Disclaimer: Some parts of this outline may heavily incorporate text and ideas from the textbook, Black’s Law Dictionary, the professor’s notes or handouts, and previous student outlines.

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# 

# METHOD OF EVALUATING CONTRACT CASES

1. WHICH LAW APPLIES?
   1. Sale of Goods ⇒ Uniform Commercial Code (UCC)
   2. Sale of Services/Real Property ⇒ Common Law (2nd Restatement of Contracts)
2. IS THERE AN ENFORCEABLE CONTRACT?
   1. Proper Formation
      * Offer/acceptance
   2. Support By Consideration (or Alternative)
   3. Precontractual liability?
   4. Statute of Frauds
   5. Defenses to Formation
      * Bargaining problems (duress, misrepresentation)
      * Status problems (capacity)
3. INTERPRETATION/MEANING.
   1. Parol evidence rule
   2. Plain meaning rule
4. WAS THERE A BREACH OF CONTRACT?
   1. Performance
      * Conditions
   2. Defenses
      * Substance (gross inequality in the deal)
      * Performance (good faith)
      * Purpose
5. REMEDIES
   1. Specific performance?
   2. Damages
   3. Limitations
      * Duty to mitigate
      * Reasonable certainty
      * Foreseeability

# WHICH LAW APPLIES?

## DEFINITIONS

1. **Goods**:all things…which are moveable at the time of identification to the contract for sale…other than money. (UCC 2-105(1)).
2. **Merchant:** a person who deals in goods of a kind or otherwise by his occupation holds himself out as having knowledge or skill… (UCC 2-104(1)).

## TWO SOURCES OF LAW

1. UCC: The UCC applies to the sale of goods.
2. Common Law: The common law applies everywhere that the UCC doesn’t (i.e. sale of services, real property). Further, the common law is the authority where the UCC has no rule on point, and also for the interpretation of the UCC.

## PREDOMINANT FACTOR TEST

In contracts for both the sale of a good and a related service (e.g. delivery of lumber) determine whether the good or the service is the primary item of contract, and proceed with respect to the appropriate law.

# WHAT IS A PROMISE?

## DEFINITION

**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)). A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct. (2RK 4).

## CASES

1. ***Hawkins v. McGee (a.k.a. “Hairy Hand”), 1929*** **(2-3)**
   1. Hawkins was a boy with a maimed hand. McGee sought to operate on it to experiment with skin grafting. He solicited consent from Hawkins’s father, making a statement that he guaranteed “to make the hand a hundred per cent perfect.” McGee also made projections about the length Hawkins’s hospital stay and when he would be able to get back to work. In reality, the hand was made worse off and the hospital stay was longer. McGee was sued for breach on both accounts.
   2. The court found that the recovery statements could only be construed as expressions of opinion or predictions and therefore were not binding.
   3. Due to the solicitation it was concluded that he intended the guarantee to be taken at face value to induce consent, and there was ample evidence that P did take them at face value, therefore the guarantee was binding.
   4. Class Notes:
      1. “Clear and direct” language.
      2. Solicitation is external manifestation of intent. (Objective standard.)
2. ***Bayliner Marine Corp. v. Crow, 1999* (4-6)**
   1. A Bayliner sales rep provided Crow with literature indicating that a particular boat model could go 30 MPH. He was also shown a brochure stating that the boat “delivers the kind of performance you need to get to the prime offshore fishing grounds.” Crow purchased the boat, but with significantly different equipment than that represented, and indicated, by the literature. Crow sued Bayliner for breach of an express warranty and implied warranties of merchantability and fitness for a particular purpose.
   2. Sale of goods; governed by UCC.
   3. **Express Warranty – UCC 2-313:** An affirmation of fact or promise must be made relating to the goods sold, a description must be made of the goods being sold, or a sample model must be shown. The literature did not describe a boat with substantially similar characteristics to the one purchased. (Contrast with diamond appraisal.)
   4. Brochure: A statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.
   5. Class notes:
      1. Usually legal matters are reviewed *de novo*, but here the issue was a question of fact, so the appellate court reviewed the evidence in a light more favorable to the winning party at trial court.

# OFFER

## ASSENT

**Intent is gauged objectively.** Obligations are attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent known intent.

1. **Meeting of the minds** (where parties actual intent or will is considered is **not the current rule.**
2. ***Lucy v. Zehmer, 1954* (pages 117-20)**
   1. Lucy and Zehmer were drinking together in a bar when they struck a deal for Lucy to buy a parcel of land from Zehmer. They discussed the sale for 40 minutes, wrote the agreement on a bar tab (after two drafts), and all parties signed it. Lucy thought it was a real agreement, but Zehmer maintained that it was only a practical joke. Court found contract.
   2. Look at **outward expression** of a person as manifesting his intention. Can’t see unexpressed intention.
   3. **Mental assent not required.** If the words or acts have but one reasonable meaning, undisclosed intention is immaterial except when an unreasonable meaning meant is known to the other party.
   4. **Reasonable person** must believe there was an agreement.
   5. Must have **actual belief** in a contract.
   6. **Parts of rule:**
      1. Subjective: Did P think there was a contract?
      2. Objective: Was P reasonable in believing there was a contract?
   7. **Why?** There is no way to know inward state. We must rely on words and conduct to interpret internal intent.
3. **UCC 2-204. Formation in General:** (1) A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

## OFFER

1. **What is an offer?**
   1. **2RK 24:** 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.
   2. An act whereby one person confers upon another the power to create contractual relations between them [just by saying “I accept”].
   3. Sometimes there is no discrete offer, but rather a gradual process by which a contract is made. The **UCC 2-204** still considers this a contract.
   4. ***Owen v. Tunison, 1932* (pages 127-28)**
      1. Was D’s statement that “it would not be possible for [him] to sell unless [he] was to receive $16K cash” and offer? No.
      2. Invitation to negotiate.
      3. **Two part test:**
         1. Does it show an intent to be bound?
         2. Were the terms specific enough? (Could the other party create a contract just by saying “I accept”?)
2. **A price quote is usually not an offer.**
   1. ***Fairmont Glass v. Crunden-Martin, 1899* (130-33)**
      1. P requested a quote for a specific quantity of a specific product, as well as requesting additional terms and cash discount. D replied with all the pertinent information “for immediate acceptance.” P accepted, D said it would be impossible to book the order. P sued. Court found that the quote (in this particular case only) was an offer.
      2. **Usually a contract is not formed until the order is made and is accepted by the seller.**
      3. “In this case we think there was more than a quotation of prices…The true meaning of the correspondence must be determined by **reading it as a whole**.”
      4. Class notes:
         1. Generally a price quote is not considered an offer. Why? Problem of unexpected demand; no reasonable person would think that a store was opening itself up to unlimited demand.
         2. “Requirement” can substitute for a quantity term.
3. Usually **an advertisement is not an offer** but ratheran **invitation** for the buyer to make an offer to purchase. (With exceptions.)
   1. ***Lefkowitz v. Great Minneapolis Surplus Store, 1957* (134-36)**
      1. Defendant placed an ad in the paper: “1 stole . . . $1. First come, first served.” P was the first to respond to the ad, but was denied the stole. He sued for breach. The court found that the ad was, in fact, an offer.
      2. **Test:** Whether the facts show that some performance was promised in positive terms in return for something requested.
      3. “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.”
      4. Notes:
         1. The absence of any words of limitation such as “first come, first served” renders the alleged offer sufficiently indefinite that no contract could be formed.
         2. Note 4: UCC 2-328 (Sale by Auction). Bidder makes the offer which auctioneer can accept or reject. Unless there is “no reserve,” in which case the auctioneer is required to sell to the lowest bidder.
         3. Reward offers are typically considered binding. No unexpected demand. Quantity is necessarily 1.
         4. Bait-and-switch, e.g. Black Friday. Disclaimer: “limited quantities.”
         5. Problem of unexpected demand. No seller would open himself up to sell a bazillion units of a good.
4. **Construction bids** can be retracted under very specific circumstances.
   1. Why? Construction is a very fast-paced industry. Subcontractors’ bids are often made at the last minute, leaving a general contractor to scramble to get his final bid ready. Mistakes can be made.
   2. ***Elsinore Union Elementary School District v. Kastorff, 1960* (139-44)**
      1. Kastorff was a general contractor who accidentally miscalculated a construction bid by leaving out the amount for the plumbing subcontracting. The school board awarded Kastorff the contract, and he informed them the next morning, immediately after realizing his mistake, that there was an error in his bid. He asked to withdraw his bid and was denied. The plaintiff took the next highest bid and sued for the difference. Court found that, due to the mistake, Kastorff could withdraw his bid.
      2. Six requirements to withdraw bid:
         1. The mistake is material to the contract. (Use mistake/total of erroneous bid.)
            1. *Lemoge-5%* (Not enough.)
            2. *Kemper-30%*
            3. *Kastorff-10%*
         2. The error was not the result of neglect of a legal duty. (Consider clerical/computational; bad judgment is neglect).
            1. *Kemper-exhaustion*
            2. *Kastorff-miscalculation*
         3. Enforcement of the contract would be unconscionable.
            1. *Kemper-No damage to city, the city knew before acceptance, “too good to be true”*
            2. *Kastorff-Expectation of plumbing should lead to expectation to pay for it*
         4. The other party can be placed in status quo.
            1. *Kemper-*Never spent any extra money; already had other offers waiting
            2. *Kastorff-*Same
         5. Prompt notice of election to rescind.
            1. *Kemper-*Several hours
            2. *Kastorff-*Next morning
         6. Must restore or offer to restore upon the other party everything of value received under the contract.
      3. If an offeree knows of mistake before acceptance, it is considered a mutual mistake and the offeror is not bound.
      4. Note: Many public contracts cannot be revoked.
      5. Why would owner want to allow revocation? Want a happy contractor. May need to change building plans, don’t want shoddy work, etc.

# ACCEPTANCE

## WHAT COUNTS AS AN ACCEPTANCE?

1. An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him the offeror, and thereby creates the legal relations called a contract.
   1. Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances. **(2RK 30)**
      1. In case of doubt, the offer is construed to invite acceptance by either promise or performance. (2RK 32)
      2. The terms of a contract must be reasonably certain for an acceptance to be effective. (2RK 33)
      3. If acceptance by performance is invited, rendering of performance will not constitute as an acceptance if the offeree seasonably notifies the offeror of his intention not to accept. (2RK 53)
   2. Unless otherwise unambiguously indicated by the language or circumstances an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. **(UCC 2-206)**
      1. An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of non-conforming goods. (UCC 2-206)
2. In most bilateral contracts, **notification of acceptance is required** and acceptance is effective upon notification. See 2RK 56.
   1. This is not the case in most unilateral contracts, where the doing of the act is usually seen by the offeror. The exception, however, is when knowledge of it will not quickly come to the promisor. See 2RK 54.
   2. Acceptance by performance does require notification under **UCC 2-206.** See definition of notification 1-202.
   3. ***International Filter v. Conroe Gin, 1925* (147-51)**
      1. Filter wrote an offer to Conroe for prompt acceptance that “becomes a contract when accepted by the purchaser and approved by an executive officer of the International Filter Company, at its office in Chicago. Conroe sent the “acceptance” and Filter endorsed by saying “OK.” Conroe breached, saying there was no contract made since Filter never notified them of its approval; that it was just an unaccepted offer. The court upheld the contract.
      2. Nothing in the offer indicates that it would become a contract only upon notice to Conroe. Further, if such notice were required, the “OK” was enough. “Whatever would convey by word or fair implication, notice of the fact would be sufficient.”
3. Offeror is master of the offer. He can specify how to accept. Silence and exercise of dominion can only count as an acceptance in the 2RK 69 circumstances.
4. **Acceptance can be implied** from the actions of the parties.
   1. ***Allied Steel v. Ford Motors, 1960* (158-60)**
      1. Ford contracted with Allied for Allied to provide and install equipment. The original contract had one set of terms, but Ford offered a second agreement with different terms than the original. Before expressly accepting the second agreement in the manner of the terms specified by Ford, but after working under it, there was an incident, and Allied claims the terms of the first agreement still applied. The court ruled that Allied had accepted the second offer by acting on it, even without explicit acceptance under the terms provided.
      2. “Acceptance of a contract may be implied from the acts of the parties….and may be shown by proving acts done on the faith of the order, including shipment of the goods ordered.”
      3. “If an offeror merely suggests a permitted method of acceptance, other methods of acceptance are not precluded.”
5. Shipment of **nonconforming goods** doesn’t count as an acceptance if the seller seasonably notifies the buyer that the shipment is only offered as an accommodation. (UCC 2-206)
   1. ***Corinthian Pharm v. Lederle Labs, 1989* (161-67)**
      1. Lederle changed their prices after Corinthian placed an order. As a courtesy, Lederle sent a small portion of the order at the reduced price with indication of the price change and instructions that Corinthian could cancel the remainder of the order. Corinthian claimed that the shipment of nonconforming goods created an acceptance of their order, but the court ruled against them.
      2. “Shipment of nonconforming goods is treated as a counteroffer just as at common law, and the buyer may accept or reject the counteroffer under normal contract rules.”
   2. Silence is not usually considered a valid acceptance, but **silent retention of a shipment may be considered acceptance** on the part of a buyer.

## MIRROR IMAGE RULE (COMMON LAW)

* + - 1. **An acceptance that varies the terms of the offer is a rejection.** Any change whatsoever varies the terms of the contract. (Counteroffer, must be accepted by offeror; this protects the offeror.)
      2. What is bad about a strict mirror image rule?
         1. Parties may not realize they are not in agreement, but they may still opertate under one and find out later that there was not a contract.
         2. Used as a pretext for getting out of bargains (hidden, dishonest agreements).
      3. **Courts have tried to soften the rule** by often holding that the extra terms were implied in the original offer. Or that they were just suggested (precatory; expressing a request). An acceptance that merely requests a change of terms is not invalidated unless it is expressly condition on assent to those terms. (2RK 61)
      4. **Last shot rule:** When some performance has taken place, the party that sent the last message before performance began usually prevails. (See *Allied Steel* above.)

## UCC BATTLE OF THE FORMS (VARYING TERMS)

1. **Specific concerns with the sale of goods:** Often standardized forms are passed back and forth, often buyer and seller assume they have planned an exchange and made a contract, terms of the contract may be determined at a different time from when the contract was formed, conduct my recognize the existence of a contract even when parties’ writings may not, repetitive dealings, industry custom.
2. **Contracts formed under 2-207(1):**
   1. **Applies to acceptances that are definite and seasonable** unless acceptance is expressly made conditional on assent to the additional or different terms.
   2. The words “subject to” do not necessarily make an acceptance expressly conditional.
      1. ***Dorton v. Collins & Aikman Corp., 1972* (193-98)**
         1. Carpet ordered and delivered from seller. Seller’s forms stated that the order was “subject to” an arbitration clause. The court ruled that the acceptance was not expressly conditional and the contract was formed under subsection (1) of 2-207.
         2. “Although use of the words ‘subject to’ suggests that the acceptances were conditional to some extent…we believe that [the proviso] was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror’s assent to the additional or different terms therein…That the acceptance is predicated on the offeror’s assent must be directly and distinctly stated or expressed rather than implied or left to inference.”
   3. If a contract is formed under 2-2017(1), its **terms are decided by 2-207(2).** By 2-207(2) the **additional terms are included if:**
      1. The agreement is between merchants.
      2. The offer does not expressly limit the terms of the acceptance.
      3. The term is not material. (I.e. could presume they would consent; no surprise or hardship; common in industry; see notes, page 99; no consensus on whether arbitration clause is material or not; changes in the quantity and price terms do more than just materially alter the contract, they prevent acceptance.)
   4. What about **terms that differ** under 2-207(2)? Three views:
      1. Knock-out rule (majority): Remove all differing terms and use gap-fillers.
      2. Drop-out rule (main minority): Differing terms in the acceptance get thrown out.
      3. Other (lesser minority): Different = additional. Use 207(2).
      4. ***Northrop v. Litronic, 1994* (202-04)**
         1. Litronic offered to sell Northrop, a giant defense firm, printed wire boards. The offer contained a 90-day warranty. Northrop’s return invoice contained a warranty period unlimited in duration. After 90 days, Northrop tried to return some of the products, but was denied.
         2. The court ruled that a contract was created under Subsection (1) and that since the terms were different, but not additional under Subjection (2) the terms of the contract would be governed by the knock-out rule.
   5. Policy: Common law favors sellers. UCC has more balance.
3. **Contracts formed under 2-207(3):**
   1. **Applies to acceptance implied from the parties’ conduct.**
   2. **Terms are decided by 2-207(3)** as well; terms are those that the parties agree on plus gap-fillers from the rest of the UCC.
   3. ***Itoh v. Jordan, 7th Cir., 1977* (199-201)**
      1. Itoh ordered steel coils from Jordan, who sent back an acknowledgement form that seller’s acceptance was expressly conditional on the addition or different terms, and if the terms were not acceptable the buyer should notify the seller immediately. Delivery and payment occurred without express consent to the additional terms. Court ruled that a contract was not formed under subsection (1) since silence was not an assent to the express conditions. The acknowledgement was a mere counteroffer. The court ruled that a contract was formed under subsection (3) by the behavior of the parties.
      2. “Since provision for arbitration is not a necessary or missing term which would be supplied by one of the Code’s gap-filler provisions unless agreed upon by the contracting parties, there is no arbitration term in the Section 2-207(3) contract which was created by the conduct of Jordan and Itoh in proceeding even though no contract had been established by their exchange of writings.”
      3. “Where a seller takes advantage of the “expressly conditional” clause he must accept the potential risk under Subsection (3) of not getting his additional terms when he elects to proceed with performance without first obtaining buyer’s assent to those terms.”

