**Hawkins’ General Framework of Contracts:**

1. What law applies?
   1. Common Law: applies in any situation where there’s not a sale of goods; made by judges.
      1. *2RK:* not actual law, just a summary of contract law in all states; not enforceable unless adopted by a judge in a ruling.
   2. Uniform Commercial Code: applies when there’s a sale of goods (moveable); statutory rules, passed by legislatures, state statutes.
2. Is there an enforceable contract?
   1. Consideration: both parties have to give or promise something that the other party wants.
      1. Gift promises are not enforceable.
   2. Contracts must be formed in the correct way.
      1. Offer and acceptance.
      2. For some, in writing.
3. What does the contract mean?
4. Was the contract breached?
5. Are there any defenses to breach?
6. What are the remedies for the breach of contract?

**What is a Contract?**

* Contract (K): a legally-enforceable promise.
  + Limitations of Definition:
    - “legally-enforceable”: concerned with exchanges; if no exchange, no contract
      * Exchange: each gives something to other and receives in return something from other.
    - “promise”: concerned only with commitment to future behavior
* A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. (2RK §1)

**What is a Promise?**

* A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made. (2RK §2.1)
  + *Hawkins v. McGee:* Doctor promises to make the defendant’s hand 100% perfect or 100% good in exchange for allowing him to perform an experimental skin-graft surgery. Statement was found to establish a warranty/contract.
    - First promise of recovery time is not a promise, because it is an opinion or prediction.
    - Second promise of 100% good or perfect hand is a promise, because they were spoken to convince defendant to have surgery and it was a very specific promise with strong language: “I guarantee.”
  + *Bayliner Marine Corp v. Crow:* Crow sues Bayliner for breach of express warranty based on claims made on sales brochure about fitness of its boats. Court rules that while description of goods that forms a basis of bargain constitutes an express warranty
    - “Delivers the kind of performance you need to get to prime offshore fishing grounds.”
      * Not an affirmation or promise; opinion/”puffery”
      * Fails because vessel purchased is different from vessel tested.
      * Consumer purchased boat based off bargain.
    - §2-313(2) says that “a statement purporting to be merely the seller’s opinion (“puffery”) or commendation of the goods does not create a warranty.”
    - Express Warranty Test:
      * affirmation of fact or promise
      * relates to goods
      * basis of bargain

**What Law Applies?**

1. **Common Law: applies in any situation where there’s not a sale of goods; made by judges.** 
   1. ***2RK:* not actual law, just a summary of contract law in all states; not enforceable unless adopted by a judge in a ruling.**
2. **Uniform Commercial Code: applies when there’s a sale of goods (moveable); statutory rules, passed by legislatures, state statutes.**
   1. UCC §1-103
      1. If the common law rule isn’t displaced by the UCC, the common law rule applies.
         1. Ex: consideration in satisfaction clauses; reliance damages
      2. The UCC does not supplant common law
   2. Article 2 reflects characteristic of commercial sales transactions. Requirements for this contract tend to be less demanding:
      1. Agreements to buy and sell goods are often made quickly and informally, electronically or by phone.
      2. If the parties have often dealt with similar goods in the past…for sales of goods, practices of trade in general are pretty important in setting what the contract means. Courts will allow evidence of the customs in the industry to set the contract.
      3. Terms are standardized.
      4. Goods are fungible (available and interchangeable on the open market);
      5. For remedies, the market price is very important part of calculation.
   3. UCC §2-105: Predominant Factor Test: contracts that involve both goods and services are called hybrid contracts. To determine whether the UCC applies…
      1. UCC should apply to all goods; common law should apply to all services.
      2. When you have a mixed contract, you have to determine what predominates: goods or not goods (services).
      3. What is the thing that the party really wanted? What's the thing that's going to cost more?
   4. §2-104(1): “merchant” as: a person who deals with goods in kind; also one who by occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction.”
   5. §2-105 (1): “goods” as: things which are moveable.
      1. Rights to sell goods are not governed, because UCC only governs actual sale.
         1. *United States Naval Institute v. Charter Communications, Inc:* USNI sues Berkley for selling paperback copies of book earlier than agreed-upon date on charges of copyright infringement and breach of contract. Court rules that Berkley did breach contract.
            1. *USNI* not governed by Article 2 of UCC because talking about *right* to sell books, not actual selling of books.
      2. Contracts that involve the sale of real property are not governed by the UCC, because they are not moveable goods.
         1. Ex: *Mattei v. Hopper*: Mattei brings action against Hopper for breach of contract by failing to convey real property in accordance with terms on deposit receipt which parties had executed. Court rules that contract the inclusion of a condition did not make the contract illusory.

**Is There an Enforceable Contract? Consideration**

1. Consideration: a promise which is bargained for is consideration if, but only if, the promised performance would be consideration. (2RK §75)
   1. Requires a bargained for exchanged. (2RK §71)
   2. In general, look to external manifestation, not motive (2RK §71)
      1. If unclear, then look to motives (2RK §71.4b-external manifestations; 2RK 81-internal motives)
2. Unilateral v. Bilateral Contracts:
   1. Unilateral Contract: promise in exchange for actual performance; contract is not formed until performance is complete.
      1. Situations where unilateral contracts are beneficial:
         1. If you’re the performer, and you’re undertaking a task that you’re not sure you can complete
         2. When you don’t care who performs
         3. If the other party is not known for keeping their word.
   2. Bilateral Contract: promise in exchange for a promise; formed as soon as both parties make a promise to each other; almost all contracts are assumed bilateral, unless performance is specifically sought.
      1. Situations where bilateral contracts are beneficial:
         1. Someone fails to perform (can’t pursue breach of contract under unilateral contract provisions)
         2. Parties want to shift the risk
         3. Planning purposes (want to be able to count on completion or damages)
3. Requirement of Exchange:
   1. To constitute consideration, a performance or a return promise must be bargained for (2RK §71.1)
   2. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise (2RK §71.2)
   3. The performance may consist of: (2RK §71.3)
      1. An act other than a promise, or
      2. A forebearance, or
      3. The creation, modification, or destruction of a legal relation
   4. Motive does not matter; external manifestation of the promise matters!
   5. *Hamer v. Sidway:* Uncle promises nephew that if he abstains from drinking, tobacco, swearing, and gambling that he will pay him $5000 at age 21.
      1. The uncle receives no benefit, and it’s not a detriment to the nephew because he’s better off. However, court changes the rules and instead of looking at bargained for response, if there was forbearance, that was enough.
      2. This case shows development in common law that someone had to experience detriment.
      3. Unilateral contract is formed: uncle doesn’t want nephew’s promise to refrain, he wants nephew’s performance of refraining.
      4. This is different than the theory of alternative basis for reliance.
4. Consideration as Motive or Inducing Cause:
   1. The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise. (2RK §81.1)
   2. If external manifestations via 2RK §71 are not obvious, must look to internal motivations.
   3. *Kirksey v. Kirksey:* Brother writes to wife after death of husband and offers her place to live and land to tend. Woman leaves her place to live on man’s land. Court says this is not an enforceable contract.
      1. The court calls this a gratuitous promise.
      2. Loss and convenience sustained by plaintiff is not considered consideration in this case.
5. Fundamentals of Consideration
   1. What promises should the law enforce? Promises are sacred; there is something despicable about not keeping a promise. (Morris Cohen)
      1. *Covenant*: was used to enforce contracts made under seal; once an action was sealed and delivered, the action of the covenant was to enforce it.
         1. Two functions: (Lon Fuller)
            1. "evidentiary": providing trustworthy existence and terms of the contract.
            2. "cautionary": bringing home to the parties the significance of their acts
         2. Uniform Commercial Code: every effect of the seal which relates to sealed instruments is wiped out as contracts for sales are concerned
         3. Now, primary criterion of enforceability of a promise was the circumstance that the promise was, or was not, given in exchange for something, or consideration.
      2. Debt: used to enforce some types of unsealed promises to pay a definite sum of money
         1. Includes: promise to repay money loaned, promise to pay for goods delivered or work done.
         2. Promisor's obligation in debt considered to rest upon receipt of benefit from promisee.
      3. Assumpsit: grew out of cases in which promisee sought to recover damages for physical injury to person or property on basis of consensual undertaking.
         1. Misfeasance: promisor, having undertaken (assumpsit) to do something had done it in a manner inconsistent with that undertaking to the detriment of the promisee.
         2. Extension to include nonfeasance: promisor does nothing in pursuance of undertaking.
         3. Extension to hold that party that had given only a promise in exchange for the other's promise had incurred detriment by having freedom of action fettered.
      4. Consideration: sum of the conditions necessary for such an action to lie.
         1. A promise, if not under seal, was enforceable only where there was "consideration" for this was to say no more than that it was enforceable only where the action of assumpsit would lie.
   2. Typical Categories of Agreements:
      1. Sale of goods
      2. Real estate transactions
      3. Construction contracts
      4. Employment agreements
      5. Family contracts
6. Invalid Claims:
   1. Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless: (2RK §74)
      1. The claim or defense is in fact doubtful because of uncertainty as to the facts of the law, or
      2. The forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.
   2. Test for fraud: *Hartle v. Stahl:*
      1. Rule Explanation: “Surrender of forbearance to assert an invalid claim by one who has not an honest and reasonable belief in its possible validity is not sufficient consideration for a contract.”
         1. Objective: looking at if reasonable and honest person in this situation would believe claim.
         2. Subjective: looking at if the plaintiff is reasonable.
         3. Court simply says that the situation can be neither absurd in fact or unfounded in law.
   3. *Fiege v. Boehn*: Boehm sues Fiege for breach of contract to pay expenses incident to birth of bastard child and provide support on condition that Boehn would not sue for bastardy. Fiege stopped payments; Boehn sued for bastardy; lack of paternity discovered. Court rules that contract is still valid, because charge of bastardy was made in good faith and consideration exchanged.
      1. Courts must look past external manifestation because of good faith clause.
7. Gratuitous Promises:
   1. Gift promises are not enforceable, because they are not supported by consideration, and they are therefore unrecoverable.
   2. *Feinberg v. Pfeiffer Co.:* Feinberg brought suit against Pfeiffer Co on alleged contract where defendant agreed to pay Feinberg $200/mo for life upon retirement. Court says Feinberg cannot count past employment as consideration.
      * 1. Employer cannot recover money, because this is a donative transfer/gift.
      1. *Kirksey v. Kirksey:* Brother writes to wife after death of husband and offers her place to live and land to tend. Woman leaves her place to live on man’s land. Court says this is not an enforceable contract.
         1. The court calls this a gratuitous promise.
         2. Loss and convenience sustained by plaintiff is not considered consideration in this case.
            1. This could be considered consideration or reliance.
            2. Judgment based on *Kirksey* (male)’s motive. (2RK §71 v. §81)
8. Past Performance:
   1. Past performance cannot be a bargained for exchange, because there is nothing to bargain for when something is already done.
      1. You can’t seek something that has already been given. (2RK §71.2)
      2. *Feinberg v. Pfeiffer Co.:* Feinberg brought suit against Pfeiffer Co on alleged contract where defendant agreed to pay Feinberg $200/mo for life upon retirement. Court says Feinberg cannot count past employment as consideration.
9. Employment Agreements:
   1. At-will employees: those whose employment agreements are terminable by either party at any time and for no reason at all.
      1. Execution of noncompetition agreement changes prior employment relationship from one purely at-will. (Williston on Contracts Section 13:13)
      2. *Land Lake Employment Group of Akron, LLC v. Columber:* Lake Land brings action against Columber, who is an at-will employee, for breaching noncompetition agreement. Court says that continued employment is consideration and in the end, employer is forbearing the right to fire. **(Note: Previous Exam Question)**
         1. Judgment here slightly based on a policy argument: law’s disfavor with restraints on trade so that noncompetition covenants are treated as special circumstances.
      3. Employee Handbooks:
         1. *Pine River State Bank v. Mettille:* Employers offer a unilateral contract in form of handbook; continued performance constitutes acceptance of bank’s offer and affords necessary consideration for offer. Employer gains advantages of more stable and more productive work force.
10. Illusory Promises:
    1. Illusory and Alternative Promises: A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performance. (2RK §77)
       1. Promises that appear to be promises, but are not enforceable and do not constitute an offer of consideration.
       2. Test for illusory promises: Could defendant have been liable for breach of contract in any circumstance?
    2. *Strong v. Sheffield*: Strong takes action on promissory note of loan signed by borrower (Rard)’s wife. Court finds that there was no consideration for the defendant’s endorsement. **(Note: This is a KEY example of illusory promises).** Court rules that in this case, though forbearance is good consideration, there was only the *optional* performance of forbearance, not the promise of it.
       1. Generally, you cannot create a unilateral contract in response to a bilateral request.
          1. In this case, his promise is “until he wants money.” Hasn’t promised anything because “until he wants” is not a fixed amount of time.
       2. This is also an example of a surety contract, in which Rard’s wife is the surety (assures promisor that principle party can perform task). (2RK §112)
11. Conditional Promises:
    1. A conditional promise is not consideration if the promisor knows at the time of making the promise that the condition cannot occur. A promise of conditional performance by the promisor is a promise of alternative performances within §77 unless occurrence of the condition is also promised. (2RK §76)
       1. A promise is conditional if its performance will become due only if a particular event, known as a condition, occurs; the event must occur before the promise can be performed, but in absence of the event, the promise is still binding.
    2. *Mattei v. Hopper*: Mattei brings action against Hopper for breach of contract by failing to convey real property in accordance with terms on deposit receipt which parties had executed. Court rules that contract the inclusion of a condition did not make the contract illusory.
       1. Hopper argues that “satisfactory” clause makes it look like buyer can leave agreement arbitrarily.
       2. Court says satisfaction clauses are enforceable and not arbitrary. Two types:
          1. Fancy taste in judgment: personal satisfaction clause; subjective—is individual satisfied, in good faith (honesty, in fact)?
          2. Commercial value or quality: objective—does a reasonable person find this satisfactory?
12. Requirements Contract:
    1. A requirements contract is a contract in which one party agrees to supply as much of a good or service as is required by the other party, and in exchange the other party expressly or implicitly promises that it will obtain its goods or services exclusively from the first party.
    2. A contract for output or requirements is not too indefinite; does not lack mutuality; party who will determine quantity is required to operate his plant or conduct his business in good faith. (UCC 2 §2-306)
       1. Rules to police these types of agreements prevent courts from policing consideration. Modern contract law tries to go away from policing consideration.
    3. Why would someone want to enter into a requirements contract like this?
       1. Exclusivity of sales
       2. Promise of continued business
       3. Long-term sales outlet
       4. Price break
    4. “Good Faith” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing. (UCC §1-201-2001)
    5. “Good Faith” means honesty in fact in the conduct or transaction concerned. (UCC §1-201-2000)
       1. **Note: Article 2 has only one version. Article 1 has a 2000 and 2001 version.**
          1. **43 states have adopted the 2001 version of Article 1. Some of the states that adopted the new version of Article 1 kept the old definition of “good faith.”**
          2. **However, UCC §2-103(1) defines good faith for merchants—honesty of fact, observance of reasonable commercial standards of fair dealing for trade.**
             1. **Even if the state adopted the old version of Article 1, merchants are still subject to subjective and objective definitions of good faith based on definition in Article 2.**
       2. The application of good faith:
          1. The requirement/quantity that you set is what you honestly require and it has to be what a reasonable person would require in a standard commercial deal.
          2. Good faith protects Gulf, because this prevents EAL from buying too little or too much than what is required.
    6. *Eastern Air Lines v. Gulf Oil Corp:* Eastern alleged that Gulf breached a contract between the two parties for the sale of fuel based on the current posted market price of oil. Gulf demanded Eastern pay the higher price or Gulf would shut off the fuel supply and alleged that the contract was invalid because requirements contract did not specify any amounts. Court ruled that the requirements contract was valid, because it was enforceable by operation in good faith, as defined by the UCC §2-306 and orders specific performance.
    7. Output contracts are opposite of the requirements contract.
       1. Promise to buy all of the “whatever” produced.
13. Implied Promise:
    1. An implied promise is a promise that is considered to exist despite the lack of an agreement or express terms to that effect and the breach of which may be recognized as a cause of action.
    2. *Wood v. Lucy:* Lucy enters contract with Wood and gives him exclusive agency to market her name. Lucy does not honor the agreement. Wood sues for breach of contract. Lucy claims that contract did not exist in the first place, because of exclusive agency. Court rules that contract is enforceable.
       1. In this exclusive agency contract, Lucy claims that there is no contract, because Wood doesn’t have to do anything because his performance or lack of performance has no consequences and there is no consideration.
          1. A lawful agreement by either the seller or the byer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale. (UCC §2-306.2)
       2. Court says there is consideration in this promise, because within this promise to give profits to Lucy in exchange to give exclusive rights to Wood, which is an implied promise.
          1. When Wood promised to enter into exclusive agency, he didn’t explicitly promise to use reasonable efforts to market, but that’s implied within the contract.
          2. Legal realism argument: court says that nobody would form this kind of agreement with Wood unless they had belief that he would use reasonable efforts to generate money.

