times. Nanakuli sued over a one-year contract, contending Shell had failed to protect it from price increases. It argued that although such protection was not enumerated in the contract, it was part of the trade usage in concrete and thus implied in the contract. Further Shell had previously performed this service. Shell argued that contract did not call for such, and its past conduct did not constitute a practice of protection. Rather it was a temporary waiver of the contract price)*
         2. Requirements Contract—An agreement pursuant to which one party agrees to purchase all his required all his required goods or services from the other party exclusively for a specified period of time.
         3. UCC §2-202: Final Written Expression: Parol or Extrinsic Evidence – You can’t contradict, only supplement the meaning of terms in K with course of performance, course of dealing, and trade usage.
         4. UCC 1-205: Course of Dealing and Usage of Trade.
         5. Course of Performance – What they do after agreement is reached, evidence of what they intended the deal to mean.
            1. One act will not constitute course of performance, but two will.
         6. Course of Dealing – Previous contract b/w these parties
            1. How the parties have acted w/ respect to past contracts
         7. Trade Usage – A course of dealing or practice commonly used in a particular trade. (arguably not good, b/c it is vague) UCC 1-303(c)
            1. Whether or not trade usage applies depends on whether they are in the same trade, vocation or trade.
            2. You can’t split hairs – the broader trade rules.
            3. If the company does not know of the trade of the business where they are new – TOO BAD…they should know so they are bound.
         8. All three above may be introduced to help interpret the meaning of a contract even if the writing is a complete integration. (I.e. not affected by PER)
         9. Usage of trade is allowed to interpret the contract even though Shell’s plain meaning stated, “Shell’s posted price at time of delivery.” Shell loses on trade usage, course of performance, and good faith.
         10. This opinion is very Relational: talks a lot about the relationship b/w Nankuli and Shell.
         11. Rule: Trade usage and past course of dealings between contracting parties may establish terms not specifically enumerated in the contract, *so long as no conflict is created with the written terms*.
     13. *C&J Fertilizer, Inc. v. Allied Mutual Insurance Co.* – (It’s obvious I didn’t break into my own store!)
         1. *(C&J (P) took out an insurance policy against burglary. The policy had a definition of burglary which included the necessity that signs of tampering exist on the exterior walls or doors, which was never pointed out to C&J. It assumed it was barred recovery only if there were proof the burglary was an inside job. C&J was burglarized of approximately $10,000. The burglars left no sign of a forced entry on the building exterior, although tire tracks and a damaged inside door remained. Allied (D), the insurer, denied coverage due to the lack of exterior damage.)*
         2. *Reasonable Expectation Doctrine* created for insurance company contracts only.
            1. Ambiguity
            2. Fine Print
            3. Generally when overall circumstances suggest reasonable expectations are negated
         3. §211(3) - Comment f: takes words and allows recovery despite plain meaning; parties are not bound to unknown terms which are beyond the range of reasonable expectation. (Counterpart to the RED for insurance K)
            1. Policy: Good rule in theory, but it is hard to enforce that rule because it requires you to take the position of the big company and prove that they didn’t know that terms would’ve changed the customers mind.
            2. Reasonable expectation now applies to contracts of adhesion (standard contracts §211(3)) …should it apply to all contracts.
         4. P expected that he wouldn’t be covered for inside job, but he expected to be covered if he could prove it was not one.
         5. Insurance Co. should not be able to rest on their language to not protect insured against burglary from outside job.
         6. Rule: A provision of an insurance contract may not contravene the reasonable expectations of the insured. In this case, reasonable expectation trumps plain meaning.
  2. PUBLIC POLICY OF PER:
     1. All courts will allow extrinsic evidence to uncover patent ambiguity, but only modern courts will allow extrinsic evidence to uncover latent ambiguity.
     2. Plain meaning gives parties' incentives to put forth effort into the writing to reduce costs of litigation. The modern approach gives more weight to the intentions of the parties and will often achieve just results, but at the expense of delays in litigation and more courtroom time/costs Plain meaning favors the big guy.
     3. The reality of the world is that we fun on face to face communication and not on paper.
     4. Lon Fullers Autonomy: Encourage people to contract and to supersede other agreements.
     5. Intent v. Certainty: We want there to be a certain certainty in words, but we also want to enforce what the parties intended. (Essence of Difference b/w Classical and Modern Interpretation.)
     6. How much time should the court spend on interpreting the K: If they admit all this evidence to try and figure out what the K means they will waste the courts time and money.
     7. L. Gordon Crovitz, “Saving Contracts from High Weirdness”—Says the questioning of the language of contracts, by allowing preposterous evidence to be heard is harmful to all areas of contract law. “Such reductio ad absurdam reasoning, undermining the rule of law, is what the deconstructionist theory of the Critical Legal Studies movement is all about…. The freedom to write contracts and the duty to abide by their terms are features of American life so basic that it’s hard to believe they could be litigated.”

1. SUPPLEMENTING THE AGREEMENT: IMPLIED TERMS, THE OBLIGATION OF GOOD FAITH, AND WARRANTIES
   1. IMPLIED TERMS
      1. Can mean (2) Different Things:
         1. Implied-in-Fact (Inferred by Facts): Implied by parties words or conduct as if the parties put it in there. Parties meant to do it, but forgot to right it into the K.
         2. Implied-in-Law (Imposed by Law): made by statutes, common law or b/c the courts thought it was appropriate. This is what the parties “ought” to have put into the K.
         3. Gap Fillers: What the parties would’ve agreed to if they had sat down and thought about it. (i.e. Wood v. Lucy and “reasonable time” provision.
         4. Default Rules: Useful rules b/c custom rules take time and are expensive. Not just “gap-fillers”, they are there so lawyers can use them; they are “off-the-peg” contract terms. (“C Drive”)
      2. *Wood v. Lucy, Lady Duff-Gordon* – (Classic Gap Filling Case!) “IMPLIED-IN-FACT”
         1. *(Lucy (D), a famous fashion designer, contracted with Wood (P) to grant him an exclusive right to endorse designs with her name and to market and license the designs with her name. They were to split the profits derived from this in half. Lucy placed her endorsement on fabrics, dresses, and millinery without Wood’s knowledge and in violation of the contract. Lucy claimed their agreement lacked the elements of a contract as Wood was not bound to do anything.)*
         2. “Imperfectly expressed”—If the parties look back, certainly they would have agreed that Wood had to sell Lucy’s goods. Implied-in-fact from the party’s behavior.
         3. The promise to pay Lucy half the profits and make monthly accounting was a promise to use reasonable efforts to bring profits and revenues into existence, without which Lucy could not get her half of the profits.
         4. This does not require the exclusive agent to use his best efforts. This is an implied-in-law term—If the parties are silent, this is what will be put in. Parties can deviate, and it is their choice to take it out.
         5. Cardozo is filling in the gap left by the parties in this case. In other words, he is saying this must have been what they meant. There is an implied promise to work with. This is clearly an implied-in-fact case. 2-306(2) makes it an implied-in-law situation.
         6. Rule: While an express promise may be lacking, the whole writing may be instinct with an obligation—*an implied promise*—*imperfectly expressed* so as to form a valid contract.
         7. UCC §2-306(2) (Applies *Wood v. Lucy* as a default rule)—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.
         8. This is very progressive in Cardozo’s time.
      3. *Leibel v. Raynor* – (Let’s Create a Default Rule!) “IMPLIED-IN-LAW”
         1. *(Raynor (D) orally contracted with Leibel (P) to become an area-exclusive distributor of Raynor’s products. Raynor subsequently became dissatisfied with Leibel and sent Leibel a notice of termination. Leibel sued, contending that reasonable notice was not given prior to termination. Middle man situation. Dealer typically putting in a lot of investment w/o guaranty of payment.)*
         2. The threshold question is whether the UCC applies. By its terms, Article 2 (§2-102) applies to transactions involving goods or merchandise. It is apparent that a contract between manufacturer and a distributor involves goods or merchandise, and, thus, Article 2 should apply.
         3. UCC §2-309: Absence of Specific Time Provisions; Notice of Termination.
         4. UCC §2-309(3): You can’t dispense if it is “unconscionable”. We are assuming that one party is dominant and could easily put a provision in K saying “no reasonable notification is required.” This is not allowed!
         5. Also think back to Trade Usage (Amy Kastely (TU default rule) and Lisa Bernstein (TU too unclear and alterable)
         6. “At-Will” employment K:
         7. Rule: Reasonable notification is required in order to terminate an ongoing oral agreement for the sale of goods creating a manufacturer-supplier (dealer- distributor / franchisee-franchisor) relationship. Opportunity to get back investment.
         8. Policy Concern: Large incentive to protect franchisee, distributors, dealers…b/c they are putting money up and therefore there is more risk, you can’t pull out the rug from under them. Allows people to make substantial steps to making their business efficient, w/o always having to worry what their back up plan is.
   2. GOOD FAITH
      1. Duty of Good Faith or Fair Dealing: One of the most important implied terms; thought not to be a default rule. Every K has a duty of good faith and fair dealing.
      2. R2K 205 :Every contract imposes upon each party a duty of good faith and fair fealing in its performance and its enforcement.
      3. Pure Heart and Empty Mind v. Reasonableness Standard!!!
      4. UCC §1-201(19): “Pure heart with Empty (Stupid) Mind” Good faith definition. (Simple Honesty in Fact is what matters)
      5. UCC §2-103(1)(b):Adds observance of reasonable standards.
         1. Objective Good Faith: even if you have a pure heart, but you didn’t know it was wrong, it’s bad faith!
         2. Here “Pure heart with Stupid Mind” doesn’t fly!! Reasonable people are not stupid!!
         3. Hence the Uniform Commercial Code is Classically Un-Uniform.
      6. GOOD CHART FOR GOOD FAITH – pg. 442 (Sumner)
         1. Burton v. Summers DEBATE:
            1. Sumner: There is no definition of Good Faith, you can only define good faith from what is NOT bad faith.
            2. Burton: Bad Faith consists of when one party attempts to gain opportunity that should’ve been assumed precluded by the K. When Good Faith is not as broad; it means “making a K and not trying to get out of it b/c of a technicality”.
      7. *Kirke La Shelle Co. v. Paul Armstrong Co*: First Good Faith Case
         1. Silent motion pictures are not like talking motion pictures. It’s bad faith to rely on the “silent motion pictures” list.
         2. “Fruits of the Contract” – honor the bargain, every K has an obligation of good faith and fair dealing.
      8. *Locke v. Warner Bros, Inc*. – (Clint Eastwood and Warner bros are Bad (Faith) Boys!)
         1. *(Locke and Eastwood were dating, but then they broke up. Eastwood secured a development deal for Locke with Warner Bros, in exchange for Lock settling and dropping her case against him. Lock entered into a written agreement with Warner, but Locke was not aware that Eastwood had agreed to reimburse Warner for the cost of her contract if she did not succeed in getting projects produced and developed. Warner complied with the agreement, but didn’t develop any of Locke’s proposed projects. Locke says the deal was a sham and Warner never intended to make any films with her.)*
         2. Locke argues that that only did they sign the K in bad faith, but they also executed it in bad faith.
         3. WB has a right to refuse her, but they have to have a good reason to refuse. They didn’t.
         4. It was bad faith on WB’s part b/c they didn’t even give Locke’s ideas a “possibility”.
         5. A breach of Good Faith doesn’t entitle you to specific performance of the contract, only to damages from bad faith.
         6. Rule: Where a K confers on one party a discretionary power affecting the rights of the other a duty is imposed to exercise that discretion in good faith and in accordance with fair dealings. Even when subjective evaluations are part of the contract, it still implies that the evaluation that is given or offered under the contract must be in good faith.
         7. Where in the stages of the K does the duty of Good Faith arise? – all arise that you have a duty in performing; but not all agree that you have a duty of good faith when you bargain.
      9. *Empire Gas Corp. v. America Bakeries Co.* – (I JUST changed my mind!)
         1. *(ABS entered into an agreement to buy 3,000 conversion units, more or less, from Empire to convert their fleet into propane cars. ABC agreed to purchase the propane and units exclusively from Empire, but they never ordered any equipment or propane.)*
         2. Not the Classic Requirements Contract, but it seems like one!
         3. ABC argument: This is a req. K, but we don’t have any requirements.
         4. UCC §2-306(1): Output, Requirements and Exclusive Dealings – “actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate…may be tendered or demanded.”
            1. Demanding Less: “GOOD FAITH” DOMINANT.
            2. Demanding More: “UNREASONABLY DISPROPORTIONATE” DOMINATE.
            3. If there is a conflict b/w the “good faith” requirement AND the requirement that the buyer not buy a “quantity unreasonably disproportionate to any stated estimate”…the “good faith” requirement is dominate when the buyer buys less and “unreasonably disproportionate” requirement is dominate when the buyer buys more. If the market price of the contract item drops substantially, a buyer acting in good faith could choose to buy huge quantities of the seller’s products and resell the items, competing in the seller’s market with the seller. (§2-306(a) disallows such behavior)
         5. Output K are the same as Requirements K, except the reverse.
         6. Mutuality of Obligation – Illusory argument for why Requirements Contract should not be enforced. (?)
            1. You can use this idea to find consideration or lack thereof.
         7. Rule: A buyer in a “requirements contract” may decide to buy less than the contract estimate, or even buy nothing, so long as the buyer acts in good faith. But, good faith requires MORE than just “changing your mind” about the terms of the contract; you have to have dire circumstance (ex. imminent bankruptcy)
   3. AT-WILL EMPLOYMENT
      1. Pros – Less litigation, employers more willing to hire employees (as a class…not individuals) b/c less risk involved.
      2. Cons – (Linzers Opinion) All contributors to an enterprise deserves some security, employees won’t work as hard and it will be bad for the economy.
         1. Incredibly Class-Based
         2. You can be fired at any time (no protection), but you can also leave at any time.
         3. Don’t employees have a stake in the company? Even more so than stockholders?
            1. Arguable that management runs and owns the company. Employees have the greatest bond with the company and they should be treated like management (somewhat owners).
            2. When you work for a company for so many years, you owed some sort of decency. Tied to Good Faith and Fair dealing??
            3. MOST COURTS WILL NOT BUY INTO THIS!!
      3. *Donahue v. Federal Express Corp*. – (At-will is not a good (faith) idea!!)
         1. *(Donahue worked for Fed Ex, he was fired after he brought up some company problems)*
         2. Very Conservative Case!
         3. Not a completely accurate picture of “at-will” employment.
         4. Whistle-blower issue: Donahue went to the middle man, (not Mr. Fed Ex himself), so the middle man doesn’t want to make waves and thinks Donahue is just a trouble maker.
         5. No Additional Consideration b/c all he did was perform his job well, there was no added benefit to Fed. Ex or a detriment to Donahue.
         6. LINZER:
            1. Courts are equally as capable and credible as Legislatures
            2. Common law had creativity, courts should return this this idea by discerning and applying community values in this and other areas where traditional common law rules appear inadequate.
            3. All contributors to enterprise deserve some security and some share of the enterprise itself.
         7. Rule: An employee cannot maintain an action for breach of an implied duty of good faith and fair dealing if the underlying claim is for the termination of an “at-will” employment contract. At-will employment K are subject to termination at any time, or for any cause. Unless there are clear mandates of public policy or terms implying good faith.
      4. 5 things to use to argue Good Faith in at will employment: (Note 3 on pg. 473)
         1. Deprivation of Compensation earned before Termination
         2. Performance Reviews – additional requirement of good faith
         3. Public Policy – Can’t be forced for refusing to commit a crime
         4. Employer expressly states that they will terminate you for good cause; but you can argue that it wasn’t in writing.
         5. Additional Consideration
         6. Promissory Estoppel – moving to another state, you can argue reliance on part of the employee.
         7. Employee’s Manual – sets procedure for termination
            1. Employer held to the manual if their was reliance on the manual.
            2. Why do employers bind themselves? – To discourage UNIONS!!
   4. WARRANTIES
      1. Under the UCC the seller may make three types of warranties:
         1. **Express warranty** - UCC 2-313
            1. Explicit promise or guarantee by the seller that the goods will have certain qualities

If a seller is expressing only an opinion about a product, he will not be held to have made a warranty

* + - 1. **Implied warranty of merchantability** UCC 2-314
         1. Unless excluded or modifies, a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant w/ respect to goods of that kind

Must be fit for the ordinary purposes for which such goods are used

Implied warranty of merchantability is always given by a merchant seller, unless it is expressly excluded by a disclaimer that meets stringent formal requirements imposed by the code.

* + - 1. **A warranty of fitness for a particular purpose** UCC 2-315
         1. 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 sellers judgment to select or furnish suitable goods

Buyer must prove three things to recover for breach

That the seller had reason to know the buyer’s purpose

That the seller had reason to know that the buyer was relying on the seller’s skill or judgment to furnish suitable goods; and

That the buyer did in fact rely on the seller’s skill or judgment

* + 1. If a seller breaches any of these warranties, a buyer may bring a damage action for breach of warranty, view similar to breach of contract
    2. ***Bayliner Marine Corp. (D) v. Crow (P)* (**no express or implied warranty for boat)
       1. *Crow, P purchased fishing boat through Tidewater, manufactured by Bayliner (D). When he bought it, he looked at the pro matrixes and a brochure to determine that the boat would be suitable for deep sea fishing, claiming it could go 30 mph. After purchasing the boat however, it would not exceed a max speeds of 23-25 mph after it was repairs by Tidewater. P testified that bc of the boats slow speed he couldn’t use it for deep sea fishing and had no use for it then. Brought this suit for breach of express and implied warranties.*
       2. Not enough evidence to support trial crts holding of express and implied warranty
       3. Rule:
          1. Code Sec.8.2 – 313- 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 promise.

B. any description of the goods which is made a part of the bass of the bargain creates an express warranty that the goods shall conform to the description.

* + - * 1. Code Sec. 8.2 – 314 – in all contracts for the sale of goods by a merchant, a warranty is implied that the goods will be merchantable. To be merchantable, the goods must be such as would “pass w/out object in the trade” and as “are fit for the ordinary purposes for which such goods are used.”
      1. Express warranty
         1. the statement sin the prop matrixes didn’t relate to the boat purchased by P, but to a boat of different specs. Therefore we conclude that the statements contained in the prop matrixes did not constitute an express warranty by D about the performance capabilities of the boat purchased by P.
         2. The statement in the brouchure is merely a commendation of the boats performance and does not describe a specific characteristic or feature of the boat. Therefore not express warranty.
      2. Implied Warranty of merchantability and fitness for a particular purpose
         1. in order to prove that a product isn’t merchantable, the complaining party must first establish the standard of merchantability in the trade. The evidence here doesn’t address the stnd of merchantability in the trade or whether Crow’s boat failed to meet the stand. Therefore, the crt holds that P failed to prove that the boat wouldn’t pass w/out objection in the trade as required by Code Sec. 8.2-314.
         2. The issue of whether goods are fit for the ordinary purposes for which they are used is a factual question. The evidence is uncontroverted that Crow used the boat for offshore fishing, at least during the first few years. Thus the evidence fails to establish that the boat was not fit for the ordinary purpose for which it was intended.
    1. ***Caceci v. Di Canio Construction Corporate***
       1. *The Caceci’s (P) contracted with Di Canio (D) for a parcel of land on which a one-family ranch home was to be constructed. Di Canio guaranteed the plumbing, heating, and electrical work, roof and basement walls for one year from title closing. When the kitchen floor started dipping four years later, Di Canio unsuccessfully attempted to repair the cracks and dips.*
       2. **Holding -** The “Housing Merchant” warranty imposes by legal implication a contractual liability on a homebuilder for skillful performance and quality of a newly constructed home.
       3. **Implied Warranty of Merchantability (UCC 2-314)—**
          1. An implied promise made by a merchant in a contract for the sale of goods that such goods are suitable for the purpose for which they are purchased. Implied means it is not stated in the contract at all, and merchantability means the good is fit for the purpose for which it was intended. This only applies if you are a merchant. If a seller sells you a lamborghini and you do not know how to drive shift, you have a case against him under merchantability. Warranties are often disclaimed by sellers because of the implication of an implied warranty. He has to state it or disclaim it in writing. If nothing is said or written, the warranty is implied.
       4. **UCC 2-313. Express Warranties by Affirmation, Promise, Description, and Sample.** 
          1. **This provision describes when a warranty is express.** Note (2) states, “It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warranty’ 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.”

