I. BASIS FOR ENDORSING PROMISES

1. The Meaning of "Enforce": A Brief Overview of Remedies

Enforceable Promises

- Enforceable Promises: a promise is enforceable is decided via the reasonable person test, and if any reasonable person would have believed contract was real

Three Protected Interests: Expectation, Reliance, Restitution

- **Expectation**
  - Putting you in the position that you would have been in if the contract were performed as stipulated
    - Where you EXPECTED to be after the promise
    - How to calculate: Promised value - what the P received
  - Example: *Hawkins v. McGee*
    - Doctor promised perfect hand, returned hand in worse condition
    - The Supreme Court overruled the trial court's decision to give reliance damages and said it should be expectation damages
      - Supreme Court explained that **the default remedy in breach of contract cases is expectation**
        - "The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work"
- **Reliance**
  - Putting you in the position that you would been in if the contract was never made
    - Restoring the promisee to the position he was in before he changed his position out of reliance on the promise
      - Where you were before you RELIED on the promise
        - Includes not only what plaintiff lost to defendant but all other fees/damages incurred
      - How to calculate: Original value- value post contract
  - Example: *Sullivan v. O'Connor*
    - Plaintiff's rhinoplasty did not go as promised and plaintiff had to undergo an extra surgery and her condition was still worsened
    - Court argued that expectation damages were too harsh and restitution was not enough so reliance damages were the Goldilocks option

- Pain and suffering is not normally considered in contract cases-normally only in torts-but since this is a non-commercial matter that could reasonably result in pain and suffering
    - Fair to include physical and psychological suffering in plaintiff's damages
        - *Can* include pain and suffering- just depends on subject matter and the background of the contract
- Examples of when it is applied:
    - **Promissory estoppel is a common category where reliance damages are applied**

- **Restitution**
    - Restoring the benefit conferred on the defendant
        - Any benefit that the defendant got, they should have to give that to the plaintiff
            - Focuses on the defendant's gain rather than the plaintiff's loss
        - Just paying back the benefit
            - How to calculate: Fair market value of any benefit conferred/any money paid
        - Not commonly employed - only used in specific situations
            - Sometimes given when expectation is too little
                - Losing Contract
            - When there is no enforceable contract at all

*Difference between Hawkins (*which awarded expectation damages*) and Sullivan (*which awarded reliance damages*):*

- The doctor solicited the plaintiff as a patient in *Hawkins*, a hand serves a more utilitarian function for an individual than a nose does, and the doctor in *Hawkins* was unqualified to perform the procedure which left Hawkins worse off than prior to the procedure

Why Expectation Damages

- **Expectation damages is the default remedy**
- Reliance damages can serve as alternative when:
    - When there are qualms about legal liability, reliance can be used to split the difference (like in *Sullivan*)
    - Hard to calculate expectation damages
    - Expectation seems like too much so reliance does rough justice
- Why expectation damages?
    - Efficient breach theory is in favor of expectation damages
        - Maximizes utility if resources end up with those who value them most
    - Other arguments for expectation damages:

        - Will theory- state should enforce intent of parties and what they intended is full value of the promise
        - Moral argument- keep promises
        - Administrative practicality- reliance is hard to measure especially lost opportunities
        - Macroeconomic argument- future expectations have present value (but maybe doesn't apply to noncommercial situations
    - **Efficient Breach theory:**
        - the idea that parties should feel free to breach a contract and just pay damages because doing so is more economically efficient than performing under the contract
        - If someone comes along that values the good more, the seller should breach because the total gains will be greater and no one will be any worse off
        - Pareto Superior: states that everyone is either the same or better off with the new transaction (with at least one person being better off)
        - *Critiques of efficient breach theory*
            - Insufficient information, externalities not being taken into account, transaction/litigation costs, moral implications of no longer being able to rely on promises, Might not have information needed to properly assess, doesn't consider relative wealth impacting the amount people are willing to pay

Punitive Damages and "Bad Faith" Breach

- Punitive damages: monetary damages that punish the breaching party
    - Meant to deter breach of contract because it threatens a worse outcome for the breaching party than compliance with the contract would have been in the first place
        - Might overdeter breach so that breaches that would be better than compliance don't occur (efficient breaches)
    - *White v. Benkowski*
        - Teaches that **there are no punitive damages in contract law- the law is meant just to put the non-breaching party back to the position they were in prior to the breach of contract**
            - Meaning expectation damages not punitive damages
        - Even if the breach of contract is willful and malicious, punitive damages cannot be provided
            - Only exception: if breach was so severe, it qualified as a tort of bad faith breach

Specific Performance and Introducing the UCC

- **Uniform Commercial Code**
  - Governing Law that must be followed in any sale of goods (unlike the Second Restatement)
  - **1-305(a)**
    - Remedies to be liberally administered - no consequential or special or penal (punitive) damages except as specifically provided
  - **2-104(1)**
    - *Merchant*: regularly deals in goods of the kind of hold themself out as having specialized knowledge
  - **2-105(1)**
    - *Goods*: movable thing (the things do not have to be tangible, it excludes real estate and services-meaning actions not things)
- **Specific performance**
  - **R2D 360 - Factors Affecting Adequacy of Damages:**
    - Can compel specific performance when damages are inadequate:
      - No substitute
        - No equivalent replacement available or would be costly and difficult to get it
      - Difficult/uncertain how to quantify damages
        - Like in *Sullivan* with the nose job, there was no simple calculation to determine what the loss of the employment opportunities would result to in terms of compensation
          - If she wanted another surgery, it would have made sense to request specific performance since it was hard to quantify damages
      - Likelihood damages cannot be collected
        - Unlikely to receive compensation due to financial status of the defendant so, in order to rectify, specific performance might be more beneficial
  - **R2D 359(1) - Effect of Adequacy of Damages**
    - Specific performance or injunction will not be ordered if damages would be sufficient to protect/fulfill the expectation
  - **UCC 2-716(1) - Buyer's Right to Specific Performance or Replevin (goods)**
    - Specific performance may be enforced when goods are "**unique**"
      - Goods are "*unique*" when they can't be covered
        - If it's not possible to get a substitute and sue for the difference in price of the substitute vs. the original

- Unique includes: land, heirlooms, artworks, items of sentimental value, non fungible items, a specially trained horse (*Morris v. Sparrow*)
    - Unique was further expanded to include dealings in *Laclede v. Amoco*
        - Since the terms of the contract were unique and could not reasonably be replaced, it was fair to compel specific performance
            - Also, in terms of externalities, there was a public interest in supplying the fuel to the public

- Specific Performance and Labor
    - Cannot compel personal service as specific performance because it would cause the servant to be degraded and demoralized and forced into a circumstance where the master would have a continual right of hand (*Mary Clark, a colored woman*)
        - Nowadays, if someone violates an employment contract and quits, they cannot be forced to work because that would be considered forced servitude
    - Lawful to have a promissory note that imposes penalties if employee terminates employment before end of the contract because it is compensatory damages for the employer's costs and lost revenue for the breach of contract (*Panwar v. Access Therapies*)
        - Expectation damages not punitive damages
        - Not forced labor
    - Negative injunction
        - Cannot "make them sing" aka make them perform the contract but can prevent them from performing for someone else
            - If an athlete leaves a team, the Court can prevent them from going and working for another team
                - Keeps them from going somewhere else to do the same work

Reasons to use Specific Performance	Reasons not to use Specific Performance
- Various economic arguments for specific performance - Damages cannot compensate - Nothing else could be of equal value - No known replacement	- Efficient breach is pro-expectation which therefore would be against specific performance - Might be difficult to supervise and regulate the specific performance - Forced labor argument: cannot make

	someone do something (Mary Clark) - Plaintiff doesn't want the performance - Historically, most contract cases were in the court of law whose primary remedy method was damages while court of equity heard real estate cases and their primary remedy method was specific performance - Institutional preference for damages vs. specific performance

2. Consideration as a Basis for Enforcement

Gift vs. Bargain: The Meaning of "If"

R2D §71- Requirement of Exchange; Types of Exchange:

- To constitute consideration, a performance or a return promise must be bargained for:
  - In exchange for a return promise OR a performance
    - The return promise or performance must be sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise
- Performance/Return Promise
  - **The performance may consist of:**
    - An act other than a promise
    - A forbearance
    - Creation, modification, or destruction of a legal relation
  - *Hamer v. Sidway*
    - The nephew's forbearance of smoking, drinking, etc. constituted as performance
      - The forbearance of his legal right was consideration
        - Does not matter if the forbearance was beneficial to the promisor
  - Motivations are not looked into- regardless of whether there was a benefit or not
- Adequacy of Consideration
  - The courts generally do not review the adequacy of consideration
    - They only look into contracts that are way too good (gifts) or way too bad (gross inadequacy)
      - Expect people to decide for themselves and wish to not get involved

- Benefit or detriment are not needed for consideration
    - However, they can be argued to strengthen your case
- Gratuitous Promises/Gifts
    - Do not have consideration and do not constitute contracts
    - *Exceptions*: Statutory reforms on enforceable gratuitous promises:
        - Very formal promises
        - Charity donation/pledges
- Nominal consideration (Peppercorn)
    - Traditionally allowed because there was formality
    - Now, we do not allow it because there is not a real bargain
        - We still view it as a gift
            - **Exceptions:**
                - Option contract will be enforceable with a nominal offer or recital
                - If a merchant puts something in a signed writing as a firm offer, it will be enforceable for a reasonable amount of time up to 3 months: **UCC 2-205**
    - *Exceptions* to Peppercorn (Nominal is allowed)
        - **R2d 87 (Option Contract)**
            - Contract in which offer is held open for a specified period of time. "Will give you option of buying X from me until sept 10th."
            - Can be formed with nominal consideration or recital of consideration
        - **UCC 2-205 - Firm Offer**
            - Offer to buy or sell goods held open for specified amount of time
            - Only requires signed writing (up to 3 months), not even nominal consideration
- Theft
    - Unconscionability

Bilateral contract (most contracts): promise in exchange for a promise
Unilateral contract (rewards are the most common type): promise in exchange for a performance
Option contract/firm offer: promise to hold offer open for a period of time (subsidiary promise)

- Inducement

    - To establish consideration, there needs to be **reciprocal conventional inducement**
        - Promise induces the detriment and detriment induces the promise
    - The motivation doesn't matter
- **3 Elements for Bargained For Exchange:**
    - Promisee must incur a legal detriment
        1. Do/Promise to do what they were not already legally obligated to do
        2. Detriment must *induce* the promise
            - Promisor must have made the promise because promisor wishes to exchange it for the other party's promise or performance
        3. Promise must *induce* the detriment

- Bargains vs. Gifts
    - *Kirksey v. Kirksey*
        - Brother tells widowed sister in law that he'd give her a place to live on his land but later, he changes mind and asks her to leave
        - Court ruled that it was a conditional gratuitous promise and that there was **no consideration**
            - Could be argued under reliance theory
                - Plaintiff had a detriment: the loss and inconvenience in moving to the defendant's residence 60 miles away
    - *"Tiffany's"*
        - Husband offers estranged daughter a ring if she has breakfast with him
            - Bargain - there is consideration
            - The daughter was induced by ring into coming and father induced by seeing daughter
    - *Tropicana Hotel Million Dollar Wheel*
    - *Radio Station 3 Song Rule*
    - *Tramp Story*

Consideration	No Consideration
Hamer Tiffany's Bracelet Example Tropicana Hotel Million $ Wheel Radio Station 3 Song Rule	Kirksey Tramp

But was it "Bargained For?": Action in the Past

- Can a past benefit constitute consideration?
    - Past benefit cannot possibly be induced by a future promise because it has already happened before the promise was made
        - **Rule**: Promises in recognition of past benefit or moral obligation are not contractually binding
    - Past benefits/work cannot be used as consideration
- *Feinberg v. Pfeiffer*
    - Long-time employee promised a pension upon retirement - "Because of your 40 years of good work, we will be giving you retirement payments"
        - Not consideration because she didn't do anything in exchange for the promise of a pension and her service was in the past so it wasn't induced by the promise
            - Plenty of time to bargain if she wanted to reach an exchange that would have resulted in consideration but no such bargain occurred
    - Lost on lack of consideration claim (but ended up overturned on promissory estoppel claim due to reasonable reliance)
- *Mills v. Wyman*
    - Son is cared for by a stranger and father promises to reimburse for costs after the care is provided
    - There was a past benefit but no induced behavior or performance by the promise made by the father
    - Moral obligation does not equal consideration
- *Webb v. McGowin*
    - Employee saves fellow employee's life, crippling himself in the process and after, the saved employee promises to pay him weekly for the rest of his life
        - Due to urgent nature of the incident, there was no opportunity for a bargain
            - Promise for past benefit *can* be made after the fact in emergency situations
    - Exception for Moral Obligation:
        - Since the defendant gained a material benefit, his life being saved, moral obligation *does* serve as adequate consideration for his promise to pay

R2D §86 - Promissory Estoppel (Past Benefit)

- When is a promise for past benefit enforced?
    - Must satisfy all of the following elements:
        1. Enforced only to the extent necessary to prevent injustice
        2. Not if it is a gift
        3. Only if it is unjust enrichment
            a. Is there a material benefit?

b. Restitution
c. A level of good samaritan care

4. Only to the extent value is not disproportionate to the benefit

- Situations where **R2D §86** is applied:
  - Reaffirming an obligation taken on, meant as exchange
    - Also when something is nonbinding by technicality (like the statute of limitations running out)
  - No prior negotiations possible/not a gift
    - Emergencies like in *Webb v. McGowin*
    - Mistakes
      - Painting wrong house and then promise to pay
        - Don't have to pay if:
          - Paint wrong house and don't promise to pay
          - Paint house as a gift
          - Paint wrong house as owner stands and watches
- Factors to Take into Account (**R2D §86: Comment B**)
  - Definite vs. Substantial Benefit
  - Formality of promise
    - Ex: Writing it down
  - Part performance
    - Ex: *Webb v. McGowin*- already started paying and then stopped
  - Reliance on promise
- Little white dog example in regard to **R2D §86**:
  - Found a little dog, spent 500 dollars at the vet, the dog is a show dog that wins prizes and is valuable, you return the dog to their owner
    - If owner exclaims "I'll pay you $1000"
      - Must satisfy all of the following elements:
        - Enforced only to the extent necessary to prevent injustice
          - It would be unjust to allow the dog owner to retain all of the benefit for the plaintiff's trip to the vet and the care he showed the dog for two week
        - Not if it is a gift
          - Not a gift in this case
        - Only if it is unjust enrichment
          - There is a clear material benefit to saving the dog's life and returning him to health especially since the dog incurs monetary reward by participating in shows
        - Only to the extent value is not disproportionate to the benefit

