Freedom of Contract

Hurley v. Eddingfield

Doctor refuses to treat a sickly patient who later dies. Family sues, but court holds that the Doctor was not obligated to treat the patient due to Freedom of Contract. There was an offer for him to enter into a contract, but doctor never accepted. One must enter into a contract willingly.

Jackson v. Seymour

Even though the widow assented to the terms of the contract, the gross disproportion of the consideration and the promise led the courts to void the contract. Gross inadequacy of consideration.

II. Expectation

Fuller & Perdue -- Aristotle Equilibrium Theory

- Restitution Interest – prevention of unjust enrichment (ex. Early payment to seller but seller never gives goods to buyer)
- Reliance Interest – put plaintiff in as good of position as he was before the promise was made (3rd party warehouse example)
- Expectation Interest – put plaintiff in as good a position as he would have occupied had the defendant performed his promise (ex. seller promises to deliver but doesn't, however no money has changed hands)

III. What Promises Do We Enforce?

Bargain: The Classic Paradigm

Restatement (2d) § 17: Requirement of a Bargain

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. … comment b.: *Bargains.*The typical contract is a bargain, and is binding without regard to form. The governing principle in the typical case is that bargains are enforceable unless some other principle conflicts.

Restatement (2d) § 71: Requirement of Exchange ...

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. ... comment b: In the typical bargain, the consideration and the return promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. ... [T]he law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. But it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain. Moreover, a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no consideration ...

Restatement (2d) § 72 comment b.

Bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy. The enforcement of bargains rests in part on the common belief that enforcement enhances that utility. ...

Restatement (2d) § 75 comment a.

In modern times the enforcement of bargains is not limited to those partly completed, but is extended to the purely executory exchange in which promise is exchanged for promise. In such a case ... [t]he promise is enforced by virtue of the fact of bargain, without more. Since the principle that bargains are binding is widely understood and is reinforced in many situations by custom and convention, the fact of bargain also tends to satisfy the cautionary and channeling functions of form. Compare Comments *b* and *c* to § 72. ... [The comments to § 72 define these functions of legal formalities, which the Restatement Second repeatedly states are not required to render a bargain enforceable, as follows: the *cautionary* function [is] to guard the promisor against ill-considered action [and] the *channeling* or signalizing function [is] to distinguish a particular type of transaction from other types and from tentative or exploratory expressions of intention in the way that coinage distinguishes money from other metal. But formality is not essential to consideration; nor does formality supply consideration where the element of exchange is absent.]

Restatement (1st) § 75 comment b.

... Consideration must actually be bargained for as the exchange for the promise. ... The existence or non-existence of a bargain where something has been parted with by the promisee or received by the promissor depends upon the manifested intention of the parties. **Restatement (1st) § 75 comment e.** It matters not from whom the consideration moves or to whom it goes. If it is bargained for as the exchange for the promise, the promise is not gratuitous.

Overall, a bargain occurs in it's simplest form when two people negotiate over something one or both want to do or happen.

Hammer v. Sidway

Uncle promises nephew $5000 if he refrains from bad behavior until 21. Nephew does so but uncle dies before giving the money. Enforceable contract? R: Waiver of any legal right at the request of another party is sufficient consideration for a promise, and peace of mind may be enough for consideration. Court found no element necessary for the creation of a trust missing.

Dougherty v. Salt

Aunt gives 8 y/o nephew promissory note for $300 payable at her death or before. The note said "You have always done for me and I have signed this note for you." Contract? No consideration, the note was voluntary promise of gift. The promise was neither offered nor accepted with any other purpose. Nothing is consideration that is not regarded as such by both parties.

The Law's Response

- **Defining the Classical Bargain**

Professor Samuel Williston: Detriment or benefit, in short, is only part of what is required for consideration. The detriment (or benefit) must still be part of a bargained-for exchange. The presence of a benefit to the promisor (absent in the Williston tramp hypothetical) is useful as an aid in determining whether the promisor intended to promise a gift or make it a bargain.

Restatement (First) of Contracts § 75. Definition of Consideration. (1) Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise.

§ 81 Consideration as Motive or Inducing Cause (1) The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.(2) The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.

Langer v. Superior Steel

Company notifies retiring employee that he would be paid 100/month for the rest of his life granted he did not go work for a competitor. Was this an unenforceable gift, or an enforceable promise supported by consideration? Court rules this promise to be an enforceable contract: it is supported by consideration due to the detriment that the promise incurred by giving up the right to work for a competitor. Not doing something is a positive action. Forbearance is a detriment.

Fiege v. Boehm

Boehm sues Fiege for monetary recovery for breach of a contract to pay expenses incident to the birth of his bastard child and to provide for its support upon the condition that she would not prosecute him for his bastardy. Fiege had found out that the child was not his and stopped making payments. He argues not binding contract because no consideration since he is not the father of the child. R: Where statutes exist to compel father to provide child support, the courts have invariably held that the restraint of the mother from invoking bastardy statute is sufficient consideration. No proof of fraud or unfairness, so enforceable. The forbearance to sue for a lawful claim is sufficient consideration of the party forbearing had an honest intention to prosecute litigation which is not frivolous, vexatious, or unlawful and which was believed to be well founded.

What Does Bargain Exclude?

United States v. Meadors

SBA sues Meadors for failure to provide as guarantor on a loan. Meadors was the wife of a principal on the loan and signed it for no apparent reason. The agreement had been set up prior to her marriage and there was no request by SBA for her to sign the guarantee. Is she liable for the default? The Court ruled that where there is no consideration, it has been the general rule that the contract is not enforceable. No bargain. The gov't suffered no detriment whether or not Meader's signed the guaranty.

Other Issues in bargained-For Exchange

- **Nominal Consideration**

Second restatement broke with the peppercorn view: **Restatement (2d) § 79** comment c. Valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions, in any event, they are not ordinarily bound to follow the valuations of others. Ordinarily, therefore, courts do not inquire into the adequacy of consideration. This is particularly so when one or both of the values exchanged are uncertain or difficult to measure, but it is also applied even when it is clear that the transaction is a mixture of bargain and gift.

Restatement (2d) § 71 illus. 5. A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay $1000.

- The Restatement, Second's repudiation of enforcement based on "a mere pretense of bargain," § 71 comment b, was not, however, thoroughgoing. The Restatement expressly provides that option contracts and guaranties are enforceable, as far as the consideration requirement goes, as long as the offer or promise is in writing and "recites a purported consideration." §§ 87, 88. In contrast, as the commentary to the Restatement, Second provisions explains, that Restatement's intent is to preclude "inquiry into whether the consideration recited ... was mere formality or pretense, or whether it was in fact given" at all. **Restatement (2d) § 88** comment b.

IV. The Waning of Consideration

The Doctrine of Mutuality

The Traditional Meaning of Mutuality

Traditionally bilateral contracts with illusory obligation on one side were not enforceable. Mutuality problems if one of the promises is illusory – imposes no real constraint on the promisor and allows complete discretion about whether to perform.

Restatement (2d) § 79 Adequacy of Consideration; Mutuality of Obligation: If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or(c) "mutuality of obligation."

McMichael v. Price

Price had an agreement with McMichael in which McMichael agreed to provide sand for Price's company to sell for ten years exclusively. McMichael then backed out, claiming no breach because no mutuality. Was there an enforceable contract/consideration? R: A contract where in D agreed to buy of P all its requirements at a specific price is not void for uncertainty in that the actual amount required was not stated. Also, where D agreed to buy its requirements from P, the contract is mutual, as such provision required D to buy all its coal from P. Cannot be said that Appellant was not bound by contract for he gave up his right to purchase elsewhere unless released by appellee.

The Modern Meaning of Mutuality

Wood v. Lucy Lady Duff Gordon

Lady gives Wood exclusive rights to sell her brand name. She then begins selling without a split of profits. He sues for breach, she claims there was no mutuality or consideration on his part. Court holds that there was an implication of a good faith promise that Wood would try to sell the Lady's name. Represents the **waning of consideration.** Actual consideration was not necessary, only the implication of it.