1. **AVOIDING ENFORCEMENT: INCAPACITY, BARGAINING MISCONDUCT, UNCONSCIONABILITY, AND PUBLIC POLICY (CH 7)**
   1. Big Picture:
      1. Modern courts are making it easier for you to get out of Ks
      2. Are these desirable or do they produce arbitrary results that threaten the efficiency of the market system?
   2. This chapter will discuss three policies:
      1. The *competency* of parties to make an agreement
      2. The *bargaining process* by which an agreement is reached
      3. The *substance* of any resulting agreement.
   3. Defenses to Contract Formation:
      1. Active Fraud – in the factum or in the inducement
      2. Failure to disclose
      3. Unconscionability – Rollins/Orkin
      4. Duress/Undue influence
      5. Mistake (unilateral & mutual)
      6. Lack of capacity
   4. MINORITY & MENTAL INCAPACITY
      1. R2K Sec. 14-16
      2. Children (minors) (14)
         1. One argument is that he didn’t have the capacity
         2. Another is that he lied about his age and so overall what would be fair?
         3. You can disaffirm any K you entered into as a minor up until the day before your 18th birthday.
         4. A contract is *“voidable”* because of incapacity – voidable means it is one-sided and only the minor can void the K; the adult is bound by the contract, unless the minor voids it.
         5. Ask for drivers license to find out! (back in the day age of majority was 21)
      3. Mental illness (15)
         1. Contract is voidable if a person enters into a contract by reason of mental illness or defect (a) his is unable to understand in a reasonable manner the nature and consequence of the transaction, or (b) he is unable to act in a reasonable manner in relation ot the transaction and the other party has reason to know of his condition.
         2. Where a contract is made on fair terms and the other party is w/out knowledge of the mental illness the power of avoidance under 1 terminates to the extent that the contract has be performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.
      4. Intoxicated person (16) (drunk or on drugs)
         1. Raises real problems, do we want to say just b/c u are drunk u are unable to make a contract?
         2. We will be very relunctant to let them out of the K unless there is lots of evidence that they were a drunk.
         3. The other side has to know that you are incapacitated and take advantage of you
      5. You must have some indication of knowing that something is wrong for mental illness and intoxicated ppl, but not knowing that a child is under age wont prevent the contract from being voidable.
      6. Minors R2K Sec 14
         1. Contract is voidable by minor!
         2. A minor who lies about his age basically commits fraud, and the other party can avoid the contract b/c of it.
      7. *Dodson v. Shrader* – (The classic “Buying a Car” case.)
         1. *(Teenage boy (Dodson) bought a truck from Shrader; he continued to drive it without repair when problems developed. D refused to take the truck back unless depreciation was factored into the rescission and the truck was hit while sitting in P’s yard.)*
         2. Basic Rule: You have to give back what you got!
         3. “Hard and Fast Rule” of “No restitution”:
            1. Pro: Car salesman can protect themselves by asking for identification, if they get burned that’s too bad. Default rule should be: “Unless you ask, you are burned.” The car salesman has a lawyer on retainer and can handle these small claims, but the plaintiff is just a stupid kid and can’t afford to go to trial.
            2. Con: It is not fair b/c the minor has some responsibility for the depreciation of the car; this undermines the entire notion of incapacity. We should hold the kid liable for the tort of fraud if he says he is over 18.
         4. Rule 1: The minor cannot recover the amount actually paid, without allowing the vendor reasonable compensation for the use of, depreciation of, and willful or negligent damage to the article purchased – IF the minor has not been overreached in any way, if there has been no undue influence, contract is fair, the minor actually paid.
      8. *Halbman v. Lemke* – (Dodson would’ve been able to walk away in Wisconsin!)
         1. Rule 2: Hard and Fast Rule! A minor who disaffirms a contract may recover the purchase price without liability for use, depreciation or other diminution in value, unless the minor misrepresents himself.
         2. What about K b/w Promoters and Minors? How can the promoter protect himself?
         3. Have an adult present.
         4. Tell him to get a lawyer and you will pay and he can pick and take his time.
         5. The natural reaction is to sign the papers even if your lawyer advises against it, but you will be protected.
         6. Restrictions on minors ability to Contract:
            1. Necessity (legal fees, repairing cars are not necessities)
            2. Reasonable time (minor can disaffirm w/in a reasonable time after he hits majority)
            3. Marriage Contracts: pg. 514 Note 6
         7. Infancy Doctrine is Bright Line Objective rule, while Mental Incapacity is very subjective!!! (Segway)
      9. Mental Incapacity: R2K §15
         1. Not only an affirmative defense, but also a cause of action to rescind contract.
         2. Elements – Unable to understand in a reasonable manner; and Unable to act in a reasonable manner.
         3. Contract is voidable at mental incapacitated persons discrestion
      10. *Hauer v. Union State Bank of Wautoma* – (The bank knew I was not well, so I don’t have to give the $$ back.)
          1. *(Hauer had been under guardianship which had been removed a year prior. Eilbes learned the Hauer had a mutual fund and got her to agree to take out a loan to help Eilbes’ business using her mutual fund as collateral. She defaulted on her loan, so the bank took over the funds.)*
          2. Test for determining Competency: Whether the person involved has sufficient mental ability to know what he was doing and the nature and consequences of the transaction.
          3. Try to use the Infancy Doctrine set forth in Halbman, but it’s not the same as Mental Incompetency.
          4. The bank is not a fiduciary and they do not have a duty to inquire about the mental state of their customers.
          5. The bank could not have been found to have lacked good faith as a matter of law absent knowledge of the incompetency because the two findings are inseparable.
          6. Rule: A mental incompetent person is required to make restoration to the other party unless special circumstances are present (the purported lack of good faith by the bank was a special circumstance here).
      11. *Ortelere v. Teacher’s Retirement Board* – (I changed my retirement plan, but it was a very BAD decision!)
          1. She made a bad decision intellectually, but emotionally thought she was doing what was best.
          2. The change of election in her retirement plan was voidable.
          3. How is mental capacity to be determined?
             1. Cognitive Test – A person lacks capacity to enter into a contract if they are *unable to understand* the nature of the transaction or its consequences.
             2. Volitional Test – A person lacks capacity to enter into a contract if the person is *unable to act* in a reasonable manner in the transaction and the other person has reason to know of the condition.
      12. Intoxication: R2K §16
          1. A contract is voidable if a party has reason to know that because of intoxication the other person is unable to either understand the transaction or act in a reasonable manner.
      13. Overview: So, a minor can generally disaffirm w/o making restoration, but a mentally incompetent person is required to make restoration to the other party unless special circumstances are present.
          1. Reason: B/c Sellers can protect themselves against minors by IDing them…but they can’t protect themselves against the mental incapacitated person.
   5. **DURESS AND UNDUE INFLUENCE**
      1. Duress – The “Gun to Your Head” Defense: Unlawful threats or other coercive behavior by one person that causes another to commit acts he would not otherwise do.
         1. CL: Wrongful or improper threat; lack of reasonable element.
         2. R2K §174 – Attacks the “acceptance level” – No manifestation of assent if compelled by duress.
         3. R2K §175 – Contract voidable under your duress cause of action with improper threat and no reasonable alternative.
         4. R2K §176 – What constitutes an Improper Threat?
         5. POLICY: The whole economic system is based on threats (supply and demand), but there are limits to these threats but we end up looking at the result to determine if their was duress or undue influence, if there was the threats cross the line.
         6. *Totem Marine Tug & Barge v. Alyeska Pipeline Service* – (You knew I had no other choice but to settle.)
            1. *(Alyeska breached the K and then made Totem settle for a third of what the job cost them and what the K was for and knew this was their first big job and that they would have to settle for this because they had just started the company and needed the money.)*
            2. You always have “free-will”, in terms of what a reasonable person would have done under the circumstances.
            3. The standard is YOU in the circumstances, not a reasonable person in the circumstances.
            4. Different from driving a hard bargain but it was TOO HARD of a bargain. Alyeska never denied their liability and that they breached the K.
            5. Look Forward to Alaska Packers (under Modification): They could’ve claimed economic duress.
            6. Economic Duress: A defense to an action that a party was unlawfully coerced into the performing of an action by another due to fear of imminent economic loss and was not acting in accordance with his own free volition in performing the action; very fact specific and deals with the motivation behind actions.
            7. Rule: Duress exists where there is: 1) a wrongful or improper threat; 2) a lack of reasonable alternative; and 3) actual inducement of the K by the threat. (R2K §175)
            8. Rule for Economic Duress: 1) party must have involuntarily accepted terms of another; 2) circumstances make it so there is a lack of reasonable alternative and 3) such circumstances were the result of coercive acts of the other party. The acts have to improper and morally wrongful – not illegal.
            9. POLICY: Courts are reluctant to set aside a contract b/c they have to fix this unequal bargaining, but there is an argument for making these settlements stick in order to encourage people’s freedom to contract.
      2. Undue Influence – The “Whispers and Shadows all around you” Defense.
         1. CL: Unusual place and time; demanded signing immediately, extreme emphasis on the consequences of delay; no 3rd parties on your side; no attorney present; multiple people pressuring you.
         2. R2K §177 – Unfair persuasion by domination and by virtue of the relationship. K voidable if the manifestation of assent is compelled by undue influence.
         3. *Odorizzi v. Bloomfield School District* – (Gay teacher charged with gay relations!)
            1. *(Principle and Superintendent pressured teacher into resigning at his apartment after he had been arrested for being homosexual.)*
            2. Threat of legal action alone is not duress.
            3. They wouldn’t let him talk to anyone else, his state of mind, all point to duress.
            4. Different courts will use different elements to get the same results.
            5. Elements that create UI, but not all are necessary to indicate UI:

Discussion of transaction at unusual or inappropriate time

Consummation of the transaction in an unusual place

Insistent demand that the business be done at once

Extreme emphasis on untoward consequences of delay

Use of multiple persuaders by the dominant side against single servient party

Absence of 3rd party advisers to servient party

Statement that there is no time to consult financial advisors or attorneys

* + - * 1. Rule: Undue Influence involves a dominant party taking unfair advantage of another’s weakness of mind with excessive pressure and persuasion.
  1. MISREPRESENTATION AND NONDISCLOSURE
     1. **Contract remedy** – mainly getting out of the deal, not getting damages (can bring it in tort and get damages but doesn’t always work). Contract remedy only gets you back to zero, nothing extra.
     2. Misrepresentation: A material misrepresentation by one party makes the K voidable by the innocent party.
        1. Misrepresentation does not necessary include fraud, b/c you can misrepresent something which you genuinely thought to be true!
     3. Two avenues of redress for misrepresentation:
        1. **Rescission** – judicial return of the parties to status quo that existed before the contract was formed (could return money spent, or property given)
           1. Requires the tender of money or property!
        2. **Tort action for damages** – receive money damages in a tort action
     4. Void – the contract can’t be made good at all, ex. Contract for criminal act
     5. Voidable – one party (the injured party) has the option to continue the contract or cancel it
     6. R2K §159: A misrepresentation is an assertion that is not in accord with the facts; notice no reference to “scienter” and no reference to reliance.
     7. R2K §162: When a Misrepresentation is Fraudulent or Material. (a little watered down from “scienter”)
     8. R2K §163: When a Misrepresentation Prevents Formation of a Contract.
     9. R2K §164: When a Misrepresentation Makes a Contract Voidable.
     10. **Scienter –** Actual or presumed degree of knowledge that makes a person legally responsible for his or her actions or failure to act. For example, owner of a vicious dog is deemed to know of its disposition and to properly secure it from causing damage or injury to others. Latin for, knowledge.
     11. If the misrepresentation is such that if it hadn’t been made you wouldn’t have entered into the contract, that makes it material and allows you to avoid the contract b/c of the misrepresentation.
     12. *Syester v. Banta* – (Dancing with the Old Lady)
         1. *(Syester got ripped off by a dance studio. They convinced her she would be a dancing star and let her buy 4,000 hours of dance lessons which she did not need; including 3 lifetime memberships!)*
         2. Fraud: False statement made “knowingly with the intent that P would rely on it, P did rely and suffered damage as a result of their reliance.
            1. Fraud in Tort puts you back to where you were before the tort happened (reliance damages)
            2. Fraud in Contract is based on the “benefit to bargain” theory and therefore P can only recover the difference b/w the fraudulent amount and the real amount (expectation damages).
         3. Tort: Fraud, Mistake…are not affirmative defenses; Contract differs b/c they are attempts to get out of a something; a contract.
         4. It takes more to prove fraud in tort; b/c in contracts were are not giving out punitive damages so we don’t have to worry so much.
         5. In order to prove Fraud, plaintiff must show:
            1. Def made one or more representations claimed by Plaintiff.
            2. One or more of the statements was false.
            3. The false statements were material matters with reference to entering into the lesson contracts.
            4. Def. knew the one or more of the representations were false.
            5. The representation were made with intent to deceive and defraud the P.
            6. Plaintiff believed and relied upon the false statements and would not have entered into the lesson contracts had she not believed and relied on the misrepresentations.
            7. Plaintiff was damaged through relying on defendant’s representations.
         6. Rule: A misrepresentation is material if it would be likely to induce a reasonable person to assent, or if the person who makes the misrepresentation knows that it would be likely to induce the other party’s assent. When one party’s conduct has been egregious, equity may relieve the other party of the consequences of a release signed under a mistaken belief of law and facts.
     13. Nondisclosure:
         1. R2K §161: When Non-Disclosure is equivalent to an assertion (the exceptions to the General Duty NOT TO DISCLOSE)
            1. If part of the truth is told, but another is not, so as to create an overall misleadin impression
            2. If a party takes positive action to conceal
            3. Failure to correct a past statement.
            4. Fiduciary Relationship
            5. If one party knows that the other is making a mistake as to a basic assumption, the former’s failure to correct that misunderstanding…failure to good faith.
         2. Disclosure of material facts is required if the prospective parties are in a fiduciary relationship or a relationship of trust or confidence.
         3. Beyond such fiduciary relationship courts have traditionally imposed disclosure between businessmen only when necessary to correct a previous misstatement or mistaken impression.
         4. Disclosure may also be required when a material fact is known to one party in the exercise of normal diligence and not to the other.
         5. *Hill v. Jones* – (The termite ripple in the wood floor.)
            1. *(The Hill’s purchased a house with termite damage that the previous owners knew about but didn’t reveal. Mr. Hill asked if a ripple in the floor could be termite damage but the seller said it was water damage.)*
            2. Duty to Disclose
            3. R2K Sec. 161- #s 1-3 have element of reliance in it
            4. Contract Integration Clause - even if the contract is integrated you can always claim fraud and use the Parol Evidence Rule to admit your proof.
            5. Concealment: When you COVER the damage so that you can get away with it. (to promote honesty and fair dealing in business relationships.
            6. *Laidlaw* Case: Buyer of tobacco’s agent was aware of the war ending—seller’s agent was not (end of the war could increase the market value of tobacco by 50%). When asked if there was any news about the war etc, the buyer’s agent remained silent. They could have said I’m not going to tell you. Then you are on notice that something may have happened. But the court says that seller worked harder to find out the news so he shouldn’t have to disclose.
            7. LINZER: How can a party seeking information avoid the “no duty to disclose” defense?

Ask them if there is anything they know that is relevant to this transaction and make them answer. If they say no and there was something then there is fraud.

* + - * 1. PP: If you have to share all of the information you find then there is less incentive to go look for info. And we end up with the rich people finding all this evidence and that poor people don’t have the resources for that.
        2. Rule: There is a duty to disclose known facts that are not observable and not known to the buyer, but would materially affect the value of the property and the buyer’s decision to purchase.
      1. ***Park 100 Investors, Inc. v. Kartes, Indiana (1995)***
         1. *P (Park) appealed the judgment that found that the part owners were not liable for unpaid rent under a personal guaranty of lease because P obtained the signatures of the part owners on the personal guaranty of lease through fraudulent means. P contended that one's reliance upon a material misrepresentation had to be justified and, in an arm's-length relationship involving knowledgeable business people such as the part owners, such reliance was misplaced.*
         2. **Holding** -The judgment that found that P obtained the signatures of the part owners on the personal guaranty of lease through fraudulent means was affirmed.
         3. **Rule -** Unilateral mistake not a defense (due to not reading a contract) unless the mistake is due to a misrepresentation
  1. **UNCONSCIONABILITY** 
     1. An absence of meaningful choice on the part of one of the parties together with contract terms, which are unreasonably favorable to the other party.
     2. **R2K §208:** If a contract or terms is unconscionable…court may refuse to enforce it.
     3. **R2K Sec. 2-302**
     4. Makes unfair contracts unenforceable
     5. How to deal with Unconscionability:
        1. Refuse to enforce K.
        2. Limit the K.
        3. Blue Pencil the K. – downside: encourages overreaching b/c if you get caught they just bring you back to where you should’ve been instead of punishing you.
           1. **blue pencil rule**– mechanical approach to possible reduction of a covenant which allows severance or reduction only if the objectionable term can literally be “lined out” and the remainder enforced

blue penciling encourages overreaching

no penalty for this against the overreaching party

no disinsentive to writing an overbroad clause

widely used

* + 1. **Procedural** Unconscionability: Lack of choice by one party or some defect in the bargaining process (such as quasi-fraud or quasi-duress)
       1. Ex. Burdensome clauses hidden in the boilerplate; high pressure salespeople who mislead the uneducated consumer; industries w/ few players, all of whom offer the same unfair adhesion contracts to defeat bargaining
    2. **Substantive** Unconscionability: Fairness of the terms of the resulting bargain.
       1. ex. Excessive price charged
       2. arbitration agreements in employment contracts
    3. Price Unconscionability: ***laesio enormis*** – a party could rescind a land sale K if the disproportion was 2:1.
    4. BACKGROUND: CL had no explicit doctrine for dealing with unfair bargains, but the court would either deny specific performance or other equitable relief if the price was inadequate (equity) or manipulate doctrine such as consideration, mutual assent, or principles of interpretation to police for unfairness and to find in favor of a party who was the victim of an unfair bargain.
       1. This was producing confusion. So, they came up with one term – Unconscionable!
       2. Karl Llewellyn: “Covert tools are never reliable tools.”
    5. Unconscionability: An absence of meaningful choice on the part of one of the parties together with contract terms, which are unreasonably favorable to the other party.
    6. R2K §208: If a contract or terms is unconscionable…court may refuse to enforce it.
    7. UCC §2-302: If K seems unconscionable, the crt may decline to enforce the contract
    8. Corbin: Terms are to be considered are to be considered in the light of the general commercial background.
    9. Unconscionability and the Code – The Emperor’s New Clause by Professor Leff
    10. *Williams v. Walker-Thomas Furniture Co.* – (The famous unconscionability case – PRE UCC §2-302!)
        1. *(Williams was sold furniture by a door-to-door salesman from Walker-Thomas who had an installment k that basically said, what you buy will be held in interest until you pay off all your debts to us. You get title to nothing until you pay off everything. Basically this dispute is about the obscure provision—to keep the balance due on every item bought until they were all paid off.)*
        2. Replevy: Seizure of personal property.
        3. Dissent: A luxury to some may be a necessity to others.
        4. Rule: Where the element of unconscionability is present at the time a contract is made, the contract should not be enforced. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.
        5. Unconscionability seems to have gone into an eclipse – no one seems to be using it anymore.
    11. Dean Alderman Lecture about Arbitration – look at notes! Pg 98 of notes
    12. UNCONSCIONABILITY AND ADHESION CONTRACTS
        1. Adhesion contracts: *"Adhesion contract"* is an imprecise term used to describe a document containing non-bargained clauses that are in fine print, complicated, and/or exceptionally favorable to the drafter.
           1. Refusal to enforce: If the court is convinced that: (1) the contract or the clause in question was *not negotiated*; and (2) the drafter had a *gross disparity in bargaining power*, the court may refuse to enforce the contract or clause.
           2. Tickets and other "pseudo contracts": Refusal to enforce what the court finds to be a "adhesion contract" is especially likely where the transaction is one in which the non-drafter does not even *realize that he is entering into a contract at all*. Parking-garage tickets, tickets for trains or planes, and tickets to sporting events, are examples: there is often contractual language in fine print on the back of the ticket, but the purchaser does not understand that by buying the ticket she is agreeing to the printed contractual terms.

