**Contracts Cheat Sheet: The Rules of Law**

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| **Principle/Theory** | **R2/UCC Provisions** | **Case Law/Holding** |
| **Intention to be Bound** A duty to read is imposed on anyone entering into a contract.It is measured by what the average reasonable person would have thought the terms meant.  | **UCC: §§ 2-204, 2-206**Any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of an agreement**R2: §§ 17, 20, 21, 22**There is no manifestation of mutual assent if the parties attach materially difference meanings to their manifestations; neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract; mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.  | **Ray v. Eurice Bros:** Absent fraud, duress or mutual mistake; one having the capacity to understand a written document who reads and signs it, or, without reading it or having it read to him, signs it, is bound by his signature in law. This case shows the objective view that since the contract was clear, and mutual assent was evident (the signatures), and there was not fraud or duress, then the Contract is enforceable. |
| **Offer and Acceptance: Bilateral**Bilateral = promise in exchange for a promise Offer = the promise is the consideration Acceptance = the return promise | **UCC: § 2-206**An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances (a deal made in a commercial setting and is understood to be closed is recognized as a contract)**R2: §§ 22, 24, 50**An offer is the manifestation of a willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it; 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.  | **Lonergan v. Scolnick:** There can be no contract unless the minds of the parties have met and mutually agreed upon some specific thing. This usually is evidenced by one party making an offer which is accepted by the other party. If one party knows the other doesn’t intend to make an offer as his “fixed purpose until further expression of assent then” it’s not a binding offer, it’s simply part of the negotiationAdvertisements are NOT generally considered offers, but rather invitations to deal 🡪 Unless the ad is intentionally misleading consumers via false/deceptive advertising is punishable by forcing seller to stand by the advertised deal even if he had no intention of actually selling the product based on the advertisement. |
| **Offer and Acceptance: Unilateral** Unilateral K = promise in exchange for a performanceOffer = the promise is the consideration for the promisee and the act is the consideration for the promisorAcceptance = the performance is completed | **R2: §§ 45**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; the offeror’s duty of performance under any option contract so creates is conditional on completion or tender of the invited performance  | **Petterson v. Pattberg:** If there is revocation of an offer for a unilateral contract and the act requested has not yet been performed, then there is no contract.Offeree can insist on bilateral or option contract if he does not want to assume the risk of revocation before his act is completed. May be that it is advantageous for both parties not be bound. |
| **Other Methods of Mutual Assent**Note about UCC § 2-207 (boilerplate): A definite and reasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as acceptance, even though it may state additional or different terms.  | **UCC: § 2-206**Contract for sale of gods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract; an agreement sufficient to constitute a contract is enforceable even if its moment of making is undetermined”**R2: § 33**Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.  | **Harlow v. Advance Steel:**An agreement sufficient to constitute a contract may be found even though the moment of its making is undetermined. Court would not rescind contract based on a minor breach. **Walker v. Keith:**If two parties agree upon a specific method of making a determination in a future contract, then they can be said to have agreed upon whatever determination emerges from the utilization of that method. |
| **Principle/Theory** | **R2/UCC Provisions** | **Case Law/Holding** |
| **Defining Consideration**A negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other Functions: Evidentiary, Cautionary, Channeling  | **R2: §§ 71, 73, 79**To constitute consideration, a performance or a return promise must be bargained for; bargained for if sought by the promisor in exchange for promise and given by promisee in exchange for that promise; performance may be act other than promise, like forbearance or creation/destruction of a legal relation.Performance of legal duty is not consideration; once the requirement of consideration is met; there is no additional requirement of equivalence or mutuality. | **Hamer v. Sidway:** A valuable consideration in the sense of the law may consist either in some right, interest, profit, or other benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. The benefit-detriment test is too subjective; the “at the request” text moves closer to the bargain requirement of §71. **Pennsy Supply v. American Ash:**The promisor received a benefit from the arrangement, which was the reason they were offering it free in the first place. "Complaint alleges facts which, if proven, would show the promise induced the detriment and the detriment induced the promise. This would be consideration." |