## TERMINATION OF POWER TO ACCEPT

1. **An offer can be terminated by (2RK 36):**
   1. Rejection or counter-offer (See 2RK 38, 39)
   2. Lapse of time (See 2RK 41)
   3. Revocation (See 2RK 42, 43, 46)
   4. Death or incapacity of offeror or offeree (See 2RK 48)
2. **Lapse** (2RK 41)
   1. If no period specified in the offer, it lapses after a reasonable time, as determined by the particular circumstances (e.g. end of a face-to face conversation, publication of revocation of an ad).
3. **Revocation**
   1. Typically an offer is freely revocable at any time before acceptance. (Except in the case of option contracts. Note: It is unclear whether rejection of on option contract will justify severing the offeree’s power to accept.)
   2. A revocation occurs when a reasonable person would have perceived it from **statements or actions** inconsistent with the making of a contract. (2RK 42, 43)
   3. **General offers** (e.g. newspaper ads) are revoked when notice of termination is given by means equal to those used to spread the offer, unless there is a better way reasonably available. (2RK 46)
   4. Why can you revoke?
      1. Prevents offeree from taking advantage of time in between.
      2. Avoids speculation.
      3. Offeror would otherwise just have to sit and wait.
      4. Wards off potential sales; stops useful economic activity.
      5. Right to freedom *from* contract is more important. Why? Expectation is a big liability. A lot at stake.
4. **Option Contracts – three ways to make an offer irrevocable:**
   1. **Consideration for the promise to keep the offer open:**
      1. ***Dickinson v. Dodds, 1876* (171-74)**
         1. Dodds offered to sell Dickinson some real estate, and for the “offer to be left over until Friday.” Before Friday, while Dickinson was preparing to accept the offer, Dodds sold the property to another man and Dickinson sought specific performance. The court ruled that the promise to keep the offer open was not binding.
         2. “It was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold…But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere (nundum pactum) was not binding…”
   2. **Merchant makes firm offer. (UCC 2-205):**
      1. Requirements
         1. Merchant
         2. Writing signed by offeror (check mark, letterhead, initial, etc. will do)
         3. Promise to hold the offer open
      2. Can create an option contract for up to three months; if longer, would be reformed by the courts to only last for 3 months.
      3. Could go for longer if the promise to hold the offer open is backed by consideration.
   3. **Offeree’s reliance in unilateral contracts (2RK 45):**
      1. ***Ragosta v. Wilder, 1991* (177-80)**
         1. The Ragostas heard that Wilder was selling a property and began to obtain financing. Wilder later sent an offer to sell “at anytime up until the last of November 1987 that you appear with me at the Randolph National Bank with said sum.” Plaintiffs informed Wilder they would show up at the bank on October 10th with the money, at which point Wilder revoked the offer. Plaintiffs argue the actions they undertook to obtain financing, which were detrimental to them, could constitute consideration for the promise to keep the offer open. Court rejected.
         2. “Defendant received no consideration…In fact, defendant returned plaintiff’s check for $2,000 which would have constituted consideration for the promise to keep the offer open, presumably because he did not wish to make a firm offer.”
         3. “Plaintiffs began to seek financing even before defendant made a definite offer to sell the property. Whatever detriment they suffered was not in exchange for defendant’s promise to keep the offer to sell open.”
         4. “Here, plaintiffs merely engaged in preparation for performance. Plaintiffs never tendered to defendant or even began to enter the purchase price. Thus, they never accepted defendant’s offer and no contract was ever created.”
      2. Acceptance only occurs upon completion of the return performance, even though once performance has begun, the offeror is estopped from revoking. (2RK 45)
      3. Offer still lapses in a reasonable time (e.g. if performance is taking too long).
      4. Why not apply to bilateral contracts? Offeree can protect themselves before performance just by saying “I accept.”
   4. Acceptance of option contracts effective only up receipt. (2RK 63)

## MAILBOX RULE

1. **General rule**: Acceptances are effective upon dispatch (2RK 63), offers, and revocations are effective upon receipt. Rejections are effective upon receipt. (2RK 40)
2. Acceptances are effective upon receipt for **irrevocable offers**.
3. **Only applies** when offer is by mail or acceptance is specifically invited by mail. (See 2RK 63.)
4. If the mailbox rule does not apply, acceptance is effective only upon receipt.
5. Offerors bear the risks of transmission.
6. **Overtaking rejection:** (A sent, R sent, R received, A received.) General rule is that a contract is formed on the sending of the acceptance, but is the offeror receives the rejection first and relies on it, then the offeree has no rights of acceptance. If no reliance, then a contract is still formed.
7. **Overtaking acceptance:** (R sent, A sent, A received, R received.) Sending the rejection first stops the protection of the mailbox rule. Everything becomes effective upon receipt. In the present case, a contract is formed because acceptance was received first. (See 2RK 40.)
8. **Similar case:** (R sent, A sent, R received, A received.) No mailbox rule since rejection was sent first. Everything is effective upon receipt. No contract formed. Acceptance is considered to be a counteroffer which the original offeree can accept or not.

|  |  |
| --- | --- |
| **Should non-merchants be allowed to make firm offers under UCC 2-205?** | |
| **YES** | **NO** |
| * Freedom of K—reasonable to enforce since voluntarily accepted the risk of enforcement. * Could adjust for risk in their pricing scheme. Every term in a bargained-for agreement may be assumed to have a price. * 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. * 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. | * Merchants arguable know what they are doing in the business. Non-merchants may not understand the legal liability they could incur when making a firm offer. Further, they may assume the common law rule that they can revoke at any time. * Quasi-consideration may be found because merchants put their commercial reputations in the hands of buyers when they make a long term commitment. Buyers forebear on right to give a bad review. Non-merchants do not have that much at stake; the promise is supported by less on the buyer’s side. * Non-merchants are not ready to take on a restraint on their trading activities without the sales experience of a merchant. * 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. |

# CONSIDERATION

## BILATERAL VS. UNILATERAL

1. Bilateral
   1. Promise for a promise.
   2. Contract is formed immediately.
   3. More common in business transactions.
2. Unilateral
   1. Promise for performance.
   2. Promisor is bound when the promise is conveyed, but does not owe a duty until performance is complete. This is when the contract is formed.
   3. Favorable when you don’t care who performs (lost dog reward), when performance is hard (realtor), to incentivize (chores), to minimize risk (service before payment).

## WHAT COUNTS AS CONSIDERATION?

1. **Consideration can consist of** performance or a promise. **Performance can be:** an act other than a promise, a forbearance, or the creation, modification, or destruction of a legal relation. (2RK 71)
   1. ***Hamer v. Sidway, 1891* (34-37)**
   2. Story promised his nephew $5K if he refrained from a list of vices until he turned 21. Nephew obliged, but uncle died before giving the money. Nephew sues estate for the money. Estate argues that there was no consideration.
   3. “A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.” (Not the current rule. See 2RK 79.)
   4. “In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise.”
   5. “Any damage, or suspension or forbearance of a right, will be sufficient to sustain a promise.”
2. **Forbearance to assert a claim or defense** which proves to be invalid is not consideration unless: (a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or (b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid. (2RK 74.)
   1. ***Fiege v. Boehm, 1956* (40-45)**
      1. Fiege and Boehm slept together and shortly after Boehm discovered she was pregnant. They came to an agreement that she would not file criminal bastardly charges against him if he would pay the medical bills and child support until the child turned 18. Fiege found out the child wasn’t his and quit paying. Boehm filed bastardly charges (which were acquitted) and sued for breach. Fiege argued that there was no consideration since the forbearance bargained for was not based on a valid claim.
      2. “In order to support a compromise, it is sufficient that the parties entering into it thought at the time that there was a *bona fide* question between them, although it may eventually be found that there was in fact no such question.”
      3. “A promise not to prosecute a claim which is not founded in good faith does not of itself give a right of action on an agreement to pay for refraining from so acting, because a release from mere annoyance and unfounded litigation does not furnish valuable consideration.”
      4. Note 3 (page 45): Will want to avoid “strike suits”—suits with a sufficiently low chance of prevailing at trial that they would not have been brought but for the prospect of settlement.
3. **Past acts** cannot count as consideration.
   1. ***Feinberg v. Pfeiffer, 1959* (46-47)**
      1. Feinberg worked for Pfeiffer for many years. Without her knowledge and only informing her after it was agreed upon, in light of all Feinberg’s years of hard work, Pfeiffer decided to give her a pension of $200 upon her retirement, which she could choose to begin at any time. Feinberg worked for another year and a half and then retired and began drawing on her pension. Later Pfeiffer stopped paying and argued that there was no consideration for the contract.
      2. “[T]he only apparent consideration for the adoption of the foregoing resolution was the “many years of long and faithful service” expressed therein…past services are not a valid consideration for a promise.”
      3. Continued employment was not found to be consideration because there was no agreement for Feinberg to continue working in return for the promise, and “hence there was lacking of that mutuality of obligation which is essential to the validity of a contract…” (Note: This is NOT the current rule. See 2RK 79.)
      4. Hypo: How could the promise have been made binding? Put some requirement on Feinberg that looks like consideration, e.g. work for two more years, or retire by 65.
4. **There is no requirement of:** a befit to the promisor or a loss to the promisee, equivalent values exchanged, or “mutuality of obligation.” (2RK 79.)
5. **There is consideration for a set of promises** if what is bargained for and given in exchange would have been consideration for each promise in the set if exchanged for that promise alone. The fact that part of what is bargained for would not have been consideration if that part alone had been bargained for does not prevent the whole from being consideration. (2RK 80)

## WHEN CAN A PROMISE COUNT AS CONSIDERATION?

1. A promise that is bargained for is consideration if the promised performance would be consideration. **(2RK 75).** Courts determine when whether a performance has in fact been promised or whether only the illusion of performance has been held out (“illusory promise”). (See 2RK 77.)
   1. ***Strong v. Sheffield, 1895* (69-71)**
      1. Strong sold a business to Sheffield’s husband on credit, and the debt was later embodied in a promissory note. Strong assured the husband that if he got his wife to endorse the note that he would not collect on the debt until “such a time as [he] want[ed] it.” He did in fact forbear for two years.
      2. “It would have been no violation of the plaintiff’s promise if, immediately on receiving the note, he had commenced suit upon it…There was no agreement to forebear for a fixed time or for a reasonable time…The consideration is to be tested by the agreement, and not by what was done under it…The evidence failed to disclose any consideration for the defendant’s endorsement.”
      3. “Illusory promises” appear to be promises, but are not sufficient consideration. (“Until I want to” leaves no way to breach.)
      4. Note: The exact rule of this case is reversed by the UCC. (With respect to sureties only; the general rule remains.)
2. **Satisfaction clauses do not make a promise illusory.**
   1. Two types of satisfaction clauses:
      1. Commercial value, operative fitness, or mechanical utility; standard of reasonable person used.
      2. Fancy, taste or judgment; good faith judgment required.
   2. ***Mattei v. Hopper, 1958* (72-75)**
      1. Hopper agreed to sell Mattei a parcel of land for a certain price “upon tender of a good and sufficient deed…and [Mattei] obtaining leases satisfactory to the buyer.” Hopper later refused to execute the contract, saying that the satisfaction clause allowed Mattei to back out at any time and therefore there was no consideration. (“If one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.”)
      2. “The promisor’s duty to exercise his judgment in good faith is an adequate consideration to support the contract.”
      3. “A promise conditional upon the promisor’s satisfaction is not illusory since it means more than that the validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine.”
3. **Output and requirements contracts** are not illusory.
   1. UCC 2-306: **Output, Requirements and Exclusive Dealings**
4. A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any 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.
5. A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.
   1. **Good faith:**
      1. 1-201 (old) - **General Definitions:** (19) “Good faith” means honesty in fact in the conduct or transaction concerned.
      2. 1-201 (new) - **General Definitions:** (20) “Good faith” except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.
      3. Old UCC, Article 1 includes “good faith” for a merchant. Same as new “good faith” “in the trade.”
   2. ***Eastern Air Lines v. Gulf Oil, 1975* (76-82)**
      1. Eastern had a “requirements contract” with Gulf to buy all the jet fuel they needed in certain cities exclusively from Gulf. Gulf attempted to breach and defended that the contract was invalid due to want of requisite definiteness.
      2. Earlier courts had ruled that requirements contracts were valid because they could determine the volume of goods provided for under the contract by reference to objective evidence of the volume of goods required to operate a specific business. The UCC later addressed this issue directly.
      3. Under UCC § 2-306 and the following note, requirements contracts are not too indefinite since “the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in a discontinuance.” (Note: The notes to the UCC are not binding law unless the state has enacted them, but are very persuasive.)
      4. Footnote 2 (pages 81-82): Under a requirements or output, a party may estimate or it may contain maximums or minimums (or neither). Estimates bar any quantities unreasonable disproportionate, but maximums and minimums are clear limits.
      5. Class Notes:
         1. Common law satisfaction clauses probably use something similar to the old UCC definition of “good faith.”
         2. Gulf is at the mercy of Eastern, hence the rules will want to protect Gulf.
         3. Other ways of policing, not consideration. Supports relaxing standards for contract formation.
6. **Promises can be implied** in a contract.
   1. ***Wood v. Lucy, Lady Duff-Gordon, 1917* (83-85)**
      1. Lucy was a fashion designer. She also charged for her endorsement on the fashions of others. Lucy entered into a contract with Wood, who owned a business adapted to the placing of such endorsements, for Wood to have the exclusive right, with her approval, to place her endorsement, sell her designs, or license to sell them. In return Wood was pay one half of all profits to Lucy and to render accounts monthly. Lucy breached and claimed that there was no consideration since Wood never expressly promised to make efforts to marker her endorsement or designs.
      2. “The implication that the plaintiff’s business organization will be used for the purpose for which it is adapted….Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business “efficacy, as both parties must have intended that at all events it should have.”
      3. “…if he was under no duty to try to market…his promise to account…would be valueless…but in determining the intention of the parties the promise has a value…His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence.”
      4. Note 3: Termination clauses are often used to minimize risk in similar contracts. If, however, termination can occur at will, the contract will be deemed illusory. If notice must be given, it will not be held to be illusory.

## CONSIDERING GRATUTIOUS PROMISES:

1. Gift: You have already given it; you can’t get it back.
2. Gratuitous Promise: Going forward; not enforceable.
3. Conditional Gift: A promise of a gift, as long as a condition is satisfied, but the party making the promise doesn’t really want whatever the condition is. It may be imposed simply due to practicality, etc. (Ex: Run with me to the bank and I’ll give you some money.)
4. Enforceable Promise: Consideration or alternative basis for supporting; binding.

## THE REQUIREMENT OF BARGAIN:

1. **The promise and the consideration must purport to be the motive for each other, in whole or at least in part.**
   1. 2RK 71 - **Requirement of Exchange; Types of Exchange:** (1) To constitute consideration, a performance or a return promise must be bargained for. (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.
   2. 2RK 81 - **Consideration as Motive or Inducing Cause:** (1) The fact that what is bargained for does not itself induce the making of a promise does not prevent it from being consideration for the promise. (2) The fact that a promise does not of itself induce a performance or return promise not prevent the performance or return promise from being consideration for the promise.
   3. 71 appears to address external manifestations, while 81 addresses internal motivations. Why look only at the external? People change their minds, you can’t analyze motives, you are never guaranteed what a person is thinking.
   4. ***Kirksey v. Kirksey, 1845* (56-57)**
      1. Woman was the widow of man’s brother and was comfortably settled on leased property, which she would have attempted to secure. Man wrote saying that if she would come down and see him that he would give her a place to raise her family. Woman went and man did, in fact, provide her and her family with a place for a while, but later kicked them out. Woman files a claim for breach.
      2. “The promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach.”
      3. Man did not offer the house in order to get woman to visit. No bargain. Consideration has to be wanted by the other party.
      4. Note 2 (page 57): A father offering his estranged daughter who refused to see him a ring in exchange for her coming to visit would be enforceable.
      5. Note 3 (page 57): Woman at a casino who won $1MM on a free spin that was given to her in exchange for providing her information so that she could be more personally advertised to was entitled to demand the money.
2. Courts are highly split about **non-compete agreements in at-will employment.**
   1. ***Lake Land v. Columber, 2002* (58-64)**
      1. Columber was at at-will employee of Lake Land. After having been employed for a time Columber was asked to sign a non-compete agreement. He worked for Lake Land for ten years after signing the agreement and upon termination of the employment Columber broke the agreement. Action for breach.
      2. “Some courts have found sufficient consideration in an at-will employment situation where a *substantial* period of employment ensues after a noncompetition covenant is executed, especially when the continued employment is accompanied by raises, promotion, or similar tangible benefits.”
      3. “It follows that either an employer or an employee in an at-will relationship may propose to change the terms of their employment relationship at any time…The presentation of a noncompetition agreement by an employer to an at-will employee is, in effect, a proposal to renegotiate the terms of the parties’ at-will employment…We therefore hold that consideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues and at will employment relationship that could legally be terminated without a cause.”
      4. Dissent: “The employer has relinquished nothing…the employee has gained nothing…the same at-will relationship continues.” An employer could terminate the relationship “as soon as the ink was dry.”
      5. Dissent 2: “Execution of a noncompetition agreement for which forbearance from discharge is the consideration alters the at-will nature of the employment relationship.”
      6. Note on handbooks (64-65): Handbooks are more often found to be enforceable, even though employees and employers do not usually expressly agree to their terms, and employees often do not even read them. Why? Perhaps: favor little guy, don’t restrict trade, promises on both sides, does not continue after employment is terminated, more stable and productive workforce.
3. **Rewards:** A reward offer “may be accepted by anyone who performs the service called for when the acceptor knows that it had been made and acts in performance of it, but not otherwise.”