Good Faith

Restatement (2d) § 205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

Section 1-203 of the UCC similarly states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

In addition, the UCC makes the obligation of good faith non-disclaimable. **Section 1-102(3) of the UCC**: "The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

Exclusive Dealing Contracts

Technique for saving the enforceability of exclusive dealing contracts codified in the **UCC: Section 2-306(2):** "A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

Under contemporary doctrine, the obligation to use reasonable efforts may be more potent than the general obligation of good faith. Because the UCC already imposes a general obligation of good faith under § 1-203, the § 2-306(2) reasonable efforts requirement might be superfluous if it is not intended to enhance the duty owed in exclusive dealing contracts. But note that § 2-306(1) imposes an arguably superfluous duty of good faith in requirements and output contracts, even though a general duty of good faith is already proscribed by § 1-203.

Requirement and Output Contracts

Requirements contract is one in which the quantity term is set not at a specific amount but rather is agreed to be the amount of goods or services that the purchaser will need in connection with a given time period, location, or enterprise covered by the contract. Output contract is where the quantity is agreed to be all of the goods or services that the seller will produce in the time period, location or enterprise covered by the contract.

Mutuality concerns: requirements buyer or the output seller is able to speculate on market fluctuations in a way that the other party to the contract cannot control. So apply good faith.

§ 2-306. Output, Requirements and Exclusive Dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

Comment 3. If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.

Personal Satisfaction and Termination Clauses

Courts imply duty of good faith on parties whose contractual obligations are conditioned on their own personal satisfaction.

Omni Group v. Seattle National Bank

Omni agrees to buy land from Clarks if land is suitable for construction. Omni decides to forgo inspection and Clarks pulls out of the deal, citing promise was illusory. Court holds that promise was not illusory. Omni's obligation to act in good faith constitutes consideration. Feasibility contracts are a standard in the industry.

Modified Contracts

Pre-existing duty rule. If the contract is modified in a way that does not require one of the parties to incur any additional detriment, the modified contract will arguably not be supported by consideration. This is because the promise of one of the component promises will already be under a pre-existing duty to perform that is traceable to the original contract. One technique considered in dealing with this problem is to dispense with the consideration requirement altogether when contract modifications are both voluntary and made in good faith.

§ 2-209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this Article needs no consideration to be binding.
(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.
(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

§ 89 Modification of Executory Contract

A promise modifying a duty under a contract not fully performed on either side is binding
(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
(b) to the extent provided by statute; or
(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

IX. E. Modification and Extortion

Legal Duty Rule: A promise to perform an already existing legal duty is not sufficient consideration.

Levine v. Blumenthall

Tenants cannot pay the rent due to economic hardships. Landlord agrees to reduce their rent. At the end of the lease, he sues for the amt he would have been paid under the original agreement. Was this modification enforceable? There was a lack of consideration on the part of the landlord. Had the tenants agreed to pay the rent even a day early, there would have been consideration. Because there was no consideration, the court ruled that this promise was unilateral and not enforceable.

Formality

Sometimes formality can be a sufficient basis for enforcing a promise even in the absence of consideration. 3 justifications: (i) to provide evidence of seriousness; (ii) to promote deliberation; and (iii) to channel the expression of the parties into legally cognizable forms and categories.

Restatement (2d) § 95 Requirements for Sealed Contract or Written Contract or Instrument

(1) In the absence of statute a promise is binding without consideration if (a) it is in writing and sealed; and (b) the document containing the promise is delivered; and (c) the promisor and promisee are named in the document or so described as to be capable of identification when it is delivered.
(2) When a statute provides in effect that a written contract or instrument is binding without consideration or that lack of consideration is an affirmative defense to an action on a written contract or instrument, in order to be subject to the statute a promise must either (a) be expressed in a document signed or otherwise assented to by the promisor and delivered; or (b) be expressed in a writing or writings to which both promisor and promisee manifest assent.

- Note, however, that many states have abolished the legal effectiveness of the seal, as has the UCC. *See* Restatement (2d) § 6, Comment b; UCC § 2-203: The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

Firm offers

The UCC itself sometimes recognizes formality as a substitute for consideration. **The phrase *firm offer* is a term of art that the UCC uses to describe options that are enforceable without consideration**. **An option is simply an offer that the offeror has promised not to revoke prior to a specified time, or prior to the occurrence of a specified event.** Normally, such a promise of irrevocability would not be legally enforceable unless it was supported by consideration. In the sale-of-goods context, however, the UCC makes such promises enforceable if they comply with certain formalities. Section 2-205 of the UCC states: "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 three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

V. Beyond Consideration

Restitution

The Historical Role of Restitution

Restitution and Quasi Contracts

§ 1 of the Restatement of Restitution: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." However, the law does not always adopt such a direct doctrinal approach to the prevention of unjust enrichment. The law has often used the device of an implied or *quasi contract* to implement its objective of preventing unjust enrichment. Writ of debt > writ of assumpsit> extended to permit recovery for the value of goods or services not paid for but delivered pursuant to request> recovery where no explicit promise, but foundation for inferring such a promise (contracts implied-in-fact)> recovery in which no explicit promise to pay by implying promise to pay in every executory contract for which consideration had been provided (contracts implied-in-law)> recover when mistakenly overpay other party, theft, conversion> The terms *quasi contract* and *constructive contract* emerged to describe these sorts of restitutionary claims that were based on fictitious contracts> Restatement changed term to *restitution*.

Glenn v. Savage

P saved D's lumber from being washed away in river. D received all benefit but did not ask for P to do so. Is D obligated to pay P for this enrichment? To be liable must have requested the service or promised to pay for it; no action can be sustained for a voluntary act of courtesy, against public policy.

Cotnam v. Wisdom

Surgeons performed emergency surgery on D who had been injured in car accident. D was unconscious and later died. Surgeons suing for cost of their services. Court ruled that even though there was no real contract between the defendant and the plaintiff, there was an implied one, therefore a remedy is in order. The court also ruled that only reasonable compensation was in order- the doctors knew nothing of defendant's financial standing when they rendered the services, therefore they cannot seek restitution on the basis of his financial standing.

The Elements of Restitution

Restitution as an Independent Cause of Action (no contract)

§ 1. Unjust Enrichment: A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

§ 2. Officious Conferring of a Benefit. A person who officiously confers a benefit upon another is not entitled to restitution therefore.

§ 3. Tortious Acquisition of a Benefit. A person is not permitted to profit by his own wrong at the expense of another.

Section 4 of the Restatement of Restitution provides for remedies to effectuate restitution including self help and judicial decrees issued by courts of law and equity.

Section 5 of the Restatement of Restitution provides that the proper form of legal action for a restitution claim is an action in general assumpsit, or an action in contract (as opposed to tort), or other appropriate form of action.

Restitution as a Contract Remedy

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

§ 371. Measure of Restitution Interest. If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced.

§ 373. Restitution When Other Party Is in Breach

(1) Subject to the rule stated in Subsection (2), on a breach by nonperformance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.

§ 374. Restitution in Favor of Party in Breach

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

(2) To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

Components of a Restitution Claim

i. Enrichment – disgorgement principle; damage if otherwise valid is amount of D's enrichment. 2 potential problems: first, the court must determine whether the D was in fact enriched at the expense of the P. Second, the court must measure the amount of that enrichment. Should be determined by what P lost or by what D received?
ii. Injustice -- **Section 2 of the Restatement of Restitution** expressly denies plaintiffs who confer benefits *officiously* from a right to restitution. It does so on the grounds that the retention of benefits conferred officiously is not unjust. Comment "a" to § 2 states that, "Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place." The comment goes on to state that, "A person is not required to deal with another unless he so desires and, ordinarily, a person should not be required to become an obligor unless he so desires."

- Although officious conduct is not protected by the law of restitution, the law does provide for restitution after the conferral of some unrequested benefits. **Section 112 of the Restatement of Restitution**: "A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of a third person." Under this Section, a recipient must pay for even unrequested benefits where circumstances have made it impractical to insist on a request. Again, the facts of *Glenn v. Savage* and *Cotnam v. Wisdom* illustrate such situations.
- **§ 116 of the Restatement of Restitution** permits restitution for unrequested efforts to save another's life or health
- **§ 117** permits restitution for unrequested efforts to save another's property. Among the requirements specified for recovery under both of these sections however, is the requirement that the plaintiff intend to charge for the services rendered rather than to provide the services *gratuitously*.

iii. Effect of a Contract – contract may effect ability or amount of restitution
    - Off-contract remedy when goal is to help undo the contract (both sides)
    - On-contract remedies – ex. Expectation damages, goal is to carry through with contract by approximate performance

Promissory Restitution (Moral Obligation)

Cases involving restitutionary promises that are not supported by consideration are often referred to as past consideration or moral obligation cases.