            - May argue that the value is actually disproportionate because the plaintiff only paid 500
            - Either could argue that they only have to pay the 500 dollars back or could say that plaintiff's care of the dog for two weeks could justify the $1000 and therefore, makes the value proportionate to the benefit
        - If owner doesn't say anything
            - It would just be restitution for the debts incurred
                - $500 vet bill

<u>Contemporary Contexts: Covenant not to Compete & Employee Handbooks</u>

<u>Wood's Rule</u>: employment can be terminated at any time by either party and is for an indefinite period of time

- <u>Non-compete covenants</u>
    - *If brought up in the original employment contract*
        - Yes, there is consideration and it is enforceable
    - *If brought up during employment*
        - Raises or promotion along with the signing of the non-compete could be consideration
        - Continued employment
            - Trading signing the non-compete for no immediate termination
                - *Lake Land v Columber*
            - California generally states non-competes are not enforceable
            - Opinions on this:
                - Some opinions state that if you continue to work somewhere for a substantial period of time, receive benefits, etc. then there is consideration
                - Others state that there is no material difference to the arrangement because all the rights and duties have remained the same other than this added promise that one side has made
                - A last opinion states that the arrangement is coercive and that the execution of the noncompetition arrangement alters the at will nature of the employment relationship
- Employee Handbooks
    - Courts are split on this
        - Minnesota says a handbook *could* have binding consideration

- Promises to follow procedures and policies in regard to disciplining employees could be binding <u>not</u> indefinite language regarding the culture of the workplace

- Michigan and California approach
  - Handbooks are <u>not contractually binding</u>
    - Just a convenient place to write down company policy
  - Unilateral changes can be made but there needs to be reasonable notice of any changes

<u>"Illusory Promise" Doctrine- When is a Promise Really a Promise?</u>

- **Illusory promise:** promissory language that actually leaves you a way out
  - When is a promise really a promise?
    - "I will if I want to"
      - Illusory, not binding to anything, leave entirely to the discretion of one party how/whether to perform
        - *Strong v. Sheffield*
          - Promise made of "I will not collect on the promissory note… until I want to" (no set time)
            - Since the plaintiff didn't agree to withhold from collecting on the debt for a specific or reasonable amount of time, there was no promise that acted as sufficient consideration
              - Leaves himself a way out
    - "If Satisfied"
      - I promise to pay for this *if* I am satisfied with it
      - Promise is not made illusory by the presence of a "satisfaction" clause
        - Made to act in good faith
      - Objective or subjective standard for satisfaction clauses
        - Normally they apply an <u>objective standard</u> in commercial settings and rejection needs to be reasonable
          - Need to show objectively that there was something wrong or dissatisfactory
        - <u>Subjective standard</u> is reserved for settings which involve taste, judgment, or fancy
          - In cases with so many factors and complexities, it may not be fair to impose an objective standard and so therefore, there must be a subjective standard

            - Cannot just be dissatisfied with the terms of the deal and therefore, want to back out
                - There has to be a good faith determination
    - *Mattei v. Hopper*
        - A satisfaction clause was included in the deal subject to the plaintiff obtaining leases satisfactory by the purchaser
            - The contract relied on good faith and therefore, not illusory
- Output and requirement contracts
    - **UCC 2-306(1)**
        - Not illusory- promising to exercise good faith in having output or requirements
            - Cannot be unreasonably disproportionate to estimates or past performances
            - Cannot shut down merely to avoid commitments
- Exclusive agency contracts
    - Exclusive agency: I promise to pay you for any deals you close on my behalf (even though you didn't commit to any amount of deals)
        - **UCC 2-306 (2)**
            - Not illusory- imposes an obligation of promised best efforts in contract
        - *Wood v. Lucy Lady Duff Gordon*
            - Implied promise to do reasonable best efforts and therefore, promise is *not* illusory
- Alternative promises
    - **R2D §77 - Illusory and Alternative Promises**
        - A promise or apparent promise is not consideration if, by its terms, the promisor or purported promisor reserves a choice of alternative performances UNLESS:
            - Each of the alternative performances would have been consideration if it alone had been bargained for
                - I will either do A or B - only works if both are independently sufficient consideration
            - One of the alternative performances would have been consideration and there is, or appears to the parties, a substantial possibility that the other would occur

- Insurance says either we will pay 10k you have an accident OR we'll pay nothing because there is no accident
    - This is fine because there is a substantial possibility of a car accident occurring and it is not under their control
- **NOT** I will do A or I will do nothing unless:
    - The choice between A or nothing is dependent on something out of control which there is substantial possibility

- **R2D §79 - Adequacy of Consideration; Mutuality of Obligation**
    - Both parties to a contract must be bound to perform or neither is

3. Reliance as a Basis of Enforcement: Promissory Estoppel

R2D §90 - Promissory Estoppel

1. There needs to be a promise
2. The promisor should *reasonably expect* that promise to induce action or forbearance in reliance on it
3. Must *actually induce* action or forbearance in reliance
4. Injustice can only be avoided by enforcing that promise

Comments:

- Remedy should be limited as justice requires
    - Usually reliance damages
- Promissory estoppel/reasonable reliance can be used to enforce a contract *without bargain or mutual assent*

- In *Kirksey v. Kirksey,* Ormond tried to argue "inconvenience and loss" constituted consideration. It doesn't appear to be bargained for but it may be the basis for a reliance theory/promissory estoppel
- In older cases, reliance was <u>used as a substitute for consideration</u>
    - *Ricketts v. Scothorn*
        - Grandfather intended granddaughter to rely on money which means *there was reasonable reliance* on the promissory note
    - *Feinberg v. Pfeiffer*
        - The promise to pay retirement pension was something she *relied on*

- *D&G Stout v. Bacardi*
    - D gave commitment to stay in business with P when P was looking to sell company, so they declined the sale offer

- D later pulled their business with P, and P sued under PE stating it reasonably relied on its business with D, not selling the company
- Court ruled in favor of P, was compensated reliance damages (difference in selling price value before and now)

4. Restitution as an Alternative Basis for Recovery

- When can restitution claims be made?
  - **Is a contract** *but*
    - Breaching party seeking relief (like a deposit)
      - Tenant breaches contract
        - Landlord is entitled to damages-amount left on the lease minus any amount of rent the landlord is able to get from a new tenant
          - But tenant paid a deposit
            - So the tenant is allowed to recover the refundable part of the deposit, which is set off against the damages owed to the landlord
              - For example, tenant owes landlord $5k (2 months rent until they get a new tenant) but paid a deposit of $2500 ($500 of which is nonrefundable) so the tenants still owes landlord $3000
    - Losing contract
      - Example: owner backs out of contract with builder to build a house when the builder has finished building half the house
        - If the contract had been carried out, the builder would have lost money in building the house because their expenses turned out to be greater than the contract price
          - Therefore, builder's expectation damages are 0
            - Builder can recover the fair market value of the services they gave the owner in building half the house = restitution
              - Aka the benefit conferred by builder on owner
                - If builder breached, owner would get expectation damages
      - Only happens when restitution would be greater than expectation
    - Never a contract but **unjust enrichment**

- Situations:
    - Contract unenforceable because of technicality
    - No chance for contract- mistake or emergency (no promise after the fact)
- Elements for Unjust Enrichment:
    - Conferred benefit on defendant that defendant retained
    - Not a gift
        - There is an expectation of payment
    - Not acting officiously
        - Not imposed on the beneficiary

- Other terms include:
    - Quasi-contract
    - In quantum meruit
    - Implied-in-law contract

- *Cotnam v. Wisdom*
    - Person gets in accident, several physicians perform surgery which is unsuccessful and person dies - physicians attempt to collect payment for services performed
    - Implied in law vs. implied in fact
        - Implied in fact: an actual voluntary undertaking on both sides to consent to argument
            - If plaintiff was conscious and allowed services to occur, we can infer that he consented to pay for treatment
            - When we actually think both sides are taking on the agreement
        - Implied in law: there's no 'meeting of the minds' or undertaking by both sides to consent to the argument **this is what *Cotnam* is**
            - Sane person, idiot, person bereft of thought and reason
            - In an emergency or unusual situation where a person is unable to assent, they could still be held liable for someone providing them with necessaries not because they voluntarily agreed but because we have imposed an obligation to compensate for necessaries
    - Professional services not good samaritan act so court ruled in their favor
    - In cases of restitution, we do *not* take into account the defendant's ability to pay
        - When parties *have* consented to a contract, it is valid to consider ability to pay and financial status because a contract would invoke expectation damages
        - Restitution is based on only fair market value of services
            - Only considering "what is the fair market value of this service?"
                - Measured on services even if there's not a good outcome

- *Pyeatte v. Pyeatte*

- Wife and husband made arrangement to support each other through post graduate education
- Wife fulfills her end of the promise but the husband divorces her before he fulfills his side
    - We **assume that promises between spouses are gratuitous**
        - Despite this, the court says that her "extraordinary and unilateral effort" made her nonetheless entitled to damages
            - But court said awarding her the cost of going to graduate school without having to work is not fair
                - That would be expectation damages and this should be restitution
                    - Restitution would be the benefit she conferred
    - If the husband had waited 5 years before divorcing her, the case would be harder to make because it would be less like unjust enrichment since she would have benefited from his law degree and thus, benefited from the efforts she had made

5. Summary of Consideration, Promissory Estoppel, & Restitution

- What is the basis?
    - Is there a bargain for exchange?
        - If no bargain, was there a promise per **R2D §86**?
            - If no promise, is there a benefit incurred that would qualify as unjust enrichment?
    - In order to establish a bargain, you need to set out enough terms that you would be able to determine a remedy
- Consideration/Bargain
    - Promise needs to be supported by consideration- must be an action, forbearance, or surrender of legal relation
        - It needs to be bargained for/there **must be an inducement**
    - Likely remedy = expectation damages
- **R2D §86 Consideration for Past Benefit**
    - Promise for past benefit
    - No opportunity to bargain
        - Emergency/mistake
    - The value cannot be greater than the benefit
    - There *must* be unjust enrichment
    - The remedy is made to prevent injustice
    - Likely remedy = Expectation damages (with the damages being capped at the value of the benefit)

- **R2D §90 Promissory Estoppel/Reliance**
    - Promise
    - Must be actual reliance
    - Reasonably expect the promise to induce an act or forbearance)
    - Justice will require the enforcement of the promise
    - Likely remedy = Reliance damages
- Restitution/off contract:
    - Restitution
        - Unjust enrichment?
    - Only remedy available

II. THE BARGAINING PROCESS

1. Mutual Assent and the "Objective Theory of Contracts"

- Mutual Assent: both parties have expressed their agreement to enter into a contract; this agreement can be shown explicitly or in a way that requires some inferring based on the facts and circumstances
    - Objective Intent: External outwards manifestations of intent
        - Words and actions
    - Subjective Intent: Internal intentions; what parties are actually thinking
- Would a reasonable person believe that the parties *manifested an intent to be bound*?
- *St. Landry v. Avie*
    - Illiterate man signs promissory note agreeing to endorse a loan for his son-in-law and claims that he did not understand what he was signing to
        - Even if he did not read the note, didn't have it read to him, or didn't understand the contract, it doesn't matter
            - **Intent is irrelevant**
        - When you sign a contract, you are agreeing to it
            - The judge has the ability to decide as a matter if something was a joke but other factual matters are for the jury
- *Lucy v. Zehmer*
    - Case where contract to sell farm was made on bar napkin and defendant claimed it was a joke
    - There was established assent in the agreement
        - **Contracts are based on outward objective manifestations, not internal subjective intentions or thoughts**
            - Inner intentions are irrelevant if words are sufficient to constitute a contract
                - To win incapacity due to intoxication: need to be so drunk that you cannot even comprehend what you are signing
    - What if they both had an honest misunderstanding: the defendant reasonably believes it's a joke and the plaintiff reasonably believes it is a serious agreement?
        - Then there is no manifestation of mutual assent and contract is not valid
    - **Held to the reasonable meaning of what was signed**
        - Remedy= specific performance
- **Restatement §20- Effect of Misunderstanding on Assent**
    - There is no manifestation of mutual assent to an exchange if the parties attach material different meanings to their manifestations and:

        - A) Neither party knows or has reason to know the meaning attached by the others (fundamental misunderstanding)
        - B) Each party knows or should know the meaning attached by the other but are lazy or fail to correct the misunderstanding, there is no contract
            - Called the laziness rule
            - Also could be that one party knows the other is joking
                - Like if Lucy knew that Zehmer was joking
    - The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if:
        - A) One of the parties does not know of any different meaning attached by the other, and the other does know the meaning attached by the first party
            - Asymmetry of knowledge rule: if A knows or has reason to know B's meaning, B doesn't know or have reason to know A's, then B's meaning governs
            - *Lucy v. Zehmer*: the meaning of the party that does not know governs
        - B) One of the parties has no reason to know of any different meaning attached by the other and the other has reason to know the meaning attached by the first party

Problem for Objective Theory of Mutual Assent:

Embry question:
"Go ahead, you're all right. Get your men out, and don't let that worry you."

- What aspect of the plaintiff's situation should be relevant?
    - Previous discussions/interactions
        - Previous negotiations about this contract renewal as well as past agreements, whether they were oral or not
    - Plaintiff's words
    - Norms of the industry
    - Formality of the discussion
- Saying "I need a contract so as not to worry" and in response, defendant says "don't worry" →a reasonable person would think that the defendant was saying "I am giving you a contract"
- Embry is certainly making an offer
    - Asking for a contract in exchange for his continued employment
- Promissory estoppel *is* relevant here but we would opt for the bargain argument because establishing that a bargain was made is always a stronger argument
- Was the employer's inner intention relevant if the words used were sufficient to constitute a contract?