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| **Should non-compete agreements in at-will employement be upheld as having consideration?** | |
| **YES** | **NO** |
| * Continued employment for a significant amount of time, even though indefinite, should count as consideration, since the employee has to opportunity to get more training, promotions, responsibility, and career advancement. * At-will employment relationships are being re-negotiated every moment and the employer can make a new agreement – continued employment in exchange for noncompetition. * A promise of continued at-will employment is arguably not illusory since a reasonable person would interpret it to be a significant, if not definite, period of time. * The employee gets something – to keep working. * Encourages productive cooperation between employers and employees. * Employers have to be able to share their trade secrets without fear of an information leak. * Maybe employer would fire employee if they didn’t sign. Thus employers if forbearing a legal right not to fire. * At-will works both ways. If it is not in employee’s best interests to sign the agreement without additional consideration, he can quit. * Employee will want to retain experience employee who already has skills and training. Valuable to them to keep. * Can be policed otherwise e.g. reasonableness. * Removal from at-will employment can count as consideration. | * It alters the nature of the at-will employment relationship. * The employee has gotten nothing new. They get no new rights, but have given up the right to compete. * Coercion/ unequal bargaining power. * There may be no new training left for employee to benefit from. * Illusory – no set time of assured employment. Can fire whenever they want. * Disfavored due to restraint on trade. * There is no way for the employer to breach. * Want to favor the little guy. * Legal fiction. * Don’t want employees to suffer detriment and then be let go and not be allowed to use their skills elsewhere. Waste of training and knowledge. * If the agreement is very important to the employer, he will be willing to give additional consideration. * Pre-existing duty rule. * Brings us back to status-based society where powerful party can get what he wants at the expense of a less powerful party. |

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| **Factors for and against enforcement of gratuitous promises…** | |
| **FOR** | **AGAINST** |
| * Ability to bind willing promisors to their word. * No uncertainty of if they will follow through. Can count on enforcement. * Bright line rule takes away uncertainty of recovery. Less litigation. | * Can be policed by social value of honoring personal commitments. * Does not encourage economy, commerce, investment, trade, etc. * Would waste judicial resources * Would introduce litigation into the family and personal realms * Consideration is a good test fore enforcement. We want to allow people to give things away, but don’t want to force them to. |

# SUBSTITUTES FOR CONSIDERATION

## TWO ALTERNATIVES

1. **Reliance:** A promisee has acted in reliance on a promise and should be compensated.
2. **Restitution:** To prevent unjust enrichment, even when there has been no promise.

## RELIANCE

1. Often seen in family promises (such as a daughter avoiding marriage to take care of her parents in the agreement that they would leave her the house), promises to convey land (where someone has moved on and made improvements), promises coupled with gratuitous bailments (where someone has counted on your properly caring for something), and charitable subscriptions (where an organization counts on a gift).
2. **Old Rule:**
   1. **Promises Reasonably Inducing Definite and Substantial Action:** A promise which the promisor should reasonably expect to induce action of forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. (1RK 90)
   2. ***Ricketts v. Scothorn, 1898* (89-91)**
      1. Scothorn was the granddaughter of the late Ricketts, who wrote her a promissory note for $2,000 plus interest payable on demand so that she wouldn’t have to work. Scothorn quit her job, but later, with permission and assistance of Ricketts, got a new job. At no time did Ricketts repudiate the obligation. He paid the interest, but passed away before paying out the note. His estate argues that the contract was unenforceable due to lack of consideration.
      2. “An estoppel in pais is defined to be “a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.”
      3. Grandfather “intentionally influenced the plaintiff to alter her position for the worse….The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them.”
      4. Old concept of equitable estoppel: You can’t go back on a promise. Two part test: 1) Was what she suffered a reasonable and probable consequence of what he promised? 2) Intentional influence of the plaintiff? Expectation damages used to automatically be given.
   3. ***Feinberg v. Pfeiffer Co., 1959* (94-95)**
      1. Feinberg worked for Pfeiffer for many years. Without her knowledge and only informing her after it was agreed upon, in light of all Feinberg’s years of hard work, Pfeiffer decided to give her a pension of $200 upon her retirement, which she could choose to begin at any time. Feinberg worked for another year and a half and then retired and began drawing on her pension. Later Pfeiffer stopped paying and argued that there was no consideration for the contract.
      2. **“**Was there such an act on the part of the plaintiff, in reliance upon the promise contained in the resolution, as will estop the defendant, and therefore create and enforceable contract under the doctrine of promissory estoppel?...such action on plaintiff’s part was her retirement from a lucrative position in reliance upon defendant’s promise to pay her an annuity or pension.”
3. **Current rule:**
   1. **Test:**
      1. Promisor should reasonably expect to induce action or forbearance.
      2. Actually induces action or forebearance.
      3. Remedy as justice requires – expectation or less.
   2. **Promise Reasonably Inducing Action of Forbearance:** (1) A promise which the promisor should reasonably expect to induce action of forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induces action or forbearance. (2RK 90(1))
   3. In determining whether injustice can be avoided only by enforcement of the promise, **the following circumstances are significant:** the availability and adequacy of other remedies, particularly cancellation and restitution; the definite and substantial character of the action or forbearance in relation to the remedy sought; the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; the reasonableness of the action or forbearance; the extent to which the action or forbearance was foreseeable by the promisor. (2RK 90(2))
   4. Class notes:
      1. Goal: To prevent injustice.
      2. Not all reliance is acceptable. It must be reasonable.
      3. Under 1RK, expectation is the only damage granted. Under 2RK, expectation is the upper limit.
      4. “A rule that enforces promises designed to induce the creation of economic activity simply reinforces the traditional free-will basis of promissory liability…”
      5. Enforceability based on reliance may ameliorate injustices that would otherwise result, but may also risk unfair or unsatisfactory outcomes.
      6. Why not get rid of “reasonably expect to induce action” from 1RK 90 to 2RK 90? We don’t want every gratuitous promise to be enforceable.

## RESTITUTION

1. You always have a claim for restitution, even if there is no contract. **Restitution is appropriate when 1) there has been a benefit conferred, and 2) the receiving party is unjustly enriched.**
   1. Sometimes the term “quasi contract” is used to describe a 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.
   2. “Legal fiction”; pretend contract; implied as a matter of law.
2. **Intermeddlers usually can’t recover restitution.**
   1. “Gains produced through another’s loss are unjust and should be restored.” However, one who acts officiously in conferring a benefit cannot get restitution from the recipient. One so acting is often called a *volunteer* or *intermeddler.* No one, that is, “should be required to pay for benefits that would be ‘forced’ upon him.”
   2. ***Contnam v. Wisdom, 1907* (106-09)**
      1. Wisdom was a physician who performed emergency surgery on Cotnam after he was thrown from a streetcar and seriously injured. Cotnam was unconscious and was never revived. Wisdom sues his estate for services rendered.
      2. “And services rendered by physicians to person unconscious or helpless by reason of injury or sickness [sustain recovery].”
      3. “This fiction merely requires a reasonable compensation for the services rendered. The services are the same be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service, and skill.”
      4. Note 2: Usually bystander help is considered gratuitous. The exceptions are medical personnel operating in their professional capacity, and when a bystander’s services are excessively expensive or burdensome.
      5. Why rule for doctors? Want to encourage action in such situations.
3. **If you are contracted with a party,** usually your remedy is against them directly.
   1. ***Callano v. Oakwood Park Homes, 1966* (110-12)**
      1. Callano did landscaping around a house that a man was contracted to buy from Oakwood. Callano was not contracted with Oakwood, but directly with the purchaser. After the landscaping was complete, but before payment, the purchaser died and the contract for the sale of the house was canceled. Oakwood later sold the house to a new buyer, and Callano sued Oakwood for their services.
      2. “They had no dealings with defendant, and did not expect remuneration from it when they provided the shrubbery. No issue of mistake on the part of the plaintiffs is involved. Under the existing circumstances, we believe it would be inequitable to hold defendant liable. Plaintiffs’ remedy is against Pendergast’s estate, since they contracted with and expected payment to be made by Pendergast when the benefit was conferred.”
      3. Why different in note 2 (page 112)? Daughter is judgment-proof. Benefit was for parents’ house.
4. Usually **no compensation for marital duties.**
   1. ***Pyeatte v. Pyeatte, 1982* (113-14)**
      1. Couple agreed that wife would work and pay husband’s way through law school, and then he would pay her way through grad school. After law school, and before paying, husband filed for a divorce. Wife sued.
      2. “Where both spouses perform the usual and incidental activities of the marital relationship, upon dissolution there can be no restitution for performance of these activities. Where, however, the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution, the remedy of restitution is appropriate.”

# PRE-CONTRACTUAL LIABILITY

## PRECONTRACTUAL LIABILITY

1. Revocability and reliance **(liability after offer):** The orthodox response is Learned Hand’s position that **promissory estoppel is inapplicable to a bargain promise which occasioned reliance not constituting performance of the consideration sought by the promisor.** “The element of exchange which mars off the bargain promise also” limits promissory estoppel. 2RK 90 (promise inducing reliance) is only meant for non-bargain situations. If you want to rely on an offer you should accept it.
   1. ***Drennan v. Star Paving, 1958* (222-27)**
      1. General contractor won a bid in which he relied on a mistaken bid from a subcontractor. The subcontractor tried to retract the bid but was not allowed. Defendant contends that there was no contract formed because they revoked the offer before acceptance of it was communicated to them. Nor was there an option contract.
      2. Problem: 2RK 90 only applies to promises not bargained for. 45 (part performance creating option contract) only applies to bilateral contracts.
      3. Court applied 90 saying that there was an implied promise to keep the offer open. Otherwise, the deal wouldn’t work. “Subsidiary promise.” Subcontractor wants contractor to use and rely on their offer so they the contractor will win the bid and the subcontractor will get work. (Same idea as 45 that an option contract is formed.)
      4. Contractor cannot delay acceptance. If he shops around, the bid is revocable.
2. Liability when negotiations fail **(liability before offer):** Claimants seeking recovery for services performed during negotiations have rarely succeeded, and when they have it has only been on a restitution basis. This is usually allowed only when a party confers a benefit that was not meant to protect its own interests. Reliance losses are sometimes allowed, typically in cases of misrepresentation where a party may misrepresent its intention to come to terms. Otherwise, only in extreme cases. 87% of preliminary negotiation reliance claims fail.
   1. ***Hoffman v. Red Owl Stores, 1965* (230-33)**
      1. Hoffman owned a bakery in Wisconsin. He wanted to open a Red Owl grocery franchise. He had $18,000 to invest and was told by a Red Owl rep that this would be sufficient. He was instructed to purchase a small grocery store to gain experience which he was then told to sell (after it was running at a profit) and was assured that Red Owl would find him a larger store elsewhere. He put money down on a lot that Red Owl selected and sold his bakery at a loss, then moved to a new town and paid rent on a house so that he could work at a Red Owl store, a job that never came through. He was then told that he needed $26,000 to invest, and later that he needed $34,000. The deal then fell through. The Hoffmans succeeded on a reliance claim.
      2. “2RK 90 does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.”
      3. “Where damages are awarded in a promissory estoppel instead of specifically enforcing the promisor’s promise, they should be only such as in the opinion of the court are necessary to prevent injustice.”

# DEFENSES TO FORMATION

## STATUTE OF FRAUDS

1. The general rule is that oral contracts are enforceable. Statutes of frauds tell **when a contract must be in writing** to be enforceable. A true statue of frauds invalidates undocumented agreements, as opposed to a statute that simply validates documented ones.
2. **Typical categories:**
   1. Contracts that cannot be completed within **one year** of their making.s
   2. Transfer of interest in **real estate** other than a lease, or for leases of a year or more.
   3. **Sale of goods for $500** or more.
   4. **Lease of goods for $1000** or more.
   5. **Sureties.**
   6. Personal property as **security** for an obligation.
   7. Performance that is not to be completed before the end of a **lifetime.**
   8. Commission for services of a **real-estate broker.**
   9. One party’s extension of **credit** to another.
3. **Steps to assess statute of frauds problems:**
   1. Does K require a writing?
   2. Is there a writing (under UCC or common law)?
   3. If not, is there an exception to the writing requirement?
   4. If not, enforceable by reliance? (Almost never.) See 2RK 90.
4. **Almost never enforceable by reliance.** Only in the most extreme cases.
5. ***Monarco v. Lo Greco, 1950* (305-09)**
   * 1. Plaintiff’s parents persuaded him to stay and work on their farm by promising to leave him the property when they died. Plaintiff agreed and, in reliance, remained on the farm for 20 years or more, staying home and working, receiving only room and board and spending money, giving up his opportunity to further his education, and requiring his wife to move in with the family instead of acquiring independent interest in the property. The agreement was never written down. Shortly before he died, the plaintiff’s father had second thoughts and changed his will to leave his half of the joint tenancy to his grandson, the defendant, instead. Estoppel was allowed.
     2. Two bases for reliance overcoming the statute of frauds:
        1. “Unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract.”
        2. “The unjust enrichment that would result if a party who have received the benefits of the other’s performance were allowed to rely upon the statute.”
     3. Three typical rules with respect to reliance and the statute of frauds:
        1. Above.
        2. Person must rely on the promise to reduce the contract to writing.
        3. Person must rely on the promise to sign a contract already written. (TX)
     4. Other notes:
        1. Reliance almost never works in SOF cases. It is a very hard rule Why? Allowing any reliance to suffice would nullify the SOF.
        2. Courts are split on whether you can use reliance under the UCC.
6. **Contracts that cannot be completed in one year from formation:**
   1. Examples: 2 year work agreement, hire for 1-hour performance 18 months from now
   2. Nonexamples: lifetime work agreement, building contract for ten 50-story buildings (majority says you don’t need a writing if the contract is not over 1 year on its face; minority says it has to be reasonable to complete in 1 year)
   3. Exception: if full performance has occurred (part performance is not enough)
7. **Transfer of interest in real property:**
   1. Examples: sale, easement, mineral rights
   2. Exceptions: lease for less than 1 year, part performance (buyer comes on property with seller’s permission and makes permanent improvements to land)
8. **Surety agreements:**
   1. Examples: any secondary liability for a debt, backing credit on a car
   2. Nonexamples: cosigning, mom buying car for daughter, taking over a loan (novation)
   3. Exception: main purpose rule (if the main purpose of the agreement is to benefit the surety, e.g. getting house painted for mom.
9. **Sale of goods of $500 or more** (proposed revision to $5000):
   1. **Exception under UCC 2-201(2):** If **between merchants, written confirmation of the contract** (same requirements as writing under 201(1) below), **sufficient against the sender** (test: must be able to sue the sender based on the contents of the confirmation), but **doesn’t have to be signed**, sent within a **reasonable time**, and the **receiver has reason to know of its contents** and **does not give written notice of objection** within 10 days. Now **enforceable on either party.**
   2. **Exceptions under UCC 2-201(3):** 1) goods are to be **specifically manufactured** for the buyer and not suitable for sale to others, and the maker has begun, or made commitments for procurement, 2) **party admits contract was made**, but then only enforceable up to the quantity admitted, 3) **payment has been made and accepted, or goods have been received and accepted.**
   3. ***St. Ansgar Mills v. Streit, 2000* (289-94)**
      1. Grain dealer made regular contracts with buyer over the phone. Buyer was typically mailed confirmation to sign and return, which he often failed to do, or the confirmations were held in the store until his father stopped by once a month and sign them while conducting other business. In this case, oral contract was made, but father did not stop by as usual, so it was over a month before the confirmation was signed. Buyer breached and claimed he was not given confirmation in a reasonable time, so the contract was unenforceable under UCC 2-201(2). Court disagreed.
      2. “The purpose of this exception was to put buyers and sellers on equal footing.”
      3. “The UCC specifically defines a reasonable time for taking action in relationship to the nature, purpose, and circumstances of the action.”
      4. Reasonable time depends on nature, purpose, circumstances, established customs, relationship, past dealings.
      5. Big transactions and volatile markets usually narrow the window.
10. **Writing requirements under UCC 2-201:**
    1. Writing (1-201(43)) – printing, typewriting, or any other intentional reduction to tangible form
    2. Signed by person against whom enforcement is sought (very lenient in what constitutes a signature, e.g. letterhead, “x”)
    3. Quantity
    4. Sufficient to indicate complete K has been made (complete K not necessary in common law).
    5. (Don’t need all essential terms, but do in common law.)
    6. (Only enforceable if signed by the party against whom enforcement is sought.)
11. **Writing requirements under common law under 2RK 131:**
    1. Parties to the contract
    2. Signed by party charged
    3. Nature of agreement
    4. Essential terms
    5. (Does not have to be in once document, unlike UCC. May be pieced together.)
12. **Overlap in UCC and Common Law:**
    1. Majority view: Agreement is unenforceable if it is wanting in documentation required for any class of contracts in which it lies.
    2. Minority view: Apply writing requirements of only either the UCC or the common law, whichever is primary, and suspend the other.
13. **Ethical issues:** Dilemma for a lawyer asked by a client to repel a claim on an oral agreement that the client privately concedes having made. Almost unanimously the courts approve that practice; but the lawyer’s conscience may not. A lawyer counseling a client may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects.

