# Does the UCC apply?

Only to the Sale of Goods!!!

**UCC §2-105:**

**Goods**: all things which are movable at the time of identification to the K, other than money, investment securities, and things in action. Also includes unborn young of animals, growing crops and other identified things attached to realty that can be severed

**Sale**: consists of passing of a title in the transfer of money or goods  
**Merchant**: one who deals in the selling of the goods regularly

**-- UCC enables people to do business w/o cts saying that no K existed by making it easier to negotiate, leave the setting of certain terms for a future time**

\* UCC refers to buyers and sellers, so probably does NOT apply to lessors and lessees!

**\*To test for the sale of goods v. services, use the predominant factor test!!!**

UCC may be supplemented by common law 🡪 **UCC § 1-103**

# Statute of Frauds Issue?

**RST §§110 – 150**

**Purpose**: designed to [prevent](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=PREVENT&SearchType=MATCH) [fraud](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=FRAUD&SearchType=MATCH) and [perjury](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=PERJURY&SearchType=MATCH) by requiring certain contracts to be in [writing](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=WRITING&SearchType=MATCH) and signed by the [party to be charged](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=PARTY%20TO%20BE%20CHARGED&SearchType=MATCH) (person to be held liable)

**“Within the Statute”:** must be in writing/signed to be enforceable.

**“NOT within the Statute”:** a K not covered by the statute that may be oral agreement

**“Taken out of the Statute”:** a K covered by statute, but exception applies, so oral ok

* Δ uses violation as defense for breach, if disputing whether enforceable K existed.
* Violation does not make the contract void, just voidable by one of the parties in the event they do not wish to follow through with it.

**K’s Within Statute – Must be in Writing (M.Y.L.E.G.S.):**

**M** – **MARRIAGE**: made in [consideration](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=CONSIDERATION&SearchType=MATCH) of [marriage](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=MARRIAGE&SearchType=MATCH)

**Y –** **YEAR**: K that cannot be performed within one [year](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=YEAR&SearchType=MATCH) of its making; Must be *impossible* to perform w/n 1 yr. If possible, oral agreement ok.

**L** – **LAND**: xfer of an interest in land. Price/value doesn’t matter. ALL must be in writing.

**E** – **EXECUTOR**: of an [executor](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=EXECUTOR&SearchType=MATCH) or [administrator](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=ADMINISTRATOR&SearchType=MATCH) to [answer](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=ANSWER&SearchType=MATCH) for a decedent's [debt](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=DEBT&SearchType=MATCH)

**G** – **GOODS**: sale of [goods](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=GOODS&SearchType=MATCH) valued at $500 or more

***Exceptions*: Oral Agreement Enforceable IF …**

**UCC §**

**2-201**

* goods *specially mnf’d* for B and not suitable for sale to others and S has begun making (RELIANCE)
* If Δ admits during proceedings that K for goods was made
* If goods rcvd and accepted/paid for.

*\**If §2-201 not satisfied, whole K is unenforceable

**S** – **SURETY**: contract to [guarantee](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=GUARANTEE&SearchType=MATCH) the debt or [duty](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=DUTY&SearchType=MATCH) of another (cautionary/deterrent)

Other Exceptions:

* K for sale/purchase of security interest – does not need to be in writing
* K for sale of pers. prop. must have dmgs amount in writing if seeking remedy >$5K

# Basics: Enforceable K = Mutual Assent + Consideration

**Consideration**: legally sufficient element of exchange. A waiver of any legal right – action, promise, forbearance, suffrage

* Detriment should be considered in legal, not practical sense. Does not matter if benefits, as long as waived legal right ***(Hamer v. Sidway – stop drinking, etc.)***

**Bargain - RST §3**: agreement to exchange promises or to exchange a promise for a performance or to exchange performances

**Mutual Assent- RST §18**: Requires each party to make a promise or begin or render a performance

* Can be implied based on actions and nature of relationship 🡪 **RST §19**

**Bilateral K:**  promise for a promise – both parties limit choice

**Unilateral K:**  promise for an act – only 1 side bound at time of K. Other isn’t bound until performance. NO MUTUALITY

# Certainty:

* to be enforceable, terms must be reasonably definite and acceptance of offer reasonably certain
* If content of agreement is unduly uncertain and indefinite, no K **(RST § 33)**
* A K is sufficiently definite if ct. can reasonably determine intent of parties
* If essential terms too indefinite for ct. to determine meaning, no K
* Cts usually refuse to supply missing term when no standard available for implication

**Part performance**: may remove uncertainty to establish K **(RST § 34)**

**Reliance**: may make remedy appropriate even though no K b/c uncertain **(RST § 34)**

# No K if…

## No Intent to be Bound…

**RST § 20: Interpretation of Misunderstanding 🡪 Can mean NO K!**

1. No manifestation of mutual assent if parties attach materially different meanings and
   1. Neither knows/has reason to know meaning attached by other
   2. Each knows/has reason to know meaning attached by other
2. Manifestations = meaning attached by 1 party if

a/b. That party does not know (b- doesn’t have reason to know) of any different meaning attached by the other, and the other knows (b- has reason to know) the meaning attached by the 1st

(*Mayol v. Weiner Co.s* – buyer didn’t know tenant’s option to purchase)

**Comment a:** interpretation depends on context and prior experiences of the parties

**Comment b:** even w/ mutual assent to same words/agreement, may be no K b/c of material difference of understanding as to the terms of the exchange

(*Raffles v. Wichelhouse –* 2 ships named Peerless sailing at diff. times)

## Donative (Gift) Promise

### *(Dougherty v Salt – aunt’s gift of note to boy)*

* No consideration (usually made for affective reasons)
* Completed gift = valid and legally binding transaction (no longer promise)

## Nominal Consideration

*(Schnell v. Nell – 1 cent for $200)*

* Form, but not substance of bargain
* Clear promisor does not view what she gets as price of bargain
* ***Exceptions***: sometimes ok if paid; as consideration for option

## Duress

*(Austin Instrument v. Loral Corp. – higher price for Navy K )*

* a [wrongful](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=WRONGFUL&SearchType=MATCH) **threat** made by one person to compel a manifestation of seeming [assent](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=ASSENT&SearchType=MATCH) by another person to a [transaction](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=TRANSACTION&SearchType=MATCH) without [real](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=REAL&SearchType=MATCH) [volition](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=VOLITION&SearchType=MATCH). **RST §175**
* Not enforceable to full extent. Does not make K void, but voidable
* Physical compulsion **RST §174**
* Hard bargaining ≠ duress

## Unconscionability

*(Williams v. Walker-Thomas Furn. – repossessed stereo, etc)*

* Extreme unfairness assessed by one party’s lack of meaningful choice and K terms that unreasonably favor the other party
* Even if consideration and mutual assent, may not be enforced for reasons of public policy
* Gross inequality in bargaining power + terms unreasonably favorable to 1 party may confirm that transaction involved elements of deception or that 1 party had no meaningful choice.