Past Consideration

Mills v. Wyman

Mills sues Wyman for compensation promised after he had taken care of his dying son. Court says promise cannot be legally enforced – when a promise is made after the fact by someone not directly related to the debtor (son had long left the family) it is not legally enforceable. No consideration.

Webb v. McGowin

Webb sues the testator of McGowin for recovery of unpaid installments accruing up until time of suit. Webb had saved McGowin's life by throwing himself off the second floor. He was seriously injured and McGownin promised to pay him $15 fortnightly for the rest of Webb's life. Then McGowin died and the payments stopped coming. Court says where promise cares for, improves, and preserves life of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service because of the material benefit received.

§ 86 Promise for Benefit Received

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

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

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

(b) to the extent that its value is disproportionate to the benefit.

Promissory Estoppel - Restoration of Reliance

Riketts v. Scothern

Grandfather gave P promissory note for $2000 saying that none of his grandchildren worked and now she didn't have to. P quit her job in reliance of the money. Grandfather died without paying all of the note. Court found that even if no consideration or all elements of contract, a promise when made intentionally to cause person to alter their position for the worse may be enforceable.

Elements of 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 and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Other Restatements Provisions

The Second Restatement has other sections that seek to protect reliance in certain circumstances, including Section 45, concerning option contracts, and Section 89, concerning contract modifications.

Commercial Promises

Feinberg v. Pfeiffer Co.

Company decided to make the gift of $200/month to the plaintiff upon her retirement for her long service. Payments were reduced. Plaintiff sues for enforcement of the promise. Court held that on the grounds of promissory estoppel, the promise is enforceable. It is likely the case that the plaintiff relied on the promise in some shape or form.

At Will Employment

Forrer v. Sears, Roebuck and Co.

P used to work for Sears but left and bought a farm. To entice him to come back Sears promised him "permanent employment" as a manager. P agreed and sold his farm and animals for a loss of $11,000. Sears then discharged him after only 4 months. Courts decided that the promise was kept when they employed him in the capacity they said they would and that the promise did not eliminate the right to free-will termination. Employer would have needed to have received additional consideration in order to use promissory estoppel.

Grouse v. Group Health Plan, Inc.

D offered P a job, P had to quit the job he was at and turned down a different offer. D decided to revoke offer. P could not get another job and lost wages. Court says given the facts P had right to assume a "good faith" opportunity to perform his duties to the satisfaction of respondent once he was on the job.

Hoffman v. Red Owl Stores

Hoffmans relied on Red Owl Store's promise to give him a business franchise for a certain amount. Relying in this promise, Hoffman sold his business and relocated. Red Owl then went back on the original promise, and the negotiations eventually fell apart. Are the Hoffmans entitled to restitution? Court awards promissory estoppel reliance in this case. Even though the contract had not been complete, reliance can be induced during the negotiation stage. Court also held that certain commercial risk that the promisee incurs are beyond the scope of reliance. Court thereby did not award damages for the Hoffman's willingness to relocate.

I. The Concept of Contract

Contracts and Public Policy

Contracts and Illegality

> SC of Wisconsin: "It is 'grave error' to assert that all contracts in violation of a statute are unenforceable. The controlling analysis in determining whether a statutory or regulatory violation renders a contract unenforceable is the intent underlying the provision that is violated.

Holland v. Morse Diesel Int'l, Inc.

P was unlicensed subcontractor and worked for MDI who treated him poorly b/c of his race and did not pay him consistently. Business and professions code barred unlicensed contractors from bringing suit to recover compensation for work requiring a license. The court found that the policy behind the code is to prevent the use/payment of unlicensed contractors but that the civil rights claim was unrelated to this protective concern. Barring him from discrimination recovery would serve no purpose. May bring suit for damages related to illegal contract so long as the law's purpose is not burdened by it.

Who can contract?

The Issue of Capacity

Youthfulness, mental capacity and intoxication are all defenses addressed in the restatement 2d.

Halbman v. Lemke

D sold to P who is a minor an Oldsmobile. P gave $ up front and continued to pay weekly for remaining balance. Car broke, had to get repaired. P disaffirmed the contract and asked for $ back. Car was later completely vandalized. Issue was whether a minor who disaffirms a contract must make restitution to the lender for the damage sustained prior to disaffirmation. The court found that, along with the infancy doctrine, absent misrepresentation or tortious damages to the lender, a minor who disaffirms a contract for the purchase of an item which is not a necessity may recover his purchase price without liability for use, depreciation, damage, or other diminution in value.

Unequal Bargains

Batsakis v. Demotsis

In Greece during wartime P lent D money. The note said D would return $2000 US, although the amount that P paid D was $25 US. Courts found that without duress or fraud or misrepresentation, the court is unwilling to void a contract merely because there may be insufficient consideration. No-inquiry rule.

How absolute is no-inquiry rule?

"A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only … (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." **Restatement (Second), Section 161.**

Unconscionability doctrine suggests otherwise.

Contracts and Social Choice

Kass v. Kass

P and D were married and had embryos frozen while trying INF due to DES pregnancy issues. They divorced and now P wants to continue trying to have kids with the leftover embryos but D doesn't want her to. Does the mother have the right to the embryos despite an original/previous contract by both and her husband agreeing to donate them in event of separation? Court says because of the parties agreement, there is no cause to decide whether the pre-zygotes are entitled to "special respect" as property. Instead, the previous contract was binding. Mother's change in position was not great enough to render changing of previous contract. H: Previous contract will hold in divorce/property dispute over embryos unless big change in circumstance.

AZ v. BZ

P and D did INV. Finally had 2 girls. Divorced. INV contract said P got embryos, but D had signed before she filled it in saying he didn't care. D wants an injunction against P for future use of the embryos. I: When the contract says the Mom gets the embryos, does that contract still count after divorce even though says "separation" on it and D doesn't agree anymore? R: Change in circumstance ie divorce so cannot be forced into parenthood. Conflicts with public policy. You cannot enforce forced paternity.

VI. The Objective Theory

The Subjective Theory

Raffles v. Wichelhaus

D contracted with P for certain cotton to be delivered via "Peerless" boat from Bombay. 2 ships named "peerless." D thought first at time of contract and P thought second (allegedly) and D refuses to accept the same cotton off of the different boat. R: "Consensus ad idem" required for binding contract. Court decides even when face of contract has not been breached, if the two held by it do not have a meeting of the minds then the contract is not binding.

The Objective Theory

Embry v. Hagardine, McKittrick Dry Goods Co.

P told D that he must have a contract for another year or he would quit. D said not to worry, just continue working. I: Did what was said constitute a contract of re-employment? If yes, would the reasonable man consider he was being re-employed on the same previous terms and would act accordingly? R: The inner intention of parties to a conversation subsequently alleged to create a contact cannot prevent one from arising if the words used were sufficient to constitute a contract. A: D may not have intended to employ P by what happened, but what D said would have been taken by a reasonable man to be an employment, and Embry so understood it, so it constituted a valid contract of employment for the ensuing year. C: Contracts can be made even without mutual assent if demonstrated/acted as if there is as understood by a reasonable man.

Lucy v. Zehmer

Zehmer (supposedly in jest) wrote out that he would accept $50,000 for his farm if Lucy could really raise it. Both he and his wife signed it. Lucy took the contract and acted upon it. Zehmer refused to sell. I: Is the writing an enforceable contract despite the differing mental assents of the parties? R: Metal assent of parties is not requisite for the formation of a contract. If the words or other acts of one have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning he attaches to his manifestations is known to the other party. P had no reasonable view that he was joking, and D's actions showed seriousness. Mental assent is not required by both parties as long as it is acted out as if assent exists.

VII. Information and Disappointment

What Degree of Honesty is required? -- Fraud and Intentional Misrepresentation

Vokes v. Arthur Murray, Inc.

Dance studio fed old woman lies that she was improving and would one day be able to dance with famous dancers. Relying on these flatteries, the woman was induced to purchase tens of thousands worth of dance lessons. Court held that the contract for these lessons is not enforceable. The dance company knew that they were being dishonest and that the woman was relying on this false statements as a reason to enter into more lesson contracts. Usually, the law requires that in order for a misrepresentation to be actionable, it must be one of fact, not opinion, but when there is a fiduciary relationship between the parties, and where the representee cannot easily infer what the truth is, these are exceptions. "…A statement of a party having…superior knowledge may be regarded as a statement of fact although it would be considered as opinion of the parties were dealing on equal terms."