**Substitutes for Consideration:**

1. Reliance:
   1. Reliance as an alternative to consideration is completely distinct from reliance as a measurement of damages.
      * 1. There is not an automatic tie between how you get consideration and what the remedies for breaching a promise are.
        2. Two policy concerns compete:
           1. Want to use reliance, because we want to prevent injustice.
           2. On the other hand, the risk in protecting reliance is that we’ll have people who will be bound to promises that we don’t think are legally-binding.
           3. Proving reliance is not cut and dry; people may not know whether they’re bound by that promise or what the other party has to exactly do.
           4. If we start honoring substitutes for consideration, start to undermine doctrine of consideration.
   2. **Note: First 2RK §90 and Second 2RK §90 are places where 2RK isn’t trying to restate existing law but rather change the existing law.**
   3. Promissory Estoppel Test (2RK, First §90)
      1. A statement is true if—(must prove all five parts)
         1. A promise
         2. Promissory must reasonably action for forbearance
         3. Action has to be definite and substantial character on part of promise
         4. Promise must induce action
            1. If this promise doesn’t actually induce you to act a different way, then this is not enforceable.
            2. (Inferred that reliance has to be reasonable)
         5. Statement is binding only if injustice would occur otherwise.
      2. When you establish test, court focuses on reliance to see if there’s an enforceable promise.
         1. Promissory estoppel gives expectation interests; “if promise is binding, it has to be enforced as made.” (Willison on Contracts)
      3. If you make a promise and meet the requirements for promissory estoppel, what are you stopped from doing? You’re stopped from not keeping your promise.
         1. Restriction on the promisor.
         2. Not everybody is “estopped”; court uses test that there must be a reasonable and probable consequence.
      4. Ex: *Ricketts v. Scothorn*: Grandfather gives granddaughter promissory note for $2000 with 6% interest saying she didn’t have to work anymore. Plaintiff quit. Court rules that since note influenced plaintiff to alter her position for the worse, expectation awarded based on reliance.
         1. Expectation interest; what she thought she was going to get from promise is exactly what she gets here.
   4. Reliance (2RK, Second §90)
      1. This is the test for modern law:
         1. A promise
         2. Promisor reasonably expects action or forbearance
         3. Promise induces action or forbearance
            1. Shows causal relationship
            2. Reliance must be reasonable
         4. Recovery avoids injustice
      2. Once test is established:
         1. Remedy granted may be limited as justice requires; but court determines what your interest due to injustice is.
         2. Now threshold is lowered; everyone qualifies, but court determines what your interest due to injustice is.
      3. Definite and substantial character part is missing. Any reliance is enough. This missing stipulation is now incorporated in remedy stipulation.
      4. This is not promissory estoppel, because you are not estopped from going back on the promise.
      5. *Feinberg v. Pfeiffer:* Feinberg brought suit against Pfeiffer Co on alleged contract where defendant agreed to pay Feinberg $200/mo for life upon retirement. Court awards Feinberg reliance damages, because she relied on the terms of the contract as evidenced by her leaving her job.
         1. 2RK §90 applies here because of her age; she is considered “disabled” by the court when she quit.
2. Restitution:
   1. General idea is prevention of unjust enrichment even when there has been no promise.
      1. Except as stated in §§198 and 199, a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on the grounds of public policy unless denial of restitution would cause disproportionate forfeiture. (2RK §197)
   2. There are two different remedies under restitution. (2RK §371)
      1. Benefit conferred to defendant *or*
      2. Cost avoided by not having to hire another individual to do the service
   3. Dawson: Gains produced through another's loss are unjust and should be restored.
      1. Limiting principle: one who acts officiously in conferring a benefit cannot get restitution from the recipient. Person doing so is called *volunteer* or *intermeddler*
      2. Quasi contract: ground for recovering money in an action at common law, when the claim is not based on a true contract but instead seeks redress for unjust enrichment.
         1. Quantum meruit: as much as he deserved; describes a type of action used in enforcing duties of payment for services
         2. Quantum valebant: as much as they were worth; action for the worth of goods.
   4. Restitution is the ultimate residual cause of action. If nothing else works in this course on the final or in practice, always think about whether or not restitution might work
      1. In any situation, the answer is that you can sue on Restitution. You may fail to make a claim on restitution, but it doesn't require a contract or a breach of contract.
   5. Has nothing to do with contract law; if you recover based on restitution, you’re not recovering based on a contract. Courts call this legal fiction.
      1. The reason is because generally, gratuitous performance or gifts are not compensable.
   6. Assumpsit: *Sceva v. True:* Standard established is that person bereft of sense and reason may be held liable, in assumpsit (he has undertaken) for necessities furnished to him in good faith while in that unfortunate and helpless position.
      1. *Cotnam v. Wisdom:* Doctor is giving services to unconscious man in accident. Victim hasn't given anything to the doctor. Court awards doctor damages based on legal fiction of implied promise.
         1. This is a policy exception to the general rule.
            1. We imply a real promise to encourage healthcare services to be rendered. We want to incentivize doctors to give aid.
            2. The court orders under the “cost avoided by not having to hire another individual to perform the service.
   7. Quasi/Construtive Contract: ground for recovering money in an action at common law, when the claim is not based on a true contract but instead seeks redress for unjust enrichment.
      1. For restitution, court says—
         1. There must be enrichment.
         2. The enrichment must be unjust.
      2. *Callano v. Oakwood*: Pendergast promises to give money and Callano promises to give shrubbery. Oakwood got shrubbery because Pendergast dies. The court says that it is not unjust for Oakwood to get the shrubbery because Callano never expected money from Oakwood.
         1. Callano should sue the party with whom they have a contract. The existence of the contract prevents Callano from suing Oakwood.
      3. *Pyeatte v. Pyeatte:* Wife promises to help husband through law school if he helps her through grad school. Court says promise wasn't definite enough. There's no contract, because it fails that the contract is sufficiently definite.
         1. Court of Appeals remands case to determine if restitution interest can be awarded:
            1. Usually services within marriage are gratuitous.
            2. Court says if the wife's service in paying for law school was extraordinary or unilateral, can recover under restitution.

**Contracts must be formed in the correct way: Offer and Acceptance.**

1. Two different kinds of assent:
   1. Objective:
      1. Was P reasonable in believing that there was a contract?
      2. Learned Hand:
         1. **“If either party when used words intended something else than usual meaning, would still be held.”**
         2. Intent doesn't matter, but the outward behavior matters. This means that people who don't want to form a contract end up forming one.
         3. As long as a reasonable person would think a contract is formed, a contract is formed.
         4. "Meeting of the minds" sounds like a subjective standard; but has lots its true meaning.
            1. Courts still say it all the time, but they can't mean this.
   2. Subjective:
      1. Did P think there was a contract?
      2. Jerome Frank:
         1. 'Actual Intent' Theory induced much fictional discourse which imputed to parties intentions they did not have.
         2. Objectivists also went too far; tried to treat virtually all varieties of contractual arrangements in same way and as to all contracts in all phases, exclude as legally irrelevant, consideration of the actual intention of the parties or either of the, as distinguished from the outward manifestation of that intention.
   3. *Lucy v. Zehmer:* Zehmers are drinking with Lucy when they promise to sell him their farm for $50,000. Zehmer insists the contract written out was not valid, because it was made in jest. Lucy insists a contract was made. Court finds that the contract is valid.
      1. Examining Subjective v. Objective Evidence of Contract Formation:
         1. The Zehmer's secret, undisclosed mental state does not matter here, because the outward manifestation to Lucy is still upheld.
         2. The other party has to know it's a joke for the contract not to be formed (can’t have pepper corn for consideration).
      2. General policy: we want for people to make the deals they want to make. Different rule here, because:
         1. At some point, if people are going to be able to do business, we have to say what matters is outward manifestation in order to protect promisee.
         2. Without this, there would be a huge incentive for parties to lie and would undermine people's freedom of contract in order to have markets that function.
2. Intent to Be Bound:
   1. Promisor may not be bound if promise, whether from content or circumstances of making, is insufficiently serious to indicate promisor's intent to be bound.
   2. Freedom to contract: a good legal rule as to the enforceability of promises should make contracting available to non-lawyers who will take the pains to clarify their ideas as to what they want to contract about
   3. Freedom from contract: should not make contracting so easy that it hooks the unwary signer or the casual promisor.
3. "Formal Contract Contemplated":
   1. Agree on what they consider to be essential terms of contract and leave details to be worked out; if one of parties then refuses to sign formal document, can other enforce their agreement?
      1. Answer depends on whether parties intended to conclude agreement earlier.
   2. *Consarc Corp v. Marine Midland* Bank: Two widely-accepted common law principles:
      1. Absent an expressed intent that no contract shall exist, mutual assent between the parties, even though oral or informal, to exchange acts or promises is sufficient to create binding contract;
      2. To avoid obligation of binding contract, at least one of the parties must express an intention not to be bound until writing is executed.
   3. *Winston v. Mediafare Entertainment Corp:* Several factors that help determine whether parties intended to be bound in absence of document executed by both sides:
      1. Whether there has been express reservation of right not to be bound in absence of writing
      2. Whether there has been partial performance of the contract.
      3. Whether all the terms of the alleged contract have been agreed upon
      4. Whether the agreement at issue is the type of contract that is usually committed to writing.
4. The Offer:
   1. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. (2RK §24)
   2. It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him.
   3. We judge whether something is a reasonable offer from the position of the offeree. (Corbin)
      1. Test: Can the offeree create a contract just by saying "I accept?"
         1. Is it specific enough?
         2. Whether or not the language shows intent to be bound.
         3. Also need to take a look at the sequence of events.
      2. Note: Doesn’t really match commercial contracts today.
5. Invitations to Deal:
   1. It is on the ground that we must exclude invitations to deal or acts of mere preliminary negotiation and acts evidently done in jest or without intent to create legal relations. **(2RK §26)**
      1. *Owen v. Tunison:* Defendant is a resident of Newark, NJ and the owner of lot. Defendant writes in response to inquiry about sale of property: "Because of improvements...it would not be possible for me to sell it unless I was to receive $16,000.00 cash." Defendant tells plaintiff after receipt of letter detailing cash payment that did not want to sell the property.
6. Price Quotes:
   1. Price quotes are generally not offers; they are usually invitations to deal.
   2. In General:
      1. Can't form a contract based on price quotes just by saying "I accept."
      2. Quantity as a term is much more important in contract law than price.
      3. Unenforceable due to unexpected demand (and by default, unknown quantity)
   3. *Fairmount Glass Works v. Crunden-Martin Woodenware*: C-M writes F for a quote for ten carloads of Mason green jars, complete, with caps, packed one dozen in a case. F responds with price for each size, shipment date, and payment date. C-M writes back to place order for ten carloads. F responds that order is unbookable due to sold out stock. Court says contract was formed and breached.
      1. This looks like an offer, because:
         1. "For immediate acceptance" shows intent to be bound.
         2. Price and quantity shows specific terms agreed to.
         3. Quantity terms in first letter, which is not an offer but an invitation to deal.
            1. However, those terms are carried over to rest of communication. Quantity terms asked for by buyer becomes incorporated in offer by seller.
            2. "Ten car loads": expression used in the trade as equivalent to 1,000 gross with 100 gross per carload.
            3. Debatable: after contract was formed, "out of stock," an out clause. However, this doesn't affect the fact that there was still a contract formed.
7. UCC §2-328: The Case of Auctions:
   1. You're opening the floor for competitive bids; people who offer bids are ones actually making offer; you accept as seller.
   2. "Without reserve"--if you sell it like that, you're making an offer as a seller.
8. Advertisements:
   1. Advertisement is not an offer but rather an invitation by the seller to the buyer to make an offer to purchase.
      1. Courts say these are not offers because:
         1. Quantity terms are left out; there is generally a problem of unexpected demand
         2. No reasonable person would think that a store would open itself up to an unreasonable demand
      2. The solution when demand exceeds supply:
         1. Sellers required to have on hand reasonable supply of advertised merchandise
         2. First come first served clause included in contract
      3. Contract law does not protect the consumer. This is a serious problem. So statutes protect consumers. In every state, there are protections for consumers.
         1. Uniform Deceptive Trade Practices Act: protects from false advertising
         2. §5 of Federal Trade Commission Act: makes unlawful unfair/deceptive acts or practice
         3. Bait and Switch legislation: makes unlawful disparagement by acts or words of the advertised product.
      4. Standard: *Williston:* where the offer is clear, definite and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract.
      5. *Lefkowitz v. Great Minneapolis Surplus Store:* Consumer wants to buy a stole after seeing posted advertisement for discounted price. Advertisement has first come first served policy. Consumer is first in line at store and wants to buy stole. Store informs him that house policy is that it's for women.
         1. The "first come first served" clause solves the problem of unexpected demand.
         2. Advertisement also specifies a limited quantity. However limited quantities do not make advertisements offers because of other terms.
         3. The house policy is not in the advertisement, so it's not part of the contract.
9. Rewards are considered offers
   1. Only one person can close this offer
   2. There's a quantity term worked in
10. Construction Contracts:
    1. Typically involve bidding process.
    2. Mistaken Bids:
       1. Problem: subcontract and supplier bidders may fear that their bids will be under cut by competition, so often wait to submit bids until the last hour or two before general contractor's bid is due. Frequently, contractor will discover a mistake, because he is substantially higher or lower than other bidders.
       2. Objection to bid shopping: results in undesirable decrease in competition, because subcontractors will pad their bids so that they can lower them later when bid shopping occurs.
       3. Opposing objection: bid shopping results in an undesirable *increase* in competition; subcontractors will be driven to bid so low (bid-chopping) that they will be operating at a loos and tempted to use substandard work and materials, with greatest disadvantage to owner
    3. *Kemper* Test: Rescission of contracts may be had for mistake of fact if:
       1. Mistake is material to contract
       2. Mistake was not result of legal duty
       3. Enforcing contract would be unconscionable
       4. Other party could be placed in status quo
       5. Party seeking relief must give prompt notice
       6. Party seeking relief must restore or offer to restore everything of value
    4. *Elsinore v. Kastorff:* Kastorff submits bid to Elsinore for a building project and discovers missing plumbing calculation after winning bid. Kastorff moves to amend the bid; Elsinore lets the bid to another contractor and is suing for the difference. Court finds that bid cannot be upheld.
       1. Calculating “material”:
          1. Compare the difference between the actual erroneous bid and the bid that would have been if it had been correct.
          2. Have to compare this to common law decisions that have already been held to determine what material is.
             1. *Lemoge:* 5% (not enough)
             2. *Kemper:* 30%
             3. *Kastorff:* 10%
       2. Determining “legal duty”:
          1. Goes to the type of the mistake
          2. Mistakes of clerical error or not mistakes of legal duty.
          3. Mistakes of judgment is a neglect.
       3. Note: In most business situations, buyers usually are flexible in price increases because later buyer might need flexibility in change orders. Legally, it's too late.
11. The Acceptance:
    1. To Whom an Offer is Addressed: (1) The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance. (2) An offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise or renders a specific performance. (2RK §29)
    2. Form of Acceptance Invited: (1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specific act, or may empower the offeree to make a selection of terms in his acceptance. (2) Unless otherwise indicated by the languages or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances. (2RK §30)
    3. Consequence of contract: offeror is no longer free to change its mind and withdraw from the relationship without incurring liability.
12. The Significance of Contract Formation:
    1. Whether or not there has been acceptance may have significance beyond the commercial exchange of goods or services with which contract disputes are usually concerned.
    2. Existence of contract may determine whether particular statutory protections attach.
    3. Whether contract has been formed also has significance for purpose of anti-discrimination law.
       1. Post-formation discriminatory conduct actionable.
13. Notification of Acceptance in Bilateral and Unilateral Contracts:
    1. Bilateral Contracts:
       1. *White v. Corlies &Tift:* If offeror proposes bilateral contract and invites acceptance by means of promise, it is ordinarily understood that offeree must at least take steps to see that promise is in some reasonable time communicated" to the offeror.
    2. Unilateral Contracs (2RK §54):
       1. *Carlill v. Carbolic Smoke Ball Co:* Necessity of giving notice less obvious if offer proposes a unilateral contract, inviting acceptance by means of performance and not a promise.
          1. If person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.
          2. How can you tell if offer has dispensed with notice?
             1. Look to offer itself
             2. Character of transaction
             3. Inference to be drawn from transaction itself
          3. If it is unlikely that the offeror will know about the performance, then the offeree must inform him.
    3. Silence Not Ordinarily Acceptance:
       1. General rule is that silence alone is not acceptance.
14. Notification of Acceptance in Bilateral Contract:
    1. Except as stated in §69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably. (2RK §56)
       1. *International Filter v. Conroe Gin, Ice & Light Co.:* International Filter submits to Conroe Gin offer with following terms: proposal is made in duplicate and becomes contract when accepted by purchaser and approved by an executive officer of the International Filter Company at its office in Chicago. Issue is whether or not contract was formed. Court says the conditions of the contract were met so notification not necessary.
15. Acceptance by Performance:
    1. An offer can be accepted by the rendering of a performance only if the offer invites such acceptance. (2RK 53.1)
       1. *Allied Steel v. Ford Motor Co:* Employee of Allied sues Ford for injuries. Ford, on basis of contract, sues Allied. Ford had two contracts with Allied, one that made them liable for injuries of Allied employees and one that did not.
          1. This is an indemnity contract. One party says that they'll indemnify other party for expenses of accidents.
          2. Allied claims they never accepted the contract because:
             1. They say that they never gave acknowledgment of consent.
             2. Contract said you had to send acknowledgment copy which should be returned to buyer.
          3. Court doesn't agree with this argument.In this case, even though Allied did not send notification until after the accident, Allied has already started working on terms of new contract.
             1. If you start to perform, you've accepted the contract; this is an older rule that wasn't incorporated. This is not the current rule.
16. The Relaxing of Contracts for Goods Under the UCC:
    1. A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of such a contract. (UCC §2-204)
       1. Formalities of contract formation are relaxed
       2. Idea from common law is relaxed
    2. General Offer and Acceptance of Goods (UCC §2-206)
17. Shipment of Goods as Acceptance/ Accommodations (UCC 2-206)
    1. *Corinthian Pharmaceuticals v. Lederle Laboratories:* Corinthian brings action against Lederle seeking specific performance. Lederle had to increase the price of the DTP vaccine. Corinthian sends a shipment of 50 vials at the lower price, stating it was an exception to its terms in light of the huge price difference. Court rules that Lederle’s response was non-conforming and a mere accommodation and constituted a counter-offer.
18. Termination of the Power of Acceptance:
    1. After party has made an offer, conferring on another power of acceptance, power can be terminated.
       1. By lapse
       2. By revocation of offeror
       3. By offeror’s death or incapacity
       4. By offeree’s rejection
    2. By lapse of offer
       1. After some reasonable time, an offer lapses; if no period is specified, it lapses after a reasonable time.
       2. Reasonable time depends on circumstances.
       3. *Akers v. Sedberry:* Oral offer to resign only valid for time-frame of face-to-face interaction.
       4. *Loring v. City of Boston:* Seeking reward money after three years and eight months.
    3. By revocation of offeror
       1. Direct Revocation: An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract. (2RK §42)
       2. Indirect Revocation: An offeree’s power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect. (2RK §43)
       3. Common law: an offer is freely revocable, up until the time that it is accepted.
          1. The reason the rule is this way is because it prevents the offeree from speculating on the market at the expense of the offeror.
       4. In order to revoke an offer:
          1. Offer must be revoked from perspective of reasonable offeree.
          2. Offer has been accepted from perspective of reasonable offeror.
          3. *Hoover:* “We might not go through with this…” is enough.
       5. It is a lot easier to revoke a contract than it is to form a contract:
          1. Don’t want to bind parties that don’t want to be part of the contract anymore.
          2. We want to make it harder to form contracts, because once a contract is formed, there is a potential for large damages amounts.
       6. Option Contracts: Made by an offeror that effectively limits the offeror’s power to revoke is called an option.
          1. An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer. (2RK §25)
          2. Options Contracts are made when:
             1. Other party gives consideration for keeping offer open.
             2. Making a firm offer under the UCC (UCC 2-205).
             3. Reliance
          3. *Dickinson v. Dodds:* Dodd write Dickinson note, “I hearby agree to sell…” and “This offer to be left over until Friday 9:00am.” Dickinson also discovered that Dodd’s had been offering or agreeing to sell the property to Allan. Court says this promise not binding.
             1. Indirect revocation of the offer occurs when Dickinson knew that Dodds was trying to sell to someone else.
             2. Under *Hoover* standard, offering to sell to someone else is a revocation.
       7. Firm Offers:
          1. Firm offers can be made under the following rule, without consideration: (UCC §2-205)
             1. Offer must be made by merchant
             2. To buy *or* sell
             3. Terms of assurance that you’ll keep the offer open

Unless merchant promises not to revoke, it’s not irrevocable.

* + - * 1. Stated time; if no stated time, defaults to 3 months
    1. Option Contract Created by Part Performance or Tender: 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 being the invited performance or tenders a beginning of it. (Restatment §45)
       1. *Ragosta v. Wilder:* Plaintiffs interested in property called “The Fork Shop.” Plaintiffs accept offer for them to purchase it from the buyer. Buyer revokes before plaintiffs are able to deliver the money. However, plaintiffs took out loan from bank at $7,499 cost to themselves. Court rules there is no valid contract.
          1. The offer is not irrevocable because the buyer relied on it. This only applies to unilateral contracts.
          2. Reliance does not make it an option contract; this rule applies only for unilateral contracts:

In a unilateral contract, the party relying on the offer can’t protect themselves. Starting performance doesn’t protect. Not protected until the last ounce of performance is done.

In a bilateral contract, if you want reliance to be protected, you have the power by saying “I accept.” Here, the offeree already has the power to be protected.

* + 1. Revocation in the Case of General Offers (Rewards):
       1. Offeree’s power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available. (2RK §46)
  1. By offeror’s death or incapacity
  2. By offeree’s rejection:
     1. Doubtful that holder of power to accept under option contract puts end to power by rejecting "offer" (2RK §37).
        1. Can a rejection bar an offeree from subsequently accepting the offer?
           1. It would be unjust to allow an offeree who has rejected an offer to reconsider and accept, if the offeror has already substantially relied on rejection.
        2. What kinds of responses from the offeree should count as rejection?
           1. Mirror Image Rule: Common law answer: acceptance must be on terms proposed by offer without slightest variation.