**UCC § 2-302:** ct may refuse to enforce or limit enforcement based on unconscionability at time K made. Applies to whole or part. Parties allowed to present evidence as to commercial setting and purpose to aid court. **(RST § 208)**

### *Substantive*: unjust/1-sided K (high price) 🡪 results from actual K terms

### *Procedural*: “unfair surprise” – K formation (i.e. fine print)

## Past Consideration

(*Mills v. Wyman –* Δ promised to pay expenses AFTER Π took care of his son)

* Usually preexisting moral, not legal duty, so not enforceable
* Exceptions: promise to pay debt barred by statute of lims, discharged by bankruptcy, or incurred when underage

**RST § 86:** a promise for a benefit previously rcvd is binding to extent necessary to prevent injustice. NOT if gift or if no unjust enrichment

## Against Public Policy

(*In Re the Marriage of Witten –* dispute over embryos)

**RST § 178**

* Hesitant to enforce K’s for restraint of trade, impairment of family relations

## Conflicts w/ Statute

* K’s otherwise enforceable will not be enforced if term/interpretation/K as whole conflicts w/ a relevant state/fed. statute

## Illusory Promise

**RST § 77:** promise not consd if promisor reserves a choice of alt. performances (unless each alt perf = consd; or 1 alt = consd. and others likely to be eliminated)

* Both parties must be bound or neither bound (no mutuality)
* (*Wickhan & Burton Coal v Farmer’s Lumber* – buy as much coal as they pleased)

## Legal Duty Rule

(*Slattery –* got confession of shooter from polygraph – no reward b/c it was his job)

**RST § 73:** perf. of legal duty owed to promisor ≠ consd; but similar perf. IS consd. if from what was required by legal duty in a way which reflects more than pretense of bargain.

* Issue of public policy (danger of threats to withhold perf. of legal duty)
* Denies enforcement to some promises which would otherwise be valid

## Misrepresentation/Fraud (see p. 11)

# If no K, Always Look for…

## Reliance

**RST § 90:** a promise which should reas’ly be expected to induce action or forbearance, and does, is binding if injustice can be avoided only by enforcement of the promise. Remedy for breach may be limited as justice requires.

### Estoppel in Pais:

* Promisor prevented from denying truth of statement if
* Statement of facts + reliance + detriment results

### Promissory Estoppel:

* Promise + justifiable reliance + detriment suffered 🡪
* K enforceable as equity/justice requires
* Reliance treated as consd or as substitute for consd

(*Kirksey v. Kirksey –* promised land if she moved)

### Reliance Interest:

* Restore promisee to position as if K had never been made (see dmgs section)

## Unjust Enrichment/Benefit Conferred

**Restitution**: see dmgs section.

* Available for part performance, or unjust enrichment

# Implied-in-Fact K

* K implied based on **actions** of the parties
* Does not require unjust enrichment

(*Bastian v. Gafford* – requested plans for bldg., then claimed no K)

# Implied-in-Law K (Quasi-K)

**Purpose** – prevent **unjust enrichment**. 🡪 AS JUSTICE REQUIRES

* Not really a K, BUT obligations **imposed by law** on grounds of justice and equity.
* Usually for work performed or services rendered
* Dmgs determined by value of service (benefit rcvd) “Quantum meruit” – how much are they worth? (limited to restitution)
* Usually, **LIABILITY** only when services were ***requested or voluntarily accepted*** benefits – conduct must be conscious
* **EXCEPTION**: emergency aid (essential to health/safety)

(*Nursing Care Serv’s v. Dobos* – claimed didn’t accept services)

# Offer & Acceptance

Manifestation of mutual assent normally form of offer followed by acceptance **RST § 22**

# Offer: manifestation of willingness to enter a bargain, made to justify another person in understanding that his assent to that bargain is invited and will conclude it RST § 24

* May be revoked by offeror until accepted (comment a)
* Must be element of exchange (comment b)

**Preliminary negotiations**: not offer if other party has reason to know that offeror does not intend to conclude the bargain until he makes further manifestation of assent **RST § 26**

**Auctions:** auctioneer invites offers which he may accept/reject **(RST §28/ UCC § 2-328)**

* Offer of sale in paper must be “clear, definite, and explicit, leaving nothing open to negotiation” (*Lefkowitz –* offer in paper for furs for $1)
* Cannot impose new or arbitrary conditions after acceptance that were not contained in the published offer

## Revocation:

* Offeree’s power of **acceptance terminated** when he rcvs offeror’s manifestation of intention not to enter into proposed K **(RST § 42)**
* Revocation effective when offeror takes definite action inconsistent w/ an intention to enter K and **offeree acquires reliable info** to that effect

**(RST § 43)** (*Dickenson v. Dodds* – knew intended to revoke, but still tried to accept offer of land by designated time)

## Firm Offers UCC § 2-205

* Offer by merchant to buy/sell goods in signed writing that assures it will be held open is NOT REVOCABLE for lack of consideration
* For time stated, or reasonable time; neither to exceed 3 mos.

## Option K:

**RST § 25**

* Promise that meets requirements for a K, and limits promisor’s power to revoke
* Offer binding as option K if in writing, signed, and has consideration to make offer irrevocable **RST § 87(1)**

(*Hunt Foods* – bought option for $1K to buy shares, to prevent from selling to 3rd party – so they wouldn’t revoke offer to sell company)

* + - can be nominal consideration (comment b)
* Can use promissory estoppel to avoid injustice 🡪 reliance on offer **RST § 87(2)**

(*Ragosta v. Wilder* – reliance on offer to get funding)

**Part performance**: creates option K when offer invites acceptance by

performance **RST § 45**

* + - **Preparing to perform does not count**. Must be part of performance invited by offer. May constitute reliance, though. (comment f)

*(Ragosta v. Wilder)*

# Counter-Offer

* Offeree makes new offer to offeror relating to the same matter as original offer, and proposes a substitute bargain differing from the original

**RST § 39**

* Terminates power of acceptance for original offer, unless contrary intention was manifested
* Imposing any additional conditions on offer or proposing to limit it constitutes counter-offer, regardless of intention to accept (acceptance must be expressed unconditionally) (*Ardente v. Horan* – asked for furniture/fixtures = c/o)
* Counter-offer invites acceptance from original offeror

# Acceptance:

* Acceptance of an offer completes a K

Acceptance = **Manifestation of Intent to be Bound** by Offer

**RST § 50**

* Accept by performance – must tender partial performance
* Accept by promise – must complete every act essential to making of promise

## Terminate Power of Acceptance by:

1. Rejection or counter-offer by offeree

**RST § 36**

1. Lapse of time (either fixed in K or reasonable under circumstances) **(RST § 41)**

(*Akers v JB Sedberry* – did not accept offer to resign)

1. Revocation by offeror
2. Death/incapacity by either offeror or offeree
3. Non-occurrence of condition of acceptance under offer

## Acceptance through Silence: RST § 69

General rule is that silence is NOT acceptance.

