# 4 Questions of Common Law K

1. Did the parties have a K?
2. What does the K consist of?
3. Is there a breach? Was there a valid legal excuse for the breach?
4. What are the remedies?

Offeror: a person who makes a proposal to another

Offeree: the person who receives the proposal

Promisor: the person who makes a promise

Promisee: a person to whom a promise has been made

Obligor: the person who owes an obligation to another, the one who must pay

Obligee: the person who is owed the obligation, the one being paid

Donor: the person making a donation

Donee: the person receiving the donation

Appellant (petitioner): the person dissatisfied, the one who wants the appeal

Appellee (respondent): the person who was happy and doesn’t want the appeal

# Question 0: What Law Applies?

Uniform Commercial Code

1. Basics
* In Texas, UCC has been adopted as law almost verbatim
* Unlike SoF, UCC is law
* Two tests to determine if sale was for goods or services (Pittsley v. Houser, pg 74)
1. Predominant Factor Test (Majority)
* Whether the predominant factor is the rendition of service (K to paint a house) or a transaction of sale (installation of a water heater)
1. Severing Test (Minority)
* Sever the K, apply UCC to the goods but not any services
1. Does it Apply?
* §2-102: “This Article applies to transactions in goods”
* §2-105: Definitions: Transferability; “Goods”; “Future” Goods; “Lot”; “Commercial Unit”
	+ - (1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in §2-207 (like minerals, timber).
		- Zamora argues by analogy that electricity is a good. the buyer is buying something that it needs, power, something that is transportable, and can even be stored if need be (in small amounts). However, the courts (and even professors) are split on the issue.
* §2-201: Formal Requirements; Statute of Frauds
	+ - A contract for the sale of goods for the price of $500 or more is not enforceable unless there is sufficient writing to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. (Note: A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable beyond the quantity of goods shown in the writing)
		- Exceptions are if
			* (a) goods are to be specially manufacture and not otherwise suitable for sale and notice of repudiation is received after production has begun or commitments for procurements have been made, or
			* (b) the party against whom enforcement is sought admits that a contract was made, or
			* (c) if payment has been made and goods have been accepted or received.
* UCC §2 implies that it is designed for sale agreements, not rental agreements
* §1-103: Supplementary General Principles of Law Applicable (lists out certain omitted items because the UCC does not have specific provisions to deal with these items)
	+ - Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions

Statute of Frauds

1. Basics
* Certain types of Ks are unenforceable against a party unless the K is in writing, signed by the party to be charged
* If SoF is applicable, but not satisfied, then you don’t have a K
* Purpose
	+ Evidence
	+ Deterrent against hasty action
	+ (sometimes) Ensure deliberation in the making of a K
1. General RULE: Writing that sets forth an earlier oral K but repudiates (refuses to acknowledge) the K serves as a memo that satisfies the statute
	* Courts usually view the memo as a means of ensuring the existence of a K and its terms
2. Does it Apply? MYLEGS
	1. **Marriage**: made in consideration of marriage
	2. **Year**: K that is not to be performed within the space of one year from the making thereof. Must be impossible to perform within 1 year. If it is possible to perform within 1 year, oral K are ok. If the K is incapable of being performed within 1 year, the K must be in writing and signed by the party to be bound
	3. **Land**: transfer of any interest in land must be in writing. Price or value doesn’t matter.
	4. **Executor**: executor or administrator answering for decedent’s debt
	5. **Goods**: sale of goods valued at $500 or more
* Exceptions: oral K sufficient if
	+ - 1. Specially manufactured for B, not suitable for sale to others, and S has begun manufacturing goods (reliance type principle)
			2. P admits during proceedings that K for sale was made
			3. Goods received and accepted/paid for
* If UCC §2-201 is not satisfied, entire K is unenforceable
	1. **Surety**: K to guarantee the debt or duty of another. Goal is to provide a cautionary warning to suretor.
* Possible exception: when the primary purpose is to obtain an immediate and direct economic benefit or advantage for himself (CiN, pg 202)
	1. Other exceptions
* Security interests – sale or purchase does not need to be in writing

# Question 1: Did the Parties have a K?

Does the law enforce all promises? NO

**K (R2K §1):** A promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty

**(§17) K = Mutual Assent + Consideration**

Mutual Assent: I agree, you agree

Types of K

* + - Bilateral K: promise for a promise
		- Unilateral K: promise for an act
* The act is the consideration
* “If you mow my law I’ll pay you $20” 1 party may never be bound. K isn’t triggered until party performs

Express K

* + - Parties explicitly consent to the terms of the K

Implied-in-Fact K

* + - True K, but party’s assent is implicit rather than explicit. Implied by the acts and manifestations of the parties.
		- Remedies? Expectation, or reliance, or restitution. Just like a regular K.

Implied-in-Law K (Quasi-K)

* + - Not a K, but label given to conduct that gives rise to liability for unjust enrichment.
		- Remedies under quasi-K? Restitution. Unjust enrichment.
		- Quantum meruit v unjust enrichment/quasi-k? QM measured by how much the person who performed the services deserves (how much they gave up), versus how much did the other person gained (quasi-contract).
		- QM usually = QK.
		- §371(a) is quantum meruit, 371(b) is quasi-contract

**Exclusive-right Ks** require best efforts (a higher obligation than good faith, good-better-best)

**Output K**: determines quantity by the output of the seller

**Requirement K**: determines quantity by the requirements of the buyer. Neither of these are necessarily exclusive

* §2-306:
	+ - * + (1) 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.
				+ (2) 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.

Consideration

* + §71
		- To constitute consideration, a performance or a return promise must be bargained for
		- A performance or return promise is bargained for if it is sought by the promisor (person making the K or promise) in exchange for his promise and is given by the promisee (who receives the promise) in exchange for that promise
		- Performance may consist of
			* Act other than a promise
			* A forbearance
			* Creation, modification, or destruction of a legal relation
* §79
* Once consideration is met, no additional requirement of benefit to the promisor, detriment to promisee, equivalence in values exchanged, or mutuality of obligation

Basics

* Consideration = (1) detriment/benefit + (2) bargain
* RULE: Legal detriment, or giving up of some legal right, satisfies the consideration requirement (*Hamer v. Sidway, pg 47 – uncle made nephew restrain from fun for $5K*)
* The making of the promise must somehow shrink the realm of choice of the promisor
	+ - RULE: Mere inadequacy of consideration will not void a K (R2K §79 supports) (*Batsakis v. Demotsis, pg 51 – 500,000 drachma for $2K US*)

But it could be subject to a claim of unconscionability

When Consideration is Not Present

* Nominal, unconscionable, moral consideration only, past considerations
* RULE: Moral consideration, only, will not support a promise
* RULE: Past considerations do not count

What is a Bargain? (§71)

* “Sought by the promisor in exchange for his promise, and given by the promisee in exchange for that promise”
* Each party gives something that he considers the price of what he gets
	+ - RULE: Courts have traditionally declined to relieve a party from the terms of a K merely because of a bad bargain (R2K §79 supports) (*Hancock Bank & Trust Co. v. Shell Oil Co., pg 50 – 15 yr K with a 90-day termination clause)*

What is a Promise?

* A promise may be express or implied
* RULE: Courts have the power to interpret a K to include an implied promise, w/o which the K would not have survived MoO (*Wood v. Lucy, Lady Duff-Gordon, pg 101 – fashionista)*
* Ct said Wood had an implied promise to use reasonable efforts to market her label

Promise or Condition?

* §224: A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a K becomes due
* A condition subsequent removes an obligation to perform
* No substantial performance for conditions. Strict compliance. But there can be substantial performance for promises.
* §225: Effects of the Non-Occurrence of a Condition
* (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
* (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
* (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.
* §226: How an Event May Be Made a Condition
* An event may be made a condition either by the agreement of the parties or by a term supplied by the court.
* §227: Standards of Preference With Regard to Conditions
* (1) In resolving doubts as to whether an event is made a condition of an obligor’s duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee’s risk of forfeiture, unless the event is within the obligee’s control or the circumstances indicate that he has assumed the risk.
* (2) …When it is doubtful whether

(a) a duty is imposed on an obligee that an event occur, or

(b) the event is made a condition of the obligor’s duty, or

(c) the event is made a condition of the obligor’s duty and a duty is imposed on the obligee that the event occur,

the first interpretation is preferred if the event is within the obligee’s control

* A party to the contract does not come under a duty to perform unless and until some designated state of events occurs or fails to occur (CONDITION PRECEDENT); or
* If some designated state of events occurs or fails to occur, the duty of a party to perform is suspended or terminated (CONDITION SUBSEQUENT).
* Express or Implied?
* Express: agreed to and imposed by the parties themselves
* Implied: Imposed by law to do justice
* A condition may or may not be inside the control of one or more of the parties.
* Promise v. Condition (*Howard v. Federal Crop Insurance Co, pg 945 – sued to recover for crop damage, before claims adjuster came out they tilled the field, K said they were not supposed to*)
* Courts are more likely to find something to be a promise rather than a condition because the Court will try to enforce most contracts, and it is easier to enforce a promise than a condition.
* When it is doubtful whether words create a promise or a condition precedent, they will be construed as creating a promise.
* The provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. The circumstances, intents of the parties, etc. may be considered as well as the language.
* Terms such as “if”, “provided that”, “when”, “after”, “as soon as”, “subject to”, “on condition that”, or some other similar phrase are evidence that performance of a contractual provision is a condition.

Assent – Did the Parties Intend to Contract?

* §20: Effect of Misunderstanding
* (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (no MA, no K)

(a) neither party knows or has reason to know the meaning attached by the other; or

I.E. no fault and no assent

(b) each party knows or each party has reason to know the meaning attached by the other.

I.E. both parties were equally stupid. Rare occurrence.

* (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if (MA, K)

(a) and (b) that party does not know/has no reason to know of any different meaning attached by the other, and the other knows/has reason to know the meaning attached by the first party.”

Note: here “does know” is subjective, while “has reason to know” is objective if you say that this is based on the standard of what a reasonable person would know. Despite the holding in *Lucy*, subjective intent is inherently built into this rule

If neither party can be assigned the greater blame for the misunderstanding, there is no nonarbitrary basis for deciding which party’s understanding to enforce, so the parties are allowed to abandon the contract without liability (*Colfax Envelope Corp. v. Local No. 458-3M, pg 381*)

*Mayol v. Weiner Companies, pg 389 – Buyer signed K to purchase property subject to tenant’s rights, but buyer didn’t know tenant had an option to purchase until after he signed it.* J/Buyer. Ct applied 20(2)(b). Why did the seller have reason to know that buyer did not know about the option? The encumbrances section didn’t mention it specifically. Saying it was subject to lease is insufficient b/c a lease doesn’t typically include an option to purchase. Court uses an at-fault justification to determine which meaning prevails.

* §201: Under question (2) – what does the K consist of?
* A “meeting of the minds”
* Subjective vs. Objective
* Subjective intent is not the measure of mutual assent b/c we cannot test it. What you know is subjective.
* Objective intent (what a reasonable person would conclude) governs.
* The mental assent of the parties is not requisite for the formation of a contract. Cts must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. (*Lucy, pg 370 – D drinking, P comes in to gas station / bar to start drinking and said he would pay $50K for Ds farm, D wrote a “K” on the back of a restaurant check, tore it up and wrote a new one and got his wife to sign, when P asked for farm D said he thought it was a joke*)
* Ct confirmed *Lucy’s* holding that MA depends on objective manifestation. “…the inner intention of parties to a conversation subsequently alleged to create a K cannot either make a K of what transpired, or prevent one from arising, if the words used were sufficient to constitute a K.” (*Embry v. Hargadine, McKittrick Dry Goods, pg 381 – sales manager EE’s contract expired, went into owner’s office and said K hadn’t been renewed yet and he would quit if it wasn’t, according to EE, owner said “go ahead, you’re all right.” Owner claims he said “go back upstairs and get your men on the road”. J/Remanded to jury to determine if a reasonable person would agree with P’s interpretation*)
* Intention is of no avail, unless stated at the time of the contract (*Raffles v. Wichelhaus, pg 374 – cotton arriving on the Peerless vessel, each party was referring to a different vessel named Peerless*)

Mutuality of Obligation

* Both parties must be bound or neither is bound
* Exception for unilateral contracts.
	+ - Promisee can no longer do that thing w/o being bound by the K
		- A unilateral K can be an illusory promise
* Addresses the question of whether there was really consideration, or whether it was an illusory promise
* Sounds like a promise, but not really a promise
* View it as a practical matter. If A cannot just walk away from the agreement, then MoO exists
* RULE: A valid K may be conditioned upon the happening of an event

*Scott v. Moragues Lumber Co., pg 88 – if S bought a boat, had to charter to M*

* As soon as the event happens, boom, the K is in effect
* Event or lack of event is an express condition (pg 90)
* Only way for S to avoid the K was to not buy the boat (🡪 detriment 🡪 consideration)
* Condition is an element of the K that must be fulfilled before an obligation to perform arises
* RULE: K to purchase whatever you want lacks mutuality of obligation. K must specify some quantity (*Wickham & Burton Coal Co. v. Farmers’ Lumber Co., pg 91 – coal shipments)*
* Obligation to sell, but not to purchase (or vice versa) is not MoO
	+ - In Wickham, there was MA, but no MoO
* Buying whatever I want is not a detriment (🡪 not consideration)
* RULE: When an agreement is executory and completely terminable at will, no mutuality of obligation *(Miami Coca-Cola Bottling Co. v. Orange Crush Co., pg 94)*
* If no MoO, it doesn’t matter which party wants out. There is no K.
* But, a 10-day termination clause counts as consideration b/c bound for at least 10 days (detriment)
* **Exclusive-right Ks / Output K** / **Requirement K**
* There is a MoO b/c buyer/seller are required to use good faith and both are giving up freedoms to contract with others
* §1-203 defines “good faith”
* Even though §2-306 applies only to the sale of goods, most courts hold that requirements and output Ks have consideration

Offer & Acceptance

Offer

* §22: Mode of Assent: Offer and Acceptance
* (1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party and parties.
* (2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.
	+ - Preliminary Negotiations
* Difference between contract negotiations and the offer/acceptance hinges on
* Whether the parties believed they had concluded the bargaining process, or
* If instead, they believed they were still in preliminary negotiations.
* §26: Preliminary Negotiations
* A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