Misrepresentation without Fraud (Innocent Misrepresentation)

Norton v. Poplos

Norton was interested in purchasing "m-1 zoned land" that Poplos was selling, and needed it for certain types of uses which he told Poplos about. Poplos agent said that he would supply restrictions if he found any. After the contract was signed, Norton found that he needed permission from the industrial park committee for his uses which ruined the m-1 zoning because he was denied. He decided not to purchase the property, and Poplos filed action for performance of the contract but then abandoned the complaint once he sold it to someone else. Norton counter-sued for return of his money. Court said innocent misrepresentation is sufficient for rescission. Contract voidable when assent is induced by material or fraudulent misrepresentation. Misrepresentation includes the failure to qualify maters as necessary to prevent false implications of assertions with respect to other facts. Even if a sales contract contains a merger clause, a buyer may still rescind the contract if it resulted from an innocent but material representation from the seller.

§ 164 When a Misrepresentation Makes a Contract Voidable

(1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

(2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

§ 165 Cure by Change of Circumstances

If a contract is voidable because of a misrepresentation and, before notice of an intention to avoid the contract, the facts come into accord with the assertion, the contract is no longer voidable unless the recipient has been harmed by relying on the misrepresentation. Comment: A misrepresentation need not be in the form of written or spoken words. Stated simply, a misrepresentation is merely an "assertion not in accordance with the facts," Restatement 2d of Contracts, § 159, and such an assertion may be made by conduct as well as words. Id. Comment a.

Contracting Out Misrepresentations

Several forms: No oral representations are operative "merger clause" or sold "as is" or directly disclaims the defendant's liability for any such misstatement. Courts have had varying responses to these clauses.

Warranties

Under the UCC warranties, the seller is required to live up to express statements that it makes about the character or quality of the goods sold. In addition, if the seller is a professional, and not a casual seller, a general implied warranty of merchantability accompanies a sale of goods. Even if nothing is said by the seller, an affirmation that the goods are merchantable will be found to be implicit in the seller's "holding out" the goods and placing them in commerce. The essence of this implied warranty of merchantability is that the goods "are fit for the ordinary purposes for which such goods are used" and that the goods will "pass without objection in the trade" under their description. UCC § 2-314(1)(c) & (2)(a) and (c).

- Doesn't apply to services but certain states and courts have upheld warranties related to services.

§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

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

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

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

Section 2-313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

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

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Section 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale **if the seller is a merchant with respect to goods of that kind**. Under this section the serving for value of good or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

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

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

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

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

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

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

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Section 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purposes.

§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
(3) Notwithstanding subsection (2)
(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

What Must Be Disclosed?

Laidlow v. Organ

A treaty of peace was signed between America and Britain which increased the value of tobacco. Organ was to receive a shipment of tobacco from Laidlow but before he sold it to Organ he asked if any news had come concerning the price, Organ didn't say anything although he knew and the transaction occurred. When Laidlow found out he took the tobacco back. I: Whether intelligence of extrinsic circumstances which might influence the price of the commodity and was exclusively known to the vendee ought to have been communicated to the vendor? The court has difficulty in balancing whether or not the defendant had a duty to disclose. They want to protect proprietary information (rewarding defendant for waking up early) while at the same time condemning the suppression of material facts. The court does not believe there was a duty to disclose, but sends it back to the jury for decision.

Caveat Emptor

Greatest significance for two Q: whether the seller had a duty to disclose known defects and whether implied warranties of quality would accompany a sale. In general, the answer under the early versions of caveat emptor were that a buyer should expect neither disclosure nor a warranty.

Theories of Disclosure

- Some courts impose expansive duty on party to disclose information that would prevent injury or loss to the other side. Others still use language reminiscent of "buyer beware."
- Even the Restatement (2d) reflects ambivalence. Section 161(b) does not say that there is a general duty to disclose important information. Disclosure is only required if it would correct a known mistaken assumption of the other party and then only if disclosure is compelled by "reasonable standards of fair dealing." Clearly the drafters believe that there are cases in which information can be consciously withheld even though disclosure would correct a mistaken assumption of the other party.

§ 161 When Non-Disclosure Is Equivalent to an Assertion

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

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

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

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

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

Different Theories of the Duty to Disclose:

a. The Economic Theory: "Information is the antidote to mistake. Although information is costly to produce, one individual may be able to obtain relevant information more cheaply than another. If the parties to a contract are acting rationally, they will minimize the joint costs of a potential mistake by assigning the risk of its occurrence to the party who is the better (cheaper) information-gatherer. Also, difference between "deliberately acquired information" and information that is casually acquired. The former entails costs, including the cost of developing expertise in the subject matter in general and costs incurred in developing information about the particular transaction. Kronman would give more legal protection to deliberately acquired information so that people are able to recoup their

investment in the information and thus are encouraged to continue to apply their resources to developing new enterprises and innovations.

b. The Relational Theory: The law should shift away from the formalistic, somewhat distancing aspects of traditional contract formation and give emphasis to norms that encourage the development of trust and reliability between the parties. A rule requiring disclosure of defects and limitations serves that end. But, information like trade secrets, pricing formula and the like presumably should be accepted by both parties as something that is the province of only one of them.

c. The Distributive Theory: The sum total of loss-avoiding effort is likely to be greater if the risk of loss is distributed among all of the parties who could have a significant impact on its occurrence. In this world, where the problem is the nondisclosure of important information and not a problem of abject fraud, some loss would always be placed on both buyer and seller. Intermediaries would also be allocated part of the loss to enhance their incentives for loss-prevention.. Ex. Real estate transactions, with most loss assigned to seller and lesser amount to buyer.

Hill v. Jones

Jones did not tell Hills about the termite issues with the home they were trying to sell them. The contract to sale was contingent on a termite report which came back okay. Did the seller have a duty to disclose to the buyer the existence of termite damage in a residential dwelling known to the seller but not to the buyer which materially effects the value of the property? Court orders that if there was no way for the sellers to find out that there were termites, then the contract to buy the house could have been rescinded. Suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false misrepresentation. Generally, if the fact materially affects the contract, it ought to be disclosed. The sellers knew that the buyers were relying on a termite report which stated there were no termites in the house. It was their duty to correct this mistake, and by them saying nothing, it was equivalent to stating that the fact did not exist. The Hills attempted to contract out of fraud by incorporating a clause which stated the seller was not bound by any understanding or representation that was not reflected in the contract. This does not mean they are free to lie, conceal, and make shit up. You cannot contract out of fraud.

Richey v. Patrick

Patricks quickly bought home from Richeys. Home had a history of sediment issues with the water system that the Richeys did not disclose. H: A contract to sell realty with an "as if" clause bars any claims for nondisclosure absent the existence of fraud or misrepresentations. No evidence of fraud so reversed.

Is Disclosure Logically Compelled?

§ 152 When Mistake of Both Parties Makes a Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

> So then doesn't it makes sense that if one party doesn't know, then it is rescindable too?

Good Faith

Carmichael v. Adirondack Bottled Gas Corp.

Carmichaels in distributorship agreement with Adirondack. The husband who signed the contract died. "Key man" termination clause said termination upon his death. Wife wanted to continue business but D's attorney said out of business whether she sold it back to them or not. They then harassed her and were unreasonably mean. I: Did Adirondack breach the implied covenant of good faith despite the fact that such dealings in question occurred after the key man termination was invoked? R: All of the post-termination activity was still subject to covenant. Given the facts that D knew about P's situation, their behavior was in bad faith. Affirmed for plaintiff for return of deposits, payment, etc.

Market Street Associates v. Frey

MSA had agreement with general electric pension trust who was supposed to fund improvements to the location for more than $250,000. There was another clause saying if negotiations fail then the lessee is entitled to repurchase the property at a price roughly equal to that the property was sold to the lessor for. Market Street petitioned for improvements, which Frey rejected, so they attempted to buy property. Frey stating MS is acting out of bad faith, did not notify them of this provision in the contract. I: Bad Faith? Judge chose to characterize in favor of D rather than P and that was wrong. To decide what was MS's state of mind is necessary to determine good or bad faith and that must be a jury Q.