**Exceptions**:

* + - When offeree ***takes benefit*** of offer w/ reasonable opportunity to reject and reason to know they were offered w/ ***expectation of compensation***

(*Register.com v. Verio* – saw terms after downloading every time)

* + - When offeror states or gives reason to understand that assent may be manifested by silence/inaction, and offeree in doing so intends to accept
    - b/c of ***previous dealings***, or otherwise, reasonable that offeree should notify offeror if he does not accept
    - If offeree does any act inconsistent w/ offeror’s ownership, he is bound by offer

## Mailbox Rule:

* acceptance effective when dispatched; revocation effective when rcvd
* issues arise when mail is delayed
* protects offeree against revocation once acceptance is dispatched
* places risk of lost communication on the offeror

**Offer and Acceptance in Sale of Goods:**

* Offer invites acceptance in **any reasonable manner**

**UCC**

**§ 2-206**

* If beginning performance is reasonable mode of acceptance, offeror who is not notified of acceptance w/n reasonable time may treat offer as having lapsed before acceptance
* Definite, seasonable expression of acceptance = acceptance, even if additional terms, unless expressly made conditional on add’l terms

**UCC**

**§ 2-207**

* **Conduct** by both parties recognizing existence of K establishes K, even if writings don’t.

# Sale of Goods – UCC Gap-Fillers

## Formation in General: UCC § 2-204

1. K for sale of goods may be made in any manner sufficient to show agreement, including conduct which recognizes existence of K
2. K can exist even though moment of making is undetermined
3. Even if 1 or more terms undetermined, does not fail for indefiniteness if intended to make K and reasonably **certain** basis for remedy

## Open Price Term: UCC § 2-305

## Absence of Specified Place for Delivery UCC § 2-308

## Absence of Specific Time Provisions; Notice of Termination UCC § 2-309

## Open Time for Payment, etc. UCC § 2-310

# Battle of the Forms…

## Mirror-Image Rule

*Classical K Law:*

* any difference b/t offer and proposed acceptance prevents K formation
* but, offer could be accepted through conduct (manifestation of assent), so…

1st form = offer, 2nd form = counter-offer, good shipped and accepted pursuant to counter-offer (so last one wins) 🡪 favors sellers

## UCC § 2-207:

Not triggered unless there is an acceptance!!!

* Return form usually = acceptance (not counteroffer)
* Different than common law in order to promote modern bus. transactions
* Not limited to K’s w/ use of forms, but limited to instances of **offer/acceptance**
* **K formed** when merchants exchange preprinted forms and **essential terms agree**
* **Counter-offer** if terms differ radically or **expressed condition of assent**
* **Expressly conditional?** – dependant upon commercial context of transaction 🡪

Can offeror reas’ly believe that in context of commercial setting in which they were acting, that a K had been formed?

**2) Additional Terms in Acceptance become part of K (b/t merchants) unless…**

#### Offer expressly limits acceptance to terms of offer;

#### They materially alter it

* if it would result in ‘surprise or hardship’ (i.e. indemnity clause w/o express awareness)
* Acceptance must be *expressly* conditional on *assent* to new terms
* Or, offeree must demonstrate unwillingness to proceed w/ transaction unless the add’l or diff. terms are included in the K

#### Give notification of objection w/n reasonable time

**3) Conduct** recognizing existence of K is sufficient, even if writings don’t

* K will include consistent terms, plus supplemented by other provisions

**Knock-out rule**: conflicting terms cancel each other out and other provisions of UCC control **(Comment 6)**

# Duty to Read Rule:

* a person cannot avoid terms of a K on the ground that he failed to read it before signing. **(RST § 201)**

**Exception**: when writing does not appear to be a K and the terms are not called to the attention of the recipient. No K is formed w/ respect to the undisclosed term.

BINARY ANALYSIS of § 2-207

Q1: Was there an acceptance? Or, is 2nd communication a counter-offer?

Q2: Was acceptance conditional on assent to add’l/diff. terms?

Q3: if yes, counter-offer 🡪 was c/o accepted by other party?

If no, are there add’l terms, or are they different? Diff = Conflicting

Q4: If add’l, is K b/t merchants? 🡪 YES 🡪 do any exceptions apply (i.e. materially alter)

If diff. 🡪 “knock-out” rule (Comment 6) – majority rule

# Interpretation: ascertainment of meaning of promise/agreement (RST §200)

* Only intention that matters is the one **manifested outwardly**. Any undisclosed intention is irrelevant to interpretation. (comment b)

**Plain Meaning Rule** – classical rule that K interpreted based on words used, unless ambiguous

POLICY: allowed people to rely that K’s will be enforced based on words in K, and not later be construed as meaning something else.

**Modern View**:

* Must avoid placing court’s meaning instead of parties’
* If ev. shows that K susceptible to 2 poss. meanings, then ev. should be allowed
* Extrinsic ev. is broader than parol ev.
* Extrinsic includes ev. of other agreements and circumstances

**4 Principles of Interpretation:**

* 1. **RST § 201(2)(b):** If parties attach **diff**. meanings, neither knows the other attaches a

diff. meaning, and 2 meanings are **not equally reasonable**, the

***more* *reasonable*** meaning prevails (*Frigaliment* chicken case)

* 1. **RST § 20(1):** If parties attach **diff**. meanings, neither knows the other attached a diff.

meaning, and 2 are **equally reasonable**, ***neither*** meaning prevails.

*(Raffles v. Wichelhouse – 2 ships named Peerless sailing at diff. times)*

* 1. **RST § 201(1):** If parties attach **same** meaning, that meaning prevails,

***even if unreasonable***.

* 1. **RST § 201(2):** If parties attach **diff**. meanings, and **1 knows** (or has reason to know) the

other has diff. meaning, but the other is unaware, the meaning attached

by the ***latter prevails***, ***even if less reasonable***.

*(Lucy v. Zehmer – claimed K to sell land was joke)*

**To Determine Meaning – RST § 202**:

1. Look at word in K
2. Other written correspondence b/t the parties in the transaction
3. General prevailing meaning, trade usage (expert testimony)
4. Course of performance (how parties have acted)
5. When reasonable, intentions of parties should be consistent w/ each other, course of performance, course of dealing, trade usage.

**RST § 203(b): Standards of Preference:**

**Express terms** 🡪**course of performance** 🡪 course of dealing 🡪 trade usage

(Same as UCC. See above.)

* Terms supplied on forms given less weight than negotiated terms
* Meaning of **missing term essential** to K supplied by the court **RST § 204**
* If missing term is for duration of K, ct will determine *reasonable* amount of time (*Haines v. NY* – extending sewage line, no perpetual performance)

# Mistake

**Mistake: A belief that is not in accord with the facts 🡪 RST § 151**

**Mistakes are made BEFORE K formation! (unexpected circumstances AFTER)**

## Unilateral Mistake (Mechanical Errors)

(*Donovan v. RRL Corp.* – ad for Jaguar at really low price)

### K is Voidable when… RST § 153

A mistake of 1 party at time K made as to a basic assumption on which he made K

* w/ material effect on agreed exchange of performances that is adverse to him
* K is voidable by him IF he does not bear risk of mistake, and
  + - Effect of mistake would make K unconscionable, OR
    - Other party had reason to know of mistake, or it was his fault

### Party Bears Risk of Mistake when… RST § 154

* Risk allocated to him in agreement
* Knew that he had limited knowledge of facts relating to mistake when K was made, but treated it as sufficient
* Court allocates risk to him b/c reasonable (*public policy*)
* **Reliance dmgs** sometimes available for party who did not make mistake, if offer is then rescinded. (promissory estoppel)
* Also look to see if ther was **unjust enrichment**.