| **Applying the Consideration Doctrine**There must be something “bargained for” to constitute consideration.  | **R2: §§ 81, 77**The fact that what is bargained for does not of itself induce the making of a promise (or a performance/return promise) does not prevent it from being consideration for the promiseA promise or apparent promise is not consideration if by its terms the promisor reserves a choice of alternative performance, unless the alternative performances would have been considerationNote about Illusory Promises: A prediction of future willingness is not an expression of present willingness and is not a promise; rather, it is a conditional promise, conditioned on the will of the promisor, and thus is not enforceable against the promisor, nor is operative as consideration for a return promise.  | **Daugherty v. Salt:**Nothing is consideration that is not regarded as such by both parties. Recital of consideration or belief by one or both parties that there is CNS is insufficient. Dougherty supplements definition of “At request of” by requiring that both parties understand that part of bargain (see § 33)**Batsakis v. Demotsis:**As long as there is some consideration, courts will not inquire into the adequacy of consideration. May be relevant to the affirmative defenses of fraud, duress, unconscionability, etc. Policy: shows the slide of contracts towards helping the free market economy (people are free to value something however they may)**Plowman v. Indian Refining:**Past or executed consideration is a self-contradictory term. Something which has been delivered before the promise is executed, and, therefore, made without reference to it, cannot properly be legal consideration. Moral consideration is not actual, legal consideration.  |
| **Pre-Acceptance Reliance**Can also be summarized as “Limiting the Offeror’s Power to Revoke”, due to reasonable reliance and induced action on the part of the promisee | **R2: §§ 87, 90**Parties are in the realm of negotiating offer and acceptance; an offer that offeror should reasonably expect to induce action or forbearance of substantial character by offeree before acceptance and does; it is a binding option contract to the extent necessary to avoid injustice (87)A promise which the promisor should reasonably expect to induce action….and does…is binding if injustice… (90) | **What was reliance + Was the K enforceable?****James Baird v. Gimbel Bros.:** The difference between the original sub-contractor cost and the new sub-contractor costs -- NO**Drennan v. Star Paving:** Same situation as above, plaintiff took steps to mitigate costs after originally relying on promise – YES **Berryman v. Kmoch:** Effort of looking for a buyer and all of the expenses that were involved – NO (because reliance was unreasonable)**Pop’s Cones v. Resorts International:** Closed shop and got ready to move during pre-promissory negotiations – YES (reasonable reliance + substantial cost) |

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| **Promissory Estoppel: Promises Within the Family**Promissory Estoppel: Granting enforceability to a promise where there was no explicit consideration, but reliance on the promise that actually induces action |  **R2: §90**“Promise Reasonably Inducing Action or Forbearance”**Injustice Prong:** “If justice can be avoided only by enforcement of the promise”, rises out of equity decisions that decided questions of fairness, court opinions provide “criteria” from which future cases can base their decisions (because there are no criteria listed in the R2, etc.) | **Kirksey v. Kirksey: Before Promissory Estoppel Doctrine**If the promise is a mere gratuity then there is no consideration. A condition to an executory promise does not provide sufficient consideration for enforcement. **Wright v. Newman: Enforced via Promissory Estoppel**If there is a promise and the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person AND the promise does induce such action or forbearance AND injustice can be avoided only by enforcing that promise, THEN there is a legally enforceable contract AND the remedy granted for breach may be limited as justice so requires. **Greiner v. Greiner: Enforced via Promissory Estoppel**Promissory estoppel can apply when one party detrimentally relies on an implied promise.  |
| **Promissory Estoppel: Charitable Subscriptions**  |  **R2: §90(2)**“A charitable subscription (or a marriage settlement) is binding under Subsection (1) without proof that the promise induced action or forbearance. To enforce a charitable promise, must prove there was a promise and it was supported by consideration or detrimental reliance | **King v. Trustees of Boston University:**If a party establishes that there was a promise to give some property to a charitable institution and a party establishes that the promise was supported by consideration OR reliance, then the charitable subscription is enforceable. If donative intent if sufficiently clear, the court will try and make the promise binding without abandoning contractual principles of specificity, consideration and reasonableness of charity’s reliance |