The Content of the Duty

"Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness." Restatement (2d), § 205, Comment a.

The Scope of the Duty

Restatement (2d) § 205, Comment c: "This Section, like **Uniform Commercial Code § 1-203**, does not deal with good faith in the formation of a contract. Bad faith in negotiation, although not within the scope of this Section, may be subject to sanctions. Particular

forms of bad faith in bargaining are the subject of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress. Moreover, remedies for bad faith in the absence of agreement are found in the law of torts or restitution."

Comment e. Good faith in enforcement. The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. See, e.g., § § 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts. It also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason. See Uniform Commercial Code § 2-209, Comment 2. Other types of violation have been recognized in judicial decisions: harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract.

Employment at Will Contracts

Fortune v. National Cash Register Co.

Fortune was an employee under NCRC. He was credited for a large deal for which he was entitled commission. NCRC fired him before he received all of his commission and refused to pay him. Court held that it was possible that NCRC was acting in bad faith. Even though employers have the right to terminate employees at will, they must do so in good faith, ie, they cannot fire someone so they will not have to pay him/her a commission. Cannot prevent one party from access to the fruits of the contract.

Mutual Mistake

Beachcomber Coins, Inc. v. Boskett

Both parties mistaken about authenticity of minted dime. P paid D $500 for it. Is the transaction rescindable or did P assume the risk? R: Where parties entering into a transaction and are both basing the transaction on a fact that is a mistake, then it is voidable by either party if enforcement would be materially more onerous to him than it would have been believed to be. Negligent failure to discover facts to which both parties are mistaken does not preclude rescission. No coin custom found to support shifting of the risk. Failure to follow custom does not preclude rescission based on mutual mistake. Court ruled that this contract was rescindable under the doctrine of mutual mistake. Both parties were convinced that this was a real coin, if they had not been sure, then there would have been more of an allocation of risk placed on the purchaser of the coin. But in this case, the court is able to re-establish the status quo and avoid unjust enrichment. This case might also be a breach of express warranty.

Lenawee County Board of Health v. Messerly

(M) bought a property in which an illegal septic tank had been installed. Land was later sold from the M to the Pickles (P). Clause in the contract said that buyers purchased the property as is, and had it examined. Ps later found raw sewage leaking, and the health department condemned the building. Do the collateral mistakes allow rescission under mutual mistake? R: When material mistake made the contract is voidable by adversely affected party unless he bears the risk of the mistake under section 154. The risk is allocated to him by the parties, he is aware of his limited knowledge, but has deemed sufficient, risk allocated by court. A: equity suggests risk should be allocated to purchasers despite finding of mutual mistake of material fact. Apparently nothing short of rescission can remedy the mistake and yet no rescission will be forced because the purchasers assumed the risk in their contract. If "as is" clause you assume risk and despite mutual mistake you're screwed. The fact that it is now of less value than the plaintiff expected is not sufficient grounds for relief.

Peerless is not a mutual mistake case -- To have a mutual mistake case, both parties have to be agreeing to the same thing, in Peerless, although they thought they had agreed to the same thing, they had not.

When is the risk Allocated?

Restatement (2d) § 154 provides that a party bears a risk (1) when it has been allocated to him by the parties' contract, (2) when he is aware at the time of the contract that he has only limited knowledge of the facts and chooses to treat his limited knowledge as sufficient, and (3) when "the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so."

Changed Circumstances

Impossibility and Impracticability

Taylor v. Caldwell

Taylor was to rent music hall and gardens from Caldwell but the hall burnt down Are the defendants liable for lost profits/reliance, or can the contract be rescinded? Court ruled that the contract is indeed rescindable. R: In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. Assuming place not at fault. Excuse implied because piece essential and would be in the contract had the people thought about it. Verdict for D. The nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. When the existence of the particular object centered around the contract ceases to exist, the contract is void…be it that the object ceased to exist by an "act of god" something unforeseeable that was not taken into account by the original contract.

Canadian Industrial Alcohol Co., Ltd. v. Dunbar Molasses Co.

The 2 had a contract made a year before started delivery of 1,500,000 gallons of molasses. When deliveries began, only 344,083 gallons delivered at a time. CA sues molasses for breach of contract. I: Whether the "special circumstances" were presupposed in the bargain between P and D. Nothing to show that P in ordering that molasses was informed by D that it would be subject to that. If knew,

would have contacted directly. Difference between burning of building and other output circumstances. Court rules that these changed circumstances were not necessarily unforeseeable, and the defendant could have been more diligent and could have possibly changed the circumstances. The defendant, for example, could have entered into a cover contract with the refinery to insure that enough molasses was produced for his order. If negligence is the cause of the impossibility, then the contract is not rescindable.

The UCC Provisions

How do the UCC rules on impossibility differ from those in the common law cases that were assigned above?

§ 261 Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 263 Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance

If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

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

"Except so far as a seller may have assumed a greater obligation . . .

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

§ 2-613. Casualty to Identified Goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then (a) if the loss is total the contract is avoided; and (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

The Problem of Increased Costs

In *Louisiana Power & Light Co. v. Allegheny Ludlum Industries, Inc*., Allegheny agreed to manufacture condenser tubing for LP&L for use in its nuclear power plant. Over the two year period Allegheny's costs under the LP&L contract increased significantly. Allegheny alleged that if it had performed the contract, it would have incurred a loss of approximately $430,000; and did not produce the tubing, and LP&L sued for damages. Allegheny raised impracticability and mutual mistake as defenses. The court concluded that "Allegheny's performance under the contract was not commercially impracticable." Moreover, the court rejected the claim of a mutual mistake on the grounds that any such mistake must pertain to the facts as they existed at the time of the contract. "Were courts to conclude that the mere failure of a party to achieve an anticipated profit might constitute a mistake of fact such as would allow alteration or rescission of a contract, then such a claim could be made in virtually every case in which a party failed to realize an expected profit. The doctrine of mutual mistake was not created to insulate individuals and corporations engaged in business from the realities and risks of commercial life." Other language used by this court and by others holds out the prospect that there are some cases in which extreme cost increases would support a claim of impracticability. For example, in *Gulf Oil Corp. v. Federal Power Commission*, the court stated that "[t]he party seeking to excuse his performance must not only show that he can perform only at a loss but also that the loss will be especially severe and unreasonable."

Frustration of Purpose

Krell v. Henry

D was to rent flat from P to watch king's procession go by. King got ill and cancelled. D had already paid $25 deposit but the defendant did not pay the balance he owed on the room. The hotel sued for the balance, defendant counterclaimed for his deposit to be returned. The court ruled that the contract was rescindable. The defendant rented the room exclusively to see the procession, and the plaintiff advertised the room solely for that purpose. That was the basis for the contract on both sides.

VIII. Offer and Acceptance

The Classical Paradigm: The offeree's power to accept the offer and thus create an enforceable contract does not continue to exist indefinitely, and may be terminated by (a) the offeror, who can revoke the offer prior to acceptance; (b) the offeree, by a rejection of the offer or a counter-offer proposing different terms; (c) the lapse of time; (d) the death or legal incapacity of either party; or (e) the non-occurrence of any condition of acceptance that the offeror imposed in making the offer.

Offer

§ 24. Offer Defined

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

§ 26. Preliminary Negotiations

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Lonergan v. Skolnick

Defendant entered into Negotiations with plaintiff to sell a tract of land. Several transactions by letter between the P and D, and defendant ultimately told the P that he would need to act fast to purchase land. Then, Defendant sold land to a third party, and plaintiff was not aware of this because of the overlap with the mail. The plaintiff then went through the provisions necessary to purchase the land. The court ruled that there was no contract, because there was never an offer. The language of the letter made this clear, "if you are interested, act fast", meaning it was likely that someone else would purchase the land soon.

§ 25 Option Contracts

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

Dickinson v. Dodds

Dodds signed a memo to Dickinson stating that he agreed to sell Dickinson property for 800 pounds and that the offer would be open until Friday at 9am. That Thursday Dickinson was informed by third party that Dodds had been offering/agreeing to sell property to Allan. Dickinson tried several times to give Dodds his acceptance up until Friday at 9am. Dodds told him he was too late. I: Was there a contract between the two and if not, did Dodds at least have a duty to notify Dickinson that he was revoking his offer? R: Promise/offer not binding until acceptance of offer. An express/actual withdrawal of offer is not required. To constitute contract, minds must meet at the time of acceptance. The fact that P knew that D was no longer minded to sell property to him was equivalent to D saying so himself. If possible acceptor learns facts inconsistent with the continued existence of an offer, then an offer to sell real property is revoked.