Refusal to enforce: The language printed on the ticket will generally be enforced only if: (1) the purchaser signs or somehow *manifests assent* to the terms of the ticket; and (2) the purchaser has *reason to believe* that such tickets are regularly used to contain contractual terms like those in fact on the ticket. Even if the ticket is found to be generally enforceable, the court will strike *unreasonable terms*.

* + - 1. Unconscionability: If a court finds that a contract or clause is so unfair as to be *"unconscionable*,*"* the court may decline to enforce that contract or clause. See UCC § 2-302(1).
         1. No definition: There is no accepted definition of unconscionability. The issue is whether the clause is so *one-sided*, so unfair, that a court should as a matter of judicial policy refuse to enforce it.
         2. Consumers: Courts have very rarely allowed *businesspeople* to claim unconscionability; only *consumers* are generally successful with an unconscionability defense.
         3. Varieties: Clauses can be divided into two categories for unconscionability analysis: (1) "procedural" unconscionability; and (2) "substantive" unconscionability.

Procedural: The *"procedural"* sort occurs where one party is induced to enter the contract without having any *meaningfulchoice*. Here are some possible types: (1) burdensome clauses tucked away in the fine-print boilerplate; (2) high-pressure salespeople who mislead the uneducated consumer; and (3) industries with few players, all of whom offer the same unfair "adhesion contracts" to defeat bargaining (e.g., indoor parking lots in a downtown area, all disclaiming liability even for gross negligence).

b. Substantive: The *"substantive"* sort of Unconscionability occurs where the clause or contract itself (rather than the process used to arrive at the contract) is unduly unfair and one-sided.

Excessive price: An important example of substantive unconscionability is where the seller charges an *excessive price*. Usually, an excessive price clause only comes about when there is also some sort of procedural unconscionability (e.g., an uneducated consumer who doesn’t understand what he is agreeing to), since otherwise the consumer will usually simply find a cheaper supplier.

Remedy-meddling: Also, a term may be substantively unfair because it unfairly limits the buyer’s *remedies* for breach by the seller. Types of remedy-meddling that might be found to be unconscionable in a particular case include: (1) disclaimer or limitation of *warranty*, especially prohibiting consequential damages for personal injury; (2) limiting the remedy to repair or replacement, where this would be a valueless remedy; (3) unfairly broad rights of *repossession* by the seller on credit; (4) waiver of defenses by the buyer as against the seller’s *assignee*; and (5) a *cross-collateralization* clause by which a secured seller who has sold multiple items to a buyer on credit has the right to repossess all items until the last penny of total debt is paid.

* + - * 1. 4. Remedies for unconscionability: Here are some of the things a court might do to remedy a clause or contract which it finds to be unconscionable:

a. Refusal to enforce clause: Most likely, the court will simply *strike the offending clause*, but enforce the rest of the contract;

b. Reformation: Alternatively, the court may *"reform"* the offending clause (e.g., by modifying an excessive price to make it a reasonable price);

c. Refusal to enforce whole contract: Very occasionally, the court may simply refuse to enforce the *entire contract*, denying P any recovery at all.

1. **PUBLIC POLICY**
   * 1. Although the process of contract formation is untainted, a contract may still be unenforceable b/c the contract itself either violates or runs directly contrary to some public policy.
     2. R2K Sec 179
     3. R2K Sec 187-88
        1. A covenant not to compete is unenforceable unless it is “ancillary” to a valid transaction. Sec. 188 defines ancillary (pg. 643 of book)
     4. **Covenants-not-to-Compete:**
        1. ***Valley Medical Specialists v. Farber*** – (The public needs my medical services)
           1. *(Dr. Farber left Valley Medical, but he had signed a restrictive covenant. HE began practicing within the area defined in the restrictive covenant.)*
           2. **Limited in Time and Place. (Very Important!)**
           3. Patient/Client relationship is very important, but the most important reason to prohibit these covenants is b/c they keep people from earning a living.
           4. Diff b/w this covenant and one b/w a seller and buyer of a business: Seller and buyer covenants are more likely to be enforced b/c you are taking away everything you have sold the buyer if you open up a new shop to compete with him.
           5. Classical Economics: favors not having the restraints on the laborer competing but protects the good will relationship b/w the business selling.
           6. Blue Penciling only allows crossing out if it’s for grammatical reasons. You can’t re-write the K.
           7. **PP:** There is a strong public interest in the “freedom of contract”, and there must be a well-established basis for any public policy that would deny enforcement of a K.
           8. If Public Policy implications outweigh the legitimate interests of the employer, then the covenant will not be enforced.
           9. General considerations in assessing the **Reasonableness** of the restriction covenant:

Scope of the covenant: Time, Place (geography), and Scope of restriction.

Hardship imposed on the promisor.

The public interest.

* + - * 1. **Rule:** A restrictive covenant-not-to-compete must be strictly construed for reasonableness and is enforceable to extent that it protects the legitimate interests of employer, imposes no undue hardship on employee and is not injurious to the public.
    1. **Public Policy based on Statute:** 
       1. R2K Sec 178
       2. When statutes explicitly declare that certain contracts are unenforceable or void, courts will obey the legislative mandate (pg. 644 in book)
    2. **Surrogacy:** 
       1. R2K§191: A 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 interests of the child.
       2. Field: Anti-Surogacy
       3. Schultz: Women should obey their contracts in surrogacy; its not feminist to say: “I’m a woman I should be able to get out of my K.”
       4. ***R.R. v. M.H. & another*** – (Very debatable surrogacy case)
          1. *(This is where the couple wants to have a child but the wife is infertile so they go to a company who helps them find a surrogate. They find a woman who will eventually be paid $10,000 and would have to refund the payments if she tried to assert her parental rights or had an abortion. She changed her mind and wanted to keep the child.)*
          2. This agreement is not enforceable.
          3. **Rule:** If no compensation is paid beyond pregnancy related expenses and the mother is not bound by her consent to give up custody until a suitable period has passed following the child’s birth (4 days) then the K is enforceable.
          4. The problem in this case is the payment is contingent on her giving the baby up (can’t sell babies) and she made the agreement before the baby was born.
          5. **TEST**: How much choice to people really have?

Surrogate mothers need the money.

Think back to the Walker-Thomas case too…poverty played a part.

* + - 1. ***Baby M Case*** – (THE Surrogacy Case!)
         1. *(Surrogate parenting K established for Mrs. Whitehead to be surrogate mother for $10k. When baby was born, didn’t want to give it up. Court gave custody to Sterns and allowed Whiteheads visiting rights.)*
         2. **Rule:** Surrogate parenting agreement inconsistent w/statutory provisions prohibiting Money in connection with adoptions.
         3. Fundamentally at odds with public policy because:

Guarantees separation of child from parent

Adoption regardless of suitability

Ignores interests of the child.

* + - 1. **Kass v. Kass**
         1. Lady and husband got involved May 9. Lady has had many miscarriages previous to this.
         2. May 9 she is presumably taking hormone drugs – affecting her personality
         3. May 14 or 15th they remove the eggs from her and implant them in the sister
         4. After a few more days they find out that it didn’t take in the sis and the sister refuses to do it again
         5. Husband and wife decide to get divorced
         6. A few days after all this she signs the second agreement about the pre-zygotes
         7. Was this women really in a condition to agree to give up what might be her last chance of having a baby after all of this happened?

Linzer thinks this is the big question.

US Crt of A only looks at the contract

1. **JUSTIFICATION FOR NONPERFORMANCE: CHANGED CIRCUMSTANCES ,AND CONTRACTUAL MODIFICATIONS**
   1. Excuses from performance arising from changes in circumstance that have either occurred or come to light since the original agreement was made.
   2. **MISTAKE**
      1. Mistake – a belief that is not in accord w/ the facts
         1. Mutual mistake – both parties have the same mistaken belief
            1. Three requirements for avoidance

Basic assumption – mistake must concern a basic assumption on which the contract was made

Material effect – must have a material effect on the agreed exchange of performance

Risk – the adversely affected party (the one seeking to avoid the contract) must not be the one on whom the contract has implicity imposed the risk of the mistake.

* + - 1. Unilateral mistake – only one party has the mistaken belief
         1. For avoidance

Must show all three above, plus

Unconscionability, OR

Reason to know – the other party had a reason to know of the mistake

* + - 1. Existing fact – only applies to a mistaken belief about an existing fact, Not an erroneous belief about what will happen in the future!
    1. **Easy Case:** “Scrivener’s error” – 2 parties, both recognize the mistake, court will usually reform the K to correct error.
    2. **Harder Cases:** The mistake is only recognized by 1 of the parties in the K.
       1. Barren Cow Case (***Sherwood v. Walker***): “Essence” of the cow has changed, so rescission is ok. This is fiction! (not followed in Lenawee)
       2. ***A & M*** Style: Value (or quality) was mistaken; it was collateral not essential – not rescindable.
       3. Note that neither of the above cases are “overruled by Lenawee, but they are instead “limited to their facts.”
    3. ***Lenawee County Board of Health v. Messerly*** – (This is a mistake)
       1. *(Original owner installed septic tank w/o permit and sold to Messerlys. Messerlys “supposedly” didn’t know this when they sold to Pickles “as is” after inspection. Land was unfit for habitability and Pickles could not use it for rental property as planned.)*
       2. **Rule:** Rescission is indicated when the mistaken belief relates to a **basic assumption of the parties** upon which the contract is made, and which **materially affects the agreed performance of the parties**. However, rescission is not available to a party who has assumed the risk of loss in connection with mistake.
       3. R2K §152(2) is not so far removed from the Barren Cow case and A&M should’ve come out the same as Barren Cow under R2K §152(1).
       4. But the Pickles lose here b/c of an “as-is” clause so he bears the risk. This is where R2K §154(a) comes in: “if one party hasn’t assumed the risk of the loss”.
       5. **LINZER:** This case was decided badly b/c there is a definite issue as to the facts of the case.
          1. Did the Mosserlys know about the septic tank and hide it?
          2. The case should not be decided on mere “boilerplate” language.
          3. On the basis of §152, they should win, but they lose b/c of §154(a).
       6. §154(b): Example in class of the little girl you went to the jeweler; she had a jewel but didn’t know how much it was worth—neither did the jeweler. This was not fraud and no disclosure was involved b/c neither side knew how much the diamond was worth; here the little girl and the jeweler both bear the risk of mistake.
    4. ***Wil-Fred’s, Inc. v. Metropolitan Sanitary District*** – (Wil-Fred is being VERY considerate of their sub…)
       1. *(Mistake was made by the subcontractor (Ciaglo) and caused a bid of the general contractor (Wil-Fred) to be way off. Metropolitan accepted the bid although Wil-Fred asked for rescission.)*
       2. R2K §153: When Mistake of One Party Makes a Contract Voidable – if he does not bear the risk of the mistake under §154 and either the effect of the mistake would make enforcement unconscionable or the other party had reason to know of the mistake of his fault caused the mistake.
       3. No mutual mistake here; only Wil-Fred is mistaken.
       4. Option K – Irrevocable Offer.
       5. The consideration for the Option K is that the Sanitary District was “committed to award the contract to the lowest bidder”, which explains why Wil-Fred couldn’t withdraw their offer before it had been accepted.
       6. By making the bid, Wil-Fred was accepting the K to not revoke his bid.
       7. Here, the Sanitary District had not relied on Wil-Fred’s bid; he tried to rescind and the Sanitary District could’ve awarded the K to someone else.
       8. Consistent with ***Drennan***:
          1. Drennan had Reliance.
          2. If Wil-Fred tried to hold Ciaglo to it, Wil-Fred could’ve applied Drennan and won.
          3. No reliance on the part of the sanitary district.
          4. The cases are reconcilable.
       9. Think back to The Business Relations Article by Ian MacNeil and Stuart McCauly. (?)
          1. Wil-Fred went through a lot of trouble to try and keep Ciaglo in business. They went to bat for them and protected their sub b/c they had done business with them for so long.
       10. **Rule:** A unilateral mistake may afford ground for rescission where there is a material mistake and the mistake is so palpabe that the party not in error will be put on notice of its existence.
       11. **Rule:** Conditions required for rescission are: 1) Mistake related to material feature of K; 2) Mistake occurred notwithstanding exercise of reasonable care; 3) Mistake is of such grave consequences that enforcement of K would be unconscionable; and 4) Other party can be placed in status quo.
  1. **IMPOSSIBILITY – IMPRACTIBILITY – FRUSTRATION OF PURPOSE**
     1. **WAYS TO GET OUT AN ENFORCEABLE CONTRACT!!!**
     2. Parties may be discharged from performing the contract if (1) performance is **impossible**; (2) b/c of new events, the fundamental **purpose** of one of the parties has been **frustrated**; or (3) performance is not impossible but is much more **burdensome** than was originally expected (**impracticable**). If a party is discharged from performing for such a reason, he is not liable for breach of contract.
     3. Applies only where the parties themselves did not allocate the risk of the events which have rendered performance impossible, impracticable or frustrated.
  2. **Impossibility:** It is ***impossible*** to complete my side of the bargain.
     1. Three main types
        1. Destruction of the subject matter (essential to the performance of the contract)
        2. Failure of the agreed upon means of performance
        3. Death or incapacity of a party
     2. **R2K §263:** Destruction, Deterioration or Failure to Come into Existence of a Thing necessary for Performance.
     3. **R2K §262:** Death of Incapacity of Person Necessary for Performance.
     4. **Can Impossibility be both subjective and objective…**which one will get observed in court.
     5. ***Paradine v. Jane*** – (Why we should have impossibility!)
        1. (Jane leased land from Paradine, but was dispossessed by Prince Rupert and his army during the English Civil Ware, Jane did not regain his property for three years and he did not pay rent during that time.)
        2. Court said TOO BAD! Very strict contractual liability!
     6. ***Taylor v. Caldwell*** – (First Out!)
        1. (Taylor had leased a music hall from Caldwell, but it burned down and Taylor sued for breach of K.)
        2. No liability b/c the hall was “essential” to the performance of the K and the parties had contracted on the basis of its continued existence.
        3. Like the Barren Cow case = The “essence” of the K has now changed.
        4. **Implied Condition** = Hall will remain in existence in order for the K to be carried out; had the parties thought about this happening they would’ve put it in the K.
  3. **Impracticability:**
     1. It is not impossible to complete my side of the bargain (selling you something), but it would be very troublesome, prohibitive, and ***oppressive***. (Seller’s defense)
        1. **Rebuttal:** You made a deal, too bad if it’s a bad deal!!!!!!
     2. **R2K §261** – If a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his duty to render that performance is discharged, unless the language or circumstances indicate to the contrary.
        1. **Ask: What is the occurrence that makes the K impracticable?**
        2. Note: The occurrence can’t be the fault of the one trying to claim impracticability and the K cannot expressly allocate the risk to the person trying to claim impracticability, if it does then he has assumed the risk.
     3. **R2K §266** – Existing Impracticability or Frustration
     4. UCC §2-615 – Excuse by Failure of Presupposed Conditions.
        1. Comments 4 and 5: Increased Cost and Lack of Profit are not enough, but a sever shortage of raw materials or supplies b/c of a war, embargo, local crop failure, natural disasters, terrorism may be enough.
     5. ***Mineral Park land Co. v. Howard*** – (The ridiculously expensive gravel case)
        1. *(D contractor agreed to purchase and extract all the gravel he needed for construction of a concrete bridge from P’s land. But, D ended up getting some of the gravel elsewhere because he had already taken all the above water-level gravel, and extracting the below water-level gravel would be 10-12 times more expensive.)*
        2. Extreme Financial Loss = Impracticability.
     6. ***Karl Wendt Farm Equipment v. International Harvester Co.*** – (Not make a profit is not a frustration of purpose)
        1. *(There is a dramatic recession in the farm equipment market so IH incurred substantial losses. IH sold their business, but the new company didn’t keep Karl Wendt on as a franchisee. Karl Wendt filed BofK action against IH, IH claimed both Impracticability and Frustration of Purpose.)*
        2. Market conditions usually will not work in courts for impractibility or fop.
        3. Even if your assets are seized – not a good excuse.
        4. Tremendous financial inability is a very hard element to meet.
        5. Good faith apprehension of danger is not enough for impracticability
        6. **Rule:** Neither market shifts nor financial inability of a party changes the basic assumptions of K such that it may be excused under doctrine of impracticability.
  4. **Frustration of Purpose**: It is not impossible to complete my side of the bargain (buying something), but the purpose for which I needed it has lost all ***value*** to me, the purpose has been frustrated.
     1. 1) The frustrated purpose must have been principle purpose
        1. Primary purpose can’t be mutual profitability – then every K would be meaningless
           1. Ex. D Agrees to rent room form P for two days at high rate to watch coronation of king, coronation is canceled. D is discharged and doesnt have to pay.
     2. 2) Frustration must be substantial not just less profitable and so severe threat is not regarded within the risk he assumed in the K.
     3. 3) Frustration must be within the basic assumption
        1. Foreseeability is evidence that it was not a basic assumption; but you are not normally let out – courts often let you out for unforeseeable.
     4. **Distinguish from impossibility**
        1. Not claiming that you Can’t perform, but claiming that it makes no sense for you to perform, bc what you will get in return does not have the value you expected at the time you entered into the contract
     5. **Factors to be considered**
        1. Foreseeability
           1. The less foreseeable the even which thwarts the promisor’s purpose, the more likely the crt is to allow the frustration defense.
        2. Totality
           1. The more totally frustrated the party is, the more likely he is to be allowed to use the defense
     6. **R2K §265** –Where a party’s **(1)** **principle purpose is (2) substantially frustrated (3) without his fault** by the occurrence of an event the non-occurrence of which was a **(4)** **basic assumption on which the K was made**, his remaining duties are discharged, unless language and circumstances indicate to the contrary.
        1. **Ask whether the K’s principle purpose was “substantially” frustrated?**
     7. **R2K §266** – Existing Impracticability or Frustration
     8. Difference b/w Subjective and Objective Impracticability and Frustration of Purpose.
        1. Objective: “It cannot be done!”
        2. Subjective: “I can’t do it!”
     9. ***Krell v. Henry*** – (The King’s Parade is off!!)
        1. *(Krell rented out the flat to watch the parade with the king go by and then the parade was cancelled. He can still go and look out the window onto an empty street so its not impossible. Krell has only paid the down payment, Henry sues for balance, Court says no.)*
        2. “Split the Baby!”- Sharing the loss. Krell lost his deposit, Henry didn’t get the rest of the payment.
        3. There is no “splitting the baby” in our courts – it’s all or nothing!!
        4. **Objective Frustration of Purpose:** it is not impossible, but the purpose of the K is gone.
        5. **Relief for Impracticability:** “All or nothing” discourages judicial intervention – b/c parties are held
     10. ***Mel Frank Tool & Supply v. Di-Chem Co.*** – (The seller has to know what your purpose is for it to be frustrated!)
         1. **Basic Assumption**: He would use the warehouse to store something; it was not known by the seller that he would be using it to store chemicals that may become illegal.
         2. If a statute is brought into place that frustrates the principle purpose.
         3. **R2K §309** – K liability is strict liability – obligor is liable even if without fault and even if circumstances have made the K more burdensome.
         4. **Force Majeure Clause:** Provides for excuse where performance is prevented or delayed by circumstances “beyond the control” of the party seeking excuse (natural events, govt. regulation). They may be subjected to application of the maxim ***contra proferentem*** and may be tested against concepts of good faith and Unconscionability.
         5. In this case, the clause didn’t change too much b/c it dealt only with total destruction.
         6. **Rule:** Where a party’s **(1)** **principle purpose is (2) substantially frustrated (3) without his fault** by the occurrence of an event the non-occurrence of which was a **(4)** **basic assumption on which the K was made**, his remaining duties are discharged, unless language and circumstances indicate to the contrary.
  5. **MODIFICATION** pg. 738
     1. Parties to an existing contract agree to modify the contract for the sole benefit for one of them, the modification will usually be unenforceable at common law, for law of consideration. (keep a look out for this, especially in construction cases) – Restatement follows this rule
     2. **UCC Sec. 2-209**
        1. UCC gets rid of pre-exisiting duty rule and thus a modification in a contract for the sale of goods does not need any additional consideration to be binding
           1. But must have good faith and any no oral modification clause must be complied w/
     3. **Tools:** 
        1. Pre-Existing Duty
        2. Duress
        3. Unconscionability
     4. ***Alaska Packers’ Association v. Domenico*** – (**Pre-Existing Duty Element**)
        1. *(Fisherman contracted to fish for salmon in Alaska for certain sum refused to work once in Alaska unless they received a higher pay. Superintendent didn’t have any authority to change Ks but did so anyway to get workers to do the job. The company refused to pay higher prices. The court ruled in favor of the company.)*
        2. UCC not around yet, but still wouldn’t be applicable b/c this is not a sale of goods!
        3. Could’ve turned something into Consideration, lawyer tried to with the nets, but it didn’t work.
        4. This is a Classical Consideration Approach; courts didn’t like to find excuses for not enforcing contracts (duress).
        5. Again we see Llewellyn’s: “Covert tools are never good tools!” b/c they just give lawyers a chance to go back and try to get around necessary items such as Consideration.
        6. **Rule:** When a party merely does what he is already obligated himself to do (**pre-existing duty**), he can’t require additional compensation by taking advantage of the necessities of the other party; this is not supported by any **additional consideration**.
        7. When is modification really “economic duress”?
           1. There is no voluntary waiver of original K; no real choice and you are basically forced to modify.
           2. Nothing has happened that would require modification. (no defective nets)
           3. Court is just trying to prevent “coercive” modification.
        8. **No-oral-modification Clause:** Insulates the parties from the claim that any provision in the K including the NOM clause has been orally waived. Held ineffective at Common Law, but they are effective how under the UCC §2-209(2). Tool used to specify that no oral modifications can be made.
        9. **No-Waiver Clause: pg. 703**
        10. **Other Exceptions to Pre-Existing Duty Rule:**
        11. **R2K §89** – 3 ways to get around the Pre-existing duty rule:
            1. Statute - UCC
            2. Unforeseen circumstances – lower standard than impracticability and frustration of purpose.
            3. Reliance – if both parties changed their position in response to the modification then you don’t need consideration.
        12. **Mutual Release Doctrine** – Fictitious Reformation and Cancellation and the same time - both parties agree to cancel the K and re-negotiate an entire new K.
     5. ***Schwartzreich v. Bauman-Basch*** – (**Mutual Release Element**)
        1. (Employee got better offer, told boss, they tore up the old K and replaced it with a new one.)
        2. Ct. held that this was mutual rescission, followed by a new and valid contract.
        3. R2K §89 says it is fictitious when the rescission and the new K are simultaneous.
        4. **Rule:** Linzer says in order for the new consideration to be adequate, there has to be a moment, a “window”, where Schwartz could’ve walked away.
     6. ***Kelsey-Hayes Co. v. Galtaco Redlaw*** ***Castings Corp.*** – (UCC §2-209 applies here!)
        1. *(The suppliers Galtaco were staying open solely for the benefit of Kelsey-Hayes, so Galtaco needed more money to stay in business and provide the parts to Kelsey. First they got 30% from everybody and the other companies eventually find new suppliers but Kelsey-Hayes can’t find anyone and if they don’t have these parts then their client Ford will have to shut down their assembly line.)*
        2. The case was governed by the UCC so no additional consideration was needed.
        3. The court says Kelsey-Hayes assented to modification of payment terms because they were under economic duress because they did not have an alternative.
        4. Judge Cohn says you have to protest and complain to make them aware that you are eventually going to resist enforcement or seek redress.
        5. *U.C. ex rel. Crane Co. v. Progressive Enterprises, Inc* **–** There was no protesting.
        6. *Austin Instrument* – Threat by one party to breach contract by not delivering required items is wrongful.
        7. **R2K §281**: Accord-and-Satisfaction: If you have a **legitimate dispute** about an amount of debt (an unliquidated amount), you have to tender the minimum amount in dispute. If they take your money they are stuck. The big companies can now put a note on their bill saying you have to send the “Accord and Satisfaction” checks to a certain person. Note: this doesn’t work when there is no dispute b/w the parties.
        8. **Rule:** A subsequent contract or modification is invalid and therefore does not supersede an earlier contract when the subsequent K was entered into under duress.Duress exists when the party’s assent is induced by improper threat that leaves the victim with no reasonable alternative; bad faith need not be present. (?)
  6. **BIG PICTURE POLICY ISSUE:** Duress, Unconscionability, and Bad Faith a better way than considering New Consideration to get around the Pre-Existing Duty Rule. Linzer thinks Alaska Packers should’ve been decided on Economic Duress, Unconscionability and Baith Faith. Had the worker given extra consideration. Should we do what they did for UCC Sale of Goods (no add cns needed) for the general common law.

