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INTRODUCTIONS

- 1) Contract is formed in any transaction in which one or both parties make a legally enforceable promise.
- 2) A promise is legally enforceable when it:
 - a. Was made as part of a bargain for valid consideration
 - b. Reasonably induced the promisee to rely on the promise to his detriment
 - c. Is deemed enforceable by a statute despite lack of consideration

Types of Contracts

- 1) **Express**: an agreement manifested by words
- 2) **Implied-in-fact**: an agreement manifested by conduct
- 3) **Implied-in-law** (“quasi contract”): not a true contract but an obligation imposed by a court despite the absence of a promise (in order to avoid an injustice).

Main Sources of Contract Law

- 1) **Common Law** – in most jurisdictions, contract law is not codified and thus the primary source of general contract law is case law
- 2) **Restatement (Second) of Contracts** - highly persuasive authority but no legal force; but cite it if you can!
- 3) **UCC**
 - a. Article 2 – covers all transactions for the sale of goods (tangible, movable things)
 - i. Exception: Securities (Article 9) and leases (Article 2A)
 - ii. UCC applies to any party – not just to merchants
 - iii. Parties can displace or override most Article 2 rules by agreement
 - iv. Some Article 2 rules displace or override contrary terms in private agreements
- 4) **Convention on Contracts for the International Sale of Goods**
 - a. Ratified by the US and many other trading nations
 - b. Governs many transactions for the sale of goods between parties with places of business in different nations

- 5) **Treatises**

Key Notes

- 1) For every Contract – consider whether or not it is governed by UCC §2
- 2) For Contracts involving both goods and services – see what the primary purpose of the contract is
 - a. If the primary function of the K is to provide a service → UCC does not apply
- 3) For contracts not covered by UCC §2, go to Restatement
 - a. Examine the elements pointing towards offer, power of acceptance, etc
- 4) Sources of Interpretation
 - a. Always start with the language of the text
 - b. Context of the Contract
- 5) **Restatement (2d) of Contracts, §17 – Formation of Contracts**
 - a. Contract requires:
 - i. Bargain
 - ii. Assent
 - iii. Consideration (return promise or actual performance)
 1. Except where special rules apply

Key Theories of Obligation

- 1) **Promissory Estoppel** – promise upon which promisee reasonably and detrimentally relies
 - a. Promisee's detriment doesn't benefit promisor; remedy to avoid injustice
- 2) **Unjust Enrichment** – promise where promisee detrimentally relies to promisor's benefit
 - a. Promisee's detriment does benefit Promisor; remedy by returning detriment
- 3) **Moral Obligation** – unrequested and un-bargained for benefit which elicits a subsequent promise from promisor
 - a. Subsequent promise = consideration
- 4) Gift = no consideration offered or received for promised benefit

OBLIGATIONS

Consideration

- 1) Consideration = “bargained-for exchange”
- 2) Main theory of obligation = agreement with consideration
 - a. In general - A promise must be supported by consideration in order to be enforceable
- 3) **Receipt by the promisor of “something of value” by the promisee**
- 4) **Two Key Elements of Consideration**
 - a. It must be part of a bargain +
 - b. It must be exchanged for
- 5) Actual value of consideration is irrelevant
 - a. Consideration does not need to be adequate BUT it does need to be there
 - b. Past actions/events are invalid as consideration

Restatement (2d) of Contracts §81

- 1) Consideration may include things bargained for that did not themselves induce the promise
- 2) Motive for accepting consideration is immaterial → unless both parties know that the purported consideration is a mere pretense

Restatement (First) of Contracts §75 (1932)

- 1) Consideration for a promise is:
 - a. An act other than a promise, or
 - b. A Forbearance, or
 - c. Creation, modification or destruction of a legal relationship, or
 - d. A return promise, bargained for and given in exchange for the promise

Bargained for and given in exchange for the promise

- 2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Hardesty v. Smith (Supreme Court of Indiana, 1851)

- 1) Smith (D) bought the rights to an invention for an improvement on a lamp
- 2) D paid for the rights by signing promissory notes → notes then assigned to P

- 3) P wanted to collect on notes but D refused; said the invention he bought was worthless
- 4) Court held:
 - a. It doesn't matter that the invention re: lamp was of no utility
- 5) Lesson:
 - a. Consideration is a subjective concept
 - b. Parties of sufficient mental capacity have right to make their own bargains; D used his judgment to decide what he should give for the rights to the invention → the contract is valid
 - i. Parties have the right to determine whatever consideration they want
 - ii. The actual value of an exchanged thing is irrelevant unless the value is nonexistent, in which case there is no consideration and no contract.

Dougherty v. Salt (NY Ct. of Appeals, 1919)

- 1) P received a note from his aunt for \$3000 payable at her death or before. On the note was written, "value received".
- 2) Aunt died and executrix refused to pay the note, said it was a gift and unenforceable.
- 3) Was there evidence of consideration for the promised payment of \$3000?
- 4) Court held:
 - a. No – the note was voluntary and unenforceable promise of a gift
 - b. Aunt was not paying a debt; she was conferring a bounty
 - c. Past consideration doesn't count [She said to nephew "you have always done for me..."]
- 5) Lesson:
 - a. "Nothing is consideration that is not regarded as such by both parties"
 - b. A promissory note given without any value received is a "naked promise" not enforceable in Contract law – a "mere gratuity"
 - c. Prof. Eisenberg re: gifts → Gifts should be considered outside K law because they are governed by values (friendship, affection) that should not be enforced by the law → world of gift should be protected from commodification

Maughs v. Porter (VA. S.Ct of Appeals, 1931)

- 1) D said there would be an auction and one person would win a new car; P won the car raffle; auction ticket only cost \$3; P never gets the car or the \$ value of the car
- 2) Court held:
 - a. Taking an action (P's attendance at the auction) was sufficient consideration – creates a contract
 - b. A gift with a condition that confers a benefit to the promisor is an agreement that can be enforced

- i. Benefit to the promisor = consideration
- ii. P's attendance at auction benefited the D

Forbearance

Restatement 2d §74

- 1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
 - a. The claim or defense is in fact doubtful because of uncertainty as to the facts or the law or
 - b. The forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid

****Hamer v. Sidway**** (NY Ct. of Appeals, 1891)

- 1) P was promised \$5000 by his uncle, if he stopped drinking, gambling and swearing until the age of 21
- 2) P stopped doing all of the above, reached age of 21, uncle died before giving the \$
- 3) Court held:
 - a. There was sufficient consideration to enforce the contract
 - b. A waiver of a legal right at the request of another party is sufficient consideration for a promise.
 - c. P's forbearance from certain activities counts as a performance
- 4) Lesson:
 - a. Surrendering one's freedom of action is sufficient consideration for a promise
 - b. Waiver of any legal right at the request of another party is consideration; "It is enough that something is promised, done, forbore, or suffered".
 - c. Forbearance = consideration

CONTRAST TO *HAMER v. SIDWAY*

Baehr v. Penn-O-Tex Oil Corp. (S.Ct. Minnesota, 1960)

- 1) Dispute over rent checks owed to P – D's agent promised to pay rent but didn't
- 2) Court held:
 - a. No contract created – no evidence of forbearance from P *in exchange* for payment from D's agent
 - b. Mere forbearance to sue on a claim without any promise is not consideration (although forbearance from suing when it is part of an exchange can count as sufficient consideration)
- 3) Lesson: There must be change in position; forbearance must be a change from status quo ante

Neuhoff v. Marvin Lumber and Cedar Co. (1st Cir., 2004)

- 1) P claimed that D broke a promise to provide them with replacement windows for free

- 2) Court held:
 - a. No bargain here, therefore no contract
 - b. D's alleged promise lacked consideration – P felt entitled to new windows, that is not enough – what are they giving up?
 - c. Mere forbearance does not count as consideration

Springtseed v. Nees (NY App. Div., 1908)

- 1) P and D were children of deceased who left them as their sole heirs; father died and left X property solely for D; “murmurs and dissent” from P so D said we give you our share in Y property if you don't bother us on X property. But D never gave their share of property over to P
- 2) Court held:
 - a. No – there was no contract created because P didn't really have any legal claim to the X property at all – so what was P forbearing in exchange for D's promise? P was promising not to “murmur or dissent”? That doesn't count as valid consideration.
- 3) Lesson:
 - a. Forbearance to assert a legal or equitable claim is sufficient consideration, but the forbearing party must have colorable claim of right to make the claim.
 - b. If forbearing from a non-right = not forbearance = not consideration!!

Corbin on Contracts

Forbearance to bring a suit, or to proceed with one already brought, or to press a claim in any other way, is not consideration if the forbearance is made with knowledge that the claim is invalid - this has a public policy reasoning behind it too,

Mutuality of Obligation

- 1) Both parties to a contract must obligate themselves to do something that constitutes consideration – but there is no requirement of equivalence, fairness, etc.
- 2) Without mutuality of obligation, an agreement cannot be enforced.
- 3) Illusory contracts – which lack mutuality of obligation – are unenforceable
- 4) Illusory promise – a purported promise that does not actually bind the party making it to a particular performance.
- 5) **Lack of Mutuality → An agreement that depends upon the wish, will, or pleasure of one of the parties is unenforceable.**

De Los Santos v. Great Western Sugar Company (S.Ct. Nebraska, 1984)

- 1) P had hauling contract with D, would transport whatever beets “as may be loaded by D”; knew that D had similar Ks with other truckers; D canceled the K
- 2) Court held:
 - a. No breach of contract here → Contract is void for lack of mutuality

- b. Mutuality is absent when only one of the contracting parties is bound to perform and the rights of the parties exist at the option of only one party.
 - i. P promised to provide services to D but D didn't promise anything to P here, just promised to pay for transportation of beets loaded by D onto P's trucks
 - ii. From a hauling agreement alone (just an option to use P's services), there is no mutual obligation.
 - iii. Once a hauling order would be placed (transport these beets!) then there would be a binding agreement (D would have to pay P for transportation).

Wood v. Lucy, Lady Duff-Gordon (NY Ct of Appeals, 1917)

- 1) D is a fashionista, employed P to help her market herself/her "endorsements"; he would get to share in the profits; P says D broke the K by placing her endorsements without his knowledge and without sharing the profits
- 2) Court held:
 - a. This is a contract for exclusive dealing
 - b. P promised to help D market herself and D promised to share profits created
 - c. **Exclusive deal = mutuality** (implied covenant of good faith dealing)

UCC §1-304 – Obligation of Good Faith

Every K or duty within the UCC imposes an obligation of good faith in its performance.

UCC §2-306(2) Exclusive Dealings

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.

Weiner v. McGraw Hill (NY Ct of Appeals, 1982)

- 1) Case of at-will employment and termination for just cause
- 2) P left job to work for D, was promised job security - no termination of employees without just cause; was fired suddenly after 8 years
- 3) Court held:
 - a. There is sufficient evidence of a contract and breach of contract
 - b. P relied on D's promise that he could only be terminated for just cause
 - c. Mutuality is not always essential to a binding contract but consideration is a key requisite.
 - i. P had right to terminate employment at-will but D had bound itself to promise to terminate for just-cause only → promises don't need to line up with each other – don't need mutuality.

******Mattei v. Hopper****** (S.Ct. CA, 1958)

- 1) P was going to construct shopping center and wanted to buy D's land for it – property sale contract had clause that P had to obtain “satisfactory” leases of space in the shopping center. P got the leases but D backed out of the sale.
- 2) Court held:
 - a. A contract dependent on one party's satisfaction does not lack mutuality of obligation because that party has a duty to exercise their judgment (in good faith).

Pre-existing Duty Doctrine

- 1) Neither the performance of duty, nor the promise to render a performance already required by duty is a sufficient consideration for a return promise.
- 2) A party's offer of a performance already required under an existing contract is insufficient consideration for modification of the contract.

Justified Reliance – Promissory Estoppel

1) **Historical Approaches to Estoppel:**

- a. Pomeroy (1886): Equitable estoppel = a party who knows the truth of a matter is precluded from later denying those facts, if based upon those facts, he persuaded another, excusably ignorant part to take action, justifiably relying on that persuasion, that would materially worsen their situation if such a denial were to be allowed.
- b. 28 AmJur 2d: Equitable estoppel is distinct from promissory estoppel.
 - i. Equitable estoppel involves only representations and inducements
 1. Involves statement of past or present fact.
 2. Lies in tort
 3. Available only as a defense
 - ii. **Promissory estoppel involves a clear and definite promise**
 1. The representations at issue in promissory in estoppel go to future intent
 2. Lies in contract
 3. Can be used as the basis of a cause of action for damages

2) **Applications of Promissory Estoppel:**

- a. Charitable subscriptions
- b. Gratuitous bailments where bailee undertakes to preserve or insure the property delivered to her care
- c. Oral promises to convey land on which the promisee then enters and make improvements
- d. Occasionally – family gifts

Restatement (2d) §90

- (1) A promise, which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person, which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
- (2) A charitable subscription or marriage settlement is binding under subsection (1) without proof that the promise induced action or forbearance.

Promissory Estoppel is different from a bargained-for exchange:

1) Absence of Consideration is not fatal:

- a. Reliance by the promisee may thus be sufficient to create an enforcement right against the promisor → even though the transaction does not involve a “bargain” between the parties and even though the promisor receives no consideration

2) Promisee’s remedy might be limited – recovery may be less in amount than the customary measure of expectation damages.

***Kirksey v. Kirksey* (1845)**

- 1) P was widow of D’s brother – he asked her to leave her property and come live with him; after 2 years he moved her into a little uncomfortable house and then forced her to leave
- 2) Court held:
 - a. D’s offer was not an enforceable contract, but just a mere gratuity
 - b. No bargained for exchange – no consideration
 - c. There is promise and reliance and P has suffered loss/inconvenience but still a gratuitous promise is not enforceable

***Ryers v. Trustees of Presbyterian Congregation of Blossburg* (1859)**

- 1) D promised funding if P would build a church; unhappy with the final church, he doesn’t give \$\$ – is he obliged to pay for the church?
- 2) Court held:
 - a. This is an enforceable contract – he repeatedly promised the congregation he would pay \$\$ and they put in labor/trouble/expense in reliance on his promise (the fundraising and construction is valid consideration).
 - b. No grounds for defense against a promise so well proved
- 3) Lesson:
 - a. A party who induces justifiable reliance on their promises by another party is bound to that promise; here, repetition (repeated encouragement) induces justifiable reliance

***Seavey v. Drake* (1882)**

- 1) P was promised land by father before he died – he occupied the land, made improvements, paid taxes on it. Now he wants the land to be conveyed to him – based on an oral contract.

- 2) Court held:
 - a. The promise from his father induced him to spend \$\$ improving the land.
 - b. P's improvement to the land = valid consideration. [Broad interpretation by court]
- 3) Lesson:
 - a. Expenditure of \$ or labor in the improvement of the land – induced by the owner's promise to give the land to the party making the expenditure – constitutes, in equity, a consideration for the promise and the promise will be enforced.

But to contrast with *Seavey*:

- 1) *Commonwealth v. Scituate Savings Bank* (1884), J.Holmes: Allowing a promise to be made binding by action in reliance “would cut up the doctrine of consideration by the roots”.

Equitable Estoppel

Pomeroy - Essential elements of equitable estoppel:

- 1) Conduct amounting to a representation or concealment of material facts
- 2) Facts must be known to the party estopped at time of conduct
- 3) Truth about these facts is unknown to the other party claiming at the time of the conduct
- 4) Conduct must be done with intention or expectation that it will be acted upon by the other party, or under circumstances where reliance is natural and probable
- 5) Conduct must be relied upon by the other party and reliance leads to action
- 6) There is a change in position for the worse for the other party, when acting in this reliance

***Ricketts v. Scothorn* (1898)**

- 1) P gave up working at a miserable job in exchange for grandfather's promissory note for \$2k – he died without paying the note.
- 2) P won against grandfather's executor because she had altered her conduct in reliance on grandfather's promise [she gave up her job at his suggestion].
- 3) Court held:
 - a. Equitable estoppel is established here.
 - b. Intentionally influencing another party to worsen their position based on a promise requires fulfillment of the promise.
- 4) Lesson:
 - a. Where a donee, relying in good faith on the donor's promise, is led thereby to spend money/incur debts/or take some other costly and irreversible step, the donor may be “estopped” on grounds of equity and fairness from asserting “want of consideration”.

Siegel v. Spear & Co.

- 1) D promised to procure insurance for P's furniture while it was stored with him. P's furniture was destroyed by a fire and no insurance had been placed on it.
- 2) Court holds:
 - a. An oral agreement to provide insurance that induces performance by the other party is sufficient consideration;
 - b. D is a gratuitous bailee and he made a promise to P and then entered upon the performance of it → he is held to a full execution of all he promised to undertake [unless he has an excuse].

Wheeler v. White

- 1) P wanted to construct a building, D agreed to give him a loan and told him to start construction prep work; after P had done the prep work, D said there was no loan. P was unable to get loan from elsewhere.
- 2) Court held:
 - a. Promissory estoppel is a valid remedy when there is no contract but there has been reliance induced by promises
 - i. Doesn't create a K but allows the court to put the promisee in the position he would have been in had he not acted in reliance upon the promise.

Hoffman v. Red Owl Stores

- 1) Terms of the K kept changing – P wanted to set up a Red Owl grocery store; P sold his business, bought a store, engaged in multiple sets of risks, because he was encouraged to believe it would lead to him getting a franchise contract from D.
- 2) Court held:
 - a. A promise that the promisor reasonably expected to induce action or forbearance of a definite and substantial character, that did induce such forbearance, will be enforced to the extent necessary to avoid injustice.

Elvin Associates v. Franklin

- 1) P wanted D to perform title role in a musical production and D expressed strong interest; they worked together for several months but no final K was ever made. P incurred many expenses making arrangements for the production based on D's assurances that P's proposal was acceptable. D never showed up for production.
- 2) Court held:
 - a. Oral promises are promises that induce reliance too
 - b. By repeatedly affirming the acceptability of an agreement, before a valid contract exists, a party may induce action in justifiable reliance on that affirmation and will be estopped from later denying liability for the induced actions.

Local 1330, United Steel Workers v. United States Steel Corp

- 1) US Steel Corp made a proposal to workers – if they put in their best efforts and made plants profitable, they wouldn't shut the plants down.
- 2) Court held:
 - a. No promissory estoppel here.
 - i. No definite promises made by D to continue operations if plants became profitable
 - ii. The statements were made by marketing and PR people
 - iii. Plants never became profitable
- 3) Lesson:
 - a. A promise made in the context of marketing or PR is not the type that induces reasonable/justified reliance.

Limits on Promissory Estoppel

- 1) Conditional or indefinite promise
- 2) Prompt revocation with notice
- 3) Promises were not made by those who could uphold them
- 4) Conditions not actually met
- 5) Attaching a termination date

Unjust Enrichment (*Quantum Meruit*)

- 1) A person who has been unjustly enriched at the expense of another is required to make restitution to the other.
- 2) **Unjust enrichment requires either a quasi-contract or a contract implied-in-fact**

Quasi-contract (aka *contract implied-in-law*)

- 1) Not a contract at all but a duty thrust under certain conditions upon one party to requite another in order to avoid the former's unjust enrichment
- 2) May be recognized even when there was no intention of the parties to bind themselves contractually
- 3) It would be unfair for the recipient to keep the benefit without having to pay for it.
- 4) A legal obligation akin to a duty to make restitution, requires proof that retention of a benefit without compensation to the conferring party is unjust
- 5) No unjust enrichment where:
 - a. The benefit was conferred gratuitously
 - b. The qs of payment was left to the unfettered discretion of the recipient
 - c. The services were rendered simply in order to gain a business advantage
 - d. The plaintiff did not contemplate a personal fee
 - e. Expectation was un-communicated and D had no cause to believe there was an expectation for compensation.