| **Promissory Estoppel: Promises in a Commercial Context** Note: Promissory estoppel claims are rarely successful, to be used as a last-ditch effort.  | **R2: §90** “Detrimental reliance” means the promise induces action or forbearance by the promisee which includes actual expenditures in reliance and a change of position**Comment B:** The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and onthe extent to which such other policies are relevant.  | **Katz v. Danny Dare: Detrimental Reliance** 1) Promise (Yes) 2) Detrimental Reliance (Voluntary, Yes) 3) Injustice (Gave up opportunity to seek another option, Yes)**Shoemaker v. Commonwealth Bank: Reasonable Reliance** If the promisor made a promise that he should have reasonably expected would induce action or forbearance AND the promisee actually took action or refrained from taking action in reliance AND injustice can only be avoided by enforcing the promise, then promise is enforceable – the promisee must satisfy the “reasonableness of the promisee’s reliance” |
|  **Electronic Contracting** Most modern contracts do not adhere to the classical model, but involve parties with radically unequal bargaining power. Contracts now consist of standard forms and involve little negotiation. Most relevant though is how contracts form electronically, rather than in person or by mail. |  **Shrinkwrap:** license agreements or other terms/conditions contractual in nature which can only be read and accepted by the consumer after opening the product**Clickwrap:** the electronic equivalent of shrinkwrap, allows users to read the terms of the agreement before accepting them**Browsewrap:** contract or license agreement covering access to or use of materials on a website, is expected or assumed to have been agreed to before a user browses the website | **Brower v. Gateway 2000: Shrinkwrap**UCC § 2-302 allows courts to flexibly police against clauses that they find unconscionable as a matter of law. Unconscionability consists of a combination of grossly unequal bargaining power plus terms that are unreasonably favorable to the more powerful party.**Register.com v. Verio, Inc.: Browsewrap**Although the terms may not have been enforceable on the first query; Verio would have been aware of the terms before making all subsequent queries and the terms were therefore enforceable. |

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|  **Restitution in the Absence of a Promise****Contract Implied in Law** (Quasi Contract): Party confers benefit to another without a bargain but the party is nevertheless entitled to restitution for those services. **Contract Implied in Fact:** There is a bargain, but no specific promise. Implied by the facts and actions of the parties. | **Restatement of Restitution:** “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”Restitution is a remedy, not to be confused with “unjust enrichment”, which is the cause of action that gives rise to the remedy. Restitution is the act of restoring something of its value. The basis of the judgment is that the recipient has been unjustly enriched at the expense of the grantor. Unjust enrichment serves as an independent theory of liability in cases when no contract has come into existence. It also plays a role when a valid contract does exist but has been breached when restitution of a benefit may be a better option that enforcement of the contract. | **Credit Bureau v. Pelo:**If a person acts un-officiously and with the intent to charge and the things or services were necessary to prevent the other from suffering serious bodily harm or pain and the person supplying them had no reason to know that the other would not consent to receiving them, then the person who has supplied things or services to another, although acting without the other’s knowledge or consent, is entitled to restitution therefor.**Commerce v. Equity:**If the plaintiff has conferred a benefit on the defendant and the defendant has knowledge of the benefit and the defendant has accepted or retained the benefit conferred and the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it, then the plaintiff has a cause of action for quasi contract |
| **Promissory Restitution** A promise may be binding when it is either an express promise to pay or when the promisor received a material benefit from the promisee | **R2: §§ 86, 71**A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice, a promise is not binding if 1) promisee conferred benefit as a gift or for another reason there is no unjust enrichment 2) to the extent that its value is disproportionate to the benefit. “Performance or return promise…may be given by the promisee to a third person” | **Mills v. Wyman: Moral Consideration, Prior Valid Obligation**If there is a “post service” promise to pay for service and there is prior valid obligation extinguished by the operation of positive law, then there is an enforceable promise. A mere verbal promise, without consideration, cannot be enforced by action, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful**Webb v. McGowin: Moral Consideration, Material Benefit Conferred** If there is a post-service promise and prior valid obligation or material benefit conferred, then there is an enforceable promise. The subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made (legal fiction) |