## Mistake in Transcription 🡪Reformation

(*Traveler’s Ins. v. Baily* – wrong terms on form for life insurance policy when child)

A mistake in transcribing the K may be corrected, under some circumstances, by reforming the K.

* Party seeking reformation has duty of establishing **beyond reasonable doubt**, the true agreement to which K in Q is to be reformed
* Generally, neither parol ev. rule nor the Statute of Frauds applies to bar proof
* Reformation based on mistake not allowed when parties purposefully K based upon uncertain or contingent events
* V. high order of ev. is required to overcome presumption that writing was manifestation of true mutual intentions.

**Reformation Okay When: RST § 155**

1. Writing fails to express agreement of b/c mutual mistake

(if mistake unknown to both parties, it is mutual)

1. No 3rd parties unfairly affected

## Mutual Mistake RST § 152

(*Sherwood v. Walker* – barren cow is basic, material assumption)

* If **mutual** mistake about **material** fact, K is voidable by adversely affected party, *unless* he bears the risk of mistake (above, RST § 154)
* To determine whether mistake has material effect, account is taken of any relief of any relief by way of reformation, restitution, or otherwise.
  + - To void, mistake must be about **basic assumption** (changes in market and financial situation of parties usually don’t count) (comment b)
    - Compare to breach of warranty – that’s usually better for buyers (cmnt. g)

## Nondisclosure/Misrepresentation

**Misrepresentation**: an assertion that is not in accord w/ the facts **(RST § 159)**

* Includes element of reliance

**Concealment:** action intended/known to be likely to prevent another from learning a fact is equivalent to misrepresentation **(RST § 160)**

* Idea that bargains should be enforced according to their terms is most secure on a foundation of complete info.
* Requiring disclosure avoids socially wasteful transaction costs

**NONDISCLOSURE: RST § 161**

* Nondisclosure = Misrepresentation (disclosure required) when:

**(a)** necessary to prevent assertion from being a ***misrepresentation*** or from being ***fraudulent*** or ***material***

- duty to disclose when discover statement was not true, is no longer true, or learn of reliance on statement **(comment c)**

**(b)** would correct mistake of other party as to ***basic assumption*** of K, and nondisclosure would be failure to act in ***good faith*** and in accordance

w/ ***fair dealing***

- seller expected to disclose defects of quality that would probably prevent buyer from buying at K price **(comment d)**

- Don’t have to disclose everything. Expect other party to take normal steps to inform himself and to draw his own conclusions **(comment d)**

**(c)** would correct mistake of other party as to the ***contents/effect of a writing*** of the agreement

**(d)** other person is entitled to know the fact b/c of a ***relation of trust*** and confidence b/t them

- normally b/t members of same family, doctor/patient, suretyship or guaranty, joint venture, etc.

* If disclosure expected, not enough to make reasonable effort to disclose. Must be ACTUAL **(comment a)**
* **Liability is narrower for nondisclosure than for misrepresentation.**

**MISREPRESENTATION**:

1. **Fraudulent** when: intends assertion to induce assent and knows/believes assertion is misrepresentation, or does not have confidence in assertion that he seems to have, or knows he does not have basis for assertion

**RST**

**§ 162**

1. **Material** when: likely to induce reasonable person to manifest assent

**No K formed when**: goes to character of essential terms and induces assent by one who neither knows or has reason to know of true character – Conduct NOT effective as manifestation of assent **(RST § 163)**

**Voids K when: (RST § 164)**

1. Manifestation of assent induced by fraudulent/material misrep., w/ justifiable reliance
2. 3rd party makes fraudulent/material misrep. Causing assent w/ justifiable reliance, unless other party to transaction gives good value or relies materially on transaction w/ good faith and no knowledge of misrep

# Parol Evidence Rule…

*The* [*common-law*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=COMMON%20LAW&SearchType=MATCH)[*principle*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=PRINCIPLE&SearchType=MATCH) *that a* [*writing*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=WRITING&SearchType=MATCH) *intended by the parties to be a* [*final*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=FINAL&SearchType=MATCH)[*embodiment*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=EMBODIMENT&SearchType=MATCH) *of their* [*agreement*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=AGREEMENT&SearchType=MATCH)***cannot be modified by*** [***evidence***](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=EVIDENCE&SearchType=MATCH) ***of earlier or contemporaneous agreements*** *that might* [*add*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=ADD&SearchType=MATCH) *to, vary, or contradict the writing. Usually* [*prevent*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=PREVENT&SearchType=MATCH)*s a* [*party*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=PARTY&SearchType=MATCH) *from introducing* [*extrinsic evidence*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=EXTRINSIC%20EVIDENCE&SearchType=MATCH) *of negotiations that occurred before or while the agreement was being reduced to its final written* [*form*](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=FORM&SearchType=MATCH)*. (from Black’s)*

* deviations prior to or contemporaneous to written K = parol evidence problem.
* deviations after K = modification problem

**Merger Clause:** clause saying that K is completely integrated – final expression

* Does not necessarily entail that the K is integrated. Can sometimes argue that a party was not aware that the clause was there (if it is in fine print on back, etc.)

## Integrated Agreements:

* **If writing is determined to be fully integrated, parol evidence is not admissible.**
* When only part is integrated, same applies to that part.
* Q for COURT 🡪 If partially integrated, supp. terms, etc. are given to jury to determine intent/meaning

**RST § 209:**

1. writing that is a **final expression** of one or more terms of an agreement
2. determine whether integrated before Q of interpretation or application of parol ev.
3. if parties have agreement in writing that is **complete and specific** enough to appear to be a complete agreement, taken as integrated unless it is established by other ev. that writing ≠ final expression

**RST § 210:**

1. **Completely integrated** agreement is adopted by parties as complete and exclusive statement of terms
2. Consistent additional terms not reduced to writing may still be shown (Comment a)
3. **Partially integrated** agreement 🡪any agreement integrated, but not completely
4. Determined by ct. b4 interpretation or app. of parol ev. rule

## Parol Evidence Rule:

1. Parol ev. can be used to prove elements not in writing
2. allow consistent additional terms to be proven (if only partially integrated)

**RST § 213:**

1. No ev. of prior agreements allowed if **inconsistent** w/ integrated agreement

(*Masterson* – allowed ev. that deed not meant to be assignable b/c consistent)

1. No ev. of prior agreements **w/n scope** of integrated agreement

(*Mitchell v. Lath* – ev. of promise to remove icehouse not allowed b/c should have been in written agreement)

1. If integrated agreement not binding or voidable, parol ev. okay, but terms in int. agreement given more weight.

**Parol Evidence Allowed to Establish… RST § 214**

#### that writing is or is not an integrated agreement

#### whether completely/partially integrated

#### The meaning of writing, whether or not integrated

#### Illegality, fraud, duress, mistake, lack of consideration, etc.

#### Ground for granting/denying rescission, reformation, spec. perf., or other remedy

* **Contradictory** evidence prior to/contemporaneous with integrated terms not

allowed **RST § 215**

* **Consistent add’l terms** allowed to supplement, unless completely integrated

**RST § 216**

* **NOT completely integrated** if it omits a consistent add’l term which
  + is agreed to for separate consideration or
  + might naturally be omitted under circumstances
* Cts are liberal in allowing admission of consistent terms and recognizing those terms as consistent 🡪 indicates that they are not too fond of P.E. Rule (as Corbin)

**YES**-------------- **Is K integrated?** ------------**NO** (PE admissible)

**🡫**

Complete or Partial? **🡪** Does it contradict? (§ 215)**🡪** **NO** (PE admissible)

**🡫** **🡫**

Is ev. w/n scope? **🡪NO** (PE ok) **YES** (No P.E.)