Contract implied-in-fact

- 1) Obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.
- 2) Such Ks are implied from facts/circumstances showing a mutual intent to contract and may arise by the conduct of the parties.
- 3) Contains all the necessary elements of a binding agreement, only difference is that it has not been committed to writing or stated orally in express term → it is inferred from the conduct of the parties in the milieu in which they dealt.
 - a. Services were carried out under such circumstances as to give the recipient reason to understand
 - i. That they were performed for him and not for some other person
 - ii. That they were NOT rendered gratuitously but w. expectation of compensation from the recipient
 - b. The services were beneficial to the recipient
 - c. The implication must arise when services are rendered

Key Notes

- 1) Benefit conferred on the D by the P, non-gratuitously
- 2) Appreciation or knowledge by the D of the benefit
- 3) The benefit is retained unjustly – acceptance or retention of the benefit by the D
- 4) Was there an opportunity to decline the benefit?
 - a. Recipient must have chance to refuse the benefit
 - b. Cannot impose benefits on people

Critical Elements of a Cause of Action for Unjust Enrichment

- 1) Enrichment of the party accused of unjust enrichment
- 2) Knowledge of the recipient that they are the intended beneficiary
- 3) Expectation of compensation by the provider of the benefit
- 4) Such enrichment was at the expense of the party seeking restitution
- 5) Circumstances were such that in equity and good conscience, restitution should be made

Bloomgarden v. Coyer

- 1) P helped D with finding an investor; told D he hoped he would get compensation in the form of his company getting some work; P sued D for finder's fee
- 2) Court held that:
 - a. P's transactions with D do not establish a quasi contract or a contract implied-in-fact.
 - b. P never mentioned he wanted a finder's fee
 - c. A contract will not be implied unless the recipient knows or has reasonable grounds to believe that the beneficial acts were performed in anticipation of remuneration.
- 3) Lesson:

- a. There is no unjust enrichment when the plaintiff did not expect payment and the other party reasonably assumed they were receiving a benefit for free.

Sparks v. Gustafson

- 1) P managed friend's property without compensation, even after friend died. Put in his own money to do repairs and pay expenses. D sold property to a third-party and P sued, wanted to recover the funds and services expended on the property
- 2) Court held:
 - a. P conferred a benefit on D
 - b. The services/expense that P did was not the type that D should think was gratuitous
 - c. This was not a gift (extent of services, type of services, actual \$ investment into property)
- 3) Lesson:
 - a. When the services performed are "the type of extensive business services for which one would reasonably expect to be paid" there has been unjust enrichment
 - i. Transfer of benefit from P to D is "too large" to be a gift.

Gay v. Mooney

- 1) P was nephew of decedent. They had an arrangement where P would provide housing for his uncle in exchange for uncle providing land for his kids. Uncle died before he could leave the land to P's kids.
- 2) Court held:
 - a. Since the deal for the land is unenforceable (needed to be written down, barred by statute of frauds), P can recover for services under theory of unjust enrichment.
 - b. Since the services were clearly not a gift (were part of the land bargain), the value of the service is owed to P.
- 3) Lesson:
 - a. A bargain or agreement for the kind of service that would normally be a gift establishes a valid contract requiring payment for services rendered

Kearns v. Andree

- 1) D made oral agreement to buy P's house. D wanted certain alterations made to house and P made those. D still declined to complete purchase.
- 2) Issue: Can you have a K when there was no conferral of a benefit?
- 3) Court held:
 - a. Even though no benefit was conferred to D, there was still unjust enrichment → in good faith and believing a contract existed, P performed services at request of D and had an expectation (which D knew about) that he would be compensated
 - b. Work done in good faith, on the expectation of an agreement being fulfilled, constitutes an unjust enrichment of the recipient, regardless of whether benefit actually accrues to the recipient

- i. Note – D prevented performance of contract here.
- ii. Note – P cant collect for any work done to house after breach of K

Quantum Meruit

- 1) Payment for the actual value of services performed
- 2) Amount to be paid for services when no contract exists or when there is doubt as to the amount due for the work performed but done under circumstances when payment could be expected
- 3) E.g. physician’s emergency care
- 4) If person sues for payment under quantum meruit, court must calculate the amount due based on market value/customary charge

Posner v. Seder

- 1) P had K to work for D for one year for \$17/week, included limited overtime without pay. D fired P and now P wants to be paid for the overtime
- 2) Court held:
 - a. P can either sue for breach of K or for quantum meruit (to recover value of services as if K had not existed)
 - b. P has sued under *quantum meruit*, for market value of overtime services → contract provides evidence of the market value for his full services (\$17/week included the OT) and he received that value
 - i. P is due the reasonable value of all his services – the amount he has already been paid.

Kelley v. Hance

- 1) P was supposed to build a sidewalk for D. P delayed construction and then didn’t complete the sidewalk. D cancelled the K.
- 2) Court held:
 - a. P had already been in material breach (delayed construction)
 - b. D was justified in cancelling the contract because of the failure to perform
 - c. P was not entitled to recover reasonable value of the benefits accrued to D because D did not accept any of the work.
 - i. No substantial performance by P
- 3) Lesson:
 - a. There must be acceptance of the benefit conferred to establish unjust enrichment.

Substantial Performance

- 1) Permits recovery where a contractor has deviated slightly from the terms of the K but in good faith and there has been substantial performance of the contract, of which the other party received the benefit
- 2) If there is no substantial performance but the breach was merely negligent (not willful), the contractor can recover value of his work,

Britton v. Turner

- 1) P had contract to work for D for one year for \$120. P left without notice or cause and then sued D for payment for work already done.
- 2) Court held:
 - a. P can recover under *quantum meruit* for value of work already done.
 - b. The breaching party may recover the value of services rendered under *quantum meruit* but may be liable for damages for breach of contract.

Watts v. Watts

- 1) P and D lived together for 12 years like husband and wife, bought property together; D induced P to quit her job, said he would take care of her; relationship ended and D refused to give her share of property
- 2) Court held:
 - a. Yes – unjust enrichment here
 - b. Unmarried cohabitants may raise a claim for unjust enrichment after termination of the relationship if one party attempts to retain an unreasonable amount of property that was jointly acquired.

Benefit Received / Moral Obligation

- 1) Normally, past consideration cannot support a contract; in rare cases, this theory can override
- 2) **Promises grounded in the past**
 - a. Usually concerns about ill-considered promises are misplaced → there is usually a time lag between promise and performance that gives promisor time to deliberate and allows him to exercise caution and evaluate the price he wants to pay for the performance
 - b. In many cases a moral consideration is sufficient where promisor originally received from the promise something of sufficient value to arouse a moral obligation
- 3) Generally someone who has been unjustly enriched at expense of someone else has to pay restitution – BUT in many cases, restitution is denied in order to protect people who had benefits thrust upon them
 - a. Subsequent promise to make restitution will remove the reason for denial of relief → then unjust enrichment kicks in.

Two Classes of Cases:

- 1) Under Restatement §82 → limited group of cases (e.g. bankruptcy or statute of limitations) → you had a duty, the state intervenes and that duty is extinguished.
- 2) Under Restatement §86 → where a tangible economic benefit has been conferred on someone; but a disproportionate promise wont be enforced (beyond proportion)

Restatement 2d §82(1)

- 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 statute of limitations

Mills v. Wyman

- 1) P took care of D's adult son; D promised in a letter that he would pay for the care but then changed his mind
- 2) Court held:
 - a. Father is not obligated to pay the debts of an adult son
 - b. A promise made without consideration is not enforceable → the party making the promise must personally gain or lose something.
 - c. Moral obligation can be a sufficient consideration for an express promise but is to be limited to cases where a valuable consideration has existed at some time
 - d. There is a difference between a promise based on moral obligation and a promise based on legal duty
 - i. D might have a moral obligation to keep his promise but no legal enforcement possible

Webb v. McGowin

- 1) P worked in factory and almost dropped a brick that would have hit D; at the last minute he dropped it on himself to save D and was badly injured for life. D promised to pay P for the remainder of his life – but D died and payments stopped
- 2) Court held:
 - a. D's promise to compensate P for saving his life is a valid and enforceable promise because D received a material benefit
 - b. Promisor received a material benefit which constitutes a valid consideration for his promise.
- 3) Lesson:
 - a. Where a promisee cares for, improves, or preserves the property or health of a promisor (even if done without his request), such action is sufficient consideration to bind a subsequent agreement to pay for that "service" because of the material benefit received.

Rule re: Moral Obligation

- 1) Material Benefit + Moral Obligation = valid consideration
- 2) Moral obligation on its own entitles P to nothing UNTIL a promise is made and the promisor is personally benefited by promisee's sacrifice → then there can be a just and reasonable claim for compensation.

Contrast to Webb:

Harrington v. Taylor

- 1) Axe on the hand case: D attacked his wife in P's home and wife was about to kill D when P intervened, axe fell on P's hand instead; D promised to pay for damages but didn't pay beyond a small amount.
- 2) Court held:
 - a. Plaintiff was not permitted to collect on an oral contract to pay for damaged incurred in performance of an action that conferred benefit on D's health
 - b. No consideration for D's promise to pay – it was a voluntary act
 - c. Court thought promise looked “ephemeral” because D was poor, couldn't have kept the promise (underlying social set of considerations)
- 3) Lesson:
 - a. Courts look at indicia of the seriousness of intent to be legally bound by promise

Restatement 2d §86 – Promise for Benefit Received

- 1) A promise made in recognition of a benefit that has already been received by the promisor from the promisee is binding to the extent necessary to prevent injustice
- 2) The promise won't be binding if:
 - a. Promisee gave the benefit as a gift or if the promisor has not been unjustly enriched
 - b. If the value of the promise is disproportionate to the benefit

Edson v. Poppe

- 1) D had P build a well – increased value of D's property so D promised to compensate P but didn't.
- 2) Court held:
 - a. Digging of the well wasn't voluntary and was not gratuitous → the service was beneficial to D so the promise is supported by valid consideration.
 - b. P had conferred a very substantial benefit to D and D had chance to reject it but didn't – he chose to take on the duty of paying P and that is an enforceable promise.
 - c. A party who accepts a material benefit conferred to his person or property – where the conferral was not intended to be gratuitous – is required to perform a later promise to pay for the benefit.

Booth v. Fitzpatrick

- 1) P took care of D's run-away bull – D agreed to pay for the past care of the bull but then didn't
- 2) Court held:
 - a. If an act directly benefits D and D promises to pay, then the promise is binding even though it is made on past consideration

Obligations arising from Torts

- 1) Tort cause of action = unreasonable interference with contractual relation

- 2) Contracts v. Torts
 - a. Breach of K arises under an agreement between the parties
 - b. In K, person's duty extends to those for whom/to whom the benefit of an enforceable promise is made.
 - c. Tort is a violation of a duty fixed by law (independent of contract)
- 3) There is a tort wherever the mis-performance (of a Contract) inflicts a foreseeable, unreasonable risk of harm to the interests of the P

Restatement 2nd of Torts § 402(a)

Seller may be liable in tort for a product expected to reach consumer in the condition sold that is in an "unreasonably dangerous" and defective condition; liability applies even if all possible care has been taken

Restatement 3rd of Torts §§ 1 & 2

Commercial sellers are liable for harm caused by defective products, despite a lack of negligence or contractual privity; defective = departing from intended design

Three groups of torts cases:

- 1) Persons who owe a duty based on their professions
 - a. See *Mauldin v. Sheffer*
 - b. Have a series of codes of professional responsibility and if they violate them, they incur professional liability
- 2) Restatement of Torts §402(a) cases
 - a. Putting into commerce – by sale or otherwise – a defective good that causes injury to a person or property of the purchaser
 - b. See *Hargrave v. Okie*
- 3) Groups of cases where there is a claim that there was a special duty NOT to violate the contract
 - a. E.g insurance company cannot engage in bad faith breach of K (that is a tort)

Mauldin v. Sheffer

- 1) P was an architect, had oral contract with D (engineer) to provide him with designs that P could use in his architectural bids – D gave him faulty designs
- 2) Court held:
 - a. D was a professional and this implies a legal duty → neglect of that duty is a tort founded upon a contract
 - b. Professional standards are legally recognized duties.
 - c. Conduct that fulfills contractual obligations but fails to meet professional standards (misfeasance or negligence) creates tort liability
 - d. Though the general duties are triggered by the contract, they are based on general duties under law

Hargrave v. Oki Nursery, Inc.

- 1) D sold defective, diseased vines to P even though he represented that the vines were free of disease; P relied on D's representations in purchasing the vines; the disease spread through P's vineyard and destroyed it.
- 2) Court held:
 - a. This is a tort due to misrepresentation
 - b. One who sells a defective product is liable for physical harm caused to purchaser or his property – IF the seller is engaged in the business of selling such a product
 - c. Misrepresentation in connection with a contract negotiation can constitute independent basis for a tort → here, misrepresentation of a material fact, falsity, scienter

Elements of Material Promissory Misrepresentation

- 1) What promisor said in her promise (explicitly or implicitly)
- 2) Whether, at the time of promising, that representation was true
- 3) Whether promisor made the promissory misrepresentation recklessly or knowingly (i.e. with the scienter/knowledge necessary for punitive sanctions)

Employment Contracts

- 1) There is no tort remedy for termination, unlike insurance contracts

Foley v. Interactive Data Corp.

- 1) Employee volunteers information likely to be helpful to the company and ungrateful company fires him
- 2) Court held:
 - a. Breach of employment K is not the same as breach of insurance K
 - b. No special relationship of trust and reliance sufficient to support tort liability for termination of an at-will employee, because the employee can seek other employment to mitigate damage

Vanlente v. Univ. of Wyoming Research Corp.

- 1) Vanlente refused to go along with company request to retaliate against another employee who filed an EEOC claim → was fired
- 2) Court held:
 - a. Unless this is one of those relationships where we permit or allow a level of discretion such that other party needs to let down their guard, there is No duty other than the duty in contracts

Doctrine of Good Faith & Fair Dealing

- 1) This is part of every contract → every party should behave honorably with one another
- 2) Can be used as an independent source of tort liability

Form

- 1) Obligation arising solely from “form” – under historical common law, a donative promise under seal was binding
- 2) Promise made in accordance with legally prescribed formality – now most states see it as evidence of consideration, not binding
- 3) In NY, written promises may be binding by that fact alone
 - a. For securities agreements or agreements assigning rights

Warranty

- 1) Our law enforces promises made by sellers, lessors or others concerning quality of their performance → warranties

Express Warranty

- 1) **UCC §2-313:** Express warranties by the seller are created as follows:
 - a. An affirmation of fact or promise made by seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that goods shall conform to the affirmation or promise.
 - 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 whole of the goods will conform in all relevant ways to the sample or model
- 2) The warranty must form part of the basis of the bargain to be enforceable
 - i. Reliance as a basis of the bargain needs to be disproved rather than proved.
- 3) An opinion is not a promise
- 4) Defenses to Express Warranty:
 - a. Inspection before purchase (not when the defect was not discovered and waived)
 - b. Inspection by experts does not waive when the defect was not discoverable
 - c. Actual knowledge contrary to warranty
 - d. Not by statements of value/opinion/commendation
 - i. Courts favor the consumer

Implied Warranty

UCC §2-314 Implied Warranty: Merchantability; Usage of Trade

- 1) Goods will pass in the marketplace as acceptable

- 2) In order for goods to be merchantable they must be fit for the ordinary purposes for which such goods are used.

UCC §2-315 Implied Warranty: Fitness for Particular Purpose

- 1) Goods will fit a particular purpose if seller affirms they are usable for known purposes of the buyer and buyer relies on that judgment in their selection of goods
- 2) **Fitness for intended use and purpose**

Keith v. Buchanan

- 1) P purchased a sailboat from D – sailboat was described in brochure as a seaworthy vessel and P told D he wanted it for that reason. P had a friend (who was experienced) inspect the boat and he advised P it was seaworthy. Boat turned out to not be seaworthy.
- 2) Court held that:
 - a. **Express warranty existed** b/c boat was advertised in brochure as seaworthy – affirmation of fact.
 - i. Express warranty is presumed to be a basis of the bargain
 1. Where defect is not discoverable, inspection does not waive warranty.
 - b. **No implied warranty**– when a buyer relies on their own judgments regarding an expressed purpose of a good, there is no implied warranty
 - i. P didn't rely on the judgment of the D → he had his friend inspect it, relied on his own expert.

Webster v. Blue Ship Tea Room

- 1) P ordered fish chowder, it had a bone in it → but D never claimed it would bone-free
- 2) Court held:
 - a. Fish bones cannot be considered a foreign substance in a bowl of chowder
 - b. No warranty for bones in fish chowder because they are common enough to be reasonably expected
 - c. The chowder is “merchantable” and “fit for ... ordinary purpose”

UCC §2-316 – Exclusion or Modification of Warranties

- 1) Conduct that tends to negate or limit a warranty will be so construed only when reasonable
- 2) Subject to (3), to exclude or modify an implied warranty requires conspicuous writing
- 3) Expressions like “as is” exclude implied warranties; the course of dealing or of performance can exclude or modify an implied warranty; and the buyer examining the goods precludes implied warranties w.r.t defects that such examination would uncover

Convention on Contracts for the International Sale of Goods, Article 35

The seller must deliver goods that are the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

Statute of Frauds

1) Contents of the Statute

- a. To survive a challenge under the Statute of Frauds, an agreement in the following circumstances shall be memorialized in a signed writing:
 - i. Contracts in consideration of marriage
 - ii. Contracts which cannot be performed within one year
 1. See *McIntosh v. Murphy*
 - iii. Contracts for the transfer of an interest in real property*
 - iv. Contracts by the executor of a will to pay a debt of the estate with their own money
 - v. Contracts for the sale of goods over a certain value*
 1. **UCC §2-201**: \$500
 - vi. Contracts for a party to become a surety/guarantor of another's debt or obligation
 1. See *Howard M. Schoor Associates, Inc. v. Holmdel Heights Construction Co.*
- b. The statute is not self-enforcing; it must be raised as an affirmative defense or lost
 - i. Any acknowledgment of the existence of the K precludes the defense
 - ii. Part performance of a contract otherwise under the Statute of Frauds will usually suffice to bring the performed action outside the Statute; the remainder of the agreement will remain unenforceable
 1. In real estate sales, if a buyer takes possession or materially improves the property, these actions may be sufficient to demonstrate the existence of a contract despite the lack of a signed writing – similar to promissory estoppel
- c. Why have the statute?
 - i. Jury trials involve non-expert triers of fact, channeling function, higher evidentiary standard for agreements that are difficult to communicate

2) Testing the defense

- a. The Statute of Frauds is generally disfavored and is applied very conservatively
- b. Application of the Statute may defeat the legitimate expectations of the parties – proof of mutual assent to common terms does not prevent voiding under the Statute
- c. **Four-step analysis if a challenge to an agreement is brought under the Statute of Frauds**

- i. Is the contract within the Statute? Does the SoF apply?
- ii. If so, is there a written, signed agreement?
 1. The entire agreement doesn't need to be written down, almost anything is a 'signature'
 - a. Though agreements for sale of land need to be complete – see *Jonesboro*
 2. It must be signed by the person against whom the claim is brought (note: signing = any identifying mark of the signor)
 3. Intention to adopt the contract
- iii. If not, does the Statute or case law recognize an exception to the requirements imposed by the statute?
 1. Part performance
 2. Admission (“I admit we had a K” → can be treated as an exception)
- iv. If there is no exception, is any other equitable doctrine available that would mitigate the effect of the Statute?
 1. **Restatement 2d § 139:** § 90 (estoppel) applies notwithstanding the Statute of Frauds
 2. See *McIntosh v. Murphy* – reliance interest

Howard M. Schoor Associates v. Holmdel Heights Construction*

- 1) P is an engineering firm, engaged to do survey and engineering for D; D didn't pay P and D's lawyer promised personally to pay for P's bills as long as P continued to do the work. P did all the work requested but never got full compensation. D said this agreement was unenforceable under SoF.
- 2) Court holds:
 - a. Oral promise of a surety (liability for payment of another's debts) is unenforceable under Statute of Frauds
 - b. BUT: the intent of the promise was to benefit the lawyer personally and therefore the contract was outside the Statute of Frauds
- 3) **Leading Object Exception:** When the leading object of the promisor is to subserve some interest / purpose of his own, notwithstanding the effect is to pay or discharge debt of another, his promise is not within the statute.
 - a. **Two tests apply:**
 - i. **Original-Collateral Promise:** what was the main purpose of the promisor?
 - ii. **Credit:** to whom was credit given for the performance?

