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| **Policy Outline**  Contracts: Prof. Hawkins |

**Does the Law Encourage Breach of Ks?**

**Policy Question:** Does the law encourage people to break promises?

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| **The Law Encourages (or should encourage) Breach** | **The Law Discourages (or should discourage) Breach** |
| Does Encourage:   * There are many opportunities for efficient breach, or breaking a promise in order to gain greater benefit while not performing. *Ex*. If you are agree to build 5,000 square foot house for $500,000, which will take you the next three months, and you are offered $1 million to build someone else a 10,000 sq. foot house, which would also take you 3 months, you would be much better off if you breached, and the other party to the first contract can be made just as well off by suing you for damages (assuming very little or no litigation costs). * When breaching Ks w/ liquidated damages clauses in states that consistently enforce them, parties can know exactly how much they’ll owe if they breach and make a rational determination about whether to do so. In cases where it is efficient, the liquidated damages clause may enable the breaching party to breach w/o the expense of litigation.   Should Encourage:   * The law should encourage efficient breaches b/c they encourage the most efficient allocation of resources (again, assuming zero litigation costs), b/c they allow the breaching party to perform for the person who wants their services the most. * Workers should be free to change their plans b/c life is too short to encourage people to pass up once-in-a-lifetime opportunities. * As long as the innocent party is fully compensated, is justice served when a breaching party is released from an oppressive or unpleasant commitment? * The law should allow for efficient breaches by large business enterprises b/c they may need to breach some Ks to continue fulfilling others and stay in business (and litigation costs are less burdensome on large business enterprises than individuals and small concerns). * Workers should be allowed to efficiently breach non-compete agreements if they will make more money breaching the K than the counter-party to the non-compete will lose by their breach. | Does Discourage:   * If the cost of litigation is sufficiently high, it may be a strong deterrent to breaching Ks. Unless you can make more money than you’ll spend defending the br/K lawsuit, you will not want to breach your K. * Legal services are not affordable for everyone, so even if you could make more money doing another job, you might not have the money to put up front to defend the injured party’s br/K lawsuit. * Practical considerations, such as the cost to one’s reputation for breaching Ks, effectively discourage breach. * The awarding of consequential damages to innocent buyers of goods under the UCC may deter sellers from breaching Ks due to the relatively high damages that can be awarded.   Should Discourage:   * Breaking promises is wrong, so K law should effectively deter it. * Breaching Ks would make long-term business planning harder b/c businesses would not be able to effectively use Ks to lock in certain prices for future goods/services for risk-shifting purposes. * There are external costs to breaking promises that cannot always be fully compensated in court, such as third-party effects and the discouragement of entering into Ks, which would be terrible for the economy. * Efficient breaches are more myth than reality, b/c people often do not act rationally in litigation, and it may turn out costlier than it should, leading to a waste of effort/resources compared to if the parties had just performed as they’d contracted to. * The uncertainty that would be created by rampant “efficient breaches” would degrade the trust people need to have in one another in order for a democracy and a voluntary market economy to function. * Society arguably needs the stability of long-term commitments being fulfilled. * If the law insufficiently deters K breaches now, perhaps punitive damages should be allowed in Ks cases in order to more adequately deter such anti-social behavior. * Rampant breaches discourage investment due to the uncertainty they cause. |

**Specific Performance vs. Damages**

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| Specific Performance | Damages |
| Pro-specific Performance:   * Especially appropriate when damages are inadequate, goods/services are unique in light of the circumstances (*i.e.,* land & antiques), and damages are unclear. * Shifts the burden of dermining the cost of ∆’s conduct from the court to the parties. Settlement would be desirable b/c there must be an equilibrium price for dissolving the injunction that would make both parties better off. * Private negotiation is cheaper from the court’s and the parties’ perspective (unless they will irrationally negotiate forever). * Private negotiation may result in a more accurate estimation of the cost of competition that would be faced by a pharmacy currently under the protection of an injunction that keeps its landlord from renting out to another pharmacy (*Walgreens*). * Prevents efficient breaches that undermine the sanctity of K.   Anti-Damages:   * Damages are often inaccurate valuations of the costs of breach. * Parties’ and courts’ high costs of litigation. | Pro-Damages:   * Avoids the cost of court supervision of specific performance. * 3rd party effects and “hold-out problems” resulting from bilateral negotiations are avoided.   Anti-Specific Performance:   * SP require costly court supervision. * 3rd parties may bear part of the costs. * Since the parties have to deal w/ each other following the injunctive order, they may fight especially hard and bitterly in negotiations, driving up their costs. * It may be undesirable to force parties whose relationship has gone sour to have to work together (especially in the employment context, and to some extent in the landlord-tenant relationship as well). |