1. The Mailbox Rule: Contracts by Correspondence
   1. Common law: assumption that dispatch of acceptance is crucial to point at which contract is made, after which offeror's power to revoke is terminated and offeree's power to reject is handed and risks of transmission are on offender.
      1. Origin of Rule is found in celebrated case of *Adams v. Linsell* (court held that wool dealers could not revoke their offer after the offeree had put letter if acceptance into post).
      2. Historical rationale: Offeree couldn’t get back acceptance after they put it in the mail.
      3. Modern rationale: We want to protect the offeree’s reliance on the contract being formed; if the offeree mails the acceptance and starts to rely on the contract, we want to protect that reliance.
   2. Also has been called upon to resolve which party should bear risks of transmission of offer.
      1. Offeree should bear risk because it is easier for sender to provide against possible miscarriage of letter.
      2. Risk should be on offeror as party more likely to inquire if no response to an offer is forthcoming.
      3. 2RK says offeror should bear risk but with some diffidence
   3. Conditions:
      1. Only applicable if acceptance is made in manner and medium invited by offer. (2RK §63)
         1. If mailbox rule does not apply, effective upon receipt.
      2. Acceptance are effective upon dispatch (2RK §62)
      3. Revocation is generally held to be effective only upon receipt. (2RK §42)
      4. Offers are effective upon receipt
      5. Rejections are effective upon receipt (2RK §40)
      6. If offer is irrevocable, acceptance effective upon receipt.
      7. If you mail the rejection first, mailbox rule is waived.
   4. Overtaking rejection: You mail an acceptance before mailing the rejection. The rejection gets there before the acceptance. (A, R, R, A)
      1. Generally, if the offeror relies on the rejection, no contract is formed, because we want offerors want to be able to rely on the rejection if it comes first, because we don’t want them to worry about receiving an acceptance later.
      2. Policy: we don’t want offerees to mail something and have three weeks until it’s going to arrive and then watch the market during this time and act in accordance to the market by revoking.
         1. We don’t want them to get a de facto options contract.
   5. Overtaking acceptance: You mail a rejection before mailing an acceptance. However, acceptance overtakes your rejection and arrives early. Since acceptance is received first, the acceptance is the one that stands. (R, A, A, R)
      1. If you mail a rejection, you don’t get the benefit of a mailbox rule anymore. (Second 2RK §40)
      2. However, in this case, since acceptance is received first, the acceptance is the one that stands, because it was received first.
   6. Similar Case: Rejection is mailed, then acceptance s mailed. Rejection is received first, then acceptance. (R, A, R, A)
      1. Rejection is sent and received first, so there is no acceptance.
      2. Later acceptance is considered to be a counteroffer
2. Battle of the Forms:
   1. Characteristic sequence includes "request for quotation," then "quotation" form, then "purchase order" followed by "sales acknowledgment.
   2. Typically, it is buyer that is making initial offer and seller that, by its varying acknowledgment, fired the "last shot" declining to enter into a contract on buyer's terms.
   3. Mismatch of terms is likely; parties likely to assume they have a "deal" in light o f their agreement regarding transaction-specific, or "dickered" terms in blanks of forms.
   4. "Battle of forms" raises an interesting set of questions:
      1. Does exchange of forms create a contract, despite failure to mirror one?
      2. If a contract is formed, what terms?
      3. What happens if exchange of forms does not create a contract but parties nevertheless perform?
3. Mirror Image Rule:
   1. General rule: acceptance has to be mirror image of offer; if it differs in any way, offer is void and "acceptance" is considered a counteroffer.
   2. This rule creates a bad motivation/has harsh implications: people may decide they don't want to do the deal anymore, so they'll make up some different between the acceptance and offer and will use this as a pretext for contract being formed.
   3. Mitigated in practice:
      1. *Farimount*: Court may decide that what seemed to be an additional or different term in acceptance was really an "implied term" in the offer so that language at first appearing to the court did not do so.
      2. Court may conclude that language of acceptance relating to additional or different terms is only suggestive/ precatory.
         1. Ex: "Yes, I'd love to come with my cat and lease the house." A court might say "the
      3. Sometimes also call the additional term a new offer after the original offer has been accepted.
   4. Last Shot Rule: Under mirror image rule, the party that sent the last message before performance began usually prevails.
      1. Performance or beginning of performance by recipient constituted acceptance of terms of final offer in the series.
      2. This is significant in modern commercial law because different companies have different standard forms.
         1. This is common law rule! **UCC 2-207 different from last shot rule.**
4. Transcending the Mirror Image Rule: UCC §2-207
   1. Two problems with mirror image rule:
      1. Parties who end up in unfavorable contract try to get out of it by pointing out some strange problem with offer and acceptance.
      2. Hard to figure out what the terms are because of "Last Shot Rule."
   2. Article 2 abandoned mirror image rule of contracts in favor of analysis more attentive to kind of commercial practices; inconsistent boilerplate passing unheeded between parties that intend to enter into contractual relationship.
   3. UCC§2-207 contemplates terms of the contract may be determined at different time than at time at which contract is formed.
      1. Possibility of "additional term" will become art of contract later when, after receiving notice, let a reasonable time elapse without giving notification of objection to additional term.
   4. Writings do not establish contract, a contract may be found through conduct by both parties that recognizes existence of contract.
   5. Materiality:
      1. If a response to an offer with additional terms operates as an acceptance under UCC 2-207.1, much depends on whether or not these terms materially alter contract under UCC2-207.2b.
      2. If the additional terms do not materially alter the original bargain they will be incorporated unless notice of objection has already been given or is given within a reasonable time.
      3. Terms may be found to materially alter if their inclusion would result in surprise or hardship if incorporated without express awareness by the other party; the element of unreasonable surprise.
         1. Surprise Test:
            1. *Union Carbide v. Oscar Meyer:* An alteration is material if consent to it cannot be presumed.
            2. “or Hardship” is no longer part of the test; it is a consequence, not a criterion; can’t walk away from a rule that you agreed to, just because it’s a hardship.
            3. What is the industry standard? If industry standard is that every contract has an arbitration clause, it will be harder for buyer to be surprised.
      4. Examples:
         1. *Northrop v. Litronic:* Defense contract for wire boards had different warranty periods in offer and acceptance. Court says any limitation on the length of the warranty in the offer would be a materially different term.
         2. *Avedon Engineering v. Seatex:*  in NY, the burden is on the proponent of arbitration to establish that arbitration is not a material alteration.
      5. Statutory text does not guarantee uniformity of interpretation and application in courts of various states.
   6. Additional terms:
      1. *Dorton v. Collins & Aikman:* Dorton, as Carpet Mart, brought action against Collins & Aikman for fraud and misrepresentation of product. Collins & Aikman moved for stay pending arbitration, asserting that Carpet Mart was bound to arbitration agreement. District court denied the stay on basis that there is no binding arbitration clause. Case remanded for further findings.
         1. Under the UCC, arbitration is an additional term.
      2. *Itoh v. Jordan*: Itoh sent Jordan a purchase order for steel coils. Jordan sent back acknowledgment form with arbitration clause. Itoh sued Jordan claiming coils were defective and delivered late. Jordan moved to stay pending arbitration. Motion denied. Court found that seller's acceptance is expressly conditional on buyer's consent.
         1. A contract is not created under §2-207.1 because of expressly conditional statement.
5. Different Terms:
   1. UCC 2-207.1: expression of acceptance contained terms that were in addition to those in the offer.
   2. Notorious distinction between different and additional appears upon comparing subsections 1 and 2 of UCC2-207.
   3. Three possible rules to employ in situation with different terms:
      1. Majority Rule: Knockout Rule
         1. Knock out different terms entirely. Both parties' version gets thrown out of window and look to 2-300s to supply gap-fillers.
         2. This rule is fair to both parties.
         3. Statutory argument against this rule: can’t add “different,” into §2-207.2, because it only says additional
      2. Leading Minority Rule: Dropout Rule
         1. Offeree's terms drop out. Offeror's terms win.
      3. Other Minority Rule (California): Posner's Rule
         1. Assimilates different and additional and treats them the same.
         2. Argument is that there's evidence that when people wrote UCC, they forgot to include "and different" in subsection 2 of 2-207. (See comment 3)
   4. *Northrop v. Litronic:* Litronic offered to sell Northrop printed wire boards. Offer contained 90-day warranted stated in lieu of other warranties. Northrup’s return invoice contained a warranty period unlimited in duration.
      1. UCC §2-207 only mentioned additional terms, not different terms.
         1. Note: Posner believes that 2-207 should have included “additional or different,” but forgot to add the “different.” Evidence of this is found in notes of section.
      2. This case employs the majority rule, in deference to Illinois’ state preference.

**Precontractual Liability and Failed Negotiations:**

1. Precontractual Liability:
   1. Orthodox contract doctrine: Neither party is bound until offer has been accepted and contract has been formed. Party can still incur liability before contract has been formed.
      1. Exception: Option Contracts (2RK §45): "an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance; an option contract is created when offeree tenders the invited performance.”
      2. Problem can be avoided if the offer seeks a promise as acceptance and either a promise is given in so many words or one can be inferred from the offeree's conduct.
   2. The *Drennan* Rule: Drennan takes the idea of 2RK§45’s theory that a unilateral contract is irrevocable once performance has begun and blends it with 1RK§90’s idea that if there is reliance on the contract, you can’t revoke to create a new rule, which can be found in 2RK §87(2) and says that “An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.”
      1. Also uses 2RK§32 which says that when it’s unclear what kind of contract you’re in, you can choose to follow the rules of a unilateral or bilateral contract.
   3. *Drennan v. Star Paving Co:* Proceedings are between offer and acceptance stage. Subcontractor (offeror) makes a mistake by offering too little in his quote/bid and tells the contractor that he couldn’t do it at that price. Subcontractor’s tries to revoke the offer on the basis that there is no acceptance. Court ruled in favor of contractor/plaintiff.
      1. In this case, there are two promises:
         1. Subcontractor offers paving to contractor at certain price, and contractor offers payment. This promise has consideration.
         2. The court says there is an implied second promise made in that the subcontractor offers his services up until the time that they are either used in a bid or not used in a bid (he promises to keep the offer open). The contractor relies on this promise when submitting a bid for work.
      2. What protection is there for the subcontractor?
         1. The contractor cannot shop around after the offer is accepted to protect subcontract.
         2. Under mirror image rule, unlike terms will end in termination of acceptance.
2. Liability When Negotiations Fail:
   1. During the course of negotiations one party has conferred a benefit on the other, the recipient may be required to make restitution.
      1. *Songbird Jet v. Amax:* Songbird claimed compensation from Amax for its services. If there was any enrichment of Amax at all, it was "unjust" because such activities "are regularly engaged in by parties endeavoring to reach a mutual accommodation."
         1. These services were voluntary and designed to and had the effect of protecting its own interests, even if they incidentally benefitted Amax.
      2. *Precision Testing v. Kenyon:* Ellis provided substantial labor and technical work in bringing Kenyon's test car to certification level while negotiating a contract to develop emissions systems for imported automobiles. Negotiations fell through. Court held for Ellis, distinguishing from "Songbird" on grounds that Songbird's services were designed to promote its own interests whereas Ellis' services were designed to benefit Kenyon.
   2. Misrepresentation is a possibility for grounds on which a negotiating party may recover reliance losses.
      1. *Markov v. ABC Transfer & Storage:* Lessor of a warehouse misrepresented to the lessee that it intended to renew the lease for three years, while " at the same time quietly negotiating for the sale of its premises." Purchaser of warehouse gave notice to vacate premises, lessee claimed damages for fraud. Court concluded that lessor fraudulently promised to renew lease in good faith and upheld an award of damages based on lessee's reliance losses
   3. It is extremely rare to get damages before a negotiation is formed!
3. Franchise System:
   1. Method of selling products and services identified by a particular product design or management expertise. Franchisee usually purchases some products fro the franchisor and makes royalty payments on the basis of units sold, in exchange for the right to offer products for the sale under trademark.
   2. *Red Owl:* Hoffmans are negotiating to open a Red Owl Franchise Store with Lukowitz. In reliance of the formation of an offer, Hoffmans purchased other businesses, put down payment on a lot, sold bakery, and moved to another city incurring major expenses. Court rules that since promises caused plaintiffs to act to their detriment, reliance damages can be awarded.
      1. 1RK§90: Only discusses possibility of receiving reliance damages based on a promise. Formal offer and acceptance is not required.
         1. Court awards reliance damages, which is more in line with the “justice so requires” clause of 2RK§90

**Statute of Frauds:**

1. Statute of Frauds:
   1. Hawkins’ Framework for Statute of Frauds:
      1. Does statute of frauds apply?
      2. Is there a writing?
      3. Is this an exception to the Statute of Frauds?
      4. Does reliance prevent the Statute of Frauds from being enforced?
   2. An agreement of certain types, otherwise enforceable, is not to be enforced if it is not represented by a signed writing. Commonly referred to as “statutes of frauds”
      1. Within this category, a provision is designated as part of *the* Statue of Frauds, traceable to a 1677 act of Parliament, 29 Charles II
   3. Rule of Effrontery, UCC §§2-201(3) and 2A-201(4)(b): Promisee can adduce circumstances other than documentation that will lead a court to enforce an agreement within one of these descriptions
      1. By stating that a promise within the Statute of Frauds is unenforceable or void, the law authorizes a promisor both to admit the existence of a promise and to defend successfully against its enforcement.
   4. Nine classes of agreements that, if entirely oral, are made unenforceable by statutes enacted in almost all states
      1. Agreement for any performance that cannot be completed one side or the other, within one year from the making of the agreement
      2. Agreement for the transfer of an interest in real estate, other than the grant of a lease, and one for the grant of a real-estate lease for a period of one year or more
      3. Agreement for the sale of goods for a price of $500 or more
      4. *Agreement for the lease of goods providing rent of $1000 or more*
      5. Agreement by a person or firm to be “surety” for the debt, or other obligation of another
      6. *Agreement by which personal property is to stand as security for an obligation*
      7. *Agreement he performance of which is not to be completed before the end of a lifetime*
      8. *Agreement to pay the commission of the services of areal-estate broker*
      9. *Agreement by a person or firm undertakes to extend credit*
   5. Effect: makes contracts unenforceable.
   6. Statute of Frauds and Professional Rules of Responsibility
      1. At some point, it’s not always in your client’s best interest to exploit the letter of the law
      2. Similar with statute of frauds, if you don’t honor a contract, could think if you’re being an ethical business person
      3. It’s possible to zealously represent your client and inform them of the business/moral efforts.
      4. Generally, you do have to make sure your client understand that they can walk away.
   7. Modern rationale for statute of frauds: a widespread belief that no unwritten agreement may be beneficent even though erroneous. It may lead people to document agreements that they would otherwise leave unwritten.
2. The Content of a Document:
   1. UCC §1-201(b)(43) states that writing “includes printing, typewriting, or any other intentional reduction to tangible form.
   2. 2RK §131: “The essential terms of unperformed promises must be stated.
      1. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought.
      2. For the enforcement of some agreements, a period of time must be indicated in the writing
   3. Memorandum exacted by the statute does not have to be in one document
      1. At least one writing, the one establishing a contractual relationship between parties, must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction
      2. Requirements can most readily be met by a provision, in a signed writing, that designates and incorporates one or more other writings.
   4. Lenience is shown in deciding what counts as a signature
      1. Stamped name and letterhead may suffice
      2. Question is always whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing
3. Electronic Documentation:
   1. Proposal to amend the Code: features, along with changes in Section 2-201, the word “Record” newly defined and broadening of the definitions of *authenticated* and *sign*
   2. UETA: Uniform Electronic Transactions Act: major US source of validation for electronic agreements not represented in signed writings
      1. Applies to contracts for the sale of goods that are governed by Article 2 and to most contracts governed by the common law
         1. “if a law requires a record to be in writing, an *electronic record* satisfies the law”
   3. E-SIGN: Electronic Signatures in Global and National Commerce Act, 15 USC §7001
      1. Comparable action on the global front is illustrated by a model law on electronic commerce, prepared by the United Nations Commission on International Trade Law
4. Duration of Performance: The One Year and Lifetime Clauses
   1. One circumstance that systematically persuades courts to enforce an agreement within the one-year clause is that, by the time of litigation, the agreement has been performed in full on the part of the claimant.
   2. Minority rule: look at whether or not its probable/reasonable whether or not the contract would be performed in a year.
   3. Majority rule: If there’s any chance it couldn’t be done in a year, it doesn’t need to be in writing.
      1. Sometimes, courts exhibit hostility to enforcing the statute of frauds.
      2. Exception: If full performance has already occurred.
         1. The only thing that makes a contract unenforceable is a lack of writing.
5. Transfers of Interests in Real Property:
   1. Required: signed writing for the enforcement of an agreement of the transfer of an interest in real estate; Even easements need to be in writing
   2. Exception: Doesn’t apply to leases less than a year
      1. Part performance exception: a buyer who enters the property with the seller’s consent and makes permanent improvements doesn’t have to have a writing to evidence the transfer of interest
         1. If someone does this, it’s evidence that the parties really did form a contract
         2. It’s a proximate way to protect the buyer’s substantial reliance on the property.
   3. This century: permitting oral agreement to be enforced
   4. 2006: need for the preference regarding landowners no longer exists; buyers and sellers should receive equal protection in the process of the sale of land so that neither stands to be unduly benefitted or disproportionately burdened by the fact that the contract has not been reduced to writing
   5. *Blair v. Brownson:* “In a contract for the sale of lands, tenements, or hereditaments, the party to be charged is the party against whom enforcement of the contract is sought.”
6. Suretyship:
   1. Surety promise is a promise to answer for the debt of another; sureties are secondarily liable for debt.
      1. Exception: If the main purpose is to benefit the surety, a verbal promise is enforceable. Rationale is that there is less chance of fraud.
   2. Rationale:
      1. One reason is that a creditor, or other oblige, may be tempted to fabricate evidence of a suretyship promise when faced with insolvency on the part of an obligor or when fearing insolvency.
      2. Another reason is that when solicited to become a surety, a person may do so incautiously, not appreciation how serious the consequence may be.
   3. Term *guaranty* is sometimes conflated with *suretyship contract*, and sometimes distinguished. A surety’s obligation is not conditioned upon another’s default. A guarantor, on the other hand, is liable to a creditor only if the debtor does not meet the duties owed to the creditor.
   4. A *novation* is not a *surety*; it is a change in a contract, substituting one party for another.
   5. If A promises B that A will pay a debt by B, this is not a suretyship. Effectiveness would not depend on a creditor’s consent. A consideration running to A would be a requisite, unless A’s understanding were to become binding by reason of reliance.
   6. Whether the main purpose or leading object of the promisor is to promote a pecuniary or business advantage to it is generally a question for the trier of fact.
   7. In making this determination, the following factors may be considered:
      1. Prior default, inability or repudiation of the principal obligor
      2. Forbearance of the creditor to enforce a lien on property in which the promisor has an interest or which he intends to use
      3. Equivalence between the value of the benefit and the amount promise
      4. Lack of participation by the principal obligor in the making of the surety’s promise
      5. A larger transaction to which the suretyship is incidental
7. Sales of Goods for $500 or more: UCC 2-201(1)
   1. Writing has to have: It only needs to have a quantity term. It also needs to have a signature by party against whom enforcement is sought.
      1. Quantity does not need to be accurate to be enforceable.
      2. Signature: 2-201(37)—can be stamp, marking, etc
   2. Writing does not have to have: every term or correct terms.
   3. Writing has to indicate that a contract for sale has been made between the parties
   4. What happens if you have an offer and is signed by offeror. Offeree didn’t sign. Can offeree sue offeror?
      1. UCC is stricter than common law.
      2. Has to show that contract has been made. Offer doesn’t indicate this.
   5. In common law, it has to have essential terms.
   6. According to Article 9 (“Secured Transactions”), the authentication of a security agreement by the debtor is one way of meeting an evidentiary requirement for the enforceability of the agreement, in full, against the debtor and third parties
   7. UCC has four exceptions to statute of frauds for sale of goods $500:
      1. 2-201(3)a: manufacture of goods not suitable for sale under ordinary course of business (specific manufacture)
         1. Reason: Very unlikely that anyone would build a special product unless it’s ordered; chance of fraud is pretty low.
         2. Can’t be a market for this product.
      2. 3b: party admits in court that a contract has been made (Rule of Effrontery)
         1. Reason: no chance of fraud of contract is admitted.
         2. Only enforceable up to the quantity you admit to agreed to.
      3. 3c: Payment has been made or goods have been accepted
         1. If you have an oral contract to sell 700 widgets at $1 each, but if buyer sends seller $350 an seller accepts it, then seller can’t assert statute of frauds as a defense to that $350 worth of widgets.
         2. For whatever hasn’t been paid for, you could assert statute of frauds.
      4. 2-201(2): merchants exception/ confirmatory memorandum exception:
         1. Allows you to use something that you have signed against the other person to make a contract enforceable against someone else.
         2. Reasons:
            1. Avoid asymmetry of power.
            2. UCC wants to incentivize people to send memos confirming oral contracts.
            3. UCC wants to facilitate enforceable contracts. This is one way to limit scope of statute of frauds.
         3. Elements needed to be proved:
            1. Between Merchants
            2. Send writing within reasonable amount of time.
            3. Sufficient against sender.