***Sterling v. Taylor* (2007)**

- 1) Dispute over purported buyer's (P) unsigned handwritten note re: sale of real property
- 2) Issue: did writings between the parties satisfy the statute of frauds and result in an enforceable agreement for the sale of real property?
- 3) Court holds:

- a. Evidence of price term in writing exists but agreement is ambiguous → writing doesn't need to be complete but needs to have some level of definiteness
- b. Contract should not be internally contradictory and this one seems to be, raises doubt → therefore we are not meeting the writing requirement of the statute of frauds
- c. Price term is insufficient to show with reasonable certainty that parties understood and agreed to the price alleged by P

McIntosh v. Murphy

- 1) P moved 2200 miles to take on a one-year job and was fired 2 months in. But the contract for one-year+ employment is an oral contract. D says the contract is unenforceable under SoF because it is not in writing.
- 2) Court held:
 - a. Not enforceable under Statute of Frauds – no writing or signing
 - b. Is there another doctrine that would allow promise to be enforced? Yes
 - i. Use Equitable Estoppel – because P's reliance interests are significant → defeats the defense of the SoF

CONTRACT FORMATION - THE AGREEMENT PROCESS

Requirements of Contract Formation

- **Offer:** An offer can be **revoked** at any time prior to acceptance (assuming no promissory estoppel).
- **Acceptance:** Acceptance requires a **manifestation of mutual assent** to the terms. **Restatement 2d §17.** Expressed through (1) **writing**, (2) an **oral agreement**, or (3) **commencement of performance**.
- **Requirement of Intent**
- **No Contract when: Mutual Misunderstanding and No Meeting of the Minds**

Assent

- 1) **Contract formation requires mutual intent to be bound by common terms: mutual assent**
 - a. Intent is measured objectively → intent to be bound = action that would express an intent to be bound if done by a reasonable person similarly situated
 - b. Common terms = both parties have the same understanding about the meaning of the agreement
 - c. Offer + Acceptance is the easiest way of forming an agreement, but the *sine qua non* of contracts is mutual intent to be bound

Embry v. Hargadine, McKittrick Dry Goods Co.

- 1) P entered into one year K with D's company; P contends his K was renewed for a second year during a conversation with D, but in February of that year he was discharged and D claimed K was never extended.
- 2) Court held:
 - 1) Subjective intent does not control - Whichever party's meaning (as understood by a reasonable person) is or should be known to the other party will control
 - i. If what D told P would be taken by a reasonable person to be an employment offer, then it constitutes a valid employment K

Hotchkiss v. Nat'l City Bank of NY [Opinion by L. Hand]

- 1) Words will be construed to have their usual meaning

Lucy v. Zehmer

- 1) P & D were drinking and D pretended to sell his farm to P as a joke – wrote the contract on the back of a receipt and induced his wife to sign it too. P took the offer seriously but D claimed he was drunk and joking.

- 2) Court holds:
 - a. P is entitled to specific performance
 - b. We must look to the outward expression of a person manifesting his intention rather than to his secret and unexpressed intention
 - c. Contract was written out, had all the terms in it.
 - d. The law imputes intention corresponding to the reasonable meaning of words and actions

Morrow v. Morrow

- 1) Familial arrangements are generally not considered contracts unless there are specific indicia of an intent to form a legally binding contract

Tilbert v. Eagle Lock Co.

- 1) P's husband was employed with D when he died. D had cancelled the insurance benefits program and sent out the notice the day the husband died. P filed for benefits and D refused to pay
- 2) Court held:
 - a. Intent to withdraw is ineffective until the other party receives effective notice
 - b. Also, a promise to provide life insurance is supported by the consideration of the other party's labor

Mistake vs. Misunderstanding

Cargill Commission Co v. Mowery

- 1) P negotiated purchase of wheat from D over a series of telegrams. D used wrong code re: quantity of wheat it was willing to sell; P resold the larger amount on the market and later got a telegram from D correcting the error.
- 2) Court held:
 - a. Mowery, the defendant and breaching party, miswrote a material term of the contract.
 - b. This is a mistake; the breaching party will be held to the explicit terms of the contract despite a lack of intent to be bound by those terms
 - c. P should not be punished for D's mistake

Raffles v. Wichelhaus

- 1) Ships Peerless case
 - a. P & D entered into a K for cotton at a certain price to arrive on a certain ship called Peerless
 - b. But two ships called Peerless exist – parties have made an agreement but attached a different meaning to which ship it is
- 2) Court holds:
 - a. This is a misunderstanding; the two parties are using the same language (the ship *Peerless*) that can be reasonably read to mean completely different things and here the parties meant different things unknown to the other

- b. There was no meeting of the minds and therefore no contract

Restatement 2d §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
 - a. neither party knows or has reason to know the meaning attached by the other; or
 - b. each party knows or each party has reason to know the meaning attached by the other
- 2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if:
 - a. that party does not know of any different meaning attached by the other and the other knows the meaning attached by the first; or
 - b. that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party

Offer

- 1) **Offer:** A manifestation of assent to be bound to specific terms, provided other party agrees to the same terms.
 - a. An offer can include (with limited exceptions) *any* terms which both parties agree to.
- 2) Three Necessary elements in any offer:
 - a. **Identity** (object of negotiation)
 - b. **Price** (or reasonable basis for establishing price)
 - c. **Quantity** (or a reasonable basis for establishing quantity)
- 3) An Offer is **NOT**: Mere Invitation to Deal or Mere Talk
- 4) Absent special circumstances, courts usually conclude that a communication which advises interested parties that a property is for sale for a minimum of \$X establishes an **invitation to deal**, not an offer. A quotation is usually viewed as still reserving the right for seller to modify or revoke their offer.
- 5) Corbin:
 - a. An offer is an expression by one part of his assent to certain definite terms, provided that the other party will likewise express his assent to the identically same terms
- 6) Haagen: An offer is the act of putting oneself in a position where one could be bound to a contract without having to take further action

Lefkowitz v. Great Minneapolis Surplus Store

- 1) D had an ad for a certain fur coat, going for a certain price to the first person in line → P was first person in line but D refused to sell it b/c of a “house rule” against sales to men.
- 2) Court held:
 - a. An advertisement specifying the terms of a sale is a “clear, definite, explicit” offer that “leaves nothing open for negotiation” and thus acceptance creates a contract
 - b. Once you have created the offer, you can’t change the deal!!
 - c. However, a “mere advertisement” would be an invitation to deal that is not made binding by acceptance
 1. An valid offer cannot be revoked once there has been part performance (here, Lefkowitz going to the store and being first in line)

Ford Motor Credit Co. v. Russell

- 1) An ‘offer’ that contains additional terms reasonably left open to future negotiation (here, financing for purchase of a car) is an invitation to deal.
- 2) The ad is just an invitation to deal → that prevents it from transforming into an offer of sale to the general public.

Courteen Seed Co. v. Abraham

- 1) D sent telegram to P notifying him that certain amount of red clover seeds were up for sale and listed asking price; P replied saying he accepted the offer
- 2) But this telegram is not an intention to form a contract, D had sent many such telegrams out looking for a buyer – just an invitation to deal
- 3) General language addressed and disseminated generally is not an offer

Southworth v. Oliver

- 1) D owned ranches and spoke with P about selling part of the property, also sent them a letter with details; but now don’t want to sell; P thinks they had a contract and wants specific performance
- 2) Indicia that this is not an offer: sent to multiple people even though only one ranch for sale ...
- 3) Court holds:
 - a. A clear and definite proposal can be a valid offer despite being sent to several people and not being intended to be an offer, when a reasonable person would have understood the proposal to be an offer
 - b. Again, subjective intent is not controlling: the wording of the agreement, interpreted in the circumstances, as reasonably understood, is what controls.
 - i. Surrounding circumstances would have led reasonable person to believe that D was making an offer to sell P the land

UCC §2-204(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.

UCC §2-311(1)

An agreement for a sale which is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

Acceptance

- 1) Acceptance is an agreement/an act demonstrating an assent to the terms of the offer
- 2) Acceptance is different from a counter-offer:
 - a. Counter-offer destroys the offer (modifies it, adds conditions to it)
 - b. Anything more than “I accept” can create confusion...
- 3) If an offer was made, a valid acceptance completes and creates a **binding contract**.
- 4) An offer can be revoked at any time prior to a valid acceptance (absent certain factors).
- 5) An acceptance must be clearly expressed via **clear written or oral assent** to the terms. On some occasions, especially if the offer is recurring, acceptance might be deemed via **performance**.

Corbin: An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract.

UCC 2-206 Offer & Acceptance in Formation of Contract

Unless unambiguously indicated, an offer to make a contract can be accepted by any reasonable medium, including the commencement of performance

An offer to buy goods for "prompt shipment" is to be construed as inviting acceptance either by promise **or** by the act of shipment itself.

Restatement 2d § 32 Invitation of Promise or Performance

When in doubt, an offer is an invitation to accept either by promising to perform or by rendering the performance, as the offeree chooses

Restatement 2d §62 Effect of Performance by Offeree Where Offer invites Either Performance or Performance

- 1) Acceptance by performance is a **two-way street**.

- 2) Performance by the offeree is equivalent to an expressly stated promise: *Having shipped the goods or otherwise commenced performance, the offeree becomes a promisor in his own right: legally bound!*

Ardente v. Horan

- 1) D offered residential property for sale and P made a bid; D told P bid was acceptable, P executed a sales agmt but added a note confirming that certain items in the house were part of the transaction – D said no; P sued for specific performance
- 2) Court held:
 - a. A reply to an offer with conditions is a counteroffer and permits the offeror to revoke the original offer
 - b. “An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist.”

Eliason v. Henshaw

- 1) D sent a letter to P stating they were in business of buying flour and if P would give them X barrels, they would pay P a certain price. P wrote back accepting D’s offer but didn’t send it back by the time/mode that D wanted – P refused to accept the flour.
- 2) Court held:
 - a. The offeror is the ‘master of the offer’ and can specify conditions of acceptance that must be met for the acceptance to be valid – even when those terms negate the possibility of acceptance.

Allied Steel and Conveyors, Inc. v. Ford Motor Co.

- 1) Ford (P) ordered machinery from D and under terms of the order, P could have D install machinery for additional sum. Indemnity provision in the K. Worker injured and P wanted to bring D into the lawsuit. D said it never accepted indemnity provision.
- 2) Court held:
 - a. Part performance is sufficient to constitute acceptance and the formation of a binding contract.
 - b. D accepted the offer when it undertook installation of the machinery.

Counter-Offers and Qualified Acceptance (Mirror-Image Rule)

Generally, an offeree who adds conditions or qualifications to an acceptance does not bind the offeror to such acceptance.

Restatement 2d §59 Purported Acceptance Which Adds Qualifications

Mirror Image Rule

A statement of acceptance is effective only if it is a **mirror image** of the offer and expresses **unconditional assent** to all terms and conditions imposed by the offeror.

Restatement 2d §39 Counter Offers

Common law treats a **counteroffer**, or proposing terms other than those contained in the original offer, as the legal **equivalent** of an **outright rejection**.

- The offeror has no legal obligation to respond and can deal with someone else. The offeree cannot accept the original offer after he proposes a counteroffer
- *Exception:* If the counter-offer is clearly expressed as an **inquiry** → The original offeree **retains** their right to accept the **original** offer. The original offeror **cannot bind** the offeree to the terms of their *inquiry* counter-offer

Acceptance by Action

Restatement 2d § 69 Acceptance by Silence or Exercise of Dominion

Silence/inaction operate as acceptance *only if*:

- (1) Benefit is taken of services offered with the expectation of compensation, with a reasonable opportunity to reject;
- (2) Offeror stated that silence may be assent and the silence was intended to be assent;
- (3) Where previous dealings reasonably suggest that notice would only be given of intent not to accept
 - a. *Cf.* 39 USC 3009: can't mail unordered merchandise unless it's free – can't impose duty to reject

White v. Corlies

- 1) P was a builder, D was merchant – D furnished P with specs for building an office and wanted estimate for cost of work; D offered P the job, P didn't reply but immediately started prepping for the work, bought lumber; next day D retracted the offer.
- 2) Court held:
 - a. Acceptance must be made by “some appropriate act...in the usual course of events, in some reasonable time communicated” to the offeror.
 - b. If the offeree does nothing that indicates acceptance, i.e. all their actions were in the usual course of business, there is no contract.
 - i. P could have bought lumber for any other work of his

- ii. Offeror has to know that offeree took these steps to complete the contract and it must come to offeror's attention in normal course of business

Ducommun v. Johnson

- 1) Was real estate agent entitled to a fee when seller never responded to contract of sale?
- 2) "Generally...mere silence or failure to reject...does not constitute an acceptance"

Duration of Offers

Restatement 2d § 36 Methods of Termination of the Power of Acceptance

- 1) Power of acceptance may be terminated by rejection/counteroffer, lapse of time, revocation, or death/incapacity.
- 2) The non-occurrence of any condition of acceptance voids the offer.

Akers v. J.B. Sedberry, Inc.

- 1) Offer from engineers to shorten length of their K; lapse of time where D discussed other things; Engineers didn't revoke offer because they it has been brushed aside by D's conduct
- 2) Court held:
 - a. An offer that is reasonably expected to be immediately accepted or declined will expire and become void immediately if not accepted.
 - b. An offer made in a face-to-face meeting expires at the end of that meeting; a non-response operates as a rejection.

Farnsworth: "Rejection by the offeree terminates the power of acceptance."

Vaskie v. West American Insurance Co.

- 1) P was in car accident. Insurance company makes a compensation offer which is accepted a month later – but insurance company refuses to pay, says the SoL ran out a few days earlier
- 2) Court holds:
 - a. Statutes of limitations are relevant but not determinative of when a reasonable time to consider an offer lapses; the question of 'reasonable time' is one of fact, not law

Caldwell v. Cline

- 1) D made P an offer for land exchange
- 2) Offer had a time provision re: acceptance but didn't have clarity w.r.t when clock would start ticking.
- 3) Court holds:
 - a. If there is no clear date of when time would lapse, we determine what a reasonable time would be under the circumstances

b. A time period of when to accept begins when the offeree (constructively) receives the offer

Restatement 2d §39(2)

(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.

Collins v. Thompson

- 1) Parties may counteroffer but still reserve the right to accept the original offer

Dickinson v. Dodds

- 1) Revocation of an offer is effective when the offeree receives the "manifestation of an intention" to revoke, even if it doesn't come from the offeror; a time-limited offer may still be revoked earlier

Restatement 2d §42 Revocation by Communication From Offeror Received by Offeree

Offer is revoked when offeree receives from the offeror "manifestation of intention not to enter into the proposed contract"

Marsh v. Lott

- 1) P was given option to purchase D's property for a consideration of 25 cents – option gave him until a certain date with privilege of extending the option. P wished to use extension and D informed P that property was no longer on sale. P wanted D to perform.
- 2) Court held:
 - a. Any reasonable consideration, however disproportionate, can form a binding bilateral option contract because there is no way to value the option
 - i. No standard exists whereby to determine adequate value of an option to purchase specific property
 - ii. Any \$ consideration is binding upon the seller for the time specified and is irrevocable for want of its adequacy

Restatement 2d § 87(1) Option Contract

An offer is binding as an option contract if it is in writing, signed, is made with consideration, and "proposes an exchange on fair terms within a reasonable time"

Options, Bilateral Contracts and Unilateral Contracts

Bilateral Contract

- 1) One in which there are mutual promises between two parties to the K (a promise for a promise)

Unilateral Contracts

- 1) A contract where you make an offer for acceptance by performance only, not by promise
- 2) Promise for performance

UCC §2-205 Firm Offers

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives 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 a reasonable time, but in no event may such period of irrevocability exceed 3 months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Restatement 2d §45 Option Contract created by Part Performance or Tender

An offer that is to be accepted via performance becomes an option contract when performance begins, but the obligations of the offeror are enforceable only upon completed performance

- (1) Option is for completion within a reasonable time
- (2) No act inconsistent with the effort to complete in a reasonable time may be taken
- (3) Purported consideration only: small/nominal for ~3 mo. options; larger for +3 months (long term)

Modern Rule: An offeror of a unilateral contract retains the right of revocation until performance has begun. The offeree, however, retains the right to abandon performance at any point prior to completion.

Davis v. Jacoby

- 1) P was niece of Whiteheads, Mr. W asked her and her husband to come live with them and help them out. She would inherit everything in return. They immediately accepted offer but Mr. W died before – P took care of Mrs. W until she died. But P still didn't get the inheritance.
- 2) Court held:
 - a. The offer was an offer to enter into a bilateral contract
 - b. P fully performed her part of the agreement, she should get the inheritance she was promised.
 - c. Mutually exchanged promises (to provide care, to deed a property) create a bilateral contract that is enforceable even though all expenses were incurred in advance of performance
 - i. A bilateral contract is the best solution for an offeror who wants performance but doesn't want to be bound before *full* performance – but the offeror can't breach without becoming liable.