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| **Should non-merchants be allowed to make firm offers w/o Consideration for SOG?** | |
| Yes, they should:   1. Freedom of K—it is arguably reasonable to bind non-merchants to firm offers they make w/o consideration since they make them voluntarily and therefore may accept the risk of enforcement. 2. It may be assumed that in making a firm offer for a good at a certain price, the non-merchant could charge a higher price than they would to someone who would buy it on the spot (analogous to charging interest for keeping the offer open). At any rate, every term in a bargained-for agreement may be assumed to have a price. 3. May encourage more efficient deals to be made, since a Buyer may see what his options are before accepting a deal from a non-merchant. 4. Gets around the fact that in the face-to-face deals made most often made by non-merchants, offers lapse as soon as the conversation is over. | No, only merchants should:   1. Merchants should be able to b/c they are in the business of sales and if they think they can entice more customers by extending firm offers in some cases, then they should be allowed to, b/c we assume they know what they’re doing. Non-merchants may not understand the legal liability they could incur when making a firm offer, b/c they may assume the common law rule that they can revoke at any time. 2. Merchants have a commercial reputation at stake that they put in the hands of the customer when they make commitments like firm offers, which is arguably a sort of substitute for consideration (the client’s forbearance from giving the merchant a bad review would be the quasi-consideration). Non-merchants do not have that much at stake, making the promise to keep it open supported by less on the Buyer’s side. 3. Non-merchants are not ready to take on a restraint on their trading activities w/o the sales experience of a merchant. 4. Non-merchants’ generally unsophisticated understanding of the goods they sell may get them in trouble if they can make firm offers that are highly unfavorable to them. |

**Plain Meaning Rule (CA Rule vs. NY Four Corners Rule)**

* 1. **Arguments for California Rule**
     1. NY rule presupposes a fixed rule language, which is undermined by the variety of meanings many words may have depending on their particular contexts.
     2. Judge may always bring in extrinsic evidence to determine whether a K term is “reasonably susceptible” to alternate meanings, and if it is the court may consider extrinsic evidence in determining which meaning should be the basis of K enforcement. This leads to a more just resolution to K disputes over terms that have particular meaning in their contexts that a judge employing a “4 corners” technique may miss.
     3. Goal is to know the true intent of the parties, so the more evidence considered the better chance of realizing the truth.
     4. NY rule doesn’t account for trade usage, which may introduce ambiguity to words that appear clear to a judge.
     5. It’s not totally out of control. After all, the judge is still the arbiter of ambiguity, and his experience (and often political vulnerability) will discourage him from straying from the truth. A Judge is less likely to just side with the sympathetic π than a jury.
     6. May encourage some parties (especially those w/ lesser bargaining power on the other side of Adhesion Ks crafted by brilliant lawyers) to enter into Ks if they don’t have to worry about a term being misinterpreted unfairly in the other party’s favor due to its facially unambiguous meaning to the judge.
  2. **Arguments for NY Rule (*Traditional* *4 Corners Rule*)**
     1. Impossible to know parties’ true intent anyways, and extrinsic evidence introduced may be self-serving, misleading and encourage unmeritorious claims.
     2. K Law loses efficacy for constraining conduct under the Ca rule. Parties may be more apprehensive in entering into Ks if their plain meaning may be later challenged in court.
     3. Ca rule takes away an incentive for making Ks, that is, certainty in contractual arrangements.
     4. Provides predictability & stability. It will also probably lead to less litigation, since parties will have no incentive to challenge facially unambiguous Ks in court if they cannot hope to persuade the judge of another meaning.
     5. Encourages parties to enter into Ks carefully, knowing that facially unambiguous terms will be enforceable according to their plain meaning.
     6. Perhaps the best evidence of what the parties intended is what they wrote down.
     7. If words are so susceptible to different meanings in different contexts, as Traynor says, then even more reason to use the 4 Corners Rule, which would encourage parties to use the most obvious meanings of words in their agreements, w/o fear due to the ease w/ which self-serving evidence presented and testimony at trial could complicate facially unambiguous words.
     8. Under the CA Rule, expensive and time-consuming lawsuits cannot be avoided if one party has a strong enough motive to challenge the K, which is costly to the judicial system & parties to Ks in California, even though it gives lawyers business and some Ps large windfalls.
     9. You could even say, like Kozinski, that it even undermines the entire legal system by undermining the principle that language can provide meaningful constraint on private and public behavior through Ks. If so, how can even legislation be reliably followed and understood??