## BARGAINING PROBLEMS

1. **Why police?** Want to coordinate the social and moral values of the broader legal system, unjust, immoral, don’t want to contradict other substantive laws, institutional integrity (e.g. don’t want to be “paymaster of thieves”), free-market system doesn’t work if parties are unsure about the value of things exchanged.
2. **Three basic types of policing concerns:**
   1. **Status or capacity** of the party seeking relief for a promise (e.g. minor, mentally infirm)
   2. **Behavior** of the parties during the bargaining process (e.g. lawless threats, duress, nondisclosure)
   3. **Substance** of the resulting bargain (e.g. particularly lopsided bargains)
3. **Status/Capacity:**
   1. Traditional categories: Minority, mental infirmity. Outdated capacity restrictions: married women, African-Americans.
   2. Can’t form a legally biding contract if drunk.
   3. Sometimes corporate agents lack capacity to form corporate contracts
4. **Minority:**
   1. ***Kiefer v. Fred Howe Motors, 1968* (312-14)**
      1. Kiefer, working husband and father, almost 21, bought a car representing that he was 21. He had difficulty with the car and, after turning 21, tried to return it. Dealer appealed from judgment for Kiefer and lost. He argued that as a matter of public policy a legally emancipated minor over the age of 18 ought to be made legally responsible for his contracts.
      2. Court said that the line had to be drawn somewhere, and that appellant would be better off to seek the change with the legislature. Why?
         1. Widely applicable
         2. Greater view than just one case
         3. Better representative of the people
         4. More ability to bring in experts, debate, do research, economists, etc. (More expertise.)
      3. Three suggested legislative solutions:
         1. Submit a proposed contract to a court which would remove the infant’s right to disaffirm upon a finding that the particular contract is fair. (Impractical in light of delay and expense.
         2. Establish a rebuttable presumption of incapacity to replace the strict rule. (Open invitation to litigation.)
         3. Statutory procedure that would allow a minor to petition a court for removal of the disabilities. (Minor would only have to go to court once.)
   2. Minority makes the contract **voidable**. (I.e. minor can choose to cancel contract, even within a reasonable time after reaching majority.)
   3. **Exceptions:**
      1. Minor affirms contract after reaching majority.
      2. Necessity. (Better decisions on things you actually need. Also, don’t want to deter giving necessities to a minor.)
   4. Seller could still get restitution. (Protects seller.) But not completely because he will be getting back a used good, or nothing at all in the case of services. Want to deter making contracts with a minor.
   5. Why not an objective standard with respect to how old the person really is or their capacity? Want to protect minors from their own actions. Trying to protect the actual status.
   6. **In Texas** not voidable if:
      1. Minor misrepresented her age
      2. Minor intended reliance by the other party
      3. The party actually relied and the reliance was justifiable
   7. **Benefits to bright-line rule:** ease of application, efficiency, predictability. **Detriments:** Huge consequences for small discrepancy on the boundary.
5. **Duress:**
   1. If you enter a contract under duress you **can void the contract.**
   2. **Reasonable resistance** required.
   3. Threats of economic injury have been recognized.
   4. **Legal threats** do not usually count, except in extraneous circumstances.
   5. **Manifestation of assent is invalid if:** induced (subjective test) by improper threat (see 2RK 176) that leaves no reasonable (objective test) alternative. (2RK 175)
   6. ***Alaska Packers v. Domenico, 1902* (325-27)**
      1. Workers contracted with employer to do work for $50, then stopped working and demanded $100 compensation. Employer’s agent changed contract to pay $100 since employer had already invested $150K in the project and needed the work done at that moment and there were no other workers. Employer then paid only $50 as originally agreed. Workers sued and court ruled that the new agreement was not enforceable. There was no contract formed because there was no consideration; the workers’ duty was already owed.
6. **Pre-existing duty rule:**
   1. **Common law:** A duty already owed cannot be consideration for a new contract. (2RK 73)
   2. Three ways to get around the consideration rule:
      1. Minimal consideration
      2. Do away with old contract and create new one
      3. New, unanticipated circumstances arise (2RK 89)
   3. ***Watkins & Son v. Carrig, 1941* (331-34)**
      1. Contract price allowed to change when company digging a hole to build a wine cellar unexpectedly came across rock.
      2. “Changes to meet changes in circumstances and conditions should be valid if the law is to carry out its function and service by rules conformable with reasonable practices and understandings in matters of business and commerce…”
   4. **Contrast *Alaska Packers* and *Watkins*:**
      1. Alaska Packers: Bad nets (court refused to accept; no evidence), 150K investment, no other options, no new contract, protest, no valid reason for change.
      2. Watkins: Rock found, no real money invested, other options, implied rescission (partly), no protest, valid reason for change.
   5. UCC 2-209(1): No consideration needed, but has to be done in good faith.
   6. Why can’t 2RK 90 apply? Party cannot lay the foundation of estoppel based on his own wrong.
   7. Not really meant as a consideration doctrine. Courts just use pre-existing duty rule to police duress.
7. **Fraud (concealment and misrepresentation):**
   1. Not just deliberate trickery or deceit, but also innocent misrepresentation, may be made a ground for avoiding a contract.
   2. **General rule:** You don’t have to tell all the details of a transaction while you are negotiating. It is expected you will conceal some of your cards. But, if you say anything about an aspect, you must disclose everything about it.
   3. **Concealing cards:** This is the general rule because we want to incentivize getting information; forced disclosure would be expensive; administrative burden; no incentive for buyer to protect themselves; discouragement of transactions; buyers always running to courts; incentive to become educated.
      1. ***Swinton v. Whitinsville Bank*  (353-54)**
         1. Seller not held liable for knowingly selling the buyer a termite-infested house.
         2. If you don’t say anything, you don’t have to tell the other party about bad things. No liability for bare nondisclosure.
      2. ***Kannavos v. Annino, , 1969* (356-59)**
         1. Seller held liable for misrepresentation in selling a multi-family building that was in violation of the single-family zoning designation in which it sat. Seller indicated that the building had multi-family purposes and could continue to operate as such.
         2. Sellers would have been OK if they had said nothing, but “because the vendors did as much as they did do, they were bound to do more.”
         3. “If he does speak with reference to a given point of information, voluntarily or at the other’s request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge. Fragmentary information may be as misleading…as active misrepresentation, and half-truths may be as actionable as whole lies.”
   4. Latent defect (hidden) v. patent defect (apparent).
   5. Have to show **justifiable reliance** on deceptive statement or misrepresentation.
      1. ***Vokes v. Arthur Murray, 1968* (362-64)**
         1. Older widow allowed void contract when dance studio persuaded her to buy thousands of dollars worth of dance lessons by false flattery and promises that she was improving and would soon be an excellent dancer.
         2. Generally promisors are not liable for misrepresentations of opinion. Only in very extreme cases can you sue on opinion.
         3. Three exceptions:
            1. Not arm’s length. Promisor has such superior knowledge that his statements can be considered as fact by the promisee.
            2. Trickery through opinion.
            3. Fiduciary duty between parties.

|  |  |
| --- | --- |
| **Pros and cons of statute of frauds…** | |
| **PROS** | **CONS** |
| * Avoid fraud, e.g. creditors making up sureties. * Encourages caution when making contracts. * Makes certain transactions more familiar and easy to replicate. * Provides evidence of agreements, which makes dispute resolution easier later. * Encourages responsibility by forcing parties to write down their agreement or risk unenforceability. * For long, complicated contracts, it gives the parties a reference. * For contracts for more than a year, a party gets some protection because full performance is an exception. For real estate there is some protection in partial performance. There is a lower risk of fraud associated with someone who has already relied. * People often enter into surety agreements without consideration, and may not realize the legal consequences of what they are doing. Writings iterate the seriousness of such a commitment to them. * Discourages breaches just because a deal is unfavorable. With written evidence, a deal is harder to deny. * UCC facilitates contract formation because its SOF requirements are rather lax; the only term required is quantity. * UCC isn’t too harsh because it provides exceptions for some common business situations. * If the case is really that bad and the SOF would leave a party in a grossly unfair position, reliance may be applied. | * Harsh effects in many scenarios may discourage the making of opportune bargains. * People may knowingly use it as a pretense for getting out of bargains. * Even if there is substantial evidence that a contract would otherwise be valid, it still will not be enforced. * Even if a contract is in writing, that doesn’t necessarily mean the parties contemplated the seriousness of their obligations (especially where the restrictions on writings are loose). * When they are forced to put a contract into writing (especially with loose restrictions), the parties may not put their full agreement into the writing. This can later prevent additional terms that were agreed upon from being enforced. * If people can get out of SOF through reliance, what is SOF useful for? * Hostility toward SOF; want to encourage contract formation. |

# INTERPRETATION

## PAROL EVIDENCE RULE (ADDIITONAL PRE-NEGOTIATED TERMS)

1. Applies when the parties reduce their agreement to writing and perhaps not everything that was discussed or negotiated actually appears in the writing. **Determines when extrinsic evidence of previously or concurrently negotiated terms should be allowed in evaluating whether those terms were actually part of the contract.** (2RK 213, UCC 2-202)
2. Substantive rule, not evidence rule. Badly named. As a non-evidence rule, it is not waived by failure to make a timely objection. Further, federal courts must apply the parol evidence rule of whatever state’s law it is using.
3. It is not barring evidence. It just decides whether prior terms can be included in the contract; if not, they are irrelevant, and evidence of them will not be heard.

|  |  |
| --- | --- |
| **Status (Level of Finality of Agreement)** | **Consequence (What Additional Terms Can Do to Existing Contract)** |
| Unintegrated | Can add or contradict |
| Partially Integrated | Can add but not contradict |
| Completely Integrated | Can’t add or contradict |

**4 tests for determining degree of integration:**

|  |  |
| --- | --- |
| **Giovanni (most restrictive)** | Compare the contract and the prior negotiated term and see if the contract would have naturally and normally included the prior term. If so, it is completely integrated. |
| **Masterson (1RK)** | Might the term have naturally been made as a separate agreement? If so, allowed in. (Dissent: Sees additional terms as contradicting terms.) |
| **2RK 216-2** | Would the term have naturally been omitted from the contract? If so, allowed in. |
| **UCC 2-202 (least restrictive)** | Would the term certainly have been included in the contract? If not, allowed in. (comment 3, pg. 373) |

1. **What evidence can be looked at** to determine degree of integration? Two views:
   1. Can look at any evidence (Restatement 210, comment b). (E.g. from Masterson: Circumstances at time of agreement, difficulty of accommodating clause into deed, inexperience of families in transactions.)
   2. Four corners rule (as in Giovanni; rejected in Masterson).
2. **Doesn’t bar evidence of** (see 2RK 214):
   1. Showing fraud
   2. accident, mistake
   3. subsequent agreements
   4. showing the written agreement is not valid
   5. separate, collateral agreements
3. **Cases of PER:**
   1. ***Gianni v. R. Russell & Co.* (368-70):** Plaintiff not allowed to bring evidence of an oral agreement that he was granted the exclusive right to sell soft drinks in an office building when this right would have been naturally included in the contract under the circumstances. Plaintiff claims that the exclusive right to sell was granted in exchange for his agreement to refrain from selling tobacco. His agreement to refrain was included in the writing; the exclusive right to sell was not. The courts thought that if such a bargain had been struck that both halves of it would have naturally appeared in the writing.
   2. ***Masterson v. Sine* (371-76):** Couple A sold a ranch to couple B, family members, reserving the right to purchase it back for the same amount. Couple A went bankrupt and tried to convey the option to their trustee in bankruptcy, which couple B did not allow, claiming that the couples had agreed that the ranch was to remain in the family. The contract was silent on the question of assignability. The court allowed extrinsic evidence to be introduced on the matter because, under the circumstances, such an agreement to keep the ranch in the family might naturally have been made as a separate agreement.
4. Evidence of **mutual mistake** is not precluded:
   1. **Common law:** Must have thought it was in the writing.
   2. **UCC (comment to 2-202):** “complete & exclusive mistake”
   3. ***Bollinger v. Central Penn.* Quarry (377-78):** P and D contracted for P to allow D to deposit construction waste on his property. P claims that the agreement was conditional upon D’s covering the waste with topsoil, but that term never made it into the contract, which P then signed without reading. D covered the waste for a while, but then stopped. The court looked at D’s acts, as well as testimony that D had entered into a similar agreement with a neighbor, to determine that a mutual mistake was made.
5. **No-oral-modification clauses:**
   1. **Common law:** Traditionally not effective. Even in jurisdictions that honor them, one can often escape by showing reliance on the oral modification.
   2. **UCC 2-209(2):** A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party. (However, can still be a waiver under 209(4). Reliance on such a waiver can make it non-retractable under 209(5).)
6. **Policy reasons for the PER:** 2RK 213 – later agreement discharges prior agreements, control of jury sympathies, only look at the writing because that’s what we think the parties agreed to, writing is the best evidence.

## INTERPRETATION (COMMON LAW)

* + 1. Use plain meaning rule to decide if a term is ambiguous and, if so, what evidence to use.
    2. Use the evidence to determine what the parties knew or should have known, then use 2RK 201 to decide whose meaning prevails.
    3. 201 (3): If deep misunderstanding, no contract. Not *necessarily* no contract (e.g. if trivial terms).

## PLAIN MEANING RULE (COMMON LAW)

1. Applies when words used by the parties admit more than one meaning. **Used to interpret existing ambiguous contract terms.**
2. **Two-step process:**
   1. Determine whether or not a term is ambiguous.
   2. If the term is ambiguous, extrinsic evidence will be admitted to inform the court’s determination of its meaning. If it is not ambiguous, the court will apply the one meaning supported by the language.
3. Controversy over **whether to allow extrinsic evidence in evaluating ambiguity:**
   1. California rule:
      1. In step 1 the court should allow any evidence relevant to prove a meaning to which the language of the instrument is reasonable susceptible. In step 2 the extrinsic evidence is looked at or not.
      2. ***Pacific Gas v. G.W. Thomas* (382-85):** P’s property was injured during work done by D under a contract with an indemnity clause in which D agreed to indemnify P for any injury or damage to property resulting from the work. P’s property was injured. D was allowed to bring evidence and testimony of previous dealings between the parties, statements by P, and commercial practices which indicated that the meaning of the clause was only to indemnify third parties, even though the term was unambiguous on its face.
   2. New York rule:
      1. “Four-corners rule” – must determine if on its face the agreement is susceptible to more than one meaning; here omission does not make a term ambiguous.
      2. Examples: Pages 396-97.
      3. ***Greenfield v. Phillies Records* (386-90):** Plaintiffs, a singing group, sued D when he began releasing their music in “synchronization,” a new process to include it in movies and television shows. The contract stated that he “shall have rights to make phonograph records, tape recordings, or other reproductions of the performances embodied in such recordings by any other method now or hereafter known.” Testimony that the contract was not to include synchronization was not allowed in because the contract on its face was unambiguous.
   3. UCC doesn’t take a side.
   4. ***Trident Center v. Connecticut General Life Ins., 1988* (392-96)**
      1. New York court forced to apply California method in determining potential ambiguity regarding a seemingly unambiguous term in a loan contract regarding early repayment.
      2. Question: Whether is California you can ever draft a contract that is proof to parol evidence. Answer: No.
4. **Vague v. Ambiguous**
   1. Vague: Several shades; questionable only on the margins. (Useful in law & in contracts.)
   2. Ambiguous: Multiple possible meanings. (Never want this.)
5. **Steps evaluated by:**
   1. Step 1: Judge; question of law.
   2. Step 2: Jury if ambiguous; judge if unambiguous.

## INTERPRETATION (COMMON LAW) CONTINUED

1. **Whose Meaning Prevails:** If the parties disagree, go with the meaning attached by one of them at the time. If a party had reason to know of the meaning attached by the other, that meaning prevails. (2RK 201) If neither party had reason to know, see section below (problems with objective interpretation).
   1. If the parties disagree, go with the objective meaning. If they agree on something other that the objective meaning, go with the shared meaning (majority) or objective meaning (minority).
   2. **Two views:**
      1. Majority: Look at the interpretation the parties intended. (See 2RK 201.)
      2. Minority: Look only for objective meanings supported. (Frigaliment)
2. ***Frigaliment v. B.N.S. International, 1960* (401-06)**
   1. Pre-UCC. Uses common law New York rule.
   2. Dispute over what “chicken” meant. Only young chickens, or all chickens.
   3. Used dictionary (not considered extrinsic evidence) and found two different objective meanings of “chicken.” This court only looked evidence of which objective meaning was supported (minority view).
   4. Burden on P in this case. (2RK does not put the burden on a particular party.) Court ruled for D because P did not meet its burdens.
   5. Evidence: English/German interpretations of “chicken” during negotiations, dictionary, prices accepted, second contract, industry terms (usage of trade), language in government regulation, course of performance, weight of chickens.
3. ***Hurst v. W.J. Lake, 1932* (407-09)**
   1. Pre-UCC. Close to California rule.
   2. Plaintiff ordered horse meat with at least 50% protein and was delivered meat with 49.53%-49.96% protein. Seller was allowed to introduce evidence of the usage of language in the trade that 50% protein really meant 49.5% or more, even though the contract seemed unambiguous on its face.