Brackebury v. Hodgkin

- 1) D was mother of P, proposed to P that if she took care of her for life they could have the house when she died; P accepted offer and starting performing upon the K; D got into fights with P and gave the house to her son instead; Offer revoked before they could complete performance
- 2) D is not allowed to do this → P's partial performance created an option to K
- 3) Court holds:
 - a. Once you start a performance, you have right to complete it
 - b. Mutually exchanged promises (to provide care until death – to deed a property) cannot be revoked once performance has begun (similar to option contract); if party receiving the performance breaches, the other can receive damages despite not fully performing.
 - ii. If the performing party breaches, they can't claim unjust enrichment (contract was for full performance so no real benefit received) and can't claim reliance because the contract upon which they relied (care until death in exchange for the deed) was *not* breached, its conditions were never met

Petterson v. Pattberg

- 1) D was owner of a mortgage bond executed by P → D made offer re: payment of mortgage and P arrived at this place to pay off the mortgage; but D had already sold it to someone else
- 2) Unilateral K → can be revoked at any time before acceptance
- 3) Has P started to perform? Once you start to perform you have an option to complete the performance
 - a. Dissent [follows *Brackebury* rule]:
 - i. D made performance impossible → promising party cannot prevent performance
 - ii. The beginnings of performance suffice to form an option
 - b. Majority:
 - i. Only full performance could constitute acceptance and create a contract

Garber v. Harris Trust & Sav. Bank

- 1) Attempt to change credit card contract → Bank tried to modify the cardholder agreement and start charging an annual fee
- 2) Court held:
 - a. Each individual transaction is a contract
 - b. The terms of use for a credit card are an option contract entered into with each purchase; only discontinuing use prevents acceptance of the terms

BID CONTRACTS

California Rule (Majority): Subcontractor's offer to do work creates an option for the General Contractor to accept at any time until the General Contractor rejects the option, or does anything inconsistent with a desire to accept.

* Bid creates an option contract

Drennan v. Star Paving Co.

- 1) Sub-contractor induced the action of the general contractor when they put in their bid
- 2) In a unilateral contract, the offeree is getting an option to complete performance as long as the offeree does no act inconsistent with the intent to perform (including unreasonable delay)

NY Rule (Minority): Bid is either a unilateral contract, and the bid is completion of the contract, or it can be structured as a bilateral agreement, which allows withdrawal of the bid before acceptance.

* Bid is an offer for performance that must be accepted

James Baird Co. v. Gimble Bros.

- 1) Sub-contractor bid is put in, the General Contractor incorporates it in his bid; then the sub-contractor wants to withdraw his bid because he discovers there has been a mistake
- 2) Court [L.Hand]: Can revoke offer anytime prior to acceptance
 - a. No contract here since no acceptance yet.

Challenging Revocation

Unless you have a forfeiture or a reliance interest, the right to revoke is absolute
→ These are only 2 grounds to challenge revocation

Bargaining at a Distance

- 1) **Common Law Rule:** acceptance is effective upon dispatch & revocation is effective upon receipt
 - a. See: Restatement §42 and §68
- 2) Variant Rule [In CA, MT, ND, and SD]: *both* acceptance and revocation are effective upon dispatch
 - a. Neutral rule → both offeror and offeree are affected on dispatch
- 3) An offer that is not received is not valid; an acceptance that is not received *does* create a binding contract
- 4) The presumptive burden is on the offeror so as to incentivize clarity
- 5) **CISG Articles 18 & 22**
 - a. Acceptance is effective upon receipt
 - b. Revocation is effective if received before dispatch of acceptance
 - c. If each of the parties in an international transaction is a national of a country that adhered to the Convention – this is the default rule

- 6) **Difference between Common Law and CISG:**
 - a. What if acceptance is dispatched but never received?
 - i. Under Common Law - you have a K
 - ii. Under CISG – there is no K
- 7) Note: Mailing is dispatched when it is postmarked

Adams v. Lindsell

- 1) D (wool dealers) wrote letter to P offering them X amount of wool; answer from P to be received in post. D misdirected letter so P got it late, replied to D; but D hadn't heard from P so they had already sold the wool; P sued for non-delivery of wool
- 2) Court held:
 - a. Contract is created upon post of acceptance; especially when the offeror's mistake causes a delay in notifying acceptance, risk is borne by the offeror

Morrison v. Thielke

- 1) Does the repudiation of an acceptance that overtakes the acceptance free the offeree from the consequence of the acceptance?
 - a. No – application of Common Law → once you have accepted, there is a contract.
- 2) Offeror bears risk of uncertainties created by indirect bargaining because they can require receipt of acceptance

Lewis v. Browning

- 1) Offeror is master of the offer → can include a contract stipulation that acceptance must be received.
- 2) When an offer specifically requires “actual communication” of acceptance, a binding contract is only formed when the offeror actually receives acceptance

Worms v. Burgess [Note: Exception to Restatement 2d §64(b)]

- 1) P is successor in interest to holder of an option contract with D. Optionor has to be notified by registered mail if optionee wants to exercise the option K. Optionee sent this notice but D never got it (before the option contract expired)
- 2) Court:
 - a. Option K was properly exercised because notice was mailed out in time

MAILBOX RULE

- 1) An acceptance of an offer – in which mail is an acceptable mode of acceptance – is effective when deposited in the mail.
- 2) Revocation of an offer is ineffective if received after an acceptance has been properly dispatched.

- 3) In negotiations by mail, one party must be in the dark during the period for transmission of the letter. The mailbox rule imposes this uncertainty on the offeror.
 - a. Offeror can shift this risk by requiring receipt of acceptance when he makes the offer.

Agreements to Agree

- 1) Extended negotiations will result in a binding agreement or something near an agreement
- 2) A 'mere' agreement to agree has no legal effect
- 3) Must look at intent (to be bound) to differentiate between a binding agreement and a mere agreement to agree

Restatement 2d § 27 Existence of a Contract where Written Memorial is Contemplated

Manifestations of assent that are in themselves sufficient to conclude a contract are a binding agreement despite an intention to later prepare a written memorial, unless the circumstances demonstrate the agreements are preliminary negotiations

Key question: is what is left truly representative of unfinished negotiations (therefore, no agreement yet)?

Arnold Palmer Co. v. Fuqua Industries, Inc.

- 1) P & D met to discuss business relationship; memorandum of intent created with detailed information re: merger; then D decided not to go through with it.
- 2) Court held:
 - a. When there are *both* indicia that an agreement is merely an agreement to agree (conditions requiring a definitive, satisfactory final agreement; requiring the assent of a BOD) and signals of an intent to be bound, a trier of fact must determine whether the parties intended to agree.

Empro Manuf. Co., Inc. v. Ball-Co Manuf., Inc. [J. Easterbrook]

- 1) D floated assets on the market and P showed interest in purchasing the assets; created letter of intent with general terms and conditions, subject to final agreement; disagreements ensued and D entered into negotiations with someone else
- 2) Court held:
 - a. When specific terms and conditions of an agreement are left open to future negotiations, a letter of intent is merely an agreement to agree

* What is the role of reliance? *Empro* says that the role of reliance is very small; *Fuqua* says the role is large.

Form Contracts and Battle of the Forms

UCC 2-204 Formation in General

(2) “An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined”

BATTLE OF THE FORMS

* THIS IS A KEY TOPIC*

- 1) Classic common law rule: Mirror Image Rule
 - a. An offer must be accepted exactly without modifications
 - b. An attempt to accept the offer on different terms instead creates a counter-offer and this constitutes a rejection of original offer.

- 2) **UCC §2-207 supplants the common-law standard mirror-image rule in routine merchandise transactions**
 - a. **Form contracts** are often used which may not be read or negotiated by the parties.

- 3) **UCC 2-207(1)** treats the supplier's confirmation as an **acceptance of the purchaser's offer** rather than a counter-offer, even if it includes terms that are different than agreed to in the order form.
 - a. We form a contract if there is a definite/seasonable acceptance even though that acceptance contains different and additional terms → those additional terms drop out unless the acceptance was made expressly conditional

 - b. Unless the supplier expressly conditions acceptance on the purchaser's assent to the supplier's terms, there is a "contract" of which the terms are those contained in the *purchaser's* order. This prevents both parties from refusing performance by seizing boilerplate discrepancies that have no material significance.

- 4) **UCC §2-207(2)** views additional (as opposed to *different / conflicting*) terms in the supplier-offeree's form as **proposals** for addition to the contract. These proposals are considered adopted by purchaser *unless*:
 - a. The offer limits acceptance to its own terms,
 - b. The additional terms are objected to by the offeror, or
 - c. The additional terms **materially alter the contract**
 - i. Material terms are rejected unless the purchaser expressly agrees to be bound by them (rare).
 - ii. **Materiality** is determined by trade practice and circumstances; do they go to the **heart of the agreement?**

- 5) **UCC §2-207(3)** says that in cases of extended dealing [and if the writings do not establish a contract under 2-207(1)], if the parties' conduct indicates an assumption that an enforceable agreement existed, **a contract based on the terms of which the parties agree** shall be enforced (plus extra terms supplied by UCC).
- 6) **General Rule** that warranty disclaimers can be relied upon by the seller only when the disclaimer calls for, and receives, the express assent of the buyer, thereby escaping the status of a proposal under 2-207(2).
 - a. This requires the buyer to give real attention to the disclaimer and test products before committing.
- 7) **Rolling Contracts (Software)**
 - a. A more contentious role of UCC §2-207 occurs when the goods are received and paid for *before* the "contract" has been furnished to the buyer.
 - b. E.g: Consumer buys computer software first, and only receives and agrees to Terms of Service upon installation. Do these post-purchase terms apply under UCC §2-207?
- 8) **UCC §2-207 treats merchants and consumers differently.**
 - a. Merchants – 2-207(2) applies
 - b. Non-merchants, 2-207(1) applies
 - c. This makes sense for many contexts
 - d. E.g. Buying airplane tickets → Although terms (i.e. departure time) may change, buying a ticket is still binding and shouldn't be treated as a "proposal" by the airline.
- 9) Generally, seller's additional terms are treated as proposals under UCC §2-207 and - assuming they materially alter the contract – these additional terms are excluded unless expressly assented to by the buyer.
 - a. When the buyer is an individual customer, the larger concern is on fairness / unconscionability.

UCC 2-207 Additional Terms in Acceptance or Confirmation

- 1) A definite and seasonable 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.
[Note: Seems to set up a first shot doctrine – additional terms do not prevent acceptance unless they are conditional]
- 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; or
- c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

[Note: Applies only to merchants: additional terms become part of the contract unless the original offer was expressly limited to its terms, or the additional terms materially change the offer, or there is noticed objection — key question is whether the term is 'materially' different]

- 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. *[Note: Conduct can be sufficient to establish a contract, the terms of which will be only the agreed terms plus any gap-fillers provided by the UCC; this is the 'knock-out rule']*

Four routes to contract formation under 2-207

- 4) definite and seasonable expression of acceptance
- 5) written confirmation of terms agreed upon
- 6) counteroffer and acceptance
- 7) conduct that recognizes the existence of a contract

Types of Responses:

- 1) Acceptance of the original offer;
- 2) Response with materially altered (added or modified) terms, in which case the altered term drops out;
- 3) Response with additional nonmaterial terms, in which case the terms become part of the agreement, unless objected to, in which case they drop out

Hill v. Gateway 2000 [Easterbrook]

- 1) Dispute over Gateway's arbitration clause applies → P says didn't notice it and kept computer for 30 days after delivery (at which time the terms became binding)
- 2) No exchange of forms so UCC §2-207 doesn't control
 - a. Terms of service for a computer (or, presumably, other goods) are binding even if unread - if there was a reasonable opportunity for them to have been read.
- 3) Sets down a bright-line rule that the agreement is entered into when you receive the good and have had time to read the terms and conditions; prior to that time, there is an 'option agreement' for return of the goods if they or the terms are not satisfactory.

See also *ProCD* –Terms inside a box of software are binding when the end user has the opportunity to read the terms and reject them via return.

Step-Saver Data Systems, Inc. v. Wyse Technology, Inc. [Wisdom]

- 1) Dispute over whether clauses for disclaimer of warranties and limitations of remedies [printed on packaging containing the software] applied to the K.
- 2) Court held:
 - a. Purchase and use of software constitutes conduct establishing a contract under UCC §2-207(3)
 - b. BUT failure to expressly agree to terms of service, if those terms are not clearly stated as necessary for use, prevents those terms from being controlling under §2-207 → opening the product did not constitute a conditional acceptance.

Policing Agreements

- 1) Contracts are generally considered void if entered into under conditions of duress, or if induced by fraud or misrepresentation

Duress

- 1) Contracts are not valid without assent, and assent cannot be given under duress, so promises extorted by threats or violence are not enforceable.
 - a. **Economic Duress** counts as well.
- 2) Duress is an assent-oriented policing doctrine: contracts made because of improper threats are not enforceable.
 - a. Absence of meaningful choice creates duress; “mere internal compulsion to act” does not
 - b. Reasonable functioning of the rules of supply and demand do not create compulsion

Restatement 2d §176 When a Threat is Improper

- 1) A threat is improper if:
 - a. What is threatened is a crime or tort,
 - b. What is threatened is a criminal prosecution
 - c. What is threatened is the use of the civil process in bad faith,
 - d. The threat is a breach of the duty of good faith and fair dealing.
- 2) A threat is improper if the exchange is not on fair terms and:
 - a. The threat will harm the recipient and not benefit the threatening party,
 - b. Prior unfair dealing magnifies the threat, or
 - c. The threat is only the use of power for illegitimate ends

Dalzell: Consent is “unreal” if “it would not have been given except for the unpleasant alternative” threatened by the demanding party.

Standard Box Co. v. Mutual Biscuit Co.

- 1) The mere threat to withhold from a party a legal right is not duress
- 2) Companies can take advantage of favorable market conditions and have a right to set prices

Machinery Hauling, Inc. v. Steel of W. Va.

- 1) A company can change the conditions for future business, even to an unfair level, without creating duress, because there is no legal right to future business

S.P. Dunham & Co. v. Kudra

- 1) A threat to embarrass another party can be outside of the kind of market behavior permitted by the duty of good faith and fair dealing
- 2) Here, restricted time is important – outside market norms

Undue Influence

- 1) Doctrine related to duress
 - a. Undue susceptibility of one party + Excessive pressure placed on that party by the other
- 2) Special relationships (lawyers and clients; maternity home and unwed mother)
- 3) Elements:
 - a. Discussion of transaction at inappropriate/unusual times
 - b. Consummation of transaction at unusual place
 - c. Insistent demand that business be finished at once
 - d. Extreme emphasis on consequences of delay
 - e. Use of multiple persuaders by dominant side against a single servient party
 - f. Absence of 3rd party advisors to servient party

Misrepresentation, Concealment and the Duty to Disclose

- 1) **Assent** implies both parties have a fair and equitable understanding of the terms at hand. If the identity or character of the thing bargained over is misrepresented, this assent is not meaningful.
 - a. This follows as a matter of law even without specific intent to defraud (negligent / innocent misrepresentation) since representations of fact, if material and relied upon in good faith, constitute **inducement**.
- 2) These are all Assent-Oriented policing doctrines
 - a. There is a process failure
 - b. Information is not being exchanged efficiently (however, there must be a substantive issue – *material terms* – to justify rescission)

Restatement 2d of Torts §552C Misrepresentation in Sale, Rental or Exchange Transaction

- 1) A party to a sale who misrepresents a material fact is liable for the other party's damages sustained by their justified reliance upon the misrepresentation (even if the misrepresentation was not made fraudulently or negligently).
- 2) Damages are limited to the difference between the amount paid and the actual value received.

Bates v. Cashman

- 1) If there is a negligent misrepresentation of a material fact, the party to whom the misrepresentation was made *can rescind* the contract – the contract is not void.

Gibb v. Citicorp Mortgage, Inc.

- 1) Case involving termite damage
- 2) Neither a disclaimer nor an “as is” clause prevent causes of action for fraudulent misrepresentation or concealment when there has been active representation by the seller.

Test for fraudulent misrepresentation

Plaintiff must prove following elements:

- 1) A representation was made
- 2) The representation was false
- 3) That when made, representation was known to be false or made recklessly without knowledge of its truth
- 4) Made with the intention of inducing reliance
- 5) The plaintiff did indeed rely
- 6) Resulted in damage to the plaintiff

Restatement 2d of Torts § 552: Negligent misrepresentation is the failure to exercise reasonable care or competence in supplying correct information

Test for fraudulent concealment

Plaintiff must prove:

- 1) The defendant concealed a material fact
- 2) The defendant had knowledge of this of material fact
- 3) Plaintiff would not have discovered this material fact through reasonably diligent attention or judgment
- 4) The concealment was designed to mislead the plaintiff
- 5) The plaintiff was misled
- 6) The plaintiff suffered damage as a result.

Effective disclaimers require the active repudiation of any duty to disclose and of any statements made

Holcomb v. Hoffschneider

- 1) When there is a misrepresentation about the acreage of a plot of land, the seller is assumed to have superior knowledge that the buyer may reasonably rely upon, and the buyer may recover damages if the acreage is different from the seller’s stated amount

Porreco v. Porreco

- 1) A wife's reliance on her husband's statements about the value of an engagement ring was not justified because she had the ability to have the ring appraised (to gain the necessary knowledge) at any time
- 2) Moreover, the ring was not actually the inducement to enter into the prenuptial agreement at issue

Weintraub v. Krobatsch

- 1) Case involving a house being sold; house had cockroach infestation but they only came out in the dark → so buyers didn't know about roaches when they inspected house; buyers wanted to rescind the contract
- 2) Deliberate concealment or nondisclosure does not automatically provide a right to rescission when the conditions are minor or immaterial, but for a major condition rescission may be equitably justified.
- 3) A party may be guilty of fraud by their silence when it is incumbent upon them to speak concerning matters of material fact entirely within their own knowledge.

Distinction Between Non-Disclosure and Concealment

Restatement 2d §161: Non-disclosure is equivalent to misrepresentation if (1) the undisclosed fact concerns a basic assumption made by the other party, and (2) the nondisclosure amounts to bad faith dealings.

Anthony Kronman:

- 1) Cases requiring disclosure involve information likely to be casually acquired (costs incurred in acquiring the knowledge would have been incurred regardless)
- 2) Cases permitting nondisclosure involve information likely to have been deliberately produced (costs not incurred otherwise) → promotes efficiency

Duty to Disclose the Legal Effect of an Agreement:

- 1) Some courts have required a party to disclose, not only the factual circumstances surrounding a transaction (see *Weintraub*) but also information about the legal effects of K terms
 - a. When K has fine print or hidden terms or
 - b. When one party has superior knowledge or a superior position
 - i. Because other party lacks education or it is a form contract

Weaver v. American Oil

- 1) P's employee sprayed gasoline on D and burned them; P had a printed form K with D that included "hold harmless" clause [indemnity clause] → D was uneducated and didn't understand the legal terms when he had to sign it.
- 2) A K is unconscionable on the grounds that it is contrary to public policy when the stronger party has a greater bargaining power and uses it to its advantage and unknown to the weaker party, causes that party great hardship/risk

Public Policy

- 1) Public policy is a content-oriented policing doctrine: because contract law is itself a species of public policy, contracts that do not further the public benefit will not be enforced.
 - a. This defense is extremely difficult; the presumption is that public policy favors enforcement of contracts.
 - b. Key question: is there some public policy interest that will be defeated if we enforce the particular form of contracting at issue?

Printing and Numerical Registering Co. v. Sampson

- 1) The pre-eminent goals of public policy are “the utmost liberty of contracting” and that “contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice”

Llewellyn: surprising or oppressive terms in a contract ought not be enforced

McCutcheon v. United Homes Corp.

- 1) When an exculpatory clause in a contract contravenes established common-law rules of liability, it may be held unenforceable as contrary to public policy.
- 2) In the aggregate, permitting parties to contract around the basic policies of the State so as to defeat that policy is not a desirable outcome.

Restatement (First) §574

A bargain for exemption from liability for consequences of negligence *not falling greatly below the standard established by law* for protection against unreasonable risk of harm is legal.

Kalisch-Jarcho, Inc. v. New York City

- 1) A clause precluding damages will not be enforced if the defendant’s actions constitute active interference with the good faith performance by the plaintiff.