**Liquidated Damages Clauses**

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| **Benefits of Enforcement** | **Detriments of Enforcement** |
| * Freedom of K - Parties of relatively equal bargaining strength should generally be allowed to form such agreements. * Allows parties to control and allocate their exposure to risk up front, so there are no surprises. * Allows parties to perform the judicial function themselves at much lesser cost and with less uncertainty. * Lessens the anxiety of parties concerned about juries awarding unforeseeable damages. * Make parties more likely to enter into worthwhile Ks that typically have highly variable or difficult-to-predict damages in cases of breach. * Burden of proof on the party challenging the clause, giving parties a measure of security in making these Ks. * Nothing in Liquidated Dmgs clauses prevent a court from granting unforeseen damages. * Fraud is never allowed, so parties may still have their day in court if that's an issue. * Reasonable factors are used to consider whether to enforce damages clauses: In situations in which the determination of damages would be a costly or inefficient use of the court’s resources, clauses are more likely to be upheld. * Saves the judicial system and tax-payers time and money by making litigation simpler and less costly. It often won’t have to come to court, but if it does, if the court decides in favor of enforcement in most cases the litigation will be very short and cheap. | * Liquidated damages clauses may be **punitive** in nature, which goes against the contracts law principles of giving non-breaching parties compensation for breaching party's breach, generally expectation damages. * Clauses are seen as punitive when they give unreasonably more than actual/reasonably expected damages. * Parties perhaps should not be allowed to determine damages ahead of time due a variety of factors, including abuse of bargaining power. * Maybe parties shouldn't perform the Judicial function at all. * The fear of enforcement of unreasonable (punitive) liquidated damages by one party may lead to **unjust** or **inefficient** situations. * May award a non-breaching party much more than her actual damages in situations in which damages were hard to foresee at the outset of contracting. * Unequal bargaining strength and Ks of adhesion may lead to oppressive, unconscionable damages clauses that shouldn’t be enforced. * Many liquidated common liquidated damages clauses are arguably punitive, such as credit card overdraft fees.  Are they punitive in the sense that they unreasonably exceed the costs of accountholders’ breaches?  Some courts in foreign countries have chosen not to allow bank overdraft fees for this reason. * In cases such as *Wasserman's* we have empirical examples in which liquidated damages are tied to revenues instead of profits and therefore bear no direct relationship with the injured party’s expectation interest. * When third parties know about them, liquidated damages clauses may provide opportunities for abuse of parties subject to them. An example that comes to mind is when a union representing construction workers finds out about a liquidated damages clause that kicks in if a job is performed late, which would give them the opportunity to strike and unfairly renegotiate the K to increase their pay some of the value of the liquidated damages they could cause the contractor to be subjected to. This dynamic might cause contractors to make higher bids or even be reluctant to bid for such jobs at all. * Liquidated damages clauses attached to time of completion may also cause undue stress to workers/contractors and/or lead to rushed or otherwise lower quality work. |