§ 32 Invitation of Promise or Performance

In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

§43. INDIRECT COMMUNICATION OF REVOCATION

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.

Acceptance

§ 2-206. Offer and Acceptance in Formation of Contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances

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

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non□conforming goods, but such a shipment of non□conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

§ 50 Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

§ 51 Effect of Part Performance Without Knowledge of Offer

Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.

§ 53 Acceptance by Performance; Manifestation of Intention Not to Accept

(1) An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance.

(2) Except as stated in § 69, the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance.

(3) Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.

§ 54 Acceptance by Performance; Necessity of Notification to Offeror

(1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.

(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless

(a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or

(b) the offeror learns of the performance within a reasonable time, or

(c) the offer indicates that notification of acceptance is not required.

§ 56 Acceptance by Promise; Necessity of Notification to Offeror

Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably.

§ 58 Necessity of Acceptance Complying with Terms of Offer

An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered.

§ 59 Purported Acceptance Which Adds Qualifications

A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.

§ 60 Acceptance of Offer Which States Place, Time or Manner of Acceptance

If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.

§ 61 Acceptance Which Requests Change of Terms

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

§ 62 Effect of Performance by Offeree Where Offer Invites Either Performance or Promise

(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.

(2) Such an acceptance operates as a promise to render complete performance.

§ 63 Time When Acceptance Takes Effect

Unless the offer provides otherwise,

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

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

§ 65 Reasonableness of Medium of Acceptance

Unless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received.

§ 67 Effect of Receipt of Acceptance Improperly Dispatched

Where an acceptance is seasonably dispatched but the offeree uses means of transmission not invited by the offer or fails to exercise reasonable diligence to insure safe transmission, it is treated as operative upon dispatch if received within the time in which a properly dispatched acceptance would normally have arrived.

§ 68 What Constitutes Receipt of Revocation, Rejection, or Acceptance

A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.

Acceptance By Promise

§ 66. Acceptance Must Be Properly Dispatched

An acceptance sent by mail or otherwise from a distance is not operative when dispatched, unless it is properly addressed and such other precautions taken as are ordinarily observed to insure safe transmission of similar messages.

Morrison v. Thoelke

Plaintiffs sent to defendants an agreement to purchase land. Defendants signed contract and mailed to plaintiffs. After mailing, but before it reached plaintiffs, defendants canceled contract. Defendants are bound due to the **mailbox rule (high formalism)**. Once it leaves possession of the offeree, acceptance is binding. At that moment, there has been a meeting of the minds.

§ 69. Acceptance by Silence or Exercise of Dominion

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

Acceptance by Performance

Peterson v. Pattberg

Defendant wrote up a contract that he would give plaintiff 780 dollars off of his mortgage granted that it is paid before a certain date. Plaintiff went to pay the mortgage before that deadline, but defendant had already sold the mortgage. Under **restatement 45,** the offeror is not bound to perform under an option contract until performance is complete, but cannot revoke the offer if offeree has begun performance. The question is, when do we consider performance? When he is saving up money to pay, or when he's walking up his steps to hand over the cash? Court's interpretation is highly formalistic and not too contextual. **The drafting of restatement 45 generally overrides this verdict.** Coming up the stairs with cash in hand is at least the beginning of performance. If he had of said, "until you place the money in my willing palm" that would have been a different story.

Mutual Assent and Consideration

Glover v. Jewish War Veterans

P's daughter ran off with a murderer. P did not know of reward offered for info about murderer but information she gave to police questioned lead to his arrest. There can be no contract unless the claimant hen giving the desired information knew of the offer of the reward and acted with intention of accepting such offer. This is because it is impossible for an offeree to assent to an offer if they don't know it exists > An exception to this is rewards offered by governmental bodies.

Industrial America, Inc. v. Fulton Industries, Inc.

P was broker for BH. Approached Fulton or business merger after name was suggested by friend. Got advertisement for fulton from WSJ and approached. Ad said "Brokers fully protected" but fulton and BH cut him out. Question is whether or not Fulton should pay IA even though he may not have initially relied on their offer and intended to capitalize on it. Court says overt manifestation of intent, not subjective, that controls the formation of a contract. P entitled to damages against fulton and allied.

Pragmatic Alternatives

Options

Under the terms of the option contract, the landlord not only offers to rent the apartment to the prospective student, but also promises not to revoke the offer for a specified period of time. The prospective student, in turn, promises to pay the landlord for this promise of irrevocability. The option contract is legally enforceable because its component promises are supported by consideration. An *option*, therefore, is simply an *irrevocable offer*. The Court held that the "adequacy" requirement applied only to the price of the land, stating that "any money consideration, however small, paid and received for an option to purchase property at its adequate value is binding upon the seller." As Comment b to Restatement (2d) § 71 indicates, mere recitals of consideration or nominal consideration are not normally an adequate basis for enforcement. In the option context, however, a mere recital of nominal consideration that was never paid is often held sufficient for the enforceability of an option contract.

Options Created by Reliance

§ 45. Option Contract Created by Part Performance or Tender

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

§ 87. Option Contract

(1) An offer is binding as an option contract if it
(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
(b) is made irrevocable by statute.
(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

§ 25 Option Contracts

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

§ 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 three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Option Alternatives

Qualified Acceptance

Mirror Image Rule stringency diluted; last shot rule evolved to permit enforcement of contracts based on performance, even when an offer and a matching acceptance could not be found. Form contracts. Boilerplate language; battle of the forms became so common that law was forced to consider new methods of dealing with contract formation and interpretation

Poel v. Brunswick-Balke-Collender Co. of NY

Series of correspondence letters between Poel and Brunswick Rep. for sale of rubber. In rep's letter back to Poel he made some changes and sent back for acceptance. The company then said they never gave permission for the rep to do that and to disregard it all. I: whether the writings constituted a contract between the parties. R: Either you accept or you reject, no middle course. D's return had a requirement of Poel to return acknowledgement of his request. Contract was not made despite std form contracts. Neither party made acceptance that matched the other's additional terms in acceptance or confirmation.

§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.

(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.

(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.

Incomplete Agreements

The traditional common law rule was that courts would not enforce incomplete agreements because the parties had not achieved sufficient mutual assent to create an enforceable contract. However, more recent doctrinal refinements have now made incomplete agreements enforceable in some circumstance.

Joseph Martin, Jr. Deli, Inc. v. Shumacher

P sued D for specific performance of their rental agreement which had provisions for continued rent at a price to be agreed upon. D wants $900/month but only worth $545.41. D wants reasonable price. Supreme Court said unenforceable because of uncertainty as matter of law. Appellate Division said enforceable if party's intent was not to terminate if can't agree. I: is the continuation of this contract at an agreed price enforceable? R: A mere agreement to agree, in which a material term is left solely for future negotiations is unenforceable. This may be different had there been some sort of formula or methodology for arrive at an agreement. It is too uncertain the way it is.

§ 33. Certainty

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

§2-204. Formation in General

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

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

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Empro Manufacturing Co., Inc. v. Ball-Co

P and D were negotiating the purchase of D's assets. P sent D "letter of intent" full of escape hatches for P. D signed but started dealing with someone else. P filed diversity suit. P argues it was each party's intent to be bound. Is the letter of intent binding if the parties intended to be bound despite lack of language to say so? Intent must be determined solely from the language used when no ambiguity

exists. Neither the test not the structure of the letter suggest one sided commitment. 2 parts say need further agreement. C: letter of intent may be binding only if manifested intent to be bound.

§ 35 The Offeree's Power of Acceptance

(1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.

(2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in § 36.

IX. Bargaining and Power

Form Contracts: Cases

Merit Music Service, Inc. v. Sonneborn

D borrowed $ from P who wanted a security of minimum guarantee from his pinball/music jukeboxes in return. Without D's attorney present, P brought by std form paperwork with the prices and duration filled in. D did not read, just signed, when D's realized, wanted equipment removed. I: whether a binding contract had been formed between the two parties. R: If no fraud or duress or MM, if capacity to understand a written document but failure to do so and then sign it, you are bound by the signature UNLESS other party knows or reasonably should that acceptor does not intent. There is no evidence of fraud here and because P was not practicing attorney no legal ethics breach. Ds should have read the contract.