Molina v. Games Management Services

- 1) Lotto winner denied payment b/c she had no record of purchase, which was a requirement of NY rules and was on the terms printed on the lottery ticket; she claimed negligence of D but there was an exculpatory clause printed on ticket
- 2) “Clear and unequivocal” exculpatory clauses will be enforced

Non-Compete Clauses

Dwyer v. Jung

- 1) An agreement dividing clients among attorneys in a dissolved partnership is void as against public policy because of the interest of permitting clients to choose their legal representation

Karpinsky v. Ingrasci

- 1) Non-compete clauses can be narrowly construed by the court to provide reasonable relief

Quandt's Wholesale Distributors, Inc. v. Giardino

- 1) Non-compete clauses “will be enforced only if reasonably limited temporarily and geographically”
- 2) Such clauses should not be broader than needed to protect the interests of the party seeking to limit

Inequality of Exchange

- 1) Inequality of exchange is a *content-oriented* policing doctrine

Black Industries, Inc. v. Bush

- 1) Contracts will be voided on public policy grounds where they are inducements on a public official to commit an illegal act or when they contemplate a conspiracy for collusive bidding.
- 2) Parties that are not dealing directly with the government cannot contain these flaws.
- 3) The relative values of consideration *will not affect the validity of the agreement.*

Jackson v. Seymour

- 1) Consideration so inadequate as to “shock the conscience” (\$275 paid for land worth \$5,000) is a key indicator that there has been fraud, though inadequate consideration is not *ep ipso* a justification to award damages or rescission.

Moore v. Gregory

- 1) Constructive fraud is breach of a legal or equitable duty that tends to deceive others, to violate public or private confidence or injure public interests [despite a lack of dishonest purpose or intent to deceive].

Unconscionability

- 1) Substantive unconscionability is a *content-oriented* policing doctrine designed to preserve fairness.
- 2) A normative principle (ancient principle in common law): if what you are doing is bad (shocks the conscience of the community), then we should not lend the power and dignity of the law and the state to AID you in your shocking behavior
- 3) Hillman: The present doctrine of unconscionability involves the lumping together of various policing doctrines without consideration for their relative weight, thus creating confusion by making decisions increasingly abstract

UCC §2-302 Unconscionable Contract or Clause

- 1) Unconscionability is a valid defense in contracts for the sale of goods; courts may refuse to enforce the contract, refuse to enforce only the unconscionable clause, or limit the application of the clause to prevent an unconscionable result.

[Note: What can a court do if it finds a K unconscionable? It has plenary power in the face of an unconscionable agreement and can treat unconscionable clause as its not there]

- 2) When unconscionability is alleged, parties may present evidence as to the commercial setting and the purpose and effect of the contract to aid the court in its determination.

[Note: When is a clause unconscionable? If consideration is grossly inadequate]

UCC §2-719(3) Unconscionability and Remedy Limitations

Clauses limiting damages may be void as unconscionable; limitation of damages for injury to the person in the case of consumer goods is *prima facie* unconscionable, but the same is not true for commercial losses.

Weaver v. American Oil Co. [see under Public Policy too]

- 1) A contract is unenforceable as unconscionable if one party had “a prodigious amount of bargaining power” that was used to their advantage and unknown to the lesser party

The Walker-Thomas Furniture Cases

Patterson v. Walker-Thomas Furniture

- 1) D charged P twice as much for a TV than any other seller in the area would charge for TV
- 2) Two elements to check for unconscionability: (1) did P have meaningful choice in the matter and (2) were K terms severely unfavorable to one party?
 - a. P did have meaningful choice – no procedural problem here! Don’t need to check the K terms.
- 3) **Without both procedural and substantive problems, a contract is not unconscionable**; the mere showing of an unreasonably high price is insufficient

Williams v. Walker Thomas Furniture

- 1) Unconscionability includes an absence of meaningful choice on the part of one party, together with contract terms unreasonably favorable to the other party
- 2) Part of this holding is that Walker Thomas *should know* that Williams can’t afford to buy the goods at issue

Ryan v. Weiner

- 1) Unconscionability requires “inadequacy of price...coupled with some circumstance that amounts to inequitable or oppressive conduct”.

- 2) Here, massively unfavorable terms in a rushed transaction with a man of limited capacity subjected to exogenous pressure rises to the level of unconscionability.

Key Elements for Unconscionability

- 1) Substantive unconscionability leads to a search for procedural flaws – both are necessary components
- 2) But: mere inadequacy of price alone, mere diminished capacity alone, and mere speed of transacting alone will not make a contract unconscionable
- 3) Equitable relief: the court restores the *status quo ante*

Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.

- 1) A completely one-sided transaction executed in haste, after the losing party acted in reliance on the pending agreement, may be voided as unconscionable at least to the particular unfavorable term.

Dillman & Associates, Inc. v. Capitol Leasing Co.

- 1) When parties are similarly situated, sophisticated businesspeople, and disclaimers are clearly stated, a contract is not unconscionable
- 2) Even a one-sided agreement will be enforced if fairly entered into.
- 3) This is the most common response to claims of unconscionability.

Davis v. Kolb

- 1) When one party substantially misrepresents their knowledge about a sale, and the other party has no knowledge at all, a resulting one-sided contract may not be properly supported by consideration and therefore void as unconscionable

Jones v. Star Credit Corp.

- 1) When it appears that knowing advantage was taken of the plaintiffs who had limited bargaining power and who would not reasonably enter into the contract, the agreement may be void as unconscionable
- 2) Here, salespeople operating ‘at the fringes of commercial activity’ will not be protected
- 3) UCC 2-302 “enacts the moral sense of the community into the law of commercial transactions”
- 4) Equitable relief: the court simply stops the deal at its present state because some fault exists on both sides

Capacity

- 1) Determination that somebody doesn't have the capacity to contract is a very serious determination in our world → have lost your legal personality, wholly dependent on others for private ordering
- 2) **Restatement 2d §15 Mental Illness or Defect**
 - a. A person incurs only voidable K duties by entering into a transaction if by reason of mental illness or defect:
 - i. He is unable to understand in a reasonable manner the nature & consequences of the transaction, or
 - ii. He is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
 - b. Where the K is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the K has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case, a court may grant relief as justice requires.

Policing Standard Form Agreements

Contracts of Adhesion → reduce transaction costs

- 1) If you are a party that deals in many agreements of this type, it is very efficient for you to know what is in your agreements (useful to have them be standardized)
- 2) “take it or leave it”
- 3) Concerns re: such contracts:
 - a. Absence of Meaningful Choice
 - b. Knowing party taking advantage
 - c. Usually dealing with issues of concealment and duty to disclose
- 4) Look for Process problems first, then look for substantively unfair terms

Restatement 2d § 211 Standardized Agreements

- 1) Assent in writing to a standard agreement known to be standard makes the terms of the agreement enforceable;
- 2) Such an agreement should be interpreted as treating all parties as similarly situated regardless of particular knowledge;
- 3) When a party “has reason to believe that the party manifesting such assent would not do so if he knew the writing contained a particular term, that term is not part of the agreement.”

Steiner v. Mobile Oil Corp.

- 1) Courts should not enforce the provisions of a contract of adhesion if there has been inequality of bargaining power that “renders contractual terms unconscionable”

Kessler: Because standard contracts are often *contracts of adhesion*, courts will try to protect the weaker party without undermining the rules of contracting, often by construing ambiguous clauses in the weaker party's favor

- 1) Standard form contracts are not designed to be read, so only reasonably expected (*i.e.*, not surprising or substantively unreasonable) clauses will be enforced against the signing party
- 2) A party who wants to add a surprising or unusual term must give clear and conspicuous notice to the other

Fairfield Leasing Corp. v. Techni-Graphics, Inc. (1992)

- 1) A jury trial waiver presented inconspicuously will not be enforced because it is reasonably surprising (it's a federal and state constitutional right, and so assumed)
 - 1) Note that courts are very likely to enforce arbitration clauses, though do not like jury waiver clauses

C&J Fertilizer, Inc. v. Allied Mutual Insurance Co.

- 1) The specific terms of an insurance contract will not be enforced against the weaker party when the terms would not be reasonably expected, or would be unconscionable in their application (here, a requirement that burglary be proven by 'external' markings)

Corbin: In interpreting an insurance contract, "the majority rule is that the insured is not bound to know its contents"

Markline Co., Inc. v. Travelers Insurance Co

- 1) Reliance by a plaintiff in a similar situation to *C&J* was held unreasonable and thus recovery was not allowed; there must be evidence of a reason to believe a particular term does or does not exist in the contract

Gladden v. Cadillac Motor Car Division, GM Corp.

- 1) A "linguistic maze" of limited-liability provisions in a standard form contract that confused the purchaser as to the terms of the guarantee were not enforced

Electronic Standard Form Contracts

Capsi v. The Microsoft Network

- 1) An electronic notice of the terms of a standard contract of adhesion will be enforced as to a forum-selection clause (extends the *Carnival Cruise Lines v. Shupe* rule to electronic notices) if consumers have the chance to review the terms before assenting to the contract
 - a. *Carnival*: cruise ship passengers were held to forum selection clause which appeared in their travel contract.

Specht v. Netscape Comm. Corp.

- 1) An arbitration clause in an electronic agreement will not be enforced when there was not “reasonably conspicuous notice” of the term, nor “unambiguous manifestation of assent” to the term

Hillman: It would be better policy to require mandatory website disclosure of license terms before purchase rather than providing those terms as part of the installation process of software already bought

Additional Policing Doctrines

Mutuality of obligation

Oscar Schlegel Manuf. Co. v. Peter Cooper’s Glue Factory

- 1) If a buyer is not under an obligation to place an order with the seller, the agreement is not enforceable for lack of consideration if the seller never places any orders

Mental Incapacity (see CAPACITY section)

Policing Modifications

Duress not only affects contract formation but modification as well.

- 1) **Pre-existing Duty Rule**: The performance of an act, which the promisee (of the modification) is already bound by contract to perform, is **not valid consideration** to support a change the promisor has agreed to.
- 2) If circumstances have *changed*, **Restatement 2d §89** allows binding modification if it is "fair and equitable in the view of circumstances *not anticipated by parties* when the contract was made.
- 3) **UCC §2-209** goes farther by eliminating the consideration requirement entirely, and requires only that the modification be made **(1) in good faith, (2) for a legitimate commercial reason**. Where there is extortion, coercion, or the use of bad faith, neither the UCC nor courts recognize the mod.

*Market shifts can provide a **legitimate reason** for re-negotiation of contract, and may even be desirable.*

UCC §2-209 Modification, Rescission and Waiver

- 1) No consideration is required to modify a contract for the sale of goods, but modifications must be made in good faith to be enforceable

- 2) A market shift that makes performance involve a loss **may provide a good faith reason** to seek modification even though failure to perform will cause a breach.
 - a. The **promisor** determines it is less costly to pay damages than to meet its original obligation unless the contract terms are modified. The **promisee** has the option of **claiming damages or renegotiating**.

Alaska Packers' Association v. Domenico

- 1) A party who refuses to continue performance midway through a contract cannot extract an enforceable promise for higher pay because such a promise would be made without consideration
- 2) Pre-existing duty rule: there is no consideration when one party receives additional consideration to perform a duty they were already required to perform
 - a. Prior to Restatement §89 and UCC §2-209, this was the basic law for modifications.

Schwartzreich v. Bauman-Basch, Inc.

- 1) Parties may rescind a contract through mutual agreement and design a substitute contract to take its place, and this new contract may be created with any terms agreed to by the parties
 - a. There must be effective rescission: parties can't ensure that both sides remain obligated at all times

U.S. v. Stump Home Specialities [Posner]

- 1) Better policy for policing modifications would be to allow all contract modifications not made under duress - regardless of consideration

Angel v. Murray

- 1) Modifications made openly and voluntarily because of unanticipated circumstances will be enforced despite the pre-existing duty rule from *Alaska Packers*.

Restatement 2d § 89 Modification of Executory Contract

Courts should enforce a modification to a contract if:

- 1) The promise was made before full performance,
- 2) Underlying circumstances prompting the modification were unanticipated, and
- 3) Modification is fair and equitable

Hillman: This section is *under-inclusive* because of the unanticipated circumstances requirement

Accord and Satisfaction

* Key Concept*

- 1) An agreement to dissolve the contract, with full satisfaction of both parties' obligations, for only part performance → essentially wiping the slate clean by terminating a disputed agreement.

- 2) An agreement (accord) between two contracting parties to accept alternate performance to discharge a preexisting duty between them and the subsequent performance (satisfaction) of that agreement. An accord and satisfaction differs from a modification in that a modification immediately discharges a preexisting duty, whereas an accord and satisfaction does not discharge a preexisting duty until the agreed upon, alternate performance occurs.
- 3) To constitute an Accord and Satisfaction, there must have been a genuine dispute that is settled by a meeting of the minds with an intent to compromise.
- 4) Where there is an actual controversy, an accord and satisfaction may be used to settle it.
- 5) An accord without satisfaction generally means nothing.

Flowers v. Diamond Shamrock Corp.

- 1) Accord and Satisfaction requires both parties be aware of a *bona fide* dispute over the amount owed; here, the problem is not a lack of consideration but a lack of notice

UCC §1-308 Performance or Acceptance Under Reservation of Rights

A party who explicitly reserves rights does not prejudice those rights by performance, except in an accord and satisfaction (in which case you cannot reserve rights because the agreement is void)

Consolidated Edison Co. of New York, Inc. v. Arroll

- 1) Con Ed cannot accept a payment explicitly marked as being in “full payment and satisfaction” without accepting an accord and satisfaction of the debt

PERFORMANCE

Parol Evidence Rule

Parol Evidence = extraneous evidence such as an oral agreement that is not included in the relevant written document

- 6) The parol evidence rule prevents the use of outside evidence (written or oral) to construe either a whole contract or a particular term where the writing at issue is integrated (*i.e.* complete and exclusive)
- 7) The evidence must supplement an *ambiguous contract* and must be prior or contemporaneous to the contract (*i.e.* not post-contractual statements or conduct)
- 8) The rule does not apply in the face of a policing doctrine (*e.g.* fraud or duress)

Williston: Parol evidence rule should only establish a presumption that prior or contemporaneous agreements were merged into the writing; “no written contract which does not in terms state that it contains the whole agreement...precludes the possible supposition of additional parol clauses, not inconsistent with the writing”

Corbin:

- 1) The parol evidence rule does not apply in determinations of integration, only after a contract is determined to be integrated does the rule take effect.
- 2) Corbin also argues that the rule is overbroad, much like the Statute of Frauds, and when applied strictly may prevent the enforcement of valid agreements and enforce contracts not actually entered into

UCC §2-202 Final Written Expression: Parol or Extrinsic Evidence

Written terms may not be contradicted by evidence of prior agreement, but may be “explained or supplemented” either by course of dealing or trade usage, or by “evidence of consistent additional terms” when the writing is not “complete and exclusive”

White & Summers: UCC 2-202 permits a judge to exclude oral evidence if the writing is complete and exclusive, if the writing is contradicted by the oral evidence, or (possibly) if the oral evidence is not credible.

Joy v. Hay Group, Inc. [Posner]

- 1) Extrinsic evidence to demonstrate that the terms of an apparently unambiguous contract will be permitted if it shows the terms mean something other than what is presumed.
- 2) When a contract is unclear, any admissible evidence is appropriate to establish the contract’s meaning.

NEW YORK RULE: limit what courts can hear because of a concern about overreaching (“four corners” rule)

Mitchell v. Lath

- 1) Three conditions for an oral agreement to modify a written contract:

- a. Oral agreement is collateral,
 - b. It does not contradict the express or implied provisions of the writing, and
 - c. It is not the kind of provision that would ordinarily be part of a writing.
- 2) Here, in a contract for the sale of land, parol evidence of a contemporaneous agreement regarding an eyesore was not permitted.

Greenfield v. Phillies Records

- 1) A contract unambiguous on its face will not be reconsidered in light of emerging technologies; the plain language of the agreement will control.

Eskimo Pie Corp. v. Whitelawn Dairies

- 1) Parol evidence that proves a contract term to be ambiguous will be allowed, though parol evidence proving what the term was supposed to mean will not.
- 2) A similar test is used in *Hield*; note that this case blurs the line some between the NY and CA rules

CALIFORNIA RULE: Generally permissive of the ability of courts to hear parol evidence because of a concern about the ability of people to communicate clearly in a writing

Masterson v. Sine

- 1) In a contract for the sale of land, parol evidence is permitted to clarify the content of an option clause because the writing did not state it contained the whole agreement and deeds are difficult to modify.

Pacific Gas and Electric Co. v. G.W. Thomas Drayage & Rigging Co.

- 1) Parol evidence will be allowed when it is “relevant to prove a meaning to which the language of the instrument is reasonably susceptible”

Trident Center v. Connecticut General Life Ins. Co.

- 1) *Pacific Gas* essentially rejects the idea that contracts can have plain meanings (Haagen: “this is just silly”)

Baker v. Bailey

- 1) Where a contract is clear and unambiguous in its terms, the court will not allow parol evidence.

Gold Kist, Inc. v. Carr

- 1) In the face of an unambiguous contract, parol evidence modifying the terms (especially where that evidence directly contradicts the terms) will not be allowed and the plain language will control.

Harrison v. Fred S. James, P.A., Inc.

- 1) In the face of a clear and integrated agreement, the parties will be bound by the plain and objective meaning of the written text despite an alleged oral contract.

Hield v. Thyberg

- 1) Parol evidence may be introduced to prove that a writing is not integrated under a “clear and convincing evidence” standard of proof (similar test in *Eskimo Pie*)

RECAP - Parol Evidence Rule deals with complete integrated agreements:

- 1) Interpretation is based on structure of agreement and specific language that declares it to be
- 2) Parol Evidence rule does not speak to fraud or duress → need to have a valid enforceable agreement to trigger parol evidence rule
- 3) Once its triggered, it bars all extraneous information
- 4) Cannot bar subsequent modifications or understandings
- 5) It bars contemporaneous or prior (oral OR written) information unless there is an ambiguity
 - a. At that point court hears evidence designed to clarify or explain the ambiguity
- 6) Critical difference between what is thought to be the NY rule and CA rule → has entirely to do with latent ambiguity and has to do with additional step that is always allowed in CA and is erratically allowed in all other jurisdictions:
 - a. Can we introduce evidence as to why you should consider our evidence?
 - b. Can we introduce evidence that there IS an ambiguity? That evidence would only go to evidence that would establish and clear the ambiguity, wouldn't go to general meaning OTHER than that ambiguous meaning

Principles of Interpretation

Restatement 2d §201: Whose Meaning Prevails

- 1) Where the parties attach the same meaning, that meaning prevails
- 2) If the parties disagree, the controlling meaning is of that party that did not have reason to know about the different meaning attached by the other, when the other knew or had reason to know of the first party's understanding
- 3) Except as provided above, neither party is bound by the other's assumed meaning, even if this means there was a failure of mutual assent

TRADE USAGE

- 1) An exception to the Parol Evidence Rule, both UCC and Restatement 2d §203 allow evidence of usage of trade or prior course of dealing in order to explain or supplement the written contract.
- 2) Trade usage and course of dealing are interpretive elements that help the court understand the parties' true intent, rather than *additional* terms whose admission would offend the parol evidence rule.

- 3) Where trade usage and course of dealing are inconsistent with express terms of the K, express terms win!