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* §24: Offer Defined
* 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
* §35: The Offeree’s Power of Acceptance
* (1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer
* (2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in §36
* §36: Methods of Termination of the Power of Acceptance
* (1) An offeree’s power of acceptance may be terminated by
* (a) A rejection or counter-offer by the offeree, or
* (b) lapse of time, or
* (c) revocation by the offeror, or
* (d) death of incapacity of the offeror or offeree.
* (2) In addition, an offeree’s power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.
* §38: Rejection
* (1) An offeree’s power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.
* (*Akers v. J.B. Sedberry, pg 424 – 2 EEs had 5 year K, ran into problems with boss, met with owner and offered to resign with 90-day notice, she did not accept and never mentioned it again during long meeting, 3 days later sent EEs a note that said she accepted their offer*) Offer? Yes. Acceptance? No. She rejected their offer and that rejection terminated the offer to resign.
* (2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.
* §41: Lapse of Time
* (1) An offeree’s power of acceptance is terminated at the time specified in the offer, or if no time is specified, at the end of a reasonable time.
* (2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.
* (3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in §49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.
	+ - The Ct will consider every communication between the parties to decide when the offer was made and when it was accepted. Must have clear manifestation from both parties to enter into contract with given specific terms. (*Lonergan v. Scolnick, pg 414 – L wants to buy land, D put ad in newspaper, letters back and forth, P thought he had brought the property, but D sold to someone else*)
		- To have acceptance, you need enough definiteness in the offer such that it can be concluded by the other party saying “I accept.” If it doesn’t make sense to answer “I accept”, then you probably don’t have an offer.
* Ex: Classified ad lists a juvenile python. S says he is “asking $250, if interested call or text.” Includes tank, rock, etc. Z calls and tells S he accepts. Contract? Argue that it was an invitation to bargain, not an offer. S will probably want to make sure Z isn’t planning on a BBQ before he gives away his pet python
* Ex 2: Ad says “1989 Ferrari. $35,000.” Gives address and telephone of seller. K? Probably not. Too indefinite – no info on time of delivery, form of payment, etc.
	+ - “An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offeror or to take it under further advisement. (*Akers v. J.B. Sedberry, Inc.*)
		- “An offer terminated in (any) of these ways ceases to exist and cannot thereafter be accepted (*Akers v. J.B. Sedberry, Inc.*)
		- “Ordinarily, an offer made by one to another in a face to face conversation is deemed to continue only to the close of their conversation, and cannot be accepted thereafter” (*Akers v. J.B. Sedberry, Inc.*)
		- Death or Incapacity of offeror before acceptance
* Under traditional contract law, the death or incapacity of an offeror terminates the offeree’s power of acceptance if the offer is revocable when the death or incapacity occurs.
* Rule applies even when
* The offeree accepts at a time when he neither knows nor has reason to know of the offeror’s death or incapacity
* In the absence of the rule, the offeror’s death would not excuse her estate from performance

Advertisements

* + - General rule: Advertisements are “invitations to bargain,” not offers
		- However, “the test of whether a binding obligation may originate in advertisements addressed to the general public is ‘whether the facts show that some performance was promised in positive terms in return for something requested’ ” (*Lefkowitz v. Great Minneapolis Surplus Store, pg 417 – Refusal of D to sell P pieces of clothing when ad said “first come first served”*)
		- Furthermore, “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” (*Lefkowitz*). Cts words sound very similar to the §24 rule.
		- Also, “while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer” (*Lefkowitz, after he was told the offer was for women only*)
		- “Nevertheless, certain advertisements have been held to constitute offers where they invite the performance of a specific act without further communication and leave nothing for negotiation” (*Donovan v. RRL Corp, pg 420 – squibb case*)
* Ex: advertisements for rewards, “first come first served,” “hole in one wins,” etc.
* Grocery store ads are covered under the FTC Regulations: page 534 in the supplement
* Argument for being stingy in calling something an offer: offeror gives offeree power of acceptance, we don’t want to accidentally bind people

Auctions

* §2-328: Sale by Auction
* (1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale
* (2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling
* (3) Such a sale is with reserve unless the goods are put in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer’s announcement of completion of the sale, but a bidder’s retraction does not revive any previous bid
* (4) Bidding by the seller
* Putting an item up for sale is only an invitation, not an offer. If seller says it is without reserve, then they are legally binding themselves to sell the item. Default is items are with reserve (invitation) unless specifically stated.

Acceptance / Counter-Offers

* §2-206(1): Offer and Acceptance in Formation of Contract
* (1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contact shall be construed as inviting acceptance in any manner and by any medium reasonable for the circumstances.

(b) 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 conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

* §30: Form of Acceptance Invited
* (1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing specified act, or may empower the offeree to make a selection of terms in his acceptance
* Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances
* §32: Invitation of Promise or Performance
* In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.
* §39: Counter-Offers
* (1) A counter-offer is an offer made by an offeree to his offeror relating to the same manner as the original offer and proposing a substituted bargain differing from that proposed by the original offer
* (2) An offeree’s power of acceptance is terminated by his making a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree
* §50: Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise
* (1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
* (2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.
* (3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.
* §59: Purported Acceptance Which Adds Qualifications
* A reply to an offer which purports to accept it but is conditional on the offeror’s assent to term additional to or different from those offered is not an acceptance but is a counter-offer
* §60: Acceptance of Offer Which States Place, Time, or Manner of Acceptance
* If an offer prescribes the place, time, or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests…another method of acceptance is not precluded
* §70: Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance
* A late or otherwise defective acceptance may be effective as an offer to the original offeror, but his silence operates as an acceptance in such a case only as stated in §69
	+ - Conditional acceptance becomes a counter-offer and terminates the offeree’s power of acceptance.
		- “To be effective, an acceptance must be definite and unequivocal;” “the acceptance may not impose additional conditions on the offer, nor may it add additional limitations;” however, conditions are ok if “the acceptance is clearly independent of the condition” (*Ardente v. Horan, pg 430 - residential property for sale, purchase agreement, party added conditions when they signed it*)
		- Language on the outside of a shrink-wrapped package with language to the effect of “opening this package or using the product inside confirms your acceptance of the following license agreement” is generally sufficient to create a contract with the consumer who opens the contract, providing the consumer has reason to expect the contents of the agreement. (*Arizona Cartridge Remanufacturers’ Ass’n. v. Lex-Mark Int’l Inc., pg 675 – printer cartridges for reduced price*)
		- May be bound to terms by clicking on a download button if the offer makes it clear that clicking on the download button would assent to the terms. Terms must be clear and visible (usually meaning that they must be placed on the screen such that they would be read before the download button is clicked). If the terms of the contract are discreet and would not be noticed/acceptance linked to the click of the download button to the normal consumer, a contract will not be formed by the consumer clicking download. (*Specht v. Netscape Communications Corp., pg 676 – downloaded program when info was below the download button*)

Option Contracts: agreement to make an offer irrevocable

* §2-205: Firm Offers
* An offer by a **merchant** to buy or sell goods in a signed writing by which its terms give assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for reasonable time, but in no event may such period of irrevocability exceed three months, but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
* §45: Option Contract Created by Part Performance of Tender
* (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it
* (2) The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer
* §87: Option Contract
* (1) An offer is binding as an option contract if it

(a) Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) Is made irrevocable by statute.

* (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
* Common law v. UCC requirements for option contracts:
* Common law – offer is freely revocable unless the promise to hold the offer open is supported by consideration
* UCC – a “firm offer” may be made without consideration, as long as:

Offeror is a merchant;

Offer is in a signed writing;

Offer contains an “assurance that it will be held open” and

Period of irrevocability does not exceed 3 months.

* Under the traditional rule, a contract was not formed until performance was complete. In a unilateral K, you accept by doing the performance. Current law has recognized this can be unfair and passed §45.
* However, beginning performance (§45) is not the same as preparing to perform (*Ragosta v. Wilder, pg 442 – the fork shop sale*)
* A person may accept an offer for a unilateral contract by rendering performance, even if he does so primarily for reasons unrelated to the offer. (*Simmons v. United States, Klockner v. Green, pg 462 – grandma had never signed will but left estate to step-grandchildren to recognize their care*)
* Generally when an offer is made, it is necessary in order to make it a binding contract not only that it should be accepted, but that the offeror be notified of the acceptance. There is an exception – the offeror may receive notification of acceptance contemporaneously with his notice of the performance of the condition. (*Carlill v. Carbolic Smoke Ball Co., pg 466 – ad said it would give a reward for using the smoke ball*)
* Acceptance may be shown by conduct (*Polaroid v. Rollins, pg 475 – waste disposal facility, general contract + each individual contract had additional conditions (counter-offer), acceptance was p/u the waste*)
* Option contracts bind the offeror, but not the offeree

Acceptance by Silence

* §69: Acceptance by Silence or Exercise of Dominion. The Silence+ Rule
* (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Otherwise is a key word – it allows the Courts to use public policy

* (2) An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.
* §70: Above
* General rule is that silence does not ordinarily manifest assent, unless you add something else to it
* Need to fit the silence into 69(a) or 69(c) to get a K.
* If you are the offeree and you want a K, you’d better fit it into 69(b)
* Relationship between the parties or other circumstances may justify the assumption that silence indicates assent to the proposal (*Vogt v. Madden, pg 491 – sharecrop agreement*)

Rejection / Revocation

* §36: (see section under “offer”)
* §37: Termination of Power of Acceptance Under Option Contract
* Notwithstanding §§38-49 the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.
* §40: (summary) Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror
* §41: (see section under “offer”)
* §42: Revocation by Communication from Offeror Received by Offeree
* An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.
* §43: Indirect Communication of Revocation
* An offeree’s power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.
* §49: Effect of Delay in Communication of Offer
* If communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the delay, though it is due to the fault of the offeror;
* but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows no has reason to know that there has been delay, a contract can be created by acceptance within the period which would have been permissible if the offer had been dispatched at the time that its arrival seems to indicate.
* §50: (see section under “acceptance / counter-offer”)

Mailbox Rule

* §63: Time When Acceptance Takes Effect
* Unless the offer provides otherwise,

(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession, without regard to whether it ever reaches the offeror; but

(b) an acceptance under an option contract is not operative until received by the offeror.

* §64: Acceptance by Telephone or Teletype (summary) – substantially instantaneous 2-way communication is governed by same principles as face-to-face communication
* §65: Reasonableness of Medium of Acceptance (summary) – medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions
* §66: Acceptance Must be Properly Dispatched
* §67: Effect of receipt of acceptance improperly dispatched
* §68: What Constitutes Receipt of Revocation, Rejection, or Acceptance
* “A written revocation, rejection or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.”
* General rule is that acceptance is effective on dispatch
* If acceptance is sent before revocation is received, a contract is formed because revocation is effective when received and acceptance is effective when sent. The offeree may begin to perform the contract as soon as he dispatches his acceptance.
* Usually emails, faxes, etc. acceptances are effective upon dispatch

What Else Do We Need For A Contract?

Preliminary Negotiations

Certainty

* §33: Certainty
* (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
* (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
* (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.
* §34: Certainty and Choice of Terms; Effect of Performance or Reliance
* (1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.
* (2) Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.
* (3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.
* §2-204: Formation in General
* (1) A contract for 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.
* Can be tension between these provisions and §204
* **Definiteness** (pg 539): “offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain”
* Indefiniteness can either mean no intent to be bound (I might to it for you), or it can mean there is no basis for determining the existence of a breach
* “Even if the parties may manifest the intent to make a contract, if the essential terms of their agreement are so uncertain that there is no basis for deciding what the contract is for or whether the agreement has been kept or broken, there is no contract.”(*Academy Chicago v. Cheever, pg 537 – wife Ked with publishers to release unpublished works of husband, accepted down payment, tried to rescind K. K silent on certain terms*)

K Enforceable w/o Consideration

Past Performance

* Generally, past performance is not consideration b/c it was not bargained for
* However, several exceptions exist
* Can be enforced if a benefit was received and justice so requires

Promise to Pay Indebtedness (Exception to Past Performance Rule)

* §82:

(1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.

(2) The following facts operate as such a promise unless other facts indicate a different intention:

(a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or

(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or

(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.

* §83: An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding

Past Performance or Benefit (Exceptions to Past Performance Rule)

* §86:

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

(a) If the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

(b) to the extent that its value (the promise’s value) is disproportionate to the benefit

* No consideration when 3rd party agreed to pay for benefits received to other (*Mills v. Wyman, pg 152 – son returned sick from sea, taken care of, father promised to pay*)
* RULE: Where the promisee cares for, improves, and preserves the property of the promisor, though done w/o his request, it is sufficient consideration for the promisor’s subsequent agreement to pay for the service, b/c of the material benefit received (*Webb v. McGowin, pg 156 – P started to drop a block and then was injured while keeping it from hitting D*)
* **Quasi-K**: Even though no one has made a promise, one party may have to pay another b/c 1st party has received a benefit, and it would be unjust to retain the benefit w/o paying the other person for it

Waiver or Modification (see below)

Reliance (see below)

Mistake

* 4 categories
	1. Misunderstanding (§201)
	2. Unilateral mistake
	3. Mistake in transcription
	4. Mutual mistake
	5. Misrepresentation/Nondisclosure
* K itself satisfies O/A, MA, consideration; but it can be rescinded b/c of a mistake. Mistakes cut across everything.
* Cannot void a K if you bear the risk
* Remedies for a mistake? K is voidable and restitution is available.

Unilateral Mistakes: Mechanical Errors

* §151: Mistake Defined
* A mistake is a belief that is not in accord with the facts.
* §153: When Mistake of One Party Makes a Contract Voidable
* Where (1) a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has (2) a **material** effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if (3) he does not bear the risk of the mistake under the rule stated in §154, and (4)

(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his **fault** caused the mistake

* §154: When a Party Bears the Risk of a Mistake
* A party bears the risk of mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract was made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so

Risk of mistake must be allocated to a party where the mistake results from that party’s neglect of a legal duty

Only where the mistake results from a failure to act in good faith and fair dealing is rescission unavailable (*Donovan v. RRL Corp, pg 715 – typo on car dealers ad meant jaguar price was wrong, P tried to purchase at wrong price, D refused to sell*)

* Mistake must be substantial
* “Bad bargain” ≠ mistake

Mistakes in Transcription; Reformation

* §155: When Mistake of Both Parties as to Written Expression Justifies Reformation
* Where a writing evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.
* Requirements for Reformation
* Must have been an agreement between the parties
* Must have been an agreement to put the agreement into a record
* A variance exists between the prior agreement and the record
* Limitations on Reformation (*Chimart Assoc. v. Paul, pg 731*)
* Substantively: reformation is not available where the parties purposely contract based upon uncertain or contingent events
* Procedurally: heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties…parties seeking reformation must overcome this
* If the mistake exists in the writing unknown to both parties, it is mutual and reformation is allowed (*Travelers Ins v. Bailey, pg 728 – Bailey buys life insurance, company uses the wrong policy when they actually issue it ($500 per year vs $500 per month). Insurance co wanted them to reform the policy*)

Mutual Mistakes: Shared Mistaken Assumptions

* §152: When Mistake of Both Parties Makes a K Voidable
* (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a **material effect** on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the **risk** of the mistake under the rule stated in §154.
* (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution or otherwise.
* Unconscionable: unilateral (§153) vs mutual mistake (§152) are very similar, but §153 has an extra factor b/c of the fault aspect - says the effect must be unconscionable or other party must have known of mistake

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* Absent an assumption of the risk, if at the time of contracting for the sale of specific goods, unbeknownst to the parties, the goods never existed or are no longer in existence, no contract is made. Where the seller is negligent in having a mistaken belief, liability may be found on an implied warranty of existence or negligence theory – see UCC provisions – this may mean that the seller cannot void the contract because he bears the risk. UCC provisions involve an allocation of risk.
* §2-312: Warranty of Title and Against Infringement; Buyer’s Obligation Against Infringement
* (1) Subject to (2), there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

* (2) A warranty under (1) will be excluded or modified only by specific language on or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
* (3)… a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.
* §2-313: Express Warranties by Affirmation, Promise, Description, Sample
* (1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promises.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

* (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.
* §2-314: Implied Warranty, Merchantability, Usage of Trade
* (1) Unless excluded or modified (§2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
* (2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unity and among all units involved; and

(e) are adequately contained, packaged and labeled as the agreement may require; and

(f) conform to the promise or affirmations of fact made on the container or label if any.