1. **CH. 10 CONSEQUENCES OF NONPERFORMANCE: EXPRESS CONDITIONS, MATERIAL BREACH, AND ANTICIPATORY REPUDIATION**
   1. Each side has a **duty to tender** and a **right to receive tender**. If performance is due, and if there is a right to that performance under the contract, and if performance is not tendered, there is breach.
   2. **R2K §241** – Lists circumstances significant in determining whether a failure to perform is material.
   3. CL suggests a **Sliding Scale** to determine Material Breach: You can see what point along the spectrum the breach is falling and you use this to predict what the court will decide. How to evaluate position on the sliding scale?
   4. How much did it deprive you of your expected benefit?
   5. Lack of the ability to compensate with $$ or lack of the ability to perform it later.
   6. Good Faith/Bad Faith Breach.
   7. **Ask (3) Questions:**
      1. Who breached?
      2. Can the non-breaching party cancel their performance?
      3. To what extent can the breaching party cure (this is how we calculate the damages)?
      4. Can they stop performing and have a suit for total breach?
      5. Do they have to keep performing and only sue for damages from partial breach?
   8. **BEFORE TENDER IS DUE:** 
      1. Anticipatory Repudiation (AR): When reasonable grounds for insecurity exist, termination or suspension of performance is allowed even before the condition was supposed to arise. You can sue for expectation damages.
         1. Duty to Mitigate: If the other party repudiates, you have a duty to stop performance that would add to the damages.
         2. Retract Repudiation: Subject to a caveat; if the other person relied on it then you can’t retract.
         3. Right to Assurances: You can request assurances if you think the other party is going to breach.
            1. Must have reasonable grounds for insecurity
            2. Assurances not adequate then you can cancel performance with AR.
   9. **AFTER TENDER IS DUE:**
      1. Material Breach: If the other side materially breaches, you can terminate or **suspend your performance** and you can get damages. Material breach suspends performance, and to the degree that canceling all performance is justified, rises to total breach.
         1. The ability to cure must not be unreasonably terminated, if its curable it is probably not material, but if it is curable, but not cured, then it becomes material.
   10. **When does a Material Breach become Total? R2K §242**
       1. Whether further delay would hinder either party?
       2. Whether the K stated that performance was needed w/o delay
   11. Total Breach: **Terminates** the existing rights and duties immediately, you have no more duty to continue and you can sue for expectation damages.
   12. Partial Breach: Does not terminate existing rights and duties; you can sue for damages incurred during the breach, but you must continue performance due to existing duty.
   13. **EXPRESS CONDITIONS**
       1. Condition: “an act or event, which unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.” “unless and until”
          1. **YOU CANNOT BREACH A CONDITION!!!!!!!**
          2. 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.
             1. Express terms of the agreement will state that performance is not due unless and until some specified even has taken place.

The happening of that event is an express condition to the duty of performance

* + - * 1. The party whose performance is so conditioned will be referred to as “**obligor**,” the one whose performance obligation is at issue.
        2. The other party will be the “**obligee**” the one to whom the performance obligation is owed, and the one who is presumably attempting to enforce it.
        3. Good words to show condition:

“if” and “unless and until”

* + 1. Distinguish b/w Express Conditions and Implied-in-Fact Conditions (Constructive Conditions).
       1. Express Conditions: The “some event” condition – I will pay you when [some event] happens.
          1. Created by the specific declaration of the contracting parties; agreed to and imposed by the parties themselves.
          2. Require strict compliance.
          3. An imperfect tender is material breach; the degree of breach determines remaining duty.
          4. Strict compliance is not required if a forfeiture would result and the breach can be cured.
       2. How is it Satisfied?
          1. An express condition satisfied with a subjective determination by the party who has the right to the tender.
          2. Good faith requirement.
          3. The requirement of satisfaction can be fulfilled with an objective determination if the court agrees that the contract is not premised on aesthetic satisfaction. (***Morin***)
       3. Constructive Conditions:
          1. Those imposed by law to do justice, subject to precept that substantial compliance is sufficient. If language is doubtful—constructive.
          2. Implied requirements of performance.
          3. Expressly written words can be seen as constructive conditions; see Cardozo’s method in ***Jacobs & Young v. Kent*** and the Reading Pipe.
          4. Tool only for Constructive Conditions (not Express): Substantial Performance, while a failure to tender, is only a partial breach of a constructive condition.
    2. **Exam TIP:** 
       1. EXPRESS CONDITION CAN BE ENFORCED TO THE “T”
       2. OR that it should only be enforce if it is material to the K.
       3. AND you can also argue what is material and what is not material.
    3. ***Oppenheimer v. Oppenheim, Appel, Dixon & Co.*** – (“A condition is a condition is a condition”)
       1. *(P required to obtain prime landlord’s written notice of confirmation. If written notice was not obtained, on or before Dec. 30, 1986, then letter agreement and Sublease shall be deemed null and void and neither party has rights or obligations. P never delivered landlord’s written consent to D and P’s attorney called on phone—after the deadline.)*
       2. The avoidance of forfeiture rationale in Jacob & Youngs is not present here.
       3. **Substantial performance allowed in constructive condition and not in express conditions.**
       4. Courts should intervene when language of the parties isn’t very clear. Oppenheimer negotiated, didn’t use boilerplate.
       5. **Rule:** Substantial Performance is not applicable to excuse the nonoccurrence of an express condition precedent.
       6. You can only waive a nonmaterial part of the performance. But in Oppenheimer the issue of waiver or estoppel are not discussed. You could argue that the landlord’s consent to the defendant’s telecommunications installation would probably be regarded as a **material** condition; however, a timely written notice of that consent could be regarded as a technical, **non-material** condition.
       7. **R2K §145** – A condition is excused if the promisor wrongfully hinders or prevents the condition from occurring.
       8. Two other ways in which a court might justify enforcing a contractual duty despite the apparent failure of a conditioning event to occur.
          1. Excuse to avoid forfeiture (***J.N.A.)***
          2. Adverse interpretation (or construction), redefining the conditioning event in a way more advantageous to the obligee. (***Morin***)
       9. **Pay-when-paid** – language of the contract in some fashion links a subcontractor’s right to payment for work performed to the general contractor’s receipt of payment form the owner. Most crts have held that this means payment w/in a reasonable time, and not as also conditioning the subcontractors right to payment on such prior receipt of payment by the general. To hold that the sub did agree tp that, pay when paid defense is available to a general contractor only if it can establish by parol evidence that the parties mutually intened the contract to create such a defense.
       10. **Waiver** – an intentional reliqueishment of a known rights. Waiver is effective w/out either consideration or reliance, but only if the condition waived was not either a material part of the performance that the obligor was to receive in exchange or a material part of the risk assumed.
           1. If a condition is minor, procedural or technical, it could be waived by the obligor’s expression of intention to do so. If it were not minor, but material, it could still be overcome by an estoppel, based on the obligor’s expression of intention not to insist on it, followed by the obligee’s prejudicial reliance on that manifestation of intention.
       11. **Prevention** – a condition is excused if the promisor wrongfully hinders or prevents the condition from occuring
    4. ***J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*** – (They put a lot of $$ into fixing that restaurant!)
       1. *(JNA owns the building and Chelsea is the current tenant and JNA is trying to evict him b/c he didn’t renew his option by the correct date***.** *Forso sells restaurant to Chelsea, a condition of the sale was that Forso was required to obtain modification of option to renew so Chelsea has right to renew for additional 24 yrs.)*
       2. Forfeiture: when one party stands to lose rights under the agreed k and it has relied on those rights and stands to lose a lot if k is terminated.
       3. Usually with an option to renew there is no forfeiture, but here they had put money into the building and were not trying to “speculate” if the market would change.
       4. Childres says the courts cheat and they find its not a condition or that there was a waiver. If it is a technical matter then they find a way out!
       5. R2K §229 says the courts can do this!
       6. Judge admits that Chelsea was negligent but weighs this against the hardship and loss they will incur if the option isn’t given. They have made substantial improvements.
       7. On it’s face this isn’t consistent with Open, which seems to be about formalism and following the k strictly. But, the reason these two cases seem to be decided differently is b/c the parties are not on the same footing.
       8. Cardozo: “equity should relieve against it if default has been due to mere venial inattention and if relief can be granted without damage to the lender”
       9. **Rule:** An equitable interest is recognizes and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed.
    5. ***Morin Building Products Co. v. Baystone Construction, Inc.*** – (Objective or Subjective Satisfaction?)
       1. *(GM hired contractor, Baystone to add on to a building, Baystone hired sub, Morin. He was to use a metal siding with a mill finish, but when the siding was finished, the GM agent didn’t like it, so it was removed by Baystone and Morin is suing for the balance on his K price.)*
       2. **Rule:** The **reasonable person standard** is employed when the K involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge…The **standard of good faith** is employed when the K involves personal aesthetics or fancy.
  1. CONDITIONS GENERALLY
     1. A. Definition of "condition": An event which must occur before a particular performance is due is called a *"condition"* of that performance.
        1. Example: Seller promises to ship Buyer 100 widgets. Buyer promises to pay for the widgets within 30 days of receipt. The parties agree that if the widgets don’t meet Buyer’s specs, he may return them and he will not have to pay for them. It is a condition of Buyer’s duty of payment that the widgets be shipped, and that they meet his specifications. Buyer’s duty is said to be conditional on the shipment of satisfactory widgets.
           1. 1. Concurrent: A *concurrent* condition is a particular kind of condition precedent which exists only when the parties to a contract are to exchange performances at the *same time*. (*Example*: *A* promises to deliver his car to *B* on a certain date, at which time *B* is to pay for the car. Delivery and payment are "concurrent conditions," since performance by both is to be rendered simultaneously.) Concurrent conditions are found most frequently in contracts for the sale of goods and contracts for the conveyance of land.
        2. 2. Express and constructive conditions: If the parties explicitly agree that a duty is conditional upon the happening of some event, that event is an *"express"* condition. If, instead, the happening of an event is made a condition of a duty because a court so determines, the condition is a *"constructive"* one (or a condition "implied in law").
           1. Example of express condition: *A* is to ship widgets to *B*, and *B* agrees to either return them if they don’t satisfy her, or pay for them. The contract states, "*B*’s duty to pay for the widgets shall be conditional upon her being satisfied with them." This is an express condition. Example of constructive condition: Same facts as above example – *A* contracts to ship widgets to *B*, and *B* agrees to either return the widgets as unsatisfactory, or pay for them. No language of condition is used in the agreement. As a matter of common law (or the UCC), the court will impose a constructive condition: *B*’s duty to pay for the widgets will be constructively conditioned upon her receiving them and being satisfied with them.

a. Significance of distinction: The reason we distinguish between express and constructive conditions is that *strict compliance* with express conditions is ordinarily necessary, but merely *substantial compliance* is usually required to satisfy a constructive condition. B. Distinction between conditions and promises: The fact that an act is a condition does not by itself make it also a promise. If the act is a condition on the other party’s duty, and the act fails to occur, the other party won’t have to perform. If the act is a promise, and it doesn’t occur, the other party can sue for damages. But the two don’t automatically go together.

Example: Landlord promises Tenant that Landlord will make any necessary repairs on the leased premises, provided that Tenant gives him notice of the need for such repairs. Tenant’s giving notice of the needed repairs is an express condition to Landlord’s duty to perform the repairs. But such notice is not a promise by Tenant. Therefore, if Tenant does not give the notice, he has not committed any breach of contract, but a condition to Landlord’s duty has failed to occur. Landlord is relieved from having to make the repairs, but cannot sue Tenant for breach.

1. Distinguishing: To determine whether a particular act is a condition, a promise, or both, the main factor is the *intent of the parties*. Words like "upon condition that" indicate an intent that the act be a condition; words like "I promise" or "I warrant" indicate a promise (though as described below, failure to keep the promise will also generally constitute the failure of a constructive condition.)

* + - 1. EXPRESS CONDITIONS
         1. A. Strict compliance: *Strict compliance* with an express condition is ordinarily required.

Example: *A* contracts to sell his house to *B* for $100,000. The contract provides that *B*’s duty to consummate the purchase is "conditional upon *B*’s receiving a mortgage for at least $80,000 at an interest rate no higher than 9%." If the best mortgage *B* is able to obtain, after reasonable effort, is at 9.25%, the court will probably hold that *B* is not obligated to close, since the condition is an express one, and strict compliance with express conditions is ordinarily required.

1. Avoidance of forfeiture: However, courts often avoid applying the "strict compliance" rule where a *forfeiture* would result. A forfeiture occurs when one party has *relied* on the bargain (e.g., by preparing to perform or by making part performance), and insistence on strict compliance with the condition would cause him to fail to receive the expected benefits from the deal.

Example: *A* contracts to build a house for *B* on land owned by *B*, for a price of $100,000. The contract provides that "*B*’s duty to pay for the house is expressly conditional upon the finished house exactly matching the specifications of *B*’s architect." *A* builds the house in general accordance with the specifications, but the living room is six inches shorter than shown on the plans, a deviation which does not noticeably affect the market value of the house. Despite the rule that strict compliance with an express condition is ordinarily required, the court would probably hold that strict enforcement here would amount to a forfeiture, and would therefore hold that the condition was satisfied despite the trivial defect.

a. Excuse of condition: Alternatively, a court may find that the fulfillment of the express condition is *"excused"* where extreme forfeiture would occur. This will only be done, however, if the damage to the other party’s expectations from non-occurrence of the condition is relatively *minor*. (*Example*: On the facts of the above example, the damage to *B*’s expectations from the short living room is very small, so the court would probably excuse the non-occurrence of the condition.)

B. Satisfaction of a party: If a contract makes one party’s duty to perform expressly conditional on that party’s being *satisfied* with the other’s performance, the court will usually presume that an *objective* standard of *"reasonable"* satisfaction was meant.

1. Subjective: But it is the *intent* of the parties that controls here: If the parties clearly intend that one party’s *subjective* satisfaction should control, the court will honor that intent. This is likely to be true, for instance, where the bargain clearly involves the *tastes* of a person. Here, good-faith but unreasonable dissatisfaction will still count as the nonoccurrence of the condition.