## EXTRINSIC EVIDENCE TO SUPPLEMENT OR QUALIFY AN AGREEMENT (UCC)

1. **Usage of trade, course of performance, and course of dealings of which the parties are or should be aware can be used to interpret, supplement, or qualify an agreement.** (See UCC 1-205(3).)
   1. **Definitions:**
      1. **Course of performance:** between specific parties in a specific transaction (after K signed; deals with acts under this specific K). (UCC 2-208(a))
      2. **Course of dealing:** conduct in previous transactions between the parties (before this specific contract) that develops a common basis of understanding. (UCC 1-205(1))
      3. **Usage of trade:** custom of a particular trade in a particular locale. (UCC 1-205(2))
      4. **Objective/subjective test for relevance:** “are or should be aware”; can interpret, supplement, or qualify (UCC 1-205(3))
      5. Test for **supplement v. interpret:** Can you identify the specific term you can day you’re interpreting?
2. When possible, UT, CD, CT **should be construed as consistent with express terms.** If this is not reasonable, the hierarchy is this (UCC 1-205(4), 2-208(3)):
   1. express terms,
   2. course of performance
   3. course of dealings
   4. usage of trade.
3. **UCC 1-201(b)(3), (12):**
   1. (3) “agreement”: what the parties actually agreed to, established by language, express terms, COP, COD, UT
   2. (12) “contract”: (3) plus all other terms the law imposes on the agreement (e.g. good faith)
4. ***Nanakuli Paving v. Shell Oil, 1981* (410-18)**
   1. Requirements contract to buy asphalt from shell for “Shell’s posted price at time of delivery.” Shell refused to recognize price protection when the local market universally recognized it. Shell had delivered goods with price protection twice before.
   2. **Usage of trade (at time of K):** Binds non-members who know or should have known of the UT (usually they regularly deal with members of the relevant trade). Does not require universal practice, just regular or majority practice in the particular locale. Two steps: 1) prove UT; 2) prove the other party knew or should have known.
   3. **Course of performance:** One act not enough (then only waiver under UCC 2-209(5)). Often disputed. No further delineation beyond the requirement of 1 act. If evidence is ambiguous, waiver is assumed.
5. ***Columbia Nitrogen v. Royster, 1971* (419-21)**
   1. Dispute over price and quantity terms in a Nitrogen supply contract where the price and quantity terms were fixed in the terms.
   2. Evidence to show that in previous contracts there had been substantial deviation from price and quantity (COD).
   3. Evidence to show that price and quantity terms in the mixed fertilized industry are mere projections (UT).
   4. **Test: Can you consistently read along with the express terms?** Contract silent about price and quantity. **Neutrality provides a basis for consistency.**
6. **Completely integrated** is not good enough to keep out UT, COD, COP without an express clause. (Even then, not certain, and doesn’t prevent the plain meaning rule from being applied.) UT, COD, COP get to stay in, even if there is a merger clause.

## LIMITS ON OBJECTIVE INTERPRETATION

1. **Old Rule:**
   1. If there is a **latent ambiguity**, and there is no way to pick a meaning, and neither party is at fault, no contract.
   2. If there is a **patent ambiguity** and no way to pick, but both parties should have realized and are equally blameworthy, then still a contract.
2. ***Raffles v. Wichelhaus, 1864* (422-23)**
   1. Confusion over a cotton delivery when two ships of the same name embarked.
   2. Latent ambiguity – parol evidence may be introduced. No consensus – no binding contract. (Plain meaning rule.)
3. ***Oswald v. Allen, 1969* (424-25)**
   1. Confusion over the contents of Swiss coin collection.
   2. Rule for when the parties have different meanings: Where the contract is ambiguous and we have no way to pick between competing interpretations, then no contract exists.
4. ***Colfax Envelopes v. Local No. 458-3M, 1994* (426-30)**
   1. Confusion over size of printing press, but both parties should have realized there was a problem with the contract.
   2. Parties both gambled on the ambiguous interpretation, so the contract was upheld. (NOT THE CURRENT RULE!!)
   3. Pg. 429: Examples of differences so big that **no contract was formed** because there was no fault:
      1. Landowner and contractor signed contracts with two different prices due to fraud by the architect.
      2. Seller quoted a price of “fifty-six twenty.” Seller interpreted as $5,620 and buyer interpreted as $56.20.
5. **Modern rule: 2RK 201.** But what if neither side can prove what the other was thinking? If both parties equally blamable, no K.

## GAP-FILLERS, WARRANTIES, AND MANDATORY TERMS

1. **What about when parties have not talked about a specific term?** Parties may not consider every possibility when drafting a contract. Just want to get the bargain done.
   1. Common law: Generally reasonable person standard for gap-filler.
   2. UCC: Gap fillers – 2-300s.
   3. UCC 1-302: Can vary the gap-fillers by agreement under (1). Exceptions under (2) for mandatory terms that cannot be varied at all, e.g. good faith.
2. **Express warranties (UCC 2-313):**
   1. Seller’s opinion does not create. (See *Bayliner*.)
   2. 3 ways to create:
      1. affirmation of fact or promise by the seller
      2. description of the goods
      3. sample or model of the goods
   3. Has to be part of the basis of the bargain.
3. **Implied warranty of merchantability (UCC 2-314):**
   1. Seller (merchant with respect to goods of that kind)
   2. 6 requirements must all be met, else breach
      1. pass without objection in the trade
      2. are of fair average quality within the description
      3. are fit for ordinary purpose
      4. run, within the variations permitted, of even kind, quality, and quantity within each unit
      5. are adequately contained, packaged, and labeled as the agreement may require
      6. conform to the promises or affirmations of fact made on the container or label
   3. Other implied warranties may arise from CD or UT
   4. ***Kotken v. Black & Veatach, 2005* (434-36)**
      1. Issue of implied warranty of merchantability when fire blanket underneath a welding site did not prevent a fire from starting from welding sparks. Issues: “fit” & “ordinary purpose.”
      2. **Ordinary use:** Uses which are customarily made of the goods in question. (P has the burden.) Court also considered whether the use was appropriate.
      3. **Fit:** Objective standard. Reasonable expectations of an ordinary purchaser.
4. **Implied warranty of fitness for a particular purpose (UCC 2-315):**
   1. Merchant status not required
   2. D had reason to know of P’s use
   3. P relied on D’s knowledge or expertise
   4. ***Lewis v. Mobile Oil, 1971* (437-40)**
      1. Issue of implied warranty of fitness for a particular purpose when Mobile provided Lewis with the wrong oil for his equipment, knowing that he was relying on their expertise. Issues: “reason to know” and “reliance.”
      2. **Reliance:** Lewis told Mobile that he didn’t know what oil to use and for them to get him the proper oil.
      3. **Knowledge:** Common knowledge around town of Lewis’s machine switch; long business relationship; seller told Mobile the type of machine.
      4. **Test:** A reasonable seller would have known about the use, even if the buyer never tells, or a reasonable seller would have know that reliance exists.
      5. If more info needed, it becomes Mobile’s duty to gather before making a recommendation (once they know that reliance exists).
5. **Disclaimers (UCC 2-316):**
   1. Merchantability: Must mention merchantability and must be conspicuous
   2. Fitness: Must be in writing and must be conspicuous
   3. Other circumstances listed in subsection (3):
      1. “As is” or similar language.
      2. Buyer has examined the goods or refused to examine before purchase – no implied warranty for defects that should have been found during examination.
      3. Implied: Can be excluded or modified by CD, CP, or UT.
   4. Express: Cannot be disclaimed
   5. ***South Carolina Electric v. Combustion Engineering, 1984* (441-45)**
      1. Issue of whether to honor a disclaimer of warranties when it was in fine print buried in single-spaced small same font at the end of a paragraph on page 17.
      2. **Implied warranty of merchantability** not disclaimed because it did not use the term “merchantability.”
      3. **Implied warranty of fitness** not disclaimed because the disclaimer was not conspicuous. Court suggests that it could have been in a different color, contrasting font, or different font size.
      4. This case failed UCC 2-316(2), but disclaimer was allowed under 316(3) because it was buyer was acutely made aware of it during negotiations.
      5. Argument that 316(3)(a) doesn’t have a conspicuous requirement, but probably should be there.
6. **In rare cases the court will not uphold a disclaimer of warranties,** even if all the elements are met. (Even though you are generally bound by what you sign.)
   1. ***Henningsen v. Bloomfield Motors, 1960* (445-49)**
      1. Steering mechanism on newly purchased car failed 10 days after delivery and plaintiff was injured. Plaintiff had signed a contract where, embedded in unclear language, her warranties were limited. Court refused to enforce.
      2. The average consumer would have understood the clause to mean something else.
      3. Buyer had no other choice. Quasi-public service, same terms across industry, could not shop around.
      4. Standard form contracts are usually take-it-or-leave-it. They look like law to the every day consumer. More powerful party writes the contract.
      5. **High burden** to prove void on grounds of public policy.

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| **New York Rule v. California Rule** | |
| **NEW YORK (4-CORNERS)** | **CALIFORNIA (EXTRINSIC EVIDENCE)** |
| * Parties intend what they say in the writing; it is the best evidence. * If allowed to bring in extrinsic evidence, there may be more of an opportunity for game-playing; parties bringing in misleading, self-serving evidence or non-meritorious claims. * May be more hesitant to enter contract if you know its plain meaning could be challenged. * Contracts are made/written because people want certainty. The CA rule makes it impossible to make secure contracts. * Predictability and consistency. Less litigation if only one meaning can apply. * Encourages caution when you know you will be stuck to your words. * If words are so inherently ambiguous, this rule will encourage parties to use the most apparent meaning of their words, or to be more detailed in their writings. This avoids complications an trial and the opportunity for self-serving testimony. * CA makes it impossible to avoid a lawsuit if one party has enough incentive to challenge the contract. We may need discovery, exhibits, witnesses, etc. just to even decide if the case is worth continuing. * CA rule chips away at foundation of legal system by giving argument that words are inadequate to express concepts (they are used to enforce decrees, statutes, opinions, laws) * Avenue to get out of contracts. * Hazy memories and decaying evidence, may not give an accurate picture of what the contract language meant in the context anyway. | * Language is flexible; men give it different meanings; words don’t have absolute and constant references. This undermines a presupposed fixed rule language. * Intent makes the contract; words may not reflect the intent. Considering more evidence will help reflect what the parties truly meant. * The judge brings their own preconceived ideas; this is already inherently extrinsic evidence, so go ahead and broaden it. * A judge may not be familiar with trade usage that could subject a word to an ambiguous meaning that a layperson in the trade would not otherwise pick up on. * The four-corners of a contract don’t tell us what context it was made under. * If the term is ambiguous, the evidence will be allowed in anyway. Letting it in at the beginning provides more justice and consistency. * It is still a limited rule; the judge’s experience and wisdom are used in determining ambiguity. A jury will not see the evidence unless the term is found to be ambiguous, thus there is less chance for sympathy. * In adhesion contracts, the lesser-power party may be more willing to enter if they know the terms won’t be applied unfairly simply due to a facially unambiguous meaning. * NY rule may hurt non-experience consumers who thought they understood what they were reading, but really didn’t. |

# PERFORMANCE

## CONDITIONS

1. **Condition:** Allows the non-breaching party (the one not subject to the condition) not to perform if the condition is not satisfied. A condition is something not certain to occur. Can be dependent on other party’s actions, third person’s actions, force of nature, etc. (See 2RK 224.)
   1. **Condition precedent (usually just called a condition):** A condition that, once met, will cause the duty of the other party to mature.
   2. **Concurrent condition:** Runs alongside K (e.g. I will let you borrow my car as long as you keep it in good shape).
   3. **Condition subsequent:** Occurrence of an event that will extinguish the duty of another party (e.g. I will wash your car every day until the Astros win the world series).
   4. **Express condition:** In words (e.g. satisfaction clause).
   5. **Implied/constructive condition:** Not written, just read into the contract by the court (e.g. courts read that payment isn’t due until performance complete, even in a bilateral contract where you are bound at formation).
   6. Purpose: Give the injured party a chance to protect self before they sue, risk-shifting device.
2. **Duty:** Obligation under the contract.
   1. Sometimes it takes a condition to occur before a duty matures. The duty is already there, but hasn’t matured.
3. **Non-occurrence can be excused** in which case the condition is treated to have been met and the duty matures (e.g. If you say you will buy a house as long as it passes a termite inspection, but never get the inspection).
4. **Combinations:**
   1. Condition but not duty: If you paint the house I will pay you.
      1. Neither party can sue if there is no painting/payment. No duty to paint, duty to pay not matured.
   2. Duty but not condition: You promise to paint and I promise to pay.
      1. Both parties can sue. Both duties are matured at formation.
   3. Duty and condition: You promise to paint and I’ll pay you if you finish painting.
      1. Payer can sue if painter doesn’t paint. Painter can only sue when he completes the job and the payer’s duty matures.
5. **Express conditions must be met exactly; no doctrine of substantial performance.**
   1. ***Luttinger v. Rosen* (692-93)**
      1. Parties agreed to sale of a house if buyers could find a mortgage for a rate not more than 8.25%. They were only able to find one at 8.5%. Seller offered to make up the difference, but the buyers rejected. The court allowed this because the condition stated that they would buy the house if they could get the stipulated loan from a bank or other lending institution.
      2. The buyers only applied to one bank. This was sufficient so that the non-occurrence of the condition was not excused. The parties knew that no other bank in town would give them the loan, and the court stated that they were not require to attempt a futile act.
6. If the language is unclear, the courts will **interpret as a duty.**
   1. Encourages K enforcement. Conditions have harsh effects. Can do 99.9% of the job and not get paid.
   2. Determined by a judge.
   3. ***Peacock Construction v. Modern Air Conditioning* (pages 701-03)**
      1. Stipulation that contractor would pay pool subcontractor “within 30 days after the completion of the work included in the subcontract, written acceptance by the Architect and full payment therefore by the owner.” Owner never paid, so contractor never paid.
      2. Two possible meanings:
         1. Conditional on the owner paying
         2. Fixing a reasonable time for payment
      3. Court interpreted as a suggested payment time. Typical for construction contracts. Don’t want to put the burden on the small subcontractor. No subcontractor would take on the risk that the owner doesn’t pay.
7. **Satisfaction clauses:**
   1. Personal: subjective, good-faith standard
   2. Commercial: objective, reasonableness standard
   3. ***Gibson v. Cranage* (704-05)**
      1. Painter contracted to make a portrait of buyer’s deceased daughter and agreed that buyer would only accept and pay if he was perfectly satisfied with it. Court enforced.
   4. Notes:
      1. Painter could not sue for reliance. 1) Took on all the risk. 2) No breach of K or breaking of a promise.
      2. If mixed motives, as long as one motive is dissatisfaction, declining to accept or pay is allowed.

## CONSTRUCTIVE (IMPLIED) CONDITIONS OF EXCHANGE

1. **Independent covenants:** Both parties must perform no matter what.
2. **Dependent covenants:** The other party’s performance is a condition of your performance. Mutual conditions. Each duty matures when the other party performs.
3. Which is better? Dependent.
   1. Self help remedy
   2. Less litigation
   3. Efficiency; people don’t have to sue to get relief, can just not perform
   4. Example of independent gone bad: Father agreed to pay dowry and man agreed to marry daughter. Man married another woman, but father was still forced to pay dowry.
4. **Assumption of mutual conditions/dependant covenants.** (2RK 232)
5. **Setting a time for performance is a way of allocating risk.** The first person to perform takes on the risk that the other won’t perform, won’t pay, or will increase price, etc. Holdup problem.
6. Well settled principle that **work comes before payment.** Based on the idea that employers are more likely to be responsible than are pre-paid workmen.
7. **UCC**: **Mutual Conditions Implied:**
   1. Buyer’s tender of payment is a condition for delivery (2-511(1)) and seller’s tender of the goods is a condition for payment (2-507(1)).
   2. Tender is an offer coupled with the present and willing ability to perform (unless otherwise indicated by language).
   3. Buyer can tender payment in any means ordinary to the business.

## SUBSTANTIAL PERFORMANCE (COMMON LAW)

1. When **constructive conditions** are applied (as opposed to express conditions) the doctrine of substantial performance is applied, meaning that a condition may be met if it has been substantially (although not perfectly) performed.
   1. The doctrine will be applied **if the breach was non-material** (meaning the performance was substantial). The effect is that the non-breaching party still has to perform their half of the deal, but can sue for non-material expectation damages.
   2. **If the breach is material** then the injured party does not have to perform and can sue for expectation damages.
2. ***Jacob & Youngs v. Kent* (724-26)**
   1. Builder built house with wrong brand of pipe, though equal in quality to that specified. Buyer refused to pay the rest of the bill.
   2. **Test:**
      1. Whether omission was trivial or innocent (old rule = willfulness was always material; modern rule = good faith and fair dealing). All or nothing.
      2. Whether there was substantial performance (if yes, partial breach and must continue performing contract; if no, breach of whole contract). (See below.)
   3. **Factors in deciding substantial performance:**
      1. Good faith and fair dealing (old rule = willfulness)
      2. Harshness of enforcing the condition
      3. Purpose of the contract
3. Who decides if substantial performance? Fact-finder.
4. Usually damages have to be proven by the party invoking the doctrine.
5. Can turn a dependant covenant into an independent covenant.