“Sufficient”: person who signed it could get sued. Incorporate all prongs from 2-201(1)

Has to confirm that it can’t create a new contract.

“In confirmation” means that it’s already established.

* + - * 1. Has to be delivered/received.

Nothing like the mailbox rule applies here.

Sets when you’ve accepted a contract.

As long as you have reason to know what the contents are, you’re charged with it.

* + - * 1. Can object within 10 days by writing.
  1. *St. Ansgar Mills v. Streit:* Grain dealer appeals from order from district court granting summary judgment in action to enforce contract for sale of corn. District court says this was unenforceable because written confirmation was not delivered in a reasonable amount of time. Supreme Court reverses and remands on the basis that “reasonable” is based on industry customs and market considerations, and in this case the dealings between the two parties indicated that it was within the normal bounds of their conduct to leave contracts unsigned for periods of time.
     1. One of main issues: how volatile the market is; if price jumps up and down all the time, suggests really quick turnaround. If price has been same for last six months, three months might be reasonable because there is very little risk that market conditions would change deal.

1. Satisfying Multiple Prongs of the Statute of Frauds:
   1. General Rule: have to satisfy both prong requirements under common law and the UCC.
2. Reliance and Other Equities:
   1. Traditional rule about whether or not reliance will prevent statute of frauds from being unenforceable: even though it can lead to harsh results, too bad. Writing necessary.
      1. Problem with having reliance impede statute of frauds, it can eviscerate it.
      2. You would guess that most people who make an oral contract end up relying in some way.
      3. You assume a risk if you don’t get a contract in writing.
      4. Assume that you lose if no writing.
      5. Evidentiary reasons why things should be in writing too (evidence of terms)
   2. Sometimes reliance by a party on an agreement is grounds for enforcing an agreement that would otherwise be unenforceable owing to a statute of frauds.
   3. Reliance must be foreseeable by the promisor and enforcement must be necessary to avoid injustice.
      1. 2RK 139 must be satisfied
      2. 2RK 30 must be satisfied
   4. Majority rule: in most states, it’s not that you can just rely on a promise, you have to rely on the party’s promise that they’ll reduce the agreement to writing and sign it.
      1. Have to rely to the point that other party will agree to write it down.
      2. An estoppel to plead the statute of frauds can only arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense.
   5. *Monarco v. Lo Greco:* Relative relies on promise of receiving land and share of estate if he worked at home and did not move out. Court rules that because of reliance, specific performance awarded.
      1. Court says Christie’s reliance on promise makes statute of frauds unenforceable.
      2. Two factors:
         1. Unconscionable injury to Christie
         2. Unjust enrichment to other party
            1. Dead guy was unjustly enriched by years of servitude
            2. Value of the investment was increased $4000 to $100000
      3. *Monarco* has limited importance generally, because usually substantial reliance isn’t enough.
      4. Specific performance: In Monarco, Christie should get the land because this is a way more extreme situation. Can’t really calculate what his sacrifices cost in money.
      5. Courts are split about whether or not you can use the reliance principles in the context of the UCC. Some courts say 2-201 displaces reliance law. Some courts say they don’t change reliance rules.

**Defenses to Contract Formation:**

1. Defenses to Contract Formation:
   1. Occurs in a situation where you have all the elements of a contract, but there’s no enforceable contract because of some problem of the status with one of the parties or the way the deal was made.
   2. Three types of policing concerns:
      1. Status of party seeking relief from a promise (capacity)
         1. Historically: married women, minorities, etc.
         2. Today: mentally infirm, minors, corporations under bylaw
      2. Behavior of parties during bargaining process
         1. Duress, informational asymmetries, emotional and economic dependencies, wealth disparities
      3. Substance of resulting bargain
   3. Motivation of courts in policing efforts:
      1. Institutional Integrity: the courts are a respected part of society, and we don’t want to make them the enforcer of deals that are fraudulent.
      2. Economic: society values free trade, but it contract is formed under duress or threat, free market does not work properly; intervention is necessary in event of or to avoid market failure
2. Capacity:
   1. Minors--General rule: contracts formed by those underage are voidable at the option of the minor.
      1. Voidable: if minor chooses to void, can do so
      2. Void: contract is not a contract any more
      3. Exception: contracts for necessities are not voidable
         1. Necessities include: food, clothing, education
         2. Necessities do not include: housing (public housing is always default)
   2. Escaping a contract entered into as a minor:
      1. Often depend on the facts of the case
      2. Must give goods back in order to get your money back.
      3. Can’t give services back.
      4. Restitution, even if the person lacks capacity; the minor could ask for their money back after –the-fact.
   3. Age limits are enforced because the court doesn’t want the power of a buyer and seller to be uneven.
   4. *Kiefer v. Fred Howe Motors:* Kiefer bought car from Fred Howe Motors a few months short of his 21st birthday. Contract stated that he represented that he’s 21 or over. After becoming of age, he sought to return the car, and sued to recover the price. Judgment affirmed for defendant.
      1. The plaintiff’s signature does not count as an “external manifestation” of being 21.
         1. Policy decision: we want to protect minors who are not able to make those decisions.
3. Overreaching:
   1. Duress: impermissible pressure exerted by one party over another either during pre-contractual bargaining or attempted renegotiations.
      1. 2RK§175: If assent is induced by improper threat, leaving the other party no reasonable alternative, then they have a claim for duress.
      2. 2RK§176: threat must be improper
         1. Subjective: individual, not reasonable person, must be induced by threat
         2. Objective: individual must reasonably try to do something else, or must be left no reasonable alternative
      3. General Rule: victims of fraud, duress, or mistake can avoid/void the contract.
         1. Requirement: victim must show at least some resistance
         2. Exception: threats of legal activity do not satisfy qualifications for duress.
         3. Traditionally: duress was a threat of physical harm
         4. Today: also includes threats to business interest
   2. Pre-Existing Duty Rule: 2RK §73: Performances of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration.
      1. Similar to past performance; if there is nothing new being bargained for and contract has been modified, there is no consideration.
      2. Rationale: we are worried about bad faith contracts
         1. “Holdout Problem”: risk exists that one party will hold up the deal by asking for more money than they would receive if the market were competitive.
      3. Avoidance: if you want to genuinely modify the contract, have to meet the rule of obviate the rule:
         1. Unforeseen circumstances arise that change the nature of the bargain
         2. Really clear the old contract is being discarded
         3. Some small amount of consideration was given in exchange for new terms
      4. Under UCC §2-209: courts simply look to see if modification occurred in good faith; no consideration is required.
   3. *Alaska Packers v. Domenico:* Workmen individually signed contracts with AP to sail from SF to Pyramid Harbor. Workmen stopped work in body and demanded additional wage. Impossible to get substitute workers. Employees sued to recover the additional compensation. Court rules in favor of defendant.
      1. The issue here is that the defendants were “held up” by the workers in that there was no free market where they could hire more workers. The defendants also fulfilled the requirement of resistance by initially declining to sign the contract and informing plaintiffs that they could not legally authorize a price increase.
   4. *Watkins v. Carrig:* By written contract between the parties, the plaintiff agreed to excavate a cellar for the defendant at a stated price. Orally agreed that the plaintiff should remove rock at a stipulated unit price about nine times greater than price for excavating. Court found that the oral agreement “superseded” the written contract because defendant yielded to the threat without protest.

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| ***Alaska Packers*** | ***Watkins*** |
| Only one set of workers available | Other companies available to contract for job |
| Questionable resistance | No resistance |
| No changed circumstances | Changed circumstances (discovery of rock bed in cellar is legitimate reason for more money) |
| Significant upfront investment and limited period of time. | No upfront investment and no time pressure |

1. Concealment and Representation:
   1. Generally, good faith negotiation is not required.
      1. Under the law, you are not obligated to disclose everything.
      2. Policy Reasons:
         1. Creates litigation, because it’s hard to show what people are aware of.
         2. Not requiring full disclosure gives people an incentive to invest in information.
      3. Problems:
         1. Information asymmetry created; parties might not know about preexisting conditions that would allow them to allocate resources efficiently.
   2. *Swinton v. Whitinsville Savings Bank:* At the time of the sale the house was infested with termites. The defendant knew the house was infested. Because of the destruction and dangerous condition, the plaintiff was put to great expense. Court gives judgment for the defendant.
   3. *Kannavos v. Annino:* Annino converted one-family dwelling into multi-family building with eight apartments in knowing violation of a city zoning ordinance. In 1965, real estate broker listed “single house, converted to 8 lovely completely furn.” Kannavos contracted to buy property. Unaware of any zoning or building permit violation. Court rules in favor of plaintiff, because (1) enough was done affirmatively to make the disclosure inadequate and partial; (2) where there is reliance on fraudulent representations, not barred plaintiffs from recovery merely because they did not use due diligence.

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| ***Swinton*** | ***Kannavos*** |
| D knew about termites | D knew about zoning issue |
| Pure Concealment | No Pure Concealment: some description of the use of property was disclosed; once you disclose one part, you must disclose all. |
| Arm’s length negotiation | Arm’s length negotiation |
| Latent Defect: P couldn’t discover | Patent Defect: P could discover |

1. Misrepresentations
   1. Misrepresentation is a ground for rescinding a contract or for a tort action.
      1. Scienter: P must establish that D made the misrepresentation knowing it to be false, or at least with reckless regard for its truth.
      2. Misrepresentation must be *material*; various standards of materiality have been expressed and are not applied uniformly; serve to give judges control over more volatile behavior of juries.
      3. Some degree of diligence is required; whether party has been negligent on relying depends on victim’s capacities, nature of transaction, and plausibility of representation.
      4. Misrepresentation must be of fact and not of opinion.
   2. Exceptions:
      1. Parties to Exception: Fiduciary Relationships (ex: attorney-client, executor-heir, etc), lack of Arm’s Length Relationship, person who is being told misrepresentation does not have equal opportunity to be apprised.
      2. General Exception Rule: “A statement of a party having superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms.”
   3. *Vokes v. Arthur Murray:* Plaintiff was sold fourteen dance courses totaling 2302 hours of dancing lessons for a total cash outlay of $31,090.45 by sales puffing. Court says possibility of misrepresentation due to unequal bargaining.