C. Satisfaction of third person: If the duty of performance is expressly conditioned on the satisfaction of some *independent third party* (e.g., an architect or other professional), the third party’s subjective judgment usually controls. But this judgment must be made in good faith.

* + - 1. CONSTRUCTIVE CONDITIONS
         1. A. Use in bilateral conditions: Remember that a *constructive condition* is a condition which is not agreed upon by the parties, but which is supplied by the court for fairness. The principal use of constructive conditions is in bilateral contracts (where each party makes a promise to the other).

1. General rule: Where each party makes one or more promises to the other, *each party’s substantial performance of his promise is generally a constructive condition to the performance of any subsequent duties by the other party*.

Example: Contractor agrees to build a house for Owner for $100,000. The contract provides that Owner will pay $10,000 upon completion of the foundation, and provides a schedule on which the work is to proceed. No language of condition is used anywhere in the document. Contractor builds the foundation on schedule, but Owner without cause refuses to pay the $10,000 charge. Owner’s fulfillment of his promise – to pay $10,000 – is a constructive condition of Contractor’s duty to continue with the work. Therefore, Contractor does not have to continue with the work until Owner pays the $10,000, even though the contract does not expressly make Contractor’s duty of continuation conditional upon Owner’s making the first payment. The court simply supplies this "constructive condition" for fairness, reasoning that Contractor shouldn’t have to keep doing work if Owner hasn’t been keeping his part of the bargain.

* + - * 1. B. Order of performance: Be careful to interpret the contract to determine the *order* in which the parties’ performances are to occur.

1. Intent: The parties’ *intent* always controls. Where the intent is not clear, the court supplies certain presumptions, as discussed below.

2. Periodic alternating: The parties may agree that their performances shall *alternate*. This is true of most *installment* contracts. Here, a series of alternating constructive conditions arises: each party’s obligation to perform his duty is constructively conditioned on the other’s having performed the prior duty. It’s therefore important to decide who was the *first* to fail to substantially perform, since that failure of substantial performance is the non-occurrence of a constructive condition of the other party’s subsequent duty.

3. No order of performance agreed upon: If the parties do not agree upon the order of performance, there are several general presumptions courts use:

a. Only one party’s work requires time: Where the performance of one party requires a *period of time*, and the other’s does not, the performance requiring time must ordinarily occur first, and its performance is a constructive condition to the other party’s performance. This applies to contracts for *services* – a party who is to perform work must usually *substantially complete* the work before he may *receive payment* if the parties do not otherwise agree.

b. Sales of goods and land: If each party’s promised performance can occur at the *same time* as the other’s, the court will normally require that the two occur *simultaneously*, in which case the two performances are "concurrent conditions." This applies to *sales of goods and land*.

i. Tender of performance: Courts express this by saying that where the two performances are concurrent, each party must *"tender"* (i.e., *conditionally offer*) performance to the other. See UCC §§ 2-507(1) and 2-511(1).

Example: Seller contracts to sell Blackacre to Buyer. The closing is to take place on July 1, at which time Seller will deliver a deed to the property free and clear of liens, and Buyer will deliver a certified check for $100,000. Since each performance can occur simultaneously, the court will presume that simultaneity is what the parties intended. Therefore, on July 1, Seller’s duty to deliver the deed will be conditional upon Buyer’s coming forward with the certified check, and Buyer’s duty to come forward with the check will be conditional upon Seller’s tendering the deed. If Seller fails to show up with a proper deed, Buyer will not be able to sue Seller for breach unless Buyer shows that he tendered the certified check, i.e., had the check in his possession and arrived at the place of closing with it.

* + - * 1. C. Independent or dependent promises: In the normal bilateral contract, the court will presume that the promises are *in exchange for each other*. That is, the court will treat the promises as being *mutually dependent*, so that each party’s duty is constructively conditional upon the other’s substantial performance of all previous duties.

1. Independent promises: But in a few situations, circumstances may indicate that the promises are intended to be *independent* of each other. Here, the court will *not* apply the theory of constructive conditions.

a. Real estate leases: For instance, promises in the typical *real estate lease* are generally construed as being *independent* of each other. Thus a tenant’s promise to pay rent, and a landlord’s return promise to make repairs, are treated as independent, so if the landlord does not make the repairs, the tenant cannot refuse to pay the rent (though he can of course sue for damages). But a growing minority of courts have rejected this rule of independence.

* + - * 1. D. Divisible contracts: A *divisible* contract is one in which both parties have divided up their performance into units or installments, in such a way that each part performance is roughly the compensation for a corresponding part performance by the other party. If a contract is found to be divisible, it will for purposes of constructive conditions be treated as a series of *separate contracts*.

1. Significance: If the contract is found to be divisible, here’s the significance: if one party partly performs, the other will have to make *part payment*. If the contract is not divisible, then the non-breaching party won’t have to pay anything at all (at least under the contract).

Example: In a single document, Contractor agrees to build a deck for Owner and renovate Owner’s kitchen. The contract lists a price of $30,000 for the renovation and $20,000 for the deck. Payment on the entire contract is due when all work is done. Contractor completes the deck but never even starts on the kitchen. If the contract is found to be divisible into two parts, Owner will be required to pay $20,000 for the deck even though he never gets the kitchen. If the contract is not divisible, Contractor will be found to not have substantially performed the whole, and he will not be able to recover on the contract for the work on the deck (though he will be able to recover the fair value of what he has done on a quasi-contract or restitution theory).

2. Test for divisibility: A contract is divisible if it can be "apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as *agreed equivalents*…." (*Example*: On the facts of the above example, a court would probably find that the parties implicitly agreed that $20,000 would be an agreed equivalent for the deck and $30,000 for the kitchen. Therefore, the court would probably find that the contract was divisible.)

a. Employment contracts: Most *employment* contracts are looked on as being divisible. Usually, the contract will be divided into lengths of time equal to the *time between payments*. Thus if the employee is paid by the week, the contract will be divided into one-week "sub-contracts"; payment for a particular week will be constructively conditioned only on the employee’s having worked that week, not on his having fulfilled the entire contract.

b. Fairness: The court will not find a contract to be divisible if this would be *unfair* to the non-breaching party. For instance, even though the contract recites separate prices for different part performances, requiring the non-breaching party to pay the full stated price for the part performance received may deprive him of fair value.

Example: A construction contract requires Owner to pay one-tenth of the contract price for each of 10 weeks of estimated work. The first week, Contractor does everything scheduled for that week, but the scheduling is very light, consisting mainly of site preparation. If Contractor breaches after the first week, the court will probably not find the contract divisible, since a finding of divisibility would require Owner to pay one-tenth of the contract price for performance that represents less than one-tenth of the full job.

* 1. **MATERIAL BREACH** (pg. 811 of book)
     1. ***Jacobs & Young, Inc. v. Kent*** – (I wanted Reading Pipe!!)
        1. *(Country residence built for Kent under K that required Reading pipe be installed. Some Pipe was reading and some was not. Only way to replace was to tear down house. Kent refuses to pay for balance of the house construction costs due to error.)*
        2. Was the pipe a material breach? – It’s a bad idea to say “breach of condition” b/c conditions don’t get breached, they just don’t happen.
        3. If the departure from the condition is so slight that it is trivial, we may treat it as a breach and not a condition.
        4. Look at Justice and Fairness and the Presumable Intention of the Parties.
        5. If it was a Material Breach (Kent wants ugly structure and Jacobs builds pretty one) then Kent would probably get specific performance or full cost of replacement.
        6. Two types of damages:
           1. Cost of Replacement
           2. **Difference in Value** – Are we talking market value or subjective value.
        7. If it is a material condition, whether express or constructive, then you are out of luck.
        8. Minor or immaterial deviations from contractual provision do not amount to material breach; they are INDEPNDENT PROMISES.
        9. Willful breach can be argued both ways – Cardozo says that it does bar recovery; Corbin says that it does not bar recovery.
        10. **Rule:** If a party has substantially performed a promise which is a **constructive condition**, his failure to perfectly perform (immaterial breach) will not discharge the other party’s duty of performance.
        11. **Substantial performance** – think about arguments for and against!!!
        12. **Constructive (implied) Conditions:** Judicially created devices to determine the consequences of breach when the parties have failed to so specify in their agreement.
            1. ***Kingston v. Preston*** – Lord Mansfield stated three kinds of covenants:

Mutual and Independent: Either party may recover damages from the other for the injury he may have received by a breach of the covenant in his favor and where it is no excuse for D to say that P breached his covenant.

Conditional and Dependent: the performance of one depends on the prior performance of another and until this prior condition is performed the other party is not liable to an action on his covenant.

Mutual Conditions to be Performed at the Same Time: if one party was ready and offered to perform his part and the other refused to perform, the party who was ready and offered has fulfilled his engagement and may maintain and action for the default of the other.

* + - 1. How does Cardozo go about allowing the evidence in that the difference in the type of pipe was insignificant? Pg. 807
         1. Crt never say that one who makes a contract fills the measure of his duty y less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture.
         2. NOT A BREACH OF A CONDITION bc you cannot breach a condition
         3. Cardozo says that this is not a material breach, and therefore there must still be performance under the contract
         4. There is complete forfeiture b/c the land belongs to Kent, Jacob & Young cant take it back. (as opposed to say I bought a really expensive car, and it wasn’t exactly how I wanted it, I can send it back.
         5. This does not excuse Kent from having to pay Jacob. But Jacob & Young will have to pay damages.
         6. The only cost is the devaluation of value (Kent wants it to be the cost of replacing the pipes but crt said that would be a forfeiture in itself) Since there is no devaluation, Kent gets nothing.
      2. **Substantial performance** – really used only for Construction
         1. Important – structural defects are almost never substantial performance. An example where substantial performance would work, is say the light fixtures are the wrong kind, but which would easily be replaced. You can get damages b/c they are entitled to what they paid for, but you still have to perform under the contract (i.e. pay the builder)
         2. Pg. 812 – There is substantial performance where the variance from the specs of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied w/out great expenditure and w/out material damage to other parts to he structure, but the defects must not run through the whole work, so that the object of the owner to have the work done in a particular way is no accomplished nor be so substantial that the allowance out of the contract price will not give the owner essentially what he contracted for.
         3. A willful breach does not automatically bar recovery, but the motive of the breaching party is a factor to automatically bar recovery, bu the motive of the breaching party is a factor to be considered in determining whether performance was substantial. R2K 241(e) (Cardozo said that a willful breach would not allow recovery under substantial performance)
      3. Sale of goods – perfect tender rule
      4. UCC 2-601 –If you buy something and there is some deviation, you can give it back
      5. When you have a duty under a contract, if you fail to do that duty, it is a breach of contract. Does that mean that the other party doesn’t have to perform? No.
      6. Distinction btwn major and minor breaches. See below:
         1. If it is a minor breach, the breaching party has to pay damages, but contract still must be performed.
         2. A material breach has the affect of a condition, b/c if A’s breach is material, the other party does not have to perform.
      7. **Material Breach in Non-Goods Contracts**
         1. If a party fails to perform a promise and the breach is material, and no cure is forthcoming, the aggrieved party may:

cancel the contract and sue for all damages under the contract; or

continue the contract and sue for partial damages

* + - * 1. If the breach is not material (i.e. minor), the aggrieved party may not cancel the contract and can only sue for partial damages.
      1. Factors which are relevant to a determination of whether a breach is material are:
         1. the extent to which the aggrieved party will be deprived of the benefit he reasonably expected;
         2. the extent to which the aggrieved party can be adequately compensated for the benefit of which he will be deprived;
         3. the extent to which the breaching party will suffer forfeiture;
         4. the likelihood that the breaching party will cure his failure, taking into account all the circumstances including any reasonable assurances;
         5. the extent to which the breaching party has acted according to standards of good faith and fair dealing. [[Restatement § 241](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(241)&source=2ndary;contr2&view=fu)]
      2. R2K 237 – Part performance – if agree to do X in exchange of Y, and you fail to do X, Y does not have to perform*.*
    1. ***Sackett v. Spindler***
       1. *Plaintiff buyer entered into a written agreement with defendant seller to purchase shares of stock. Plaintiff paid the initial installment on time and made an additional payment, but the check remitted for the balance due never cleared. Defendant reclaimed the stock certificates held by plaintiff's attorney. Plaintiff argued that the evidence revealed no actionable breach on his part.*
       2. **Holding**: The court affirmed the decision of the trial court, which held that plaintiff buyer breached the contract with defendant seller for the purchase of stock when he failed to make final payment to defendant because defendant did not repudiate the contract by sending a letter cancelling the sale after plaintiff failed to make payment. The court modified the damage award and deleted the award of interest
       3. Case is about the Difference btwn a material breach and a non-material breach
       4. When you terminate a contract you do not relieve the other party of their duty. You can recover for both the contract and damages.
       5. You can cure breaches sometimes. (part of Remedies)
       6. Notes. pg. 821-824 VERY GOOD!
       7. **Total breach** – a material breach that is uncurable.
          1. Breach is total if the breach is sufficiently serious to justify discharging the nonbreaching party from her obligations to perform the contract. The distinction btwn total and partial breach is significant in two ways: it determines the effect of the breach on the performance obligations of the nonbreaching party; it also affects the measurement of that party’s damages.

First a total breach relieves or discharges the nonbreaching party form his duties under the contract; after a total breach the nonbreaching party is justified in refusing to perform his obligation sand may even enter into alternative contracts.

A partial breach does not discharge the nonbreaching party, who must continue to perform his obligations under the contract.

* + - * 1. Second, after a total breach, the injured party is entitled to recover not only actual damages accrued as a result of the breach but also any future damages that will reasonably flow from the breach;

A partial breach produces a right to damages only for the actual harm that has resulted to date, not for future harm

* 1. **ANTICIPATORY REPUDIATION**
     1. If a party makes it clear, even before his performance is due, that he cannot or will not perform, he is said to have anticipatorily repudiated the contract.
        1. Victim of anticipatory repudiation can sue before the repudiator’s time for performance has arrived.
     2. Can be express or acts.
     3. Two things that alone do not cause a breach, can together form a K.
     4. After repudiation occurs, the repudiatee must mitigate their damages by securing an alternative contract, if one is reasonably available.
     5. **What Constitutes a Repudiation**
        1. A party repudiates a contractual duty by:
           1. making a statement indicating that he will breach the contract
           2. engaging in a voluntary affirmative act that renders him unable to perform the duty
           3. failing to provide an assurance of due performance in response to such a request by the other party when there exists reasonable grounds to believe that the obligor will not perform.
           4. [[Restatement §§ 250](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(250)&source=2ndary;contr2&view=fu), [251](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(251)&source=2ndary;contr2&view=fu); [UCC § 2-609](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-609)(4), proposed revised § 2-610(2)]
     6. **Effect of Anticipatory Repudiation**
        1. In non-goods contracts, anticipatory repudiation by one party entitles the other party to:
           1. bring an action for damages for total breach
           2. discharge his remaining obligations. [[Restatement § 253](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(253)&source=2ndary;contr2&view=fu)]
        2. In goods contracts, an anticipatory repudiation which will substantially impair the value of the contact to the aggrieved party, allows the aggrieved party to:
           1. await performance by the repudiating party for a commercially reasonable time
           2. seek remedy for breach even if he has notified the repudiating party that he would await performance and has urged retraction
           3. suspend his own performance. [[UCC § 2-610](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-610)]
     7. **Retraction of Repudiation**
        1. In goods contracts, a repudiating party may retract his repudiation up to the time his ***next performance under the contract is due***, unless the aggrieved party has since:
           1. cancelled
           2. materially changed his position
           3. otherwise indicated that he considers the repudiation final. [[UCC § 2-611](http://www.lexis.com/xlink?showcidslinks=on&searchtype=get&search=U.C.C.+%A7+2-611)]
     8. The Restatement likewise allows for retraction of repudiation under similar circumstances but without terminating the right of retraction upon the repudiating party's next performance installment. [[Restatement § 256](http://www.lexis.com/xlink?showcidslinks=on&searchtype=bo&search=rule-no(256)&source=2ndary;contr2&view=fu)]
     9. ***Hochster v. De La Tour*** – (AR traced back to this English Case)
        1. De La Tour makes the argument that Hochster sued too soon b/c he had not yet breached.
        2. The court says it makes sense for him to go ahead and substitute with K that will be able to perform.
        3. The notion that you cannot yet sue b/c there has not yet been a breach has not survived and would not even be in the case book if Williston hadn’t said it.
        4. You can breach before the performance date and you can sue before breach—anticipatory repudiation.
           1. Rationale: if Hochster had gotten other work w/out being able to terminate—he may have been in breach.
           2. Anticipatory Repudiation encourages the injured to go find a substitute and keep the damages down.
        5. **Williston:** Criticized the doctrine of anticipatory repudiation, arguing that it was illogical b/c a promise could not be broken until the time set for its performance. It unfairly increased the obligations of promisor by requiring them to perform their promises early. **LINZER says: NOT TRUE!**
        6. **Corbin:** More sympathetic to the doctrine, arguing that an action prior to the date of performance could be justified on the ground that the repudiation itself damages the other party by reducing the value of the contract right.
        7. Doctrine is widely accepted in Restatement §253(1) and UCC §2-610
     10. ***Truman L. Flatt & Sons v. Schupf*** – (Retraction of AR)
         1. *(Wanted to rezone an area to build a big asphalt plant or something and the public didn’t want it. The k said if they got the rezoning then they were to purchase for 160 thousand and if they did not get the zoning variation then the buyer could rescind the k.)*
         2. NOT A TYPICAL AR SITUATION!
         3. A manifestation of intent not to perform must be definite and unequivocal; mere doubtful and indefinite statements that performance may or may not take place, not enough.
         4. AR is a strong remedy b/c it is a total breach of K; but this is NOT a breach of K at all.
         5. PROBLEM: In this case, if the seller had treated it as a Repudiation that would’ve been a breach of K by the seller!!
         6. Truman did not retract by trying to modify the agreement, but even if he did he can get out because he took back his retraction before the other party acted on that retraction.
         7. (3) things to make the repudiation irretractable: UCC 2-611
            1. 1) I state that I consider your acts and words a repudiation – K over.
            2. 2) If I materially alter my position (i.e. sell to someone else) in reliance on the repudiation; or
            3. 3) I sue for breach
         8. **Rule:** Anticipatory Repudiation may be retracted by the repudiating party unless the other party has, before the withdrawal, manifested an election to rescind the K, or changed his position in reliance of the repudiation, or sues for breach.
     11. ***Hornell Brewing Co. v. Spry*** – (Right to Adequate Assurances)
         1. *(Hornell wants letter of assurance to secure financing from Spry. Spry wasn’t paying on time.)*
         2. **R2T §251**
         3. **UCC 2-609** authorizes one a party upon “**reasonable grounds for insecurity** to demand adequate assurance of due performance and until he receives such assurance…if commercially reasonable suspend any performance for which he has not already received the return.”
         4. Reasonable Grounds for Insecurity: Asking for extra time to pay, Changing your payment practice…
         5. The K did not provide for a letter of credit; if you demand changes in the k and say you can’t perform unless you get those changes, this could be a breach of K (b/c you are trying to modify the K)
         6. There was a Contract here b/w of **UCC §2-204(1):** If both parties recognize a contract then there is a contract. (Kinda like the Last-Shot rule under Battle of the Forms!)
         7. You have to ask for assurances when you get something that may look like anticipatory repudiation, if you say it AR and you are wrong, now you have breached the K.
         8. A request for assurances is not a modification!
         9. **Rule:** You can demand adequate assurances of due performance if you have reasonable grounds for insecurity, and until you receive your assurances you can suspend performance for which you have not been paid for.