## PERFECT TENDER RULE (UCC)

1. **Buyer can reject goods unless a seller makes a “perfect tender.”** This covers not only the quantity and quality of the goods, but also the details of the shipment.
   1. **Problems:** Does not require buyer to actually be harmed by the breach. Can just give them an excuse to get out of a contract if they change their mind or if the market price falls. Sometimes seller won’t be able to resell in time (e.g. food).
   2. **Benefit:** Buyer doesn’t have to guess at his own peril if a breach is material. Proving materiality may also have required him to divulge competitive secrets.
2. **UCC 2-601. Buyer’s Rights on Improper Delivery.** If the goods or tender of delivery fail in any respect the buyer can: 1) reject the whole shipment, 2) reject part of the shipment, or 3) accept the shipment anyway.
3. **Ways harshness is reduced:**
   1. **UCC 2-508 gives the seller the right (NOT obligation) to cure a defect if the time of performance has not yet expired.**
      1. 508(1) requirements: 1) time for performance has not passed, 2) have to notify the buyer, 3) have to make conforming delivery before time for performance runs out.
      2. 508(2) If the seller gives non-conforming goods and thinks the buyer will accept the non conforming goods (with or without accompanying damages) but the buyer rejects, the seller has reasonable time to deliver conforming goods. Have to give notice.
   2. **UCC 2-608 allows a buyer to revoke acceptance (effectively a rejection) of the goods only if 4 conditions are met:**
      1. Substantially impaired value
      2. Accepted on the reasonable assumption that the defect would be cured and it has not been seasonably cured or accepted without noticing the defect because it was difficult to discover or because of seller’s assurances.
      3. In reasonable time after defect is discovered or should have been discovered
      4. Notification of seller
   3. **UCC 2-613 allows a buyer under an installment contract to reject an installment only if the value is substantially impaired and to reject the whole contract only if the value of the whole contract is substantially impaired.**
      1. (E.g. the brain of a robot is damaged in the first of 4 installments. Need interconnectedness.)
      2. Installment contract if you have to accept goods in separate shipments (e.g. multiple lots, requirements contracts).
      3. Policy: Seller could just fix the problem in the next installment. Standard for rejecting is a lot higher.
      4. (2) can reject an installment if it is substantially impaired, but must accept it if seller gives assurance of a cure
      5. (3) can reject the whole contract if a bad installment substantially impairs the value of the whole contract, but the contract is reinstated if the buyer accepts.
4. **Rejection – UCC 2-602:**
   1. In reasonable time; and
   2. Seasonably notify seller
5. **Acceptance – UCC 2-606:**
   1. Expressly
   2. Impliedly
      1. After reasonable opportunity to inspect, signifies to seller that goods are conforming or will be accepted regardless of nonconformity.
      2. Failure to make an effective rejection after the buyer has had reasonable opportunity to inspect the goods.
      3. Any act inconsistent with the seller’s ownership of the goods that the seller ratifies as an acceptance.
6. **Effects of acceptance and rejection – UCC 2-607:**
   1. (1) If you accept, your duty to pay matures.
   2. (2) Acceptance precludes rejection.
   3. (4) Burden is on the buyer to establish breach.
7. **If the seller breached, you still have to perform, but can still sue for damages.**
8. This is a **contrast with substantial performance,** but express conditions work the same for both UCC and common law.

## DIVISIBILITY (COMMON LAW)

1. **Only for services;** common law equivalent of installment contract.
2. **If divisible, the duty matures with each unit.**
3. ***Gill v. Johnstown Lumber* (733-34)**
   1. Contract to float a number of logs down a river to a delivery location. Some were lost in a flood. Court ruled that payment had to be made for those that arrived, even though all the logs under the contract did not arrive.
   2. Contract was divisible by unit, but not by mileage. The contract was for delivery to a specific location.
   3. **Test:** Apportionable ofrapportioned consideration. “If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is (1) apportioned to each item to be performed, or (2) is left to be implied by law, such a contract will generally be held to be severable…But if the consideration to be paid is single and entire the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.”
   4. **Typically delivery of cargo contracts are considered to be divisible.**
   5. Note 2: 4 phase contract with independent consideration for each phase. Contract was for development of a product and readiness to produce it in case of a national emergency. Court ruled not divisible because all the phases of the contract were only there to get to phase 4.

## SUSPENSION AND TERMINATION OF PERFORMANCE

1. In the middle of the contract, when can you decide not to perform and be excused because the other party breached? Questions:
   1. Is there an uncured breach?
   2. Was it breach of a duty under exchange of promises?
   3. Did the other party have to perform first?
   4. Was the other party’s breach material? (Decided by the court.)
2. **Can use after acquired evidence to defend breach.**
   1. **Pros:** Allows parties to repudiate contract earlier, before more damage, when they feel a deal is going bad.
   2. **Cons:** Not particularly fair. Can breach a contract and then later look for reasons if you have to defend your breach.
   3. **Exception for employment contracts. Policy reasons:** Employers tucking away wrongdoing to use later, trying to dig up dirt on employees, could discourage wrongfully fired employees from filing suits.
3. Can repudiate the contract if the other party’s breach was material. **To determine if a breach is material**, look at the factors in 2RK 241:
   1. Extent to which the injured party will be deprived of the benefit it reasonable expected
   2. Extent to which the injured party can be reasonably compensated
   3. Extend to which the breaching party will suffer forfeiture
   4. Likelihood that the breaching party will cure his failure
   5. Extent to which the breaching party comports with standards of good faith and fair dealing
4. ***Walker & Co. v. Harrison* (748-51)**
   1. Contract to rent a sign for 36 months and to pay every month. The lessor was to maintain the sign. There was an acceleration clause that if the lessee missed a payment all payments would become due. Sign was vandalized by a smashed tomato. Lessee informed lessor who, failed to clean it after a week, so lessee refused to pay.
   2. Question: Who committed the first material breach? Have to be careful! Here, the renter. Was not a material breach by not cleaning tomato. Could have just had it cleaned otherwise and sent the bill.
   3. Risky decision. As here, you could actually end up being the one making the material breach. You are just making your best guess.
5. **Generally, completing a contract on time is not a condition.** (See 2RK 242(c).) Can either put in the K that time is of the essence, or if the other party had reason to know that time was really important.

## ASSURANCE (UCC)

1. **The common law does not give a right to assurance.**
2. **If you are worried about a party not performing you can demand assurance that they will keep up their end of the bargain. (UCC 2-609)**
3. **Reasonable grounds for insecurity (fact issue):**
   1. Doubts on this exact K.
   2. Performance problems on other K’s.
   3. Financial state, etc.
4. **Demand for adequate assurance:**
   1. Can suspend performance until assurance.
   2. Can repudiate if assurance not received. (Material for sure; no guessing.)
5. No clear definition of assurance (fact issue).

# LIMITS ON THE BARGAIN AND ITS PERFORMANCE (SUBSTANCE)

## RESTATEMENT

**1RK 367:** Specific enforcement of a contract may be refused if:

1. The consideration for it is grossly inadequate or its terms are otherwise unfair, or
2. its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or third persons, or
3. it was induced by some sharp practice, misrepresentation, or mistake.

## AREAS OF LIMITATIONS

1. **Unfairness:**
   1. Common law
   2. Limit on substance
2. **Unconscionability:**
   1. Denies enforcement to a contract or term of a contract that is found to be oppressive.
   2. Limit on substance
3. **Good faith (2RK 205, UCC 1-304):**
   1. Neither UCC or common law require good faith in negotiations.
   2. Required in performing and enforcing contracts.
   3. Cannot disclaim good faith requirement.
   4. Ways to erode: Define as something reasonable, but that has more wiggle room than honesty in fact (e.g. industrial standards).

## UNFAIRNESS

1. **Courts don’t look into the adequacy of consideration.** It just has to be enough for the bargain not to be a sham. The question is the fact of the bargain, not its contents. (2RK 79(b))
2. Why not look at fairness? Undercuts certainty, limits freedom of contract.
3. **Really only a defense to specific performance** (equity acts). Extended to actions at law by doctrine of unconscionability.
4. ***McKinnon v. Benedict* (455-57)**
   1. B bought property adjacent to M. M loaned B the down payment interest-free in exchange for B agreement not to cut down trees for 25 or make any improvements closer to M’s property than the present buildings. M also agreed to help get B business for their campsite business. B’s business wasn’t doing well, so they built an RV park on site, closer to M’s property.
   2. M sued for specific performance. (Typical in real estate.) Specific performance is an equitable doctrine; more susceptible to unfairness. SP is treated differently. M still could have gotten other damages.
   3. SP was not granted because of gross unfairness.
      1. What B gave:
         1. Would have ruined his business.
         2. 25 year agreement.
      2. What M gave:
         1. Got almost no business for B. (One family for less than a week.)
         2. Loan only saved $145 in interest.
         3. Loan was secured. (No risk.)
         4. M was only there during the summer.

## STANDARD FORM AND ADHESION CONTRACTS

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| **PROS AND CONS OF STANDARD FORM CONTRACTS…** | |
| **PROS** | **CONS** |
| * One interpretation for all. * Predictable; risks calculable. * Efficient to apply. * Familiar. People know what they are getting into every time. * Saves time and trouble. * Makes reading the contract less necessary if it says the same thing every times. * May encourage contract formation because people feel comfortable with what they are signing over and over again. And because many others have signed the same contract. * Won’t be enforced if unconscionable. | * Take-it-or-leave-it. * Stronger party has the power to pick the terms. * No advantage of expert advice or chance to scrutinize. * Movement back toward status system where the stronger party has the power to tell you what to do. * Less freedom of contract. * Contracts of adhesion. No other option anywhere. * Shrink-wrap contracts – you don’t even get to read them until you have already bought the product. * Corporations are essentially performing private legislation in which consumers have no representation. * Too long to read. May just give in and submit to terms so you don’t have to sift through. * Could enforce very unfavorable arbitration agreement, essentially depriving a consumer of justice. * One bad interpretation could affect many people. |

1. **Policing boilerplate:**
   1. **Ways to police:**
      1. Adequate notice (font, color, size, etc.)
      2. Strictly construe against the powerful party
      3. Where a party effectively manifests assent to a standardized agreement but the other has reason to believe he would not have done so if he had known of a particular term, the term is not part of the agreement.
      4. Doctrine of reasonable expectations: In insurance contracts that discourage detailed inquiries, the reasonable expectations of the buyer will be honored, even though the policy does not support them.
   2. Exculpatory clauses:
      1. E.g. parcel room ticket, parking garage ticket, “shrink-wrap contracts”, etc.
      2. Court focuses on adequate notices and assent (e.g. keeping the goods)
      3. Fact question
2. **Contracts of adhesion:** Take-it-or-leave-it; basically have to go with that contract or no other choice.
   1. **Enforceable unless:**
      1. Terms do not fall within the reasonable expectations of the weaker party
      2. Unduly oppressive or unconscionable
   2. ***Graham v. Scissor-Tail* (475-77)**
      1. Dispute between concert promoter and artist’s representative. Entire music industry used the same contract that required arbitration by the American Federation of Musicians.
      2. Graham had prior dealings with such contracts, so it was not unenforceable; he expected the proscribed arbitration procedure and had used it before.
      3. Court found unconscionable because arbitration would be biased.
3. **You are still bound, even if you don’t/can’t read the contract. Or if it’s in another language.**
   1. Why?
      1. Can’t have two departments of law, literate and illiterate.
      2. Administrative efficiency.
      3. Harder to do business.
      4. Want unified contract law.
   2. Exception: Contract is unintelligible
      1. Unreadable/unintelligible
      2. Small font
      3. Impenetrable language
4. Legislature: Forced awareness requirements; regulations through disclosure
   1. Example: must include interest rates
   2. Shortfalls:
      1. People can still make bad decisions (need to ban transactions)
      2. Still may not even know what the disclosed terms mean (e.g. how is credit card interest calculated?)

## UNCONSCIONABILITY

1. **Defense to breach where weaker party does not perform.**
   1. Applies to everyone (and not just UCC).
   2. Decided by judge, not jury. (See UCC 2-302.)

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| **TWO VIEWS ON SUBSTNATIVE UNCONSCIONABILITY…** | |
| **FOR (EISENBERG)** | **AGAINST (EPSTEIN)** |
| * Should be used to police both procedural (bargaining) and substantive (fairness) unconscionability. * Sometimes there is no procedural unconscionability, but a contract still should not be enforced because of strong policy against it, e.g. in the absence of other meaningful choice. (See below.) * Price unconscionability is necessary to apply in some cases, and would not be possible without substantive unconscionability. * Without, standard form adhesion contracts would be imposed on all consumers, without a grounds for attack. * In cases where there is no meaningful choice, not applying substantive unconscionability would have the same effect as duress, but since there would be no need for procedural unconscionability, there would be no protection. * Courts should not encourage stronger parties to make unconscionable bargains. * Procedural unconscionability may be hard to prove but substantive unconscionability can have the same effects, and the evidence is present in the contract. * Substantive unconscionability looks at the contract, not the parties to it, thus avoiding labels and misconceptions about their status or capacity. * Some types of contracts may take advantage of loopholes around regulations made for consumer protection, and should thus be deemed unconscionable. | * Should only be used procedurally to police and protect proper market functioning. * Takes away from freedom of contract. Undercuts the right of private contract. * Procedural unconscionability is enough to limit flawed bargains. Otherwise, the parties have willingly agreed to what they signed and it should be enforced. * Procedural unconscionability assumes that parties are not wise enough to make their own contract decisions. * It may become harder to transact business when it is not possible to determine if a standard form contract will be upheld or not. * May discourage availability of needed services to people that are more of a credit risk, because it will place more risk on the lender. * People need to be responsible for their own decisions and not depend on the court to save them when they make a bad choice. * More litigation. * If you only have one option of who to contract with and what you are seeking is not a necessity, you can just choose not to contract. * Incompetence is swallowed up in procedural unconscionability. Thus those who really shouldn’t be held to the uncontemplated consequences of their contracts are already protected. * Substantive unconscionability could lead courts to treat people with less means like children, monitoring agreements they willingly entered. |

1. ***Williams v. Walker-Thomas Furniture* (497-501)**
   1. Pre-UCC (common law case). Judge deciding.
   2. Rent-to-own contract with cross-collateralization. (Haven’t paid anything off until you’ve paid everything off.) Lots of pressure to pay. Buyer had no other meaningful choice of where to go to buy furniture, etc. Credit risk, limited mobility, etc.
   3. **Test:** substantive and procedural unconscionability. Look at the terms of the contract in light of the circumstances when the contract was made.
2. ***Jones v. Star Credit* (503-05)**
   1. Poor family bought a freezer on credit for $900 when it was only worth $300. After additional charges it totaled $1234.80. Family paid $619.88 then breached and was sued.
   2. Only issue is price.
   3. UCC 2-302: If unconscionable clause, court can refuse to enforce the whole contract, can refuse to enforce only the unconscionable term, or can limit application of the unconscionable clause as to avoid any unconscionable result.
   4. Court looked at the financial resources of the purchaser, meaningfulness of choice, and inequality in bargaining process.
   5. Court ended contract and considered freezer paid for.
3. Arguments for getting rid of contract:
   1. Save people from themselves.
   2. Don’t want to run business under. Price may be necessary.
   3. If you cap interest rates, payday lending will cease.
   4. Discourage taking advantage of people with no free choice.

## GOOD FAITH

1. **Old UCC:**
   1. 1-201(19) – Good faith: honesty in fact in the conduct or transaction concerned
   2. 2-103(1)(b) – Good faith for merchants: honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade
2. **New UCC:**
   1. 1-201(20) – Good faith (for everyone): honesty in fact and the observance of reasonable commercial standards of fair dealing
3. ***Eastern Air Lines v. Gulf Oil* (526-28)**
   1. Requirements contract for jet fuel at certain locations. Gulf Oil alleged a breach of good faith because Easter would practice “fuel freighting,” buying excess fuel in other locations not contracted with Gulf when it was cheaper.
   2. Court rejected. Relevant considerations are courses of performance, courses of dealing, and usages of trade. This was practiced regularly by Eastern, known to Gulf, taken into account by their contracts, and an unchanged and unchallenged practice established industry practice. This established good faith called for in requirements contracts under UCC 2-306.