**What Does the Contract Mean?**

1. Determining the Parties’ Obligation Under Contract:
   1. Starting point for determining obligations of parties to a contract is language; even when parties reduce agreement to writing, may omit some terms or express others unclearly.
   2. Problems: one or both parties may want to use facts outside the written document in order to determine the nature of the full agreement between them.
2. Parol Evidence Rule:
   1. Tells us when terms negotiated *prior to a contract* being reduced to writing are part of the contract.
      1. Only applies in case of written contract.
   2. Rule is not aptly named:
      1. Not limited to oral agreements (also excludes writings such as letters and emails as well)
      2. Not an exclusionary evidence rule that bars the use of certain types of evidence (rule keeps out parol evidence because it makes it irrelevant, therefor not introducible in court)
   3. Procedural Notes:
      1. A failure to object to evidence that would establish the existence of an agreement not reflected in the writing does not bar a later assertion of the parol evidence rule.
      2. A federal court adjudicating a state law claim must apply the parol evidence rule of the appropriate state.
   4. Parol Evidence Rule does not apply to Later Agreements (RK§213): later agreement “discharges prior agreements.”
   5. Exceptions to the Parol Evidence Rule:
      1. Validity of the Agreement: does not bar extrinsic evidence to show that the written agreement is not valid in cases where the writing was a sham, not intended to be enforced, or that a recital of performance as consideration is false.
      2. Fraud: parol evidence rule does not preclude the use of extrinsic evidence to show fraud in the inducement of the contract.
   6. Integrated Agreements Explained: 2RK 209(2), 210(3) involves two steps to be followed by the court:
      1. Whether a writing has been adopted by the parties
         1. No writing: rule does not apply
         2. Writing: agreement is known as an “integrated agreement” with the consequence that “evidence of prior agreements or negotiations is not admissible in evidence to contradict a term of the writing. (R§§209, 215)
      2. Whether a writing has been adopted by the parties as a complete and exclusive statement of the terms of the agreement:
         1. Writing not adopted: agreement is known as partially integrated agreement
         2. Writing adopted: agreement is referred to as completely integrated agreement with consequence that evidence of a *consistent additional term* is not admissible to supplement the written agreement (R§§210, 216)
   7. Implication of Level of Integration:
      1. Unintegrated: can add and contradict terms, including subtractions
      2. Partially Integrated: can add terms; cannot contradict writing
      3. Completely Integrated: can’t add or contradict
   8. *Gianni v. Russell:* Lease for three years was signed; contained provision that lessee should use premises for sale of fruit, candy, soda, water, etc; expressly understood that tenant is not allowed to sell tobacco in any form. Plaintiff defends exclusive right to sell soft drinks in the building. No stipulation in written lease. Judgment for defendant.
      1. **Test: Compare the oral agreement and the written agreement and determine whether parties would naturally and normally include the one in the other if it were made. If so, it is completely integrated.**
         1. **Natural and normal: relate to the same subject-matter and are so interrelated that both would be executed at the same time and in the same contract.**
   9. *Masterson v. Sine:* Masterson and wife owned ranch as tenants in common; conveyed it to Sine by grant deed. “Reserving unto the Grantors herein an option to purchase the above described property on or before February 25, 1968.” Judgment for plaintiffs in that lower courts incorrectly excluded parol evidence from consideration of the contract.
      1. **Test: (1RK) Could the term have actually been made as a separate agreement? If so, allowed in the contract.**
      2. Dissent: Sees additional terms as contradicting terms
   10. 2RK§216.2b Test: **Would the term have naturally been omitted from the contract? If so, allowed in the contract.**
   11. UCC Test: **Would the terms have certainly been included in the document? If so, not allowed in the contract; If not, allowed in the contract.**
   12. *Bollinger v. Central Pennsylvania Quarry:* Agreement provided that defendant was to be permitted to deposit construction waste on property. Bollingers claim that mutual understanding was that D would remove topsoil of P’s property, pile on waste material, and then restore topsoil. When defendant first began working, did first remove topsoil, deposit waste on bare land, then replace topsoil. Court rules for plaintiffs.
       1. Parol evidence rule is not applied here, because there is a mutual mistake; everyone thought the missing term was already in the writing.
3. No-Oral Modification Clauses
   1. Any prior agreement, including a no-oral modification clause, can be modified by later agreement.
      1. Even in jurisdictions that honor no-oral modification clauses, a party that seeks to escape the effect of the clause can do so by showing reliance on the oral modification.
   2. Under common law: if you modify the contract, you must meet the requirement of consideration.
   3. Under UCC §2-209(2): A signed agreement which excludes modification or rescission except by a signed writing cannot otherwise be modified or rescinded.
      1. Can’t modify without a writing; can modify without consideration
      2. Under subsection 4: what may fail to be effective as a modification or rescission may be effective as a waiver.
      3. Under subsection 5: a material change of position in reliance on the waiver may prevent its retraction; subject of differing interpretations.
4. The Plain Meaning Rule/ Four Corners Rule: The Use of Extrinsic Evidence of Parties’ Intent:
   1. Courts have traditionally employed a two-stage process often referred to as the “plain meaning rule.” Because the process is generally used only for completely integrated agreements, it is often regarded as a corollary of the parol evidence rule.
      1. First stage: the judge determines whether the language in the written agreement, with respect to the dispute in question, admits of only one plausible meaning or, rather, is ambiguous.
         1. If the language is not ambiguous, extrinsic evidence as to its meaning will be excluded.
      2. Second stage: the court determines the meaning of the contract language.
         1. If in the first stage, the language was found to be ambiguous, extrinsic evidence as to its meaning will be admitted to inform the court’s determination of the meaning of the contract language.
   2. Useful to distinguish vagueness from ambiguity:
      1. Word is vague when its applicability in marginal situations is uncertain
   3. Exceptions to extrinsic evidence: in general, dictionaries, evidence incorporated into a contract by reference.
   4. Hypothetical: If both parties thought writing said “chicken,” but both parties were envisioning “pig,” what would a court do in that situation?
      1. Objective approach: ignore the shared meaning and determine what a reasonable person would think “chicken” means
      2. Subjective approach: use the parties’ shared meaning of the term
   5. 2RK§201-1: “Where the parties have attached the same meaning to a promise or agreement of a term thereof, it is interpreted in accordance with that meaning.”
   6. 2RK§201-2: “Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them at the time the agreement was made.”
   7. *Greenfield v. Philles:* The Ronettes signed a five year music recording contract, where they agreed to perform exclusively for Philles Records and in exchanges, Philles acquired an ownership right to the recordings of the Ronettes’ musical performances. Plaintiffs commenced this breach of contract action in 1987 alleging that 1963 agreement did not provide Philles Records with the right to license the master recordings for synchronization. Court of Appeals found that, because there is no ambiguity in the terms of the Ronettes agreement, defendants are entitled to exercise complete ownership rights, subject to payment of applicable royalties due plaintiffs.
      1. In this case, the ambiguous term is “property.”
      2. In New York, the court uses the Four Corners rule to figure out if the term is ambiguous.
      3. In this case, they applied the California Rule to the issue as a result of the divorce proceeding; incorrectly applied:
   8. Collapsed the rule by saying that you look to all credible extrinsic evidence to determine the meaning. In CA, extrinsic evidence isn’t used to determine meaning immediately, only to make the initial assessment of whether or not a term is ambiguous.
5. Rules in Aid of Interpretation: Comparing Statutory Interpretation and the Interpretation of Contracts
   1. The Statutory Analogy: obvious similarity between the interpretation of contracts and that of statutes.
      1. Ex: Are the policies for or against the use of legislative history as an aid to statutory interpretation similar to those for or against the use of negotiations (transactional history) as an aid to contract interpretation?
   2. Purpose Interpretation: For statutes, involves these steps:
      1. Examination of the law before enactment of the statute
      2. Ascertainment of the mischief or defect for which the law did not provide
      3. Analysis of the remedy provided by the legislature to cure the disease
      4. Determination of the true reason of the remedy; and then
      5. Application of the statute so as to suppress the mischief, and advance the remedy
   3. In statutes, statement of purpose of enactment can be found in preamble or purpose clause of statute itself. Similarly, it is not uncommon for written contracts to begin with a series of recitals of the surrounding circumstances and of the objectives of the parties.
   4. Courts have frequently repeated Lord Escher’s three rules:
      1. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction
      2. If the recitals are ambiguous and the operative part is clear, the operative part must prevail
      3. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred
   5. Public Interest:
      1. We saw that contracts involving performance that would be in violation of some strongly rooted public interest, often expressed in a statute, may be held to be unenforceable
   6. Maxims:
      1. *Esjusdem generis*: of the same kind
      2. *Expressio unius est exclusion alterius*: the expression of one thing is the exclusion of another
      3. *Noscitur a sociis*: it is known from its associates
      4. *Contra proferentem:* against its author or profferer
      5. Where various meanings can be given a term, the term is to be strictly construed against the draftsman of the contract.
6. Function of Judge and Jury:
   1. Meaning of language is a question of fact, but interpretation of written agreements has often been withdrawn from jury by calling it a question of law for the judge rather than of fact for the jury.
      1. Distrust of unsophisticated, uneducated, and illiterate jurors.
      2. Desire for consistency in interpretation of some kinds of contracts, such as standard insurance policies.
      3. Scope of Review: assignment to judge or jury does not of itself determine the standard of review to be applied on appeal. Interpretation by a trial court of a factual matter is reviewable on a clearly erroneous basis, rather than as a plenary one.
7. Judge Traynor/California’s Interpretation of the Plain Meaning Rule:
   1. Use extrinsic evidence itself to determine whether or not the term is ambiguous or unambiguous.
      1. If it’s ambiguous, extrinsic evidence can be admitted. If it’s unambiguous, extrinsic evidence cannot be used for judgment.
   2. *Pacific Gas:* Defendant entered into contract with plaintiff to furnish labor and equipment necessary to remove and replace upper metal cover of plaintiff’s steam turbine. Defendant agreed to perform work at its own risk and expense and to indemnify plaintiff against all loss, damages, expense, and liability resulting from injury to property. During work, cover fell and injured exposed rotor of turbine. Court says can consider extrinsic evidence to determine ambiguity.
      1. In this case, the ambiguous term is “property” and whether it involves the plaintiff’s property or just third-party property.
   3. *Trident v. Connecticut General:* Trident Center and General Life Insurance Company entered into financing loan agreement. In case of default during years 1-12, Connecticut General has the option of accelerating the note and adding a 10% prepayment fee. Trident then brought suit in state court seeking a declaration that it was entitled to prepay the loan now, subject only to a 10% prepayment fee. Court has doubts about the wisdom of *Pacific Gas,* have no difficulty understanding its meaning, even without extrinsic evidence to guide us. Must reverse and remand to admit extrinsic evidence.
      1. Term at issue here is “the event of prepayment from a default…”
      2. Judge Kozinski doesn’t want to use extrinsic evidence to decide if the term is ambiguous, but this is a case based on California law.
      3. Kozinski thinks the CA interpretation is a bad rule because:
         1. You can always argue that there’s no way to write a contract and interpret it without using extrinsic evidence; leads to more litigation.
         2. We can compare this to statutory interpretation to say that law is ambiguous. If all laws can’t be written to mean something specific, it’s harder to enforce them.
         3. Leads to a lot of litigation that is meaningless, because this rule elicits self-serving testimony and incentivizes people to lie.
8. Extrinsic Evidence from the Commercial Context (UCC):
   1. UCC §2-202: “Terms…intended by the parties as a final expression of their agreement…may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented: (a) by course of dealing or usage of trade (§1-303) or by course of performance (§2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
   2. UCC §1-303: Course of Performance, Course of Dealing, Usage of Trade:
      1. (a) Course of Performance exists if:
         1. Must have multiple opportunities to perform; one instance does not establish course of performance; unspecified what amount is
         2. Performance occurs multiple times, especially contractual performance that occurs after the formation of a contract between two parties; how those two parties have acted in relation to the contract/performing on that contract.
      2. (b) Course of Dealing:
         1. Everything with these two parties to the contract, but in regards to other contracts.
      3. (c) Usage of Trade:
         1. How everybody in the industry or trade acts.
      4. (d) Express terms, applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other; if unreasonable:
         1. Express terms prevails over all
         2. Course of performance prevails over course of dealing and usage of trade; and
         3. Course of dealing prevails over usage of trade
   3. *Frigaliment Importing v. BNS International:* Two contracts existed between the plaintiff for the sale of chickens delineated at certain weight classes. When the initial shipment arrived, plaintiff found that the 2.5-3.5lb chickens were not young chicken suitable for broiling and frying but stewing chickens. Plaintiff filed suit alleging that goods of delivered were not to exact specifications. Plaintiff has not sustained its burden of persuasion that the contract used the narrower sense of the definition.
      1. This case is a New York case, so the judge uses the four corners rule.
      2. Judge Friendly only cares about discovering what the objective meaning of “chicken” is in this case, not what the subjective meaning is.
         1. Non-extrinsic Evidence:
            1. Dictionary
            2. Wording in contract that differentiates between sizes of chickens (1.5-2lb vs 2.5-3lb)
            3. USDA definition (mentioned by reference)
         2. Extrinsic Evidence:
            1. Market Price of classes of chickens
         3. Course of Performance:
            1. Plaintiff accepted second shipment of goods and did not complain about contract until after his customers began to complain.
         4. Course of Dealing:
            1. Exchange of cablegrams between parties
         5. Usage of Trade:
            1. Problem: can’t use this evidence because defendant is new to the trade and not abreast of all terminology
   4. *Hurst v. Lake:* Specifications stated that scraps would be minimum 50% protein and contract stipulated that if any of the scraps analyzes less than 50% of protein, Lake would have discounted price of $5.00 a ton. Lake paid only $45 for 140 tons that contained protein varying from 49.53 to 49.96%. Hurst sued, alleging that both parties were members of traders in horse meat scraps and that defendant was aware of usage under which terms “minimum 50% protein” and “less than 50% protein” required the buyer to accept all scraps containing 49.5% or more and pay for them at rate provided for 50% protein.
      1. The term at dispute is “minimum 50%”
      2. Court uses the California approach, because when looking at the definition of 50%, they’re using extrinsic evidence to determine whether or not there’s an ambiguity. Trade definitions and practice change the meaning of 50%.
   5. Treatment of People New to Trade:
      1. In the case of people outside the trade, use an objective test to see if the person should’ve known; use of trade can still bind you if not in the trade but only if its sufficiently well publicized that you should have known.
      2. In the case of person new to trade, degree of how well-established trade usage must be for it to count is a question of fact for the jury. Comment 5 to §1-303
   6. *Nanakuli Paving & Rock v. Shell Oil:* Nanakuli bought all its asphalt requirements from Shell under two long-term supply conracts. Suit charged Shell with breach of later 1969 contract. Jury returned verdict of $220,800 for Nanakuli on first claim, which is that Shell breached 1969 contract by failing to price protect on asphalt.
      1. This is a requirements contract.
      2. Nanakuli says they’re entitled to price protection, because it’s an industry standard. Nanakuli also contends that price protection in this case is the method of notification; want more notice that the price will change. Reason is because they’re stuck in contracts with government that won’t change contract price.
         1. In this case, they’re trying to add a new term that is not included in Shell’s Posted Price; this is allowed in the UCC
      3. Trade Usage: Shell could not come up with any argument to counter Nanakuli’s evidence
      4. Course of Performance: Court pointed to two other occasions in which they price protected; communication by Shell official that they felt Nanakuli was entitled to price protection.
         1. Shell’s defense is that they waived their rights the last two times.
         2. Court points out that waiver only applies when acts are ambiguous.
      5. Court says that the contract does not say that Shell doesn’t price protect, it just says a price; “Less than complete negation of the term that an unstated exception exists at times of price increase…”
   7. *Columbia Nitrogen v. Royster:* Contract whereby Royster agrees to sell Columbia a minimum of 31,000 tons of phosphate a year for three years, with an option to extend. Royster sued for breach. Court says course of dealing and usage of trade, unless carefully negated, are admissible to supplement the terms of any writing, and that contracts are to be read on the assumption that these elements were taken for granted when the document was phrased.
      1. Court says that even with zipper clause in contract, you can enter evidence of usage of trade unless it is explicitly rejected under the terms of the contract.
9. Extrinsic Evidence When Parties Have Different Understandings About Meaning of Term:
   1. Most of the time, if you have two parties in which one thinks X = A and another thinks X = B, and the reasonable person thinks X = A, courts will choose the meaning of the contract to be A.
   2. If you have a situation where one party thinks X = A and the other thinks X = A, and the reasonable person thinks X = C, subjective (majority/modern) view: go with terms agreed upon by both parties; objective view: should still go with the common understanding definition.
   3. When we have a situation where one person thinks X=A and another thinks X=B, and most people think X=C, we shouldn’t enforce this contract, because both of them are thinking something different and neither of them is thinking the objective meaning of the term.
   4. Latent Ambiguity: An ambiguity that does not readily appear in the language of a document, but instead arises from collateral matter when the document’s terms are applied or executed.
   5. *Raffles v. Wichelhaus*: Agreement between plaintiff and defendant that plaintiff should sell goods to defendant; specifically referred-to goods include 125 bales of Surat cotton to arrive ex Peerless from Bombay. Ship mentioned in agreement was intended by defendants to be ship called Peerless which sailed from Bombay in October. Plaintiffs did offer cotton that arrived from another ship, also called the Peerless. Court says there was no consensus ad litem and therefore no binding contract.
   6. *Oswald v. Allen:* Oswald (who spoke very little English) arranged to buy for $50,000 what Mrs. Allen thought was her Swiss coin collection and what Oswald thought were all her Swiss coins. When Oswald was informed that Allen would not go through with the sale, he sued for specific performance. Court says there is “no sensible basis for choosing between conflicting understandings.”
      1. *Oswald* Rule: “When any of the terms used to express an agreement is ambivalent, and the parties understand it in different ways, there cannot be a contract unless one of them should have been aware of the other’s understanding.”
         1. No meeting of the minds, no K.
   7. Patent Ambiguity: An ambiguity that clearly appears on the face of a document, arising from the language itself.
   8. *Colfax v. Local:* Colfax signed summary of new contract which stated terms of manning machinery in truncated terms: “4C 60 Press—3 Men and “5C 78 Press—4 Men” Colfax thought all presses operated as 4 color presses over 60” would now require only 3 men and sues. Union counterclaimed for order to arbitrate under terms of new agreement. Posner says the arbitrator, rather than a court, should determine whether, “under proper interpretation of the contract, there really was no meeting of the minds over the manning requirements and therefore that the contract should be rescinded after all.”
      1. Posner does not send this case to arbitration, because he wants to first decide if this term is so deeply ambiguous that no contract has been formed.
      2. This is a case of patent ambiguity; Colfax probably knew that the court could have sided either way, and he shouldn’t be allowed to hope that the court would either take his interpretation or dismiss the contract. He has to assume the liability that the court would take the union’s side.
   9. Burden of Proof: Friendly’s view in *Frigaliment* is that the plaintiff has the burden of proof to show that the narrower definition of chicken is the definition of chicken. This is out of step with the current way we approach these problems, because all he established is that the plaintiff didn’t show but that the defendant should’ve known what plaintiff meant. The modern view is that the burden of proof is on both parties.

**Filling Contractual Gaps:**

1. Filling Contractual Gaps—Generally:
   1. UCC and common law sets out ways to fill gaps where parties should’ve agreed on something. The law will fill it in, even if the parties don’t.
      1. UCC §1-201.3 “Agreement”: bargain of the parties in fact as found in their language or inferred in their circumstances, including course of performance, course of dealing, or usage of trade as provided in §1-303.
      2. UCC §1-201.12 “Contract”: means the total legal obligation that results from the parties’ agreement as determined by UCC as supplemented by any applicable laws.
      3. Agreement is smaller than the contract, because the contract encompasses the total agreement including the unexpressed terms in UCC§2-300.
      4. Even though it’s not explicitly said, courts assume that agreements encompass industry trade practice, etc.
   2. “Implication”: court may need to supply a term to deal with the dispute.
      1. Process may have one of two basis; first basis: actual expectations of the parties
         1. If the court is persuaded that the parties shared a common expectation with respect to the omitted case, the court will give effect to that expectation, even though the parties did not reduce it to words.
      2. In the absence of a common expectation, matters are more difficult and courts are faced with a number of theories:
         1. Should implement bargain the parties would have made
         2. Should do what the fair and reasonable man would do; adopted by 2RK §204
         3. Focus on law and economics
         4. Penalty Default Rule: give at least one party to the contract an incentive to contract around the default rule and choose affirmatively the contract provision they prefer.
   3. UCC §1-302: Generally, you can contract around the default terms, but sometimes you cannot.
      1. May not be able to disclaim good faith, but you can state what good faith will be measured by.
      2. §2-307, 308, 310: buyer and seller are not constrained by this rule, because of the phrase “unless otherwise agreed” can change or vary the terms.
         1. If this phrase did not exist: UCC §§1-302(a) and 1-302(c)
      3. §2-306.1 If sections do not have “unless otherwise agreed”, can terms be varied?
         1. §1-302(c): does not imply that the effect of other provisions may not be varied by agreement under this section.
      4. There is not an implication for quantity terms. You MUST include one.
2. Implied Warranties in Sales of Goods:
   1. Most of the time, when it looks like stores are giving you a warranty, they’re actually taking something away; the terms of the UCC might be more generous.
   2. Caveat emptor: “buyer beware”; if the agreement is silent as to product quality, the contract does not impose any minimum standard; if a buyer wishes to contract only for goods that meet a particular standard, he or she must contract for that result
   3. Implied warranties: Contract terms implied by law; most common use appears to be in sale of goods under UCC Article 2
      1. Implied warranty of merchantability: UCC §2-314
      2. Implied warranty of fitness for particular purpose: UCC §2-315
      3. Warranty of title and warranty against infringement: UCC §2-312
   4. Three questions must be addressed:
      1. In what circumstances does Article 2 make the warranty part of the contract?
      2. What is the content of the warranty?
      3. May the parties, if they so desire, conclude a contract that does not contain the warranty?
3. Implied Warranty of Merchantability:
   1. UCC §2-314: “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of the kind.
      1. Merchantability: if the seller is a merchant with respect to goods of the kind, the contract for their sale contains a warranty that the goods shall be merchantable
      2. Merchantable goods: UCC §2-314
   2. Have to show:
      1. Seller is a merchant
      2. Implied warranty has not been modified or excluded
      3. Prove that all six of requirements listed in §2-314 were violated; (c) comes up the most
   3. Most litigation under UCC §2-314(2) has concerned the second (“fair average quality”) and third (“fit for the ordinary purpose for which such goods are used”) criteria of merchantability
   4. Recurring issue: whether the buyer’s use of the goods is ordinary.
   5. *Koken v. Black & Veatch:* Fire blanket had been used to protect the area beneath the welding. Summary judgment for defendant. There is no testimony that the ordinary use reasonably expected a fire blanket to prevent the type of melting that Austin observed. B&V failed to provide evidence establishing the expectations of ordinary users beyond the subjective views of a single individual.
      1. Burden of proof: plaintiff has to establish the ordinary purpose of the good.
      2. The expert witness to show whether or not the blanket was used ordinarily gave personal testimony, not general industry standard. Proof must be objective.
      3. There is not a warranty of merchantability for all uses, because merchants should expect people to use their products reasonably; they shouldn’t be held liable when people don’t.
4. Implied Warranty of Fitness for Particular Purpose:
   1. Implied warranty of fitness for a particular purpose: Law in some circumstances provides protection for a buyer who intends to put goods to non-standard use. UCC 2-315
   2. *Lewis v. Mobil Oil:* Lewis requested from Mobil Oil dealer proper hydraulic fluid for his hydraulic system. Mobil Oil dealer contacted Mobil representative for recommendation and sold plaintiff product known as Ambrex 810, which is a straight mineral oil with no chemical additives. Mobil Oil visited and recommended a new oil which contained chemical additives, including a defoamant. Defendant appeals from a judgment entered on a jury verdict in favor of the plaintiff in the amount of $89,250 for damages alleged to be caused by use of defendant’s oil. The evidence establishes an implied warranty of fitness.
      1. Claim for implied warranty in this case based on fact that: representative was aware of facts, statute requires seller to know at time of purpose for which goods are required and buyer has to rely on seller’s skill or judgment, clear in this case that buyer doesn’t know anything.
      2. Rule: You don’t have to show that the buyer told the seller; “where the seller at the time of contract has reason to know…”; we only care about subjective standard—what the buyer had reason to know.
5. Express Warranties (UCC 2-313):
   1. Differ from implied warranties in that they are the product of bargaining between the parties rather than implication by law.
   2. Comment 1 of UCC 2-313: express warranties rest on ‘dickered’ aspects of individual bargain; may be considered terms of the agreement between the parties not worth of extensive discussion.
   3. General test for puffery: Can you prove or disprove the fact?
      1. Sample or model of the goods creates a warranty that the “whole of the goods” will conform to the sample or model.
   4. Three aspects of UCC 2-313 are noteworthy:
      1. No requirement that the buyer have relied on the affirmation of fact, promise, description, sample, or model in order for it to be part of the contract, but it must have been part of the “basis of the bargain”
      2. Not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty under UCC 2-313(2); cannot escape the conclusion that there is an express warranty merely by claiming that he did not intend to incur that obligation
      3. Affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty (UCC 2-313(2)); sometimes known as “puffing” exception or “sales talk” exception; attributed to common experience that discloses some statements or predictions cannot fairly be viewed as entering into the bargain. As seen in Bayliner.
6. Excluding Implied Warranties from the Contract:
   1. Article 2 does not make implied warranties mandatory.
   2. Refer to UCC §2-316 for detailed rules that indicate how a contract for a sale of goods can be concluded without those warranties
      1. Provides that it takes more than a simple agreement to the contrary to prevent implied warranties from becoming part of the contract
   3. *South Carolina Electric and Gas v. Combustion:* The sales contract contains an item labeled “Warranty” that expressly warrants the equipment be free “from defects in material and workmanship for a period of one year. Also included is a disclaimer of warranties provision that states that “there are no other warranties, whether expressed or implied, other than title.” Appellant South Carolina seeks to recover damages that it alleges it sustained as a result of a fire. The disclaimer does not satisfy the requirements of Subsection (2).
      1. There is no mention of merchantability in this case. To preclude or modify, you must actually say “merchantability” in the contract.
      2. Provision is also not conspicuous under UCC (Page 220) definition.
   4. *Henningsen v.Bloomfield:* Plaintiff purchased automobile; wife injured when steering mechanism failed. Both sued Bloomfield Motors and manufacturer, Chrysler Corporation, for breach of implied warranty of merchantability. Only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase “it’s obligation under this warranty being limited to making good at its factory any part or parts thereof” signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile.
      1. People signing contracts are not bound by waiver of warranties. In this case, car dealership functions as a public entity and uses the same form/provisions to which people must adhere if they want to buy a car.
      2. Balance of power is not equal and dealing does not occur at arms length.
7. Supplementing the Contract With Mandatory Terms: Good Faith
   1. All contracts contain an obligation of good faith (or good faith and fair dealing)
   2. UCC 1-304: Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement.
   3. 2RK 205: Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
   4. What is good faith?
      1. Honesty in fact and the observance of reasonable commercial standards of fair dealing UCC 1-201b20
         1. First portion: subjective test
         2. Second portion: objective test
      2. Until recent revision of Article 1, definition of good faith referred only to “honesty in fact”
   5. Obligation is present even if parties have not bargained for it.
   6. Parties cannot prevent the obligation from becoming part of their contract.
   7. Obligation of good faith is said to be a mandatory term of a contract.
   8. Explicit authorization for parties to determine by agreement the standards by which the performance of the obligation of good faith in the performance and enforcement of the contract is to be measured if those standards are not manifestly reasonable.