1. **CH. 11 EXPECTATION DAMAGES** 
   1. **A. COMPUTING EXPECTATION DAMAGES**
   2. **FARNSWORTH FORMULA**
      1. A claim of damages for total breach may have 4 elements:
         1. **Loss in value:** the Contract Price: the difference between the value to the injured party of the performance that should have been received and the value to that party of what, if anything, actually was received.
         2. **Other loss:** Consequential damages and Incidental damages
            1. Consequential damages: things you would have made based on transaction but not directly from the transaction (Hadley)
            2. Incidental damages: costs incurred: ex: if you don’t buy all things have to rent a warehouse to store things and Rent is an incidental cost/ damage.
         3. **Cost avoided:** what you didn’t spend
         4. **Loss avoided:** Mitigation: things you have mitigated by compromise or resale. Ex: buy lumber for $10,000 for K that is later terminated and you resell lumber for $6,000.
      2. Loss in Value + Other Loss – Cost Avoided – Loss Avoided = Damages

Or

* + 1. Loss in Value + Other Loss – (Cost Avoided + Loss Avoided) = Damages

OR

* + 1. Lost Profit + Out of Pocket Expense = Damages
    2. **Problems on page 850**
       1. Case 1: Builder suing Owner for breach
          1. LV + OL - CA - LA
          2. (200,000-70,000) + 0 – ( 85,000) - 10,000 = $35,000
          3. CA = (180,000-95,000) = 85,000
       2. Case 2 – employer hires employee for two yr contract. Employer wrongfully dischargers employee
          1. LV + OL - Cost Avoided
          2. 75,000 + 1,000 - 45,000 = $31,000
          3. LV = 50,000 + 25,000 =(6mo. at 50,000/yr)
       3. Case 3
          1. Expectation damages = expected net profit on the entire contract + unreimbursed expenses at the time of breach = should equal the same as Fransworth formula
          2. (200,000-70,000) + (-95,000) = 35,000
    3. **Proof of Market Value:**
       1. Basic Unit for sale of Contract = Contract Price at Market Price
       2. If the market price is lower than Contract Price: Seller entitled to difference between Contract price and Market Price
       3. If the market price is higher than Contract price the Buyer is entitled to Contract Price – Market Price.
    4. **UCC Damage Rules:**
       1. Basic Measure of Damages **UCC § 2-708** difference between market price and contract price.
       2. How to determine Market Price:
          1. When a Buyer is suing: market price at the time when buyer learned of breach
          2. When Seller is Suing: market price at time and place for tender. (looks like seller must wait until the date of tender)
       3. **§ 2-712:** In case of breach by the seller, this section allows the buyer to “cover” her loss by purchasing substitute goods and to measure her damages by the difference between the cost of those goods and the contract price.
    5. **Resale:** if seller sells at loss can get difference between what was sold and Contract price; it doesn’t matter what market price is; Seller must act reasonably and in good faith.
    6. **Cover:** Buyer’s equivalent right; Buyer can pay more to get what he needs and sue seller for the difference in what he bought and the Contract Price.
    7. **Resale and Cover** are easier because no problems of proof. Preferred way of doing things instead of market price.
    8. **Prejudgment Interest** usually only given on things that are fixed. Ex: Promissory note.
    9. *American Standard v. Schectman* (You didn’t grade the property!)
       1. *P decided to close the pig iron manufacturing plant and contracted with the D to convey the buildings and other structures and most of the equipment to the D in exchange for $275,000 and a promise to grade the property correctly. D does not grade the property properly.*
       2. Holding: the generally accepted measure of damages for breach of construction contract is the cost of completing performance properly. Only where such cost of completion would entail unreasonable economic waste will the measure of damages be the diminution in value of the property caused by the breach.
       3. Bound by Jacobs and Young. Factors to Determine if Jacobs Applies:
          1. Willful transgressor = Schectman didn’t act in good faith
          2. Cost of Completion Grossly Disproportionate to diminution in value.
          3. When the defect wasn’t essential to the contract then diminution in value. But for Amer. Standard the improvements to land were the essence of the Contract.
       4. Groves v. John Wunder: Groves contracts with Wunder for Wunder to take the gravel away and improve the land. Wunder only took the best gravel and said it was not worth the money to improve the land. 1930s Groves gets $ damages and then sells the property in the 1950s and takes a profit. Posner says this was a windfall. Linzer says Posner is nuts.
       5. American Standard is not a service Contract: Schectman is a buyer of goods.
       6. Posner Analysis of American Standard ASK GIRLS
    10. *Peevhouse v. Garland Coal & Mining Co.*
        1. *Peevyhouses entered into K with a strict mining company. The strict mining company offers $3,000 in damages but Peevyhouse refuses wants the land to be fixed. Garland doesn’t fix the property.*
        2. The Peevyhouses really wanted the grading of the land not money.
        3. Argument was that the difference in the property was only $300 and so that’s what the Peevyhouses should get.
        4. But the Peevyhouses didn’t sell their property.
  1. B. RESTRICTIONS ON THE RECOVERY OF EXPECTATION DAMAGES: Foreseeability, Certainty, and Causation
     1. *Hadley v. Baxendale*
        1. *P’s mill crank shaft broke. They contracted with the Pickford & Co. to transport the shaft to Greenwich to make a new one. Due to some neglect the shaft was delayed and the Ps did not receive their new shaft for several days after they should have received it. the working of the mill was delayed and they lost profits.*
        2. Rule: when a party breaches his k the damages he pays ought to be those arising naturally from the breach itself, and, in addition those as may reasonably be supposed to have been in contemplation of the parties at the time they made the K in case of probable breach.
        3. **RULE** From book: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either (1) **arising naturally** (according to the usual course of things) from such breach of contract itself, or (2) such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probably result of the breach of it. (remote or unusual consequences – D needs notice of these)
        4. Rule : Damages ought to be :
           1. Arising naturally from the breach itself. OR
           2. As may reasonably be supposed to have been in contemplation of parties at the time the contract was made.
        5. The type of damages have to be FORESEEABLE.
        6. Restatement says that only the breaching party has to know not both the parties
        7. Hadley says that the damages must be in the contemplation of both parties.
        8. Holmes’ Position: Tacit Agreement Position: Must show that party actually agreed to liability nor just that he knew about it. Epstein is the only one who accepts this position.
        9. Hadley today:
           1. What kind of rule is Hadley? Can you change it?

Your contract can change it. So it is a DEFAULT rule. You can change it to say that the ex. Shipper will take all liability for loss. Or that there are no consequential damages

A penalty default rule – puts burden on the person who knows the information to disclose it or forfeit the damages

The rule is there to force the info out of the contracting party, the buyer, b/c he has greater access to the info than the seller.

Relevant today – the mortgage crisis – all these bailouts

Bailing out these ppl who sign mortgage for 12% and then the gov. comes in and says no you don’t have to pay it.

Screwing w/ contracts – states cannot impair the right to contracts

During great depression – passed mortgage imporium act that said cannot foreclose for the next two years, didn’t get rid of debt, but couldn’t foreclose.

This might happen today

If gov. comes in w/ a bailout – everyone is going to say that you are interfering w/ the right to contract

Just as Hadley was in the middle of a change, the same thing is happening today

This case is a black letter rule

Put in the role of a changing economy, similar as today

* + 1. *Florafax International v. GTE*
       1. *Florafax has a contract with Bellerose by which Florafax would handle Bellerose’s orders made through the number 1-800-FLOWERS. Florafax then contracted with GTE by which GTE would establish a call center and handle orders. GTE breached the K and as a result Florafax lost its K with Bellerose and incurred costs to setting up a call center to do what GTE was supposed to.*
       2. On 2nd prong of Hadley because talking about Bellerose Contract.
       3. R § 351: Courts can limit consequential damages if unreasonable.
       4. Default rule is the Hadley Rule: foreseeable damages; If you don’t like it then write “No Consequentials” in the Contract.
       5. Speculative damages are allowed in Tort but not in Contract
       6. R § 352: must prove damages with reasonable certainty.
       7. New Business Rule: can’t get lost profits; not the modern rule: if you can prove profits then you can recover.
       8. Contract applies strict liability not negligence.
       9. On 2nd prong of Hadley because talking about Bellerose Contract.
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       14. New Business Rule: can’t get lost profits; not the modern rule: if you can prove profits then you can recover.
       15. Contract applies strict liability not negligence.
  1. **C. RESTRICTIONS ON THE RECOVERY OF EXPECTATION DAMAGES: Mitigation of Damages**
     1. ***Rockingham County v. Luten Bridge Co.***
        1. *Luten brought the action to recover for breach.  Luten was contracted to build a bridge for Rockingham.  Rockingham admits breach, but provided a notice of cancellation prior to completion.  Luten continued to build the bridge anyway, until finished*
        2. **Rule:** If a contract is repudiated and notice given, then the non-breaching party has a duty to mitigate its damages and cannot recover for expenses incurred after the repudiation is given.They can however recover for expenses made prior to the repudiation and profit that would’ve been made from the contract.
        3. Instead of completing the bridge, the D should have made a **request for assurances,** to determine whether or not D has to continue to work on the bridge and not be in breach of contract.
           1. Completing the job when there was no reason to complete it didn’t make sense
        4. If one party repudiations, the non breaching party can:
           1. 1. can accept repudiation
           2. 2. say breach of contract
           3. 3. act in reliance on the repudiation.
     2. ***Havill v. Woodstock Soapstone Co***
        1. *The employee had worked for the employer for many years, off and on, but developed problems working with an employee hired specifically to handle a reorganization. Nonetheless, when she was fired, she was told it was for economic reasons, not given the formal warnings required under company personnel policies for disciplinary firings, and given a laudatory reference. The company hired people who did what she had been doing, and she was never able to find a job with the same pay and benefits*
        2. **Rule:** An employee claiming wrongful discharge has a general duty to mitigate damages. Mitigation, in the context of an employment dispute, requires that the employee make a good faith effort to find suitable alternative employment. When an employer is claiming that the employee did not properly attempt to mitigate damages, the burden of proof is on the employer to show such failure. This requires that the employer show both that suitable work existed and that the employee did not make reasonable efforts to obtain it. Suitable employment is that which is substantially equivalent to the position lost and suitable to a person's background and experience
        3. Contract found based for breach in employee manual.
        4. Can get incidental damages that are incurred by you trying to mitigate your damages. i.e. hiring an employment agency to help you find a job
        5. She hasn’t benefited by being terminated. The money she made from Therapeutic shouldn’t have been used to deduct from her damages as the crt says that it needs to be reversed and taken out of. The crts point was that she could’ve gotten more hours. She could’ve worked 60 hrs she had worked for both D and Therapeutic, instead of 40 hrs she worked only for D and later for Therapeutic (i.e she could’ve works all of the 60 hrs for Therapeutic… but could she have really?)
        6. Wrongful termination cases involve hire level ppl. They can get very confusing.
        7. Note 3 pg. 900
           1. If I am a sub contractor and my contract was for $100K and I do 25K worth of work. Then my bad contracting skills makes me in essence breach the contract. The general contract then has to find someone else to do the contract. So im liable for whatever the contract cost is minus 75K. What if someone bids 100,000. Can I come in and bid 95K to mitigate my own damages from 25K to only 20K? Courts are split. If I can show that I have the right skills now to do the job, then I might only be liable for the 20K even if the general contractor takes the 100K bid. And they are essentially out 5K.
        8. Note 4
           1. **Parker v. Twentieth Century Fox Film Corp.** Pg. 900

*Shirley MacLaine sued to recover damages for the D breach of contract to employ her in the musical Bloomer Girl. She has signed contract to be the star of bloomer girl and have choice of director. Fox decided not to use her but offered a part in Big Country for the same amount of pay, but she didn’t get to choose director and had to go on location.*

**Reasoning** Crt held that an employee need not accept employment which is of a different kind.

The majority held that the mere circumstances that bloomer Girl was to be a musical review while Big Country was a straight drama demonstrates the difference in kind since a female lead in a western is not the equivalent of or substantially similar to a lead in a musical.

**Dissent:** Says this is nuts, the contract contained a “pay or play” clause – which gives one party (Fox in this case) what amounts to an option to either perform under the contract or to pay the amount set forth in the clause.

She would’ve been the star of Bloomer Girl, but in Big Country she would’ve been a secondary role.

Also, it may have been that Bloomer Girl was a feminist and racial justice piece which MacLaine was a known big advocator for.

* + - 1. **Notes pg. 909**
         1. 2. Loss –volume- Fundgable product – if you have a product and someone breach’s contract to buy it, you can still sue them for damages for not buying it even if you sell it to another person, even for a profit, b/c presumably you could’ve sold the same product at the same time to another product.
         2. 4. calculation of lost profit
         3. -if I have an overhead cost of 10,000 that I charge to each job, do I have to deduct this from my damages? No b/c you would still have ot pay it.
  1. D. NONRECOVERABLE DAMAGES
     1. Comment: Recovery of Punitive Damages for Bad Faith Breach of Contract (932)
        1. R § 355: Punitive dam ages are not recoverable for a breach of K unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.
        2. Why are Punitive Damages not allowed in K Action:
           1. the damage remedies available in K are only such as will compensate the P for the harm actually cause and should not put the injured party in a better position than she would have occupied had the contract been performed.
           2. Contract law is a system founded not on “fault” but on “strict liability” for the consequences of breach; since culpability plays no part in determining liability it should also play no part in fashioning the remedy.
        3. Contract remedies (like the law of contract in general) should promote “efficiency”, and therefore should deter only “inefficient” breaches of contract; punitive damages could deter “efficient” breaches, which ought to be encouraged.
        4. One of the Major Exceptions to the principle of punitive damages are not recoverable for breach of K involves Insurance Contracts
        5. Justification for this exception:
           1. The special nature of an insurance contract
           2. An insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity.
           3. There is usually an unequal bargaining position between the insured and the insurance company.
           4. Often the insured is in an especially vulnerable economic position when such a casualty loss occurs.
           5. The whole purpose of insurance is defeated if an insurance company can refuse or fail, w/o justification to pay a valid claim
        6. *Seaman v. Standard Oil*: the California court agreed that in some situations bad faith breach of contract should be treated as a tort for which punitive damages could be recovered.
        7. *Foley v. Interactive Data Corp*: the California court limited the holding in Seaman’s declaring that it did not apply to employment contracts
        8. *Freeman v. Mills*: The court overruled Seaman’s and held that recovery for bad faith breach of contract was limited to insurance companies.
        9. While recovery of punitive damages for bad faith breach of a noninsurance contract is unlikely in almost all jurisdictions, it should be remembered that punitive damages can be recovered if the defendant’s conduct goes beyond bad faith to amount to an independent tort for which punitive damages are recoverable. Cases that involve fraud or breach of fiduciary duty are likely candidates for such treatment.
  2. **E. BUYERS’ AND SELLERS’ REMEDIES UNDER THE UCC** pg. 938
     1. **Buyers’ Remedies**
        1. **Cover**, UCC 2-712
           1. Traditional rule for measuring damages for a seller’s breach is the

contract price – market price = damages

* + - * 1. if the buyer complies w/ the requirement so 2-712 she may recover the difference btwn the cover price and the contract price, plus incidental and consequential damages
        2. to recover damages, the covering purchase must be made in good faith and w/out unreasonable delay
        3. cover is elective and failure to cover does not bar the buyer from any other remedy, However, 2-715(2) allows a buyer to recover consequential damages that meet the foreseeability test of Hadley, provided the damages could not reasonably be prevented by cover or otherwise.
        4. Thus, the buyer’s failure to cover will preclude recover of consequential damages only if she fails to act reasonably
      1. **Market damages**, UCC 2-713
         1. Timing is when the buyer becomes aware of the breach
         2. If the buyer has elected not to purchase substitute goods as cover, the buyer may instead recover damages under 2-713
         3. The basic measure of damages is based on the difference btwn the market price at the time when the buyer learned of the breach and the contract price
         4. Pg. 939
      2. **Damages for Accepted Goods**, UCC 2-714
         1. Can recover for those damages that result in the ordinary course of events from the seller’s breach.
         2. If the damages are caused by a breach of warranty, 714(2) provides that the measure of damages is the difference at the time and place of acceptance btwn 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. 714(3) authorizes incidental and consequential damages
         4. buyer must give notice to seller w/in reasonable period of time in order to preserve the right to collect a remedy
      3. **Specific Performance**, UCC 2-716
         1. Specific performance is a contract remedy – most common form of equitable remedy
         2. Very hard to get
         3. Specific performance w/ goods was usually limited to unique items
      4. **Incidental and Consequential Damages**, UCC 2-715
         1. Incidental damages – consist of out of pocket expenses incurred by the buyer to deal w/ the consequences of the seller’s breach
         2. Consequential damages include

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 be prevented by cover or otherwise, and

Injury to person or property proximately resulting from any breach of warranty

* + - * 1. Lost profits is subject to the foreseeability test of Hadley
        2. Damage to person or property not subject to foreseeability test. Damages must be proved by the buyer w/ reasonable certainty but not mathematical precision
    1. **Sellers’ Remedies**
       1. **Resale Damages**, UCC 2-706
          1. Allows seller to resale goods after a breach by the buyer and recover the difference btwn the resale price and the contract price
          2. Equivalent to buyers right to “cover”
          3. Seller must follow three basic steps to recover damages

1. Seller must identify the goods being resold as the same ones under the contract that was breached

2. Seller must give the buyer proper notice of resale

for private sales – seller must give the buyer reasonable notification of his intention to resell

for public sales – seller must give the buyer reasonable notice of the time and place of the resale except in the case of goods which are perishable or may quickly decline in value

3. Seller’s resale must be made in good faith and in a commercially reasonable manner

* + - * 1. the fact that in hindsight a better price could’ve been obtained however, does not make a sale unreasonable
      1. **Market Damages**, UCC 2-708(1)
         1. Timing: At the time and place of tender
         2. Contract price -- market value = damages formula
      2. **Lost Profits,** UCC 2-708(2)
         1. Alternative to market price measure of damages
         2. Court can award lost profits to sellers if the market measure of damages set forth in 2-708(1) is inadequate to put the seller in as good a position as performance would’ve done
         3. Three situations in which it should apply

1. Lost volume seller

buyer breaches and the seller makes a resale of the same item the seller may collect lost profits if it can prove that it had the capacity to make both sales and that both sales would’ve been profitable

Jetz Service case

2. A seller who is in the process of assembling a product for sale when the buyer breaches

awarding lost profits based on the contract price minus the cost of production

3. Case of the “jobber,” a middle person who purchases goods for resale

if the buyer from a jobber breaches before the jobber has acquired the goods, courts may award lost profits as the best measure of the seller’ harm

* + - * 1. applies if the market value measure of damages is inadequate to put the seller in as good a position as full performance by the buyer
      1. **Seller’s Action for the Price**, UCC 2-709
         1. Seller may recover the price of the goods from the buyer as damages in three situations:

1. If the buyer has accepted the goods, then seller may recover the price

2. Seller may recover the price if the goods are damaged after the risk of loss has passed to the buyer

3. Seller may recover the price and essentially force the goods on to the buyer, if the seller is unable to resell the goods w/ reasonable effort

* + - * 1. analogue of 2-716 which makes specific performance available to the buyer
      1. **Seller’s Incidental and Consequential Damages**, UCC 2-710
         1. Allows the seller to recover incidental damages, which include, a variety of out of pocket expenses incurred by the seller to deal w/ the buyer’s breach, such as cost of storage or transportation of the goods.
         2. Does not contain any reference to consequential damages!
  1. F. JUSTIFICATIONS FOR THE EXPECTATION DAMAGE RULE
     1. Protecting the Expectation Interest Under a Wholly Executory Contract
     2. 1936 Article by Fuller and Perdue: Reliance interest of K damages
     3. Fuller: we allow expectation damages because substitute for reliance because frequently can’t prove reliance.
     4. **3 Interests that the Law may seek to protect in fashioning remedies for breach of contract:**
        1. 1) Expectation = benefit of the bargain
        2. 2) Reliance= what your out; the plaintiff has in reliance on the promise of the defendant changed his position; common reason to get these damages is that you can’t prove expectation damages
        3. 3) Restitution= what other guy got; the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant. The defendant fails to perform his promise. The court may force the defendant to disgorge the value he received from the Plaintiff.
     5. Fuller’s article is designed to answer the following question: **Why should the law ever protect the expectation interest?** (that is where the defendant has breached his promise at a time when the plaintiff promisee had neither preformed not relied in the defendant’s promise of performance why should we allow the plaintiff to recover expectation damages?
     6. **Fuller’s answers to the question:**
        1. **Psychological:** the promisee has formed an attitude of expectancy such that a breach of the promise causes him to feel that he has been deprived of something which was “his”.
        2. **Will Theory of Contract Law:** this theory views the contracting parties as exercising, so to speak, a legislative power, so that the legal enforcement of a contract becomes merely an implementing by the state of a kind of private law already established by the parties.
        3. **Economic or Institutional Approach:** in a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property. This view asserts the primacy of law over economics; it sees law not as the creature but as the creator of social institutions.
        4. **Juristic:** this explanation would seek a justification for the normal rule of recovery in some policy consciously pursued by courts and other lawmakers.
     7. If we take into account “gains prevented” by reliance, that is, losses involved in foregoing the opportunity to enter other Ks, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched.
     8. This foregoing of other opportunities is involved to some extent in entering most Ks and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses.
     9. It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements… to encourage reliance we must therefore dispense w/ its proof
  2. **Encouraging Breach of Contract: the Theory of “Efficient Breach”**
     1. **Holmes in 1897:** basic notion breach of K is not a tort leads to doctrine of efficient breach.
     2. **Efficient Breach:** when nonperformance would be more efficient then completing the contract then the law should not only permit the breach but encourage it.
     3. **Posner Example Illustrating Efficient Breach:**
        1. I sign a contract to deliver 100,000 custom-ground widgets at 10 cents a piece to A. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me 15 cents a piece for them. I sell him the widgets and as a result do not complete timely delivery to A, causing him to lose $1,000 profit. Having obtained an additional profit of $1250 on the sale to B, I am better off even after reimbursing A for his loss, and B is also better off. The breach is Pareto Superior. True had I refused to sell to B he could have gone to A and negotiated an assignment to him of part of A’s K with me. But this would have introduced an additional step w/ transactional costs.
     4. Arguably makes breaching the K not wrong.
     5. Linzer thinks that efficient breach is wrong.
     6. MacNeil: Efficient breach creates a loss in trust in the first contract if the deal is that you can always walk away.
  3. ***Roth v. Speck***
     1. *P/ owner of a beauty salon hired the D/ hairdresser under a 1-yr. employment contract. After 6 ½ months the D leaves for another job where he is making more $. The P has not been able to replace the D adequately.*
     2. **Rule in Gilbert’s:** When the employee breaches the employment contract, the employer is entitled to recover the wages that must be paid to a replacement minus the employee’s wages.
  4. **The Disgorgement Principle:**
     1. Requires the breaching party to give any gain he received as a result of the breach to the non-breaching party.