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| **ARGUMENTS FOR AND AGAINST PAYDAY LENDING, ETC…** | |
| **FOR** | **AGAINST** |
| * Some people can’t get a real loan, but really do need whatever they are seeking. This provides an opportunity for them to meet their needs where they otherwise may not be able to. * Have to keep interest rates/prices high so that lenders are protected from high risk of default. * Freedom of contract, even for lower-income people. * Voluntary, bargained-for exchange. No procedural unconscionability (duress, fraud, etc.). * Alternative to pawn and loan-sharks, which are arguable more oppressive. * Alternative to car-title loans where people could end up losing their car over a small amount of money. This could result in the further decline of their financial/economic state. * Injects money into poor communities, which could stimulate jobs, and encourage opportunities for self-reliance. * There are meaningful choices, such as secured credit cards, and the other alternatives discussed. * Lender doesn’t create any absence of meaningful choice, person has created it by their own financial decisions. | * Oppressive interest rates and prices. * Not regulated by the same rules that govern regular banks and lending institutions. * May provide money for things people don’t really need, like electronics. * Cyclic. They may always be a payment behind or may grow dependent. * The only other alternatives are often pawn, car-title, loan sharks, etc. These cannot be considered meaningful choices. * The people using these services probably don’t have access to legal counsel, so they have no option for recourse. * In communities with lower education, people may not fully understand what they are getting into, even if it is on the face of the contract. * There may be more favorable legislative solutions to the problem. * Not efficient because people are paying way more than the interest is worth just because they don’t have a choice. * Often involve other transactional fees beyond just the interest rate. For frequent small loans these can build up quickly. |

# DEFENSES TO BREACH

## MUTUAL MISTAKE

1. **Focused on purpose or performance; must be about something in existence at the time the K was formed. Can’t be a mistake about a prediction.**
   1. **Requirements:** Both parties believe the wrong thing about some basic assumption of the contract which is so important as to upset the very basis of the contract.
   2. ***Renner v. Kehl* (811-14)**
      1. Renters entered into a lease on land to grow jojoba plants on the assumption of both parties that the land had sufficient water supply. It turned out not to, and the lessees rescinded based on mutual mistake.
      2. Both parties were entitled to restitution. Cannot get reliance/consequential damages.
      3. \*\*Hypo: What if seller did not know why buyer was purchasing land? Seller would not have even formed a belief, so no mutual mistake.
      4. \*\*Hypo: What if seller knew there was no water? No mutual mistake. Fraud or misrepresentation.
      5. \*\*Note 2: What if they found enough water and also oil underneath? Not MM. Seller beware. Policy of not letting people sue for things of higher value than they recognized when they bargained it. Undermines the purpose of a K.
2. Example of MM based on performance: *Watkins & Son* (cellar digging case). That case: not big enough mistake to undermine the whole contract.
3. **Failure to investigate does not preclude rescission where risk of mistake was not allocated among the parties.** (FN2, page 812)
4. **2RK 154 - When a Party Bears the Risk of a Mistake:**
   1. allocated to him by agreement of the parties
   2. he is aware at the time the K is made that he has only limited knowledge of the facts related to the mistake and treats that knowledge as sufficient
   3. the risk is allocated to him by the courts on the ground that it is reasonable in the circumstances to do so
5. **Difference from misrepresentation:** Misrepresentation requires negligence at least; mutual mistake does not.
6. **Distinguish** from Raffles (Peerless cotton case). Raffles – agreed to two separate ideas; undermines assent; no K ever formed. Renner – agreed on the same wrong thing.
7. **Sale of goods:** Not directly addressed by UCC. Defers to common law.
   1. Diamond case: Woman sold rock for $1 that turned out to be $700 diamond. Could not get it back.
   2. Cow case: Man was allowed to not tender pregnant cow that he sold thinking it was barren.
   3. Why different?
      1. Maybe before/after tender.
      2. Maybe difference in value. Woman got $1 for a rock that probably would have been worthless.
      3. \*\*Diamond case – the buyer took on the risk that it was worthless.
      4. Cow case – considered a totally different animal.

## FRUSTRATION OF PURPOSE

1. **Focused on purpose; problem can exist at time of K or can be something that happens in the future. Have to show it was reasonable that person didn’t know about that fact.**
   1. Benefits the payer.
2. ***Krell v. Henry* (854-56)**
   1. Rental of an apartment window, only during the day time, for two days in order to watch the King’s coronation parade. King got sick, coronation didn’t happen as scheduled, and renter breached.
   2. Foundation of the contract (as assumed by both contracting parties) has to be almost completely frustrated.
   3. Unique time and place elements (in this case). Flat particularly suited to particular purpose.
   4. Cab case - page 856: Not frustration of purpose because there were tons of different cabs the person could have taken.
   5. Note 2: Not efficient to make parties agree to price they wouldn’t be willing to pay in order to get the K done.

## IMPRACTICABILITY

1. **Focused on performance; problem can exist at time of K or can be something that happens in the future. Have to show it was reasonable that person didn’t know about that fact.**
   1. **Supervening:** If event after K formation makes performance impracticable.
   2. **Existing:** Something in existence at the time of K formation. Should also raise mutual mistake.
   3. Benefits the person giving the good or providing the service. Cannot be through fault of your own.
2. ***Taylor v. Caldwell* (825-828):** Contract for rental of music hall on particular date, but could not happen because the music hall burnt down. Impracticable because K was conditioned on the existence of the hall.
3. ***Transatlantic v. US* (830-836)**
   1. Extra shipping costs due to closing of the Suez Canal. Shippers had to go around the Cape of Good Hope. Suing for restitution for extra costs. Not suing on the K. Saying K impracticable.
   2. **Relationship to conditions:** Argument that there was an implied condition that Transatlantic didn’t have a duty to ship unless they could go through the Suez. Court denies.
   3. Note 2: Advertiser took on risk in claiming they could develop a new product, and it turns out they couldn’t. Here, risk was allocated, so impracticability could not be claimed.
   4. Why not commercially impracticable?
      1. Goods not harmed
      2. Crew prepared to do it
      3. Transatlantic had better ability to calculate risk. Should have gotten insurance\*\*, made a higher K price, allocated risk.
      4. \*\*Cost of deviation was not enough. (44/306)
   5. Could not get quantum meruit claim. If impracticable, have to sue on whole K. Can’t just get lost profit from performing. Have conferred no new benefit on the cargo owner. Can only get K or restitution…If you want the K, you take the whole K, including the amount of money you get. Can’t enforce the K and get restitution.
4. **Elements:**
   1. A contingency (something unexpected) occurred
      1. Easiest element. Just raises the issue of impracticability.
   2. Risk of the unexpected occurrence not allocated to a party either by agreement or custom.
      1. Express
      2. Implied through custom [Suez not the only customary way.]
      3. Foreseeability alone doesn’t allocate the risk. Unforeseeable means there was no allocation of risk.
   3. Occurrence of contingency rendered performance impracticable.
      1. Objective determination (unless both parties know about the subjective capabilities of the parties). (FN 13, page 835)
5. **Unless so far as a seller has assumed a greater obligation** (UCC 2-615)**:**
   1. Impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made.

# REMEDIES (BASIC)

## PURPOSE:

1. The purpose of remedies in contract is typically not to punish—the primary purpose is to protect the expectation of the promisee.
2. Why should the law enforce certain promises?
   1. Protecting the promisee’s reliance
   2. Respecting the promisor’s autonomy
   3. Economic efficiency
   4. Predictability
   5. Fairness, social justice, and morality
3. ***United States Naval Institute v. Charter Communications, 1991* (9-12)**
   1. USNI entered into a license agreement with Charter/Berkley to publish a paperback version of a book (USNI was still selling a hard-bound version), not to be published before October 1985. Berkley sold the book early. Original judgment granted for profits USNI lost as a result and for profits Charted gained as a result.
   2. Court found no copyright infringement, so USNI, was not entitled to Berkley’s profits for September as would have been allowed under the Copyright Act.
   3. “The purpose of damages for breach of contract is to compensate the injured party for the loss caused by the breach…Those damages are generally measured by the plaintiff’s actual loss…Punitive awards are not part of the law of contract damages.”
   4. Note: Where the breaching promisor’s profits match the amount the promise would have gained had the promise been performed, disgorgement may be ordered. In such a case disgorgement and expectation produce the same figure.”

## THREE PROTECTED INTERESTS (2RK 344)

* + - 1. **Expectation**
         1. **To put the promisee in as good a position as he would have been in had the contract been performed.**
         2. Sometimes this involves specific performance, but this is not typical. Specific performance not very efficient for the courts and is usually only ordered in cases where compensation is “inadequate,” such as in land sales, since each parcel of land in considered unique and therefore not susceptible to substitution.
         3. This is the favored remedy.
      2. **Reliance**
         1. **To put the promisee in as good a position as he would have been in had the contract never been made; reimburses the party for loss caused by reliance on the contract.**
         2. Example: Building a barn to house animals you were contracted to buy.
      3. **Restitution**
         1. **To protect the promisee’s interest in having restored to him any benefit he has conferred upon the other party.**
         2. Example: A down payment.

1. ***Sullivan v. O’Connor, 1973* (14-19)**
   1. Sullivan, a professional entertainer, sued Dr. O’Connor for a nose job gone bad after he had promised to “enhance her beauty and improve her nose.” She was scheduled to have two surgeries, but also had a third to attempt to fix the damage. It was unsuccessful.
   2. “Recovery limited to restitution seems plainly too meager…expectancy recovery may well be excessive…There is much to be said, then, for applying a reliance measure to the present facts.” (As far as value of the nose.) “Suffering or distress resulting from the breach going beyond that which was envisaged my the treatment as agreed, should be compensable on the same ground as the worsening of the patient’s condition because of the breach.” (**Pain and suffering not typically a contract award;** distinction between foreseeable and unforeseeable pain and suffering.)
   3. Interests:
      1. Expectation interest: difference in pre-surgery and post-surgery value of nose, hospital fee for third surgery, pain and suffering from third surgery.
      2. Reliance: Lost value to nose, pain and suffering for all operations, all hospital fees, doctor’s fee
      3. Restitution: Doctor’s fee.
   4. **Why reliance or restitution over expectation sometimes?**
      1. Expectation hard to calculate. (E.g. non-fungible goods.)
      2. Expectation grossly disproportionate to payment. (E.g. small fee for service but expectation damages are high.)
      3. Expectation too burdensome. (E.g. very long-term contract, runaway jury award.)
      4. Expectation too hard to apply. (E.g. specific performance that has been rendered near impossible.)
      5. Specific performance is often disfavored. (E.g. where court will have to oversee.)
      6. Reliance favorable to plaintiff; money would have been lost by promisee if contract had been performed. (E.g. construction project where material costs went up.)
      7. Restitution favorable to plaintiff. (E.g. getting back $1 instead of a losing lottery ticket.)
      8. Reliance typical in tort medical malpractice cases, thus it would be appropriate to apply the same standard to medical malpractice contracts cases.
      9. Contract is indefinite.
      10. Performance was interfered with by external circumstances.
      11. General rule: In commercial cases follow expectation. Sometimes, however, there are cases where other theories better apply.

## ECONOMICS OF BREACH:

1. Philosophies
   1. Perform-or-pay: Prices do the work of morals.
   2. Self-interested motivations: Sanctions are useful means of enlisting self-interested individual behavior to promote social welfare.
2. Efficient Breach
   1. Efficient breach hypothesis: A promisor will exercise an “option” to breach and pay expectation damages instead of performing when it is in her economic interest to do so.
   2. Pareto-improving transactions: Transactions that make no one worse off, while making someone else better off.
   3. Kaldor-Hicks efficiency: One party’s gain exceeds the other party’s loss.
   4. Efficient breach is one reason for contracts to avoid punitive damages. “Hard bargaining, ‘efficient’ breaches, and reasonable settlements of good faith disputes are all acceptable, even desirable, in our economic system.
3. Class Notes:
   1. In TX you can recover attorney’s fees for breach. Not typical of other states.
   2. Hypo: Contract to buy corn for $10. Farmer sold to someone else for $15. You had to buy for $12. You get $2 from farmer. Farmer is still better off. **You may have incurred additional transaction costs, search costs, drafting costs, etc.**

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| **DOES/SHOULD THE LAW ENCOURAGE BREACH?** | |
| **DOES/SHOULD** | **DOESN’T/SHOULDN’T** |
| * There are many opportunities for efficient breach. If one party can come out better off while another isn’t harmed, then why not allow? * If there is a liquidated damages clause, the parties know exactly how much they will have to pay, and can make a calculated determination of whether it would be beneficial for them to breach or not. * Parties can be made whole through expectation damages. * No punitive damages in contract law. * One policy behind non-compete agreements is that they encourage cooperation. But if they restrain trade, an employee should be able to use his skills elsewhere to make money. * Companies could go under if they are never allowed to breach losing contracts. * Most efficient allocation of resources. People pay as much as they think something is worth. If someone else values it more, then they should get it. * Personal circumstances change, and individuals being forces to adhere to oppressive contracts could be detrimental to their financial state or livelihood. | * Efficient breach assumes little or no transaction and litigation costs. Also ignores inconvenience, etc. * High litigation costs deter breach, because it may be more inconvenient and expensive and a once economic breach may no longer be economic. * Some people may not breach just to avoid having to obtain legal services. * Even though a party may be made whole through damages, it could take years for the award to come through. What about the immediate consequences they are suffering? * Sometimes expectation damages are not an option an a party will have unjustly missed an opportunity. * Damage to reputation discourages breach, especially in the business world. * Awards of consequential damages may make once economic breached not look so favorable. * Breaching promises is wrong. The law should deter it. * Why bind yourself to a contract at all if the other party may be able to breach? * Society needs to be able to count on commitments being fulfilled. * Makes business planning difficult if you cannot be certain about the contracts you make. * People wouldn’t trust each other and our market wouldn’t function properly. |

# REMEDIES (MORE DETAILED)

## SPECIFIC PERFORMANCE

1. **Generally not used. Only if award of damages would be inadequate. At discretion of judge. General exception only made for land. Sometimes used in cases of gross unfairness**.
   1. ***Campbell Soup v. Wentz* (584-86)**
      1. Campbell’s entered an output contract with Wentz for carrots at $23-$30 per ton. The market price went up to $90 per ton and Wentz refused the contract and began selling to Lojeski, a neighboring farmer, who sold about half to Campbell’s and half on the open market. This type of carrot was virtually unobtainable otherwise. Campbell’s sued for specific performance.
      2. These carrots were very important to Campbell’s business. Consistent ingredients important in food industry. Couldn’t go out in the market and get the same product. Court ordered specific performance.
      3. **Note 1: Why not get expectation damages for the difference?**
         1. L was also selling to others; no guarantee of getting all W’s carrots. **Uncertainty.**
         2. W may not be selling all their carrots to L. **No way to guarantee quantity without specific performance.**
      4. **Courts are more likely to give specific performance when there is no supervision required. (LARGE factor.)**
      5. **Note 2: Other places money damages are inadequate:**
         1. **Deprivation of loved one’s companionship**
         2. **Loss of goodwill**
         3. **Uncertainty**
         4. **Damages too speculative**
2. **Difference in price does not make money damages inadequate. Can just get expectation damages.**
3. **UCC 2-716:**
   1. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
   2. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
   3. (3) The buyer has a right to replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing…
4. Specific performance easier under the UCC than the common law.
   1. ***Klein v. PepsiCo* (588-91)**
      1. Klein contracted with Pepsi to buy a used G-II jet. Pepsi breached. Trial court granted specific performance. Appeal reviewing the trial judge’s decision for abuse of discretion. (Very hard to overcome trial court’s decision.)
      2. Appellate court reversed because specific performance was not necessary.
         1. 3 roughly comparable planes on the market.
         2. Buyer said the price was too high for the other jets, but this was not a good enough argument. You can just include this in money damages.
         3. Faith in the market – if the product is out here, you can get it.
   2. ***Morris v. Sparrow* (593-94)**
      1. Man worked for 16 weeks on a farm in exchange for $400 and a particular horse. He spent significant time during the 16 weeks training and breaking the horse, and then the owner refused to turn the horse over. Worked sued for specific performance and it was granted.
      2. **Why not just give the worker money for another similar horse? Personal investment/relationship. Money is not an adequate remedy.**
5. **Other considerations:**
   1. **Investment:** Parties will not invest sufficiently unless they expect to receive full return on those investments. Specific performance can encourage the parties to invest as though they are certain to receive performance.
   2. **Emergency situations:** E.g. Alaska packers – need something immediately. Can get an emergency temporary injunction.
   3. **Employment:** 13th Amendment – can’t force servitude. When are services eligible for specific performance? Special skills (e.g. professional athletes). You don’t make them work, just prevent them from working elsewhere (negative injunction).
   4. **Accountability:** When a party isn’t getting all the bad things from their actions (e.g. too many medical tests paid for by insurance, payment by the hour, etc.) the interests don’t align. No full accountability.
6. ***Laclede Gas v. Amoco Oil* (596-600)**
   1. Laclede contracted to provide propane to several developments. It entered into a 10 year contract with Amoco where Laclede built pipelines from all the subdivisions up to the Amoco plant and Amoco agreed to provide the required gas to the subdivisions at a price to fluctuate with the market. Amoco breached. Specific performance was granted.
   2. **Why?**
      1. **Long term arrangement.** Could go out on the open market and buy gas, but would not obtain another 10-year contract.
      2. **Public interest in getting propane.**
      3. **Uncertainty** in determining cost and calculating damages.
      4. **Up front costs** in investment in the distribution systems.
      5. **Only way to cover a requirements contract is to get another requirements contract.**
      6. Could be “other proper circumstances” – UCC 2-716
   3. Note 1: Uniqueness doesn’t relate just to the good, but to the whole circumstances.
   4. One party was allowed to cancel at any time. Why not illusory promise? 30-day notice requirement. At least 30 days of performance required.
7. ***Walgreen v. Sara Creek Property* (602-04)**
   1. Walgreen rented a location in a mall under the agreement that the mall would not rent to any other pharmacy. The mall began to lease to another pharmacy chain and the court granted an injunction until Walgreen’s lease was up. The mall testified that damages could be readily calculated by Walgreen’s lost profits but specific performance was granted do to the uncertainty and high burden on the courts of calculating damages over the life of the 10-year lease.