* (3) Unless excluded or modified other implied warranties may arise from course of dealing or usage of trade.
* §2-315: Implied Warranty, Fitness for Particular Purpose
* Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified… an implied warranty that the goods shall be fit for such purpose.
* §2-316: Exclusion or Modification of Warranties
* (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (§2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
* (2) Subject to (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous….
* (3) Notwithstanding (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

* If the K is explicitly based on a shared assumption that turns out to have been mistaken, normally the mistake should furnish a basis for relief
* If there is a difference or misapprehension as to the substance of the thing bargained for, there is no K
* A barren cow is substantially a different creature than a breeding one (*Sherwood v. Walker, pg 732 – K to sell a cow that they thought was barren. Turns out the cow was pregnant, which greatly increased value of cow. Seller refused to sell cow, saying the K was for a barren cow*)
* When there is no pretense of any mistake as to the identity of the thing sold, rescission is improper (*Wood v. Boynton, pg 740 - found stone the size of a canary egg, sold it for $1, later figured out it was a rough diamond worth $700. W wanted stone back, B refused. Ct held for B*)
* Why are they different? Could argue that in SW they were sort of talking about other things, whereas in WB they were talking about the exact same thing. 154(a) doesn’t really apply. 154(b) might get you there (if you are Ps lawyer). Turns on how you describe the K. Tricky one.
* P could have money back b/c K was for sale of a genuine coin, not a coin that may or may not be genuine(*Beachcomber, pg 749 – coin supposedly minted in Denver*)

Misrepresentation

* §159: Misrepresentation Defined: A misrepresentation is an assertion that is not in accord with the facts
* Elements (§164)
1. Fraudulent statement or misrepresentation
2. Concerns a material fact
* Material: one to which a reasonable person would attach importance in determining his choice of action in the transaction
1. Justifiable reliance
* Whenever a party has fraudulently induced another to enter into a transaction under circumstances giving the latter to bring a tort action for deceit, the deceived party may instead elect to avoid the transaction and claim restitution. Misrepresentation or non-disclosure may render a transaction voidable even if there would be no tort cause.
* If the misrepresentation is intentional, avoidance is available regardless of the materiality of the fact.
* To recover for misrepresentation, the deceived party must establish causation – the party seeking recovery must have relied on the fact when entering into the transaction.
* Misrepresentation of fact may render a contract voidable; erroneous statements of opinion generally do not.

Nondisclosure

* §160: When Action Is Equivalent to an Assertion (Concealment)
* Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.
* §161: When Non-Disclosure Is Equivalent to an Assertion
* A person’s nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases **only**:

(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in party.

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

* General rule is that there is no duty to disclose. Exceptions are:
* Where a statute/regulation requires disclosure.
* There is a difference between non-disclosure and concealment – concealment can be considered misrepresentation.

Failure to disclose is misrepresentation (*Hill v. Jones, pg 757 – termite damage to the house, no current damage but sellers did not disclose the prior termite problems*)

* Where partial disclosure is made, lack of full disclosure may constitute misrepresentation.
* Where a party has made a true statement in good faith and supervening events make it no longer true, there is a duty to disclose the discovered truth if the representor knows that the other is relying on it.
* Relationship between the parties – fiduciary, confidential, etc. – there is a duty to disclose material facts.

Not a K: Donative (Gift) Promises

* + - RULE: A voluntary gift, without an exchange of value, is not ordinarily enforceable (*Dougherty v. Salt, pg 6: aunt’s gift of note for $3000 to nephew*)
		- RULE: The promise of a gift is unenforceable
		- No consideration
		- 2 process bases for enforcing promises
			* Evidentiary safeguards: problems of proof
			* Cautionary safeguards: deliberativeness
		- Executory gift: something that is to be given in the future
		- Executed gift: enforceable. Intent + transfer of possession. Do not have to be given back. Valid and legally binding transaction.
		- How would we protect the interests of the donee?
			* Offer something in return
			* Take immediate possession of the gift
			* Put it in a will
			* …Consideration!
* Conditional Promises: Question of **Motive** versus **Intent**
* Conditonal Bargain Promise: performance of the condition as the price of the promise
* Ex. If you mow my lawn, I will pay you $20. **Intent.**
* Conditional Donative Promise: performance of the condition as the necessary means to make the gift
	+ - Ex. If you walk to the cleaners, I will let you have my coat. **Motive.**

Not a K: Nominal Consideration

* RULE: Mere inadequacy of consideration will not negate an agreement…unless mere exchange of money(*Schnell v. Nell, pg 14: $200 for 1-cent*)
* The 1-cent was nothing special, just a penny. Schnell didn’t want it. >Not consideration.
	+ - Plays off the bargain theory (recall, exchange must be bargained for)
			* Nominal consideration is not a bargain.
			* *Form* of a bargain, but not the *substance*

Not a K: Illusory Promise

* §77: A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) Each of the alternative performances would have been consideration if it alone had been bargained for; OR

(b) One of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.”

* + - Illusory promise is a promise conditioned on the will of the promisor. Promisor has not limited themselves, thus no detriment, thus no consideration. If the promisor has a free way out of the agreement, the promise is illusory.
		- A contract with a cancellation clause, and a penalty to be paid upon any cancellation, was not an illusory promise because the cost of cancellation meant the lessee was giving something up (*Wasserman, pg 308*)

Not a K: Legal Duty Rule

* §73: Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration, BUT similar performance is consideration if it differs (is materially different) from what was required by the duty in a way which reflects more than a pretense of a bargain
* Comment (d): The rule that performance of a legal duty is not consideration for a promise has often been applied in cases involving a contractual duty owed to a person other than the promisor…But the tendency of the law has been simply to hold that performance of contractual duty can be consideration if the duty is not owed to the promisor
	+ - Often a matter of public policy, otherwise there would be an incentive to break Ks and hold out for more money
		- Logic behind the rule is that no new detriment has been created. No MoO and no consideration.
		- If the legal obligation has expired, renewing the obligation can be consideration
* RULE: When a party does what he is already obligated to do, he cannot demand additional compensation for it. (R2K §73 gives the same result) (*Lingenfelder v. Wainwright Brewery, pg 111 – brewery builder wanted more $ and % A/C install*)
* Ct. distinguished it from *Bishop v Busse – pg 113*, where the owner changed the plan for the house to cause the number of brick to substantially increase. Each party gave up something. Agree to modify the K and the K was enforceable.

A?

A?

B

* How we define the lines of a K is extremely important (and difficult). Lines define the scope of the legal duty. If A’s performance is already in the K, then it is not consideration.
* K law is pre-disposed to enforce modification, b/c the world is messy
* RULE: Payment of less than the debt does not satisfy the debt unless there is some other consideration (*Foakes v. Beer, pg 114 – installment pymts on principle and forgiveness of interest*)
* Example: Z owes C $1MM due Dec 1. Z can’t pay, offers to pay $900M in place of the $1MM. How to make it enforceable? Pay it before March 1 (i.e. a discount). Could even try paying in euros (exchange rate risk).
* Note: A promise (executory) is unenforceable, but you cannot take back an executed promise
* Duress ties in to legal duty – I already promised to do this, but I won’t unless you do X

Not a K: Against Public Policy

* §178-179
* A court can read a provision out of a K if public policy requires it (same concept as unconscionability)
* K itself might be legally enforceable, but this particular part is not
* Public policy is an overriding concern (especially in human issues) (*In Re the Marriage of Witten, pg 164 – frozen embryos*)
* Agreements entered into at the time in-vitro fertilization is commenced are enforceable and binding on the parties, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo (mutual assent)
* Agreements between spouses are usually not enforceable because the parties usually do not intend for them to have legal consequences (*Balfour v. Balfour, pg 163*)
* Ct found an implied agreement for partner to pay, but chose not to enforce it on public policy grounds (*TF v. BL, pg 173 – two women, gave birth after couple separated. Promised to pay support*)
* Surrogate parenting agreements are usually void and unenforceable if the mother’s agreement was obtained prior to a reasonable time after the child’s birth or if her agreement was induced by payment of money. (*RR v. MH, pg 183 – surrogate mother*)
* Contracts for the sale/exchange of organs are unenforceable (note: would not include expenses for storage, transfer or care of the organ) (42 USC §274(e))

When a K is Voidable: Mutual Assent / Duress - §§175, 176

* + - §175: Manifestation of assent induced by (1) an improper threat by the other party that (2) leaves the victim no reasonable alternative, the K is voidable by the victim (*Post v. Jones, pg 57: whaling vessel auctioned oil to rescuers*)
* Voidable (capable of being judged void), not automatically void
* Idea is that 1 party has absolute power
* §176: Improper Threat

(1)(a) Threat is a crime or tort

(1)(b) Criminal prosecution

(1)(c) Use of civil process

(1)(d) Breach of duty of good faith and fair dealing. \*\*\*Most open

(2)(a) Act would harm recipient and not significantly benefit maker

(2)(b) Prior unfair dealings

(2)(c) Power for illegitimate reasons

* + - Threat of financial loss ≠ duress
		- Hard bargain ≠ duress
		- Duress attacks the mutual assent component. Technically there is consideration, there just isn’t MA
		- Whether the duress was a situation caused your own fault, or something you had no impact on, could change the opinion on whether to void the K
		- Austin’s Supreme Court Rule for Economic Duress(*Austin v. Loral, pg 117 – K for gear parts, wanted more $ and the 2nd K*)
1. Threat of breach of K
2. No reasonable alternative
3. Normal remedy for breach (damages) insufficient

When a K is Voidable: Unconscionability

 Rules

* §2-302: If Ct, (1) as a matter of law, (2) finds the K of any clause to be unconscionable (3) at the time K was made, court may
1. Refuse to enforce the K
2. Enforce K w/o unconscionable clause
3. Limit application of unconscionable clause
* §208: If a K or term thereof is unconscionable at the time the K is made, a court may (do the same 3 things)
* Matter of law comment
	+ - Public policy element b/c judges decide matters of law
		- Consequence – appellate courts may overturn
	+ Common law also supports unconscionability

Comments

* + Absence of meaningful choice on the part of 1 party together with K terms that are unreasonably favorable to the other party, gross inequality of bargaining power, or whether the terms are “so extreme as to appear unconscionable according to the mores and business practices of the time and place” are all considerations of unconscionability (*Williams v. Walker-Thomas Furniture Co., pg 63*)
* 2 parts of unconscionability (*Maxwell v. Fidelity Financial Svcs. Inc., pg 76 – hot water heater*)
1. **Procedural**: procedures under which the mutual assent was gained (unfair surprise, fine print, ignorance)
2. **Substantive**: actual terms of the K (unjust, one-sided, fairness)
* Majority rule: both P and S elements must be present
* Minority rule: either P or S is enough. Ct in Maxwell believes that UCC contemplated S alone to be enough. If P only, then there are other remedies that are probably more appropriate (i.e. duress or fraud)

Changes to a K: Accord & Satisfaction

Rules

* §3-311 (§3 deals with commercial paper, i.e. checks)
* (a) If a person against who a claim is asserted proves that they
	+ 1. In good faith, tendered an instrument to the claimant as full satisfaction of the claim
		2. Amount of claim was unliquidated or subject to a bona fide dispute
		3. Claimant obtained payment of the instrument
* (b) Then… claim is discharged if person proves conspicuous statement that it was tendered in full satisfaction of the claim
* (c) BUT, claim is not discharged IF either
	+ 1. Claimant, if an organization, designated a specific person to handle disputed debts AND the instrument was not sent to that designated person, OR
		2. Any claimant, within 90 days of payment, tenders repayment
* (d) UNLESS, claimant knew the instrument was tendered in full satisfaction
* §281
	+ - * + (1) An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty. Performance of the accord discharges the original duty.
				+ Before performance of accord (🡪 executory), the original duty is suspended unless there is a

Breach by obligor (person that owes)

WILL discharge the new duty of the obligee to accept the satisfaction. If this happens, the obligee may enforce either the original duty or any duty under the accord.

Breach of obligee (happy, the person getting the money)

Does NOT discharge the original duty. Obligor may sue for specific performance of accord in addition to any damages for partial breach of the original contract.

Comments

* How might this satisfy consideration? 1 party accepts less money, the other party pays off their debt or loses their right to dispute the amount
* Policy reason behind §3-311: Debtor cannot unilaterally create an accord and satisfaction (b/c there is no consideration). New promise (or a modification) must have MA and consideration under common law rule.
* Need good faith in tendering the agreement, and need to have an honest dispute (if not honest, then one side isn’t really bargaining, flunks the consideration test) (*McMahon Food Corp. v. Burger Dairy Co., pg 127 – milk cases and several checks*)

Novation

* A novation requires a previously enforceable debt. A novation formed on a previous contract that is unenforceable is not valid (*Maxwell v. Fidelity Financial Services, Inc., pg 76 – solar water heater*)

Changes to a K: Substituted Contract

* §279
* (1) A substituted K is a K that is itself accepted by the obligee in satisfaction of the obligor’s existing duty
* (2) The substituted K discharges the original duty and breach of the substituted K by the obligor does not give the obligee a right to enforce the original duty
* Difference b/w substituted K and accord/satisfaction? In a substitution, the K itself discharges the original duty. Suit can only be brought on the new K. In an accord/satisfaction, original duty is not discharged until the satisfaction is complete.