**Substantive Unconscionability: Two Views**

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| **Benefits of Substantive Unconscionability (UC) Doctrine** | **Detriments of Substantive Unconscionability Doctrine** |
| * There are circumstances in which procedural unconscionability is lacking, but a K nonetheless should not be enforced as a matter of sound policy, such as in *Walker Thomas Furniture*, when an obscure term in a K was used to unfairly repossess furniture that should have been owned free-and-clear. Although there was no fraud, duress, or undue influence in that situation, it should nonetheless not be enforced due to the extreme one-sidedness of the bargain, the absence of meaningful choice for the consumer and the gross inequality of bargaining power between the parties. * The doctrine of price unconscionability, in which a highly unfair price is imposed on a consumer w/o a meaningful choice either upfront or through opaque interest payment arrangements, would not be a defense to contract w/o the adoption of substantive unconscionability, since it would lack fraud, duress or undue influence. Procedural unconscionability was lacking in *Jones v. Star Credit*, but it nonetheless would offend many peoples’ social mores to allow such a K to stand. * Many consumer Ks are Ks of adhesion, which are std-form Ks presented to consumers on a take it or leave it basis by a stronger bargainer, and w/o substantive unconscionability, highly one-sided and unfair adhesion Ks that are uniform across a market would be immune from attack absent substantive unconscionability doctrine. * The essence of substantive unconscionability is the lack of meaningful choice, b/c when a consumer must buy a necessity, a seller presenting a deal in a market w/o meaningful choices has no need to employ procedural unconscionability, since market dynamics leading to a lack of a meaningful choice already do it for him. * Courts should not enable unconscionable bargains by enforcing them. * It may be difficult to prove procedural defects, so price unconscionability or other types of UC can serve as substitute evidence for mkt failures, parties’ taking knowing advantage of a consumer, etc. * Unconscionability doctrine focuses on the nature of the transaction/bargaining differential, not the characters of the parties, avoiding the stereotyping of certain classes of people as “vulnerable.” * Offers like Rent-to-Own may be a way to trick people into agreements that violate interest laws, so they may be illegal interest through a back door, which would be substantively UC. | * It may undercut the right of private K in a way that does more harm than good, according to Richard Epstein. * Procedural UC doctrine is sufficient to limit the enforcement of flawed bargains. * An attack on the freedom of K, b/c it supposes that some people are not free or savvy enough to control their voluntary affairs. * Incompetence also limits the enforcement of unconscionable bargains w/o the same risks as UC doctrine. * Public policy needs to encourage responsible behavior by “free people” to take responsibility for themselves. * It may discourage sales of goods to poorer people, b/c it will lower the profit margins of such businesses and cause some of them to close. * It may make business planning difficult by complicating std-form K drafting/predictability. * Ensuring fairness in the process (procedural) is enough to ensure fairness in the outcome (substantive). * The key element of procedural UC is unfair surprise, which, if avoided, will allow free people to freely enter into Ks according to their own good judgment. * There may be a valid analogy between unconscionability & incapacity, b/c both may stereotype the parties. It may be fair to stereotype incapables, but is it fair to stereotype poor people? * Do we really want to say that the poor or vulnerable can’t really contract fully. |

**Standard Form & Adhesion Ks**

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| Pros: | Cons: |
| * Take advantage of experience & enable judicial interpretation of one K to serve as an interpretation for scores of Ks. * Reduces uncertainty, saves time & trouble. * Creates an evolving body of K law that helps businesses manage their risk by learning from each other’s experience. * Simplifies planning and administration. * Makes risks more calculable. * Allow consumers to learn from the experience too. * Make reading Ks less necessary, b/c you know what they’ll say if they’re all the same in some business. * UCC 2-302 limits the applicability of unconscionable Ks and terms, so there is not that much to worry about in SOGs. | * Offer means by which one party may impose his will on another (especially w/ adhesion Ks—take it or leave it proposals offered by a strong party to a weak one) * May allow for corporations to perform a sort of private legislative function that infringes upon the domain of gov’t. * May move us away from a society of voluntary Contract back to a society of Status w/o realizing it. * Many are so long that consumers don’t read them. They feel resigned to accept the will of the stronger party. * May be unconscionable when they are highly unequal and there is no meaningful choice of terms in a marketplace. * May allow a stronger party to impose an unfair arbitration arrangement for all disputes in a forum of their choosing, such as the performing artists union K in *Graham* that the promoter had no meaningful choice in. * A judicial interpretation by a court that enforces an arguably unconscionable arrangement may be used to impose that arrangement on scores of others who may be bound by the precedent. |

**Should a promise of continued at-will employment be valid consideration for enforcing covenants not to compete?**

**Yes:**

* Continued employment for a significant amount of time, even though indefinite, when an employer is free to fire at any time, should count as consideration, since the employee is exchanging his freedom to compete to continue employment w/ probably more responsibility and career advancement.
* A promise of continued at-will employment is arguably not illusory b/c any reasonable person would interpret it to be a significant, if not definite, period of time.
* It basically removes the employee from at-will employment in the strictest sense,
* Policy—Employers need to be able to share their investments in knowledge w/ their employees for collaborative purposes w/o fear of such information being freely used by competitors or former employees.
* If the non-compete is so important that the employer would not continue employing the employee, then it should especially be enforced then, b/c the employer’s forbearance from firing the employee is a legal right that he is foregoing in exchange for the employee’s agreement not to compete.
* Arguably, employees are free to quit at any time. Non-competes are generally used in industries in which knowledge is prized, and knowledge workers are prized. If such a knowledge worker decides its not in his interest to sign the non-compete w/o add’l consideration, he can quit. If he decides to do so, he deems that it is in his interest to accept the employer’s promise of continued employment, even if it is technically indefinite b/c it is practically valuable enough to keep the employee there when he theoretically could leave w/ his valuable skills and find other employment or start a business himself.
* Since many courts, such as the Ohio Supreme Court, hold that only reasonable non-competes may be enforced, the employee w/ his weak bargaining power has adequate protection.
* Allowing for employers to have faith in non-competes backed up by continued at-will employment as consideration will give the employees opportunities for additional responsibility and career growth that comes with working w/ sensitive information.
* Arguably, any promise of continued employment is removes the employee from the realm of at-will employment, which should be adequate consideration for an enforceable K.