1. **CH. 12 ALTERNATIVES TO EXPECTATION DAMAGES**
   1. RELIANCE DAMAGEs
      1. Generally: *Reliance* damages are the damages needed to put the plaintiff in the *position he would have been in had the contract never been made*. Therefore, these damages usually equal the amount the plaintiff has *spent* in performing or in preparing to perform. They are used either where there is a contract but expectation damages cannot be accurately calculated, or where there is no contract but some relief is justifiable. The main situations where reliance damages are awarded are:
         1. Profit too speculative
         2. Vendee in a land contract
         3. Promissory Estoppel
      2. Many times limited to the amount of P’s expenses
      3. *Wartzman v. Hightower Productions* (Woody sits in a flagpole)
         1. *Hightower productions hired Wartzman to help them set up their company, become incorporated and raise money to finance their production scheme of Woody Hightower. It ended up that the corporation was structured wrong and Hightower productions needed to hire a securities attorney to correct the problem. But Hightower didn’t have the $ to do this and Wartzman refused to pay for it.*
         2. In this case they can’t prove what they would have made (expectation) but they are out a whole lot of money and can get that back through reliance.
         3. Rule R § 349: If the P can’t prove expectation damages (because they are too speculative but they would otherwise be recoverable), the P’s fall back position will usually be to seek reliance damages (hard to prove because may involve some forbearance)
         4. Essential and Incidental Damages:
            1. Under the original Restatement § 333(a): reliance damages as an alternative to expectation damages were stated to be not recoverable in excess of the full contract price promised by the defendant.
            2. Fuller and Purdue Criticize This: they argue that a distinction should be drawn between the costs of performance of the contract (Essential Reliance) and the costs incurred in collateral transactions related to the contract (Incidental Reliance). The contract price should limit the recovery of incidental reliance damages.
            3. You shouldn’t make more than you would have as the contract been performed. If we give you reliance damages you are making more than you would have made on the contract. So We Will LIMIT your reliance damages.
            4. Essential Reliance: the cost of doing business; this is the factor that goes into expectation damages limited by the contract price. This is subject to Hadley.
            5. Incidental/Consequential Reliance: things you buy in reliance of the contract. Limited by the Hadley Rule.
      4. *Walser v. Toyota Motor Sales*
         1. *Walser began the steps necessary to obtain a Lexus Dealership. Walser had submitted all the necessary paperwork to get a letter of intent from Toyota which would contain final conditions that has to be satisfied before the agreement was finalized. If all of these conditions were met then a formal dealership agreement would be approved by Toyota and signed by both parties. While Walser was waiting on the LOI Haag (Toyota Regional Manager) told Walser “You’re our Dealer” but then Walser found out that the LOI was not approved and he would not be getting the Lexus Dealership. Walser had already bought the land for the proposed Lexus Dealership.*
         2. Walser got a jury verdict in its favor on the promissory estoppel claim but their damages were limited to out of pocket expenses which the jury calculated to be $232,131, not the $7,600,000 in expectation damages that Walser asked for.
         3. The court made 2 conclusions:
            1. That § 90 authorized the district court to limit damages to out-of-pocket expenses. (§ 90 says remedy granted may be limited as justice requires)
            2. The district court judge’s definition of out-of-pocket expenses as the difference between the actual value and the amount paid for the property is correct.
         4. The court in this case followed the restrictive approach: that recovery for promissory estoppel should always be limited to the amount of actual reliance (i.e. out-of-pocket expenses).
         5. Most courts treat reliance damages as a matter of discretion
         6. Big Picture: Whether to give expectation or reliance damages is not resolved. Frequently there is no difference btwn the 2.
         7. If suing in reliance you are limited to the Contract Price
         8. Eisenberg p. 940: when should you get expectation and when you sued in reliance?:
            1. Rather than saying you should always or never get expectation damages when suing in reliance Eisenberg says: if the guy has made a substantial change not easily reversible he should get expectation damages
            2. This is a good argument to make in Walser and it would be possible to prove expectation damages in the Walser case b/c you could look at other Lexus dealerships.
            3. Lexus was introduced in 1989 and by the time this case goes to trial it is 1992 that is enough time to prove a track record.
         9. Notes:
            1. The doctrine of Promissory Estoppel was viewed originally as a substitute for consideration rather than an independent theory of recovery.
            2. The logical consequence of this view is that the injured party would be entitled to recover full expectation damages. This is not done in the Walser case b/c they are still in the preliminary stages of negotiation
            3. Wheeler v. White: doesn’t get expectation damages just reliance damages, which is the basic rule in TX.
            4. This theory of recovery under § 90 was advocated by Williston:

Williston was asked to give his opinion of the measure of damages if an uncle promised his nephew $1,000 to buy a car and the nephew detrimentally relied by purchasing a car for $500. Williston responded that the uncle would be liable for $1,000: “either the promise is binding or it is not. If the promise is binding then it has to be enforced as it is made”.

* + - * 1. Comment d of § 90: seems to advocate that a trial court has discretion to award expectation, reliance, or some other form of remedy when the basis of recovery is promissory estoppel.
        2. But this reading of § 90 is somewhat tempered by Illustration 10: “ The assurances from B to A are promises on which B reasonably should have expected A to rely, and A is entitled to his actual losses on the sales of the bakery and for his moving temporary living expenses. Since the proposed agreement was never made however, A is not entitled to lost profit from the sale of the grocery or to his expectation interest in the proposed franchise from B.” Only gets reliance damages. The exclusion of damages and lost profits in the illustration may suggest that such damages should usually be denied in promissory estoppel cases.
        3. Courts often award lost profits or other forms of expectation damages in promissory estoppel cases rather than limiting damages to P’s reliance interest.
        4. Expectation-based remedies are commonly and routinely awarded in promissory estoppel cases and concluded that where recovery is limited to reliance damages, this is usually not because promissory estoppel is the basis of recovery, but because an expectation based recovery would fail to satisfy one of the other requirements, such as certainty or foreseeability.
        5. Measure of recovery in construction bidding cases: Drennan v. Star Paving: damages computed by subtracting the defendant’s bid price from the price the plaintiff had to pay another subcontractor for the goods or services in question.
        6. As we have seen, from Fuller and Perdue, it has been commonly assumed that the expectation interest is greater than the reliance interest, and that where full compensation is given for injury to the P’s expectation, any injury to the reliance interest will automatically be thereby redressed… it does not follow that the expectation interest will necessarily be greater than the interest generated by reliance.
  1. RESTITUTIONARY DAMAGES
     1. Generally: The plaintiff’s restitution interest is defined as the *value to the defendant of the plaintiff’s performance*. Restitution’s goal is to *prevent unjust enrichment*.
        1. 1. When used: The main uses of the restitution measure are as follows:
           1. (1) a non-breaching plaintiff who has partly performed before the other party breached may bring suit on the contract, and not be limited by the contract price (as she would be for the expectation and reliance measures); and (2) a breaching plaintiff who has not substantially performed may bring a quasi-contract suit and recover the value that she has conferred upon the defendant.
           2. Market value: Restitution is based on the *value rendered to the defendant*, regardless of how much the conferring of that value costs the plaintiff and regardless of how much the plaintiff was injured by the defendant’s breach. This value is usually the sum which the defendant would *have to pay to acquire the plaintiff’s performance*, not the subjective value to the defendant.
        2. Generally not limited to the contract price – ex. If P expends more than what the contract is worth and D is unjustly enriched, P can recover the all of what he spent even if more than contract
           1. Not allowed if P has fully performed however
     2. R (2nd) § 349: If a party cannot prove expectation damages w/ reasonable certainty, she may still recover damages measured by her reliance interest.
     3. R (2nd) § 373: Modern contract law also allows a non-breaching party to elect recovery of restitutionary rather than expectation damages for breach of contract.
     4. R (2nd) § 374: even a breaching party may in some cases be entitled to restitution by virtue of the benefit conferred on the other party by part performance.
     5. R (2nd) § 375: If the performance obligations imposed by the contract have been “discharged” for some reason, such as incapacity or impracticability, either or both of the parties may be entitled to restitutionary relief.
     6. *United States ex rel. Coastal Steel Erectors v. Algernon Blair* (Restitution as remedy for Breach)
        1. *Blair contracted with the US for the construction of a naval hospital. Blair then contracted with Coastal to perform certain steel erection and supply certain equipment in conjunction with Blair’s contract with the US. Coastal terminated the contract after completing 28% of the sub-contract because Blair refused to pay for crane rental. Blair said it was not obligated to do so under the contract. Blair then hired a new subcontractor to complete the job.*
        2. Coastal brought this action to recover fro labor and equipment furnished.
        3. Issue: May a subcontractor, who justifiably ceases work under a contract because of the prime contractor’s breach recover in quantum meruit the value of labor and equipment already furnished pursuant to the contract irrespective of whether he would have been entitled to recover in a suit on the contract?
        4. District Court: the plaintiff was not entitled to recover damages because the plaintiff would have lost more than $37,000 if the plaintiff had completed performance.
        5. The Court of Appeals: Reversed, holding: that when a plaintiff elects restitution as a remedy for breach of contract by the defendant, the measure of recovery… is the reasonable value of the performance and recovery is undiminished by any loss which would have been incurred by complete performance. (Market Value Restitution)
        6. Reasoning for Market Value Restitution: if the Plaintiff elects to rescind the contract and recover restitution, the contract no longer “exists”; any loss that would have resulted from performance of the contract, therefore, should not act as a limitation on the amount of recovery. In addition it seems unfair to allow the defendant, who is after all the breaching party, to retain the benefit of the bargain. He can recover more than he could have lost under the K.
        7. Holding applied to the case: Coastal has, at its own expense, provided Blair with labor and the use of equipment. Blair, who breached the subcontract, has retained these benefits w/o having fully paid for them. On these facts Coastal is entitled to restitution in quantum meruit ( Definition of Quantum Meruit-the reasonable value of services; used today as an equitable remedy to provide restitution for unjust enrichment)
        8. Can get use restitution; why is restitution allowed but not reliance:
           1. Can’t use reliance if you are running at a loss
           2. General breached the K; Coastal Erectors declared the K at an end. No K but we’ve conferred a benefit on you so you are getting something for nothing. Not suing for breach of K but for benefits conferred. The K is gone so K price is irrelevant.
           3. Either sub gets hit for a big loss and breaching party gets a windfall or breaching party pays for what he got.
        9. Notes:
           1. Actions under the Miller Act:

Plaintiff claim in Blair was based on the Miller Act, which provides that in any contract for construction of any public building or public work of the US in an amount in excess of $100,000 the contractor is required to furnish both “performance” and “payment” bonds issued by satisfactory sureties (normally insurance companies).

A performance bond protects the government against the contractor’s improper performance; if the contractor breaches, the government may demand that the surety complete or pay for the performance of the contract.

A payment bond protects the sub-contractor against non-payment by the contractor.