UCC 1-201(b)(3)

“Agreement means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.”

UCC §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 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.
 - a. If a contract involves repeated performance, any course of performance previously accepted without objection shall be “relevant to determine the meaning of the agreement”

UCC §1-303 Course of Performance, Course of Dealing and Usage of Trade

- (b) Course of dealing is a sequence of at least two prior instances establishing a common understanding;
- (c) Usage of trade is factual industry practices or methods (again, two examples needed)
- (d) A course of performance or course of dealing or usage of trade is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement and may supplement or qualify terms of the agreement.
- (e) 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. When such construction is unreasonable, express terms shall control course of performance, which in turn controls both course of dealing and usage of trade → **For inconsistent contracts, express terms > course of performance > course of dealing > usage of trade**

Berke Moore Co. v. Phoenix Bridge Co.

- 1) When a price term in a contract strongly indicates a particular reading of the terms, the parties ‘knew or should have known’ that was the intended meaning

Turner Holdings, Inc. v. Howard Miller Clock Co.

- 1) The unexpressed understanding of one party will not control; the plain meaning of the agreement controls unless *both parties* understood that language to mean something particular or different from the common understanding

Nanakuli Paving and Rock Co. v. Shell Oil, Inc.

- 1) When a party is trying to override the express language of the contract, they must prove that outside considerations (prior performance, usage of trade) modify the express terms in such a way as to preserve the consistency of the agreement as a whole.
- 2) When they can do so (here, using both course of dealing and trade usage in the particular market), the modification will control.

Hurst v. W.J. Lake Co.

- 1) Courts should adopt the “vernacular” of the parties in construing agreement language

Gap Fillers

- 1) Under certain circumstances, it is preferable (or necessary) to leave certain terms unspecified, such as quantity.
- 2) How should courts enforce a contract which is *ambiguous on its face*?
- 3) A contract remains enforceable despite missing terms as long as there is a common understanding and the court can supply the missing terms with a reasonable degree of certainty

Haines v. City of New York

- 4) Contracts can't be unlimited in duration
- 5) Where such a term is missing, the reasonable duration will depend on the reasonable intent of the parties in entering into the agreement.

* When necessary, the court will look to constructive intent by considering the purpose of the contract

Keppy v. Lilienthal

- 1) If there is no discernible intent of the parties as to duration, the contract will either be terminable at will or within a reasonable time, depending on the circumstances

Haslund v. Simon Property Group

- 1) A court may supply details to a contract when those details do not materially alter the terms of the agreement and are both easily discerned and reasonably likely to be correct.
 - a. If the court cannot interpret the agreement with reasonable certainty, the term or contract is unenforceable, and therefore only nominal damages may be collected

UCC § 2-204. Formation in General.

(3) Contracts do not fail for indefiniteness because one or more terms are left open if the parties have intended to make a contract and there is a reasonably certain basis for giving remedy.

Southwest Engineering Co. v. Martin Tractor Co.

- 1) When a court can impute a contract term from the UCC, the court will do so unless doing so contradicts the expressed intention of both parties.
- 2) Here, in the absence of a term, payment is due upon receipt per **UCC 2-310**

Good Faith & Fair Dealing

UCC §1-203 Obligation of Good Faith

“Every contract or duty within this Act imposes a duty of good faith in its performance or enforcement.”

Restatement 2d §205 Duty of Good Faith and Fair Dealing

Every contract imposes a duty of good faith and fair dealing in performance

Comment a. Meanings of “Good Faith”: Bad faith is violation of community standards of decency and fairness

[Good faith = the absence of bad faith]

Fortune v. National Cash Register Co.

- 1) Termination of an at-will employee, where cause is not required, is still subject to the restriction that any termination be done in good faith and for legitimate business purposes
 - a. Where the employee substantially fulfilled his obligations, the employer should not be permitted to profit from that work without providing just compensation

City of Midland v. O’Bryant [TX]

- 1) There exists no freestanding duty of good faith in the employment context because employees do not expect such a duty to exist

Tymshare, Inc. v. Covell [Scalia]

- 1) A contract clause stating that a decision can be made at the sole discretion of one party implies a duty to act in good faith if there is an implied condition that the decision be reasonable.

Feld v. Henry S. Levy & Sons, Inc.

- 1) P entered into an agreement to purchase all bread crumbs *produced* by D. Crumbs were produced as part of their business, not as a by-product. After several shipments, D determined the contract was not profitable and stopped producing bread crumbs in any quantity. P sued, D claimed they had no obligation to produce.
- 2) Court held:

- a. even though D found a more profitable opportunity, **the realization of less profit, or no profit, is not sufficient to justify breach of contract under the good faith standard of UCC.**
- 3) In a contract for exclusive dealing, there is a good faith requirement to continue production until cancellation, unless the entire business is threatened by continuance.
 - a. **UCC 2-306:** Output should not be unreasonable given previous levels
- 4) This case shows that requirements and output cases are treated to the same standard as fixed quantity contracts b/c both require the parties to continue with the agreement even if market changes or other factors have made the commitment uneconomical to one party

Pillois v. Billingsley

- 1) When there is no contract, just performance by one party, the judge has flexibility to determine the reasonable value of services rendered.

Centronics Corp. v. Genicom Corp. [Souter]

- 1) **Four-part test** for when there is a violation of good faith:
 - i. Is the defendant provided discretion “tantamount to a power to deprive the plaintiff of a substantial proportion of the agreement’s value?”
 - ii. If so, does the evidence indicate the parties intended to make a legally enforceable contract?
 - iii. If so, did the exercise of the defendant’s discretion surpass the limits of reasonableness (in the context of the contract and community standards)?
 - iv. If so, was the abuse of discretion caused by bad faith, or events beyond the control of either party?

CONDITIONS ON PERFORMANCE

Express Conditions

The Nature of Express Conditions

- 1) Express conditions involve the conditioning of a duty to perform on the occurrence of another event
- 2) Condition precedent: a duty to perform is created if a certain condition is met
 - a. These must be pled and proven by the party seeking to prove the condition was not met
- 1) Condition subsequent: a duty to perform is discharged if a certain condition is met
 - a. These must be pled and proven by the party seeking the discharge of their duty

Restatement 2d § 237

Comment d. Substantial Performance: Where full performance is a condition, substantial performance is insufficient and relief can only be had if the non-occurrence of the condition is excused

Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.

- 1) Failure to fulfill a condition excuses performance but does not constitute breach of contract subjecting the non-fulfilling party to liability for damages unless some independent promise to perform was made.

Jacob & Youngs, Inc. v. Kent [Cardozo]

- 1) The “Reading pipe” case: When a condition has been substantially fulfilled except for an “insignificant” departure that is “trivial and innocent”, it will be considered failure to meet an independent condition that does not rise to the level of a breach.
- 2) Damages awarded: the difference between promised performance and value received
- 3) *Dissent* – Defendant has a right to enforcement of the terms of the contract

Brown-Marx Associates, Ltd. v. Emigrant Savings Bank

- 1) Substantial performance of express conditions will not be sufficient to fulfill the condition and activate the duty, especially where complete performance is not impossible as a practical matter
 - a. This was an executory transaction, unlike the building contract in *Jacob & Youngs*, so its more important that every term be fulfilled exactly

Interpretation of Express Conditions

Restatement 2d § 227(1)

In resolving the nature of a condition of an obligor's duty, the interpretation is preferred that reduces "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."

Glaholm v. Hays

- 1) Construe contract clauses based on the intent of the parties; if a particular event appears designed to be a condition, it should be read as such.

Howard v. Federal Crop Ins. Corp.

- 1) When there is any uncertainty about the meaning of a term, it will be read as an obligation rather than a condition precedent
- 2) Here, the court didn't want to interpret the agreement as leading to the forfeiture of the farmer's entire policy, so they construed a requirement as an obligation, rather than a condition precedent

Gibson v. Cranage

- 1) Where a contract has a condition of 'satisfaction' that is evaluated according to taste, whim, or fancy, the obligor has nearly complete freedom to choose not to fulfill their duty

Forman v. Benson

- 1) Where a condition of satisfaction is capable of objective measurement, the decision of the party will be evaluated according to a 'reasonableness' standard; *all satisfaction clauses imply a duty to evaluate performance in good faith*
- 2) Here, rejection in bad faith was a violation

Luttinger v. Rosen

- 1) An offer to substitute a type of performance that would satisfy the condition but materially alter the form of performance may be rejected, preventing the condition from being met
 - a. The law does not require performance of a futile act

Excuse & Avoidance of Express Conditions

E.I. Du Pont de Nemours Powder Co. v. Schlottmann

- 1) Certain conditions involve implied promises not to interfere with the condition arising (here, by shutting down a plant before output could be measured)
- 2) However, this obligation only exists until it creates unreasonable risk (as in *Feld v. Henry S. Levy*)

Hanna v. Commercial Travelers' Mutual Accident Association

- 1) When a contract states an express condition precedent, accident or unforeseen contingency will not excuse or modify the duty in the condition
- 2) *Dissent* – Courts should consider practical impossibility a valid excuse or modification

Connecticut Fire Insurance Co. v. Fox

- 1) Where a party by its action indicates a required condition precedent is not necessary or operative, that requirement is waived.

Corbin: Waiver will generally induce a promise not to perform the condition; however, if waiver is given after failure to perform, there is no change of position that would support estoppel

Hillman: Parties generally cannot waive material terms without consideration

UCC §1-205 Reasonable Time; Seasonableness

A ‘reasonable time’ depends on the nature, purpose, and circumstances of action; ‘seasonable action’ is taken at or within the time agreed, or within a reasonable time in the absence of specification

Overriding Express Conditions

Restatement 2d § 229

To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court *may* excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange

[There is no situation in which the court *must* act to prevent forfeiture]

J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.

- 1) A party who fails to meet an express condition may be excused from the effect of that failure if it is unlikely to materially harm the other party and would cause a significant forfeiture to the failing party.

Holiday Inns of America, Inc. v. Knight

- 1) Failure by one party to meet a condition not material to the contract (timing of a payment) that would not significantly harm the other party but would cause significant forfeiture by the first party will be excused if they were acting in good faith

Order of Performance

Simultaneous Exchange

The presumed order of performance is simultaneous.

§ 2-507. Effect of Seller's Tender; Delivery on Condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

UCC § 2-511. Tender of Payment by Buyer; Payment by Check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

Restatement 2d § 234(1): When performances can be rendered simultaneously, they are to that extent due simultaneously, unless language or circumstance indicates otherwise.

Corbin: Promises to be exchanged simultaneously are “concurrent conditions”; when there is no specification of time, you assume concurrence “within a reasonable time”

PDQ Lube v. Huber

- 1) K did not specify an order of performance – implied condition of concurrent performance
- 2) D failed to perform within a reasonable time – P’s breach was result of D’s failure to perform

Sequential Performance

For construction and work contracts, performance will be sequential, and *substantial performance* is required before the duty to pay arises.

Stewart v. Newbury

- 1) In a construction contract, payment cannot be demanded before substantial performance is rendered.

Quality of Performance

Key question: in the absence of any express term, does the non-occurrence of sufficiently high-quality work excuse a failure to pay?

Restatement 2d §241 Circumstances significant in determining whether a failure is a material breach

A material breach is determined in light of the following circumstances:

- 1) extent of anticipated benefit of the injured party
- 2) extent to which adequate compensation in damages can be provided
- 3) Amount of performance already completed
- 4) level of hardship falling on the breaching party by termination
- 5) degree of willfulness/innocence in the breaching party's behavior
- 6) Level of uncertainty as to future performance

CISG Article 25: “fundamental” breach is one that substantially deprives the other party of what they were reasonably entitled to expect under the contract

CISG Article 49(1) and 64(1)(a): fundamental breach or failure to perform justifies avoidance

Plante v. Jacobs

- 1) Where the quality of the performance meets all the material terms of the contract, interpreted in light of the particular circumstance, there is substantial performance sufficient to justify a demand for payment.

O.W. Grun Roofing and Construction Co.

- 1) Where the performance does not meet the implied conditions of quality material to the agreement, there is no duty to pay and damages can be collected. Specifications for construction work on a personal home may be material despite appearing to be matters of taste.

Walker & Co. v. Harrison

- 1) The dry-cleaning sign case: Implied conditions of quality of performance will be read in light of the circumstances and the reasonable expectations of the parties.

Severable Contracts

John v. United Advertising, Inc.

- 1) When specific provisions of a contract can be severed without affecting or impacting other obligations under the contract, the court will view the obligations as severable and breach of one provision will not impact the others.

Carrig v. Gilbert-Varker Corp.

- 1) When a contract specifically breaks out the obligations of a party, breach of some terms but not others will not justify recovery on the unbreached terms, and the breaching party may recover the value of performance of the unbreached terms.

Kirkland v. Archbold

- 1) A contract providing a schedule of payments for construction work is not severable where the contract read as a whole sets down a total amount to be performed and paid.

K&G Construction Co. v. Harris

- 1) In labor or construction contracts, the duty to pay is presumptively conditional on performance.
- 2) Failure to perform adequately is a breach that prevents the duty to pay from arising, and failure to perform on the basis of nonpayment is a second breach.

Failure to Perform

UCC §2-711 Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(2) If the seller is in breach of contract under subsection (1), the buyer, to the extent provided for by this Act or other law, may:

- (b) deduct damages resulting from a breach of contract from any part of the price still due under the contract. [Right to self-help]

Restatement 2d § 237 Effect on Other Party's Duties of Failure to Render Performance

It is a condition of each party's remaining duties that no "uncured material failure by the other party" to render performance still exist. (Right to suspend performance pending cure)

Restatement 2d §241

Determining whether a failure to perform is material depends on:

- a) Extent to which injured party is deprived of a benefit reasonably expected,
- b) Extent to which injured party can be adequately compensated
- c) Likelihood the party failing to perform will suffer forfeiture,
- d) Likelihood the breaching party will cure the failure, and
- e) Comportment of the breaching party with the standard of good faith

Restatement 2d § 242 Circumstances Significant in Determining When Remaining Duties Are Discharged

Determining whether duties are discharged because of failure to perform:

- a) Look to circumstances listed in §241
- b) Extent to which delay may prevent or hinder substitute arrangements,
- c) Extent to which agreement was designed to ensure performance without delay

Conditions and the UCC

UCC 2-601 Buyer's Rights on Improper Delivery.

Breach of an installment contract for nonconformity permits the buyer to either:

- a) reject the whole,
- b) accept the whole, or
- c) accept any commercially unit(s) and reject the rest

UCC 2-602 Manner and Effect of Rightful Rejection.

(1) Rejection must be within reasonable time. It is ineffective unless buyer seasonably notifies the seller.

UCC §2-608 Revocation of Acceptance in Whole or in Part.

Buyer may revoke acceptance of a non-conforming unit if its value has been substantially impaired if it has been accepted

- a) with the reasonable assumption it would be repaired and it has not been, or
- b) if failure to discover the non-conformity

Wilson v. Scampoli

- 1) Sale of a color tv that was defective
- 2) For minor problems, repair that is not inconvenient to the buyer does not justify rescission.

UCC §2-612. "Installment contract"; Breach.

(2) Buyer may reject non-conforming installment under a contract if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect.

(3) If the impairment of the installment substantially impairs the value of the whole contract there is breach of the whole

Hubbard v. Utz Quality Foods, Inc.

- 1) Contract asked for certain kinds of potatoes; Hubbard was unable to produce potatoes matching the color requirement
- 2) Where a seller fails to produce goods of the quality specified in the contract, and the contract makes quality an integral condition of performance, such that non-conformity substantially impairs the value of the contract, the seller may reject the goods and rescind the contract.

Anticipatory Repudiation

Restatement 2d § 250: Repudiation is either a statement or affirmative action that indicates the obligor will commit a breach that would give rise to a claim for damages

Comment b: Mere expression of doubt is not sufficient to constitute repudiation

UCC § 2-609. Right to Adequate Assurance of Performance.

(1) Where there are reasonable grounds for insecurity that performance will be rendered, the party may in writing demand assurance of due performance and until he receives such assurance, may suspend performance.

(4) After receipt of a justified demand for assurance, failure to provide such assurance within a reasonable time (no more than 30 days) is a repudiation of the contract.

UCC §2-610. Anticipatory Repudiation.

When either party repudiates a contract for performance not yet due, such that the value of the K is substantially impaired for the other party, the injured party may either

- a. await performance for a commercially reasonable time,
- b. resort to any remedy for breach despite notification he would await performance, and
- c. may in either case suspend performance

CISG Article 72: If prior to the date of performance it is clear one party will fundamentally breach, the other party may void the contract, and the voiding party must give reasonable notice if possible so as to permit assurance of performance (unless there was affirmative declaration of intent not to perform)

Hochester v. De La Tour

- 1) D & P entered into a K where P would accompany D on a tour starting June 1. D contacted P in May saying he changed his mind, refused to compensate P. P sued D immediately; P eventually found a new job starting in July.
- 2) When there has been pre-emptive cancellation before the duties under the contract arise, the injured party may bring suit immediately for damages.

Hathaway v. Sabin

- 1) The VT snowstorm case: Sabin was required to provide a hall for a concert by Hathaway and he failed to provide it; there was a bad snowstorm so he argued that his performance was excused by apparent impossibility of Hathaway arriving – but Hathaway managed to arrive in time.
- 2) Failure to perform on the basis of an assumption that the other party will fail to perform constitutes breach of contract in the absence of the other party's failure.
- 3) Parties are not permitted to breach pre-emptively on the assumption, however reasonable, that the other party will breach.

Magnet Resources v. Summit MRI, Inc.

- 1) Parties are within their rights to suspend performance pending receipt of a justified assurance of performance. When a party does not cancel a contract after one failure to perform, it is estopped from claiming that such failures constitute a material breach of the contract.

Greguhn v. Mutual of Omaha Insurance Co.

- 1) D issued disability policies to P; P suffered an injury and was unable to work; Ds paid him for a certain amount of time and then stopped saying P was able to continue to working.
- 2) When there has been anticipatory breach of a contract requiring payments into the future, damages will only be awarded for the payments already due.
- 3) Only after the other party continues to breach will an order for damages in the amount of all future payments be appropriate.

GROUNDS FOR CESSATION

Mutual Mistake

Mutual Mistake = when a party learns that the circumstances at the time of contracting were materially different from what both parties assumed at the that time, they may claim relief on the grounds of “mutual mistake”

Restatement 2d § 152: When 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 performance, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.

Restatement 2d § 154: A party bears the risk of mistake when: a) the risk is allocated to him by agreement, or b) he is aware at the time of contracting that he has only limited knowledge with respect to facts relevant to the mistake, but treats his knowledge as sufficient, or c) the risk is allocated by the court on the ground that it is reasonable to do so under the circumstances

Sherwood v. Walker

- 1) Case of “Rose of Abalone” [the cow]
- 2) When both parties entered into a contract for the sale of a cow believing she was barren, the fact that she was not, and that this new fact materially changes the agreement, permits the seller to void the contract on the ground of mutual mistake
- 3) Prof. – trying to draw the distinction between what goes to the ‘heart of the transaction’ and what does not has proven a “disaster” throughout the case law

Wood v. Boynton

- 1) By proceeding with limited knowledge, a seller assumes the risk that the transaction will be unfavorable, and the sale cannot be voided on the ground of mutual mistake.

Lenawee County Board of Health v. Messerly

- 1) An “as-is” clause assigns *all risk* to the buyer, so rescission is not available to them as a remedy.