**No:**

* In my opinion, a **promise** of continued at-will employment should not be held to be consideration in exchange for signature of a non-compete agreement, b/c such a promise would be an **illusory promise**.  If the employer’s promise of continued employment gives no specific amount of time he will continue employing the employee, the same at-will employment relationship will continue, with the employer relinquishing **nothing in exchange** for the employee’s promise (**no** **mutuality**).
* Since the employer gives up nothing in this scenario, it is a legal fiction that is not justified by public policy, since it arguably imposes undue restraints on trade.
* If non-competes are so important to employers w/ trade secrets, then they such employers should be willing to give add’l consideration, such as an employment K for a specified amt of time.
* The highly unequal employer/employee relationship supports upholding the pre-existing duty rule, so that courts may have an add’l tool in their arsenal to justify non-enforcement of unfair non-competes.
* To accept anything less as consideration in the **highly unequal employer/employee relationship** would be to undermine an eminent maxim of contract law: the goal of promoting a progressive society in which **voluntary agreements (contracts) displace coercion based on status** (Sir Henry Maine).

**Non-Enforcement of Gratuitous Promises.**

Pros:

* B/c of the dubious social value of compelling personal commitments of a non-commercial nature.
* Does not encourage the making of promises that will benefit the economy, promote commerce, encourage investment, facilitate trade, etc.
* Would waste the judicial system’s resources for a dubious purpose.
* Would inappropriately introduce the specter of litigation into familial and personal realms.
* Bargained-For exchange (consideration) is a good way to test the sufficiency of a promise for enforcement. People may voluntarily give things away for free, but we don’t want to allow courts to force them to.

Cons:

* Takes away an opportunity to bind willing promisors to keep their word. Look at the harsh effects of the gratuitous promise interpretation of intra-familial promises from the *Kirksey* case… *Good thing the courts are gradually becoming more willing to enforce agreements made between intimates.*
* The uncertainty of recovery for those who sue for promissory estoppel makes court an inevitability in many disputes.

**Payday Lending**

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| **Pros** | **Cons** |
| * There may be no alternatives to Payday loans, so they may serve a vital purpose in low-income communities b/c of their high default rates. * There are some meaningful choices, such as secured credit cards. * Alternative to pawn shops and loan sharks. * They may keep people in their homes and feed their children. * Base transaction costs may make the APRs look skewed, since it may costs $5/loan for the paperwork to be done by tellers. * Alternative to car title loans, which may result in poor people losing cars essential to their livelihood, etc. * Freedom to K, the avoidance of stereotyping people as unable to contract freely. * Voluntary, bargained-for exchange w/o duress, undue influence or fraud. * Stimulates consumer spending, which creates jobs. * Increases the availability of credit to poor communities, which may result in opportunities for entrepreneurship and self-reliance. | * Extremely high APR rates. * Free from regulations that govern mainstream banks. * May be worse than pawn shops and title loans, b/c dependency can develop. * May be better to mandate banks move into poor areas, but that is a legislative solution. * Encourages poor spending habits. * May be substantively unconscionable due lack of a meaningful choice in the community: Ks of Adhesion—highly unfavorable terms, oppression & unfair surprise. * Bargain principle may be undermined b/c neither fairness nor efficiency are served by allowing these loans. * Market failure b/c of the lack of alternatives. * People wronged may not have access to legal counsel. |

Statute of Frauds: Worth retaining?