**Limits on the Bargain and Its Performance:**

1. Circumstances where law may still refuse to enforce the deal out of concern about its content.
   1. Three areas in which the law has found it appropriate to place limits on substance, and through obligation of good faith, performance:
      1. Conventional controls: limit certain bargains marked by an inequality of exchange
      2. Modern doctrine of unconscionability: denies enforcement to a contract, or particular term, that is found to be oppressive; considers the types of contracts, including standard form contracts and adhesion contracts
      3. Insistence on decencies in how parties carry out contractual obligations; parties must perform in good faith
   2. Public Policy: deals with bargains challenged because they threaten interest of the public at large.
2. Unfairness:
   1. In equity courts:
      1. decree of specific performance was not a matter of right in the same sense as was an award of damages; often denied when bargain was procured by sharp practice or highly disproportionate exchange
      2. enforceability regularly denied when bargain was affected by mistake.
   2. At law courts:
      1. Resorted to more established methods of policing, such as finding that a particularly overbearing provision conflicts with an established public policy.
      2. Courts have manipulated doctrine to serve the ideal of fairness, including determinations about whether or not there was any “bargain” at all
   3. *McKinnon v. Benedict:* McKinnon promised some help in getting business and gave the Benedicts a loan for $5,000. Benedicts promised McKinnon to cut no trees and to make no improvements closer to his property than present buildings. Benedicts decided to add a trailer park and tent camp. Suit brought by McKinnon against Benedicts to enjoin them from continuing with improvements. Considering all the factors (inadequacy of consideration, small benefit that would be accorded the McKinnons, and the oppressive conditions imposed upon the Benedicts), this contract failed to meet the test of reasonableness.
      1. Whole issue of unfairness is tied to the fact that plaintiff is suing for specific performance via no development of part of land near his property. This invokes the courts’ equitable powers at law.
         1. Just because McKinnon can’t get specific performance doesn’t mean that he can’t recover monetary damages.
         2. In this case, the reason the court says this case is unfair is because the exchange is not valid; restriction on land is a huge concession and promotion of business and loan is not a big deal.
         3. The court says this is also unfair because they don’t have a choice on the loan.
         4. Public policy argument: don’t want to have restrictions on development/use of land.
3. Standard Form and Adhesion Contracts:
   1. Standard Form Contracts:
      1. Advantages:
         1. Take advantage of lessons of experience and enable a judicial interpretation of one contract to serve as an interpretation of all contracts
         2. Reduce uncertainty and save time and trouble
         3. Simplify planning and administration and make superior drafting skills more widely available
         4. Make risks calculable and increase real security which is the necessary basis of initiative and assumption of foreseeable risks
      2. On other hand, often referred to as contracts of adhesion: offer the means by which one party may impose its will upon another
         1. An enterprise may have such disproportionately strong economic power that it can dictate its terms to the weaker party
         2. May be no opportunity to bargain over terms at all
         3. Standardized contracts are often used by a party who has had the advantage of time and expert advice in preparing it while the other party may have no real opportunity to scrutinize and often no real means to understand the contract.
   2. Adhesion Contracts: Court is concerned with whether a party to a standardized contract can reasonably be held to have seen, understood, and assented to its unfavorable terms, and accordingly, to be bound by then.
   3. Informed Minority View: in any contract, there’s an informed minority who will choose who to do business with based on the terms of the contract, so theoretically, that minority will change the terms of the contracts that are offered; this theory has not been proven.
   4. *Henningsen:* Courts will limit the contract by adopting doctrines of strict construction and notice.
      1. Court will make sure party had notice.
      2. If they didn’t, then they’ll strictly construe the contract (restrict what the contract means in a way that benefits the less powerful party).
   5. *Graham v. Scissor-Tail:* Graham signed four contracts, all prepared on an identical industry form that provided arbitration clause. Dispute arose concerning whether losses from one concert could be off-set against profits from another. Graham filed an action for breach of contract. Scissor-Tail moved to compel arbitration and won.
4. Agreeing to Boilerplate:
   1. Common to find contracts of much less formal nature
   2. 2RK §211(3): where a party effectively manifests assent to a standardized expression of agreement, and the other party has reason to believe he would not have done so if he had known that it contained a particular term, “the term is not part of the agreement.”
   3. *Klar v. HM Parcel Room:* Man left parcel with parcel room and received claim ticket which had boilerplate disclaimer stamped on the back. When man went to retrieve package, parcel room had lost it. Man sues for value of package; parcel room contends that disclaimer absolves them of all except $25 responsibility. Court holds that boilerplate is not valid, because there was not adequate notice and actual assent.
      1. When the dignity of a full contract is absent, have to make sure that other party actually knows and must receive assent from them.
      2. Courts have approached the fact that “Contract” was printed on the front in different ways. Depends on the case.
      3. 2RK §211.3; this is hard to apply because “what you reasonably expect people to accept” is subjective; the alternative is a practical evaluation is a fact-specific inquiry
5. Standard Form Contracts: Hawkins’ Summary:
   1. Three step process for analyzing:
      1. Whether or not have standard form contract; chances are it’s enforceable
      2. Whether or not have contract of adhesion; doesn’t end the discussion
      3. Look to different ways courts have addressed:
         1. *Henningsen:* strict construction against drafter; construe this most favorable to recipient and whether or not they knew
         2. *Klar:* look at whether adequate notice and actual assent was given
         3. *Graham:* not going to enforce contracts of adhesion that don’t conform to reasonable expectations of parties; in this case, did reasonably expect terms of contract, or if contract is unconscionable
6. The Duty to Read:
   1. Common law rule: in the absence of fraud, one who signs a written agreement is bound by its terms whether he read and understood it or not, or whether he can read or not
   2. Various exceptions to relieve a party who has signed a standard form of a contract that is unintelligible:
      1. Cases where parties are not able to know what the contract terms are because they are unreadable.
   3. Plain language statutes: ensure that terms are not only visible but intelligible as well
7. The Duty to Disclose:
   1. Major consumer protection is through disclosure laws. Why do you think the US has adopted disclosure-based regulations:
      1. Way to help parties understand the contract
      2. Promote market efficiency
   2. Negative of disclosure-based regulation:
      1. Some people think disclosures are bad because they give too much information
         1. Theory of economics: information overload—tell people too much, all of it becomes less salient
      2. People don’t understand financial terms so even if you tell someone, that’s not enough because people might not know what that really means.
   3. Behavioral economics: people don’t behave in a rational way; variety of biases that sociologists and psychologists have conclusively demonstrated
      1. People overestimate the likelihood that good things will happen to them
      2. Disclosures don’t correct sub-optimal decision making
8. Unconscionability:
   1. Unconscionability is a defense; people bring it up when they breach the contract and are defendants in a suit.
      1. In some states, this is used as a cause of action.
      2. It arises in both consumer and commercial law, but a huge percentage relates to consumers because it’s harder to prove that one company was subject to unconscionability.
   2. Only a judge can decide whether a contract is unconscionable. This is not a jury question.
      1. Giving it to the judge makes a more stable consumer market and standard for unconscionability.
      2. Juries might invalidate a lot more contracts than judges would, because it’s a small party against a large party
   3. Unconscionability: Two Views (Eisenberg & Eppstein)
      1. Both agree that unconscionability has some form and place.
      2. Eisenberg breaks down unconscionability into two types: procedural and substantive
         1. Procedural: unfairness in bargaining process
         2. Substantive: unfairness in outcome/terms
   4. Eppstein embraces procedural unconscionability but does not embrace substantive unconscionability
      1. The market should solve the problem on its own.
      2. Courts should only invoke unconscionability when:
         1. Proof of some defect in process of contract formation
         2. Incompetence of the party against whom the agreement is to be enforced
      3. All unfair outcomes won’t occur as long as the process is fair; want to get rid of fraud and duress (procedural unconscionability), because this results in inefficient contracts.
      4. The substantive dimension serves only to undercut private right of contract in a manner that is bound to do more social harm than good.
   5. UCC specifically provides that court may refuse to enforce a contract which it finds to be unconscionable at the time it was made (2-302).
   6. *Williams v. Walker-Thomas Furniture, Co:* Walker-Thomas Furniture standard contract stated, “all payments now and hereafter made by purchaser shall be credited pro rata on all outstanding leases, bills and accounts…” Williams bought stereo set; defaulted and appellee sought to replevy all items purchased. Court holds that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.
      1. Rent-to-own term: this is not unconscionable.
      2. Cross-collaterization term: works in conjunction with pro-rata distribution; if you default on the last item you buy, they repossess everything on the basis that you haven’t paid fully for all items
      3. The UCC is used as persuasive; does not apply as law because enacted after this transaction.
      4. Substantive standard; legal test: in determining reasonableness or fairness, we have to look at the circumstances and they can’t be mechanically applied; have to consider in light of commercial reasonableness and commercial trade
         1. “No man would have made and no man would accept.”
         2. This is a harsh standard
      5. Procedural unconscionability is required: here, it is the absence of meaningful choice
         1. Lack of meaningful choice is due to deception and the fact that they couldn’t qualify for credit anywhere else
   7. Why have repossessions?
      1. Reposessions are expensive and net recovery is often very low.
      2. This is a way to terrorize people; creates a cyclical situations where you have to constantly re-buy seized possessions.
      3. FTC now has a rule that you can’t take security interest in stuff that you don’t think is going to generate cash on resale.
      4. If you don’t repossess everything one time, court might say you exercised waiver. However, if you choose not to repossess three times, this supplements the terms of the contract under course of performance.
      5. Market-based decision to intervene: prevent bad decision making about future finance and prevent deficient choices
   8. *Jones v. Star Credit Co:* Plaintiffs purchased home freezer unit for $1,234.80. Plaintiffs have paid $600 of their purchase. Dependent claims balance of $819.81 still due from plaintiffs. When purchased, freezer had retail value of approx. $300. Court says balance is already more than paid off.
      1. Price alone makes the terms unreasonable. According to 2-302, we can look at all the terms of the contract, and price is an important term of the contract.
         1. Court looks at ratio between cost and profit margin.
         2. Court also looks at fact that people don’t have other choices for shopping.
      2. Rationale for not looking at price: let people determine what market value of items are.
   9. *Eastern Air Lines v. Gulf:* Gulf accuses Eastern Air Lines of fuel freighting: if the price was higher at a Gulf station, the practice could have reduced liftings there by lifting fuel in excess of actual operating requirements at prior station; vice versa. Eastern’s performance under the contract does not constitute a breach of its agreement with Gulf and is constituent with good faith and established commercial practices as required by UCC 2-306.
      1. Court looks at extrinsic evidence, Good Faith (1-201), course of dealing
      2. 2-306 offers protection for requirements contracts: “no quantity grossly disproportionate to stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded”
         1. “Reasonable elasticity in the requirements is expressly envisioned by this section.”; this covers normal shut downs, expansions, etc . of Eastern’s fuel requirements.
      3. Note: Good faith is an obligation and informs how you perform your other obligations. Can’t independently sue for bad faith; have to sue for bad faith in the performance of some part of the contract.

**Was the Contract Breached?**

1. Conditions:
   1. Duty: obligation under contract; every contract that is bilateral has people with obligations/duties
   2. 2RK §224: Condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.
      1. Exception: “unless its non-occurrence is excused”; duty under contract doesn’t mature.
      2. Conditions can be in party’s control, in third-party’s control or not in anyone’s control
      3. Conditions give some parties a self-help remedy in case of breach.
   3. Two Main Types of Conditions:
      1. Express Conditions: A condition that is the manifested intention of the parties (expressed; created by words)
         1. Ex: satisfaction clauses
      2. Implied/Constructive Conditions: A condition contained in an essential contractual term that, though omitted by the parties from their agreement, a court has supplied as being reasonable in the circumstances; a condition imposed by law to do justice (not stated anywhere in the contract or elsewhere, but a judge reads them into a contract).
   4. Conditions Categorized By Duty Maturation:
      1. Condition Precedent: some event has to occur before performance is due; most common
      2. Condition Subsequent: party is obligated to perform until an event occurs
      3. Condition Concurrent: condition runs alongside performance
   5. Condition/contract interpretation is a matter of law:
      1. Courts generally want parties to perform on the contract; the default is to read something as just duties and not conditions.
      2. Generally, best construction of express conditions: “is conditioned upon”
2. Express Conditions:
   1. A condition that is the manifested intention of the parties and directly inserted into the contract as such.
   2. Require 100% perfect performance.
   3. *Luttinger v. Rosen:* Contract for purchase of premises subject to and conditional upon buyers obtaining first mortgage financing on said premises from a bank or other lending institution in amount of $45,000 for a term not less than 20 years and at an interest rate which does not exceed 8.5% per annum. Also stipulated that if plaintiffs were unsuccessful in obtaining financing as provided and notified seller, all sums would be refunded and contract terminated. Court ruled condition precedent to perform contract not met.
      1. This is an example of an express condition.
      2. Court says that it is okay that the buyer only went to one bank to obtain a mortgage, because only that bank would loan him that much money. If he hasn’t gone to the bank, it would have been an excused condition.
      3. Court also says it does not matter that the seller tried to come up with a different way outside of the contract to make up the difference between what the bank was offering and what the contract stipulated.
   4. *Peacock Construction Co. v. Modern Air Conditioning, Inc.:* Contract clause between subcontractors and contractor stated that “…full payment therefor by the Owner.” Court held that this provision should be interpreted as a reasonable time for payment.
      1. Potential condition here: owner pays general contractor before contractor has to pay subcontractor
      2. Two possible interpretations: condition or time provision
      3. Court says the contract terms are ambiguous and uses the plain meaning rule, which would then allow extrinsic evidence to interpret.
      4. Courts generally do not want to read things as conditions.
   5. *Gibson v. Cranage:* Plaintiff brought action to recover contract price for the making and executing of portrait for dead daughter. Condition in oral contract stated that “when returned if not perfectly satisfactory, need not take or pay.” Defendant objected to making of painting, but plaintiff urged him saying deal was risk-free. Court upholds this as an express condition contract.
      1. The condition in this contract was never satisfied, so duty to pay does not mature.
      2. Plaintiff bears the risk as seller.
      3. If the buyer had refused to look at portrait, the condition would have been excused in this “fancy taste in judgment” satisfaction clause due to lack of good faith.
3. Constructive Conditions:
   1. Constructive conditions: A condition contained in an essential contract term that, though omitted by the parties from their agreement, a court has supplied as being reasonable in the circumstances; a condition imposed by law to do justice.
      1. Not set in stone
   2. Covenants:
      1. Independent covenant: a covenant that imposes a duty that does not depend on the other party’s prior performance.
         1. Ex: Dad gives money if guy marries daughter. Dad must pay money and sue separately to prove guy breached.
         2. Independent covenants require performance and separate suit for breach.
      2. Dependent covenant: a covenant that imposes a duty that depends on the other party’s prior performance.
         1. Ex: Dad gives money when guy marries daughter. If event doesn’t occur, father’s obligation to pay doesn’t mature.
         2. Conditions in this case are a self-help remedy.
         3. Doing nothing imposes a risk, but if it’s a dependent covenant, he could not pay and never go to court.
      3. 2RK§232: we used to construe obligations as independent, but now we assume that promises are dependent of each other.
   3. Ways to allocate/mitigate risk:
      1. Setting a time for performance can allocate the risk between the parties
         1. Whoever must perform first risks that they perform and the other side will not.
         2. Avoids holdup problem: party who performs first sinks costs which the other party may hold hostage by demanding greater compensation in exchange for its own performance
      2. Create an alternate way to get paid
   4. Common Law: Doing (Faciendo) precedes Giving (Dando)
      1. Can always be changed by contract
      2. *Kingston v. Preston:* Apprentice was to pay for his share of the business in monthly installments. To assure the payments, the apprentice agreed to give the master “good and sufficient security” (collateral) and master would convey the business. Apprentice does not pay collateral and sues master for not turning over the business. Court rules that the two promises were dependent on each other and the obligation to turn over the business never matured.
         1. The court implies this promise.
   5. Specific Performance:
      1. Constructive conditions of exchange sometimes do not operate with the same effect as in ordinary damage actions; court can insert a condition that effectively secures the receipt by the defendant of the plaintiff’s promise performance.
4. The UCC Rule: Constructive/Implied Concurrent Conditions (2-507 and 2-511):
   1. Both duties are due at the same time.
   2. The meaning of tender (2-503):
      1. Tender has two meanings—duty to pay and duty to deliver goods
      2. Due tender: an offer coupled with a present ability to fulfill all conditions and must be followed by actual performance.
         1. An offer of goods or documents under a contract is fulfillment under its condition, even when there’s a defect when measured under the obligation.
         2. Have to be willing to exchange
      3. The seller tenders by turning over goods
      4. The buyer tenders by turning over payment of acceptable tender (UCC 2-511.2)
5. Substantial Performance:
   1. If substantial performance is certain, the judge decides. If it is uncertain, a jury decides. In other words, in most cases a jury decides.
   2. Meant to ameliorate harshness of constructive condition of exchange rule.
   3. If you have not contracted for perfect performance, the default is that you have contracted for substantial performance.
   4. Substantial performance of a promise changes the promises from being dependent to independent.
      1. Upon substantial performance, the injured party still has to fulfill the obligation to perform by payment, because the obligation to pay matures.
      2. Upon substantial performance, can still sue for harm due to “breach.”
   5. The standard for substantial performance is subjective. In order to determine if something is substantial performance or material breach, look at factors in 2RK§241:
      1. Extent to which the injured party will be deprived of the benefit which he reasonably expected.
      2. Extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived.
      3. Extent to which the party failing to perform or to offer to perform will suffer forfeiture.
      4. Likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account all of the circumstances including any reasonable assurances.
      5. Extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
         1. Cannot be “willful”
   6. *Jacobs & Young:* Reading Pipe case. Court rules that substantial performance was rendered, because the breach was not willful.
6. UCC 2-601: Perfect Tender Rule
   1. UCC 2-601: If goods or tender fail in any respect to conform, the buyer can reject in whole, accept in whole, or accept any commercial units and reject the rest.
      1. Problems:
         1. Buyer has more power and can avoid contract by using a slight pretext to get out; court might say that if buyer does this, he is not acting in good faith.
         2. In case of perishable goods, there might not be an opportunity to resell in the case of rejections.
      2. Seems like this is a default rule. Can probably contract out perfect tender as long as it does not substantially impair the contract.
         1. Money tradeoff: every term in a contract has a price.
         2. Seems like you could do something under UCC 2-718 and UCC 2-719 to avoid the perfect tender rule.
         3. *Expressio unis*: since the statute tells you one way to modify the perfect tender rule, it probably means you can’t change this rule under other provisions.
      3. This is a harsh rule that is mitigated in three ways:
         1. UCC 2-508: Opportunity to Cure
            1. Gives the seller an option (not obligation) to cure a defect if time of performance has not yet expired.
            2. (1) Four Prongs:

Tender or delivery rejected because non-conforming

Time for performance has not expired

Seller may reasonably notify buyer of intention to cure

Within contract time, make a conforming tender

* + - * 1. (2) Four Prongs:

Buyer rejects goods

Seller as reasonable grounds to believe they’re acceptable

Seller seasonably notifies buyer

Further reasonable time to substitute conforming tender

* + - 1. UCC 2-608: Revocation
         1. Revocation is difficult for buyers to do and only occurs if conditions are met.