**🡫**

**YES** (No P.E.)

## Parol Evidence in Sale of Goods UCC § 2-202

Express terms in writing intended by parties as a final expression of their agreement may not be contradicted by ev. of any prior or contemporaneous agreement, but may be explained/supplemented by:

(a) **Course of performance**, **course of dealing**, **usage of trade**

* assumption that these were taken for granted when writing created, so unless carefully negated, they become an element of meaning of words used
* course of performance considered best indication of intentions (comment 2)

(b) Ev. of **consistent add’l terms**, unless writing was complete and exclusive statement of terms of agreement

(*Hunt Foods* – ev. allowed that option only to be used if Δ solicited outside offer)

* If consistent add’l terms would definitely have been included, must be kept from trier of fact (comment 3)

**Course of performance:** action of parties in carrying out K at issue **(UCC § 2-208)**

**Course of dealing**: relations b/t parties *prior* to signing that K (**UCC § 1-205)**

**Usage of Trade:** practice/method of dealing regularly observed in a place, vocation, or trade, so as to justify expectation that it will be observed in transaction in question (**UCC § 1-205)**

**Agreement**: bargain in fact as found in parties’ language or implication from other circumstances including course of dealing, usage of trade, or course of perf. **(UCC § 1-201 – definitions)**

* Order of preference to consider is based upon the importance given to the intent of the particular parties in the particular K or agreement.
* can always consider usage of trade, course of perf., course of dealing, but

EXPRESS TERMS TRUMP ALL

* These are imp. enough to *always* be admitted, even for final/complete agreement. But, not binding on parties if cannot reasonably be reconciled w/ express terms of K.
* Express terms control if inconsistent, but if not in conflict, they don’t have to control
* Whether express terms and usage of trade contradict or conflict is the hard Q!

# WARRANTIES

* K’s for sale include warranty that seller is rightful owner, and have no liens, etc. unless expressly stated otherwise in K. **(UCC § 2-312)**

## Express Warranties: (UCC § 2-313)

* Goods **shall conform** to any affirmation of fact, promise, description of goods, sample or model, on which bargain is based.
* Statement of seller’s opinion ≠ warranty
* But, don’t have to use words ‘warranty,’ ‘guarantee,’ etc.
  + Rests on “dickered terms” 🡪 disclaimer on form repugnant to individual bargain **(comment 1)**

## Implied Warranties of MERCHANTABILITY: (UCC § 2-314)

* Goods sold by merchants have implied warranty of **merchantability**. (includes food) Must T4 at least…
  + Pass w/o objection into trade under K description
  + Fungible goods 🡪 fair average quality w/n the description
  + Fit for ordinary purposes for which such goods are to be used
  + w/n variations of agreement, be of uniform kind, quality and quantity
  + be adequately contained, packaged, and labeled as required by agreement
  + conform to promises or statements of fact made on container/label
* other implied warranties may arise from **course of dealing** or **usage of trade** (unless excluded or modified)

## Implied Warranty: FITNESS for PURPOSE (UCC § 2-315)

* If seller has reason to know buyer is **RELYING** **on his judgment** to select suitable goods for particular purpose, there is **implied warranty** that goods shall be fit for such purpose.

## Exclusion or Modification of Warranty: (UCC § 2-316)

# CONDITIONS An event, not certain to occur, which must occur, b4 performance under a K becomes due. RST § 224

**§ 226:** made either by agreement of parties (***expressed***) or term supplied by ct (***implied***)

**§ 225: (1)** Obligation to perform is triggered by condition or excused by ***waiver***

**(2)** Non-occurrence of condition discharges duty

* Must be accepted by both parties
* K formed at agreement, obligation to perform after condition met

(*Clark v. West –* wrote law books w/ condition to abstain from drinking)

* failure to perform a condition does not itself give rise to dmgs!
* If not a condition, it is a promise, which breaching can still give rise to dmgs. Or, if a material breach, can still rescind the K

**Express Condition**: explicit contractual provision that either 1) a party does not come under a duty to perform unless and until some designated state of affairs occurs or fails to occur; or 2) if some designated state of affairs occurs or fails to occur, a party’s duty to perform is suspended or terminated

**REASONING**: neither party is willing to promise that the state of affairs in Q will occur, or to avoid the doctrine of *substantial performance*

***Condition precedent***: an act or event, other than lapse of time, which, unless condition is excused, must occur before a duty to perform a promise in the agreement arises.

1. Most describe acts/events that must occur before a party is obliged to perform a promise made pursuant to an existing K
2. Some are condition to the formation of the K itself

***Express Condition:*** agreed to and imposed by the parties themselves. Must be literally performed. Uses words “if,” “unless and until”

***Implied Conditions:*** imposed by law to do justice; usually arise from language of promise. Subject to the precept that subst’l compliance is sufficient.

**Interpretation of Conditions** 🡪 **RST § 227**

* Interpretation preferred that reduces risk of forfeiture, unless assumed the risk or event is w/n his control
* Prefer interpretation that duty imposed on oblige that an even occur, if w/n his control, rather than event being condition of obligor’s duty or combo of 2.

## Satisfaction Clause as Condition: RST §228

* if practicable to determine whether reas. person would be satisfied, interpretation is preferred from viewpoint of reas. person (Criteria not whether owner satisfied in fact, but whether reas. person should have been satisfied)
* Lack of approval must be 1) **reasonable** and 2) done in **good faith** (personal aesthetics/fancy)
* requirement not read into every K b/c not always reliable guide to parties’ intentions
* satisfaction clause = express condition 🡪 must be strictly performed
* reasonable person standard does not apply when clear parties intended satisfaction dependent upon individual’s **aesthetic taste** (painting house, etc.)