| **Statute of Frauds: Scope and Application** **Test:**1) Is the contract within the statute?2) If so, is there an adequate writing?3) Is the writing requirement excused?If Y,N,N 🡪 not enforceable promiseIf Y,Y 🡪 enforceable promise | **Doctrines for Overcoming SOF in R2:**§139 – promissory estoppel generally available to overcome SOF§178 – promissory estoppel available only where defendant has promised to create a sufficient writing**R2: §110**Classes of contracts covered 1) Goods $500+ 2) Cannot be performed within one year 3) Interest in land 4) Answer for the duty of another 5) Marriage§130 🡪 Defining “contract cannot be performed within a year”§131 🡪 Must state with “reasonable certainty the essential terms of the unperformed promises in the contract” §132 🡪 Defining the admissibility of “several writings” §133 🡪 Defining “memorandum not made as such”§134 🡪 Defining “signature”  | **Crabtree v. Elizabeth Arden: Several Writings & Parol Evidence**If the writing is signed with the intention to authenticate the information contained therein and the information contained therein does evidence a contract, then the writing satisfies the SOF. **Rule:** If the writings signed /unsigned by the party to be charged clearly refer to the same subject matter or transaction, then the writings signed by the party to be charged and the writings unsigned by the party to be charged may be read together to satisfy the SOF.**Winternitz v. Summit Hills:**A contract within the SOF is neither void nor voidable if that contract affects third parties and it can affect the legal relationships between the contracting parties and third parties. An oral contract unenforceable under the SOF may be enforced with respect to independent duties owed to third parties. **Alaska Democratic Party v. Rice:**Promissory estoppel may be invoked to enforce an oral contract that falls within the SOF. The SOF represents a traditional contract principle that is largely formalistic and does not generally concern substantive rights.  |
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| **Statute of Frauds: The Sale of Goods**  | **UCC: § 2-201**A sale of goods for $500+ is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing (2) (between merchants, reasonable notice) | **Buffaloe v. Hart:** A check may satisfy the requirements of the statute of frauds if it contains sufficient writing to indicate the contract of sale, is signed by the party against whom enforcement is sought, and indicates quantity. Because Defendant did not sign the check, it does not satisfy the requirements of the statute of frauds. Even though the writing does not satisfy the statute of frauds, the agreement should be enforced under the doctrine of part performance.  |
|  **Principles of Interpretation**1) If a written contract contains a word or phrase which is capable of two reasonable meanings, one which favors one party and the other of which favors the other, then that interpretation will be preferred which is less favorable to the one by whom the contract was drafted2) If one or more specific items are listed, without any more general or exclusive terms, then other items, although similar in kind, are excluded. | **R2: §§ 204, 207****Supplying an essential term:** When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court**Interpretation favoring the public:** In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.**§201(2)** “…if that party did not know of any different meaning attached by the other, and the other party knew the meaning attached by the first party; OR that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.” (applied in Joyner)  | **Joyner v. Adams: Two Sophisticated Parties,**If two parties have different meanings, then there is no enforceable promise, unless 1) one party is “innocent” and the other party is not or 2) one party has superior bargaining power and drafted the contract**Frigaliment v. B.N.S. International:**Courts typically will apply plain meaning rule and refuse to allow extrinsic evidence of meaning unless court first concludes there is ambiguity. Walks through various categories of evidence that a court can use to see whether a particular party has “reason to know” what the other party means: The text itself, preliminary negotiations, trade usage, market-based judgment, basic language, government regulation. **C&J Fertilizer v. Allied Mutual Insurance:**If there is a conflict between the terms of an insurance policy and a term that an insured would reasonably expect to be in the policy, then the court is to interpret in accord with the reasonably expected term. Reasonable Expectations: If a party adheres to the other party’s standard terms and the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term, then the party does not assent to the term. |