Changes to a K: Modification (Change in the **Promise**)

* §2-209: Modification, Rescission, and Waiver
* (1) An **agreement** modifying a K within the UCC needs **NO consideration**
* (2) A signed agreement that excludes modification or recission, except by a signed writing, cannot be otherwise modified or rescinded, except as b/w merchants such a requirement must be on the proper form and signed
* (3) Statute of Frauds (§2-201) requirements must be satisfied
* (4) If an attempted modification or recission does not meet the above requirements, it can still operate as a waiver
* (5) Waiver can be retracted if reasonable notification is given to the other party, unless the retraction would be unjust in view of a material change of position in reliance on the waiver
* §89: A **promise** modifying a duty under a K not fully performed on either side is binding
* (a) If the modification is fair and equitable in view of **circumstances not anticipated** by the parties when the K was made, or
* (b) To the extent provided by statute
* (c) To the extent that justice requires enforcement in view of material change of position in reliance on the promise (promissory estoppel)
* Consideration **required**
* Common law: modification of a K **requires** consideration
* Under Modern law, exceptions have been recognized for unanticipated events. Consideration is not required – R2K §89(a)

Changes to a K: Waiver (Change of **Condition**)

* §2-209(4&5): See previous section for (1) – (3)
* (4) If an attempted modification or recission does not meet the above requirements, it can still operate as a waiver
* (5) Waiver can be **retracted** if reasonable notification is given to the other party, unless the retraction would be unjust in view of a material change of position in reliance on the waiver
* §84:

(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, **unless**

(a) occurrence of the condition was a **material part of the agreed exchange** for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of risk assumed by the promisor.

(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change or position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1)

* §1-107: Consideration is generally NOT required
* **Waiver** is relinquishment of the right to enforce a condition. Under certain circumstances waivers can be retracted.
* Conditions may be expressly waived
* Non-fulfillment of a condition can be excused if a party waives the condition (*Clark v. West, pg 144 – author who wasn’t allowed to drink liquor*)

Relief Valves for Enforcing a K (K w/o Consideration) - Reliance

Promissory Estoppel

* + - * §90: A PROMISE which the promisor should reasonably expect to induce action or 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.
* Not based on a contract approach, but merely an attempt to limit the damages incurred b/c of reliance.
* Compare with K theory, which says you get whatever the K said
* Reliance treated as a substitute for consideration
* Nice flexible rule. Could make an argument for expectation damages under the “justice requires” verbiage
	+ - * §87(2): Option Contracts
* (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
* (*Hoffman v. Red Owl, pg 573 - wanted to franchise a RO store, sold his bsns, did a bunch of other things, and moved after discussions with RO. Deal fell through*): Terms were too vague to be an offer, so P tried to win on PE grounds. Ct held PE applied under §87(2)
* Preparations to perform can give rise to PE type recovery
* Elements
1. Promise – statement that you are going to do something in the future
2. Reliance – relies on the promise
3. Reasonable – reliance must be reasonably expected (from an objective person’s standpoint)
4. Detriment – undertook an act or forbearance
* Kirksey: court ruled detriment b/c she retired b/c of the income
* *Hayes v. Plantations, pg 34* - no real reliance
* Ct held that damages for promissory estoppel could include the value of an opportunity lost due to the breach of a promise. That measure is more akin to an expectation measure than a reliance measure, but §90 does not require a reliance measure per se. (*D.G. Stout, Inc. v. Bacardi, pg 40*)

Estoppel in Pais: Misrepresentation of fact

* Elements
1. False representation of material fact
2. Reliance
3. Reasonable
4. Detriment
* Promisor estopped from denying truth of statement

Other Rules

* RULE: Ks of employment are presumed to be terminable-at-will
* True, but most courts don’t like really like this rule
* RULE: *Pepsi-Cola and Eby, pg 42* - Cannot recover lost future wages (expectation damages), but can recover reliance damages [moving costs = out-of-pocket losses and foregone wages = opportunity costs] from a employment K that is terminable at will. Indiana case.
* Restatement (Second) of Contracts is persuasive, but not authoritative

# Question 2: What does the K consist of?

* “Old Contract Law” = objective intention only, “New Contract Law” = subjective intentions of parties matters
* 1st thing to look at when trying to figure out what a K meant? The K itself (often has definitions)
* In an ideal world, K law should validate the intent of the parties. The laws hold that we validate when one party is more reasonable than the other. Reality, however, is that even reasonable minds can differ.
* §201 is a significant step away from traditional contract law because it allows for subjective intent
* §20: Above
* §201: Whose Meaning Prevails
* (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
* (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
* that party did not know/had no reason to know of any different meaning attached by the other, and the other knew/had reason to know the meaning attached by the first party.
* (3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.
* §202: Rules in Aid of Interpretation
* (1) Words and other conduct are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
* (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
* (3) Unless a different intention is manifested,
* (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
* (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.
* (4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
* (5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.
* §204: Supplying an Essential Omitted Term
* When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the Court.
* In the absence of an express term fixing the duration of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the surrounding circumstances and the parties’ intent, and the contract will not be terminable at will. Where the parties have not clearly expressed duration in a contract, the courts will imply that they intended performance to continue for a reasonable time. (*Haines v. New York, pg 399 – City of NY built and paid for a sewage system, city kept growing and facility as max capacity, P wanted to develop an area and tie in to sewage system, city refused b/c it would mean expanding the system. Ct held duration of K was for a reasonable time but the city did not have to expand*)
* §205: Duty of Good Faith and Fair Dealing
* Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement

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* §2-202: Final Written Expression: Parol or Extrinsic Evidence
* Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (even if the agreement is final)
* (a) by course of performance, course of dealing, or usage of trade (§1-303); and
* (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
* §1-205: Course of Dealing and Usage of Trade
* (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
* (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question…
* UT: custom of trade that people usually follow. Ex, chicken means fryer.
* (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
* CD: pattern of performance in prior K between the same parties. Ex, in all the previous K’s seller sent ½ stewing chickens, ½ fryers
* (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
* Note: means order is 1) express terms of contract; 2) course of performance (see §2-208 below); 3) course of dealing; 4) usage of trade
* (5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
* (6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.
* §2-208: Course of Performance or Practical Construction
* (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
* CP: pattern of performance during this particular K. Ex, seller sent fryers and buyer sent them back
* (2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§1-205).
* (3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver of modification of any term inconsistent with such course of performance.
* §203: Standards of Preference in Interpretation
* In the interpretation or a promise or agreement or a term thereof, the following standards of preference are generally applicable:
* (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;
* (b) express terms are given greater weight, then course of performance, then course of dealing, and finally usage of trade (paraphrased)
* (c) specific terms and exact terms are given greater weight than general language
* (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated
* §223: Course of Dealing
* (1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct
* (2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement
* §222: Usage of Trade
* (1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. It may include a system of rules regularly observed even though particular rules are changed from time to time.
* (2) The existence and scope of a usage of trade are to be determined as questions of fact. If a usage is embodied in a written trade code or similar writing the interpretation of the writing is to be determined by the court as a question of law.
* (3) Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.
* **UCC “Gap Fillers”:** used to fill gaps the parties leave in a contract for the sale of goods; are default rules that the law reads into a contract in the absence of the parties’ actual agreement on the issues.
* §2-305: Open Price Term
* (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
* (a) nothing is said as to price; or
* (b) the price is left to be agreed by the parties and they fail to agree; or
* (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
* (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
* (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
* (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable to do so must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.
* §2-308: Absence of a Specified Place for Delivery
* Unless otherwise agreed
* (a) the place for delivery of goods is the seller’s place of business or if he has none his residence; but
* (b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
* (c) documents of title may be delivered through customary banking channels.
* §2-309: Absence of Specific Time Provisions; Notice of Termination
* (1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.
* (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
* (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.
* §2-310: Open Time for Payment or Running of Credit; Authority to Ship Under Reservation
* “Unless otherwise agreed
* (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
* (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract; and
* (c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
* (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period
* “If there is a misunderstanding a K results on the terms understood by the party who is less at fault for the misunderstanding” (*Mayol v. Weiner Companies, pg 389 – Buyer signed K to purchase property subject to tenant’s rights, but buyer didn’t know tenant had an option to purchase until after he signed it*)
* “Every instrument in writing is to be interpreted, with a view to the material circumstances of the parties at the time of execution, in light of the pertinent facts within their knowledge and in such a manner as to give effect to the main end designed to be accomplished. (Spaulding v. Morse, pg 402 – Divorce, Dad agreed to pay son monthly stipend before and during college, son went into Army instead)
* Words don’t make sense without context. “The words in the clause standing alone are meaningless. But when taken in context with the preceding language of the contract…the clause can have but one objective meaning” (*Lawson, pg 404 – two years to cut and remove timber unless high water*)
* Williams: 3 kinds of non-logical implication
	1. Terms that the parties probably had in mind but did not trouble to express (effort to arrive at actual intention)
	2. Terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention (effort to arrive at hypothetical intention – intention the parties would have had if they had foreseen the difficulty)
		+ Haines v. New York
		+ Spaulding v. Morse
	3. Terms that the parties, whether or not they had them in mind or would have expressed them, are implied by the Ct b/c of the Cts view of fairness or policy (not concerned with the intention of the parties)

At-Will Employment Ks

* Original doctrine was that employment Ks could be terminated for cause, w/o cause, or for “bad” cause
* 3 general exceptions (*Wagenseller v. Scottsdale, pg 516 – Nurse employed at hospital under at-will employment K, good reviews, after rafting trip where she refused to participate in same inappropriate activities as boss, relationship deteriorated, eventually terminated*)
1. Public Policy: employer may terminate for good cause or for no cause, but may not fire for bad cause – that which violated public policy (clearly mandated)
2. Proof of an implied-in-fact promise of employment for a specific duration
* Employee handbook can be part of your employment K
1. Implied-in-law good faith and fair dealing: courts generally reject this
* Modification of EE handbooks:
* Some cts have held that “continuing to work…may constitute consideration”
* ITT case – “separate consideration, beyond continued employment, is necessary to effect a mod”

Parol Evidence Rule

* Comes in to play when there is a written agreement between the parties and one party seeks to admit oral evidence to aid in interpretation of the K
* PER will exclude evidence of any agreement, oral or written, that is entered into prior or contemporaneous with the written agreement (when it varies/contradicts/adds to the K terms)
* Corbin (UCC) emphasizes intent, discusses completely and partially integrated agreements, more inclusive. Williston emphasizes the writing.
* §214 trumps all; can always bring in contradictory evidence to show the agreement was not integrated
* §212 says you can always bring in extrinsic evidence to interpret the agreement
* PER examines whether or not the jury should hear the information. You still need to prove the information.
* §2-202 (see the previous section): UCC has a different PER. If the UCC applies, then course of performance, course of dealing, and usage of trade are **always** allowed. Remember that the R2K supplements the UCC, so for example, §214 might still play in to a UCC problem



**1**

*Mitchell v. Lath, pg 584 – Ds wanted to sell land, orally agreed to remove icehouse from their land, k subsequent to promise, gave deed to P, D never removed icehouse*

**2**

*Masterson v. Sine, pg 595 – conveyed ranch with an option to purchase in the deed, trustee in bankruptcy proceedings wanted land back, D wanted to introduce evidence that the option was only to keep the property in the family*

* §209: Integrated Agreements
* (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
* (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
* (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.
* §210: Completely and Partially Integrated Agreements
* (1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
* (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
* (3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
* §211: Standardized Agreements
* §212: Interpretation of Integrated Agreement (extrinsic evidence)
* (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter
* (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the **credibility** (i.e. whether X said Y) of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation of an integrated agreement is to be determined as a question of law (i.e X said Y. So what?)
* §213: Effect of Integrated Agreement on Prior Agreements (PER)
* (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
* (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
* (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.
* §214: Evidence of Prior or Contemporaneous Agreements and Negotiations
* Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
* (a) that the writing **is or is not an integrated** agreement;
* (b) that the integrated agreement, if any, is completely or partially integrated;
* (c) the **meaning** of the writing, whether or not integrated;
* (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
* (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.
* §215: Contradiction of Integrated Terms
* Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.
* §216: Consistent Additional Terms
* (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
* (2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
* (a) agreed to for separate consideration, or
* (b) such a term as in the circumstances might naturally be omitted from the writing.
* §217: Integrated Agreement Subject to Oral Requirement of a Condition
* Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition
* If the agreement is completely integrated in some respects and partially integrated in others, each type will be considered separately
* What is within the scope? “Surrounding circumstances, as well as the written contract, may be considered”
* Parol evidence v. extrinsic evidence – extrinsic evidence is broader than parol evidence because extrinsic evidence includes not only evidence of other agreements but also evidence of surrounding circumstances, evidence of subjective intention, usages, course of dealing and course of performance.
* Plain Meaning Rule: interpret the K based on plain meaning of the language (Williston influence). If the language is express and clear, Cts do not need to interpret it by reference to extrinsic evidence (*Steuart v. McChesney, pg 608 – sold farmland with right of 1st refusal, later argued over price to be paid when exercising the right*)
* Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties (*Pacific Gas v. GW Thomas Drayage, pg 615 – indemnity clause for steam turbine*)
* What K excludes consistent additional terms? Completely integrated agreements (§216)
* What K excludes evidence to interpret a term? None!

Exceptions or Special Circumstances

* Merger Clause: a statement that says “this is the K and nothing else matters.” If there is a merger clause, this declaration conclusively establishes that the integration is total, unless
* The document is obviously incomplete, or
* The merger clause was included as a result of fraud or mistake or any other reason sufficient to set aside a contract.
* But, even a merger clause will not prevent enforcement of a separate agreement supported by a separate consideration.
* If there is not a merger clause, look to the writing – does it appear to be a complete and exclusive agreement or is it obviously incomplete?
* Admissible if the evidence shows an “invalidating cause” of the written agreement (lack of consideration, duress, mistake, etc), even if there is a merger clause or the agreement is otherwise thought to be completely integrated
* Promissory fraud – when a party makes a promise with the intent not to perform it
* Rule does not apply to a parol agreement under which the occurrence of some state of events is a condition to making the written agreement binding or effective (idea is that before the condition occurs, there is no contract, so parol evidence may be freely applied)
* Does not apply to a later agreement that modifies an integration

Battle of the Forms – Form Contracts

* 2 problems: 1) was a K really formed; and 2) what were the terms of the K (this is often a problem even after performance has occurred)
* Mirror Image Rule: common law, any difference between offer and acceptance, no matter how minor, meant there was no K
* §2-207: Additional Terms in Acceptance or Confirmation
* (1) A definite and seasonable (timely) expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, **unless** acceptance is expressly made conditional on assent to the additional or different terms.
* (2) The additional terms are to be construed as **proposals** for addition to the contract. BETWEEN MERCHANTS such terms become part of the contract unless:
* (a) the offer expressly limits acceptance to the terms of the offer;
* (b) they materially alter it (“material” usually means economic significance or it would be likely to affect a party’s decision to enter into the contract); or
* (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
* (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act (generally meaning the “gap filler” provisions of the UCC).
* Inquiry is whether the offeree clearly and unequivocally communicated to the offeror that its willingness to enter into a bargain was conditioned on the offeror’s assent to additional or different terms. 2-207 only applies 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. Whether this has occurred is dependent upon the commercial context of the transaction. (*Gardner Zemke Co. v. Dunham Bush, Inc., pg 645 – K to purchase A/C units*)
* Knockout rule: conflicting terms in the offer and acceptance cancel each other out
* Typically the most important performance terms (performance each party must render) will be custom-tailored to each transaction, but the less important terms (non-performance) will typically be preprinted.