## Waiver: voluntary abandonment/relinquishment of some right/advantage

* Expressed or implied through actions (*Clark v. West*)
* Usually, waive conditions w/o consideration

**UCC §2-209(4):** Can be attempted modification/rescission that does not meet the statute of frauds

**UCC §2-209(5):** Can **retract** waiver if reasonable notification rcvd by other party that strict performance will be required of any term waived

* Cannot retract waiver if detrimental **reliance** to other party

## Forfeiture:

* A [destruction](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=DESTRUCTION&SearchType=MATCH) or [deprivation](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=DEPRIVATION&SearchType=MATCH) of some [estate](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=ESTATE&SearchType=MATCH) or [right](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=RIGHT&SearchType=MATCH) because of the [failure to perform](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=FAILURE%20TO%20PERFORM&SearchType=MATCH) some [obligation](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=OBLIGATION&SearchType=MATCH) or [condition](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=CONDITION&SearchType=MATCH) contained in a [contract](https://www.blackslawdictionary.com/Content/SearchResults.aspx?SearchString=CONTRACT&SearchType=MATCH).
* General legal policy opposed to forfeitures

## Modification:

1st determine legal duty. If honest dispute about pre-existing K, parties may create new K requiring different duties. This is modification.

**RST § 89:** Promise modifying duty under a K ***not fully performed*** on either side is binding

**(a)** if it is fair and equitable in view of circumstances not anticipated by parties when K made; or

**(b)** to extent covered by statute

**(c)** to extent justice requires in view of material change of position in reliance on the promise

* Must be modified before there is full performance on either side

**Generally enforced when:**

* Unexpected/unanticipated difficulties arise during contract
* Parties voluntarily agree to modification
* No duress/coercion – fair and equitable

**UCC §2-209:**

**(1)** No consideration needed for modification

**(2)** Original K can require modification/rescission to be in writing

**(3)** Statute of frauds applies to modifications

**Comment 2:** must meet test of good faith, even though no consideration

# Material Breach

* If one party breaches before they have substantially performed, the other party may

1) rescind the K 🡪 breaching party will not be allowed to sue for dmgs

2) sue for specific perf.,

3) sue for dmgs

* When material breach, but not substantial performance, breaching party is entitled to restitution for value of any benefit conferred on the other party.

## Factors Determining Whether Breach is Material (RST § 241)

* Extent injured party will be deprived of benefit of bargain
* Extent to which compensation is possible for benefit deprived
* Extent to which party not performing will suffer forfeiture
* Likelihood of cure
* Existence of good faith/fair dealing

## Perfect-Tender Rule: common-law rule that buyer could reject any tender of delivery that was not perfect. (replaces doctrine of subst’l perf.)

**UCC § 2-601**: Buyer may reject goods/tender that fail in any respect to conform to K, BUT harshness of this section is mitigated by other provisions (subject to)

## Breach of Warranty:

* buyer may **revoke acceptance** only if nonconformity subst’ly impairs value of goods

**UCC**

**§ 2-608**

* If buyer knew goods nonconforming, can only revoke acceptance if she reasonably assumed it would be cured.
* Can only reject **installment** if substantially impairs value and can’t be cured **(UCC § 2-612)**
* **CURE**: **UCC § 2-508**
* seller may **cure** defect by making conforming delivery w/n K time, OR if goods rejected and seller had reasonable grounds to believe that they would be accepted, can cure w/n reasonable time, even after K time has expired

(*TW Oil* – oil w/ .9% sulfur content allowed to cure)

* Cure must meet perfect tender requirement to be valid

**Purpose**: safeguard seller against surprise as a result of sudden technicality on part of the buyer.

* + Revised in 2003, but not adopted by any states. (replaced seller believing that goods would be acceptable w/ acting in good faith)

## Order of Performance RST §234

1) if possible, performances of both parties due simultaneously.

2) If 1 party’s performance requires a period of time, his performance is due at an earlier time than the other party.

**UCC §2-507; 2-511**

# Substantial Performance

\*Sometimes said that there is an implied condition of subst’l perf. in every K.

* If one party substantially performs under a K, the other party may not rescind the K.
* Converse is material breach, which can lead to rescission. (see above)
* Gen. rule for building K’s requires complete performance. Subst’l perf. is exception.
* Contractor must have made a good faith effort to perform and have subst’ly performed. Only granted on this theory when problems inconsiderable and not fault of contractor.

***Jacob & Youngs v. Kent***(diff. brand of pipe in house)

**Weigh**: 1) purpose to be served, 2) desire to be gratified, 3) excuse for deviation from the letter, 4) the cruelty of enforced adherence.

* If willful detour from K, penalty enforced in full
* BUT if **unintentional/trivial**, can be shown mercy 🡪 pay for diff. in value instead of cost of replacement *(like Peevyhouse)*

***Grun Roofing (1975)***: (yellow-streaked roof)

* buyer should not be compelled to accept something less than what he K’d for. T4, especially w/ homes, variations are unacceptable; but, incompleteness or deviations that are easily remedied may constitute substantial performance.
* No restitution if buyer has to replace completely, b/c no benefit.

# Good Faith

**“Every K imposes upon each party a duty of good faith and fair dealing in its performance and enforcement” 🡪 RST § 205**

**Good Faith:** honesty in fact in the conduct or transaction concerned **(UCC § 1-201)**

* For ***merchants***, means honesty in fact and the observance of reasonable ***commercial standards*** of fair dealing in the trade **(UCC § 2-103)**

**\*\*\***Every conduct/duty w/n UCC imposes an obligation of good faith in its performance or enforcement **(UCC § 1-203)**

* What is the community in which the K was formed and performed, and what is the standard? Can look at usage of trade.

**3 Views of Good Faith:**

1. limitation on exercise of discretion conferred on a party
2. Proscribes behaviors which violate basic standards of decency
3. Basis of implied term to fill a gap or deal w/ an omitted case

***Patterson v. Meyerhofer*** (bought homes at auction other party was supposed to)

* every K has implied undertaking on part of each party that he will not intentionally do anything to prevent the other party from carrying out the agreement on his part.
* Party who causes/sanctions breach is thereby precluded from recovering dmgs for its nonperformance or from interposing it as a defense

***Best v. US Nat’l Bank***(raised fees w/o notifying)

* Discretion of one party has to be exercised w/n reasonable expectations of the other party
* (Application depends to at least some extent on subject matter of the K.)
  + - Enforce essential purpose of Ks, eliminate trivial excuses for nonperformance

# Unexpected Circumstances

* **Become an issue AFTER performance has begun (mistake is before)**

## Impossibility

(*Taylor v. Caldwll* – music hall burned down)

If performance impossible due to non-existence of necessary element of K, parties are excused from performing the K (could still get restitution – liquidated dmgs, etc.)

* Compare to implied condition (that thing will still exist, etc.)
* NOW, usually replaced by 🡫

## Impracticability

* A legal impossibility b/c can only be done at an excessive/unreasonable cost
* Party’s duty to perform is discharged when an event occurs, the non-occurrence of which was a *basic assumption* of the K, and performance becomes impracticable (unless it shouldn’t) **(RST § 261)**

(*Transatlantic Financing –* no impracticability b/c closure of pass foreseeable)

* Death/incapacity of necessary person 🡪 **RST § 262**
* Destruction, Deterioration, failure of thing to come into existence 🡪 **RST § 263**

(compare to *Taylor v. Caldwall*, above)

* Prevention by govnt’l regulation/order 🡪 **RST § 264**

**UCC § 2-615 – Impracticability**

Unless seller has greater obligation, or is able to substitute performance **(§2-614),**

**(a)** **Delay in delivery or nondelivery** is NOT a breach if performance made impracticable by occurrence of contingency, nonoccurrence of which was a basic assumption of K, or by compliance in good faith w/ foreign/domestic regulation/order, whether or not invalid

**(b)** If impracticability affects **only part of seller’s ability to perform**, he must allocate production and delivery among customers

**(c)** Seller must **notify buyer seasonably** of delay or non-delivery, and if allocation is required, must inform buyer of estimated quota for him.