| **The Parol Evidence Rule****Integration:** The level to which the writing is intended to be a complete statement of the agreement**Parol Evidence Rule:** Extrinsic evidence is inadmissible to contradict or vary the terms of a valid written instrument**Four Corners Approach:** The writing itself, not extrinsic evidence, is the best reflection of the parties’ intent**Corbin Approach:** The court looks at all extrinsic evidence first to see whether it will aid in ascertaining the intent of the parties; then “finalizes” its understanding of the contract | **Other Case Law: Mitchell v. Lathe, Nanakuli v. Shell Oil, and Raffles: “The Peerless Case”** **R2: §§ 222,223,202****§222:** A usage of trade is a usage having such regularity of observance in a place or vocation as to justify an expectation that it will be observed with respect to a particular agreement**§223:** A course of dealing is a sequence of previous conduct between parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct**§202(4):** Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of an agreement**See also UCC § 1-205** | **Thompson v. Libby: 4 Corners**Parol evidence of extrinsic facts and circumstances would be admissible to apply the contract to its subject-matter, or in order to a more perfect understanding of its language. But in that case such evidence is used, not to contradict or vary the written instrument, but to aid, uphold, and enforce it as it stands.**Taylor v. State Farm: Corbin** If the disputed terms of the agreement are “reasonably susceptible” to proffered evidence of meaning, then “the evidence is admissible to determine the meaning intended by the parties. But, if the extrinsic evidence is admissible, then the extrinsic evidence does not “vary or contradict the written words.”**Sherrod v. Morrison-Knudson: 4 Corners** If a K is reduced to writing, whether the law requires so or not, then the written K supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied its execution, UNLESS a mistake or imperfection of the writing is claimed or when the validity of the agreement is the fact of the dispute. |
| **Principle/Theory** | **R2/UCC Provisions** | **Case Law** |
| **Implied Terms**“The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.” | **Issue with Illusory Promises: R2 §77** A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances**UCC:** **2-306(2):** Distributor must perform in “good faith” by exerting “best efforts” to promote sales.**2-209(5):** A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver | **Wood v. Lucy, Lady Duff-Gordon: Exclusive Agency**If the whole writing is “instinct with an obligation,” then there is a K, even though a promise may be lacking. If a party accepts exclusive agency then he makes an implied promise to use reasonable efforts to bring profits to existence. The court gets around the illusory promise problem by saying that the plaintiff had actually taken on a implied duty to use “reasonable efforts to bring profits” **Leibel v. Raynor: Distributorship** The court finds that distributorships fall under the UCC, which requires that reasonable notice be given if the agreement is for an infinite duration. The Court interprets reasonable notice as relating to “the circumstances under which notice is given and the extent of advance warning” not the method by which notice is given. The Court holds that Appellee was required to give Appellant reasonable notice of intent to terminate. |
|  **Implied Obligation of Good Faith**The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness | **R2:** **§205:** Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement**§228:** When it is a condition of an obligor’s duty that he be satisfied with respect to the obligee’s performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position would be satisfied (not about aesthetic quality), an interpretation is preferred under which the condition occurs if such a reasonable person in that position would be satisfied. **UCC:** Where contractual limitations are not expressed, **UCC 2-306(1)** which sets a “good faith” standard on minimums and maximums except where limited or exceeded based on prior tradeGood faith is defined in Uniform Commercial Code § 1-201(19) as "honesty in fact in the conduct or transaction concerned." "In the case of a merchant" Uniform Commercial Code §2-103(1)(b) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." | **Morin Bldg. v. Baystone Construction: Satisfaction Clauses**If it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, then the rule of the condition is to be read as follows: If a reasonable person in the position of the obligor would be satisfied, then the condition is met. If the contract involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge, then it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied**.****Locke v. Warner Bros.:** Court holds that discretionary power affecting rights of others must be exercised with good faith.**Donahue v. Federal Express: At-Will Employment** There is Good Faith and Fair Dealing if and only if there is Honesty in Fact. If a party acts in bad faith as to deprive another employed party of his fair share of the profits related to the project, then the employed party can recover for the lost profits, but not for the loss of employment. But, If an employee establishes that he has given his employer additional consideration other than the services for which he was hired, then he is no longer an at-will employee. |