# Question 3: Was There a Breach?

Unexpected Circumstances

* 5 Basic Categories where performance is excused
* Destruction, deterioration or unavailability of the subject matter or tangible means of performance (*see Taylor v. Caldwell*)
* Failure of the contemplated mode of delivery or payment (see UCC §2-614)
* Supervening prohibition or prevention by law
* Failure of the intangible means of performance – by “an act of God, the law, or the other party”.
* Death or illness (if personal performance is required).

Impossibility

* If the performance depends on the continued existence of something
* But that thing becomes impossible
* Performance is excused

*Taylor v Caldwell, pg 765 – rented music hall for 4 days to have a concert, after K but before concert hall burned down*; performance was excused and money refunded

Impracticable

* When it can only be done at an excessive and unreasonable cost
* 3 Step Analysis (*Transatlantic financing, pg 774 – cargo shipped from Tx to Iran, tried to go through Suez but it was closed, went around Cape of Good Hope instead, cost them extra money*)
	1. A contingency – something unexpected – must have occurred
		+ If the contingency was reasonably foreseeable, the defense may be lost b/c it should have been included in the K
	2. Risk of unexpected occurrence must not have been allocated either by agreement or custom
	3. Occurrence of the contingency must have rendered performance commercially impracticable
* A manufacturer cannot express aspirations and gamble on mere probabilities without any risk of liability (*US v Wegematic, pg 771 – computer, manufacture was continually delayed, manufacturer tried to say it was impossible to build and so they were excused*)
* Not-always-true rule of thumb: if the world changes and then the K is made it is a mutual mistake, but if the K exists and then the world changes it is impracticability (think of the King’s coronation cases)
* §2-614: Substituted Performance
* (1) Where without fault of either party… the agreed manner of delivery… becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
* (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligations unless the regulation is discriminatory, oppressive or predatory.
* §2-615: Excuse by Failure of Presupposed Conditions
* Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
* (a) Delay in delivery of non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been **made impracticable** (note: this is commercial impracticability) by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made…
* (b) Where the causes mentioned in (a) affect only a part of seller’s capacity to perform, he must allocate production and deliveries among his customers… he may also allocate in any manner which is fair and reasonable.
* (c) the seller must notify the buyer…
* Three things are required under UCC §2-615
* Basic assumption of both parties
* No assumption of the risk by party seeking to use defense of impracticability
* Impracticability
* §2-616: Procedure on Notice Claiming Excuse (when buyer receives notification)
* (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts, then also to the whole,
* (a) **terminate** and thereby **discharge** any unexecuted portion of the contract; or
* (b) **modify** the contract by agreeing to take his available quota in substitution.
* (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.
* (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under §2-615.
* Allocation of Risk: §2-509 (Risk of Loss in the Absence of Breach) and §2-510 (Effect of Breach on Risk of Loss)

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* §261: Discharge by Supervening Impracticability
* Where, after a contract is made, a party’s performance is made impracticable **without his fault** by the **occurrence** of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, **unless** the language or the circumstances indicate the contrary.
	+ - Unexpected, no fault, risk not allocated? Sounds like mutual mistake!
* §262: Death or Incapacity of Person Necessary for Performance
* … is an event the non-occurrence of which was a basic assumption on which the contract was made…
* §263: Destruction, Deterioration, or Failure to Come Into Existence of Thing Necessary for Performance
* … is an event the non-occurrence of which was a basic assumption on which the contract was made
* §264: Prevention by Governmental Regulation or Order
* If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.
* §266: Existing Impracticability or Frustration
* (1) Where, at the time the contract is made, a party’s performance under it is impracticable without his fault because of a fact of which he had no reason to know \* and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
* (2) Where, at the time a contract is made, a party’s principal purpose is substantially frustrated without his fault by a fact of which he had no reason to know \*
* §267: Effect on Other Party’s Duties of a Failure Justified by Impracticability or Frustration
* (1) A party’s failure to render or offer performance may, except as stated in (2), affect the other party’s duties under the rules stated in §§237 and 238 even though the failure is justified under the rules [regarding impracticability].
* (2) The rule stated in (1) does not apply if the other party assumed the risk that he would have to perform despite such a failure.
* §268: Effect on Other Party’s Duties of a Prospective Failure Justified by Impracticability or Frustration
* (1) A party’s prospective failure of performance may, except as stated in (2), discharge the other party’s duties or allow him to suspend performance under the rules stated in §§251(1) and 253(2) even though the failure would be justified under the rules [regarding impracticability].
* (2) The rule stated in (1) does not apply if the other party assumed the risk that he would have to perform in spite of such a failure.
* §269: Temporary Impracticability or Frustration
* Impracticability of performance or frustration of purpose that is only temporary suspends the obligor’s duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.
* §270: Partial Impracticability
* Where only part of an obligor’s performance is impracticable, his duty to render the remaining part is unaffected if
* (a) it is still practicable for him to render performance that is substantial, taking into account of any reasonable substitute performance that he is under a duty to render, or
* (b) the obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered.
* §271: Impracticability as Excuse for Non-Occurrence of a Condition
* Impracticability excuses the non-occurrence of a condition if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result.

Frustration

* Includes several of the above, plus
* §265: Discharge by Supervening Frustration
* Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
* Four requirements to use doctrine of frustration:
* Object of one of the parties entering into the contract must be frustrated by a supervening event.
* Other party must also have contracted on the basis of the attainment of this object. (Basic assumption of both parties)
* Frustration must be total or nearly total
* Party seeking to use the defense must not have assumed a greater obligation than the law imposes (assumed the risk)

Material Breach

* A material breach is a breach that justifies the suspension of performance and the term “total” breach describes a breach that justifies cancellation of the contract.
* If you materially breached then you haven’t substantially performed, and the non-breaching party can rescind the K
* The doctrine of substantial performance concerns the question, when can a party who has breached a contract nevertheless bring suit under the contract. The doctrine of material breach concerns the very different question, when can a party who has not breached a contract (i) invoke the sanction of terminating the contract for the other party’s breach, and (ii) bring suit for damages for total breach.
* §241: Circumstances Significant in Determining Whether a Failure is Material
* In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
* The extent to which the injured party will be deprived of the benefit which he reasonably expected;
* The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
* The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
* The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
* The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
* §242: Circumstances Significant in Determining When Remaining Duties are Discharged
* In determining the time after which a party’s uncured material failure to render or to offer performance discharges the other party’s remaining duties to render performance under the rules stated in §§237 and 238, the following circumstances are significant:
* Those stated in §241;
* The extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;
* The extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party’s remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.
* Note: there is no “material breach” under the UCC because of the perfect tender rule, but look at warranty sections

Substantial Performance

* Basic concept: a party who did a substantial amount of the performance and is in breach can be forgiven
* CL says that every K has an implied condition that the parties will substantially perform. If you substantially perform, the breaching party can recover under the K. Quantum Meruit is different in that you forget about the price under the K and decide what reasonable amount compensates the breaching party for their work.
* Emphasizes the intent, not the literal words, of the K. Party in breach is entitled to the original compensation so long as the non-breaching party is compensated for any damages (to give him the benefit of the bargain). A breaching party can almost always get money on a restitution principle.
* For the doctrine to apply, the part unperformed must not destroy the value or purpose of the contract.
* An omission, both trivial and innocent, will sometimes be compensated for through damages and will not always be a breach of a condition to be followed by forfeiture. Such a substantial performance of the contract is not a breach and the non-breaching party cannot rescind the contract or seek damages for breach of contract. (*Jacob & Youngs v. Kent, pg 915 – house called for Reading pipe only, later discovered some of the pipe was from a different (but similar) manufacturer*)
* How do you make sure Reading pipe was used? Make it an explicit condition of the K
* The inquiry in determining substantial performance is not whether the breach was willful, but whether the party comports with standards of good faith and fair dealing. (*Vincenzi v. Cerro*)
* Mere deviations v. aesthetic deficiency
* In a construction contract, evidence that the materials used where in the same quality, appearance, market value and in cost as the brand stated in the contract may supply a basis for determining that the defect was not material. (*Jacob & Youngs v. Kent, pg 915*)
* Where there is a mere incompleteness or deviation which may be easily supplied or remedied after the contractor has finished and the cost to the owner is not excessive and readily ascertainable, the court will usually find substantial performance. Where the part of the contract not performed is aesthetic and a material part of what was bargained for, the court will usually find that substantial performance did not occur. (*O.W. Grun Roofing & Constr. Co. v. Cope, installed new roof but it had yellow streaks and needed to be fully replaced*)

Buyer’s Rights – The “Perfect Tender” Rule (No “substantial performance” doctrine in the UCC)

* §2-601: Buyer’s Rights on Improper Delivery
* Subject to the provisions of this Article on breach in installment contracts (2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
* (a) reject the whole; or
* (b) accept the whole; or
* (c) accept any commercial unit or units and reject the rest.
* §2-602: Manner and Effect of Rightful Rejection
* Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
* Subject to the provisions of the two following sections on rejected goods (2-603 and 2-604),
* (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
* (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article, he is under a duty after rejection to hold them with reasonable care at the seller’s disposition for a time sufficient to permit the seller to remove them; but
* (c) the buyer has no further obligations with regard to goods rightfully rejected
* The seller’s rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller’s remedies in general (2-703).
* §2-608: Revocation of Acceptance in Whole or in Part
* (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
* (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
* (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances.
* (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
* §2-606: What Constitutes Acceptance of Goods, §2-607: Effect of Acceptance
* §2-612: “Installment Contract”; Breach – NOTE: THIS IS NOT THE PERFECT TENDER RULE
* (1) An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause “each delivery is a separate contract” or its equivalent.
* (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
* (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Seller’s Rights

* §2-508: Cure by Seller of Improper Tender or Delivery; Replacement
* (1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
* (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.
* Courts are more concerned with the reasonableness of the seller’s belief that the goods would be acceptable rather than with the seller’s knowledge or lack thereof of the defect. (*T.W. Oil v. Consolidated Edison, pg 927 – K to purchase oil based on previous tests, when oil arrived it had more sulfur than it stated*). Ct identified the 3 underlined elements of 2-508.

Good Faith & Fair Dealing

* §1-201(19): “Good faith” means honesty in fact in the conduct or transaction concerned.
* §1-203: Obligation of Good Faith
* Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.
* §205: Duty of Good Faith and Fair Dealing
* Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
* In every contract there is an implied understanding on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part (*Patterson v. Meyerhofer, pg 886 - agreed to purchase 4 parcels of property after P bought them at a foreclosure sale, D instead bought them herself at the sale*)
* One party merely making the contract more difficult to perform will not excuse a breach of contract by the other party, but the conduct of one party which prevents the other from performing may be an excuse for nonperformance (*Iron Trade v. Wilkoff, pg 888 – K for rails, P purchased some of their own and caused the market to go up, so D didn’t want to sell the rails for the K price*)

# Question 4: What are the Remedies / Damages?

Legal Rules Regarding Damages

* §344: Judicial remedies serve to protect one or more of the following interests of a promisee
* (a) His “**expectation interest**,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed
* Note: This is the preferred interest to promote because it encourages people to contract because they will receive the “benefit of the bargain” whether or not the contract is performed. This encourages more efficient contracting.
* Value of “perfect hand” minus value of post-op hand (*Hawkins v. McGee, pg 190 – scar tissue from a burn and an ugly skin graft*). Unanticipated pain and suffering can be built in to the value of the post-op hand.
* Expectation: ☺ - ☹
* (b) His “**reliance interest**,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
* Out-of-pocket costs: costs incurred by promisee in reliance prior to breach, minus the value produced by those costs that can be realized after breach
* Opportunity costs: things the promisee would have enjoyed if he had taken opportunities that the given promise made him forgo
* Value of the pre-op hand minus value of post-op hand (*Hawkins*). Pain and suffering can be built in to the value of the post-op hand.
* Reliance: 😐 - ☹
* (c) His “**restitution interest**,” which is his interest in having restored to him any benefit that he has conferred on the other party
* Promissory restitution: Person has received some benefit. Later promises to pay the other party X. X is a good indication of what the person thought it was worth.
* Restitution: ☺ 🡪 🡨 ☹
1. Purpose of damages is to put the person in as good of a position as if the K had been performed
	* Don’t typically had punitive damages in K law, unless there is some sort of a tort (since the goal of tort law is partially to punish the D, also to compensate the P)
2. Efficient breach means you make more by breaching the K than by keeping it. Supposedly K law is value neutral and the cts aren’t in the business of punishment. Key is still preserving the interest of the non-breaching party.
3. There is no single size measure for damages

**Expectation Damages**

1. Breach of a K to Perform Services
	1. Breach by the person who has contracted to perform services
	2. Breach by the person who has contracted to have services performed (not addressed)
2. Breach of a K for the Sale of Goods
	1. Seller’s breach
	2. Buyer’s breach

Breach of a K to Perform Services (by the person who has contracted to perform)

* §348: Alternatives to Loss in Value of Performance
* (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
* (a) The diminution in the market price of the property caused by the breach, or
* (b) The reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him
* Ordinary rule is **cost of performance**, except where the provision breached was merely incidental to the main purpose and CoP would be grossly disproportionate, then **diminution in value** is the appropriate measure of damages (*Peevyhouse v. Garland Coal & Mining Co., pg 220 – coal miners failed to restore the farm*)
* Diminution in value: value of farm if D had done what they promised to do (minus) present value of farm
* Examples
* Fact finder may determine that if CoP is awarded instead of DIV (even if CoP is more) the owner will actually complete performance. If he is not interested in obtaining the best immediate economic position, cost of repair may be appropriate.
* In case where oil and gas well polluted their land, Ct held that the proper award of damages was the DIV of the property, not the cost to reduce the level of contamination to the required level (*Schneberger v. Apache Corp, pg 228*)
* Where the appearance of the beams was central to the aesthetics of the architectural scheme, when the beams were defective the Ct held that CoP was the proper remedy even though it was more than DIV – defect was not incidental (*City School Dist. Of Elmira v. McLane Const. Co, pg 232*)
* When a vendor breaches K for a prior sale because of a subsequent sale of the same property, he should pay as damages to the original buyer the profit in the subsequent sale. The seller becomes a trustee for the original buyer. This is to protect the expectation interest of the original buyer in receiving property that is worth more than they would have paid. (Coppola Enterprises, Inc. v. Alfone, pg 207)
* Where one party does not suffer a measurable loss from a breach of contract by the other party and the defendant’s breach is deliberate and willful, damages limited solely to diminution in value of what the party should have received may sometimes be seriously inadequate and other damages should be given. (Laurin v. DeCarolis Construction Co., pg 208)

Breach of a K for the Sale of Goods – Breach by the Seller

* 2 categories
1. Specific relief, buyer is awarded actual goods
2. Damages, two subcategories
	1. Buyer’s remedies when seller fails to deliver or buyer properly rejects the goods or revokes his acceptance (§2-711 to 715, 723, 724)
	2. Buyer’s remedies when buyer has accepted the goods, and cannot or does not want to rightfully revoke his acceptance, but the goods are defective (§2-714)
* §2-711: Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole K, the buyer may cancel and whether or not he has done so may, in addition to recovering so much of the price as he has paid,

(a) ‘cover’ and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (§2-713)

* §2-712: “Cover”; Buyer’s Procurement of Substitute Goods

(1) After a breach within the preceding section, the buyer may ‘cover’ by making in **good faith** and **without unreasonable delay** any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§2-715), but less expenses saved in consequence of the seller’s breach.