Cate v. Dover Corp

P bought 3 lifts from the Beech tire mart made by Dover. Despite repairs by both, they never worked properly. Dover's warranty is titled as "You can take rotary's new 5-year warranty and tear it apart … " R: Merely providing a buyer a copy of document containing an inconspicuous disclaimer does not establish actual knowledge. Concerns as to whether the disclaimer was "inconspicuous" but Dover claimed didn't matter because Cate knew regardless. Court says Dover failed to establish actual knowledge. H: To be enforceable, written disclaimer of implied warranty made in connection with a sale of goods must be conspicuous to a reasonable person.

Duick v. Toyota Motor Sales

P sued for emotional distress, false advertising, and negligence. I: Whether the arbitration clause of the terms and conditions is binding. R: fraud in the inducement of the agreement so that the promisor is deceived as to the nature of his act and doesn't actually know what he is signing or does not intend to enter into a contract at all then mutual assent is lacking and the contract is void. Toyota misrepresented whether or not they had the intention to. The nature and conduct of Duick was not negligent in failing to understand the true nature because reasonable person would not. Contract is void because fraud in inception.

Unconscionability

1. The relative harshness of the term in Q, including the importance of the legal right affected
2. The manner of presentation in the agreement
3. The relative bargaining power of the party against whom the term is assented.
4. The commercial justification for the term.

§ 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Williams v. Walker-Thomas Furniture Co.

Purchases made from Furniture Company, paid for by monthly installments. Until all payments were made, furniture company retained title of the items and could repossess. Could also repossess all items previously purchased. The court refused to enforce this contract on the basis of unconscionability. The court asked the following questions to determine if the contract was indeed unconscionable: **(1)** Meaningful choice may be negated by disparity of bargaining power **(2)** Were the terms so clear that a reasonable party could understand? **(3)** Are the terms unreasonably favorable to one party? The court found the answers offered failed to satisfy the requirement that a contract be conscionable.

Jones v. Star Credit Corp.

Welfare recipients paid over 1000 dollars for a freezer which had a retail value of 900 dollars. The court held that charging a vulnerable person far more than what a product is worth can be a form of unconscionability. The poor and illiterate have a horrible bargaining power and the court should step in when necessary to protect them. From class: We have vaguely floating around in the legal system a 3x rule. If you sell something for 3x the market value, you are suspect for price unconscionability.

X. Deference to Writings

§ 2-309. Absence of Specific Time Provisions; Notice of Termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

C.R. Kewin, Inc. v. Flagship properties

P was a construction contractor. D was a real estate developer. D became the developer of a major project and met with P about contracting services. D orally agreed to hire P as the construction manager for the project, which was supposed to take about 10 years to complete. There was no written contract. P worked on the project for a few months. D became dissatisfied with P's work and replaced P as construction manager. P sued D for breach of contract. An oral contract that does not say, in express terms, that performance is to have a specific duration beyond one year is equivalent to a contract of indefinite duration, does not fall under the statute of frauds, and should be enforceable, regardless of how long completion of performance will actually take. A contract is not within the one year clause (thus requiring a written contract) unless its terms are so drawn that it cannot by any possibility be performed fully within one year. Contracts of uncertain duration are excluded from the clause. The clause covers only those contracts whose performance cannot possibly be completed within a year**.**

§ 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing. ...
(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or (c) with respect to goods for which payment has been made and accepted or which have been received and accepted.
Section 2-209(3) provides that modifications of a contract within the scope of section 2-201 must be in writing in order to be enforceable.

The Parol Evidence Rule

If the parties have adopted an "integrated" agreement, a document that constitutes the final expression of part or all of their contract, the parol evidence rule requires a court in construing the contract to limit its consideration to the document. The parol evidence rule thus identifies "the subject matter of interpretation." **Restatement (2d) § 213** comment a. The justification for the parol evidence rule is usually stated to be that it serves the interests of "certainty and security of transactions." **Restatement (2d) Chap. 9, Topic 3 introductory note.**

Two Classic Cases:

Mitchill v. Lath

Mitchills wanted to purchase land owned by Lath's under the condition that they remove an icehouse. Laths orally agreed to do so. After Mitchill moves in, Laths have not removed the icehouse and have no intention in doing so. Due to the parol evidence rule, the court refused to consider the evidence that the Laths promised to remove the icehouse. The court ruled that in order to consider oral evidence, the evidence must: **(1)** Be collateral in form **(2)** It must not contradict the implied or express provisions of the contract **(3)** It must be information that parties would not ordinarily expect to put in writing. The court found that the third requirement was not met. It would have been perfectly reasonable and almost necessary to put the icehouse provision in the contract, because it was material.

Masterson v. Sine

Masterson conveyed their land to Sine, with an option of repurchasing the contract. Masterson went bankrupt and creditors came after the land. Sine states that there was an understanding that the land was to be kept in the family even though this was not expressed in the option contract. The court took a more open interpretation of the parol evidence rule. They state that if the contract is integrated, parol evidence should be introduced to prove the elements of the agreement which were not reduced to writing. If there are matters on which the contract is silent, parol evidence should be consulted, especially when the parties did not intend for the writing to be an exclusive embodiment of their agreement. Furthermore, the court believes that parol evidence should be excluded only when the evidence is not credible or the finder of fact is likely to be misled. In this situation, the court felt that it was reasonable that there may have been other agreements. Because this is a transaction between family, the courts recognize that context and recognize that a contract may not be as formal, say than it should be in Mitchell v. Lath, which was only a one-on-one transaction.

Ambiguity and Interpretation

Two Contrasting Cases:

Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc.

Defendant agreed to incur all risk associated with the performance of the contract for the plaintiff, indemnify. Defendant's work injured property of plaintiff and plaintiff wants to recover amount spent on repairs. Defendant said that indemnify language was meant to cover damage to third parties, not plaintiffs. The court ruled that parol evidence should be admitted in order to discover what it was that the parties actually assented to. Furthermore, the court does not want the meaning to corrupt by the bias of judge's background and education. Theory that no words have one meaning, but are relevant to their surrounding context and surrounding circumstances. The court ended up stating that parol evidence should be introduced when the interpretation of a contract is under dispute. This is necessary to meet the high standards of mutual assent

Trident Center v. Conn. Gen. Life. Ins. Co.

Two parties entered into a contract for a loan. Defendants had a provision which stated that they could not pre-pay the loan, but then had another clause which stated that "in the event that you default and pre-pay". Plaintiffs argued this rendered the language of the contract ambiguous, and parol evidence should be introduced to interpret it. The court is strongly against admitting parol evidence, but decide to allow it based on the precedent established by Pacific Gas and to make a point. Other than the precedent, they believe that the words on the contract are perfectly precise and clear- but Pacific Gas suggests that all words are ambiguous.

XII. Remedies

Hockster v. De La Tour

Hockster engaged by De La Tour in April to accompany a tour on June 1st. On May 11th, De La Tour changed their mind and refused to compensate Hockster. Hockster brought an action on May 22nd for breach of contract. I: Whether an action for breach of contract for a performance that was to commence at a future date can be brought prior to that date of commencement. R: A party who receives repudiation of contract before performance is due may bring suit immediately, before the date performance was due.

The Basic Formula

The injured party is entitled to receive (1) the loss in value of the other party's performance attributable to the other party's breach; *plus* (2) other losses attributable to the breach, such as her own wasted expenditures under the contract, *minus* (3) any costs of her own that have been avoided by not having to perform. **Restatement (2d) § 347.** The provisions to which § 347 refers exclude from the injured party's recovery avoidable (§ 350), unforeseeable (§ 351), and uncertain damages (§ 352), and most damages for emotional injury (§ 353).

Questioning the Norm

The UCC and the Restatement, Second, of Contracts reflect (and seek to encourage) the tendency on the part of many courts to adopt "a more liberal attitude" to awarding specific performance. UCC § 2-716 Official Comment 1. *Cf.* Restatement (2d) § 359 comment a. ("Doubts should be resolved in favor of the granting of specific performance.").

The Mechanics of Damages

Section 1-106(1) "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law."