Distinguishing mutual mistake vs. misunderstanding:

Noroski v. Fallet

- 1) When there is no meeting of the minds as to the terms of the agreement, there is no contract, not a mutual mistake that permits rescission.

Shrum v. Zeltwanger

- 1) Here, there was no mutual mistake, there was a dispute over a material term (the meaning of ‘cow’), so the court must construe the term pursuant to the usual rules.

Unilateral Mistake

Restatement 2d § 153: When a mistake of one party at the time of contracting has a material effect on the exchange that is adverse to him, he can void the contract if he doesn’t bear the risk of mistake and a) the effect of the mistake renders the contract unconscionable or b) the other party had reason to know of, or caused, the mistake.

A unilateral mistake must be more serious than a mutual mistake: it generally must make enforcement of the contract unconscionable

If a party can get out of the contract cleanly, the court may allow avoidance, but once there has been reliance or once property has changed hands, there has been harm and avoidance is problematic

Triple A Contractors, Inc. v. Rural Water District No. 4, Neosho County

- 1) Case of mistake in bid contract by P (calculation mistake led to them submitting a bid for a very low amount); P wanted acceptance of its bid to be canceled and wanted return of the bid bond.
- 2) A completed bid contract cannot be voided on the ground of unilateral mistake in the absence of fraud.
 - a. Public Policy reason here – must preserve bidding process.

Donovan v. RRL Corporation

- 1) An error in good faith about the price of a good printed in an advertisement does not prevent a contract from forming, but does permit rescission on the ground of mutual mistake if the size of the harm caused by the mistake makes enforcement unconscionable

Impossibility of Performance

Taylor v. Caldwell

- 1) The ‘music hall’ case – P contracted with D to use a music hall for 4 days, K stated that hall must be fit for a concert but no stipulation re: disasters. Hall was destroyed by fire before concerts and the concerts couldn’t be performed anywhere else. Taylor sued for breach but no party was at fault for fire.
- 2) There was an implied condition that the hall would continue to exist that was not met, and there was no assigned risk of loss.

- 3) Performance may be excused for impossibility of performance if it depended on the continued existence of something which has now ceased to exist.

Bell v. Carver

- 1) If a building is destroyed, a contractor is excused from liability for failure to perform; they can recover the value of their services rendered in *quantum meruit*, but cannot sue for lost profit

Davis v. Skinner

- 1) The buyer of a house that burned down after contract and taking possession, but before legal title passed, has an equitable interest in the property and can claim the value of insurance

Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.

- 1) A middleman or supplier assumes the risk of unavailable supply; the duty to deliver persists despite difficulties in performance

UCC § 2-509. Risk of Loss in the Absence of Breach.

Risk of loss passes to the buyer upon receipt (taking possession) if the seller is a merchant, otherwise risk passes to the buyer on tender of delivery

UCC § 2-104. Definitions: "Merchant"

A merchant is one who “holds himself out as having knowledge of skill peculiar to the practices or goods involved in the transaction” – or one in whom such knowledge can be implied.

UCC § 2-613. Casualty to Identified Goods.

If goods suffer casualty without fault before Risk of Loss passes to the buyer, then:

- a. if the loss is total the contract is avoided, and
- b. if the loss is partial or the goods have become so nonconforming, the buyer may demand inspection and either 1) void the contract or 2) accept the goods at a reduced price and without retaining further rights against the seller

Impracticability of Performance

Mineral Park Land Co. v. Howard

- 1) When performance of an obligation is so difficult as to be constructively impossible, considering the expenses anticipated against those necessary to render performance, the duty to perform will be excused.
- 2) Key question: was the risk of increased cost allocated in the contract, or not?

Marcovich Land Corp. v. J.J. Newberry Co.

- 1) When parties expressly allocate risk in their agreement, conditions rendering performance difficult but not impossible will not excuse the party to whom the risk was allocated, nor permit them to rescind the agreement.
- 2) Here, greater social context: don't want to say all contracts in this area are voidable

Transatlantic Financing Corp. v. United States

- 1) Three-step procedure to construe an implied condition for changed circumstances:
 - a. unexpected contingency
 - b. risk not allocated by agreement or custom, and
 - c. occurrence of the contingency must have rendered performance commercially impracticable.
- 2) Here, when performance became more difficult for the party to whom some risk was allocated, that party cannot sustain a claim for damages caused by the increased difficulty of performance.

UCC § 2-615. Excuse by Failure of Presupposed Conditions.

- a) Delay in delivery or non-delivery in whole or in part can be excused if performance was made impracticable by a contingency, the non-occurrence of which was a basic assumption of the contract.
- b) If there is only a shortage of goods, sellers must allocate a reasonable amount of the goods to all purchasers, and provide notice of the delay and the estimated quota available to each buyer.

CISG Art. 79(1)

A party is not liable for failure to perform if that failure was due to an impediment beyond their control, that could not have been expected at the time of contracting, and could not have been reasonably avoided or overcome.

Mishara Construction Co. v. Transit-Mixed Concrete Corp.

- 1) Mishara was building a housing project, had K with D for concrete, with deliveries to be made at times and in amounts as required by P. There was a labor strike at the construction site and D refused to cross picket lines so no concrete was delivered. P covered by getting concrete from elsewhere but at a higher price; sued D.
- 2) Some labor disputes will meet the UCC §2-615 standard for impracticability, but generally they are not extraordinary.
- 3) The question of impracticability is one of fact that should be determined by a jury.

Frustration of Purpose

Restatement 2d § 265: 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.

Test:

- 1) Was the frustrated purpose a principal purpose of that party in making the contract, such that otherwise they would not have contracted?
- 2) Was the frustration substantial, such that it was outside the reasonable risk assumed?
- 3) Was the non-occurrence of the frustrating event a basic assumption upon which the contract was made (same determination as with impracticability)?
 - a. Frustration is pleaded by parties who don't want to *pay*;
impracticability is pleaded by parties who don't want to *perform* – because payment is easier, this is a harder defense to establish

Krell v. Henry

- 1) The King's procession being cancelled, the essential purpose of the contract that was known to both parties is frustrated and therefore the obligations of both parties do not arise
- 2) Test: 1) what was the foundation of the contract? 2) was the performance of the contract prevented? 3) was the event which prevented performance of such a character that it was not within the reasonable contemplation of the parties at the time of contracting?

Lloyd v. Murphy

- 1) Frustration of purpose is only available as a defense when there has been total or nearly total destruction of the value of the agreement because of an event unforeseeable at the time of contracting, the risk of which event was not allocated in the agreement, and avoidance is acceptable as public policy.
- 2) The courts will only apply this doctrine in cases of *extreme hardship*

Smith v. Roberts

- 1) When the main store burns down, the purpose of leasing an adjunct storefront is substantially frustrated
- 2) the value of the contract is virtually totally destroyed, so performance is excused

Downing v. Stiles

- 1) A transaction becoming less profitable is not justification for avoidance

REMEDIES AND DAMAGES FOR BREACHES

Expectancy Damages – we put the party in the position they would have been in had there been performance of the K

Reliance Damages – we put the party where they would have been had there been no promise

Restitution Damages – we put the breaching party back in the position they would have been had there been no promise → disgorge them of their [unjust] benefit

General Principles

- 1) Monetary remedies = lost expectancy damages, reliance damages, liquidated damages
- 2) Other remedies = specific performance (an order to do what you said you would do); substitutionary relief (alternative to specific performance)
- 3) Restitution (for unjust enrichment)
- 4) Punitive damages are only allowed when there is an independent tort involved

UCC §1-305(a) – Remedies to be Liberally Administered

Remedies are to be liberally administered, with the goal of putting the party in as good a position as had the breaching party fully performed

Expectancy Damages

- 1) **Goal:** put the P in as good a position as he would have occupied had there been full performance
 - a. Both the gains prevented as well as the losses caused must be considered
 - b. **Restatement 2d §347, Comment b:** Measure the damages *Actually Suffered* by the injured party because of the failure to perform [rather than looking to hypotheticals]
 - c. Hillman: Courts almost never really provide expectancy damages because they are unwilling to do everything necessary to truly make the injured party “whole” – often the goal is to provide reliance damages but these are difficult to measure so expectancy can be a surrogate.

COST OF COMPLETION v. DIMINISHED MARKET VALUE

Groves v. John Wunder Co.

- 1) P & D entered into a K where D leased the land to remove sand and gravel with provision that D would leave property at a uniform grade – D deliberately breached the K, didn't leave the property as promised.
- 2) In construction contracts (here, for clearing property of sand and gravel), because the harm suffered to the innocent party is the loss of a physical accomplishment, the injury is best measured by the cost of performance → the breaching party is liable for the cost of what they contracted but willfully failed to do
 - a. This is a minority holding, which has been supplanted and modified by *Peevyhouse*

- b. You get holdings like this when it's a non-market transaction or the market isn't functioning
- c. *Dissent* – should limit inquiry to compensation adequate to remedy loss; cost of completion unless that is disproportionate, in which case measure the difference in value.

Peevyhouse v. Garland Coal & Mining Co.

- 1) Peevyhouses leased land to a mining company; K had a restoration clause that was violated.
- 2) Court held;
 - a. Damages must be reasonable.
 - b. The 'cost of performance' rule for expectancy damages only functions until the damages would be vastly greater than the value gained by full performance
 - i. Here, the cost of complete restoration is \$29K while the reduction in value of property (from incomplete restoration) is only \$300.
- 3) Where the benefit from full performance is "grossly disproportionate" to the cost of performance, damages are limited to the diminution in value resulting to the property because of the non-performance.
 - a. Here, the plaintiff was awarded only the \$300 difference in value, their harm, not the other party's savings.
- 4) Note → Peevyhouses could have lessened likelihood of this kind of decision by using words in the K that indicated the centrality of the restoration to the contract (see *Radford*)

Rock Island Improvement Co. v. Helmerich & Payne, Inc.

- 1) D leased land from P for coal mining → lease had a reclamation clause (that after mining the surface would be restored to a condition close to what it was before mining operation) → D did not restore the land after mining it.
- 2) An OK statute enacted after the decision in *Peevyhouse* required land reclamation (regardless of whether the cost of reclamation is disproportionate to the increase in land value), and there was a reclamation clause in this contract.
- 3) Therefore the proper measure of damages for failure to restore mined land is cost of performance/expectancy
 - a. Negotiated agreement for land reclamation is upheld regardless of disparity

Radford v. De Froberville

- 1) P sold his neighboring lot to D → D required to build a fence to divide the two properties but didn't. The lack of the wall had no impact on the value of the property

- 2) Court awarded damages for the cost of performance because: “the plaintiff genuinely wants this work done and...intends to expend any damages awarded on carrying it out.”
 - i. If the D knew or should have known that a particular specification was important (a central condition, not an incidental one), then the damaged party is entitled to expectation damages/cost of performance → irrelevant that the value of the property had not been changed by lack of the wall.
 - ii. If the D didn't know, then the damages would be the market price difference (which can be \$0)

Thorne v. White

- 1) P had Contract with D for a new roof and the roof was left incomplete by D → the new replacement contract cost more and P sued D for the difference.
- 2) Court held:
 - a. The new contract requires more things than the original contract; it was substantially different from the original contract, the new contract was worth more
 - b. **“Imperfect cover”** problem: if expectancy damages are awarded, the injured party should not get \$\$ for an unreasonably better outcome, only the reasonable value of equivalent performance.
 - c. **A party damaged by a breach may only recover for losses which are the natural consequence and proximate result of that breach → injured party should not be placed in a better position than he would have been in had no breach occurred.**

Morello v. J.H. Hogan, Inc.

- 1) Sub-contractor (P) was contracted to do work worth \$44k, he only did work worth \$9411. The main contractor (D) had to spend \$54k to complete the work. P sued for the \$9411 and D counter-claimed for the difference between the contract price and what he had to spend completing the work.
- 2) When awarding damages for cost of performance, the owner can claim the value of the part performance plus the cost of the second contract in expectancy damages, and the first (breaching) contractor can claim the value of the part performance in unjust enrichment.
 - a. Calculate damages to each party separately before taking the difference.
 - b. Here, D gets the value of the second contract plus the part performance, minus the value of the first contract (expected cost), P (1st contractor) gets value of performance in unjust enrichment
 - c. So damages = [(K2 + Part Performance) – K1] – (Part Performance/Unjust Enrichment)
 - i. [54000 + 9411 – (44000)] – [9411] = \$10,356 damages to D

ANTICIPATED PROFITS AS AN EXPECTANCY DAMAGE

Freund v. Washington Square Press

- 1) Contract to publish a book falls through; P wants D to pay him the anticipated royalties from the book.
- 2) Cost of completion is not measured by the breaching party's savings but by the natural and probable consequences of the breach to the plaintiff.
- 3) Here the royalties would be a % of the sales; cannot be ascertained with enough certainty.
- 4) Where there are only speculative gains in expectancy, there can be only nominal damages
 - a. Court awarded 6 cents

Warner v. McLay

- 1) Breach of a written building K → P wants damages to include the expected lost profits.
- 2) Court cannot make assumptions about the expected profits from a K → P needs to prove the existence of the profits he seeks to recoup as damages
- 3) P has a right to recover such sum in damages as he would have realized in profits if the K had been fully performed – in addition to expenditures for work/labor towards completing the K

DUTY TO MITIGATE

Handicapped Children's Ed. Board of Sheboygan County v. Lukaszewski

- 1) D was offered a better job so she quit despite the K, made up an excuse about health issue; the breach forced the board to hire a replacement teacher who had more experience and required a higher salary
- 2) When the non-breaching party has no way of mitigating its damages except through a more expensive option, the breaching party is required to cover that expense if it was reasonably foreseeable that such a result could occur

Cooper v. Clute

- 1) P gave cotton to D to sell for a certain price and D sold it for a higher than market price. K price = market price → P accused D of unjustly retaining P's profit
- 2) Non-breaching party is entitled only to the harm they suffer, not the value of the gains of the breaching party (*see sub. re: mitigation*) – **efficient breach theory**

SALE OF GOODS UNDER THE UCC

UCC §2-712 “Cover”; Buyer's Procurement of Substitute Goods

- 1) After a breach, 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 the cover and the K price (but less expenses saved in consequence of seller's breach)
- 3) E.g. You wanted a plain marker but seller breached so you have to get a mont blanc instead – you are allowed to keep that added value:
 - a. As long as it was reasonable to treat that as cover (you needed something to write with asap)
 - b. You are entitled to the difference between what you were promised and what you got → but not when that something had nothing to do with transaction.
- 4) Damages = (Cover Price – Contract Price) + (Incidental Damages + Consequential Damages) – Expenses Saved

UCC §2-713 Buyer's Damages for Non-Delivery or Repudiation

- 1) Buyer's damages for non-delivery = difference between market price at place of tender/arrival at the time the buyer learns of the breach and the contract price, with adjustments for incidental costs
- 2) Damages = [(Market Price – Contract Price) + (Incidental Damages + Consequential Damages)] – Expenses Saved

UCC §2-708 Seller's Damages for Non-acceptance or Repudiation

- 1) Seller's damages for non-acceptance = difference between market price at the time the seller learns of the breach and the contract price, with adjustments for incidental costs; if the market price is lower than the expected profit, the seller can sustain a claim for the lost profit
- 2) See *Warner v. McLay*
- 3) Damages = (Contract Price – Market Price) + (Incidental Damages) – Expenses Saved

UCC §2-706 Seller's Resale Including Contract for Resale

- 1) After breach, the seller gets the difference between the resale price and the contract price, if the resale was done in good faith and in a 'commercially reasonable' manner
- 2) Damages = (Contract Price – Resale Price) + (Incidental Damages) – Expenses Saved

UCC §2-714 Buyer's Damages for Breach in regard to Accepted Goods

- 1) Buyer can recover damages for nonconformity of tender, however the difference between conforming/nonconforming can be reasonably calculated, and the measure of damages for breach of warranty is the difference between the value of

the goods accepted and the value they would have had if they had conformed with the warranty, with value measured at the time and place of acceptance of delivery

- 2) Damages = (Value of Goods as warranted – Value of Goods Accepted)
 - a. Value of Goods as warranted = market price or contract price

The Lost-Volume Seller

Neri v. Retail Marine Corp.

- 1) Boat dealer seeks incidental and profit damages from the repudiation of a sale of a new boat to the D.
- 2) Boat dealer is a lost-volume seller (as per UCC §2-708)
 - a. Could have had 2 boats sell instead of one if the breach hadn't happened
→ so breaching buyer owes him the loss of profits for the sale and any incidental damages
- 3) When there is an 'infinite' (*i.e.* not concrete or definite) supply of goods, breach of contract by the buyer deprives the seller of the profits from one sale
- 4) Lost-volume seller under **UCC§ 2-708** is a seller who cannot be fully compensated under cover or resale
 - a. The difference between the market price and the contract price does not create as good a position as performance would have done because they lost the profit from one sale.

UCC 2-718 Liquidation or Limitation of Damages; Deposits

- 1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in 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. A term fixing unreasonably large liquidated damages is void as a penalty.
- 2) When buyer breaches and seller withholds delivery of goods then buyer can recoup payments of:
 - a. greater than the seller's liquidated damages OR
 - b. in the absence of liquidated damages clause, the smaller of \$500 or 20% of the total contract valuethough this may be offset by other damages the seller may recoup, or the amount of other benefits the buyer received under the contract

Limitations on Expectancy Damages

- 1) Foreseeability – communication measure
- 2) Mitigation – causation measure
 - a. If you have not mitigated, you have caused your problem
- 3) Certainty – evidentiary issue
 - a. You have to show your damage with reasonable certainty, if you can't show it with reasonable certainty, you can't collect
 - b. UCC §1-305 → we construe contract damage measures liberally → you are not required to prove them with mathematical certainty, you are required to show them with a reasonably certain basis
- 4) Scope – policy matter
 - a. Certain types of things are not recognized in Contracts

Foreseeability

Two prongs re: foreseeability of special circumstances:

- 1) Special circumstances must be made known AT the time of the contract
- 2) It has to be a natural consequence – could be reasonably considered to arise naturally from the breach

Hadley v. Baxendale

- 1) Carrier had a delay in delivering the parts, caused extra days of the mill being out of production
- 2) Is the carrier held liable for damages including lost profits when there was an unnecessary delay in delivery?
- 3) Carrier was not aware of the special circumstances required urgent delivery (that mill couldn't operate without the parts)
- 4) Holding:
 - a. Since the carrier could not have reasonably foreseen that delayed delivery would cause mill to be totally shut down, he is not liable for the lost operating profits which resulted from the delay.
- 5) Foreseeability in contracts means “actual or imputed knowledge of this particular harm”
- 6) Burden is on the knowledgeable party to communicate possible harms
 - a. Contrast with *Armstrong v. Bangor Mill Supply Corp* → here the court sees greater knowledge and therefore carrier is liable → Ds contracted to repair a broken crankshaft and didn't do it properly; they should have been aware of the delay caused since they knew it was broken and machine was not working!

UCC §2-715(2)(a) Buyer's Consequential Damages

Consequential damages resulting from the seller's breach include: losses resulting from requirements/needs of the buyer that the seller at the time of contracting had reason to know and which could not be prevented by cover.

Restatement 2d §351 – Unforeseeability and Related Limitations on Damages

- (4) 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

* Parties must understand the form and amount of harm they could cause

Convention on Contracts for the International Sale of Goods [CISG], Article 74

Damages for breach of K by one part consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach, not exceeding the loss which the breaching party foresaw or ought to have foreseen.