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| **SPECIFIC PERFORMANCE V. DAMAGES** | |
| **SPECIFIC PERFORMANCE** | **DAMAGES** |
| * Useful when damages are inadequate in light of the circumstances (e.g. where a long term or requirements contract would be impossible to replace or where goods might be unobtainable otherwise. * Parties will be more likely to settle. If the injured party actually has an opportunity to get what they think is fair, even if it is above expectation because the breaching party may be willing to give more when faced with the possibility of specific performance. * The market will police, not the courts. * Shifts the burden of determining cost from the courts to the parties. If specific performance is ordered, the parties can still negotiate their way out of it for what they think is fair. * Private negotiation is cheaper (maybe). * Prevents efficient breaches that destroy the basis of contract reliability, but can still end in an efficient result if the parties negotiate to a more favorable settlement for both. * Could give parties more time to figure out accurate damages while protected by an injunction. * High litigation costs to determine damages. * Damages are often not completely accurate of a party’s total losses. | * Specific performance can often require continuing supervision by the courts. * Specific performance can have potential costs on third parties. * Specific performance can result in a bilateral monopoly (only one possible seller for one buyer): holdout problem; creates a bargaining range; high negotiation costs; no efficiency if hard bargainer. * Parties could get unhappy about specific performance an not perform easily or properly, or could get nasty during negotiations, driving up costs and reducing chances of settlement. * Don’t want parties with a bad relationship to have to work together. (Think of employee/employer or landowner/contractor or landlord/tenant.) |

## COMMON LAW EXPECTATION

1. **Two common law formulas:**
   1. **Damages = loss in value – costs avoided + other losses – losses avoided**
      1. Loss in value: difference between what you should have gotten and what you actually got
      2. Costs avoided: what you would have paid out either for the contract, or for supplies to make a product, etc.
      3. Other losses:
         1. Incidental: incurred in trying to mitigate other losses from the breach
         2. Consequential: harm to property, business, person
      4. Losses avoided: Money you get from selling to someone else (e.g. after breach)
   2. **Damages = reliance + profit + other losses – losses avoided**
   3. Examples:
      1. K for 1MM, cost 900K, profit 100K, breach immediately
         1. D = LV – CA + OL – LA 🡪 D = 1MM – 900K + 0 + 0 = 100K
         2. D = R + P + OL – LA 🡪 D = 0 + 100K + 0 – 0 = 100K
      2. Above, but breach after 500K spent
         1. 1MM – 400K + 0 – 0 = 600K
         2. 500K + 100K + 0 – 0 = 600K
      3. Above, but breach after performance complete
         1. 1MM – 0 + 0 – 0 = 1MM
         2. 900K + 100K + 0 – 0 = 1MM
2. ***Vitex Manufacturing Corp. v. Caribtex Corp.* (pages 609-13)**
   1. Vitex closed down its plant, but then reopened just to provide services to Caribtex. Caribtex then breached. Vitex tried to claim damages including overhead. Problem of where overhead factors into damage calculations.
   2. Not factored into formula A. Not a cost avoided. Not directly related to the contract (even though accounting principles allocate part of fixed costs to each contract. Loss in value includes profit, direct costs, and fixed costs (overhead).
   3. In formula B add overhead to profit section. Logic: It is a lost profit because that is a portion of overhead that will have to be allocated to another contract, taking away from profits in that contract.

## UCC BUYER’S REMEDIES

1. **3 options (see UCC 2-711):**
   1. Cover – UCC 2-712
   2. Do nothing and get market damages – UCC 2-713 (if not delivered) or UCC 2-714 (if accepted, but defective)
   3. Try to get specific performance – UCC 2-716
2. **Cover (UCC 2-712):**
   1. **Requirements:**
      1. Good faith
      2. Without unreasonable delay
      3. Reasonable purchase
      4. Substitution
   2. **Damages = cost of cover – contract price + incidental and consequential damages under 2-715 – expenses saved in consequence of breach**
   3. Comment 2: Immaterial that the method of cover was not the cheapest or most effective. Just has to be reasonable.
   4. Comment 3: No requirement of covering. Can use 2-713 instead.
   5. ***Laredo Hides v. H & H Meat Products* (613-16)**
      1. Action to recover damages for undelivered cow hides. Laredo was to deliver them to a tannery and had to buy others on the market for a higher price.
      2. No requirement to take the cheapest price. Just has to be reasonable.
3. **Damages for non-delivery (UCC 2-713):**
   1. **Damages = market price at the time when the buyer learned of the breach at place of tender – contract price + incidental and consequential damages under 2-715 – expenses saved in consequence of breach**
   2. Comment 5: If you cover, cannot use 2-713.
4. **Damages for accepted (defective) goods (UCC 2-714):**
   1. **Requirements:**
      1. Acceptance
      2. Notification under 2-607
   2. **Damages = difference in value of goods at the time and place of acceptance + incidental and consequential damages under 2-715**
5. **Specific performance (UCC 2-716)**
   1. See above.

## UCC SELLER’S REMEDIES

1. **3 options (See UCC 2-703):**
   1. Resell – UCC 2-706
   2. Damages for non-acceptance – UCC 2-708
   3. Action for the price (essentially specific performance) – UCC 2-709
2. **Resale (UCC 2-706):**
   1. **Requirements:**
      1. Good faith
      2. Commercially reasonable manner
      3. Notification under the rest of 2-706
   2. **Damages = Resale price – contract price + incidental damages under 2-710 – expenses saved in consequence of breach**
3. **Damages for non acceptance (UCC 2-708(1)):**
   1. **Damages = market price and time and place of tender – unpaid contract price + incidental damages under 2-710 – expenses saved in consequence of breach**
4. **Lost-volume sellers (UCC 2-708(2)):**
   1. **Lost volume seller: Getting second sale does not make them whole. You have to be able to make the extra sale and that sale has to be profitable. Not lost volume if you only have one of that particular product. Would you have made both sales? Has to be part of your regular inventory. Have to prove someone would have bought that exact product.**
   2. **Damages = profit (including reasonable overhead) + incidental damages under 2-710 + costs reasonably incurred – credit for resale**
   3. 708(2) also available if you stop building a customized item and can’t resell.
   4. ***R.E. Davis Chemical v. Diasonics* (619-24)**
      1. Sale for an MRI machine. Buyer breached. Remanded because seller was required to show that it could have produced and sold another unit.
      2. In this case, burden was on the seller, but this is not unanimous among the courts.
      3. Court interpreted “resale” to mean scrap sale of unfinished goods. (Otherwise, if read literally, would be the same as 2-706.)
      4. 2-708 can still be chosen, even if 2-706 or 709 are available. Not compelled to choose 706.
5. **Action for the price (UCC 2-709):**
   1. Goods lost or damaged after the risk of their loss has passed to the buyer.
   2. Goods identified to the contract that the seller is unable to resell after a reasonable effort or circumstanced indicating that such effort will be unavailing.

## LOSING CONTRACTS/RESTITUTION

1. Breach on a **losing contract:** Promisee may recover his outlay in preparation for performance reduced by as much as the promisor can show that the promisee would have lost if the contract had been performed.
2. UCC 2-718(2) – restitution for pre-paying buyers.
3. ***United States v. Algernon Blair* (626-28)**
   1. Contract for steel erection. Dispute over who would pay for the crane rental. Contractor completed 28% and then quit. Amount due was $37,000, but more than that would have been lost on the job.
   2. Quantum meruit: Allows a promisee to recover the value of services he gave to the defendant irrespective of whether he would have lost money on the contract and been unable to recover in a suit on the contract.
   3. The measure of recovery is the reasonable value of the performance, and recover is undiminished by any loss which would have been incurred by completing performance.
4. An injured party who has fully performed and then been refused payment **cannot recover more than the contract price.**

# LIMITATIONS ON DAMAGES

## THREE CONSIDERATIONS

1. Duty to mitigate
2. Reasonable certainty
3. Foreseeability of damages

## AVOIDABILITY

1. The injured party has a **duty to mitigate damages.** Failure to mitigate does not preclude recovery, but it does **reduce damages** by the amount that could have reasonably been avoided.
   1. ***Rockingham County v. Luten Bridge* (630-31)**
      1. Bridge builder was told not to continue construction due to public opposition, and continued to build until completion. Builder was denied extra damages resulting from the continuation of construction.
      2. Why complete the bridge? The builder would have gotten the same amount (lost profit) either way. Were unsure if the order to stop building was legitimate. Political uncertainty.
      3. Damages = profit + reliance + …
         1. Profit stays the same. Reliance increases as you spend.
         2. Economic reason: P gets the same net $ either way, but the breaching party is worse off due to the increased reliance costs.
2. **UCC:**
   1. Under UCC 2-704(2) a **manufacturer may proceed to completion** upon the buyer’s repudiation instead of salvaging, as long as it is “in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization. Seller may then base recovery on the goods as completed.
   2. UCC gives buyers and sellers the option to arrange a substitute transaction (2-706, 2-712) or to do nothing and accept market damages (2-708, 2-713). **If the injured party fails to take affirmative action and find a substitute transaction, the damages are based on the difference between the contract price and the market price at which it could have arranged a hypothetical substitute transaction.**
   3. Avoidance only relates to consequential damages (see UCC 2-715(2)).
   4. Cannot recover for lost profits of refusing to cover. Consequential damages have to be foreseeable and not avoidable.
3. **Employment Contracts:**
   1. **In 1800’s England:** Doctrine of constructive service. Having served part of a term and been willing to serve the rest, employee was considered to have served the whole. Employee was allowed to recover the agreed compensation for the entire term.
   2. Rejected in late 1800’s America: **Discharged employee may not remain idle, but must accept employment elsewhere if it is offered.**
   3. **Current rule:**
      1. You do have to mitigate if you are offered a **non-inferior, similar job.**
      2. Must **make reasonable efforts** to get a new job. You do not have to accept a different or inferior job, even if a reasonable person would accept it.
      3. Is one a replacement? **But/for relationship.** Could you have done both at the same time?
      4. If you actually do take a non-replacement job the court will decrease your damages, even though you are not obligated to avoid them by a different or inferior job.
      5. Why won’t this encourage people to just sit at home? Realistically, most P’s can’t just sit around without income.
   4. ***Parker v. 20th Century-Fox* (638-41)**
      1. Fox breached a contract with an actress when the canceled production of a film, but they offered her a new contract for a different film. Actress rejected offer. Question of whether she was required to take the new film to mitigate her damages. No The new job was different/inferior.
      2. Why?
         1. Acting type (musical/drama)
         2. Location (L.A./Australia)
         3. Producer rights (yes/no)
         4. Name of the film (Bloomer Girl/Big Country, Big Man)
         5. Working conditions (studio/western)
         6. Hostile (scorned party) in second contract
4. **Remedy defect: What happens when the breaching party cannot remedy the defect for less than the loss in value to the injured party?**
   1. **General rule (broader):** Damages are the cost of undoing the breach.
   2. **Exception rule (narrower):** Damages are the difference in value resulting from the breach.
   3. ***Jacob & Youngs v. Kent* (pages 645-46)**
      1. House builder accidentally built a house with the wrong brand of pipes, though they were of the same quality. Owner wanted damages to redo the house with the correct piped. Court denied.
      2. **“The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.”**
      3. **Test:** When grossly disproportionate, choose which solution is less.
      4. Note 2: Court may inquire as to whether owner is actually going to make the repair.
      5. Note 3: Court may inquire as to why the particular pipes were so important to him.

## FORESEEABILITY

1. **Breach must be cause in fact and the damages must be foreseeable.**
   1. **Two part test:**
      1. Damages arose naturally, i.e., according to the usual course of things, from the breach of contract itself; or
      2. Damages may be reasonably supposed to have been in contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.
   2. ***Hadley v. Baxendale* (657-659)**
      1. Mill owners not allowed to recover lost profits when slow shipment of a mill part forced them to shut down operations for longer than anticipated. The owners had not communicated the particular circumstances to the shipper, so the shipper had no reason to expect to be liable for lost profits.
2. **When do you measure foreseeability? At the time K is signed.** Why? If you knew at the time of making the contract, you could have not entered into it or asked for more $ to offset the extra risk.
   1. **How do consequences relate to expectation?** You didn’t expect the consequences from the breach to befall you if the K went through.
3. **UCC 2-715(2)(a):** Consequential damages are those that the seller “had reason to know” of at time of contracting. (Leaves out naturally arising test.) Note – seller’s can’t get consequential damages.
   1. ***Delchi Carrier v. Rotorex* (661-63)**
      1. Air conditioner company allowed to recover for lost profits when they were sent the wrong product and therefore missed out on an entire season of resale and filling orders that had already been placed. Court ruled that Delchi “knew or should have known as a possible consequence” of their breach that profits would be lost.

## CERTAINTY

1. Damages must be proved with **reasonable certainty,** though not with mathematical certainty.
   1. Problematic in showing damages to reputation, etc.
2. **Lost profits** can generally be recovered as long as you can prove with certainty. This is harder for new businesses.
   1. ***Fera v. Village Plaza* (674-78)**
      1. Plaintiffs rented a space for a new business, but were then denied their right to occupy it. It had been rented to other tenants.
      2. Defendant’s argued that plaintiffs could not recover lost profits because they are a new business. Court ruled that a new business could recover lost profits if they could present enough evidence to take the damage calculation from the speculative-conjecture category and support submission to a jury.

## LIQUIDATED DAMAGES AND PENALTIES

* + - 1. **Liquidated damages are usually a specific amount stipulated during contract formation that the injured party may collect in the case of a particular breach.**
         1. **Primary example:** Completion assessments – amounts deducted from a construction contract for each day beyond a deadline the construction runs; often used to encourage contractors to apply sufficient resources to complete a project on time
      2. Liquidated damages are **not meant to be a penalty**. This can happen if the amount stipulated is more than actual damages from the breach. Could be a windfall.
         1. Promisors are expected to **demand extra compensation** for facing a risk of high liquidated damages. This will generally cause a rise in bid prices. Thus it is important to use them on only projects where the urgency really exists.
         2. Can give **power to third parties**, e.g. unions, to demand higher wages, etc.
         3. **Historically looked down on** because debtors would agree to damages twice the amount of the debt. (Loan sharking.)
      3. **Modern trend:** Assume enforceable. Burden of proof on opposing party to show unreasonable. Question of law, but may require resolution of underlying factual issues.

1. ***Wasserman’s Inc. v. Township of Middletown* (pages 680-86)**
   1. Commercial lease of municipal property for a general store. Liquidated damages for the value of any improvements + 25% of gross receipts for 3 years if the township canceled the lease.
   2. Remanded to consider 5 factors.
      1. Reasonableness of using gross receipts as the measure of damages
      2. Significance of calculation scheme as opposed to some other method
      3. Reasoning of the parties for choosing these damages
      4. Duty to mitigate
      5. Available alternatives
2. **Test: Reasonableness (grossly disproportionate to the harm suspected or actually sustained)**, difficulty to assess damages (more likely to enforce if hard to forecast), intent (little bearing).
   1. **One look:** assess reasonableness at the time the K was written; were the damages close to those expected; considerations – requires honesty and genuineness of the parties, don’t have to wait on actual damages (efficiency), court doesn’t have to hear evidence of actual damages
   2. **Two look (modern trend):** assess at both the writing and actual damages from breach (has to be reasonable at either/or); encourages more frequent enforcement; considerations – more enforcement, court influenced by hindsight so the one look would be less fair, rewards punitive clauses based on coincidence, more potential litigation (and attempts to show damages)
   3. UCC 2-718: two-look rule.
3. Other bits:
   1. If unenforceable, just get regular K damages.
   2. What if the damages are set **too low?** Then not a penalty when the person is giving too little. Courts police by unconscionability. See UCC 2-718.
   3. Is injured party required to mitigate? Usually. Prevents waste. (Courts disagree on this.)
   4. What if the liquidated damage clause says it covers all unforeseeable damages (for a set amount)? Usually enforced.

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| --- | --- |
| **PROS AND CONS OF LIQUIDATED DAMAGES…** | |
| **PROS** | **CONS** |
| * Risk control – parties know exactly what they are facing and can adjust prices, etc. accordingly. * Avoids uncertainty, delay, and expense of litigation. * Economic and market efficiency in allowing contractors to choose the terms as they see fit in the situation in order for the bargain to be valuable to them. * Freedom of contract. * Judicial economy in not having to try cases. * Encourages contract formation where parties will be willing to enter into a more certain contract. * Burden of proof of the party challenging the clause gives protection to the one attempting to enforce it. * The industry may be better than a court at determining what a breach is worth. * Discourages inefficient breach. Makes parties stick to their word. * Can encourage efficient breach since parties know exactly what it will cost. * Court can still grant unforeseen damages. * Reasonableness factors are considered, so a party won’t get hit with overly-oppressive damages that aren’t really contemplated or actually present. * Decision to enforce (if it goes to the courts) is quick and cheap, saving resources all around. * Encourages contractors to devote adequate resources to finishing a job on time. * Don’t have to spend time and resources calculating actual damages, which could be a whole trial in itself. | * Private parties overtaking public law. * Usurps judicial function. * Courts must still monitor for unreasonableness. * Could be punitive in nature, undermining contract principles. * Could be a windfall when one party gets extra damages that they didn’t actually incur. * Could be a windfall because often a contract price is increased to accommodate a liquidated damages clause. If you don’t enforce, one party has paid for the clause but not benefitted from it. * Unequal bargaining power or adhesion could lead to an oppressive result. * Could lead to rushed, lower quality work. * Breach that might otherwise actually be efficient could be deterred because of inflated liquidated damages clauses. * Essentially forces parties to perform. * Even things like bank overdraft fees and credit card late fees appear to be punitive. * Sometimes they can have no direct relation to expectation interest. * Third parties could use them to their advantage, e.g. unions going on strike right before a building project has to be completed. * Damages would be more certain to calculate after the fact. |