* **Cost of Cover – K price**

(3) Failure of the buyer to affect cover within this section does not bar him from any other remedy.

* §2-713: (No Cover/”Hypothetical Cover”) Buyer’s Damages for Non-delivery or Repudiation

(1) Subject to the provisions of this Article with respect to proof of market price (§2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (§2-715), but less expenses saved in consequence of the seller’s breach.

**Market Price – K price**

If you don’t cover, you can’t sue for lost profits

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

* §2-715: Buyer’s Incidental and Consequential Damages

(1) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and other reasonable expense incident to the delay or other breach.

(2) Consequential damages include

Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise, and

Can’t recover if the expense could have been prevented by covering

Injury to person or property proximately resulting from any breach of warranty

* §2-714: Buyer’s Damages for Breach in Regard to Accepted Goods

(1) When the buyer has accepted the goods and given notification, he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

* CISG rule on damages is article 74. More general than the UCC b/c it doesn’t break it down.

Market Value

* §2-723: Proof of Market Price: Time and Place

(1) … any damages based on market price shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he had given the other party such notice as the court finds sufficient to prevent unfair surprise.

* §2-724: Admissibility of Market Quotations

… reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence.

* Remedies are not the same as damages. Damages in K law means money amount that is being attributed to the remedy prescribed by the ct. Other remedies may not involve money damages.
* Whatever rule the court is using, test it against the 3 types of damages. If it doesn’t work, need to revise it.
* Court is granted “reasonable leeway” in measuring market price (*Egerer v. CSR West, LLC, pg 243 – k to fill land development w/pit run*)
* Variable costs may be included in the computation of lost profits, but fixed costs are generally not b/c they aren’t really tied to the K (*Delchi Carrier v. Rotorex, pg 248*)
* Crappy goods delivered to buyer. Buyer rejects. They can have §§2-711, 712, 713, 715. If Buyer decides to keep them, then he gets §§2-714, 715.

Breach of a K for the Sale of Goods – Breach by the Buyer

* §2-501: Insurable Interest in Goods; Manner of Identification of Goods

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers to even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale or for the sale of crops to be harvested within twelve months or if the next normal harvest season after contracting whichever is longer.

* §2-702: Seller’s Remedies on Discovery of Buyer’s Insolvency
* §2-703: Seller’s Remedies in General

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may:

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided (§2-205);

(c) proceed under the next section respecting goods still unidentified to the contract;

(d) resell and recover damages as hereinafter provided (§2-206);

(e) recover damages for non-acceptance (§2-208) or in a proper case the price (§2-709);

(f) cancel

* §2-704: Seller’s Right to Identify Goods to the Contract Not-withstanding Breach or to Salvage Unfinished Goods

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner

* §2-706: Seller’s Resale Including Contract for Resale

(1)… the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (§2-710), but less expenses saved in consequence of the buyer’s breach.

**K price – Resale price**

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale…

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§2-207) or buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest.

* §2-708: Seller’s Damages for Non-acceptance or Repudiation

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price, the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (§2-710), but less expenses saved in consequence of the buyer’s breach.

**K price – Market price (expectation interest)**

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit which the seller would have made from full performance to the buyer, together with any incidental damages provided in this Article (§2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

* §2-709: Action for the Price

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damages within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated, a seller who is held not entitled to the price under this section may nevertheless be awarded damages for non-acceptance under the preceding section.

* §2-710: Seller’s Incidental Damages

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.

* Whether or not the buyer actually suffered the economic damages, or if instead he was able to pass them along to a subsequent party, is irrelevant in the damage calculation (*KGM Harvesting v. Fresh Network, pg 253 – lettuce sales and cost-plus provision*)
* For a volume seller (sells several of the exact same things), a buyer’s breach amounts to a lost sale, not a resale. Thus, the profit on this lost sale can affect the buyer’s restitution through offset (*Neri v. Retail Marine Corp., pg 260 – K to buy boat, seller resold*)

In other works, proceeds of the resale are not to be credited to the buyer if the seller is a lost volume seller (*Teradyne, Inc. v. Teledyne Industries, Inc., pg 264*)

* §2-718: Liquidation or Limitation of Damages; Deposits

(1) Damage for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

* A failed liquidated damages clause is a penalty. L.D. clauses are triggered by breach.

(2) Where the seller justifiably withholds delivery of goods because of the buyer’s breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of term liquidating the seller’s damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller (the consolation prize)

(3) The buyer’s right to restitution under subsection (2) is (also) subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract

* If you can prove seller is entitled to any other damages, they can subtract that from the restitution of the down payment

Special Cases: Mitigation

* Duty to mitigate damages. Although this goes against the bedrock principle that the P should be in a good a position as if the K had been performed, the argument for duty to mitigate is to avoid economic waste.
* Duty to stop work and mitigate future damages. The measure of P’s damage…is an amount sufficient to compensate P for labor and materials expended and expense incurred in the part performance of the K, prior to its repudiation, plus the profit which would have been realized if it had been carried out in accordance with its terms (*Rockingham County v. Luten Bridge Co, pg 266 – bridge builders kept building after county told them to stop*)
* §2-704(2): Seller’s Right to Identify Goods to the Contract Not-withstanding Breach or to Salvage Unfinished Goods

(2) Where the goods are unfinished an aggrieved seller may, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, either complete the manufacture and wholly identify the goods to the K or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

Coat for Yao Ming’s wire. Under (2), Cts understand the seller may be in a difficult position. If you finish the coat you can go to §2-706 or §2-708. Alternatively, you can sell it for scrap under the above.

* §2-715(2): Buyer’s Incidental and Consequential Damages

(2) Consequential damages include

Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise, and

Can’t recover if the expense could have been prevented by covering

Injury to person or property proximately resulting from any breach of warranty

* §350: Avoidability as a Limitation on Damages

(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extend that he has made reasonable but unsuccessful efforts to avoid loss.

Mitigation: K for Employment

* Duty to mitigate through reasonable action, reasonable does not require party to seek “different or inferior employment”
* The measure of recovery by a wrongfully discharged EE is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the EE has earned or with reasonable effort might have earned from other employment (*Shirley MacLaine Parker v. 20th Century, pg 272 – actress hired for film that was cancelled, didn’t want the other film*)

Sullivan dissented on procedural grounds b/c whether or not it was inferior was a fact issue

What is “reasonable” can depend on a lot of factors, including the type or job or profession

* Cts have held that duty to mitigate does not necessarily mean EE is obligated to accept employment at a distance from his home. Search required may be confined to the immediate community or neighborhood (*Punkar v. King Plastic Corp, pg 275*)
* The employee may recover necessary and reasonable expenses incurred in an effort to avoid or mitigate damages under the original employment contract. (*Mr. Eddie, Inc. v. Ginsberg, pg 275*)
* If the employee obtains other employment, even if different or inferior, his earnings are used in calculation of mitigation of damages. (*Southern Keswick, Inc. v. Whetherholt, pg 276*)
* If the employee can prove real and specific losses that resulted from the injury to their reputation by the breach of contract (i.e. damage to reputation that hurts future opportunities, inability to practice the profession if such practice was reasonably foreseeable through the contemplation of the contract), such damages may be recoverable.

Special Cases: Foreseeability

* Rule of Foreseeability (*Hadley Rule*): Damages are such as may fairly and reasonably be considered either

(1) Arising naturally or as a probably result of the breach, or

(2) Special circumstances under the K communicated between parties

* Rule promotes the sharing of information (*Hadley v. Baxendale, pg 279 – broken crank shaft S/D mill for a few days, mill sued for lost profits and court denied recovery*)
* Underlying principle is social policy and disproportionate compensation
* §2-713, §2-715(2)
* §351: Unforeseeability and Related Limitations on Damages

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

* In order to establish liability the P must merely show that the Ds breach was a substantial factor in causing the injury (*Independent Mechanical Contractors, Inc. v. Gordon T Burke, pg 291*)
* Test is reasonable foreseeability, not actual knowledge. It doesn’t have to be the most foreseeable consequence, just a foreseeable consequence to the reasonable person (*Hector Martinez and Co. v. Southern Pacific Transp., pg 287*)

Special Cases: Certainty

* §1-106(1): Remedies to Be Liberally Administered

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in the Act or by other rule of law.

* §352: Uncertainty as a Limitation on Damages

Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.

* Damages must be

(1) Demonstrated with certainty that such damages have been caused by the breach, and

(2) Alleged lost must be capable of proof with reasonable certainty, and

(3) Must be a showing that the particular damages were “foreseeable”

*Kenford Co. v Erie County, pg 292 – domed stadium in Buffalo*

* Requirement that damages be reasonably certain does not require absolute certainty. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation (*Ashland Management Inc. v. Janien, pg 295*).
* If it is a new business seeking to recover loss for future profits, a stricter standard is imposed for the reason that there does not exist a reasonable basis of experience on which to estimate lost profits with the requisite degree of reasonable certainty (*Kenford Co. v. Erie County, pg 292*)
* Courts considered damages certain where racehorse had proved her ability prior to the breach and then was consistent in the year after the breach (*Rombola v. Cosindas, pg 297*)
* “Mathematical precision” not required.

Damages for Mental Distress

* §353: Loss Due to Emotional Disturbance

Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

* §355: Punitive Damages

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable

* General rule, with a few exceptions, is to uniformly deny recovery for mental distress damages although they are foreseeable within the rule of *Hadley* (*Valentine v. General American Credit, Inc., pg 302*)
* Generally no mental distress damages if contract is economic in nature. Courts will consider whether the contract has elements of personality. (*Valentine*)
* If the contract is personal in nature (ex. care for one’s child, performance at a wedding reception, for a vacation, etc) and it is foreseeable that a breach of contract would result in mental distress, damages for mental distress may be recoverable. (*Lane v. Kindercare Learning Centers, Inc.; Jarvis v. Swan Tours, Ltd.; Deitsch v. Music Co., pg 305-308*)

Liquidated Damages

* §2-718(1): Liquidation or Limitation of Damages; Deposits
* §356(1): Liquidated Damages and Penalties

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

* **Liquidated Damages**: Sum a party agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages, is legally recoverable
* **Penalty**: Sum a party agrees to pay as a punishment, the threat of which is designed to prevent the breach, not legally recoverable
* Reasonableness and difficulty of estimating the harm are the standards for deciding the validity of stipulated damages clauses (*Wasserman’s Inc. v. Middletown, pg 308 – grocery store had a 30-year K with the town, K had a cancellation clause that stipulated if the K was cancelled, town would pay for the improvements made and 25% of the gross receipts for 1 year*)

Trend is to assess reasonableness either 1) at the time of K formation; or 2) at the time of the breach

Factors to consider: reasonableness of using gross receipts as a measure no matter when the cancellation occurs, significance of the award of damages, reasoning of the parties, duty to mitigate, fair market rent, availability of replacement space (Wasserman)

* Policy reasons for allowing stipulated damages are: economic efficiency, judicial economy, freedom to contract
* Clauses to return a deposit in full will generally not be enforced if damages (against the deposit) could be accurately estimated at the time of contract. (*Lee Oldsmobile v. Kaiden, pg 315*)
* Under-liquidated Damages Clauses: Limiting damages to an amount less than the estimated damages. Generally enforced.

§2-719: Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Specific Performance

* The default is that damages are money damages. Specific performance is the exception to this rule.
* At common law, a court should award SP only when money damages are inadequate (because the don’t fully compensate the plaintiff)
* SP is when the Ct orders the breaching party to perform the contract, instead of requiring money damages
* Arguments against SP

Public policy

Difficulties of supervision

Personal relationships

* Unidroit 7.2.2 (not law) – Parties may require performance, unless…preference is for SP
* §2-716: Buyer’s Right to Specific Performance or Replevin

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

Note: uniqueness is measured by the entire circumstances, not just the good itself (i.e. Are the terms of the contract unique? What is the good? Is there any substitute?)

(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) The buyer has a right of replevin for goods identified to the contract if, after reasonable effort, he is unable to effect cover…special cases for household goods

* Where is the seller’s right to SP? SP for a seller is to get the money. §2-709.
* §357: Availability of Specific Performance and Injunction

(1) Subject to the rules stated in §§359-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty.

(2) Subject to the rules stated in §§359-69, an injunction against breach of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty if

(a) the duty is one of forbearance, or

(b) the duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.

* §359: Effect of Adequacy of Damages

(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.

(2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.

(3) Specific performance or an injunction will not be refused merely because there is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in §357.

* §360: Factors Affecting Adequacy of Damages

In determining whether the remedy in damages would be adequate, the following circumstances are significant:

(a) the difficulty of proving damages with reasonable certainty,

(b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and

(c) the likelihood that an award of damages could not be collected.

* §367: Contracts for Personal Service or Supervision

(1) A promise to render personal service will not be specifically enforced.