- No - inner intention is irrelevant per *Lucy v. Zehmer*

2. The Offer

- **An offer is:**
  - The manifestation of willingness to enter into a bargain made to make the other person understand that they have the power to conclude the deal
    - Putting the ball in the other party's court; gives them the ability to make the contract by agreeing to it, thus creating a binding contract
      - Gives offeree power to create the contract on the offeror's terms
        - Did they mean to put the power in the other party's hand and give their acceptance the ability to create a contract?
    - Must be communicated to person the offer is addressed to
    - Must indicate a desire to enter into contract
    - Must be directed at a person or a group
    - Must invite acceptance
      - Must put forth a reasonable understanding that acceptance will create a contract
    - Must be clear and definite in price, terms, quantity, etc.
  - Can be a reward- offer for unilateral contract
    - The promise (offer) must induce a performance
      - *Broadnax v. Ledbetter*
        - Individual captured a prisoner at large but did not know about the reward available when doing so. Tried to receive the reward after the fact but court ruled no consideration because the individual was *not induced* by the offer.
          - If performance is completed before knowing of the offer, no collection
- **An offer is not:**
    - Statement where there is evidently no intent to contract
      - *Leonard v. PepsiCo.*
        - Pepsi commercial promoting new Pepsi points program offering a jet for 7 million Pepsi points- was obviously a joke and not intended as a serious contract since a jet is worth way more than the value of the Pepsi points
    - An invitation to deal/bid in an action
      - Someone says "I am going to sell my car for $10k"
        - Does not constitute an offer - only shows an intent to sell
      - "I wouldn't sell my car for less than $12k"
        - Not an offer, just an invitation for negotiation

            - *Owen v. Tunison*
                - Person says “I wouldn’t accept less than $16k” and other party says “Ok, I accept those terms” but original person says “I wasn’t offering”
- An act of preliminary negotiation
    - “I’d sell my car for $12k”
        - Price quote so most likely not an offer
        - Not direct or specific enough to be an offer
            - If directed at specific person with specific terms laid out, it may be an offer
            - There cannot be anything left to negotiate
    - *Fairmount Glass Works v. Crunden Martin Co.*
        - Seller quoted a price for “immediate acceptance” and after buyer accepted order at the quoted price, seller backed out
            - Court declared that, although a price quote is not usually an offer, because it was so specific, included the quantity, was directed at a particular client for a particular service, and because it was made with the language of “for immediate acceptance,” the quote is considered to be an offer
        - Exception
- Public advertisement
    - Generally, the rule is that an advertisement is not an offer
    - Exception to rule:
        - When an offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract
            - *Lefkowitz v. Great Minneapolis Store*
                - Store advertised saying “first come, first serve” for the black stole for $1
                    - Clear, definite, and explicit with no terms left up to negotiation so therefore, it was an offer

- If the offer is going to multiple people and if all the recipients are aware of the fact that they are not the only one receiving it, it is *not* an offer

3. Acceptance

- **Acceptance**: manifestation of a willingness to enter into a bargain
  - Demonstrating that they want to make a deal
  - Clear, unequivocal, not adding to the offer
- Classical rule: Valid acceptance of an offer must be "absolute, unequivocal, and unconditional"
  - *Wucherpfennig v. Dooley*
    - Plaintiff responded to offer by saying he was interested and wanted to know exact dollar amount; language sounded more like intent to reach an agreement in the future
    - The Court found that the language of the 'acceptance' did not meet "absolute, unconditional, unequivocal" standard
- **R2D §50- Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise**
  - 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
  - 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
    - Unilateral contract where acceptance by performance is invited by the offer
  - Acceptance by a promise requires that the offeree complete every act essential to the making of the promise
- **Manner of Acceptance**
  - Rule: Any reasonable manner of acceptance or medium permitted, *unless* offer invites acceptance by exclusive mode
  - **R2d §79**
    - In cases of doubt, offer is interpreted as inviting either acceptance by performance or acceptance by promise
  - **UCC 2-206(1)(a)**
    - Order can be accepted either by promise to ship or by prompt shipment, *unless* unambiguously indicated otherwise by language or circumstances
      - "Unambiguous circumstances" could be a long-standing relationship in which parties have always done things a certain way
  - **R2d §62 - Effect of Performance by Offeree Where Offer Invites Either Performance or Promise**

        - If an offer invites either promise or performance as acceptance, the acceptor can choose which method
            - Beginning the invited performance is acceptance by performance and a promise to render complete performance
    - "**Offeror is master of the offer"**
        - Offeree is constrained to respond and accept in exactly the way that is invited by the offer; *both the manner and content invited by offer*
    - **UCC §2-206(1)(b)**
        - Shipment of non-conforming goods is acceptance unless seller seasonably notifies buyer it's only an accommodation
        - *Corinthian v. Lederle*
            - The defendant said that they would not fulfill the whole order at the old price but they would give 50 vials at old price and then the remaining 950 vials would be sold at the new price
                - The 50 vials were non-conforming goods but they specified that this was an accommodation so it did not count as acceptance
    - Modern Acceptance and Emoji Use
        - *CX Digital Media v. Smoking Everywhere*
            - Smiley face was found to constitute acceptance
        - *Lightstone RE LLC v. Zinntex LLC*
            - Thumbs up emoji held as acceptance
            - Rationale: keeping up with the customs of modern business people
- **Notice**
    - **Bilateral Contracts**: In bilateral contracts, notice is usually required unless the offer manifests contrary intent
        - **R2D §56- Acceptance by Promise; Necessity of Notification to Offeror**
            - Except 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 cceptance seasonably
                - A mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which binds the other
            - *White v. Corlies & Tift*
                - Plaintiff argued that, by buying the lumber, he was beginning the performance which qualified as an acceptance but court held that the offer invited an exchange of promises and buying the lumber was not adequate form of acceptance

            - No invitation to accept by performance and it could not have been obvious that he was buying the lumber as acceptance because he could have been buying it for any of his jobs
    - In bilateral contracts (promise inviting promise), beginning performance can act as a return promise
        - *Ever-Tite Roofing v. Green* → held that the plaintiff loading the trucks was commencement of performance because the materials were put out of possession already
            - The plaintiff drafted the offer but the defendant made the actual offer to have the plaintiff roof house and the acceptance invited in that offer was "written acceptance by an officer of the plaintiff or **upon commencing the performance"**
                - Return promise was commencement of performance
        - Comparing *White* and *Ever-Tite* cases:
            - Commencing of performance: in *Ever-Tite*, they arrived to the site of the work already and there was seasonable notification whereas in *White*, the materials were not specific to that particular job and they were kept in his workplace so that Corlies would not have known he had begun performance
    - *International Filter v. Conroe Gin*
        - In case where the terms stated that the proposal would become a contract when accepted by defendant and approved by executive officer, the court held that notice is required in bilateral contract except when the requirement of notice is specifically dispensed with by the offeror
            - This case also teaches that the drafter of terms is not always the offeror
    - Example: A emails B "I would like to order 300 widgets at $10 a widget." B does not respond and ships widgets
        - **This is a close case — would have to examine past dealings to see if it's unambiguous under circumstances that this was an acceptable mode of acceptance**
- **Unilateral Contracts**: Notice is not usually required unless offer requests notification or offeree has reason to know the offeror won't learn of performance with reasonable promptness or certainty
    - *Carbolic Smoke Ball*- wouldn't expect every person who uses the ball to call up the company to notify them about performance

            - Only give notice of performance when one wants to collect the reward
        - **R2D §54 - Acceptance by Promise; Necessity of Notification to Offeror**
            - 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
            - 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:
                - The offeree exercises reasonable diligence to notify offeror of acceptance *or*
                - The offeror learns of the performance within a reasonable time *or*
                - The offer indicates that notification of acceptance is not required
    - **Mailbox rule**: acceptance occurs as soon as the offeree dispatches acceptance
- **Silence**
    - Silence is not acceptance except when:
        - Offeree keeps benefit and knows/should know compensation is expected
        - Offer invites acceptance by silence and offeree *intends* to accept by silence
        - Because of previous dealings or otherwise, it's *reasonable* for offeree to *notify* offeror of intent not to accept
        - *Corinthian v. Lederle*- is tracking number acceptance?
            - Court said no- just an acknowledgement of the offer
    - **R2D §69: Acceptance by Silence**

4. Termination of the Offer

- Ways that an offer might be terminated:
    - Lapse of offer after reasonable amount of time
    - Death of offeror means offer usually dies with him
    - Revocation:
        - Classical rule of revocation:
            - Offers are revocable until acceptance
            - *Dickinson v. Dodds*
                - Offer to sell the property was there until Friday at 9 am but it was not enforceable because there was no consideration or meeting of the minds and because the buyer indirectly knew seller intended to contract with someone else
            - **R2D §43- Indirect Communication of Revocation**

        - An offeree's power of acceptance is terminated when the *offeror takes clear action inconsistent with intention to contract* and offeree learns of this from a reliable source
- **Exceptions to rule of revocation- Option Contracts:**
    - **R2D §87- Bilateral Option Contract**
        - True option contract requires at least nominal recital of consideration
        - If offer induces action in reliance that offeror should have reasonably expected, it is an option contract that is not revocable to prevent injustice
            - *Drennan v. Star Paving Co.*
                - The court held that the subcontractor cannot revoke the bid because that bid **induced** the general contractor to accept a job contract with the school and the general contractor **relied** on the subcontractor's bid
    - **R2d §45 - Unilateral Option Contracts**
        - Contract created by part performance of offerree
        - Offer irrevocable once performance begins, but performance by offeror not required until performance is complete
        - Offer not accepted until performance is complete
        - Brooklyn Bridge Problem
            - cannot revoke once part performance has began- then it becomes an option contract where he must give Maria a reasonable amount of time to complete the contract but she is not obligated to complete it
                - Maria doesn't have to finish it but needs to have the opportunity to do so
    - **UCC §2-205 - Firm Offers**
        - Must be in signed writing by a merchant that the offer for sale of goods will be held open for a reasonable period of time
        - No separate consideration needed
        - 3 month time limit
- **R2D §63- Mailbox Rule**
    - Acceptance of an offer is valid when sent
        - No regard to whether it ever reaches the offeror and the offeror bears the risk of transmission
            - *U.S. Life Insurance v. Wilson*

- Check sent out to revive insurance policy and the check was effective acceptance of reinstatement *as soon as it was out of the property of offeree*; offeror was told to make the policy effective as of that day of sending
- Revocation of an offer is valid when received
- Rejection of an offer is valid when received
- *If acceptance and revocation cross*, acceptance is effective even though revocation was received first
- Email is governed in the same way as mail but it needs to be sent in a way that is accessible to other person

○ Widget Offer Problem:
- If offeror makes offer on Saturday and then sends an email on Sunday saying "never mind, I take back the offer" and then the offeree accepts offer on Monday, there is no contract because the offeree received the revocation prior to acceptance
  - However, if the offeree only receives the revocation after already sending out the acceptance, there is a valid contract
  - Here are four ways to create an option contract:
    - Consideration
    - Nominal Consideration or Recital
      - **R2D §87**
    - Reliance/Promissory Estoppel
      - **R2D §87(2)**
    - Firm Offer
      - **UCC §2-205**

5. Rejection, Mirror Image Rule, "Battle of the Forms", and UCC 2-207

- **Mirror Image Rule**
  - The terms on which you accept have to be exactly the ones issued in the offer
    - Must be mirroring the offer in your acceptance
    - Acceptance must be on exact terms of offer
      - If not, it's a counter offer
  - What's bad about the mirror image rule?
    - Welcher in executory contract where the party tries to use this rule to get out of contract
      - Contract where someone is already performing
      - Concern about boilerplate/fine print disclaimers

        - Scenario: Before performance, the market changes which makes one party want to get out of the contract- so they try to get out of contract because of the tiny fine print disclaimer discrepancies

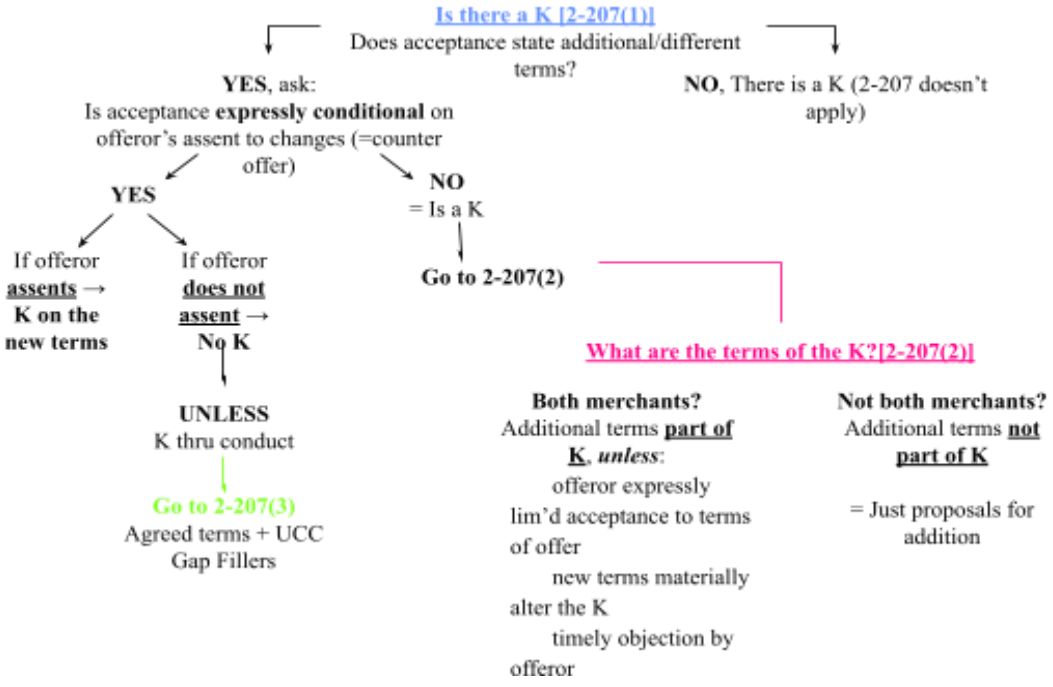
- **Battle of the forms**
    - *Last shot rule:*
        - Whoever has the last word, according to the mirror image rule, that party's terms won so battle of the forms would be people just sending back and forth forms so they could be the last one
            - Burying other party in paper since they always want to have the last form
- **UCC §2-207**
    - **UCC only applies to sale of goods**
        - Common law is service contracts and real estate
            - **M/I rule still applies for areas outside of sales of goods.**
    - **2-207 (1):**
        - Whether or not the purported acceptance is actually an acceptance or is it a counter offer?
        - We allow the offeree to add some additional terms and it still counts as an acceptance *unless:*
            - The acceptance is **expressly conditioned** on the offeror's assent to the changes made by the offeree
                - S offers to sell P a pen for 5 dollars, P says "I accept on condition that you lower the price to 4 dollars." That is no longer an acceptance
        - Added terms or conditions do not negate acceptance unless the acceptance is expressly conditional on the other party's assent to the added terms
    - **2-207 (2):**
        - If there is an acceptance, what terms govern the contract?
        - If they're both merchants, the additional terms are added to become part of the contract unless:
            - The offer expressly limits acceptance
                - I will sell you this pen only if you accept my terms exactly
            - The terms materially alter the contract
                - Additional terms that materially alter the contract do not apply
                    - If the offeree cuts the price term in half, that's a material alteration

                - If not expected to pay shipping price, and then the offeree adds a term of the offeror being expected to pay shipping price, that is a material alteration
            - Notification of objection to terms has already been given or is given within a reasonable time after notice of them is received
                - Opportunity within a reasonable period of time to refuse an additional term
            - If any of these exceptions occur, both of the conflicting terms are knocked out and replaced with gap fillers
                - If they're not both merchants, the additional terms do not apply and the conflicting terms are knocked out and replaced with gap fillers