Substantial change in condition of goods

On reasonable assumption that non-conformity would be cured and it was not seasonably cured

Induced by seller’s assurance or difficulty in discovering problem OR

Occurs within reasonable time after buyer discovers/should have discovered

Before any substantial change in condition of goods which is not caused by their own defect

Buyer notifies seller

* + - * 1. Buyer who revokes has same rights and duties as if he had rejected.
      1. UCC 2-612: Installment Contracts
         1. General exception to the perfect tender rule; don’t have to perfectly tender goods if there’s an installment contract.
         2. Rationale: we have this rule to prevent harsh outcomes against seller, because buyer would get windfall for only one defective installment; much easier to cure
         3. Standard: defect substantially impairs installment and cannot be cured OR if defect in required documents

If seller gives adequate assurance of cure, buyer must accept installment

Look to cases to define “substantially impairs”

* + - * 1. Exception: if non-conformity substantially impairs whole contract, there is breach of the whole.
    1. UCC 2-602: Rejection of Goods
       1. Two Prongs:
          1. Reasonable time after delivery or tender
          2. Seasonably notify seller
    2. UCC 2-606: Acceptance of Goods
       1. Doesn’t prevent ability to sue if goods are non-conforming.
          1. Damages: difference between goods expected and goods received; market value
    3. UCC 2-607: Effect of Acceptance/Rejection
       1. Acceptance precludes rejection

1. Divisibility/Severability (Common Law version of Installments Contracts)
   1. Test: divisible consideration
      1. Several distinct items (performance).
      2. Price is apportioned to each item to be performed or left to be implied by law.
      3. If consideration is whole, the contract is not severable even if the goods are apportioned.
   2. If the contract was indivisible, then you look to see if there is substantial performance.
   3. *Gill v. Johnstown Lumber:* Plaintiff agreed to drive four million feet of logs. At trial, directed verdict was granted for Johnstown on the basis that the contract was entire and that Gill defaulted when a flood carried a considerable proportion of the logs past the Johnstown Lumber Company’s boom. Gill appealed. The court said the contract was severable and should have been submitted to the jury.
      1. *Note 2:* A company agreed to complete a contract with four steps for the federal government. They completed the first three and not the fourth. Sued for payment. Court said the last step was really valuable, so it is not divisible.
2. Suspension and Repudiation of Duty/ Termination of the Contract
   1. Occurs when parties have not performed completely and therefore breached.
   2. Hawkins’ Steps of Analysis:
      1. Is there an uncured breach?
         1. If no, can’t stop performing.
      2. Is the uncured breach of a duty created by the exchange of promises?
         1. If no, can’t stop performing.
         2. Generally, duties created by an exchange of promises are dependent on whether the other party performs or not.
      3. Did the other party have to go first?
         1. If no, can’t repudiate the contract
         2. In common law, doing goes before giving.
      4. Was the breach material?
         1. Question of law
         2. If the breach is not material, then it is partial
            1. Can’t repudiate
            2. Can’t suspend performance
            3. Can sue
         3. If the breach is material, then the party can choose its recourse
            1. Option 1: suspend performance and repudiate the contract
            2. Option 2: treat the breach as a partial breach and sue
         4. What evidence can you use to prove this?
            1. General Rule: After-acquired evidence (evidence discovered after the suspension of performance) to justify the repudiation of the contract is acceptable.
            2. Exception: Employment (most of the time)

Rationale: employers will scour work records for wrongdoing, tuck away acts of wrongdoing for later, employees will endure repeated harassment because work record is not spotless.

* 1. *Walker v. Harrison:* Man renting-to-own sign stops paying rent, because there was a clause in the contract saying that current owner of sign had to keep it clean by leaving tomato residue on it for a week, allowing it to rust, and allowing cobwebs to gather. The court says that there was no material breach so he should have kept paying the contract price and sued for cost of cleaning.
     1. Note: He cannot clean it up and then subtract that cost from his rent.
     2. In this case, the renter committed the first material breach.
  2. Risk of repudiation: if the other party’s breach turns out to not be material, you have to pay damages.
  3. What is a Material Breach? (2RK 241)
     1. Note: Adding a Time is of the Essence clause with respect to payment shows that nonpayment is a material breach (2RK 242c).
        1. Adding this clause in serves the same function as making performance on the contract an express condition, in a way.

1. Assurance on the Contract (2RK 251; UCC 2-609)
   1. UCC 2-609: provides a way to require the other party to confirm that they are going to perform on the contract.
      1. Can request adequate assurance with reasonable grounds for insecurity
         1. Breaching previous contracts is considered reasonable grounds
      2. Have the right to suspend the contract until the response is received, if commercially reasonableness.
         1. For merchants, reasonableness is determined according to commercial standard
      3. Failure to assure after receiving a reasonable demand is a repudiation of the contract.
      4. Recourses:
         1. If the other party provides adequate assurance, then breaches anyway, no special remedy. Can only recover the same buyer/seller remedies that originally are available under normal breach.
         2. Can sue for inadequate assurance.

**Defenses to Contract:**

1. Defenses to Contract, In General:
   1. These are very rare.
   2. Three defenses:
      1. Mutual mistake
      2. Impracticability
      3. Frustration of purpose
   3. Distinguishing between the three defenses:
      1. Focus of the contract
         1. Performance: impracticability, mutual mistake
         2. Purpose: frustration of purpose (defeats the whole contract and makes it impossible to perform), mutual mistake
      2. When did the problematic thing exist?
         1. At the time of contract: mutual mistake
            1. Can’t be a future event or something that hasn’t come into existence)
         2. At the time of contract or later: impracticability, frustration of purpose
            1. Catch: if the facts existed when you formed the contract, have to show that you didn’t know or shouldn’t have known
      3. Who benefits?
         1. Person providing the goods/services (party trying to do something): impracticability
         2. Payer (person getting something): frustration of purpose, mutual mistake
2. Mutual Mistake:
   1. Test:
      1. Is there a mutual mistake?
      2. Is it a material fact?
      3. Is it an essential part of the bargain?
         1. Note: this makes the standard higher than the standard for concealment
   2. Remedies:
      1. Restitution damages are awarded (2RK 376, 2RK 384).
      2. This is an example of unjust enrichment (2RK 376).
      3. Exception for land: later discovery of valuable attribute is not grounds for rescission (2RK 154)
   3. Failure of parties to make a thorough investigation does not preclude rescission where the risk of mistake is not allocated among the parties and the mistake is material and relates to a basic assumption on which the contract was made.
      1. If the contract allocates the risk to another buyer by incorporating an “as is” clause, then mutual mistake does not exist.
   4. Mutual mistake is different from *Raffles*:
      1. *Raffles* is about a mistake in which the products are different, so no K is formed because the mistake is so basic to the contract.
      2. Here, the mistake is about one product; a contract can be formed but an essential part of the product is different
         1. Parties knew what they were getting, generally
   5. *Renner v. Kehl:* Parties enter a contract for land in which one party is expressly seeking land to grow jojoba plants and is concerned about sufficient water and the other believes that there is sufficient water available. Upon drilling 5 wells to find water, it is discovered that not water exists on the land. Court says that mutual mistake exists, therefore the contract is void.
      1. Ways to change this case to where mutual mistake does not exist anymore:
         1. Buyer doesn’t tell seller purpose for land
         2. Seller knew about lack of water and didn’t way anything
         3. Didn’t buy land solely for jojoba plants
         4. Event occurred that wasn’t existing at time of K (Ex: Drought)
      2. In this case: Down payment + Amount by which efforts increased value of property – Fair rental value
         1. Note: Don’t get what you spent on improvements, just the enrichment to the value of the property
   6. *Sherwood v. Walker:* Pregnant Cow Case. Parties contracted for the purchase of a cow, and the price was fixed based on the fact that she was barren. Court allows seller to rescind when it is discovered that the cow was pregnant.
      1. Example of the rule being pro-seller
   7. *Wood v. Boynton:* Diamond in the Rough Case. Woman gave up an unidentifiable stone for $1, thinking it was a topaz. Stoned turned out to be an uncut diamond worth $700. Court says she can’t recover, because the buyer didn’t know that this was a rough diamond, and she contracted for a $1 on the basis that the stone could be more valuable.
   8. Difference between *Wood* and *Sherwood*:
      1. Price:
         1. $80 for a cow indicates the assumption that the cow is barren
         2. $1 for an unknown stone indicates a compromise between no value and great value for stone.
3. Impracticability (UCC 2-615; R2K 261)
   1. Supervening Impracticability: Events that arise after K is formed but before the time when promisor’s performance is due; promisor had no reason to anticipate and did not contribute to the occurrence of.
      1. Contrast to Mutual Mistake: mutual mistake must be about facts that existed before the K was formed.
   2. Existing Impracticability: Condition that parties didn’t know about and didn’t have reason to know about before the formation of the K.
      1. Compare to Mutual Mistake: a party that pleads an existing impracticability can probably also rely on mutual mistake.
   3. Test:
      1. Contingency (unexpected event) occurred
         1. Corbin’s Contingency Test: How much risk did the promisor assume?
      2. Risk of unexpected occurring must not have been allocated by agreement or custom (absence of express or implied conditions).
      3. Contingency must render performance commercially impracticable
         1. Commercially impracticable: impossible to do; change in cost in addition to some other outcome that changes business
         2. Objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor’s capability of performing as agreed.
            1. Exception: If both parties are aware of dealer’s limited capabilities, no objective determination would be complete without taking into account this fact
   4. Remedies: *Quantum Meruit* (restitution on quasi-contractual basis)
   5. *Taylor v. Caldwell:* Ps rented music hall from Ds and paid deposits, etc for purpose of hosting parties four nights in a row. Music hall burned down. Court held that impossible to perform and unfair to hold D accountable for unforeseen circumstances when no intent to breach and could not perform on K.
   6. *Transatlantic Financing Corp v. United States:* Contract between shipping company and the government for delivery of goods from Galveston to Iran. Due to the seizure and closure of the Suez canal, shipping company forced to take longer route around Cape of Good Hope. Suing for additional cost of performance. Court says not frustration of purpose, because shipper impliedly bore the risk of changed circumstances.
      1. Meeting the Test for Frustration of Purpose:
         1. Contingency occurred? Yes. Suez canal unexpectedly closed.
            1. This is the easiest prong to meet.
         2. Has risk of event been allocated? Not sure. K does not specify whether one party will bear risk or not. Risk is allocated to Transatlantic, because tension affected freight rates and risk of closure became part of dickered terms (UCC 2-615 Comment 8).
         3. Did contingency render performance commercially impracticable? No; goods were not subject to harm, crew fit to sail, insurance could have covered contingency’s occurrence in terms of difference in cost (which was not substantial).
            1. Cost alone cannot establish impracticability.
4. Frustration of Purpose (R2K 261)
   1. *Krell* Test:
      1. What is the substance of the K?
      2. Does the substance of the K need for its foundation the assumption of the existence of a particular state of things?
   2. Result: If K impossible to perform by reason of the nonexistence of the state of things, NO BREACH!
   3. Difference between frustration of purpose and impracticability: value of performance to party, rather than cost, turns out to be significantly different than expected; it is possible to perform but not desirable to perform after change in circumstances.
   4. *Krell v. Henry:* P rented flat from D for sole purpose of seeing coronation of King; King was sick and date of coronation changed. Court says K not breached and not enforceable, because the value of renting the rooms on that day was diminished after change in circumstances.
      1. Note Case (Cab for Derby Day): P hired cab at heightened price to take them to race site at Derby Day. Derby Day cancelled. Not frustration of purpose, because purpose of cab was conveyance, not viewing. Purpose of cab not frustrated.

**Remedies for the Breach of Contract:**

1. Remedies for Breach, In General
   1. Compensatory Relief: judgment awarding money damages to be paid to aggrieved promisee
   2. Specific Relief: form of a court order directing promisor to perform its promise
   3. In Personam: equity acted against the person of the defendant
   4. In Rem: law acted against defendant’s property
2. The Economics of Remedies (For All Remedies, in General):
   1. If breaching a contract is economically profitable, it is okay to breach? **(Note: Previous Exam Question)**
      1. Pros: more profits
      2. Cons: cost for breach is expensive (litigation), damaged reputation, moral obligations
   2. “Efficient Breach Hypothesis”: a promisor will exercise an “option” to breach and pay expectation damages instead of performing when it is in his/her economic interest to do so.
      1. Breaching party is better off; injured party is no worse off because they received damages.
      2. Litigation is not included in this model.
   3. Pareto-improving: transactions that make no one worse off, while making someone else better off
   4. Kaldor-Hicks efficiency: outcome is considered more efficient if a Pareto optimal outcome can be reached by arranging sufficient compensation from those that are made better off to those that are made worse off so that all would end up no worse than before.

**Remedies (Common Law):**

1. The Purpose of Remedies: Three Protected Interests
   1. Purposes:
      1. Protect promisee’s reliance on the promise
      2. Protect promisor’s autonomy
      3. Economic efficiency
      4. Predictability
      5. Fairness
      6. Social justice and morality
   2. Principles of Contracts:
      1. Meant to give relief to injured parties
      2. Not punitive towards breaching party
      3. Remedy puts promises at position it would have been in had promise been performed
   3. *Sullivan v. O’Connor:* Sullivan sues O’Connor for breach of contract after botched plastic surgery. Court rules that she can recover damages, including those for pain and suffering.
      1. Court is arguing damages in this case, because this procedure is not fungible (interchangeable/easily found on market)
      2. Sullivan assigns reliance interest because plaintiff waives the right to expectation damages.
      3. Courts like expectation damages.
   4. Three Interests (**Note: Previous Exam Question)**:
      1. 2RK 344a: Expectation Interest: “benefit of the bargain”; puts the promisee in as good a position as he would have been had the contact not been breached.
         1. Specific performance: courts can compel performance of what was required
            1. Often unavailable or undesired
            2. Additional supervision required by court
            3. Goods are unavailable
            4. If damages are adequate, specific performance or injunction will not be used (2RK §359)
         2. Compensation: more common form of damages
         3. Disgorgement:
            1. *Cincinnati Siemens-Lungren Gas Illuminating Co v. Western Siemens-Lungren Co:* Defendant’s profits are used as a measure of damages only when profits tend to define plaintiff’s loss.
            2. This is basically expectancy damages.
      2. 2RK §344b: Reliance Interest: whatever expenses incurred relying on the fact that the contract would happen; puts promisee where he would have been before contract was signed
      3. 2RK §344c: Restitution Interest: whatever benefit injured party conferred on breaching party; any benefits bestowed to other party restored to promise
      4. Calculation of Interests (2RK §347)
      5. Note: Attorney’s fees are not factored into interests (Rule 54, FRCP)
         1. In some states, like Texas, breaching party can get attorney’s fees.
2. Remedies in Practice:
   1. Usually, courts like to give expectation interests. Sometimes, other measures will put party in better position.
      1. Reliance preferred over Expectation when:
         1. Expectation hard to apply or would impose too great a burden
         2. Performance interfered with by external circumstances
         3. Contract was indefinite
      2. Restitution preferred over Expectation when:
         1. One party advances the other party money in anticipation of a contract
3. Measuring Expectation (2RK 347):
   1. Usual remedy for breach of contract is an award of damages based on expectation interest.
   2. Expectation interest poses difficulty: what value would promisee have received had breach not occurred?
      1. Based on particular promisee at hand, not reasonable promisee
      2. Depends on particular promisee’s unique circumstances
   3. 2RK §347 looks to three broad factors in measuring party’s expectation interest:
      1. Loss in value to him of other party’s performance caused by its failure or deficiency, and
      2. Any other loss, including incidental or consequential loss caused by breach, less
      3. Any cost or other loss that he has avoided by not having to perform
   4. Calculating Expectation:
      1. Formula A:

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| --- |
| Damages = Loss in Value – Cost Avoided + Other Losses – Loss Avoided |

* + 1. Formula B:

|  |
| --- |
| Damages = Reliance + Profits + Other Losses – Losses Avoided |

* + 1. Loss in Value: difference in value that he party would’ve received if breaching party had performed versus what they actually got
    2. Cost Avoided: avoided by the injured party
    3. Other Losses: incidental and consequential damages; things that aren’t directly related to value of performance but that you suffer because of breach
    4. Loss Avoided: ways the injured parties save money as a result of breach
    5. Incidental Losses: costs incurred in a reasonable effort, whether successful or not, to avoid loss, as where a party pays a brokerage fee in arranging or attempting to arrange a substitute transaction
    6. Consequential Losses: encompass, but are not limited to, harm to persons or property as a result of breach
  1. \*Note: Court might give reliance damages when it’s clear that an injured party is going to lose money on a contract and not give expectation damages

1. Overhead/ Fixed Costs: costs associated with fixed inputs and must be borne before any goods can be produced; usually calculated naturally into price/profit margin.
   1. Generally courts don’t have a way to calculate overhead costs per contract
   2. Since overhead is already divided into profits from all contracts, loss is already naturally allocated, because losing a contract means overhead is divided into less profits.
   3. Some courts have taken into account overhead costs
   4. *Vitex Manufacturing Corp v. Caribtex:* At time of suit, if goods were imported into Virgin Islands and processed then high tariffs avoided. Vitex was engaged in business of chemically shower-proofing imported cloth. Caribtex obtained Italian wool and negotiations for processing contract were conducted. Vitex reopened plant, ordered necessary chemicals, recalled work force, and main preparations to perform bargain, but no goods were forthcoming from Caribtex. Court says it is not compelled to consider overhead costs, and judgment is affirmed. Loss is within contemplation of losses caused and gains prevented.
      1. Expected costs in expectation formula: expected costs in performing this contract, not general costs for everything
      2. Caribtex wants to put overhead costs under Loss Avoided category, so they don’t have to pay as many damages. Court says this should not be included and is already worked into the profits. End result: Vitex can recover overhead costs.
2. Specific Performance, Efficiency, and The Coase Theorem:
   1. Specific performance can encourage disregard of the possibility of breach, leading parties to invest as though they are certain to receive performance: either promisor performs or court orders specific performance
   2. Allocatively efficient outcome: resources end up in the hands of those who value them the most; movement of cash is normally treated as having no allocative efficiency, because parties are assumed to value cash in exactly the same way.
   3. Costs of transaction:
      1. Search costs: costs to the parties of finding each other
      2. Bargaining costs: costs to the parties to negotiate over the terms
      3. Ink costs: costs to the parties to write up their agreement
   4. Coase Theorem: when transaction costs are absent or small, and legal entitlements well-defined, parties will bargain to allocatively efficient outcomes under any remedy; bargaining will result in goods going to the party who values them the most, irrespective of the remedy provided by the court.
      1. Since transaction costs are always present, the remedy may affect the allocation of goods.
      2. Efficiency is based on transaction costs associated with various remedial regimes.
3. Specific Performance and Injunctions (Common Law):
   1. Benefits of an injunction:
      1. Takes the burden off the court to determine costs
      2. Private bargaining process between parties will most likely produce a more realistic value of what actual losses will be
   2. Costs of an injunction:
      1. Court has to enforce and monitor
      2. Companies might be resistant to settling
         1. Creates a bilateral monopoly and possible holdout problems, where people say they’re going to refuse to accept a price and negotiations might completely break down
   3. *Walgreen Co. v. Sara Creek Property:* Walgreen operated a pharmacy. Under the lease, the landlord promised not to lease space in the mall to another pharmacy. Sara Creek, the landlord informed them that it intended to install a store operated by Phar-Mor. Walgreen sought an injunction against Sara Creek. The trial judge entered a permanent injunction against Sara Creek’s letting the premises to Phar-Mor until Walgreen’s lease expired. The determination of Walgreen’s damages would have been costly in forensic resources and inaccurate.
      1. Landlord here wants money damages in order to make an efficient breach.
4. Specific Performance and Employment (Common Law):
   1. Specific Performance: A court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate.
   2. Injunction: A court order commanding or preventing an action.
   3. In the instance of employment, courts don’t usually award specific performance:
      1. Difficulty of passing judgment on quality of performance
      2. Undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken
      3. Imposing involuntary servitude
      4. Difficult to monitor
      5. Concern that party compelled to perform may not have best incentives to perform well
      6. Create risk that individuals will take less than ideal actions knowing that they will not be made fully accountable for their actions
      7. “Moral hazard”
5. Damages in Employment Breach of Contracts (Common Law):
   1. If an employee is fired in breach of contract and does other work as a result of being freed from that contract, the employee’s damages are based on the salary that would have been earned under the broken contract less that earned by doing the other work.
      1. But-for breach, would new employment have been got?
      2. If the substitute job is not a but-for cause (ex: you are also working part-time in fast-food) because both the lost job and this job can be done at the same time, you get full damages for the lost original job.
   2. Collateral Source Rule: an employee’s recovery is reduced by sums received from collateral source, such as employment compensation
   3. Expandable Volume Business (Ex: Contractors): Generally assumed that a person or firm can undertake a new repair or construction job while continuing work on jobs already booked, adding as necessary to the work force and the stock of tools and materials. Earnings on a new job are not credited against a builder’s claim for having been dismissed, wrongfully, from an “old” one. The breach results in lost volume for the builder.
6. Quantum Meruit Recovery (Common Law):
   1. “as much as he has deserved”
   2. The reasonable value of services; damages awarded to compensate a person who has rendered services in a quasi-contractual relationship (2RK§34)
      1. Recovery is undiminished by any loss which would have been incurred by complete performance.
      2. The standard for measuring the reasonable value of the services rendered is the amount for which such services could have been purchased from one in the plaintiff’s position at the time and place the services were rendered.
   3. *United States v. Algernon Blair:* Blair entered contract with US for construction of naval hospital and contracted Coastal to perform steel erection and supply certain equipment in conjunction with Blair’s contract with the US. Blair refused to pay for crane rental, maintaining that it was not obligated to do so under the subcontract. Because of Blair’s failure to make payments, Coastal terminated performance. When the amount has been determined, judgment will be entered in favor of Coastal, less payments already made under the contract.