(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

* An equitable decree will not be adjudged unless the ordinary common law remedy of damages for a breach of K is an inadequate and incomplete remedy for injuries arising from the failure to carry out its terms (*London Bucket Co v. Stewart, pg 326 – K to furnish and install a heating system, D did a bad job and never finished, P sued for specific performance*)
* Specific performance is traditionally the remedy for breach in the sale of real property
* Damages may be inadequate if difficult to calculate. One reason against SP is when things are of a personal nature and it is difficult to determine if there was full performance or not.

|  |  |  |
| --- | --- | --- |
| **Principle factors in determining if Ct should award SP** | **$ - Easy to Calculate** | **$ - Hard to Calculate** |
| **Supervision of SP – Easy** |  | Most likely a court will award SP. *LaClede Gas Co, Walgreens* cases. |
| **Supervision of SP – Hard**  | Least likely. *London Bucket* case. |  |

* *Walgreen Co., pg 328 – Walgreen had 30-yr K with mall that said they were to be the only pharmacy, anchor store went out of business and mall tried to move in a Phar-Mor*

TC awarded injunction. Appellate court upheld.

Posner argues that if an injunction is granted, a commodity (monopoly) is granted to Walgreens. Walgreens can then bargain with Phar-Mor to determine the value of that commodity. This bargaining would be more efficient that the judicial system.

Walgreens would have to calculate how much they would make over the next 10 years with and w/o Phar-Mor in the mall, a difficult computation. But supervision would be easy.

How much deference should an appellate ct give to a lower court’s judicial ruling of an injunction? Pg 329 – “whether the district judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes”

Reliance

* §344(b): His “**reliance interest**,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

Value of the pre-op hand minus value of post-op hand (Hawkins). Pain and suffering can be built in to the value of the post-op hand.

Reliance: 😐 - ☹

* §345: Judicial Remedies Available

The judicial remedies available for the protection of the interests stated in §344 include a judgment or order

(a) awarding a sum of money due under the contract or as damages

(b) requiring specific performance of a contract or enjoining its non-performance

(c) requiring restoration of a specific thing to prevent unjust enrichment

(d) awarding a sum of money to prevent unjust enrichment

(e) declaring the rights of the parties, and

(f) enforcing an arbitration award

* §349: Damages Based on Reliance Interest

As an alternative to the measure of damages stated in §347 [measure of damages in general], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

* Where a K has been breached, the non-breaching party may, at the party’s discretion, recover damages incurred in reliance on the K, including expenditures made before the K was entered into, as an alternative to recovering expectation damages;
* OR Where a K has been breached, the non-breaching party may recover expectation damages. If, however, the damages cannot be proven with **reasonable certainty**, the non-breaching party may recover under reliance theory if such damages are reasonably foreseeable (*Security Stove, pg 341 – P manufactured a combo oil-gas burner furnace, K with D to ship furnace to industry exhibit, most important piece never showed up and P never displayed furnace. P sued for reliance damages.*)
* Where a contract is made with a carrier and the carrier has notice of a peculiar circumstance under which the shipment is made, which will result in an unusual loss by the shipper in case of delay in delivery, the carrier is responsible for the real damage sustained from such delay if the notice given is such that the carrier will be presumed to have contracted with reference to the special circumstances (*Security Stove, pg 341*)
* Rationale for granting reliance damages: When the amount of expected profit cannot be determined with the requisite degree of certainty, the amount of the gain which would have reimbursed plaintiff for the expenditures incurred in preparation and part performance can be determined, and those expenditures should be allowed in recovery. (*Beefy Trail, Inc., pg 345*)

Restitution

* §344(c) His “**restitution interest**,” which is his interest in having restored to him any benefit that he has conferred on the other party

Restitution: ☺ 🡪 🡨 ☹

* §370: Requirement that Benefit be Conferred

A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.

* §371: Measure of Restitution Interest

If a sum of money is awarded to protect a party’s restitution interest, it may as justice requires be measured by either

(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant’s position, or (QUANTUM MERUIT)

(b) the extent to which the other party’s property has been increased in value or his other interests advanced (QUASI-CONTRACT).

* §374(1): Restitution in Favor of Party in Breach

(1) Subject to the rule stated in Subsection (2), if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party’s breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.

* Policy reasoning? Unjust enrichment.
* Restitution is available where there has been a K breach of vital / essential / material importance (*Osteen v. Johnson, pg 348 – P country singer, K with D to promote music and do certain activities as part of that, D did some but not all of the required activities*)
* \*\*\*Just like promissory estoppel, restitution is available even when there was no K to begin with (so if the Statute of Frauds had prohibited a K, someone can still argue for restitution)
* If a major breach, party can **suspend performance** (**rescind**) and sue for restitution
* Plaintiff has the option to forego any suit on the contract (for damages to address expectation interest) and claim only the reasonable value of his performance (restitution) (*United States v. Algernon Blair, pg 351 – Blair and Coastal had a K for construction of a naval hospital, B refused to pay for crane rental so C terminated. But if the K had been performed, C would actually have lost money. C sued B.*)
* **Quantum Meruit**: allows a Plaintiff to recover the value of services he gave to the Defendant of whether he would have lost money on the contract and been unable to recover otherwise. The measure of recovery for quantum meruit is the reasonable value of the performance, undiminished by any loss that would have been incurred by complete performance. The standard for measuring the reasonable value of services rendered is the amount for which such services could have been purchases from one in the plaintiff’s position at the time and place the services were rendered.
* Whenever the breaching buyer proves that the deposit exceeds the seller’s actual damages suffered as a result of the breach, the buyer may recover the difference (*Kutzin, pg 355 – Buyers put a down payment on a house, K had a condition precedent giving attorneys 3 days to review and amend K, despite some communication Ct held still a K, buyer withdrew offer, seller resold house but refused to return deposit*)

# Hypos and Review Problems

Chapter 1 Review Problem, pg 28-29:

* Promise supported by bargained-for consideration? Not likely. Consideration only an issue for enforcement of a promise. Is there even a promise here? Question of motive or intent, bargain versus condition.
* Promissory estoppel versus estoppel in pais? Again, is there even a promise? Nephew does seem to be relying on the funds.
* Deceit? Intentional misrepresentation, has an element of intent. Uncle didn’t intend to deceive.
* What damages are appropriate?
* Expectation damages: Give the nephew the $40K he would have gotten
* Reliance damages: May be lost opportunity costs. Could have been on his way to buy stock in a brand new company, spent the money here instead.

Chapter 1 Hypos

* Hypo 1: C is in law school and takes the bus to school. Aunt feels sorry for C and says “I’ll give you my VW for $10.” VW really worth $5000. Aunt renigs.
* Can C assert his right in a court of law? Probably seen as a gift intent, not a bargain intent. The Aunt didn’t really want the $10.
* What if C had promised to pay the $10? Is this nominal value or a K?
* Hypo 2: Uncle tells you to go to law school and he promises to give you $8K a month for expenses. You go. He stops paying. You sue. Now what? Could argue this point, but pretend no consideration. Left with promissory estoppel. What is the detriment? Goes both ways.

Chapter 2 Hypos

* Hypo 3: Jim runs catering bsns in Houston, has a fleet of trucks. Day after Hurricane he begins bringing food to NO. Had K with G ($3K/truckload of food) to bring him food for his farm. G agrees, said he had no choice if he wanted to save his farm. Jim presents bill to G for $30K. (J making 1000% profit in the deal). Any argument that G can make to say he isn’t required to pay? Duress under §175? Maybe. Counter-argue that J saved the chickens and that from an economic standpoint it made perfect sense. UCC would apply here (sale of goods).
* Hypo 4: K to install A/C. $10K total K value, $5K for new A/C, $3K for labor, $1K installation, $1K profit. Does the UCC apply? Discuss the predominant factor test v. severing test.
* Hypo 5: Local club signed K with band to play in “arrangements to be made later, at club’s discretion, rate of $500/night. K was for 2 years.” Band played 1 night and then became famous. Club wants them to play tomorrow for $500. Band says no. Club comes to you. What do you tell them?
* Probably a bilateral K (but can you argue unilateral?).
* SoF? Assume it’s written
* Sounds like MA, but is there a MoO? Is this too much like the coal Wickham coal case, where the club can do whatever it wants but isn’t really bound?
* K with construction company to remodel apartment for a fixed price. Later discover that sheet rock is in short supply and the construction co will have to pay a lot more than expected. CCo asks for 10% more. Z says yes. Is the new K enforceable?
* New K for something that was already agreed to (fixed price)? No via legal duty rule.
* Suppose the K says “CCo shall remove all existing sheet rock, prep walls, apply new sheet rock, then paint walls.” CCo finds that studs are rotted and need replacing. Ask for $500 more, agreed. Enforceable? If repairing studs is a different service, then yes. If that was an included promise, then no.
* What it K says “shall remove all existing sheet rock, prepare the studs, and apply new sheet rock?” Again, still depends on whether repairing studs is a different service.
* Constant fight between too specific and too general. Construction contracts are notorious for modifications.
* Hypo: B owns farmland, rents to J to grow peppers. 5 yr K, no termination clause. J must pay all expenses + 40% of the net sales to Bob. In 2 yrs, J tells B he is going broke, costs of everything have increased. Asks B to pay ½ the expenses, B agrees. Enforceable? Pretend waiver does not apply.
* Modification of a right – need consideration. Except for UCC § 2-209 (sale of goods).
	+ Legal duty rule. J not doing anything new.
	+ SoF problem – promise not enforceable
* Is this a sale of goods? No, a lease.
* Hypo: M owns restaurant. K with J to “purchase all the peppers I need for 6 mo. at $3/lb.” J says I can get $5 from FM. I’ll only give you the peppers if you pay $4/lb. Phone call, M agrees to pay $4. Enforceable?
* Is there a MoO? §2-306. Requirements K satisfies MoO b/c duty of good faith. Good faith is the consideration. §1-203 defines good faith.
* Does the UCC apply? §2-209 says no consideration needed. Does this abide by the UCC SoF? §2-201. Doesn’t say anything about $500 worth of goods, so J would need to get it in writing.
* On exam, would discus application of UCC, consideration not required but need good faith for modification, common law rule of duress
* Hypo: B owns ranch. Hires J as cattle breeder for $3K/mo + incentive clause ($10K bonus for any bull born that wins “best in show” award). P wins 2nd place. B, in writing, tells J he can have the $10K anyway. Enforceable?
* UCC application? Sale of goods or service?
* Not really a modification.
* R2K §84 falls under the section of “k w/o consideration”. Do we satisfy part (b)? Probably not a part of the promisor’s risk?
* Best in show thing is a condition, not a promise
* Waiver of a condition precedent – voluntarily abandoned the right to not pay him?
* Conditions do not require consideration, modifications do

* Hypo: K (written, signed) to sell a Ford Woody for $20K on condition that S bring $20K in cash by Friday at 6 pm. S calls Friday morning to say she can’t pay until Sat. Z agrees. Friday at noon B shows up and offers to pay $25K. Z calls S and says deal is off unless she gets there by 6 pm, she can’t make it. Z sells to B. Next week, car wins award and is worth $75K.
* 1st q to ask yourself: what law applies? Sale of goods, article 2 of UCC applies.
* Under UCC, modification does not require consideration.
	+ Can’t we just say the K was modified at this time? No. According to §2-209 you need to meet SoF, which requires a writing and signed. Didn’t meet SoF, not a modification.
	+ Ss argument is that it is a waiver. Does UCC have a waiver provision? §2-209(4). It doesn’t make it as a mod but could be a waiver. Could go to the common law rules re waiver. §1-103 allows us to go to the common law rules.
	+ How does §2-209(5) fit in? He can retract the waiver, unless she argues material change of position/reliance on his waiver.
* Hypo: S volunteer fireman. Hurricane comes in, M was in a building that collapsed. S pulls her out. M says “thank you I will pay you $10K.” Enforceable?
* §86: Yes – M received a benefit (life). S gave it to her. Is it necessary to prevent injustice? Probably not.
* Suppose S broke his leg and feel. Now necessary to prevent injustice? Still a volunteer.
* What if he isn’t a volunteer, just a good Samaritan? Probably.
* What if he was a paid fireman? Legal duty rule.
* Hypo: Aggie football fan. Hire contractor to paint house maroon for $5K. Contractor breaches. What do you sue the K for?
* Breach of a K to perform services. Default rule – CoP, $5K.
* D lawyers argues Peevyhouse rule of diminution in value
* Counter that the breach was not incidental
* Hypo: S buys jalapeños from B to sell “on a stick” at ballgames. B agrees to sell for $10/lb. Freeze in valley. B can get better price from Ninfas. S has to buy from Su instead for $20/lb. Pays Su and brings suit against B, asking for damages to fulfill expectation interest.
* S has “covered” and can recover delta b/w cost of cover and K price (+ some and – some)
* §2-711 and 712: buyer didn’t get the goods. Seller failed to deliver. K price = $10/lb. Cover price = $20/lb. $10/lb is the measure of damages.
* Goal – buyer ends up with a right to the merchandise. Fulfill buyer’s expectation interest. Good here.
* What if S doesn’t cover? Recover damages for non-delivery according to §2-713. Delta b/w market price when buyer learned of breach (market price) and K price (+ some and – some). Suppose market price had gone up to $15/lb. Does this meet his expectation interest? What about his lost profits? If he didn’t cover, he can’t sue for lost profits. §2-715 mentions consequential damages and says if it could have been prevented by covering, you can’t recover on it.
* Don’t have to cover. 2-712(3). But must be made in good faith and reasonable.
* 711🡪 712 or 713, each of which go to 715
* Hypo: K price for $1000. Buyer repudiates. Market price falls to $700. What can seller do?
* Recover damages for non-acceptance. §2-703(e) 🡪 708. Delta b/w K price and market price (expectation interest). Entitled to $300.
* Now pretend Seller sells for 650. §2-703(d) 🡪 706. Delta b/w K price and resale price. Entitled to $350. It is OK that he sold for below market if sold in good faith.
* Sells to uncle for $50. Ct must find it was “reasonable and good faith.”
* Sells for $1200. Not accountable to buyer for any profit under 706(6).