| **Avoiding Enforcement: Minority and Mental Capacity**Common law race/gender restrictions on the ability contract were designed to oppress, not to protect, and have been removed accordingly. Minority and mental capacity are two contemporary limitations on contractual capacity.  |  **R2:** **§15:** The test goes beyond the “volitional standard”; if a person lacks mental capacity and is unable to act in a reasonable manner in relation to the transaction or is unable to understand in a reasonable manner the nature of the transaction, the power of avoidance exists. **§14:** A natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday (this depends on whether the contract is for “necessaries” or not)  | **Dodson v. Shrader:**If the contract is entered into by a minor, and if such contract was not unreasonable and no undue influence was used, and the minor purchased and paid for the product, and used it for a period of time, the product may be returned but the purchase price can be discounted by the use and damage to the item.**Hauer v. Union State Bank of Wautoma:**Where a contract is fairly entered into, and neither party knows of the other’s incapacity, the contract is not voidable if the parties cannot be restored to their previous positions. However, if one party knows, or has reason to know of the other party’s incompetence, the contract may be voided and the consideration that was given need not be restored. |

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| **Avoiding Enforcement: Duress and Undue Influence**These cases hit at three overarching themes in contract law:1) Allocation of Risk2) Unequal Capacities to Contract3) Heteronymous v. Autonomous Parties | **R2: §§ 174, 175**If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent….improper threat that leaves the victim with no reasonable alternative…or is induced by one who is not a party to the transaction unless the other party to the transaction acts in good faith. **R2: §177**Undue influence = unfair persuasion of a party under domination of other or who because of relationship is justified in assuming with act consistent with his welfare. If assent induced by undue influence, then K voidable by victim. | **Totem Marine v. Alyeska Pipeline: Economic Duress**By wrongful acts or threats, intentionally causes P to involuntarily enter into a transaction and P has no reasonable alternative but to accept D’s terms or face serious financial hardship, then the contract is voidable. The circumstances must be the result of coercive acts by D. **Odorizzi v. Bloomfield School District:**If there is excessive pressure by a “dominant subject” and excessive pressure is used to persuade “one who is vulnerable to excessive pressure, then there is undue influence. There is a subjective standard applied to determine; which uses time, place, nature of demand, emphasis on consequence, multiple dominators, and absence of advisors as factors.  |
| **Avoiding Enforcement: Misrepresentation and Nondisclosure** Parol evidence is always available to show fraudThis raises questions in terms of allocation of risk and transaction cost. Burden is usually on the one who can get the information with the lowest transaction costs | **R2:** **§161:** **When Non-Disclosure is Equivalent to an Assertion** (a party may reasonably expect the other to take steps to inform himself and to draw his own conclusions = defense)**§162:** **When a Misrepresentation is Fraudulent or Material:** Fraudulent when intends to induce assent AND knows wrong, no basis, or no confidence; Material if likely to induce assent from reasonable person or maker knows likely … from recipient.**§163: When a Misrepresentation Prevents Formation:** “If a misrepresentation as to character or essential term…induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent. | **Hill v. Jones:**If the seller of a product (or property) knows of facts materially affecting the value of the property and these facts are not readily observable and these facts are not known to the buyer, then the seller is under a duty to disclose. Sub-rule for materiality: If a matter is one to which a reasonable person would attach importance in determining his choice of action, then a matter is material. This is a question for the trier of fact. If a provision in a contract makes it possible for a party thereto to free himself from the consequences of his own fraud in procuring its execution, then the provision is invalid and necessarily constitutes no defense |
| **Avoiding Enforcement: Unconscionability****Procedural Unconscionability:** some defect in bargaining process or lack of choice by one party**Substantive unconscionability:** fairness of terms in resulting bargain | **UCC §2-302: (1)** If court finds as a matter of law that the K or any clause were unconscionable at the time at which the contract is made, then the court may refuse to enforce the contract, OR it may limit the application of any unconscionable clause**R2 §208:** If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. | **Williams v. Walker Thomas Furniture:**If there is an absence of meaningful choice on the part of one of the parties and there are contract terms unreasonably favorable to the other party, then the contract is unconscionable and should be held unenforceable.Factors for absence of meaningful choice: 1) Gross inequality of bargaining power 2) Factors for unreasonably favorable terms |