- **2-207 (3):**
    - If there was never an acceptance because a counter offer was made instead of an acceptance, can a contract still exist based on conduct?
        - Parties treated the counter offer as an acceptance- there was never a valid enforceable contract since the purported acceptance was actually a counter offer but they acted as if there was a contract based on their conduct
            - So what are the terms of the contract?
                - Any overlapping terms agreed to by both parties apply and any contradicting terms are knocked out and replaced by gap fillers from the UCC
                - Conflicting terms that are not found in gap fillers the terms just fall away
                    - These terms will never include an arbitration clause because the UCC does not have any gap fillers for arbitration
    - Known as the 'knockout rule'
        - Knocks out all the conflicting terms and then sometimes they are filled with gap filler terms
            - Gap filler terms are 'reasonable' terms
- Different terms (according to Posner in *Northrop v. Litronic*):
    - Majority approach:
        - Knockout rule
    - First shot rule:
        - The offeror's terms apply
            - Whoever said the terms first
    - California approach**:

- Treats "different" the same as "additional"
    - Thus, you would apply UCC 2-207(2)
- The proposed 2-207
    - Knocks out all of 2-207 and replaces it with just UCC 2-207 (3) aka "the knockout rule"

- *Step-Saver*
    - When there is evidence proving that the acceptance of an additional term is not conditional for the offeree's assent and the additional term materially alters the contract, the contract is considered formed without the additional term and a gap filler is used instead
        - UCC 2-207(2)
        - Conditional acceptance: must be clear to a reasonable person that the party would have been willing to forgo the contract if the term was not accepted



6. Rolling Contracts and Consent to Boilerplate

- Rolling Contracts
    - Assent to contract is deferred and contract is not formed until the buyer has gone home with the product, read additional terms, and still not returned it
    - "Accept terms or return"
        - Buy now, terms later

        - Terms in agreement assented to by opening package and not returning it for a specified period after the consumer presumably read the agreement and used the products (ex: 30 days)
    - Usually used for consumer sales as opposed to merchants
    - Two different approaches:
        - ENFORCE: *ProCD v. Zeidenberg*
            - Shrinkwrap (terms inside the box)
            - Product had notice of license on box and stipulated that the full license was inside
            - Court found that the buyer effectively accepts a contract when they are given notice that there are additional terms inside the packaging and the buyer does not return the product so the contract is formed after 30 days no return
                - Notice on outside of box + terms on inside + right to return = enforceable K
                - Court uses the reasoning of additional terms found on the back of concert tickets or cruise tickets- if you don't want to accept the terms, you simply don't go to the event
                - **Businesses want the "right of return" approach while individuals want UCC 2-207**
                    - Court says it's not 2-207 because no battle of the forms but this reasoning is criticized
            - **UCC §2-204(1)**
                - Contract for a sale of goods may be made in any manner to show agreement, including conduct by both parties which recognizes the existence of such a contract
            - *Hill v. Gateway 2000*
                - Arbitration clause inside computer box that would govern if not returned in 90 days but plaintiffs say they didn't agree to the clause
                    - Court says that they could have read the documents and returned them if they objected to the term but they didn't so by accepting the goods after 30 days, the buyer is bound to the terms and a contract is formed
                - Says this is not an issue of 2-207 because
        - DO NOT ENFORCE: *Klocek v. Gateway*
            - The court says that 2-207(2) applies and since the additional terms materially alter the contract, they are not a part of the contract because consumer is not a merchant

        - The terms in the box are mere proposals for addition, not added contract terms
    - Policy Arguments for Rolling Contracts vs. UCC 2-207
        - Rolling contracts
            - Preferred by businesses
            - Pros: Makes little sense practically to include all terms up front
            - Cons: Risk of 'hidden terms' or terms consumers do not understand, puts pressure on buyer to return which can be costly and may be impractical because what if the item is non refundable
        - UCC 2-207 Approach
            - Preferred by consumers
            - Pros: Incentivizes companies to highlight their most important terms so they are not removed later for material altering of the contract

- **End User License Agreements (EULA)**
    - Click wrap
        - Terms require you to click "agree" to proceed
            - Generally enforceable and treated like paper contract
            - Especially enforceable if they make you scroll to click agree
    - Browse wrap
        - Terms hidden elsewhere on website (like on Uber where the terms are buried in app)
            - Most courts say not enforceable but generally, a toss up
                - One recent decision says that they should know to look for terms before agreeing but it might not be okay to enforce since most people are not actually reading these things
            - One recent decision says that clicking the hyperlink before you agree to terms is what a reasonable consumer should know to do

7. Pre-Contractual Liability

- Bargain contracts require BOTH consideration and mutual assent but when either one is missing, R2D §90 can be used
    - If there is no mutual assent,there may still be a promise that creates a contract

- **R2D §90 Promissory Estoppel**
  - Elements:
    - Must be a promise
    - There must be a reasonable expectation that the promise will induce action
    - The promise must actually induce the action
    - It must be necessary to enforce the agreement to prevent injustice
  - *Hoffman v. Red Owl*
    - Plaintiff takes a bunch of steps after relying on defendant's advice and expectation that defendant will give P a franchise store but then the deal falls through due to failed negotiation
    - Court found that, even though no actual contract existed, there was still liability under §90
      - The court found that Hoffman was induced by the defendant's promises and took actions due to this inducement
      - Damages: does not get lost profits back but should get out of pocket expenses made in reliance of defendant's promises
  - *Cyberchron v. Calldata*
    - Defendant orders equipment from plaintiff under strict specifications and before any agreement was signed, plaintiff begins production anyway and then defendant terminates the purchase
      - The court applies §90 and says that the defendant actively encouraged plaintiff to incur costs and expenses in developing the equipment and the injury was unconscionable
        - Imbalance of bargaining power- don't want to encourage parties acting in bad faith
          - P was entitled to shutdown costs to the extent incurred due to D's promises
  - Policy arguments
    - For normal people:
      - *Should be used* in cases where people not knowledgeable about contract law are being taken advantage of in negotiations and are acting reasonably
    - For businesses:
      - *Shouldn't be used* but businesses have lawyers who should know the rules and they shouldn't rely on negotiations without agreement
        - *But* there could be power imbalances between large businesses too and, by making Cyberchron perform first, the other party took advantage of that

- **<u>Preliminary Agreements</u>**
    - When something is written down and agreed on but not yet the formal contract, ***is there an agreement to agree?***
    - Tribune I and Tribune II contracts
        - Tribune I: Preliminary agreement where **all** key terms are agreed upon, but agreement has not been placed into the final and formal form in the manner intended by parties
            - Parties <u>bound by these terms</u>, could be liable for breach
        - Tribune II: Preliminary agreement where **some** key terms, but not all, are agreed on
            - Parties <u>only bound to act in good faith</u> in negotiating the other terms, not to terms themselves

- *Definiteness*
    - **Definition**: Must be definite enough to…tell if there's been a breach, and what the remedy would be if it was breached.
    - **Examples**:
        - "If you boys will continue the way you have been..1st next January I will close my books and give you a fair share of my profits"—*Varney v. Ditmars*—Not definite enough, what is fair share?
        - Realist answer would say it is enforceable, look at custom to inform what is fair share—this has been the trend of the court in recent years
        - Vague price term:
            - *Toys Inc*.: Compare to UCC 2-305: Real Estate/Land unique. Harder than coming up with a reasonable price than standard goods
            - *Oglebay*: Proper role for courts in setting prices?

<u>Classical and Realist Approaches to Mutual Assent</u>

- In general:
    - Classical – Formal – Bargain, Offer & Acceptance at a moment in time. ON/OFF
    - Realist – Take into account ex ante risk allocation, fairness, equity; separate out issues of Contract formation from what the terms are
- Particular doctrines:
    - Revocability of offers:
        - Classical – Anytime before acceptance
        - Realist – Can create option K thru part performance of unilateral K (R2d 45) or reliance on offer for bilateral K (R2d 87)
    - Acceptance devating from offer:
        - Classical – Mirror Image Rule (More recently, conservative judges use "Rolling K" analysis, melding classical & realist modes of argument)

        - Realist – UCC 2-207, which often leads to first-shot rule or knockout rule
    - Indefiniteness:
        - Classical – have to include all important terms specifically
        - Realist – ok to have flexible terms if there's a mechanism to figure out - enough for remedy

8. Requirement of Definiteness

- K must meet two requirements to be enforced by a court:
    - **Mutual Assent**: Both parties must agree to be bound by the agreement.
    - **Definiteness**: The terms of the agreement must be clear enough to be enforced
        - Definiteness
            - Realist view: the terms of a contract are reasonably certain/definite if they provide a basis for determining the existence of a breach and for giving an appropriate remedy
                - **R2D §33(2)**
                - Realists have almost completely taken over this area and they enforce far less definite contracts with more flexibility
                    - Can clarify indefinite terms by looking to preliminary negotiations, prior communications, government regulations, trade usages, prior dealings, and terms implied by law
            - Classical view: every term must be set out expressly in writing and there is no contract if it is indefinite; stricter
    - *Varney v. Ditmars*- effect of indefiniteness
        - "If you continue the way you have been going, I'll give you a fair share of my profits"
            - Classical court says it is not sufficiently definite- what is a fair share?
    - *Pyeatte v. Pyeatte*
        - Too indefinite for contract but there is unjust enrichment and could need restitution

- **Vague Price Terms**
    - Modern rule: a specific price term is not required as long as there is a practicable, objective method of determining the essential terms
        - Could be market indicator or external indicator
        - Usually court will construe against the drafter of the contract
    - *Toys Inc. v. F.M. Burlington Company*

        - Lease that included a renewal option that stated that rent would be "renegotiated to the then prevailing rate within the mall," but when the parties failed to agree on a rent and the defendant claimed the contract was indefinite, the court ruled that the lease created a binding option
        - An option agreement is binding where it sets forth a definite, ascertainable method of determining the price term and all other essential terms
            - *"Practicable, objective method of determining the essential terms"*
    - *Oglebay v. Armco*
        - Parties entered into a long term contract and over time, the contract was modified and the plaintiff made substantial investments to meet the defendant's needs but eventually the pricing mechanism failed when industry rates ceased to be published and when the parties failed to agree on a rate, the court ruled that the *contract was still enforceable* despite the failure of the pricing mechanism because the *parties showed a clear intent to be bound*
            - When a contract's pricing mechanism fails but parties intend to remain bound, the price defaults to a "reasonable price at the time of delivery," especially if based on an agreed standard or third-party determination that is no longer available

- **Definite terms**
    - Terms like "good faith" and "reasonable efforts" are considered definite enough if an external standard can define their content. The court would likely have done so in *Wood v. Lucy, Lady Duff-Gordon* if needed
- **Open Terms and Intent:**
    - Courts will consider factors like:
        - Partial Performance: Have the parties started acting as if there's a contract?
        - Prior Dealings: Is there a history between the parties that clarifies the open terms?
        - Industry Customs: Are there common practices in the relevant field that provide meaning to the terms?
- **Indefiniteness and Contract Price:**
    - Parties may intentionally leave some contract details unspecified initially, to be decided later, such as the delivery location
        - This is common practice
    - Leaving the price term open is also possible, particularly in long-term contracts where both buyer and seller want protection from market fluctuations. In such cases, the price would be "a reasonable price at the time for delivery," as per **UCC § 2—305 (Open Price Term)**

        - However, *disputes may arise over what constitutes a "reasonable price.*" To avoid this, parties can define a price schedule based on specific contingencies. This "fill-in-the-price" mechanism requires sophisticated parties capable of anticipating contingencies
        - Another option is using an arbitrator to determine the price if parties disagree and courts are generally required to defer to arbitrators' decisions
        - *"Escalator clauses"* offer another solution- they tie the price to a formula based on market factors, similar to rent tied to gross profits in commercial leases or wages tied to the cost of living in collective bargaining agreements
- **UCC § 2-204 (Formation in General)**
    - Showing Agreement: a *sales contract can be established in numerous ways, even without a formal written agreement;* conduct from both parties that acknowledges the contract's existence is sufficient
        - For instance, consistent ordering and delivery of goods over time, even without a signed contract, can demonstrate the existence of an agreement.
    - Moment of Making: The *exact moment a contract is formed doesn't need to be pinpointed* for it to be valid
        - A contract can arise from ongoing dealings and negotiations, even if a specific "meeting of the minds" moment isn't clear
    - A sales contract *isn't automatically invalidated just because some terms are left open or undefined*
        - The key is the parties' intent to form a contract
            - If intent is clear, and a court has a reasonably certain basis to determine a remedy in case of a breach, the contract can be binding
        - How courts address open terms:
            - **"Reasonable Price" (§ 2-305)**: When the price is not set, § 2-305 allows for a "reasonable price at the time for delivery"
                - Recognizes that market conditions might change between agreement and delivery
                - However, disputes can arise over what constitutes "reasonable," so specifying a mechanism or formula is often preferable
                - Price is reasonable price at the time unless:
                    - Sophisticated contingent price schedule is devised, third party designated to determine price, or price fixed according to formula tied to market
                    - There is no intent to be bound unless price is fixed or agree, then there is no contract and you must return goods or pay reasonable value

- Key Takeaways:
    - Importance of Intent: Courts look for evidence of the parties' intent to be bound, especially in long-term contracts like *Oglebay* where circumstances might change.
    - Flexibility and Gap-Filling: Courts are often willing to "fill in the gaps" in contracts to achieve a just result, as long as there's a reasonable basis for doing so. They might draw on industry standards, course of dealing, or external sources to provide clarity to indefinite terms.
        - This is evident in *Toys, Inc.* where the court found that the "prevailing rate" language provided a sufficient basis for determining rent.
    - Limitations of Court Intervention: While courts aim to uphold contracts, they are unlikely to enforce agreements with excessively vague or incomplete terms, particularly if there's no objective way to determine the parties' obligations
- **Illusory promise vs. indefinite**
    - Illusory promise:
        - I'll cash the check 'whenever I want to'
            - Strong v. Sheffield
    - Indefinite
        - 'I won't cash this check for a reasonable time'
            - Consideration is not an issue
                - It is indefinite though because time term is too vague

Summary of Creation of Contract

What is the basis for enforcing the contract?

- Was there a bargain with consideration?
    - If the consideration was something received in the past, could there be enforcement under R2d 86?
    - If there was no bargain, could there be a promissory estoppel claim?
    - Was there unjust enrichment/a claim for restitution?
- Was there mutual assent?
    - Did the parties manifest an intent to be bound?
    - By offer & acceptance ...or by conduct?
    - Did the offeror attempt to revoke? If so, can the offeree claim an option K?
    - Did the acceptance deviate from the offer?
    - Is it a sale of goods? If so, apply UCC 2-207 (unless it's a consumer K where you could apply "rolling K" analysis instead)
    - Is the K definite enough for enforcement?
    - If NO mutual assent (not definite enough or otherwise preliminary), was there reliance on a promise that could be enforced under R2d90?