**(C #4)**

- Increased costs alone don’t count, unless due to some unforeseen occurrence which alters essential nature of performance

- Neither are market fluctuations, b/c should be accounted for in K price

- But, war, embargo, local crop failure, unforeseen supply source shutdown, can count

**Risk of Loss:**

**(1)** Seller shipping goods by carrier:

**(a)** If not required to deliver to particular place, risk of loss passes to buyer when goods delivered to carrier.

**(b)** If REQUIRED to deliver to particular place, risk of loss passes to buyer only when he actually takes delivery

Etc…

## Frustration

* If party’s principal purpose is substantially frustrated w/o his fault by event not assumed to happen, remaining duties discharged, unless language or other circumstances indicate to contrary **(RST § 265)**
* Impracticable performance w/o fault, w/ no reason to know, no duty to render performance arises unless… to the contrary **(RST § 266)**
* Impracticability may discharge other party’s duty to perform, unless assumed the risk **(RST § 267)**
* Temporary frustration/impracticability only discharges duty to perform temporarily, unless made materially more burdensome **(RST § 269)**
* If only partially impracticable, duty remains to render remaining part **(RST § 270)**

# Employment-At-Will

**RULE**: Generally, cannot bring action for wrongful termination of emp-at-will K

**EXCEPTIONS:**

1. **Public Policy** 🡪 Can bring action when termination based on something which is against pub. policy. Determined by statutes, state constitutions, and jud. decisions
2. interests of society as a whole will be promoted if employers are forbidden to fire for cause which is “morally wrong”
3. may not fire for bad cause – which violated pub. policy

(*Wagenseller* – refused to moon on camping trip, then fired)

1. **Personnel Policy Manuel** 🡪 implied terms that limit rt of discharge 🡪 **Implied in Fact.** – manual can become part of emp. K. **Q of fact for jury!**
2. **“Good Faith & Fair Dealing”** 🡪 requires that neither party do anything that will injure the rt of the other to rcv the benefits of agreement ***(Ct does not accept)***

* Also prohibited: 3rd party interference w/ emp.-at-will Ks – “not at will of others”
* Rt. of 1 party to terminate at will does not invalidate the K
* Majority of jursd. say employer may terminate or modify a K w/ no fixed duration period after a reasonable time period, if it provides ee’s w/ reasonable notice, and modification does not interfere w/ vested ee benefits

🡪 continuing to work may constitute acceptance of modification

* **Disclaimers** can take away liability, but must be designed to attract attention

# Factors Determining Damages:

**Purpose**: to compensate injured (non-breaching) party

## Protect INTERESTS of a promisee: RST § 344

#### Expectation: benefit of the bargain by being put in as good a position as if

#### the K had been performed

#### Reliance: reimbursed for loss caused by reliance on K, put in as good a

#### position as if K had not been made

#### Restitution: restore any benefit conferred on other party

* **Nominal dmgs** available if breach causes no loss or loss not proved **(RST § 346)**
* **Punitive dmgs** generally not awarded, unless also a tort (or for fraud) b/c purpose is to compensate victim, not punish breaching party **(RST § 355)**
* Most K’s don’t address dmgs. Left to courts (those that do are liquidated dmgs)
* Usually easier to determine value of performance than reliance. K price is known, forgone price is speculative
* **Interest** usually awarded, determined from time performance was due

## Mitigation:

* Breaching party not liable for dmgs which need not be incurred

(*Rockingham County v. Luten Bridge Co.* – finished bridge after breach)

**RST**

**§ 350**

* No dmgs for loss that could’ve been avoided w/o undue burden, risk, humiliation
* Can still recover if attempt to mitigate, but unsuccessful
* Not obliged to mitigate w/ inferior product. *(Shirley Maclaine v. 20th Cent. Fox)*

**COVER… UCC § 2-712**

1. In good faith, w/o unreasonable delay, buyer may purchase or K to purchase substitute goods (cover)
2. Dmgs = difference b/t cost of cover and K price, plus incidental/consequential
3. Failure to cover does not bar buyer from other remedies.

## Foreseeability RST § 351

Dmgs NOT recoverable unless at time K made, breaching party had reason to foresee loss (*Hadley v. Baxendale –* broken crankshaft and delivery service)

* In ordinary course of events
* As result of special circumstances that breaching party *had reason to know*
* To avoid disproportionate compensation, ct may exclude dmgs for lost profits or limit recovery to loss incurred in reliance

## Certainty RST § 352

* Dmgs must be established w/ reasonable certainty in order to recover

## Mental Distress RST § 353

* generally, dmgs not awarded for K. Breach usually involves some annoyance
* Can be awarded in exceptional circumstances (breach to marry, deliver baby by c-section, etc.), BUT usually covered by tort actions
* Must be w/n contemplation of parties (foreseeable), and particularly likely

## Liquidated Damages

* Allows parties to control risk; courts don’t have to determine dmgs

**RST § 356:** K can state dmgs in case of breach, but must be **reasonable** based on

**foreseeable** loss

* + Terms for unreasonably large liquidated dmgs construed as penalty and not enforced on grounds of public policy. Dmgs only for reasonable amount
  + Can also get specific perf. **(RST § 361)**

**UCC §2-718:** dmgs may be liquidated in K if reasonable in light of:

* + Foreseeable harm
  + Difficulties of proof of loss
  + Inconvenience/nonfeasiblity of otherwise obtaining adequate remedy

(*Wasserman’s v. Middletown –* cancellation clause for lease requiring dmgs)

* Unreasonably large term void as penalty; unreasonably small term may be stricken as unconscionable
* **Deposits**: breaching buyer entitled to **restitution** of deposit when seller justifiably

withholds delivery

# Specific Performance

# (*Walgreen v. Sara Creek Prop*. – don’t allow competitor)

* Balance b/t ability to calculate dmgs and ability for ct. to supervise
* Does not have to be identical to performance required by the K, can be granted for part or whole. Other dmgs allowed in addition to s. perf. **(RST § 358)**

## Generally, GRANTED:

* + - At court’s discretion **(RST § 357)**
    - K terms must be sufficiently **certain (RST § 362)**
    - Matters of high importance
    - Matters that benefit pub. interest/welfare
    - Land K’s
    - Unique goods **(UCC § 2-716)**

## Generally, NOT GRANTED when:

* + - Dmgs easy to calculate
    - **Supervision** by court difficult **(RST § 366)**
    - Dmgs **ADEQUATE** to protect expectation interest **(RST § 359)**
      * Not for construction Ks b/c dmgs usually adequate
      * to determine if dmgs adequate, look at difficulty of proving them w/ reasonable certainty or ability to procure suitable substitute w/ dmgs; also likelihood that dmgs would not be collected **(RST § 360)**
    - Promise to render **personal service** **(RST § 367)** (issues w/ 14th AMD)
    - Contrary to **public policy** **(RST § 365)**
    - employment Ks