| **Avoiding Enforcement: Public Policy**Sources of public policy = statutes, professional codes, cases, social mores and norms, etc.  | **R2: §§ 178-188****Generally:** **Factors in favor of enforcement:** parties’ justified expectations, forfeiture, special pub interest**Factors against:** strength of policy as a manifested by statutes or case law, likelihood refusal to enforce will further that policy | **Valley Medical Specialists v. Farber:**If a restriction is greater than necessary to protect the employer’s legitimate interest or if that interest is outweighed by the hardship to the employee and the likely injury to the public, then no enforceable contract (covenant)  |

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| **Principle/Theory** | **R2/UCC Provisions** | **Case Law/Holding** |
| Justification for Nonperformance: **Mistake**Mistake can be used to describe a variety of things: 1) refer to a decision that with hindsight turns out to have been wrong 2) describe a decision that has turned out to be “not the best choice” that could’ve been made 3) deals with the parties’ mistaken belief in certain agreed to terms | **R2:****§152:** Where a mistake of both parties at the time of contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake**§153:** Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of mistake§154: A party bears the risk of mistake when(a) The risk is allocated to him by the agreement OR (b) He is aware, at the time the contract is made OR (c) The risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so | **Lenawee County v. Messerly: Mutual Mistake**If both parties make a mistake at the time a contract is made and the mistake is as to a basic assumption on which the contract was made and the mistake has a material effect on the agreed exchange of performances, then the contract is voidable by the adversely affected party, unless he bears the risk of mistake.**Wil-Fred’s v. Metropolitan Sanitary District: Unilateral Mistake**If there is clear and positive evidence to the effect that the mistake relates to a material feature of the contract and the mistake occurred notwithstanding the exercise of reasonable care and the mistake is of such grave consequence that enforcement of the contract would be unconscionable and the non-mistaken party can be put in as good a position as it would have been prior to the promise on which the mistake was based, then there can be rescission on the ground of unilateral mistake. |
| Justification for Nonperformance:**Impossibility, Impracticability,** **Frustration**Something has happened that one or both of the parties had not anticipated and the one party will suffer a windfall loss or gain | **R2:** **§261:** After K is made, becomes impracticable without his fault by occurrence of event, the non-occurrence of which was a basic assumption of K, duty is discharged unless language of K indicates otherwise**§265:** “…After party’s principal purpose is substantially frustrated w/o his fault by occurrence of event…” | **Karl Wendt Farm Equip. v. International Harvester:** Court held that the mere lack of profit is not enough to satisfy a defense of impossibility. The unforeseen circumstance did not frustrate the primary purpose of the contract.**Mel Frank Tool v. Di-Chem:** A contract can only be avoided under the idea of frustration of purpose, when an obligee’s entire purpose for entering into a contract is frustrated. |
| Justification for Nonperformance: **Modification** Modification allowed only if there is consideration for the new promise | **R2 §89:** Promise modifying duties under K not fully performed may be binding if:a) modification is fair and equitable in view of circumstances not anticipated by parties when K is made; orb) to the extent provided by statute; orc) to extent justice requires enforcement in view of material change of position in reliance | **Alaska Packers v. Domenico:****Kelsey-Hayes v. Galtaco Redlaw:****Brookside Farms v. Mama Rizzo’s:**  |
| Consequences of Nonperformance: **Express Conditions**  |  **R2:** **§237** (comment d) 🡪If the parties “have made an event a condition of their agreement, [then] there is no mitigating standards of materiality or substantiality applicable to the non-occurrence of the event.**§236:** Condition may be by agreement of parties or by a term supplied by the court | **Oppenheimer v. Oppenheim:** Express conditions must be literally performed, whereas for constructive conditions (usually language of promise) substantial performance is sufficient. Express conditions must be formally interpreted and enforced by the court, even if harsh, unless pub policy requires they do not. (Exception allows equitable exception.) |
| Consequences for Nonperformance: **Material Breach** | **R2 §241:** Circumstances Significant in Determining Whether a Breach is Material: Extent of deprivation, extent of adequate compensation, extent of failure to perform, likelihood of self-initiated remedy, extent to which behavior comports with standards of good faith and fair dealing**See also: §§ 240, 235, 237, 238** | **Jacob & Youngs v. Kent:** If the parties have not expressly conditioned their duties and party A has substantially performed his duties under the K then A’s substantial performance constitutes satisfaction of the constructive condition on B’s duties UNLESS A is a willful transgressor. |