III. STATUTE OF FRAUDS

- Statute of Frauds says certain categories of categories are often not enforceable if they are not in writing
    - Five categories:
        (1) A contract to guarantee someone's debt
        (2) Sales of Land
        (3) Contract that cannot be completed within one year from the time of its making
        (4) Sales of goods greater than $500
            (a) UCC 2-201
        (5) Wills
    - Exceptions and Loopholes:
        - Almost anything in writing will do
            - Confirmations of oral agreements, electronic records, even just one party writing it down when the other didn't
        - Some courts say audio/video tape counts
        - Can be multiple detached documents
        - If there once documents that were lost, stolen, or destroyed, the requirement is satisfied
        - **UCC 2-201(3)(b)**
            - Oral agreement is enforceable for sale of goods
        - If all else fails, restitution and promissory estoppel are used to enforce promises unenforceable traditions due to Statute of Frauds

IV. POLICING THE BARGAIN

1. Capacity

- **Mental Incompetency**
    - Traditionally cognitive test
        - Did the party lack the capacity to understand nature and the consequence of the transactions?
            - Ex: *Lucy v. Zehmer*
                - Despite being Drunk, Zehmer knew what we was doing when he offered to sell the farm so it was still a contract because he had the capacity to understand the nature of the consequences
            - Alcohol and drugs are cognitive standards
                - Did they lack the capacity to understand and did the other party have reason to know they lacked that capacity

        - Only voids contract if other party has reason to know of the lack of ability to understand transaction
            - High bar
    - Expanded to volitional test
        - A contract entered into under compulsion of mental disease or disorder
            - If by reasons of mental disease or defect, a party is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition
                - If benefit is conferred, there needs to be restitution
                - They may cognitively understand the nature of contract formation but not be able to control their actions
                - Ex: individual in psychosis
- **Minors (children)**
    - A contract is generally voidable at the election of the minor
        - May disaffirm before or after reaching majority age (18) but may only ratify contract after reaching 18
            - If a minor avoids contract, they must return what remains of the benefit received
                - <u>But</u>, not traditionally liable for depreciation or loss
            - Does not matter whether other party knew minor's age
    - Exceptions:
        - Some states have exceptions for minors as plaintiff, seeking recovery for cash paid
        - Some states have exceptions for minor misrepresenting age

<u>2. Overreaching: Conventional Controls</u>

<u>A. Pressure in Bargaining</u>

- <u>Classical Doctrine:</u>
    - One party coerces or pushes the other party to make a bargain
    - **<u>Classical Duress</u>**
        - An
            - when there is a 'gun to your head' or someone moving your hand
            - Very narrow
        - **R2D §175- When Duress by Threat Makes Contract Voidable**
            - If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim

- If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim
    - Unless the other party to the transaction, in good faith and without reason to know of the duress, either gives value or relies materially on the transaction

- **R2D 176- When a Threat is Improper**
    - A threat is improper if:
        - Threat of physical crime
            - Crime or tort
        - Criminal Prosecution
        - Use of Civil Process in Bad Faith
        - Breach of Duty of Good Faith and Fair Dealing
            - Taking advantage of temporary monopoly
    - The resulting exchange is not on fair terms **AND** the threatened act would harm recipient *but not* benefit the threat maker
        - This shows that it is not just hard bargaining
    - Effectiveness of threat in inducing manifestation of assent is significantly increased by prior unfair dealing by party **OR** if what is threatened is otherwise a use of power for illegitimate ends
    - *Mostly OR statements- don't need all of the above*

- **Classical Pre-existing duty**
    - No consideration for doing something you are already bound to do
        - Includes a threat to breach contract unless higher price is paid
        - Still technically good law but now, there are realist exceptions
        - **R2D §73**
            - Performance of legal duty owed is not consideration
                - Similar performance is consideration if it differs from what was required by duty/is more than the pretense of bargain
        - *Alaska Packers v. Domenico*
            - Plaintiff fishermen on a fishing contract stop working and refuse to continue until they get paid more so the company agrees but then refuses to pay later
                - Court finds for defendant, asserting the pre-existing duty rule since P provided nothing extra for their increased wages other than continuing what they had already agreed to do

Realist Doctrine Changes:

- **Realist Duress**
  - Expanded to include **economic duress**
    - **Economic duress** is typically found in situations where parties are already in course of dealing and party holds up halfway and threatens to end contract if they don't get more out of the other party
      - Pressure must have been *applied by one of the parties*
        - Economic pressure of the marketplace does not constitute duress
        - Merely taking advantage of another's economic need is generally not duress
        - Contrast with unconscionability- you can act unconscionably to cause economic duress but the terms are not always interchangeable
          - Ex: Ron's Taxi Bill
            - Ron took advantage of temporary monopoly created by circumstances arguably unconscionably by raising prices but he didn't create the monopoly and the parties were not already in course of dealing and he didn't create the duress so you cannot argue economic duress
    - Today, this would include *Alaska Packers*
      - The fishermen have a temporary monopoly which coerced the company and allowed the fisherman to take unjustifiable advantage and extract more from same deal - *bad faith*
  - *Austin v. Loral*
    - Plaintiff awards defendant subcontract on first navy set but on the second set, they only award defendant subcontract for lowest bid parts which upsets defendants, who threaten to stop delivery if they don't get full bid
    - Court finds for plaintiff, saying that contacting the past 10 vendors previously used was sufficient to 'exhausting all reasonable alternatives', given the situation and time constraints for this type of contract
      - Defendant deprived P of free will, meaning P was under duress and then P acted promptly and tried to get alternative but couldn't

        - Normal contract remedies wouldn't be adequate because P had a deadline to meet so P had to agree to D's new terms and then seek to recover
- **Realist Pre-existing duty**
    - Weakened to allow for good-faith agreed-upon modifications
        - Helpful for business bargains, especially those with long-term contractual relationships
        - **R2D §89- Modification of Executory Contract**
            - A promise modifying a duty under a contract not fully performed on either side is binding if:
                - If modification is fair and equitable in view of circumstances not anticipated when contract was made
                - To the extent provided by statute
                    - **UCC 2-209** says a signed writing is enough
                - To the extent that justice requires enforcement in view of material change of position in reliance on promise
        - **UCC 2-209- Modification, Rescission, and Waiver**
            - Modification needs no consideration to be binding
                - Only needs to meet test of good faith
        - *Watkins v. Carrig*
            - Written contract for plaintiff to excavate but after excavation began, the diggers encountered solid rock and they then renegotiated orally and agreed to a new price for solid rock at 9x original price. D then refused to pay the heightened fee.
            - Court held that the oral contract should be upheld since it was a good faith modification in light of new circumstances; the fact that the owner agreed to the new price made the difference
                - If the owner had said no, then the plaintiff would have had to excavate at the original price; owner's consent to heightened price made the new contract enforceable
        - **Policy**: If in good faith the two parties wanna enforce, we want to allow efficient/reasonable agreements, don't want parties to have to take on extra risk and not be able to change K; assumes business people act ethically

SBC-TV & The Stetsons Hypothetical

Arguments for SBC- TV	**Arguments for Actors**
Pre-existing duty rule - Not a good faith modification. - Success was not unanticipated, $100,000 salary took into account the possibility of success, that's what happens when you start a show.	*Pre-existing duty rule* - No pre-existing duty. - No one anticipated this level of success from the Stetsons (not that it was unimaginable, just unanticipated). - There is consideration for the pay raise – 2 additional years on the show.
Duress - Lack of reasonable alternatives, voice actors are unique and irreplaceable, threat to leave the show	*Duress* - No duress. - No threat to leave the show, just a request for adjustment (like Watkins). - Good faith negotiations. There was no pushback from SBC.

In general, we give extra scrutiny to those binding themselves in long-term K's, especially in personal service K's. Hard to know what people want years down the line.*

- **Undue Influence**
  - Small subset of cases involving confidential relationships or other factors involving relative status of parties where **one party has power over the other's will**
    - Always between individuals; not in commercial settings
    - Confidential relationships include:
      - Guardian/ward
      - Attorney/client
      - Principal/agent
      - Elderly or mentally disabled party susceptible to their will being overcome
  - **R2D §177- When Undue Influence Makes a Contract Voidable**
    - Undue influence: the unfair persuasion of party who is under domination of the person exercising persuasion or who, by virtue of relation between them, is justified in assuming that person will not act in a manner inconsistent with his welfare
      - If party's manifestation of assent is induced by UI by the other party, contract is voidable

- If party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim
    - Unless the other party to the transaction, in good faith and without reason to know the undue influence, either gives value or relies materially on the transaction

- *Howe v. Palmer*
    - Plaintiff was susceptible to persuasion due to mental illness and the defendants took advantage of this and convinced him to sell them part of his property and then started a Christian ministry on the farm
    - **4 factors typically present with Undue Influence:**
        - Party shows abnormal attitude or decision making/ unnatural disposition
        - Agreement signed by someone susceptible to undue influence
        - Agreement to the benefit of someone with opportunity to exercise undue influence
        - Beneficiary has used opportunity to procure the abnormal decision through improper means
    - The court held that any action which subverts genuine desire of individual is undue influence
        - Numerous means by which undue influence can be exerted – overt or subtle, persistence, physical, mental, moral
- *Odorizzi v. Bloomfield School District*
    - Superintendent and principal go to plaintiff's house and threaten to reveal his homosexuality unless he resigns
    - Court held that that this was undue influence through overpersuasion since multiple people came to his home, invaded his space, and pressured him
        - This pressure, combined with the fact that they said they were there to assist him and that he should rely on their advice, was evidence of undue influence
            - Just because the plaintiff was only temporarily weak did not mean that he was not unduly influenced
        - **Factors the Court took into account** (good to use these when P is not elderly or disabled)
            - Unusual or inappropriate time or place
                - Especially one's own home
            - Demand to hurry/dire consequences for delay
            - Multiple persuaders
            - No lawyer or other advisers

B. Concealment & Misrepresentation

- **Misrepresentation**
  - Classical definition: intentional material fraud creates defect in bargaining and overcomes free will
  - Modern realist definition: an assertion or statement not in accord with the facts (not opinions)
    - **R2D §164- When a Misrepresentation Makes a Contract Voidable**
      - Makes a contract voidable when it:
        - Is fraudulent or material representation
          - **R2D §162- When a Misrepresentation is Fraudulent or Material**
            - Fraudulent: when the maker intends his assertion to induce a party to manifest his assent and the maker knows it is not in accord with facts
            - Material: if it would be likely to induce a reasonable person to assent or if the maker knows that it would induce the recipient to assent
        - Induces party's manifestation of assent
        - Is justifiably relied on
      - If misrepresentation fulfills all criteria but is made by someone who is not a party to the transaction, contract is still voidable *unless* other party, in good faith and without reason to know of the misrepresentation, gives value or relies materially on the transaction
  - Tort vs. contract claims for misrepresentation
    - Tort: must be fraudulent misrepresentation and then can get damages
    - Contract: gets contract rescinded (**R2D §164**)
- **Fact vs. Opinion Distinction**
  - Opinions are generally not misrepresentations that would justify reliance and thus, make a contract voidable
    - Exceptions include:
      - Relationship of trust
      - Special skill/knowledge
      - Fiduciary duty
  - *Vokes v. Arthur Murray*
    - Woman told she was a great dancer and bought an excessive amount of dance lessons after being consistently encouraged and flattered by instructors about her dancing skills

        - Plaintiff's dancing skills were being misrepresented- the dance instructors had superior knowledge (that plaintiff could reasonably rely on) that she would not improve
    - Court held that since Defendant told half truth and started sharing facts, they were required to share all the facts
        - Was misrepresentation, even if it was an opinion, because the plaintiff relied on their opinions as facts since they were experts
    - Court finds that an opinion can be treated as a fact if
        - There is a fiduciary relationship between parties
        - There is artifice or trick by representor
        - Parties aren't at arm's length
        - Representee doesn't have equal opportunity to discover truth
- **R2D §168- Reliance on Assertions of Opinion**
    - An assertion is one of opinion if it expressed only a belief, without certainty, as to the existence of a fact or expresses only a judgment
    - If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may still interpret it as an assertion:
        - That the facts they know are not incompatible with the opinion or
        - That he knows fact sufficient to justify him in forming it
- **R2D §169- When Reliance on Assertion of Opinion is Not Justified**
    - To the extent that an assertion is one of opinion only, recipient is not justified in relying unless the recipient:
        - Has a relation of trust and confidence
        - Reasonably believes that, compared with himself, the person who asserts their opinion has special skill, judgment, or objectivity regarding the subject matter OR
        - For some other special reason, is particularly susceptible to a misrepresentation of the type involved
- Court says **sales puffing** goes beyond and is not actionable

- Concealment/Nondisclosure
    - **Nondisclosure**
        - Classical rule (still good law)
            - Bare nondisclosure (saying nothing about something) is not misrepresentation or a falsehood → is ok
            - Duty to read and to be self-reliant
            - *Swinton v. Whitinsville*
                - Defendant knew house was infested with termites but plaintiff couldn't have known (latent defect) and wouldn't have thought to look so plaintiff is asking for cost of

termite repair (not contract rescission for nondisclosure, which is atypical)

- The court held that there was no misrepresentation because there was no duty to disclose; rule is "buyer beware"
  - It was an arm's length transaction and there was no half-truth
    - Court said it would *become a slippery slope* if court found liability here and that decision would require disclosure of all defects by seller and disclosure of all benefits by buyer
- Compare this holding to *Hill v. Jones* which held that there was a duty to disclose termites when owners covered up termite damage which went beyond mere disclosure and became concealment

- Modern Rule
  - **R2D §161- When Nondisclosure is Equivalent to An Assertion/Misrepresentation**
    - Nondisclosure is equivalent to assertion/misrepresentation when:
      - It is a half-truth
      - Necessary to correct mistake about writing
      - Relationship of trust/confidence
        - Fiduciary relationship
      - Necessary to correct mistake about basic assumption of contract + breach of DGFFD
        - Good faith is discretionary and hard to argue
  - *Kannavos v. Annino*
    - Defendant advertised multi-family home that could be profitable and took affirmative action through conduct advertising and statements that gave impression that building was suitable and appropriate when it was actually a violation of zoning laws
      - Court held that even though P could've found out about zoning laws, it was duty of D to disclose
        - Fragmentary information can be just as misleading as misrepresentations
          - *When someone gives a half truth, they have a duty to tell the full truth*
      - Distinguishing from *Swinton*
        - Public record

- Half-truth
    - Building advertised was breaking the law against multi family homes
- Factors/Policies to Consider (also for DGFFD)
    - Buyer v. Seller
        - More likely to say it's OK for buyer to keep quiet about information than seller
            - More likely to find seller has a duty to disclose because they had opportunity to get information
    - Shallow vs. Deep Secret
        - More protections for deep secrets because shallow should have reasonable investigations
    - Did one party invest in valuable information or did they get the information cheaply/freely wrongly?
        - Balancing act between wanting to reward people who invested in superior knowledge and the interest to share with other party so that more information is on the table
            - Did one party pay for a land evaluation? Did they go to school to become qualified/an expert? Or did they obtain the information unlawfully through trespassing because that would not count.
- Realists concern: aware of systematic disparity in bargaining power and resources/people taking advantage of power dynamic imbalances