* + - * 1. R (2nd) § 373(2) Full performance exception to Market Value Restitution: The right of a nonbreaching party to elect restitution in situations like that presented in Algernon Blair is subject to an important exception. If the nonbreaching party has fully performed his obligations under the contract and the breaching party’s only remaining duty of performance is the payment of a sum of money, the nonbreaching party may not elect restitutionary recovery but is limited to expectation damages.
        2. R (2nd) 373 Cmt. b: asserts that this exception is justified because it protects the nonbreaching party’s expectation interest while eliminating the judicial burden of determining the market value of the performance.
    1. *Lancellotti v. Thomas* (Possibility of Restitution in favor of a party who is herself in breach)
       1. *The parties entered into an agreement in which Lancellotti agreed to purchase Thomas’s luncheonette business and to rent from the Thomas’s the premises on which the business was located. Lancellotti agreed to buy the name of the business, the goodwill, and equipment; the inventory and real estate were not included in the agreement for the sale of the business. Thomas’s agreed to sell the business for $25,000 and Lancellotti agreed to run the business and to build an addition to the building. The agreement to build the addition was a condition of the lease. Problems arose regarding the construction of the addition and the Thomas’s resumed possession of the business.*
       2. Lancellotti’s sued the Thomas and demanded that they return the $25,000 plus interest.
       3. Thomas denied that appellant was entitled to recovery of this sum and counterclaimed for damages totaling $52,000: $6,665 as rental for the property for the summer 1973 season and the remainder as compensation for “grievous damage to Thomas’s business, its good will and its physical operation and for a nervous condition in Lillian Thomas resulting from Lancellotti’s default.
       4. Trial court: allowed Thomas’s to retain the $25,000 and allowing the Thomas’s to recover $6,665 on their counterclaim.
       5. The trial court rested its opinion on the old common law rule: prohibiting a defaulting party on a contract from recovering.
       6. New Rule: the party who committed a breach should be entitled to recover “any benefit in excess of the loss that he has caused by his own breach (R § 374(1)).
       7. Rule: If you put $ down and then you breach and the seller could be made whole w/o keeping all of your deposit then they have to give you back your $
       8. Linzer Example of an Exception: if I’ve completed the work and all you owe me is $ I can’t cancel the K and collect restitution; I can’t declare breach all I can do is sue you for the $.
    2. Notes:
       1. Effect of willful breach: the original Restatement provided that a defaulting party could not recover restitution if the breach was willful and deliberate. Corbin attacks this notion ; Corbin says that this requirement showed a childlike faith in the existence of a plain and obvious line btwn the good and the bad. So, surprise, surprise, the language of R (2nd) § 374 does not mention willfulness.
       2. Comment b to § 374: indicates that an intentional variation from the terms of the contract will preclude restitution: “A party who intentionally furnishes services or builds a building that is materially different from what he promised is properly regarded as having acted officiously and not in part performance of his promise and will be denied recovery on that ground even if his performance was of some benefit to the other party.
       3. Measure of Restitution:
          1. Since it is a breaching party that is seeking relief recovery is limited
          2. R § 374 cmt. b: recovery should be limited to the lesser of either: a) the value of the benefits conferred or b) the defendant’s increase in wealth.
          3. R § 374 cmt. b, illustration 3: In order to prevent the breaching party from recovering more than her expectation interest, the Restatement also provides that in “no case will the party in breach be allowed to recover more than a ratable portion of the total contract price where such a portion can be determined.
          4. R § 374(1): to ensure protection of the nonbreaching party’s expectation interest, any damages suffered by that party must be deducted from the amount of the restitutionary award.
          5. How Do you figure what is fair value?: Market Value.
    3. *Ventura v. Titan Sports* (Role of Restitution where the K has been rendered unenforceable; Post-Bloom, the waiver of royalty rights was found to be fraudulently induced)
       1. *Ventura began wrestling for Titan under an oral contract. After Ventura got hurt he worked for Titan as a color commentator under an oral agreement. Later Ventura hired Bloom as his talent agent and Bloom was told that Titan’s policy was to pay royalties only to feature performers, Bloom didn’t think it was worth it to try to break the policy. Ventura worked for Titan under a new contract that waived royalties and continued to work as a commentator for Titan until 1990.*
       2. Ventura filed an action in Minn. State court seeking royalties for the use of his likeness on videotapes produced by Titan.
       3. The case was removed to federal court where a jury found that Titan had defrauded Ventura and was awarded $800,000. The jury also determined that Titan exploited Ventura’s name or likeness and awarded Ventura $8,000.
       4. The district court concluded that Ventura was not entitled to a jury verdict on his quantum meruit claim. Accordingly the court vacated the jury verdict and entered findings of fact and conclusions of law that were consistent with the verdict.
       5. Titan appealed and Ventura cross-appealed the denial of the prefiling interest.
       6. Is Quantum Meruit available during the pre-Bloom period?
          1. First, the court decided that the Minnesota Supreme Court would recognize the tort of violation of publicity rights, and thus Titan’s violation of this right makes Titan’s use of Ventura’s commentary without his consent unjust.
          2. We hold that the district court’s finding that the pre-Bloom Ventura-Titan contracts did not address videotape licenses or royalties is not clearly erroneous and we believe that the judgment of the district court was correct insofar as it awarded damages for the exploitation of Ventura’s pre-Bloom commentating performances.
          3. The pre-Bloom period Contracts didn’t contemplate royalties so he can recover.
       7. Is Quantum Meruit available for the post-Bloom period?
          1. We believe that the district court correctly concluded that Ventura was entitled to avoid the fraudulently induced contracts and to recover the reasonable value of the royalties. (In reliance on the purported policy Ventura waived his rights to royalties).
          2. Titan lied about their policy during negotiations (this is fraud). There is no obligation of good faith in negotiations BUT there is an obligation not to lie.
       8. How can Ventura rescind the Contract and get restitution for work done?
          1. The K is gone but Ventura was not a volunteer so he can recover in restitution
          2. Equity will not aid a volunteer; if you volunteer to do something you can not recover for benefits conferred because they were not requested.
       9. Did the district court abuse its discretion when it relied upon the testimony of Ventura’s damages expert?
       10. No. Ventura’s expert’s methodology in arriving at the royalty percentages was reliable.
    4. Notes:
       1. Measuring the restitutionary interest: enrichment or benefit:
          1. When commentators first began developing the theory of restitution it was often said that the basis of restitution was “unjust enrichment”.
          2. Woodward suggested that the measure of recovery should be based upon the “receipt of benefit” rather than enrichment. While the term benefit seems to imply enrichment, the term was intended to refer to the value of what was received rather than the increase in the defendant’s wealth.
          3. R (2d) § 371: recognizes both means of measuring restitution (reasonable value of the performer’s services and value of increase to the recipients property) and indicates that relief may be measured as justice requires.
       2. The post-Bloom claim exemplifies a case in which restitution is sought after a contract has been unenforceable due to fraud.
       3. If a contract was discharged, courts historically measured damages in restitution by the benefit to the defendant; expenditures that did not confer any benefit were not recoverable.
       4. R § 371: provides that and in an action for restitution a court may “as justice requires” measure recovery either by the value of the performance rendered ( the benefit theory) or the increase in value of the defendant’s property or interests ( the enrichment theory).
       5. Cmt b to § 371: provides that the measure of recovery excludes expenditures “to the extent that they conferred no benefit”
       6. Other sections of the restatement allow a court to award reliance damages when a contract is discharged for reasons such as impracticability.
  1. SPECIFIC PERFORMANCE
     1. Substantial performance generally: Where one party *substantially performs* (i.e., does not materially breach), the other is not relieved of his duties. If the latter refuses to perform, the substantially performing party has an action for breach of contract.
     2. In Anglo-American tradition specific performance is not a remedy to which the plaintiff is automatically entitled, even when an unexcused breach has been clearly established. Why?
        1. History: that is just not the way we do things
        2. Specific performance or equitable relief came from the Court of Chancery and you only get an equitable remedy from when there was no remedy at law
     3. Peevyhouses should have asked for specific performance b/c that would have been fair and it is what they really wanted.
     4. Farnsworth: Equitable relief was confined to special cases in light of both practical and historical limitations.
     5. Practical Limitations:
        1. Practical limitations grew out of the problems inherent in coercion.
        2. Our courts will not undertake to coerce a performance that is personal in nature- to compel an artist to paint a picture or a singer to sing a song.
        3. Our courts have also been reluctant to order specific performance where difficulties of supervision or enforcement are foreseen.
     6. Historical Limitations:
        1. First historical limitation: The chancellor granted equitable relief in order to supply the deficiencies of the common law, equitable remedies were readily characterized as “extraordinary”.
        2. So it came to be that money damages were regarded as the norm and specific relief as the deviation, even where the law could easily have provided specific relief w/o any cooperation from the defaulting promisor.
        3. Land was singled out for special treatment. Each piece of land was considered to be “unique” and from this it followed that if a vendor defaulted on his promise to convey land not even money would enable an injured purchaser to find a substitute, so a decree of specific performance would ordinarily issue.
        4. Second historical limitation: premised on the notion that equitable relief is “discretionary”.
     7. *City Stores v. Ammerman*
        1. *Defendants desired to construct a shopping center near Tyson’s Corner. In order to build the center they had to persuade the Board to rezone the property. Mr. Lerner/D asked for a letter from Lansburgh’s/owned by City Stores expressing a desire to participate in defendant’s Tyson Corner project, which could be used in the hearing before the Board.*
        2. Defendants/Gudlesky and Lerner contend that the plaintiff/City Stores/Lansburgh’s/ Jagels wrote this letter in order to secure defendant’s help in obtaining necessary permission from other department store tenants in the Wheaton Plaza shopping center for plaintiff to become another major tenant there.
           1. The court finds that this contention is not supported by the evidence.
        3. Plaintiff contends on the other hand that the Jagels letter to Lerner and Gudlesky was written at Lerner’s request in exchange for a promise that plaintiff would be given an opportunity to become a major tenant at Tyson’s Corner on terms at least equal to those of other major tenants at the center.
        4. Plaintiff seeks specific performance of a contract wherein defendants allegedly promised to offer plaintiff a lease as a major tenant in defendant’s shopping center in Tyson’s Corner.
        5. The City Stores court begins its analysis by determining that an enforceable contract exists
           1. The Lerner-Gudelsky letter was a binding unilateral contract, which gave plaintiff an option to accept a lease at Tyson’s Corner, and that the existence of express and implied conditions precedent did not render it invalid or too indefinite to be a contract.
        6. The court then proceeds to decide whether obligations imposed by the contract were sufficiently certain and definite to be susceptible to specific performance.
           1. The court holds that specific relief will not be denied merely because the parties have left some matters out of their agreement, or left some issues to be agreed on in the future, particularly when the parties have agreed on all material terms and other equitable factors are present. (R § 362 cmt. b)
        7. The court finds that specific performance is the appropriate remedy: It is apparent from the nature of the contract involved in this case that even were it possible to arrive at a precise measure of damages for breach of a contract to lease a store in a shopping center for a long period of time- which it is not- money damages would in no way compensate the plaintiff for the loss of the right to participate in the shopping center enterprise and for the almost incalculable future advantages that might accrue to is as a result of extending its operation into the suburbs.
     8. Notes:
        1. Contracts involving land are prime candidates for specific enforcement because land is regarded as unique
        2. R § 360 cmt e.: indicates that specific performance has traditionally been available to both buyers and sellers. Cases awarding specific performance to sellers however are hard to find
        3. R § 360: identifies other circumstances which support a claim that damages are inadequate. These include the difficulty of proving damages with certainty, the difficulty of procuring a suitably equivalent substitute performance, and the likelihood that a damage award would not be collectible.
        4. Ordinary building contracts are unlikely to be specifically enforced, both because of the difficulties pf supervision and because construction services can readily be purchased on the market with a money award in damages
        5. Factors, other than adequacy of the remedy ‘at law’ (aka money damages) and the problem of supervision, affecting award of specific performance:
           1. The possibility that the contract was the product of mistake or unfair practices or that the exchange it calls for is grossly inadequate or the terms of the contract are otherwise unfair. R § 364
           2. These factors are reflected in the doctrine that equity will not aid one who comes to the court with “unclean hands”
           3. Another factor to be considered is the question whether specific relief would cause unreasonable hardship or loss to the party in breach.
        6. R § 364 (1): Besides the possibility that specific relief may disproportionately affect the defendant, the court in some cases must consider the possible impact of its decree on 3rd parties.
        7. LINZER: increased availability of specific performance is supported by both reasons of economic efficiency and by fairness of holding promisors to their obligations
        8. UCC § 2-716: declares that specific performance “may” be decreed where the goods are “unique” or “in other proper circumstances”
        9. Cmt. 1 to § 2-716: states that the section is intended to continue in general prior policy but with a more liberal attitude then some courts have shown” toward the granting of specific performance of contracts for the sale of goods. Under the code’s more liberal attitude the courts must still decide whether the goods contracted for were sufficiently unique to justify specific performance.
        10. Even under the Code, absent special circumstances, court are still almost certain to deny specific performance if the goods are readily available on the market; in that case “cover” by the buyer plus a suit for damages sill normally be an adequate remedy. UCC § 2-712
     9. *ABC v. Wolf*
        1. *In Feb. 1978 ABC and Wolf entered into an employment agreement which, following exercise of renewal option, was to terminate on Mar. 5th 1980. The contract contained a clause, known as a good faith negotiation and first refusal provision, that is the crux of this litigation. Under this provision Wolf was bound to negotiate on good faith with ABC for a 90 day period. For the first 45 days the negotiation with ABC was to be exclusive. Following the expiration of the 90 day period and the contract Wolf was required before accepting another offer to give ABC a right of first refusal. After termination of the exclusive period Wolf and CBS orally agreed to the terms of an employment agreement. Wolf signed a production agreement with CBS which gave them the exclusive right to his name or likeness*
        2. What did K say: K Expired
        3. Day 1 Day 46 Day 90 3months later
        4. 12-6-87 1-19-80 3-5-80 6-4-80
        5. Day 1 to 46: Period 1: 46-90:Period 2: 90-3mos: Period 3:
        6. No negotiations w/ 3rd parties Doesn’t say he can’t If no deal w/ ABC then he can’t sign a new deal

sign anything here unless he gives ABC a right of 1st refusal

doesn’t say don’t enter a K says don’t accept an offer w/o giving us a chance to match it 1st.

* + - 1. What Happened:
         1. Wolf talks to CBS in Oct. but the critical period does not start until Dec. 6th. So Wolf did not violate the no negotiation agreement w/ ABC b/c negotiated w/ CBS before this agreement kicked in.
         2. In Feb. Wolf signed 2 things w/ CBS

Off the air Sports Specials K: Not bad b/c not in post expiration period and not an on the air services contract

On the air Options K: Wolf pays CBS $100 in exchange for them to hold the position open until June 4th.

* + - 1. ABC sued Wolf alleging breach of good faith negotiation and first-refusal provisions of his contract. ABC asked for specific performance.
      2. Finding by the Court Wolf only breached the duty to negotiate in good faith; he followed the contract literally except for negotiating in good faith; the specific performance may not be granted because it would force Wolf off the air
      3. Courts of equity have historically refused to order an individual to perform a contract for personal services. Originally this rule evolved because of the inherent difficulties courts would encounter in supervising the performance.
      4. Another reason for this historic rule is the 13th Amend.’s prohibition of involuntary servitude. But most people don’t really think the 13th Amend bars specific performance
      5. Once the employment contract has terminated equitable relief is potentially available only to prevent injury from unfair competition or similar tortious behavior or to enforce an express and valid anticompetitive covenant. In the absence of such circumstances the general rule is that unfettered competition should prevail.
    1. Notes p. 986:
       1. Courts have been willing to grant “negative enforcement” by way of injunction when the services were unique and the employee expressly or impliedly covenanted not to do work for others during the term of employment.
       2. R § 367: a negative injunction will not be issued if it would probably produce an “undesirable” continuance of personal relations or “leave the employee w/o reasonable means of making a living.
       3. Essential to the granting of injunctive relief is a showing that the services to be performed were unique.
    2. Linzer on ABC v. Wolf:
       1. Exceptional employee/entertainer may deserve special treatment (i.e. specific performance)
       2. What can employer do to enforce the exceptional performer:
          1. Even if you could hold him to the contract do you want to?; is the person going to perform the same?
          2. If not going to make them work for you what can you do?: Negative Enforcement: keep them from working for someone else (Lumley v. Wagner). RESPONSE to Negative Enforcement: but then the employer can’t earn a living.
          3. You want to limit specific performance to people w/ unique services
       3. In Wolf Case Specific Performance is not proper b/c it would be too harsh (equity always concerned w/ things like harshness)
       4. Linzer thinks ABC overplayed their hand. ABC drafted a bad K and CBS did a better job and got around the K. ABC asked for too much; asking for Wolf to be kept out of work for 2 yrs is too much b/c it would ruin his career
       5. Linzer likes the Dissent: which wants a 90 day injunction.
       6. But the Majority rejects this because they say you can’t give a non-competition provision after the K was terminated if it was not in the K in the 1st place. If you don’t have a non-competition clause we will not imply one. This is done for Public Policy reasons, they don’t want to decrease competition.
       7. But the dissent says that is justified in this situation given the extreme bad faith of Wolf.
       8. The majority says that ABC could sue for damages but Linzer says this is not really true b/c they can’t get damages in this type of case.
    3. Notes p. 998:
       1. Liquidated Damages Clause: we don’t know what it is worth so we are going to make a good faith effort to come up w/ a number.
       2. Courts don’t like them because:
          1. Steps on their responsibilities/job
          2. Often they border on penalty (won’t enforce them if they are too high and sometimes they won’t enforce them if they are too low)
       3. Never use word “Penalty” in k b/c equity prohibits it.
       4. Points about liquidated damages clauses:
          1. Damages are unclear = can’t estimate it
          2. Can’t be a penalty
          3. Must be a good faith estimate
       5. Exception to No Penalty Rule:
          1. Public Contracts (ex. K w/ the gov’t to build a road or a bridge): can make them pay a late fee for being late b/c it is in the public interest to have it done on time.
          2. Not called a penalty but it is and it is being enforced
  1. Comment: Commercial Arbitration
     1. Arbitration agreements are bad b/c they are imposed on unwilling parties.
     2. Further notes on this in Dean Alderman’s lecture above
  2. LIQUIDATED DAMAGES
     1. Parties can stipulate to specific performance, but the crts will probably say you cant tell us what we’ll do
     2. Liquidated damages are in a similar situation
        1. They are usually so obviously a penalty clause
        2. DON’T EVER USE the word “PENALTY”
           1. All it can do is to encourage a court not to enforce it b/c can’t have penalty clauses
     3. But what happens if they are equal parties?
        1. Those who argue that liquidated damages are wrong, crts should just give it up
     4. Notes pg. 1039 - **Westhaven** case
        1. 1. test of enforcement of liquidated damage clauses
           1. 1. The damages to be anticipated from the breach must be uncertain in amount or difficult to prove
           2. 2. The parties must have intended the clause to liquidate damages rather than operate as a penalty
           3. 3. The amount set in the agreement must be a reasonable forecast of just compensation for the harm flowing from the breach
     5. R2K Sec 356 – two part test
        1. A provision for liquidated damages will be enforceable if the amount fixed is reasonable in light of the anticipated or actual loss and the “difficulties of proof of loss”
        2. Comment b – the greater the difficulty either of proving that loss has occurred or of establishing its amount w/ the requisite certainty, the easier it is to show that the amount fixed is reasonable.
        3. Thus the difficulty in quantifying harm resulting from a breach is pivotal in many cases
     6. **Notes p. 998:**

1. Liquidated Damages Clause: we don’t know what it is worth so we are going to make a good faith effort to come up w/ a number.
2. Courts don’t like them because:
   1. Steps on their responsibilities/job
   2. Often they border on penalty (won’t enforce them if they are too high and sometimes they won’t enforce them if they are too low)
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4. Points about liquidated damages clauses:
   1. Damages are unclear = can’t estimate it
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   3. Must be a good faith estimate
5. Exception to No Penalty Rule:
   1. Public Contracts (ex. K w/ the gov’t to build a road or a bridge): can make them pay a late fee for being late b/c it is in the public interest to have it done on time.
      1. The cost in such a delay is felt by the entire community, and cost is nothing compared to the cost of the ppl having to wait, waste gas, etc.
      2. City would lose its taxes b/c of delay
   2. Not called a penalty but it is and it is being enforced
      1. Really are penalty, but they are there to coerce the party into the time table. They make sense economically
      2. Bare in mind, if the crts wanted to strike it down, how could they do so?
         1. Ex. Complete job by June 1 – liquidated damages 10K a day
         2. Can get around it by drafting better, by saying
            1. Complete by May 1, get bonus of 10K a day
6. **Problem 11-4** pg. 964
   1. What is the advise? What is her risks?
      1. She might be able to do efficient breach
      2. She could claim that due to unforeseen circumstances she could try to get a higher wage rate on the tv series Operating Room – but Flying High would be a much better deal, better position and money etc
      3. Otherwise, if she breached her contract w/ OR, she probably wouldn’t end up paying much except for whatever it cost the co. to replace her.
      4. She would have to pay the cost of another reasonable actor to replace her and if they demanded more than 75,000/wk, it would probably be a very bad idea to breach.
      5. Could the OR get specific performance? No – personal services contract, the crts don’t enforce these normally – notion of involuntary servitude
      6. **Disgorgement** – other possibility of the producers of OR to seek all of her profits
         1. LINZER thinks it is a very good argument
         2. Less justifiable time is when ppl are working – seems punative, and the less likely place we want to give punative damages is when it involves personal services
         3. Freedman says in a situation in which a person breaches for tactical reasons, he says disgorge the windfall
            1. CIA doesn’t learn of ex agent publishing book. CIA goes and sues, crt says agent has to give all profits to the CIA
   2. Note 6 pg 1031 – can the OR get an **injunction**?
      1. Possibly – if they can get it, it will be the most effective remedy -CA said yes if they have a special type of talent
      2. **Westhaven Associated v. CC of Madison** Pg. 1032
         1. If parties intended it to be a penalty they will throw it out but it will almost never be found
      3. Notes-ish pg. 1039
         1. Can argue that liquidated damages are in place of consequential damages
         2. All damages must be proved w/ certainty and not speculative and its very difficult to do this in liquidated damages
   3. **INJUNCTIONS**
      1. Crts do allow injunctions when there is a covenant not to compete
      2. Sometimes allow both liquidated damages and injunctions at the same time (LINZER thinks is ridiculous)
   4. **LOW LIQUIDATED DAMAGES**
      1. Disclaimer of liability – as minimal liquidated damages – do you even need to prove the damage? No, its obvious (first prong of Hadley)
         1. Ex. Telephone co. gets your number wrong in the ad, they have a disclaimer that they will give you your money back. Most courts find that the phone book is not liable
      2. Justifiable – cost of liability is insurmountable if they were liable – they are bound to makes some mistakes – the liability is enormous and every mistake is catastrophic to the person who has the mistake made against, but so would it be against the phone co. if they had to pay for all of these mistakes (i.e. no phone books anymore) i.e. their liability would be open ended
      3. The way to look at low liquidated damages is just as a disclaimer of liability
      4. The telephone co. ad is a contract of adhesion
      5. Definition: A *"liquidated damages clause"* is a provision, placed in the contract itself, specifying the *consequences of breach*. (*Example*: Contractor contracts to paint Owner’s house for $10,000. In the basic contract, the parties agree that for every day after the deadline that Contractor finishes, the price charged by him will be reduced by $100. This provision is a liquidated damages clause.)
      6. General rule: Courts will enforce liquidated damages provisions, but only if the court is satisfied that the provision is not a *"penalty*.*"* That is, the court wants to be satisfied that the clause really is an attempt to estimate actual damages, rather than to penalize the party for breach by awarding "damages" that are far in excess of the ones actually suffered. Therefore, in order to be enforceable, the liquidated damage clause must always meet one, and sometimes two, requirements:
         1. 1. Reasonable forecast: The amount fixed must be *reasonable* relative to the anticipated or actual loss for breach; and
         2. 2. Difficult calculation: In some courts, the harm caused by the breach must be *uncertain or very difficult to calculate accurately*, even after the fact.
      7. Reasonableness of amount: All courts refuse to enforce liquidated damages clauses that do not provide for a *"reasonable"* amount.
         1. 1. Modern view: Courts disagree about the *time* as of which the amount must appear to be reasonable. Most courts today will enforce the clause if *either*: (1) the clause is a reasonable forecast when viewed *as of the time of contracting*; or (2) the clause is reasonable in light of the *actual* damages which have occurred.
         2. 2. Unexpectedly high damages: This means that a clause which is an unreasonable forecast (viewed as of the time of Contracting) can still be saved if it turns out that P’s damages are unexpectedly high, and therefore in line with the clause.
            1. No loss at all: Courts are split about whether to enforce a liquidated damages clause where P has sustained *no actual losses at all*. The Restatement does *not* enforce the clause if it turns out that no actual damage has been sustained.
         3. 3. Blunderbuss clause: A *"blunderbuss"* clause stipulates the same sum of money as liquidated damages for breach of *any* covenant, whether trivial or important. Where the actual damage turns out to be *trivial*, most courts will not enforce a blunderbuss clause (or will interpret the clause as not applying to trivial breaches).
            1. a. Major loss: But if the breach turns out to be a *major* one (so that the liquidated amount is reasonable in light of the actual loss) courts are split on whether the blunderbuss should be enforced. The modern view is to *enforce* the blunderbuss where the actual loss is roughly equal to the damages provided in the clause.
      8. **UCC rules**: The UCC basically follows the common-law rule on when a liquidated damages clause should be awarded. The UCC follows the modern view, by which the party seeking enforcement of the clause will succeed if the sum is reasonable viewed *either* as of the time the contract is made or viewed in light of the actual breach and actual damages. See UCC § 2-718(1) (clause enforceable if "reasonable in the light of the anticipated or actual harm caused by **the breach...").**