Chapter 3 Hypos:

* Hypo: Same facts as the Rockingham Bridge case, but Bridge company does stop work. K was for $50K. Bridge expected profit of $10K. At time of repudiation, expenses were $1900.
* Theoretically should recover $10K + $1900, or $11900.
* What if bridge had slew of workers assigned to construction of the bridge under a term K? EEs are no longer working but still have to be paid. Still get the $10K profit, the $1900 expenses, and if it can’t be mitigated the worker’s wages
* If someone came along and said “we want a water tower”, the company can mitigate damages and there should be no recovery for wages
* Hypo: How far do we carry the duty? Bubba is an 8th grade teacher and football head coach. School district wrongfully terminates his 4-yr K. After 1 yr, Bubba gets a new job as 10th grade teacher and basketball assistant coach. New job is 1 hr from home instead of 5 min, but new job pays slightly more.
* Cts generally do not make you look outside the “neighborhood” (*Punkar*, pg 275)
* What if he took the job and it was inferior (janitorial assistant)? (Whetherholt, pg 276). If he took the job, his earnings can be used to mitigate damages.
* Hypo: Daughter gets K to sing in a Mozart Opera. Opera decides to cut the K, gets her an offer for a Britton Opera. One is in Boston, one in DC. She refuses. Both Ks were for the same amount of money. Is it a “reasonable substitute”? Might need a jury to decide.
* Hypo: Managing partner of construction company is bidding on an extension to the convention center. Bid is for $50MM. Bid must be received by 5pm Friday to qualify. Construction company hired Mercury Messenger to guarantee delivery by 5 pm, paid them 2x the regular rate ($150). Messenger was told that it must be delivered by 5pm or they would lose out on a big contract. Messenger had accident on the way, bid was late. Construction company can prove that they would have been awarded the K and would have made $8MM in profits. What result?
* P argues Hadley rule, D argues crushing liability or that the Messenger company only charged $75 for regular delivery, for such a little amount they must not have expected liability. P finds support in §351. 351(1) is basically the Hadley rule. But what is a probable result? Also support in 2-713 and 2-715(2) (contend that reason-to-know is a lower standard than probable). 315(2) still mostly Hadley. (3) Argue that you should recover the $75 + cost of the bid under reliance principle.
* Hypo: Olympic contestant, figure skating. Signed K w/US Olympic committee to be on good behavior. K included an arbitration clause. Thrown off team b/c accused of attacking another skater. Turns out she was innocent. Goes to arbitration b/c she lost the chance to have a gold medal. Sues for expenses in prepping for Olympics and $3MM in lost profits she would have gotten by winning the medal and getting endorsements. Also asks for $1MM for mental anguish. What result? Suppose she made $2.5 MM after not winning anyway.
* Mitigation: cite to *Kenford*. Probably couldn’t have mitigated
* Foreseeability: Damages were foreseeable
* Certainty: Lost profits, very likely a certainty issue, authority is §352
	+ Cite to *Rombola* for authority that she could recover
* Mental distress damages for breach of employment K, authority is §353.
	+ No recovery unless bodily harm or serious emotional disturbance
	+ Ct barred recovery in *Valentine*. §355 prohibits punitive damages.
* Hypo: Publicist has important presentation to make to client L. Presentation will be done via a video interview. K w/TechiCorp to provide satellite feed. If the video conference goes well, publicist likely to get a $500K contract. To make sure it works, include in K that any failure of link to work entitled P to $1MM. Link fails. Publicist doesn’t get a K with L and sues for $1MM. What result?
* § 356 – liquidated damages versus penalty clause. Liquidated damages that flunk the rule become penalty clauses
* LD elements?
	+ Reasonable – cts focus primarily on this part
	+ In light of anticipate or actual harm
	+ Caused by the breach
	+ Difficulties of proof of loss

Chapter 7 Hypos:

* Hypo: I buy a Jacuzzi bathtub for my home – and the “Limited Warranty” that accompanied the Jacuzzi tub says the following:  “SOLE REMEDY.  Jacuzzi Corporation warrants that the Jacuzzi spa will operate as described in the Instructions Booklet, if used as instructed.  If the Jacuzzi spa fails to operate as warranted, Buyer’s remedy shall be limited SOLELY to repair of the Jacuzzi spa by an authorized Jacuzzi Corporation repair technician.  This remedy shall terminate five years after the date of delivery of the Jacuzzi to the Buyer.  Jacuzzi Corporation shall not be liable for any monetary damages to which the Buyer might otherwise be entitled, and Buyer shall hold Jacuzzi Corporation harmless for payment of any such damages.”

I used the Jacuzzi for 2 weeks, and then started having difficulties with malfunctions.  The pumps did not work with any force, so I had a Jacuzzi repair person come fix the problem.  The Jacuzzi worked for another week, then I had the same problem.  In the first 6 months I had the Jacuzzi, I had to schedule repairs 23 different times, both on the pumps and on the drain system.  It has gotten to the point that I only take showers at home now. What can I do?  Can you advise me?

* Suppose Ct holds this is a K. The UCC applies. Look to 2-719(1)(a) if you are the Jacuzzi Corp. Buyer looks to 2-719(2) – if this provision hadn’t been put in there, the buyer could argue unconscionability.

* Hypo: I rent a car from Rent-a-Wreck Car Rental Agency.  The contract states: “Rent-a-Wreck Corporation shall not be liable for any damages arising out of injuries to any person that may occur while such person is riding in the rented vehicle during the period of this car rental agreement.”    While driving the car in South Texas, the car has a flat tire that causes it to leave the road,  and the car crashes into a boulder.  My wife and I are seriously injured.  I contend that the car had unsafe (bald) tires, and that Rent-a-Wreck should be held liable for the extensive damages that my wife and I suffered in the accident.  I also argue that Rent-a-Wreck should be held liable for punitive damages. What advice?
* Does the UCC apply? No – it’s a service, not a good.
* 355 – punitive damages. Tort law. But is there any recourse under K? Unconscionability. Even though UCC doesn’t apply, 2-719(3) builds in unconscionability.
* Hypo: Z is a shareholder in the Atlanta Braves baseball team. Z owns 30% of the shares to the Braves. P owns 30%, rest are distributed among several others. K with P that P will sell his 30% to Z. Cts hold there was a breach. Z sues for specific performance. What result?
* Z’s lawyers: London Bucket, holding was that SP available when monetary damages are inadequate. But why are the money damages inadequate? Controlling interest. But another 30% is out on the market? High transaction costs.
* Ps lawyers: Market price had the benefit of having a controlling interest already built in. He should get market – K price. But what about transaction costs?
* Why isn’t market price adequate? Purpose of K was to get a controlling interest. Considerable expense or trouble to go to the open market.
* What about the Laclede Gas Co case itself? SP was granted. Ct applied R2K. UCC must be adopted by the states. Bottom of 336 we see that the Ct references Missouri statutes that reference the UCC (2-716). The unique factor was the long term K in the energy crisis of the 1970’s.
* Inadequacy can be because something is unique, because computation of damages is very difficult
* Where is the seller’s right to SP? SP for a seller is to get the money. 2-709.
* Hypo: Z asks B to do a heart valve replacement. B agrees. When Z needs it, B is out of the country. Z sues B. Likely to get injunctive relief?
* Personal relationship – Cts are unlikely to grant those

Offer/Acceptance Hypos

* Hypo: emailed K problem about the lumber clearing company. B paid the company $10K up front to clear his land. They began clearing the land and then stopped work. Stopped responding to phone calls or emails, have not been back, left a bulldozer on location.
* Enforceable? K could have been performed within a year. Verbal was ok.
* MA? Yes. Consideration? Yes.
* Any indefinite terms? Seems to be ok.
* Breach? Breached obligation to clear land within a reasonable time. What is a reasonable time? Ct could decide what that means by using §204.
* Remedies? Specific performance is likely to be awarded if damages are difficult to calculate and SP is easily supervised. Restitution of $10K on the unjust enrichment grounds, entitled only if material breach. Could sue for cost of completion + lost rent + lost business (expectation + consequential damages). CL says for consequential damages it must be foreseeable. Lumber company would bring up the uncertainty of damages due to lost business and the uncertain lost rent
* Hypo: Tom, Dick, and Harry are members of a circus group called TDH. Known for daredevil acrobatics – juggle chainsaws, etc. 10 yrs working for B&B circus. Each year they sign 6 mo. K to last through the circus season. Spend winters in Houston perfecting act. Each year in Nov they receive the new K. Join B&B in the spring of following year. Last year TDH were dissatisfied with wages. Made changes in K that was sent to them in Nov – limitation in max no. of performances each week and ability to engage in other performances (previously the K had an exclusivity clause). Sent K back, said “hope these changes are OK, if not let us know right away, else we’ll see you in Feb.” Never heard anything. Arrived Feb 1 and manager told them they had hired another group. Now too late for them to get K with another circus.
* TDH vs B&B. P has burden of proof. D moved for SJ.
* TDH: 1st argue that the modified K was an acceptance with some hopeful changes, but not really a counter-offer. Good luck with that one. The offer was when TDH sent the modified K. Made it very clear that they expected to hear back if the changes were unacceptable, if not BB had to reply. BB didn’t reply as they requested (§50), so acceptance was b/c D never responded.
* BB: Compare to Vogt case. Oral sharecrop agreement. Sharecropper thought they did have a K to farm in 1981, owner thought they didn’t. Conversation between parties, probably an offer but not clear if there was an acceptance, either way sharecropper thought they agreed. §69 – general rule is that silence is not acceptance, b/c acceptance is manifestation of assent.
* TDH: Argue 69(c), and the Laurel Race case.
* BB: In Laurel Race, track benefitted from the work. Unjust enrichment, that is why Ct held K. Here, circus didn’t benefit.
* TDH: Kukuska sends insurance application and check. Insurance sat on offer, when crops ruiner, ct held acceptance under 69c. 69c is the rule if you take the “otherwise” language. Try to fit it into 69a by saying the money he had to give the insurance co was a benefit. Cts were playing the public policy card.
* BB: Previous dealings required an express K – never made any changes to the K before.
* Hypo: suppose Sally is a health food nut who wants Jack to plant organic jalepenos. During negotiations, Sally tells Jack she needs to see them to know they are up to spec. Jack prepares the land, invests significant capital, and then Sally says forget it. Does Jack have any rights?
* No K. But we can go to §87(2) and try for promissory estoppel. “I will do this if you show me that…”. Preparations to perform can give rise to PE type recovery.
* Hypo: purchase a used computer from Gordon for $1400, but nothing is in writing. Later, after computer crashes, try to show that Gordon promised it would work for 6 months. Does the PER apply?
* No b/c no written agreement
* Not SOF problem under 2-201(c) – payment has been made and accepted
* Now pretend there is a written K that says the computer has 3 mo. warranty (in fine print). Want to introduce evidence that Gordon gave a written statement promising that it would work for 1 year before the K was signed.
	+ Parol evidence rule applies (not just for oral evidence) b/c it excludes any evidence that would vary a written agreement.
* Written K with Eddy, your friend and accountant. Eddy says he’ll do Z’s taxes for $X. Made the K in December, and shortly before April 15 Z loses his job. Eddy says I’ll still do them for 0.5X. PER?
* Not under PER b/c it came after.
* Might be a modification problem, or pre-existing duty rule.
* Hypo: Merger clause in a K to purchase auto from major dealership says complete integration. Salesman makes oral representation that they will stand behind the car, 1 year full warranty, can bring it back within 1 year. K says nothing of this sort. Does the PER excludes this evidence?
* Try to make it fall under the exception in 214 – fraud. Allows for introduction of PE to prevent sellers from doing bad things
* Hypo: In the K, seller agrees to sell “all the frying chickens” that buyer needs for 5 years for $0.75/lb. Since the price of chickens tends to fluctuate, the seller and buyer orally agree that if the market price increases to $1.50/lb they can re-negotiate. Year 3 the price increases and seller attempt to raise the cost to $1.35/lb. Buyer doesn’t want to pay. Seller sues. As a judge, do you admit the evidence of the price increase conversation?
* Chickens are a good, so UCC 2-202. (a) isn’t what we are dealing with here, so we look at (b). Question is whether this was a completely integrated agreement. 2nd question is if the EE contradicts or interprets the price (gut feel is contradict). If it was completely integrated, this is contradictory evidence and probably should exclude it. Even if it wasn’t completely integrated, it appears to be a clear contract, and we would probably exclude it anyway.
* Hypo: K to sell donuts for $0.75/dz. What if I want to introduce evidence that I really meant a “baker’s dozen?”
* Usage of trade allowed under UCC 2-202(a)
* Hypo: car dealer puts a price of $15K on the window of a truck that is on its own lot. Bob spots the sign, stops, looks at truck and offers a check to purchase it. California law says placing of a sign on a vehicle on dealers lot makes it unlawful not to sell vehicle for the price listed. Dealer learns EE put the wrong sign on the vehicle. It was supposed to be $22K, not $15K. Distinguish from Donovan.
* In Donovan, 3rd party made the mistake. Here, the mistake was solely the dealer’s fault.
* Hypo: Z contracts with David to purchase David’s car. Agree on price, David gives Z keys, Z cannot get the car to work. Turns out David met his old crappy car, not the nice new car that Z thought he was purchasing. Both parties thought they were getting a good deal. Who wins?
* Misunderstanding problem, §201. Not a mistake case.
* Hypo: Z wants to sell his old Saab convertible (which he himself had bought used). After several years, Z began having trouble with the car. Mechanic kept saying it needed new things, it would work for awhile and then need more fixing, started having overheating problems. Z put ad in newspaper. Woman calls, wants car, moving from Boston to Austin. She asked if there were any major issues, Z presented car service documents but didn’t mention overheating problem. Z traded cash for the pink slip. Several hours later, phone ring. She is 50 miles outside of Austin and stranded b/c the engine overheated and died. She wants her money back. Advise Z of his legal responsibilities.
* Gave her the receipts but she didn’t really go through them. Didn’t tell her about the overheating issue.
* No light for overheating, but a working dial.
* At time of sale, Z had hoped the mechanic had fixed the car
* No mutual mistake (Z wasn’t really mistaken about whether or not the car would overheat).
* Is there a mistake by one party? Do we get past 153? Probably can’t say it was really a mistake.
* Misrepresentation or nondisclosure? If it was, then the K may be voidable under 164. Does it fit into 161? Might catch it under (b) for good faith and fair dealing. Misrep must be material under 164.
* What about an as-is stipulation on new cars? 2-316 discusses exclusion of warranty. Z would make an analogy to *Wood* – bought a used car, you get a used car

# Miscellaneous

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In the regular room on the days we meet first, after class on the days we are second

Stare decisis: let the decision stand

Conditions – if they aren’t fulfilled, there is no K. If it isn’t a condition, and you don’t do it, you might be in breach but the K is still valid

Emphasis on **analysis**, close reading of cases, cases to extract the rule and how it works. Lots of hypos. Construct the paradigm.

Exams are open book, open note. Can bring anything you want.

Mid-term = 25% of grade

Commercial outline won’t do you any good (tutor). Note any brilliant pieces of analysis in the cases. Best way to prepare is to do old exams. Know it cold, don’t rely on the notes.

How to read his cases: facts are very important – anyone can understand the rule, but the facts make the case.

1. What are the **facts**?
2. What was the **procedure**? How did the case get here
3. **Issues**: What were the issues, as precisely as possible.
4. **Rule** that the court used to decide the case
5. **Reasoning** court uses to apply the rule
6. **Holding**: How the rule applies to these particular facts.