- Express/Implied Warranties
    - Can get expectation damages for breaching express/implied warranties - unless they waived the warranty through words/actions
    - **UCC §2-313: Express Warranties by Affirmation, Promise, Description, Sample**
        - Express warranties created by seller as follows:
            - Any affirmation of fact or promise made by seller to buyer which relates to goods and become part of basis of bargain creates an express warranty that goods shall conform to affirmation or promise
            - Any description of the goods which is made part of the basis of the bargain creates express warranty that the goods shall conform to the description
            - Any sample or model which is made part of the basis of the bargain creates express warranty that the whole of the goods shall conform to the sample or model

            - I.e. provides express warranty by description (like if you advertise something as such)
                - In Kannavos, they could argue that since it was described as multi-family, an express warranty was made that the sale will conform to that
                - Same with sample warranty that the goods will be like the sample
        - Important: must be express by affirmation, promise, description, or sample, and "sales puffing" does not count
            - If they made a promise for it to be a certain way
            - Just *sales puffing* like "this dress will make you feel like a million bucks" is viewed as general language that is understood as just vague
            - Expressions of opinion won't count as express warranty
    - Comparing Implied Warranties to Express Warranty (2-313) or Misrepresentation
        - Implied warranty can be created by description, affirmation, sample → warranty = contract
            - *Breach = expectation damages*; restore you to position as if contract was fulfilled as expected
        - If sued for misrepresentation, result is that the contract is voided
            - *Thus, breach of warranty may be preferable*
- **UCC §2-314: Implied Warranty- Merchantability**
    - Implied warranty that the product is of fair, average quality
        - General warranty
    - Normally applies when seller is a merchant
    - Warranty for 'ordinary purpose'
        - I.e. not particular fitness like in §2-315
- **UCC §2-315: Implied Warranty- Fitness for a Particular Purpose**
    - Whereas seller, at the time of contract, has reason to know any particular purpose for which goods are required and that buyer is relying on seller's skill/judgment to select/furnish suitable goods, there is an implied warranty that goods shall be fit for such purpose (unless excluded or modified under next section)
        - Typically a non-ordinary purpose
        - Buyer relied on seller for a suitable good
- **UCC §2-316: Waiving/Excluding Implied Warranties**

- Merchantability is conspicuous (clearly visible)
- Fitness is in the writing and conspicuous
    - Language like "as is, no warranties, with all fault"
- Want to exclude → must be clear/unambiguous

3. Unconscionability & Adhesion Contracts

A. Standard Form Contracts

Contracts of Adhesion

- "Take it or leave it" contract
    - Unequal bargaining power
        - Drafted by one party and offered to the other with no opportunity to bargain
    - Mass produced
    - One party imposes their terms, no free will to choose
- Disadvantages:
    - Imposes will on another
    - Disproportionate economic power of one party allows them to dictate terms to weaken party
    - Often used by a party that has had the advantage of time and expertise in preparing it while other party may have no real opportunity to scrutinize
        - No real means to understand the contract
- Classical Approach to Contracts of Adhesion:
    - Either:
        - Tough luck
            - Deal with the consequences of signing
            - Assume you bargained for all the terms if you manifested your assent to them
        - Strict construction
            - Reading term narrowly to avoid unjust outcome
            - May be a way to not enforce the contract
            - I.e. she fell on the lawn, not the sidewalk
    - *O'Callaghan v. Waller*
        - Tenant injured in apartment courtyard and then brings action to recover for injuries alleging defective payment but defendant claims that agreement that tenant signed shifts the liability for injury onto her
        - The court held that this was 'tough luck' and the contract's exculpatory negligence clause was okay

- The court argued that the use of a form contract did not itself establish a disparity of bargaining power and said that the market was competitive so the plaintiff could have chosen somewhere else to rent
    - The court reasons that this is a matter for legislature not the court
        - Beyond the competence of the court- should not be trying to fix problems between landlords and tenants
    - Dissent: the clause should be avoided because tenant had no choice but to sign the waiver if she wanted the apartment since the market was not actually competitive and there was a housing shortage where these exculpatory clauses were extremely common
        - Matter of public concern because these clauses affect many people
- **R2D §211- Standardized Agreement (Reasonable Expectation Doctrine)**
    - Party adopts terms without regard to knowledge or understanding of standard terms (except for where other party has reason to believe that party manifesting assent wouldn't do so if he knew that the writing contained a particular term - then that term is not part of the agreement)
        - When you sign a standard paper for a deal, you're agreeing to everything on it, as long as there's nothing sneaky in there that you'd obviously reject if you knew about it
    - Always goes with unconscionability
        - Can use reasonable expectations doctrine to argue procedural unconscionability/public policy in the argument of why a contract of adhesion should not be enforced

- Realist Approach to Contracts of Adhesion:
    - Reasonable Expectations Doctrine:
        - Contract includes: the agreed terms and all the form terms that *a reasonable person would agree to* if they knew they were present
        - Not the terms outside of the reasonable expectations of consumers
    - *Henningsen*
        - Plaintiff buys a car with hidden warranty waiver in fine print that prevented action for injury due to failed mechanism 10 days later
        - Court held that the hidden terms were not enforceable because they were not brought to buyer's attention and the terms were not within reasonable expectation
            - Unenforceable because it was against public policy due to:
                - Lack of competition
                    - Most forms had this
                - Concern with limited warranty
                    - Hidden terms

- Ordinary layman would not conclude they were relinquishing this right
- Unconscionability
  - Can throw out whole contract or just some terms
- Statutes
  - **Procedural**
    - Attempts to combat fine print, hidden terms without equal bargaining power
    - Disclosure requirements
      - Format requirements to make sure terms aren't hidden
    - Cooling off periods
      - Time to think over/change mind like with airline tickets
    - Truth in lending act
      - APR/interest rates need to be posted in an intelligible way
    - Magnuson-Moss Act
      - Warranties must be made clear to consumer
  - **Substantive**
    - Attempts to combat one-sided and unfair contracts
    - Banning certain kinds of clauses
      - Presuming certain clauses are unconscionable
        - Examples:
          - Interest rate caps
          - Prohibitions on long term contracts
          - Prohibitions on exculpatory clauses
            - Like waiver of liability in O'Callaghan
          - Prohibitions on cross-collateral clauses
          - Prohibitions on implied warranty disclaimers

<u>Standard Form Contracts</u>

- Mass produced contracts
- Not always contracts of adhesion
- Advantages:
  - Reduces uncertainty
  - Saves time
  - Makes risks calculable
  - Economic perspective of standard form contracts benefiting consumers because, in competition, reductions in cost of doing business create lower prices
  - There could be a contract that is drafted by one party and used as default, but they do not have opportunity to negotiate

B. Unconscionability

- **R2D §208- Where Party Withdraws or Situation is Contrary to Public Interest**
  - If contract or term of contract is unconscionable at the time it was made, a court may refuse to enforce the contract or may enforce the contract without the unconscionable term or limit application
- **UCC §2-302- Unconscionable Contract or Clause**
  - Court decides as a matter of law whether or not contract was unconscionable at the time the contract was made and then court can void all or part of the contract
    - Note: voiding in part might encourage companies to include unreasonable terms because worst that could happen is that those terms will be thrown out
  - Influential outside sale of goods
- **UCC §2-302- Comment 1:**
  - Basic test:
    - In light of the general commercial background and the commercial needs of the particular trade or case, are the clauses so one-sided as to be unconscionable under the circumstances at the time the contract was made?
  - Meant to prevent oppression and unfair surprise
  - Definition from *Williams*
    - When there is an absence of meaningful choice and terms unreasonably favorable to one party
- A sliding scale between substantive and procedural
  - Need at least some element of both but the *more* you have of one, the *less* you need of the other

Substantive	Procedural
Oppressive terms: ● One-sided terms ● Terms that are simply substantively bad for one party ● Favors one party more than should be reasonably expected given certain	Unfair surprise: ● Hidden terms ● Confusing language ● Manner in which it was introduced ○ Rushed into making decision with hidden terms and

commercial context ● Price unconscionability is mostly substantive ● Waivers of liability ● Very high price ○ Most of the time, Courts do not inquire into how much the bargain makes sense unless it's really really one sided	procedural irregularities Status of the parties: ● No real bargaining power ● One party dictating terms to other ● No great alternative ● Things to look at: ○ Education ○ Language ○ Economic Status ○ Employer/Employee ○ Seller/Buyer ● No ability to understand terms Absence of meaningful choice: ● "Take it or leave it" ● No competition in market

Oppression and unfair surprise can be both procedural and substantive elements

- Price unconscionability
  - *Jones v. Star Credit*
    - Home sale of fridge where total price was 3x market price
      - Buyer did not understand all the hidden fees and had paid part of price
    - Court said unconscionable price so leave it where it lies
      - Buyer doesn't owe more, doesn't have to return fridge, but also doesn't get back the money paid
- *Williams v. Walker-Thomas Furniture Co.*
  - D sells furniture to customers on payment plans using cross-collateralization (late payment means all purchases are repossessed) and plaintiff's last item bought was a $514 stereo set with D's 'full knowledge' that plaintiff was struggling financially
  - Court held that this was unconscionable because D was taking advantage of buyer
    - Absence of meaningful choice- unlikely to understand what they agreed to
    - Gross inequity of bargaining power- little real choice
    - Salesman had formed a personal relationship with plaintiffs, who were welfare recipients
    - Court says that there was both procedural and substantive unconscionability:
      - Procedural: customers are low-income and don't have a lot of options
      - Substantive: cross-collateralization is unfairly one-sided, predatory practices
  - Dissent:

- Dissenting opinion said that a decision for the P was overly paternalistic- people should be able to have freedom to contract regardless of socioeconomic status
- Institutional competence- legislation should be the remedy

Policy (using *Williams*)	**Pro-Enforcement of Contract No unconscionability**	**Anti-Enforcement of Contract Unconscionability**
Paternalism	Don't second guess poor people and their ability to make rational choices- people should have freedom to contract regardless of socioeconomic status	Protect people from bad terms and uneducated choiced; sometimes consumers need protection and there is a concern for weaker party being taken advantage of
Distributive Justice	Empirical view: if we don't allow companies to use this type of credit system, credit will become unavailable and costs will just be passed onto the consumers Normative view: distributive justice is not the job of contract law; let legislature figure out answers to these problems, not the courts	This is a bad situation so court should do rough justice for the weaker party and make furniture company bear the costs
Efficiency	Let markets work themselves out (neoclassical) Storm emergency hypothetical: This is just how markets work- when demand is high, prices go up so we shouldn't interfere with the markets	Market failure and negative externalities If you have consistent market failures built in structurally, it is not necessarily efficient to just let the market work itself out because the market does not actually work itself out and there is a lot of evidence of systematic market failures that work against one category of people Storm emergency hypothetical: In a state of emergency, there are market failures and not enforcing unconscionable contracts would make up for defects in the markets
Fairness of Terms	Terms agreed to by the parties at the outset of the contract- we should not inquire into the	Substantively extremely unfair and full of one-sided terms Predatory pricing includes "prices

	adequacy of terms when they have already been agreed to	so high they shock the conscience" and ones that take advantage of states of emergency or vulnerable people Cross-collateralization would take advantage of people while being aware of their financial positions
Freedom of Contract	Free contract- poor people can make contracts the same as anyone else and individuals should be able to choose which contracts to enter without having their agency limited	Not really free- freedom of contract is an illusion In cases with great disparity of bargaining power, there is an absence of meaningful choice due to market failures

Arbitration agreements

- *Dominant approach by Supreme Court and others: all arbitration is good*
    - Supreme Court has upheld enforceability of agreements under Federal Arbitration Agreement, specifically approving class action waivers
- California's sidestep of Supreme Court:
    - Finds certain terms of arbitration clauses unconscionable without throwing out the entire clause
        - Door not closed for procedural unconscionability when conditions under which employee signs are wrong
            - Hurry or pressure involved
- *Brower v. Gateway*
    - Arbitration terms were held unconscionable
    - Same contract as the other Gateway cases
        - Rolling contract where consumer accepts terms upon opening and keeping after 30 days
    - Arbitration clause stipulated that arbitration would occur in Chicago, only correspondence would be France and costs would be up to $2k, which was more than a typical Gateway computer
        - Onerous terms made this arbitration clause was unconscionable
            - Deters individual consumer from invoking process
                - Court vacates just the unconscionable part
- *Prasad v. Pinnacle Property Management*
    - Found procedural unconscionability met because applicants were not able to apply without signing agreement
    - Court went provision by provision and found a provision preventing class actions and requiring confidentiality conscionable

    - Found the following terms unconscionable:
        - 1 year time limit to start arbitration
            - Didn't apply to employer which made it one-sided
        - $50 filing fee
            - Cannot require extra costs that would not be involved in court process
        - Splitting cost of arbitration
        - Allowing employer to unilaterally modify agreement
            - Prevents negotiation of contract
- Concerns with Arbitration
    - Want to preserve the right to trial and don't want to limit remedy
    - Employment is a necessity
    - Weaker party pressured to sign
    - Bias if employer are repeat players in the arbitration
    - One-sided terms that may force consumer to arbitrate while including no such clause for seller (*Armendariz*)
- Policy in favor of Arbitration
    - Quick
    - Cheaper
    - Saves judicial resources
    - Can always just use severability and take out the arbitration clause part but leave the rest

Case	Unconscionable?
Armendariz (2000) – CA	Yes – terms were too one-sided. Required employees to arbitrate their claims but did not require employers to arbitrate. "Modicum of bilaterality"
Oblix (2004) – 7th Cir.	No. Similar one-sided terms to *Armendariz* not found unconscionable.
Discover Bank (2005–CA) / *Scott v. Cingular Wireless* (2007–WA)	Class action waivers held unconscionable. B/c act as waiver of liability for company wrongdoing. Banks/businesses charging late fees to customers, but no individual would bring a lawsuit for the small amount they were charged in late fees. Class action would be route to take. So having customers waive class-actions would effectively allow these companies to get away w/ late fee practices.
AT&T Mobility v. Concepcion (2011) – SCOTUS	Overturns *Discover Bank & Scott v. Cingular*. Unconscionability is **preempted** by the Federal Arbitration Act (FAA). Preempts (prevents) lower courts from finding class-action waivers unconscionable.