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| **Yes** | **No** |
| * It encourages responsible behavior on the part of parties contracting within its provisions by forcing them to write down their agreement or else risk un-enforceability of the K. * Complicated, long-term transactions of over a year should be written down, such as high-rise construction. * Encourages prudence in entering into long-running, expensive or otherwise serious commitments. * Encourages memorializing agreements, which overall makes dispute resolution easier later on. * Ks for performances taking over a year: Harsh effects have been mitigated by the general rule that full performance releases the performing party from the SOFs requirement. * Ks for real estate: Harsh effects mitigated by the part performance exception, that allows evidence of consent of Seller for buyer to enter land, make improvements, etc., which are probative of a real K. This is justified by the lower risk of fraud attached to such situations & b/c it protects the Buyer’s reliance interest. * Sureties—people should not be held to surety agreements (which basically have no consideration) unless they understand exactly what they’re doing, and putting it into writing encourages people to be circumspect about entering into such Ks. * It discourages fraud, after all, by making sure that people have an easy way out when they orally agree to an unfair deal. * UCC’s liberal standards for SOGs mitigate potential harshness (any marking for a writing accepted; signed, non-rejected confirmation notice binds both parties when merchants; Quantity term is the only essential term; specially manufactured or custom goods excepted; goods received/accepted excepted; judicial admission of a K).—UCC facilitates K formation w/in the SOFs. * Reliance can substitute for a writing. | * Harsh effects in many scenarios, especially sale of goods, which discourages SOGs over $500. * Often the SoF results in people making their deciscions based on their reliance on the SoF. E.g. You know that you are making a K with another person, and you know that everything brought up is valid, but you use the SoF as a means of getting out of the K, even though the main purpose is to avoid fraud, where you are using it to get out of a K. * There may be substantial evidence that the K was valid, but it was not made/sufficiently in writing, so one party may be able to get out of an otherwise valid K. * The fact that a K is in writing (especially w/ loose restrictions on the requirement of a writing) does not necessarily mean the party sufficiently contemplated the seriousness of the K. Also issues arise where previous negotiations are not included in K, may (depending on Juris) not include things that were part of the agreement purely because they were not in the written K. |

**Sample Hypo Excerpt:** Regarding ads as not being offers.

S's listing in the phonebook is not an offer (O) b/c of the general rule that advertisements are merely price quotations and invitations to deal, not Os.  S's ad is unlike the ad in Lefkowitz, which was an O, b/c S's ad lacks a quantity term such as "first come, first served."  Even though the ad has the price term and a description of the pipes, it lacks a quantity term, which is necessary to confront the prospect of unexpected demand.  The ad, therefore, is not "clear, definite, and explicit, and leaves nothing open for negotiations" as the court mandated in Lefkowitz.

Legal Formalism vs. Legal Realism.

* + 1. In some K situations, a measure of damages more in tune w/ the specific situation may be more appropriate than the full measure of expectation damages in cases of breached Ks. Consider the medical K cases of *Sullivan* and *Hawkins*.
       1. In *Hawkins*, the π was awarded full expectation damages, which were far in excess of the original fee he paid (he got the difference between what he expected, a perfect hand, and what he got, a mangled and hairy hand). Should the foreseeable unpredictability of medical treatment really be that severely punished absent negligence though?
       2. In *Sullivan*, the π was awarded reliance damages.

Materiality of Breaches:

Breaches

Material --- partial not material

Suspend performance partial breach

Cure? Yes, then partial

No, then total breach (repudiate K)

**The diagram dilemma in other words:**

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| If a breach appears material, the aggrieved party has a choice—she can treat it as a partial or a total breach. If it’s a total breach, then the injured party may (risk is on the aggrieved party treating the breach as material. If they’re wrong, then THEY’VE materially breached!):   1. Suspend performance and wait for a cure.    1. If cured, then the party must perform and treat it as a partial breach.    2. Party has a self-help mechanism. 2. After suspension for a certain amt of time, then terminate the K (factors: R2K §242). |

**GR**: Can look at after-acquired evidence to determine if there was a material breach.

* + 1. Criticism: not really fair in all circumstances.
    2. Defense: fair in circumstances in which the materiality of a breach is a close call and the suspending/repudiating party has a definite feeling that the deal is going south. If he was right, it’s fair to allow him to back up his correct premonition w/ facts that support it.
    3. **Serious resistance to allow this for employment Ks—**
    - Policy reasons for not allowing—gives an incentive to dig up dirt on employees after they complain of being fired for improper reasons. Also may intimidate wrongfully fired employees who know something could be dug up on them if they complain. Society may want to discourage such “fishing expeditions.”