## Sale of Goods 🡪 UCC § 2-716:

1. Allowed for unique goods or other proper circumstances
2. May include condition to pay price, dmgs, or other relief ct deems just

# Expectation Measure “Benefit of the Bargain”

**Purpose**: to put non-breaching party in as good a position as if contract had been performed

**K Price**

**– Value at breach**

+ Incidental/Consequential loss

– Costs avoided by not performing

**Measured by**: **(RST § 347)**

* Not policy to put party in better position – “made whole and no more”
* In principle, supposed to represent the actual worth of the K to the party rather than to some reasonable 3rd person **(RST § 344, comment b)**
  + But, limited to objective standard by certainty and foreseeability

## Breach for Service

* + - Usually, rcv cost of completion
    - But, if unreasonable economic waste or overly disproportionate, apply value rule 🡪 look at diminution in value

(*Peevyhouse* – cost to complete repair to land too high)

* + - * But, if willful, wonton, in bad faith, entitled to cost of comp.

**Dmgs w/ no reasonable CERTAINTY: ()**

* + - Breach delays use of property; loss in value uncertain 🡪 can rcv rental value
    - Defective/unfinished construction 🡪 diminution in market value; or cost of completion if not clearly disproportionate (*Peevyhouse)*
    - Value of conditional right if promise conditioned on fortuitous event

## Breach for Sale of Goods

* + - Remedies under UCC are to be administered **LIBERALLY**, so as to put injured party in as good a position as if the other party had fully performed.

**(UCC § 1-106)**

### BUYER’s Remedies…

* + - * What buyer chooses to do w/ benefit of bargain NOT relevant to dmgs

(*KGM Harvesting* – cost plus arrangement, so profited)

* + - * Dmgs available for failure to deliver or breech of warranty (defective goods)

#### If he COVERs:

* + - Buy substitute goods in good faith w/o unreasonable delay

**UCC**

**§**

**2-712**

* + - Dmgs = difference b/t cover price and K price
      * Plus incidental/consequential loss; minus expenses saved
    - Failure to cover does not bar other remedies (restitution, etc.)
    - Whether cover has occurred may be disputed Q of fact

#### NON-DELIVERY/REPUDIATION

(*Egerer v. CSR West –* wanted shoulder excavations)

**UCC**

**§**

**2-713**

* + - Difference b/t market price when breach discovered and K price
      * Plus incidental/consequential loss; minus expenses saved
    - Complete alternative to cover! Only applies to extent buyer has not covered (comment 5)
      * Court allowed ‘reasonable leeway’ to determine market price
      * If reasonable, can use price for goods of different quality

Proof of Market Price: **UCC § 2-723**

#### BREACH OF WARRANTY UCC § 2-714

* + - Buyer accepts goods, gives notice of non-conformity **(UCC § 2-607)**, may recover dmgs determined in any reasonable manner
    - Difference b/t **value as warranted** and **value as rcvd** at time of acceptance, unless special circumstances warrant a different amount.
      * (Cost to repair? Diminution in value? Reliance?)
    - Can also rcv incidental/consequential dmgs
    - Seller can CURE! (UCC § 2-508 – see breach section)

#### Incidental/Consequential Dmgs: UCC § 2-715

1. **Incidental**: Expenses from inspection, receipt, transportation and care and custody of goods ***rightfully rejected***, reasonable charges, expenses/commissions in connection w/ ***cover***, and other reasonable expense b/c delay or breach
2. **Consequential: a)** loss that seller had reason to know and could not reasonably be prevented by cover or otherwise; **b)** injury to person/prop. proximately resulting from breach of warranty

### SELLER’s Remedies…

Dmgs = K price – market price at breach (+incidental, etc.)

* If seller has inexhaustible supply, can recover **lost profits** if buyer’s breach could have reasonably cost another sale

(*Neri v. Retail Marine Corp.* – sold boat)

* + - If goods unfinished at time of breach, seller may complete manufacture (wholly identify goods), or resell for scrap **UCC § 2-704(2)**
    - May ***stop delivery*** **UCC § 2-705**
    - May ***resell*** in *good faith* 🡪 K price minus resell price **UCC § 2-706**

#### Non-Acceptance or Repudiation UCC § 2-708

* + - **Difference in Value:** unpaid K price, minus market price at time and place for tender (plus incidental/consequential, etc.)
    - **Lost Profits:** If normal measure of dmgs insufficient to put seller in as good a position, can rcv lost profits

#### Incidental Damages UCC § 2-706

# Reliance Measure

**Purpose: Put Π in the position he would have been in if no K had been made.**

* Dmgs based on costs incurred b/c of reliance (usually expenses)
  + Does not matter if expenses incurred b4 K formed

**RST § 349**

* + Reliance dmgs can be reduced by amount Δ can prove Π would have lost if K had been completed.
  + If profits (exp. int.) uncertain, can recover expenditures base on reliance instead, or if would have had a losing K
* Reliance must have been **foreseeable** by breaching party
* Capped by expectation measure – cannot rcv more than if K had not been breached.
* “limited as justice requires” **RST § 90**

## Nondelivery:

*(Security Stove v. Am. Rys. Express – stove part not delivered at convention)*

* Usually based on expectation interest 🡪 difference b/t value at time delivered and value at time supposed to deliver
* If deliverer notified of unusual circumstance, then there is unusual loss, responsible for REAL dmgs (expenses, etc.)

## Promissory Estoppel:

Even if no K, a party can get damages for reliance based on promissory estoppel

* + - No bargain, so no benefit of the bargain.

## Option K (RST § 87)

* Offer which could reasonably expect to **induce action or forbearance** of substantial character **before acceptance**, and which does, is binding as option K to extent necessary to avoid injustice
  + - **Preparing to perform** 🡪 justice may require remedy, even if acceptance through performance not expected, BUT reliance must be **substantial and foreseeable (comment e)**

# Restitution Measure

**Purpose: Restore benefit conferred on one party**

* Available when benefit conferred through part performance or reliance, NOT available if full performance **RST § 370**
* Available even w/o K

## Measured by: RST § 371

* + - value conferred to other party; or the extent to which the other party’s property has been increased in value or his other interests advanced
* Can get more than expectation interest (i.e. if would have lost $ by full perf.)
* Should be breach of “vital importance” 🡪 goes to essence of K *(Corbon on K’s)*
* Amount limited “as justice required”
  + Π must return what was rcvd for part perf.

## Specific Restitution RST § 372

## Quantum Meruit: “as much as he deserves”

* + - Equitable remedy providing restitution
    - Available w/o K, in an Implied-in-law case, to avoid injustice

## Deposits/Breaching Party

* + - Either party entitled to restitution of deposit paid in excess **UCC § 2-718**
    - Breaching party entitled to restitution of benefit conferred on other party through part performance or reliance, in excess of loss caused by breach **RST § 374**