Samaniego (2012) – CA lower courts	Courts held class-action waivers can still be unconscionable according to C/L Ignores *Concepcion.*
Amex (2013) – SCOTUS	Enforced class arbitration waiver
DirecTV (2015) – SCOTUS	Extends *Concepcion* – struck down CA law invalidating class action waivers
Rule from the Consumer Financial Protection Bureau (2017)	CFPB rule restoring right to class arbitration for consumers in July 2017 → Nov 2017: reversed
Epic Systems Corp. (2018) – SCOTUS	Class and collective action waivers upheld – NLRA doesn't clearly override FAA
Prasad (2018) – CA lower court	Find some aspects of mandatory arbitration unconscionable but **not class action waiver** Courts also use K formation, reasonable expectations doctrine to strike down mandatory arbitration. Idea of severability is intrinsic to unconscionability doctrine (see UCC 2-302; court has discretion to refuse entire agreement or sever unconscionable parts) Disagreement over how central the substantive unconscionability was to the agreement as a whole; decided unconscionable terms were collateral.
Turbo Tax (2021)	"Mass arbitration" P's lawyers filed thousands of individual arbitrations as part of their effective mass arbitration strategy. D's lawyers unable to keep up → led to large settlement for the individual P's w/o a class action suit.
Forced Arbitration Injustice Repeal Act (FAIR) (2022)	Passed in the House of Representatives; died in the Senate.

4. Illegality and Violations of Public Policy

- Classical doctrine of illegality:
    - Cannot contract to do something that is against the law
    - If the terms are against the law, the contract is unenforceable
- Realist doctrine expansions of illegality:
    - Can't contract to do something against public policy
        - Expands doctrine where legislation hasn't yet spoken
            - Ex. surrogacy- treated differently in different states
                - Some courts void it because it's considered to be against public policy

A. Covenants not to Compete

- Outside of CA/Majority rule: Rule of Reason
    - Employer must show that the covenant is reasonable and related to business interest for which it is sought
    - **R2D §186-187**
        - Restraint is reasonable only if it it is:
            - Not greater than necessary in order to protect employer
            - No undue hardship on employee
            - Not injurious to the public
                - By limiting competition
    - *Hopper v. All Pet Clinic*
        - Plaintiff had non-compete with previous employer to not practice small animal medicine with 5 miles for 3 years
        - Court held that the agreement was partially unreasonable because the length of time should only be one year but other than that, the agreement was generally fair and did not cause undue hardship
    - 3 Approaches to deal with non-competes:
        - All or nothing
            - Either enforce the whole thing or enforce none of it
        - Blue Pencil
            - Can cross out terms but not add in new ones
            - This approach is heavily criticized
        - Modify
            - See Hopper method
            - Controversial method since it might incentivize employers to write unreasonable non-compete agreements since they know that even if they are sued, the worst that could happen would be that the court modifies terms but still doesn't strike the non compete agreement entirely
- California Approach: All NCAs unenforceable
    - **CA Section 16600**
        - Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void
            - Except for in cases of sale of business, dissolution of partnership, or LLC
    - *Edwards v. Arthur Andersen*
        - P's employer company was sold off and then the new company offered P a job but required to sign a Termination of Non-Compete Agreement to release him from NCA but P did not sign so he sued former employer, arguing that the non-compete was originally invalid

        - The court held that non-competes are void unless it is a partner or it involves trade secrets
            - Legislative intent was to promote competition and employee's freedom to move from company to company
            - Contract was invalid because it restrained employee's ability to engage in his accounting profession
        - Court reaffirmed that non-competes are never valid
- Policy arguments on Covenants not to Compete
    - Rule of Reason:
        - More interest in investing in employees if they know that the employees are prevented from competing
        - Freedom to contract- should be reasonable from the point of view of parties rather than from a judge
    - CA Approach:
        - General concern about court stepping in because they do not have the inside knowledge about the industry
        - Freedom to Work: employee has the right to make a living
        - Society benefits from innovation and competition
        - In rule of reason, the worst thing that would happen if court modifies is that the unreasonable terms will be throw out
            - This encourages employers to put unreasonable terms in the contract because they will generally be enforced

B. Premarital Agreements

- Prenuptial agreements are held as binding and should be evaluated under the same standards as any other contract, regardless of legal counsel or whether the terms were fully understood

V. CONTENT AND MEANING OF THE CONTRACT

1. Parol Evidence Rule:

- Applies ONLY to written contracts
- Applies only to prior agreements or contemporaneous oral agreements
  - Does NOT apply to subsequent agreements
- Prohibits the introduction to a factfinder of any extrinsic evidence to vary or contradict the clear terms of an integrated agreement
- Remember: contracts do not have to be written, as long as parties manifest intent to be bound then a contract is formed
  - Unless it falls within the Statute of Frauds and doesn't meet that writing requirement
- PER is applied to preclude determination that an agreement made outside of the written contract is part of the contract, including terms that were made:
  - Prior to the contract writing (in writing or orally)
  - Contemporaneously with the contract writing (orally)
- **R2D §213: Effect of Integrated Agreement on Prior Agreements (PER)**
  - A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them
  - A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope
  - An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement
    - But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated

- **Applying PER to Supplement Terms:**
  - **Step 1:** Is the evidence that the party wants to introduce *extrinsic evidence*?
    - *If yes*, PER may apply
    - *If no*, PER does not apply
    - **Extrinsic Evidence**: evidence of prior written or oral contracts, contemporaneous oral contracts, negotiation process
      - EE does not include:
        - Subsequent oral or written terms
        - Contemporaneous written contract
      - If PER applies then the extrinsic evidence is kept from the fact finder
    - Always admissible regardless of PER:
      - Course of prior dealings

- Trade usage
- Evidence that supports defense to contract
    - Duress, etc.
- If both parties believed that the extrinsic evidence terms were actually in the written contract, constituting a mutual mistake, they can be admitted to reform the agreement

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

- Terms, with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in writing intended by parties as a final expression of agreement with respect to such terms, are included and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained by:
    - Course of performance, course of dealing, or usage of trade; and
    - By evidence of consistent additional terms unless court finds the writing to have been intended also as complete/exclusive statement of the terms of the agreement

■ **R2D §214- When Evidence of Prior/Contemporaneous Agreements and Negotiations is Admissible**

- EE is admissible to establish:
    - That the writing is/is not integrated agreement
    - Meaning of writing, whether or not integrated
    - That it is completely or partially integrated
    - Illegality, fraud, duress, mistake, lack of consideration
    - Grounds for granting/denying rescission, reformation, specific performance, or other remedy

○ **Step 2:** Is the extrinsic evidence within the field embraced by the written agreement?

■ *If yes*, PER may apply

■ *If not*, it may be a collateral agreement

■ *Gianni v. Russell*

- P signed lease with D for room in building to sell the convenience store items which included a restriction on selling tobacco but P thought he had exclusive rights in that building to sell soft drinks
- The court reasoned that since they included the tobacco restriction, the contract could have and should have easily included the soft drinks exclusivity clause
    - The court held that these exclusivity terms were related to the original written agreement (within the field embraced)

and therefore, the agreement would have naturally included this subject matter in the same contract

- **Step 3**: Is the written agreement an integration (intended by parties to be the final expression of one or more terms of agreement)?
  - *If yes*, then must determine whether it is a complete or partial integration
  - **R2D §209 - Integrated Agreements**
    - A writing constituting a final expression of one or more terms of agreement
    - Must be complete and specific enough to reasonably be a complete agreement
- **Step 4**: Is it a complete integration or partial integration?
  - **R2D §210 - Completely and Partially Integrated Agreements**
    - A **completely integrated agreement** is a complete and exclusive statement of the terms of the agreement
    - A **partially integrated agreement** is one other than a completely integrated agreement
    - Whether an agreement is completely or partially integrated is to be determined by the court prior to determination of a question of interpretation or to application of the parol evidence rule
  - Finding out what type of integration there is:
    - Classical approach
      - 4 corners rule
      - Judge decides if document seems complete based on its face
      - Just look at contract
    - Realist approach
      - Judge looks at extrinsic evidence to determine if it indicates that agreement was not complete
      - Look at EE to determine admissibility
  - Complete integration is all the terms
    - Merger clauses provide evidence of complete integration- shows that you intend for it to be a full agreement
      - Not an ironclad clause
    - Especially not conclusive evidence in contracts of adhesion where the merger is 1 of 100 terms in a take it or leave it agreement
  - Partial integration is final expression of only the terms it contains but there may be other terms outside
  - *If contract is* **complete integration**: you *can't* bring in extrinsic evidence to *contradict* or *supplement*
    - Basically you can't bring in the extrinsic evidence

        - *If contract is* **partial integration**: you *can't* bring in extrinsic evidence *to contradict* the terms but you *can* bring them in to *supplement*
    - **Step 5:** If the contract is partial integration, are extrinsic terms consistent or contradictory?
        - *If contradictory*, the terms are not admitted
        - *If consistent*, the terms are admitted to supplement
        - *Masterson v. Sine*
            - Grant deed within the family giving the grantors the right to buy back the property but P claimed a contemporaneous oral agreement that only the P could exercise this option and they wanted to introduce this evidence when the bankruptcy trustee tried to exercise the property option
            - Court held that the extrinsic evidence should be admitted because the deed was silent on completeness and assignability and court said that because of the structured nature (would be difficult to accommodate in the agreement), it was unlikely that it incorporated all agreements and thus, was partially integrated, *allowing for extrinsic evidence to supplement terms*
            - The court rejects the classical 4 corner rule, saying that courts generally have to look at the extrinsic evidence itself too in order to determine admissibility
    - **Exceptions:**
        - If both parties believed that extrinsic evidence were actually in the written contract (mutual mistake as to the contents of the writing), the agreement can be reformed to add extrinsic evidence
        - Even if contract is completely integrated, if the extrinsic evidence is being offered to prove no agreement was formed or that the agreement is invalid because of fraud, misrepresentation, duress, mistake, etc, then the PER does not apply and the extrinsic evidence is admitted
- PER Policy Arguments
    - **Pros of PER:**
        - Jury may be too sympathetic to plaintiffs and can't adequately judge evidence
            - Typically the party wanting to bring in the extrinsic evidence is the underdog (weaker party) which may be prone to getting juror sympathy
        - Actually gives effect to the final expression of parties' intent
            - Easier to lie about fraud
            - Writings are more reliable than party testimony
        - Incentivizes putting things in writings

        - Clarity, predictability, less litigation
        - Bright-line rule is easier to follow!
    - **Cons of PER:**
        - Unreliability of language and intrinsic ambiguity in contracts
        - Special concern for underdogs/people who don't know the rules
        - There may be a special reason not to put the terms in writing
            - Speed
            - Ease
            - Oral contracts
        - We should trust juries with all the evidence and not assume they will do the wrong thing
        - The point of contract law is to give effect to the intent of the parties which isn't always captured by the writing
        - Intent of parties may not be embodied and we should give effect to it however the intent is expressed

- **<u>Oral Modification Clause</u>**
    - Clauses prohibiting oral modifications after contract is created
        - Not covered by PER because it comes after a written agreement to modify
    - <u>Classical rule:</u>
        - Ineffective
        - In general, oral agreements are enforceable if that is the parties' intent
        - A clause forbidding changes can itself be changed
    - <u>Realist rule</u>:
        - Enforceable but can be waived
        - **UCC §2-209- Modification, Rescission, and Waiver**
            - Comment 2: Contract with "no oral modification" clause cannot be modified or rescinded *unless* it is between merchants on a form signed by the other party
            - Comment 4: Waiver - attempt to modify no oral modification clause can operate as a waiver that is retractable
                - If oral modification is relied on, that reliance can act as a waiver
                - May retract waiver by reasonable notification *unless* the retraction would be *unjust in view of a material change of position in reliance* on the waiver
                - Waiver still a part of the contract- can be waived once but still enforced going forward

- On exam: if making an argument regarding the enforceability of a No Oral Modification Clause, even with reliance, it is probably not going to be enforced, *especially if the drafter sought it out*
    - *Example*: Let's say Professor Gross and I have an agreement to do work for $50/hr, and we have a NOM in the agreement. Then orally, I say the work has been getting more difficult, I want $60/hr. Professor says sure. If at that point, I start doing it and rely on us having orally modified it to $60/hr, this could count as Professor waiving the NOM this one time in agreeing to my attempted oral modification. Especially if I relied on that waiver. But just because she waived it once, doesn't mean she'll waive it again. It's not like the NOM is unenforceable, it's just that she waived it that one time and can't go back on that now – if I tried to make another change orally, she's still perfectly in her rights to decline because of NOM.
        - *We'd also still have to check if the modification was good faith in light of reasonable circumstances; realist pre-existing duty rule*

2. Use of Extrinsic Evidence for the Purpose of Interpretation

- Applying PER to Interpret Terms:
    - Even if the contract is a complete integration, is the extrinsic evidence being offered to interpret the meaning of the written terms?
        - If yes, then 2 stage process ensues:
            - **First**, ask the Judge whether the language is ambiguous or reasonably susceptible to more than one meaning?
                - How to determine this:
                    - Classical rule: Plain meaning aka 4 corners rule-look to terms' dictionary definitions
                        - Are there more than one dictionary meanings?
                            - If yes, extrinsic evidence is admitted
                            - If no, extrinsic evidence not admitted
                        - *Greenfield v. Philles Records*
                            - P agreed to sign exclusively for D and signed a contract with royalties but years later, D capitalized on P's recordings and D said that the contract stipulated absolute ownership even though it did not specify all the ways it was owning
                            - Court held that silence on a topic is not the same as ambiguity and since

the contract is clear on its face about giving full ownership to recording company without any stipulated limitations, extrinsic evidence is not admissible

- Realist rule: Look at all evidence, including the extrinsic evidence, to decide there is indication of the existence of multiple meanings
  - *PG&E v. Thomas*
    - P and D entered into contract and D agreed to indemnify against loss but parties disagree over what the indemnity provision covers (whether protection is for 3rd parties only or for everyone, including the plaintiff)
    - Court held that extrinsic evidence should have been admitted because there was no "plain language" rule here since there was more than one dictionary definition here and the term was "reasonably susceptible to more than one meaning"
      - Court said context and surrounding circumstances needed to be looked at to determine the meaning instead of just relying on 'plain meaning'

- **Second**, if the language is reasonably susceptible to more than one meaning, the extrinsic evidence is introduced to the factfinder for them to interpret the written terms

3. Interpreting Ambiguous Contract Language: Express Terms

- When interpreting express terms, look to:
  1. Meaning at moment of creation
     - **R2D §201- Whose Meaning Prevails**
       - i. If both parties have attached the same meaning to a promise/agreement/term, the subjective meaning prevails
       - ii. If both parties have attached different meanings and one knows or has reason to know of the other's meaning, it is interpreted in

accordance with party who didn't know or have reason to know of other party's meaning

1. *Lucy v. Zehmer*

b. R2D §20- Doctrine of Misunderstanding

i. If both parties had totally different meanings and neither party know or has reason to know the other's meaning, there is no contract

ii. *Raffles v. Wichelhaus (Peerless ships)*

1. P and D contract sale of cotton to arrive by ship Peerless but they mean two different ships, both named Peerless
2. Court held that there was no contract because neither party knew or had reason to know the other party's meaning