As a general matter under the UCC "parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies [provided in the Code] are to be given effect." UCC § 2-719 official comment 1. However, "it is of the very essence of a sales contract that at least minimum adequate remedies be available," and a court acting under the UCC is to ignore a contractual provision that modifies or excludes the Code's remedies if the provision was unconscionable when written or due to circumstances would "fail of its essential purpose" to provide a minimally adequate remedy. UCC § 2-719(2) & comment 1.

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

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

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

(4) Where the resale is at public sale

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

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

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and
(d) the seller may buy.
(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.
(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).

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

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non‐acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

§ 2-709. Action for the Price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.
(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non‐acceptance under the preceding section.

§ 2-710. Seller's Incidental Damages.

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

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

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
(b) recover damages for non‐delivery as provided in this Article (Section 2-713).
(2) Where the seller fails to deliver or repudiates the buyer may also
(a) if the goods have been identified recover them as provided in this Article (Section 2-502); or
(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).
(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

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

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

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.
(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

§ 2-713. Buyer's Damages for Non‐delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non‐delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.
(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

§ 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non‐conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

§ 2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
(2) Consequential damages resulting from the seller's breach include
(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
(b) injury to person or property proximately resulting from any breach of warranty.

§ 2-716. Buyer's Right to Specific Performance or Replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

Problems of Measurement

Bennett Case:

P purchased a new mobile home from D. Some efforts at repair were attempted. This went on for more than 7 years. In the end, the mobile home was still defective. Plaintiffs had been making monthly payments on the mobile home for the entire period of time. I: How much are the plaintiffs entitled to recover? R: UCC sections 2-715s … A: P wanted to recover the full contract amount of the home, 109,597.57, plus $80,000 in interest paid to date. D argues that only the principal is recoverable and that that sum must be reduced for the use of the property by the P and therefore P are entitled to nothing. P can't recover full amount because still had roof over their head and didn't have to pay for housing elsewhere so reduced percentage returnable from rent. No mental anguish awarded, plaintiff failed to establish what the moving expenses would be and not sure would include anyway. Miscellaneous costs allowed, found no loss of wages, and interest said to be encompassed with what they are being returned in the rent. C: The Court ordered revocation of acceptance, award damages in the amount of $39,238.29, and awarded prejudgment interest of $3923.82.

Economic Waste

Peevyhoues v. Garland Coal & Mining Co.

Plaintiffs owned farm containing coal deposits and leased it to D for coal mining. D specifically agreed to perform certain restorative and remedial work at the end of the lease period. He did not, and the cost involved in doing so would be about $29,000. Jury verdict for $5000. D said the damages should be difference between the value of the house before and after his work. I: Should the "value" rule be used or the "cost of performance" rule in determining damages given these circumstances? R: No person can recover a greater amount in damages for the breach of an obligation that he would have gained by the full performance thereof on both sides … damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered. C: Where, in a coal mining lease, lessee

agrees to perform certain remedial work on the premises at the end of the lease period, and thereafter the contract is fully performed by both parties except for that remedial work, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance

Lost Volume Sellers

Locks v. Wade

The gains made by a lessor on a lease entered into after the breach are not to be deducted from his damages unless the breach enabled him to make the gains. A: The equipment called for by the agreement was readily available in the market, but locations were very hard to get. If there had been no breach and another customer had appeared, he would be getting twice the profit rather than the same as with property. C: The proper measure of damages in this type of situation where supply exceeds demand is the difference between the contract price and the cost of performing the first contract.

Additional Losses

Consequential Damages

Hadley v. Baxendale

Ps mill's crank shaft broke. They hired D as carriers to transport the crank shaft to the engineers so that they could make another one P. P needed a new one to continue work. D told P that if it was sent up by twelve any day it would be delivered to the engineers on the following day. P agreed. The delivery was delayed by some neglect, and as a consequence the plaintiffs did not receive the new shaft for several days than they would have otherwise done, and they lost profits they would have otherwise received. I: Whether the trial court erred in allowing the jury to take into consideration P's lost profits in determining damages to be awarded. R: Special circumstances of a contract need to be expressed and communicated between both parties in order for such special damages involved to be contemplated as a consequence of the breach of contract and damages allowed for it. A: Because P did not express to D the direness of his situation, the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both parties when they made this contract. Such a loss therefore does not flow naturally from the breach of contract.

§ 351 Unforeseeability and Related Limitations on Damages

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

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

(a) in the ordinary course of events, or

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

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

Liquidated Damages

Wasserman's Inc. v. Middletown

Wasserman was leasing from Township commercial area in which they had a clause which provided that if township cancelled the lease, it would pay tenant a pro-rata reimbursement of improvement costs in two parts: 1) a percentage of the total value of all improvements made by lessee and 2) a portion of the average gross receipts for one year. Township breached. I: Whether the provision providing for damages based on the lessee's gross receipts is an enforceable liquidated damages provision or is an unenforceable penalty clause. R: A stipulated damage clause must constitute a reasonable forecast of the provable injury resulting from breach; otherwise, the clause will be unenforceable as a penalty and the non-breaching party will be limited to conventional damage measures. The reasonable test is whether the clause is reasonable under the totality of the circumstances. A: Damages based on gross receipts run the risk of being found unreasonable for they do not reflect actual losses incurred because of the cancellation. C: Up to trial court to consider reasonableness of the clause in light of this opinion. D is liable, but the second part of the liquidation clause needs to be reconsidered.

UCC Section 2-718: (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-foreseeability of otherwise obtaining an adequate remedy.

Restatement, Second: the clause is to be upheld if it specifies a sum that is reasonable either from the perspective of the time of formation or in light of the actual injury the plaintiff suffered. The official comment notes that while "[a] term fixing unreasonably large liquidated damages is expressly made void as a penalty," an "unreasonably small amount would be subject to similar criticism and might be stricken" as unconscionable.

§ 356 Liquidated Damages and Penalties

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
(2) A term in a bond providing for an amount of money as a penalty for non-occurrence of the condition of the bond is unenforceable on grounds of public policy to the extent that the amount exceeds the loss caused by such nonoccurrence

Equitable Remedies

Van Wagner Advertising Corp. v. S & M Enterprises

Michaels leased eastern exterior wall of her building on East 26th street in Manhattan to Van Wagner Advertising who made sign and leased to Asch Advertising for three years. Michaels sold the building to defendant S & M Enterprises and in accordance with the lease canceled it. Argument over whether the clause meant that the previous owner had the right to cancel before selling or whether the third party it was sold to had the right to cancel it as well. I: Whether or not to award specific performance for billboard space R: Whether or not to award specific performance is a decision that rests in the sound discretion of the trial court. A: Here lease rather than sell an interest in real property for which specific performance is less common. C: The value of the "unique qualities" of the space could be fixed with reasonable certainty and without imposing an unacceptably high risk of undercompensating the injured tenant and so specific performance not required. Specific performance should be denied here on the ground that such relief "would be inequitable in that its effect would be disproportionate in its harm to D and its assistance to P.

Covenant Not to Compete

Hopper v. All Pet animal Clinic, Inc.

F: Hopper during employment signed a non-compete contract saying that should she leave or be fired she will not practice with small animals within the city for 3 years. She is fired and ignores it and works elsewhere. APAC brings suit for damages and injunctive relief. The district court found enforceable, but that the amount of damages suffered was speculative. I: Is the covenant not to compete in this case reasonable? R: **Restatement Section 188**: (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public (2) Promises imposing restraints that are ancillary to a valid transaction or realtionship include the following: (a) a promise by the seller of a business not to compete with the buyer in such a way as to injure the value of the business sold; (b) a promise by an employee or other agent not to compete with his employer or other principal; (c) a promise by a partner not to compete with the partnership. SO: A valid and enforceable covenant not to compete requires a showing that the covenant is: (1) in writing; (2) part of a contract of employment; (3) based on reasonable consideration; (4) reasonable in durational and geographical limitations; and (5) not against public policy. Reasonableness in a given fact situation is made by the court as a matter of law. A: Enforcement of the practice restrictions Hopper accepted does not create an unreasonable restraint of trade. She could have earned a living in her profession without relocating by practicing large animal medicine which is a significant area of practice in the state. Sufficiently limited to avoid undue hardship to Hopper while protecting the special interests of APAC. Public Will not suffer injury from enforcement of covenant because while she was competent her services were neither unique or uncommon. Other sources available for the public. But, unable to find reasonable relationship between the three year durational requirement and the protection of APAC's special interests. Reduced to 1 year. C: Enforceable except for length.