**Remedies for Buyers:**

1. Damages for Buyers, In General (UCC):
   1. Nondelivery:
      1. “Cover” (UCC 2-712)
      2. Market Damages (UCC 2-713)
      3. \*Note: If you cover under 2-712, you cannot get damages under 2-713
   2. Defective Delivery:
      1. Specific Performance (2-716)
   3. \*Note: If tender and acceptance are in different locations in each measure of damages, and prices differ in each locale, focus on the price at the time and place the tender is measured.
2. Cover: purchase substitute goods as a result of breach of contract

|  |
| --- |
| Damages = Cover Cost – Contract Price + Incidental Damages + Consequential Damages – Expenses Saved |

* 1. Requirements of Cover:
     1. Good faith
     2. Without unreasonable delay: price rises a lot, so purchase must be made quickly
     3. Reasonable substitution: price must be reasonable; cannot be different type of good
  2. \*Note: does not matter if it is later proved that cover was not the cheapest or most effective at time; just has to fulfill requirements.
  3. If cover costs less than contract price, you don’t get compensated, but your reward is a more efficient breach.
  4. *Laredo Hides v. H&H Meat Products Co:* Output contract was executed where LH agreed to buy HH’s entire cattle hide production. $9000 check for payment delayed in the mail; HH demanded payment within a few hours. Demand was not met, and HH notified LH that it regarded this as a breach justifying cancellation. LH had contracted with other tannery. To meet the contract, was forced to purchase hides on the open market in substitution. Market price for hides steadily increased following execution of contract in question. Court orders damages awarded to Laredo Hides.
     1. \*Note: Sometimes, when other party doesn’t perform, your obligation to perform ceases.

1. Specific Performance for Buyers (UCC 2-716):
   1. Traditional Rule: specific performance is given when money damages are not adequate; must prove inadequacy.
      1. Determining inadequacy is fact-specific to every case; the test is subjective.
   2. Cases in which specific performance for buyers is more likely to be granted:
      1. In the case of land
      2. When goods are unique
      3. When monetary estimates are too speculative or uncertain
      4. When breach leads to deprivation of a loved one’s companionship or a firm’s good will
      5. When the goods are unattainable elsewhere
      6. Difficult for court to supervise
   3. *Campbell Soup Co v. Wentz:* Wentz, farmers, entered in to contract with Campbell for delivery of all Chantenay red-cored carrots to be grown on Wentz farm. Contract price was for $30 per ton. Market price at time of harvest was $90 per ton. Wentzes resold 58 tons on open market, gave approximately half to Campbell. The court says specific performance should be awarded because the goods of the special type contracted for were unavailable on the open market, the plaintiff had contracted for them.
      1. To combat fraud in specific performance, can set up receivership in which someone is in charge and oversees distribution.
   4. *Klein v. Pepsico:* Klein was looking to purchase a GII corporate jet from PepsiCo. Contract was stipulated on pre-purchase inspection, which Klein sent a representative for. At inspection, repairs were discovered which Pepsico promised to undertake and pay for. Chairman of Pepsico asked that the jet be withdrawn from the market. Court says lower price is not enough to compel specific performance.
      1. Court says this is not a unique good, because there were other jets and the buyer knew of them.
   5. *Morris v. Sparrow:* Morris owns a cattle ranch. Sparrow is a cowboy. He and Morris made an agreement that while Morris went to Canada, Sparrow would stay at the ranch and do the necessary work for $400 for 16 weeks. He was also to receive a horse called Keno on the condition that his work was satisfactory. Sparrow trained the horse during his spare time. Horse is a specific good that cannot be replaced; relationship with animal developed that can’t be replicated.
2. Requirements Contracts and Specific Performance (UCC):
   1. Requirements contracts are one type of contract where specific performance is appropriate, but that doesn’t always mean a party gets specific performance. Must look at each specific case to see if justified.
   2. *Laclede Gas v. Amoco Oil:* Amoco and Laclede entered into a contract in which Amoco was the supplier and Laclede was the distributing utility for propane gas systems. Laclede Gas Co brought this action alleging breach of contract against Amoco Oil and sought relief in the form of a mandatory injunction. Court held that Laclede’s power to terminate die not make its promise illusory and that the agreement was an enforceable contract for Laclede’s requirements for the subdivision. Specific performance is the proper remedy in this situation.
      1. Court’s reasoning for enforcing specific performance:
         1. Would not be able to replicate contract with someone else
         2. Future energy supply is not certain
         3. Difficult to calculate damages
         4. Laclede made a huge upfront investment on distribution center
         5. Significant impact on public

**Remedies for Sellers (UCC)**

1. Remedies for Sellers, In General (UCC)
   1. “Cover” (UCC 2-706)
      1. \*Note: Sellers can only get incidental damages, not consequential damages.
   2. Market Damages (UCC 2-708(1))
   3. Lost Volume Damages (UCC 2-708(2))
   4. Action for the Price (UCC 2-709)
2. Lost Volume Sellers (UCC 2-708(2)):
   1. Most courts define lost volume sellers as those that have a predictable and finite number of customers and that have the capacity to sell to all new buyers or to make the one additional sale represented by the resale after the new breach. The breach cost the seller an additional profit and the seller can only be made whole by awarding its lost profits under 2-708(2).
      1. Does not apply to customized goods
   2. Three conditions need to be met to prove lost volume seller:
      1. The person who bought the resold entity would have been solicited by plaintiff had there been no breach and resale
      2. Solicitation would have been successful
      3. Plaintiff could have performed that additional contract
   3. Competing Views/ Definitions:
      1. Could you have made sale and would it be profitable (*Diasonics)*
      2. Could you have made it
      3. Would you have made it (sort of incorporates profitability)
   4. *Davis v. Diasonics:* Davis and Diasonics entered into written contract under which Davis agreed to purchase equipment and paid Diasonic $300,000 deposit. Davis breached its contract with Diasonics. Diasonics later resold equipment to third party for same price at which it was sold to Davis. The district court should calculate Diasonics’ damages under 2-708(2) if Diasonics can establish, not only that it had the capacity to make the sale to Davis as well as the sale to the resale buyer, but also that it would have been profitable for it to make both sales. Diasonics additionally must show that it probably would have made the second sale without breach.
      1. Additional requirements to burden of proof for lost volume sellers:
         1. Must prove that producing additional goods would have been profitable (do not need to prove you would have been as profitable)
            1. Under law of diminishing return, selling additional items might diminish return to seller and make it unprofitable to conclude the next sale.
      2. Court interprets “due credit or proceeds of payments of retail” as being the sale of scrap.
         1. UCC 2-704(2), which deals with custom goods, defines this term as the resale of scrap.
         2. In application, if you are a lost volume seller and your good is complete, you don’t subtract any terms at all.

**Limitations to Damages:**

1. Duty to Mitigate Damages:
   1. Limitations to damages:
      1. Voided
      2. Foreseeable
      3. Proven with reasonable degree of certainty
   2. Substitutions only need to be reasonable and in good faith; you cannot recover damages you could’ve avoided (UCC).
   3. If you take affirmative acts to increase your damages, you do not receive that money.
      1. *Rockingham County v. Luten Bridge:* Contract was entered to build a bridge; board notified the plaintiff not to proceed under the contract. Despite the notice, plaintiff continued to build the bridge then sued for the total amount due the plaintiff. After an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance.
   4. Mitigating Damages in the Case of Employment:
      1. Have to take a job if it’s similar or not inferior
      2. Must make reasonable efforts to find that kind of job.
      3. *Parker v. Twentieth Century Fox Film Corp:* Plaintiff is a well-known actress who was cast to play the female lead in defendant’s contemplated production of a motion picture entitled “Bloomer Girl,” which was a musical production. Prior to filming, the defendant decided not to produce and notified the plaintiff, but offered to employ her as a leading actress in another film entitled “Big Country, Big Man” a western filming in Australia. Employee need not seek or accept inferior employment.
         1. Fox’s argument is that plaintiff failed to mitigate/avoid damages by taking other contract.
         2. Considerations that make this an inferior kind of employment:
            1. Filming in Australia
            2. Didn’t have same level of creative control
            3. Different kind of lead role
            4. Substitute employment offered by actual employer (could lead to hostile relationship)
         3. If Parker took inferior employment, then sued, she would not have been compensated, because this would have been considered an adequate substitute. Dissent worries this incentivizes laziness.
            1. Reality: most people need money and will always take an inferior substitute job if available.
         4. UCC reference: 2-715: you can’t get consequential damages if they could reasonably be taken care of by cover.
2. Exception to Cost of Replacement:
3. General Rule: cost of replacement is measure of damage
4. Exception: if cost of replacing and repairing is grossly and unfairly out of proportion with the good to be obtained
   * 1. *Jacobs & Young v. Kent:* Plaintiff built a country residence for defendant and is suing for balance owed. Defendant complains that one of the specifications for the plumbing work provides that pipe used must be Reading pipe. The defendant learned that some of the pipe were Cohoes pipes, which is the same in quality, appearance, market value and cost. The plaintiff was ordered to redo the work, which meant the demolition at great expense of substantial parts of the completed structure. The measure of allowance is not the cost of reconstructions.
5. The goal of contract law is not punitive; it is not trying to overcompensate a party and result in a windfall.
   * 1. Sometimes the jury will have to decide how likely it is that the injured party is going to fix a problem versus keeping the problem and benefitting from the breach.
6. Consequential Damages:
   1. Standard for recovering consequential damages is foreseeability; use objective standard (2RK 351.1)
      1. Measured at the formation of the contract: at the time you make contract, this is when you fix all costs, so if you couldn’t foresee lost profits as a consequence of breach, chances are you charge less money
      2. Did the party actually know?
      3. Could the party have known?
         1. Did it arise naturally from breach/probable consequence?
   2. UCC 2-715(2)(a): anything at the time of contracting that the seller had reason to know; objective standard
      1. Under UCC, consequential damages for buyers only. Sellers will try to squeeze damages into definition of incidental damages to get some sort of recovery.
   3. *Hadley v. Baxendale:* Plaintiffs were forced to shut down their mill because the crank shaft of the steam engine became broken. Reopening of mill was delayed five days. Loss of profits here cannot be consequential. The loss would neither have flowed naturally from breach of contract nor were the special circumstances communicated or known to defendants (which would have made it reasonable and natural consequence).
   4. *Delchi v. Rotorex:* Delchi asked Rotorex to supply conforming compressors; Rotorex refused and Delchi cancelled the contract and sued Rotorex. It was objectively foreseeable that Delchi would take orders for sales based on the number of compressors it had ordered and expected to have ready for that season. Delchi is also entitled to recover costs incurred for shipping, customs, etc. and Labor incurred as a result of production line shutdown.
      1. Court says CISG test must be read in light of *Hadley*: were these things a possible consequence?
         1. *Hadley* actually says probable consequence, which is a higher standard.
7. Certainty in Proving Damages:
   1. Old Rule: Damages for breach of contract must be shown, by clear and satisfactory evidence, to have been actually sustained and be shown with certainty and not left to speculation or conjecture.
   2. New Rule: Must be reasonably certain to prove damages.
      1. Loss beyond an amount that evidence permits to be established with reasonable certainty precluded.(2RK §352)
      2. Damages need not be calculable with mathematical accuracy and are at best approximate and have to be proved with whatever definiteness and accuracy the facts permit, but no more (UCC 1-106)
   3. Courts will sometimes tilt the scale in the favor of the injured party.
   4. General Rule for lost profits for new businesses: because those profits are uncertain and speculative, not awardable.
      1. Exception: enough evidence may be given by expert witnesses to make profits reasonably certain.
   5. *Fera v. Village Plaza, Inc:* Plaintiffs signed ten year lease for book and bottle shop. Complications arose, including numerous work stoppages and bank foreclosures. By the time the space was ready, the plaintiffs were refused the space because the lease was misplaced. Might have found plaintiffs’ proofs lacking, but that is not the standard of review. As a reviewing court, cannot invade finding of fact unless actual factual record is so clear that reasonable minds may not disagree.
      1. Defendant argues that profits for future are speculative and uncertain, so shouldn’t be recoverable.
      2. Appeals court rules that they are only reviewing whether there was an abuse of discretion in awarding. Insinuate that might have found plaintiff’s proof lacking.
8. Liquidated Damages Clauses:
   1. Liquidated Damages Clause: sometimes promisee can encourage promisor’s timely performance by stipulating liquidated damages.
      1. Promisor must agree to stipulated damages and will likely demand compensation for being accountable for award greater than legal default.
      2. Set up at time of contract; set out specific amount of damages or formula for establishing damages.
   2. Treatment by Courts:
      1. Historically, viewed with a lot of suspicion—Is it a legitimate attempt to predict damages or is it a penalty?
         1. Practice where people got double the amount owed to them
         2. Used against debtors who breached contract to pay
      2. Modern trend—Presume enforceability
   3. Potential Punitive Effect:
      1. Punishes breaching party because of windfall judgments and overcompensation.
      2. Party subject to liquidated damages clause may charge other party more for services to buffer in case of breach. However, if breach does not occur or court says liquidated damages clause invalid, party subject to clause gets unfair profit.
   4. Effect on Third Parties:
      1. Gives power to parties if there’s a liquidated damages clause; unions have extra power because union workers know that you can’t hire a new fleet of workers and you’ll be more wiling to give in to demands; result is that other people will have to pay union members more, because that’s how the market has changed.
   5. Policy Arguments circa *Wasserman*:
      1. Pro Enforcement of Liquidated Damages:
         1. Allow parties to control exposure to risk by setting payment for breach in advance (business values certainty)
         2. Avoid uncertainty, delay, expense of using judicial process to determine actual damages
         3. Allow parties to fashion remedy consistent with economic efficiency in a competitive market (rationale for specific performance circa *Posner)*
         4. Enable parties to correct what parties perceive to be inadequate judicial remedies by agreeing upon a formula which may include damage elements too uncertain or remote to be recovered under rules of damages applied by courts.
         5. Consideration of judicial economy and freedom of contract
         6. Contract prices every term so liquidated damages clause is already priced into term; if not enforced, party receives windfall.
      2. Anti Enforcement of Liquidated Damages:
         1. Plaintiff gets a windfall by receiving more damages than they would have normally received
         2. Courts don’t like when parties usurp their normal activities (concerns for duress, compensatory damage principles)
         3. In case of default judgment, party with liquidated damage clause always wins because proof is in the contract.
         4. If liquidated damages are too high, makes it harder to efficiently breach.
         5. Gives party not subject to clause too much power, sometimes leads to unequal bargaining.
         6. Might be able to get unforeseeable damages
   6. Burden of Proof:
      1. Party challenging liquidated damages clause must prove reasonableness
      2. Reason: party challenging damages needs to prove why they shouldn’t owe the party hurt by breach shouldn’t get reasonable damages; presume they’re enforceable, so person who doesn’t want to enforce it must overcome the presumption.
   7. Question of Law, Not Fact (Goes to Judge, Not Jury):
      1. This is a question of law in which you need to look to factual determinations to find out the legal answer.
   8. Assess Liquidated Damages Clauses Based On:
      1. Reasonable forecast of damages (Ex: small or insubstantial breach will create a huge amount of damages).
         1. Depends on point at time we are assessing:
            1. Time of contract formation: compare liquidated damages award to forecasted cost of breach; also look to see whether harm is difficult to estimate accurately
            2. Time of breach: compare liquidated damages award to cost of breach
         2. Two Look View (Minority): *Wasserman* looks at it at either point in time. You have a choice in which you do not have to compare, but only establish that one is reasonable at one point in time.
            1. Policy Rationale: modern presumption of enforceability leads us to want to enforce these more often
         3. One Look View (Majority): Courts will only look at whether or not the forecasted breach was reasonable at the time the contract was formed.
            1. Policy Rationale: this is better because courts don’t have to calculate actual damages, which is expensive and time-consuming process.
      2. Damages are uncertain (generally not an independent prong, but idea comes up)
      3. Subjective intent of parties (but immediately say this has little bearing)
   9. Result:
      1. If liquidated damages are reasonable, they are enforced.
      2. If liquidated damages are unreasonable, you only get actual damages via judicial determination of damages. Two types of unreasonability:
         1. If liquidated damages are too high, they are considered a windfall
         2. If liquidated damages are too low, they are considered unconscionable, because they are not a penalty for the breaching party
   10. UCC and Liquidated Damages:
       1. Two look approach: reasonable in anticipated harm or actual harm
       2. Like common law, only tells us what to do with unreasonably large award.
       3. Comment one addresses unreasonably small amounts; might be stricken on unconscionability.
   11. *Wasserman v. Township of Middleton:* Agreement between parties contained clause providing that if the Township cancelled a commercial lease for a tract of municipally-owned property, it would pay the lessee a pro-rata reimbursement for any improvement costs and damages of 25% of the average gross receipts for one year. Court remands to district court in order to determine reasonableness.
       1. Issue: whether or not liquidated damages clause in *Wasserman* is unreasonable due to calculations based on gross receipts. Gross receipts could be unreasonable because:
          1. Too speculative because future activity might be different from past activity.
          2. Doesn’t take into consideration any costs for ordinary expenses or expenses specifically attributable to breach.
          3. Doesn’t reflect what you expected to walk away from; might be selling at loss.
       2. Remand to district court to consider:
          1. Reasonableness of use of gross receipts as the measure of damages no matter when cancellation occurs
          2. Significance of the award of damages based on 25% of one year’s average gross receipts, rather than on some other basis such as total gross receipts computed for each year remaining under the lease
          3. Reasoning of parties that supported calculation of stipulated damages
          4. Lessee’s duty to mitigate damages (courts generally don’t enforce liquidated damages clauses that say you don’t have to mitigate; don’t like waste)
          5. Fair market rent and availability of replacement state