COVER

- 1) Exactly same good in same time, for same amount of money (perfect cover)
- 2) Imperfect cover when you are forced to take an inferior, inadequate replacement

Mitigation

- 1) The innocent party has a positive obligation to take reasonable steps to mitigate the damage caused by breach of contract – failure to take these steps precludes recovery.

Clark v. Marsiglia

- 1) D asked P to stop repair work on paintings but P continued anyway. D breached the K by asking P to stop working and he incurred a liability to pay whatever damages P sustained. BUT: P had no right – by stubbornly persisting in the work after D told him to stop – to make the penalty on D greater than it otherwise would have been.
- 2) Plaintiff cannot claim damages for performance done after the contract was cancelled, though may recover for damages up until the cancellation
- 3) General rule: innocent party may act “in a reasonable business manner” after breach

Schiavi Mobile Homes v. Gironda

- 1) D was supposed to buy a mobile home but was unable to due to personal issues. D’s father offered to buy it so they wouldn’t lose the deposit but P said that was not necessary. P then sold mobile home for lower price and sued D for lost profits.
- 2) Innocent party is required to do what a reasonable person similarly situated would do in order to have properly mitigated damages

- 3) P had an affirmative duty to take reasonable steps to mitigate the damage and should have sold it to the father; failure to do so bars recovery of any interest expense or reduced earnings from that time forward.

Parker v. Twentieth-Century Fox Film Corp.

- 1) Shirley MacLaine had a movie role that fell through, she was offered another role but it was a different type of film and she rejected it.
- 2) The innocent party is not required in mitigation to accept an inferior contract (as judged by a reasonable person similarly situated)

In re Worldcom

- 1) Worldcom went bust → had a multi-year endorsement deal with Michael Jordan but refused to pay him once they went bankrupt
 - a. Worldcom says Jordan didn't try to mitigate his loss by seeking a new endorsement deal
 - b. Jordan claims he is a lost-volume seller and can't mitigate loss → court holds that he is not a lost volume seller and therefore had a duty to mitigate his losses
- 2) Lost-volume sellers, or contractors who are capable of performing multiple jobs simultaneously, are unable to mitigate damages

UCC §2-712 "Cover"; Buyer's Procurement of Substitute Goods

Buyer can mitigate by making a purchase of substitute goods and have seller pay the difference between the price of those goods and the contract price

CISG Article 77

Non-breaching party has to take reasonable steps to mitigate damages; failure to take those steps allows the breaching party to claim a reduction in damages for the amount that should have been mitigated

Uncertainty

- 1) Uncertain or speculative damages cannot be recovered in K law; any harm must be proved with reasonable certainty
- 2) New business rule [increasingly disfavored by courts] → new or not-yet-opened businesses can only speculate about lost profits and therefore cannot recover

Evergreen Amusement Corp. v. Milstead

- 1) Parking lot for a new movie theatre was not completed in time, resulted in delays in opening. P wants lost profits from delayed opening.
- 2) "New business rule" applied
 - a. This rule is in decline → unfair, creates a hardship

- b. Many courts instead require: a rational basis upon which to calculate award or a reasonably certain factual basis for computation of probable losses.

Lakota Girl Scout Council v. Havey Fund-Raising Management

- 1) Girl scouts were organizing a new fundraising campaign; due to mismanagement of fundraiser, they raised much less than the goal; sued Havey for breach of contract (since they lost potential funds)
- 2) **KEY TEST:**
 - a. Lost profits are recoverable provided that:
 - i. There is proof some loss occurred
 - ii. The loss flowed directly from the agreement breached and was foreseeable
 - iii. There is proof of a rational basis from which the amount can be inferred/approximated.

Recovering from Emotional Distress

Chrum v. Charles Heating & Cooling

- 1) D installed a furnace for P – few months later furnace caused a fire and destroyed P's house. P had insurance and were compensated – sued D for emotional distress.
- 2) Court held:
 - a. Recovery for emotional distress requires the harm be foreseeable, the contract involve deep human relations and there be independent tortious conduct
 - i. Contract law does not provide punitive damages
 - b. Contract for furnace installation is just a commercial contract – doesn't involve matters of mental solicitude → injury was to property, not to person
 - i. Damages for emotional distress allowed when injury is to person

Restatement 2d §355

Punitive damages are not permissible under contract law unless there is an independent tort

Key Recap – Limitations on Expectancy Damages

- 1) If the damages are not foreseeable, you cannot collect on them.
- 2) Have a duty to mitigate → if your harm is caused not by the breach but your failure to respond appropriately to the breach, we will reduce your damages in proportion
- 3) If we can't figure out what your harms are, too speculative, you can't collect
- 4) If its outside the scope of contracts (i.e. mental distress), you cant collect

Reliance Damages

- 3) **Goal:** to put the plaintiff in as good a position as he was before the promise was made
 - a. Both gains prevented as well as losses caused must be considered

Nurse v. Barns (1664)

- 1) P had K with D to use D's iron mills for 10 pounds for 6 months; P relied on the K and incurred expenses in anticipation of using the mills; D breached the K and P sued.
- 2) Damages above the value of the consideration may be awarded if materials were wasted in reliance on the contract

Fuller & Perdue (1936): Essential reliance (price of benefits contract may involve) vs. incidental reliance (price of benefits following naturally from the contract that are not the price of performance) – do not knowingly put a plaintiff in a better position than he would have been in had the contract been fully performed (see *L. Albert & Son*)

Chicago Coliseum Club v. Dempsey

- 1) D was a boxing champion and entered into a K with P, where P would organize a boxing match between D and another boxer. P hired a promoter etc; but D refused to get ready for the match, said he had no intent to fight the match.
- 2) Expenses incurred “in furtherance” of the contract are recoverable if incurred after the contract was executed and before breach; only variable costs are recoverable, fixed costs that would have been incurred regardless are not.

Anglia Television Ltd. v. Reed

- 1) P had been preparing to make a film and hired a director, etc; D was lead actor and he decided to drop out of the film; P was forced to abandon the project
- 2) Expenses incurred before the contract may be recovered if they were reasonably likely to be wasted were the contract broken.

L. Albert & Son v. Armstrong Rubber Co. [Opinion by L. Hand]

- 1) D agreed to sell P four machines to recondition old rubber; P spent money and built a foundation for the machines; D breached the K by delivering late
- 2) The non-breaching party can recover expenses incurred in reliance on the contract subject to a deduction for reasonably provable losses incurred were the contract to have been fully performed; don't want to put a party in a better position than they would have been in had the contract not been breached

Coppola v. Kraushaar

- 1) Bride claims that in reliance of wedding dress being delivered, she planned a wedding (which cost \$\$) → sued the dressmaker
- 2) Holding:

- a. Failure to deliver wedding dresses on time does not create liability for the cost of the entire wedding, since this was not a reasonably foreseeable harm (see *Hadley v. Baxendale*)

Autotrol Corp. v. Continental Water Systems Corp. * [Opinion by Posner]

- 1) Contract to develop and manufacture new technology, with some terms to be negotiated later → when the parties couldn't agree on the terms, lawsuit arose.
- 2) P claims that certain fixed costs (engineer's salary) could have been reallocated if not for the failed contract.
- 3) Plaintiff companies may only recover allocated fixed costs unless there was an opportunity cost forgone in reliance on the contract
 - a. Salaries are presumptively fixed costs, but where a company is growing, salaries are variable costs because employees could have been working on another project.
 - b. Here, the salaries were not genuinely fixed costs – cost at the margin – then you can proportion these fixed costs to the breach.
 - c. Any cost that is a response to the agreement, can be recovered.

Fixed Costs – are the same whether or not the firm does anything; improper for damages claims because the breach would not have caused the expense to be incurred (would have been spending that \$ anyway)

Variable Costs – caused by fluctuations in firm's activity; had it not been for the K, these expenses would not have been incurred; recoverable as damages because the breach deprived the party of the opportunity to recover them (with the profits)

Liquidated Damages Clauses

- 1) Needs to be a reasonable a priori attempt to estimate damages
- 2) If harm caused by breach would difficult to estimate – then these types of clauses can be great
- 3) Cannot be a penalty!! Difference between penalty and liquidated damage clause:
 - a. As long as its reasonable
 - b. Penalty punishes non-performance well above the value of performance

Restatement 2d § 339

- 1) Contracts fixing damages are unenforceable unless the amount is a “reasonable forecast of just compensation for the harm that is caused by the breach” and “the harm is...difficult of accurate estimation”
 - a. Liquidated damages must be a reasonable *a priori* attempt to specify damages when it is difficult at the time of contracting to predict what damages would be at the time of breach
 - i. These will fail if they are so large as to constitute a penalty
 - b. Limitation of damages clauses are acceptable until the damages are ‘a nullity’ – merely illusory

- i. See **UCC 2-718** (same test as in Restatement § 339)

UCC 2-718(1)

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate penalty.

H.J. McGrath Co. v. Wisner

- 1) Contract to deliver all the season's tomatoes to P for a fixed cost; when that price turned out to be lower than market price, D sold tomatoes on the market rather than to P as contracted. K had a liquidated damages clause of \$300.
- 2) Liquidated damages clauses that are not tied to the scope of the actual harm, and are merely an estimate or average, are not enforceable.
- 3) The clause in this K is not tied to the scope of the harm; it is a penalty for a breach and therefore void
 - a. Public policy is firmly set against imposition of penalties or forfeitures.

Truck Rent-A-Center, Inc v. Puritan Farms, Inc.

- 1) D produced milk – had a 7 year lease with P – for 25 milk trucks with a provision to buy at any time after one year; P had to take care of maintenance and repairs – K had a liquidated damages clause
- 2) After 3 years, D tried to terminate the lease – said P didn't make the necessary repairs and therefore it could leave the lease without paying the liquidated damages
- 3) Court held:
 - a. Liquidated damages clause can be upheld here
 - b. Liquidated Damages provision = estimate, made by the parties, of the extent of injuries that would be sustained as a result of a breach in the agreement
 - c. Clause is okay as long as its not unconscionable or against public policy
 - d. The amount stipulated by the parties bears a reasonable relation to the amount of probable actual harm → this is not a penalty.

Vanderbilt University v. DiNardo

- 1) Vanderbilt sued DiNardo (football coach) for breach of contract – he left football program to go to another university; employment K had reciprocal liquidated damages clause
- 2) Court held:
 - a. Liquidated damages clause is enforceable
 - b. Was reasonable → resulted from negotiations between parties (Process is important!)
 - c. Amount is in line with actual damages suffered by Vanderbilt

Damages Under Promissory Estoppel

Restatement 2d §90 – Promise Reasonably Inducing Action or Forbearance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person 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**.

- 1) The goal is to protect the reliance interest by enforcement of the promise.
- 2) Limit damages as justice requires to ensure truly equitable remedy → remedy can be limited to less than full expectation damages.

Goodman v. Dicker

- 1) Dealer got franchise to sell radios for Emerson → dealer incurs expenses in preparation for getting Emerson franchise (employed salespeople, etc); but then franchise was not granted.
- 2) Promissory Estoppel: D knew the P was making expenditures in reliance on its promise to give it the franchise
- 3) Court holds:
 - a. Expenses incurred in justified reliance on a promise intended to provoke a change in position are recoverable – although lost expected profits are not.
 - i. Sufficient Notice (“we continue to claim our right to terminate at will”) eliminates justified reliance
 - ii. Reliance interest does NOT cover forward-looking expectation

D&G Stout v. Bacardi

- 1) P was a distributor for D in liquor market – most suppliers abandoned P and it was going to sell out but D promised P that P would continue to be a distributor for Bacardi liquor – P decided not to sell out based on this promise but then D withdrew its account one week later.
- 2) Court holds:
 - a. A party who makes a promise that materially changes the other party’s position is responsible for damages incurred in reliance if the promise is retracted.

Walters v. Marathon Oil Co.

- 1) P wanted to make an investment and bought a gas station based on promises from D (petroleum seller/distributor) – then D refused to sign a K; P couldn’t find another gas supplier
- 2) Court holds:
 - a. Ps suffered a loss of profits as a direct result of their reliance on D’s promises

- b. When actual damages incurred in reliance are near zero, lost profit damages may be appropriate as a measure of investment opportunities foregone in reliance

Restitutionary – Quantum Meruit Damages

- 1) **Goal:** to prevent unjust enrichment of the defaulting promisor at the expense of the promisee
- 2) Court has discretion over remedy:
 - a. Cost of services breaching party obtained OR
 - b. The value that the breaching party's property increased by
 - c. Have to take the more generous of these measures
- 3) Restitution is separate from K

Restatement 2d §371 Measure of Restitution Interest

If a sum of money is awarded to protect a party's restitution interest, it may be measured by either:

- 1) 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
- 2) The increase in the value of the other party's property or interests

When the Non-Breaching Plaintiff Conferred a Benefit

United States for use of Susi Contracting Co. v. Zara Contracting Co.

- 1) D entered into a construction sub-contract with P → P faced unexpected soil condition & work was slowed down, they had to do extra work → wanted more \$\$ from D → D kicked them off project and took over completion of the K
- 2) Susi is the non-breaching party, and they bring suit for restitution for the value of their part performance → entitled to quantum meruit
- 3) Damages awarded in the amount of profit Zara derived from Susi's labor → Susi is entitled to the benefit they have given Zara
- 4) Susi is not limited to contract damages because the contract was breached and a breaching party cannot assert the contract as a defense

Oliver v. Campbell

- (1) **Special Rule: when there has been nearly-complete or full performance by one party, and the other party is obligated to pay for the services under the contract (even if they are the breaching party), damages are limited to the obligation under the contract**
 - a. "Restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance" is a specific payment
 - b. Plaintiff attempted to sue in *quantum meruit*, outside the contract, but this isn't allowed

When the P conferred a benefit but had a negative expectancy: Losing Contracts

Losing Contract → where Restitution Damages > Expectancy Damages

Restatement 2d §373, comment d:

In losing contracts, restitution may provide a larger recovery than expectation. The plaintiff is entitled to the restitution recovery even if it exceeds the rate per unit of work stipulated in the contract.

Two approaches to Quantum Meruit damages (both equally valid):

City of Philadelphia v. Triple

- 1) If you breached a K, don't try to claim a defense under it
- 2) The breaching party cannot use the contract as a defense to the claim of restitution and thereby limit the non-breaching party's damages
- 3) The defendant is liable for the reasonable value of the labor and materials expended, even when that exceeds the contract price

Johnson v. Bove

- 1) Innocent party is limited in the recovery by the total amount they could have gotten under the contract
 - a. Here, the K was used as a ceiling on restitution

Non-Breaching Party Conferred Benefit but Cannot Prove Lost Expectancy

Bausch & Lomb v. Bressler

- 1) B&L had K for exclusive rights to distribute D's products in N.America, paid D \$500k for the rights; D breached K after 2 years
- 2) Losing K → B&L would not have made the revenues it expected to make; if the contract had been completed, their profits would have been less than \$500k
- 3) P did have exclusive rights for 2 years
 - a. Subtract partial performance from the amount the D unjustly retained

Osteen v. Johnson

- 1) Breach of oral contract where D was paid \$\$ to promote P's music
- 2) There is partial performance here – D did do a lot of promoting work, should get compensation for the effort he did put in
- 3) Court has to subtract the partial performance from the amount that is disgorged from D → have to put a value on the part performance

When the contract is unenforceable

- 1) Restitutionary relief may be granted despite an unenforceable contract if a claim in *quantum meruit* can be sustained
- 2) See *Kearns v. Andree* (work done in good faith, on the expectation of an agreement being fulfilled, constitutes an unjust enrichment of the recipient regardless of whether benefit actually accrued to the recipient)

When the plaintiff is the breaching party

- 1) Plaintiffs who breach contracts cannot recover except via *quantum meruit*
- 2) *Britton v. Turner* – The breaching party may recover the value of services rendered under *quantum meruit* but will be liable for damages for breach of the contract
- 3) *De Leon v. Aldrete* – Preventing the breaching party from collecting damages in unjust enrichment is punitive, and punitive damages are not permitted in contract law.

Specific Performance

Restatement §359 / UCC §2-716

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

- (1) Unique goods: non-market elements, uncertain value, land
- (2) Other proper circumstances: difficult to calculate monetary damages, past precedent

Farnsworth: getting an order of specific performance is getting easier because courts are using comparative analysis about the value of particular remedies rather than strict categories.

Kitchen v. Herring (1851)

- 1) D sold land to P and now wants to breach; D tried to remove timber from the land (chief value of the land)
- 2) Land is assumed to have peculiar value - not measurable through monetary damages.
- 3) Specific performance is the standard remedy for cases where land is involved
- 4) The only place where Specific Performance is not awarded for land is when there are multiple sales of the same plot

Curtice Brothers Co. v. Catts

- 1) P is in business of canning tomatoes and wants SP of a K where D agreed to sell to P all the tomatoes grown on a plot; D wants to breach; P won't be able to get that amount of tomatoes anywhere else, all his prep work will be wasted
- 2) When an item contracted for sale is unique or sufficiently rare that it is not easily obtained on the open market, and there were significant resources expended in preparation that will go to waste but for delivery, an order of specific performance to deliver the item(s) is appropriate.

- a. Here the harm to the plaintiff is extremely difficult to measure, could be as large as the entire business, while the harm to the defendant (tomato grower) is only the profit from sale at a higher price

Curran v. Barefoot

- 1) Case involves mixed property (real and personal) – K for house with everything in it – D breaches and P wants SP
- 2) Assumption is in favor of Specific Performance
 - a. Even if K is for things like boats or furnishings – anything associated with real property – is going to get Specific Performance

Stephan’s Machine & Tool, Inc. v. D&H Machinery Consultants, Inc.

- 1) P leases a machine, takes out bank loan for it, machine doesn’t work, cant mitigate damages by getting another machine
- 2) Plaintiff is entitled to specific performance of a promise to replace a defective machine because he had no money to buy a replacement
 - a. Prof Haagen: “This is one of the dumbest cases I’ve ever read”

Laclede Gas Co. v. Amoco Oil Co.

- 1) Gas distribution agreement, for long-term supply of propane gas to residential areas – D breached
- 2) Order of specific performance in a contract for the long-term supply of propane; because the spot market for propane doesn’t exist, there is no reasonably available replacement
 - a. When a replacement can only be obtained “at considerable expense, trouble, or loss, which cannot be estimated in advance,” an order of specific performance is appropriate

Defenses to a Request for Specific Performance

- 1) Unfairness
- 2) Lack of Mutuality of Performance (if the P’s future performance is in doubt)
- 3) Indefiniteness of the agreement (K terms should not be ambiguous)
- 4) Impracticability of Performance
- 5) Contract is for the provision of personal services (no order to perform allowed but possibly an injunction against performance for others, e.g. athletes can be forbidden from playing for a rival league)
- 6) In general → no SP for employment contracts but wrongful dismissal can be remedied via SP

Recap – Where is the Law Now?

- 1) Movement One

- a. Big push towards SP → emphasis on keeping contractual agreements so the court doesn't misjudge the intention of the parties; here, you can clearly limit your damage, if your K is fully negotiated
- 2) Movement Two
 - a. Notion of Efficient Breach → important to allow parties to get out of Ks

* A contract cannot provide for specific performance [can provide for it in a liquidated damages clause]