2. Express terms of contract
   a. Start with the term itself
      i. If it is susceptible to more than 1 meaning, look at in the context of whole contract
         1. Include dictionary meaning and governmental statute regulations
            a. Like in *Frigaliment*

b. R2D §203- Standards of Preference in Interpretation

i. An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which doesn't

ii. Express term>course of performance>course of dealing>usage of trade

3. Course of performance
   a. *After or during agreement*
   b. What can we infer from the parties' performance of the contract so far about what they intended the term to mean?

i. R2D §202- Rules in Aid of Interpretation

1. Words and conduct are interpreted in light of all the circumstances, and, if purpose of parties is ascertainable, it is given great weight
2. Unless a different intention is manifested, words are interpreted to generally prevailing meaning; technical terms given their technical meaning when in a transaction within field
3. When contract involves repeat occasions of performance by parties without objections, course of performance can be accepted to determine the meaning of agreement

4. Wherever reasonable, manifestations of intentions are interpreted as consistent with each other and any course of performance, dealing, or trade usage

4. Course of dealing
    a. *Before agreement*
    b. What can be inferred from the parties' previous conduct about what they intended the term to mean?
    c. How have the same parties bargained/performed in the past in different deals?
5. Negotiations
6. Trade Usage (custom)
    a. Industry standard, practice, or method of dealing having such regularity that the parties knew or should have known about it
    b. How is the term used in industry? Is there a widespread consensus?
    c. Generally held that outsiders are not meant to know the trade usages but the parties are held liable for knowing trade usages once you join the trade
    d. Modern courts often hold that trade usages are actually part of contract, as opposed to something you look to if contract is ambiguous
        i. Cardozo's reply: people reasonably expect to comply with social norms; the contract *is* their reasonable expectation of what it is, therefore social norms are part of the contract
        ii. Classical court (including some conservative judges today) say that you only look to trade usage to interpret ambiguous contract term
    e. Nanakuli
        i. Court held that since D dealt with asphalt industry a lot, it was reasonable to expect that they knew price protection was commercially reasonable standard of fair dealing in Hawaii, evident by trade usage and course of performance of D to P on two prior occasions
        ii. Court found that the terms were not contradictory with express term (that the price is seller's price)
            1. Only contradictory if it's a total negation which would be buyer's price
        iii. Court finds price protection was implied term
        iv. Court also held that this was a violation of the duty of good faith and fair dealing
            1. Commercially reasonable standards of fair dealings
            2. Parallels between T of U and DGFFD so would make sense that if you satisfy T of U, likely would satisfy DGFFD

** Note: if there are two competing definitions, plaintiff has burden of proving his definition**

- **UCC §1-303- Course of Performance, Course of Dealing, and Usage of Trade**
  - A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
    - The agreement of the parties involves repeated occasions for performance by a party; and
    - The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection
  - A "course of dealing" is a sequence of conduct in previous transactions between the parties to a particular transaction that can be used as a basis interpreting their expressions and other conduct
  - A "usage of trade" is any practice or method of dealing having such regularity as to justify an expectation that it will be observed in any transaction
    - The existence and scope of such a usage must be proved as facts and if established, the interpretation of the record is a question of law
  - A course of performance or course of dealing between the parties or usage of trade in the trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement
  - Express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:
    - **Express terms prevail over course of performance, course of dealing, and usage of trade; course of performance prevails over course of dealing and usage of trade; and course of dealing prevails over the usage of trade**
      - Always admissible to explain meaning of contract even if completely integrated
    - "Complete negation of term" is the test for inconsistency
      - As long as the COP, COD, or TU do not completely negate the express term, the court will construe the supplement as consistent
- *Frigaliment v. B.N.S. Corp.*
  - Contract itself calls for grade A chicken and incorporates, by reference, DOA regulation but the parties disagree on what 'chicken' means so the court examines several different areas to interpret the term 'chicken'
    - Looking at the contract itself

            - Court says that the contract refers to DOA regulations in other parts of the contract and those regulation say chicken included all types
            - Court also said that the price offered was below the market price for larger chickens so both parties should have known all chickens were included
        - Looking at course of performance
            - Court said that there were two shipments of chickens and P did not object to the second shipment even though the first shipment did not have the type of chickens P says they expected so they should have expected the second shipment would have the same result
        - Looking at negotiation
            - Court says that P did not object when German word that meant any kind of chicken was used to confirm the order
        - Looking at trade usage
            - Both parties bring evidence and witnesses and courts says that it is a wash and that P did not meet burden of showing that their meaning should prevail
                - Court held that plaintiff had the burden to show that the ambiguities in the express term point to plaintiff's meaning of the term rather than the defendant's
                    - Probably depends on who is bringing the lawsuit

Rules of Interpretation

- Maxims courts often use
    - *Contra proferentum* - construe the contract against the drafter
        - Usually used as last resort after all aids to construction have been employed without satisfactory result
        - Drafter had all the opportunity to make their meaning clear and if they left it ambiguous, we should interpret it against their interest and for the other party because the other party had less power
        - In a given example, contra proferentem will probably be given greater weight because it's more concrete
            - Often goes together with contract of adhesion that the other party didn't have choice about
    - *Ejusdem generis*- of the same kind
        - If you have a list of things, any additions made to the list should be of the same kind as the ones already on the list

            - Ex: Cows, sheep, other animals → any additions should also be domesticated so a tiger would not be included because it wouldn't fit
    - *Expressio unius est exclusion alterius*- expression of one thing is the exclusion of another
        - If you have a list and it doesn't specifically say "and other things," there are not additional things
            - Ex: If the list has cats and dogs, gerbils are not allowed
    - *Noscitur a sociis*- known by its associates
        - Interpreting according to the other things on the list
            - Ex: Lease allows for "sheep, cow, and pigs" on farm → argue a wild boar is not included, even if other people may argue that a wild boar is a pig so it should be included, but it should not be included because all the other listed animals are domesticated so wild pigs would not be included
    - *Ut res magis valeat quam pereat*- the thing should rather have effect than be destroyed
        - Court should favor interpretations that would make contract valid rather than invalid
            - Things should also be interpreted in the most favorable way to public interest
        - **UCC 2-202(a)**
            - Unless different intention is manifested, language is interpreted in accordance with generally prevailing meaning
    - *Public interest*
        - Interpret contract in the way most favorable to the public interest
            - Ex: Non-compete agreement "within 50 miles of company office" and technician goes to work 45 miles away but 55 minute drive so how do we interpret 50 miles?
                - This is **purpose interpretation**→ to make this reasonable, lawful, and effective- purpose is to keep people from competition
                    - One argument would be that we all travel by car so we should interpret by driving distance
                    - Counter argument could be that it should be a circle radius of 50 miles
                    - However since the purpose of this limitation is that people traveling within 50 miles would compete with customers in the office, so if purpose is

actually people's travel, it makes more sense to use driving distance

- *Separately written terms*
  - Court should give greater weight to specific terms and to terms that look as if they have been separately negotiated
  - Greater weight to negotiated terms than standardized terms- conflict resolved in favor of negotiated, handwritten, or typed terms
    - Reasoning is that these terms show a clear intent to be included because they wouldn't have been written down otherwise
- *Context of contract*
  - Terms should be interpreted in a way consistent with the whole
  - In general, the contract should be read as a whole and any particular terms should be interpreted in a way that makes the whole thing reasonable, lawful, and effective

4. Implied Terms/Filling Gaps

- Implied terms
  - Used to interpret terms that are intended to be in the contract by parties but not written out explicitly
    - Not imposed extrinsically
  - Express terms > course of performance > course of dealing > usage of trade
    - If an implied term was consistent with one of the higher priority references on this list, but not with a lower one, the court will go with the higher one
      - Try really hard to find that the terms are consistent with each other, the standard for inconsistency is high
  - 1. Check if terms are consistent with express terms:
    - **R2D §202:** Implied terms can supplement express terms
    - **UCC §1-303**: Implied terms can supplement or *qualify* express terms
    - Can never contradict express terms
      - Standard for contradict is "total negation"
  - 2. Check if implied terms are consistent with **course of performance**
  - 3. Check if implied terms are consistent with **course of dealing**
  - 4. Check if implied terms are consistent with **trade usage**
    - Existence and scope of TU is *matter of fact*
      - If trade usage is embodied in a code, it's for court to decide
- Gap Fillers
  - **2-305- Open Price Term**
    - When price is left open to be agreed by the parties or nothing is said regarding price, then the price is a reasonable price at the time of delivery

- **2-308- Absence of Specified Place for Delivery**
  - Unless otherwise agreed, the place for delivery of goods is the seller's place of business or if he has none, his residence
- **2-309-Absence of Specific Time Provisions; Notice of Termination**
  - When there is no specific time provision for delivery or duration etc., it should be a reasonable time
  - Termination of a contract requires reasonable notification

Implied Warranties

- These only apply to transactions in goods
  - **UCC §2-105**- Goods are movable, including animals and crops
  - **UCC §2-314: Implied Warranty- Merchantability**
    - Only applies to merchants
      - UCC §2-105: a merchant is a person who deals in goods of the kind or holds himself out as having knowledge or skill peculiar to practices or goods
    - Only covers latent (hidden) defects
      - Does not cover patent defects that buyer could have discovered through examination
    - Merchantable:
      - Fit for ordinary purpose of goods, fair and average quality
        - Not all goods have to be perfect- they just have to be merchantable on average within the shipment
  - **UCC §2-315: Implied Warranty- Fitness for a Particular Purpose**
    - Whereas seller, at the time of contract, has reason to know any particular purpose for which goods are required and that buyer is relying on seller's skill/judgment to select/furnish suitable goods, there is an implied warranty that goods shall be fit for such purpose (unless excluded or modified under next section)
      - Typically a non-ordinary purpose
      - Buyer relied on seller for a suitable good
    - Applies to everyone (not just merchants) as long as the seller knows buyer has bought the good for a particular purpose and that particular purpose must be:
      - Not the good's usual purpose
      - A specific subcategory of ordinary purpose
      - Ex: If someone buys a pair of running shoes and seller knows that the buyer intends to use them for mountain climbing, there is an implied warranty that the shoes are fit for mountain climbing
  - **UCC §2-316: Waiving/Excluding Implied Warranties**

        - Merchantability waiver
            - Must be conspicuous (clearly visible) or
            - Mention merchantability or
            - Use language like "as is"
        - Fitness is in the writing and conspicuous
            - Language like "as is, no warranties, with all fault"
        - Fitness waiver
            - Want to exclude → must be clear/unambiguous
            - Warranty can be excluded or modified explicitly
    - **UCC §2-313- Express Warranties**
        - Created through <u>affirmation, promise, description, or sample</u>
        - *NOT* "sales puffing"
            - I.e. general language that is vague, positive, expressions of opinion
            - E.g. "This car is old faithful;" "This dress will make you feel like a million bucks"
        - Promise that goods will conform to description if basis of bargain
    - <u>When to use Warranty vs. Misrepresentation</u> for relief from good that wasn't what was advertised
        - <u>Warranty</u>**:** When you want the good but you want D to pay to fix the defect
            - Implied warranty grants purchaser relief for defects in the goods whether or not these are known to the seller
        - <u>Misrepresentation</u>**:** When you want to rescind the contract

<u>5. Duty of Good Faith & "Best Efforts"</u>

- Duty of Good Faith and Fair Dealing
    - Implied term in almost every contract
        - Applicable in every UCC contract
            - **UCC §1-201**
                - Good faith- honesty in fact (subjective) and the observance of reasonable commercial standards of fair dealing (objective)
                    - Exception: in 10 states, the definition only includes "honesty in fact" unless you're a merchant
        - **R2D §205**
            - Faithful to an <u>agreed upon common purpose</u> and consistency with justified expectations of the other party
                - Based on the idea that contracting parties are on the same time, both working together to perform contract

        - Excludes opportunism, holdups (economic duress), unfair surprise
    - When does it apply?
        - Only AFTER contract is formed
            - Attaches in performance and enforcement of contract
                - NOT applicable during bargaining/negotiation stage
    - Saves contracts that would have been illusory under Classical regime
        - Output & requirement contracts
        - Exclusive agency agreements
    - Most courts consider DGFFD a mandatory rule as opposed to a default rule that can be contracted around
        - Minority says that you can contract away this duty
        - Termination clause: can terminate with no notice but generally require some sort of notice for good faith
    - Cannot be sued for alone; must be added to another claim
- What is 'Bad Faith'?
    - Doing anything to destroy or injure right of other party to receive fruits of contract
    - Abusing discretion by acting arbitrarily or irrationally
        - *Dalton v. Educational Testing Service*
            - D (SAT company)canceled P's score and refused to look at the evidence P provided after P's score had a huge increase
            - Court held that P was not entitled to keeping his contested score but he was entitled to a good faith review of the evidence he sent and that D had acted arbitrarily/irrationally in exercising discretion
    - Opportunism
        - Taking advantage of temporary monopoly
        - Using discretion under contract to recapture foregone opportunities
            - When a party performs first, there is a risk of other party taking advantage
            - *Alaska Packers*
                - Holdup by taking advantage of temporary monopoly
            - *Austin v. Loral*
                - Instance of economic duress, violating DGF
            - *White v. Benkowski*
                - Turned off water maliciously and will ill intent
        - Taking advantage of party once committed
            - *D&G Stout v. Bacardi*
- What is '*Best Efforts*'?

- Parties contracting for best efforts (or when it's implied) have to make efforts even if it negatively impacts them, short of the point of bankruptcy, and may not prioritize other concerns to the detriment of their fulfillment of the 'best efforts' clause
- *Bloor v. Falstaff*
    - D bought P's brewing labels, along with provision that D would use best efforts to promote and maintain high volume of sales; D decreased advertising for P and P sues for breach of DGFFD
    - Court held that D breached DGFFD by not using best efforts to prompt and maintain high volume of sales
        - P reasonably expected them to sell the beer because of the royalty price and D breached the best efforts duty
        - Once risk of bankruptcy subsided, D must fulfill DGFFD even if it thereby reduces profit
        - P was not required to show what exact steps D should have taken but rather, the burden shifts onto D to show that there were no reasonable alternatives
- Application to *Wood v. Lady Duff Gordon*
    - If we go back to *Wood v. Lady Duff Gordon* and she's suing him for violating DGF, how would we argue that Wood was breaching his duty? What kind of evidence would we want to bring?
        - Look at graph of sales of her products, look at other clients to see how sales promotions are going, and have him show what marketing materials he made
    - Even without specific best efforts clause, parties are still bound to make good faith effort

VI. BASIC ASSUMPTIONS: MISTAKE, IMPRACTICABILITY & FRUSTRATION

1. Mistake of Fact

- **Elements of Mistake:**
  - **Belief** *not* in accordance with **facts** (mistaken belief)
    - An error in judgment does not qualify as a mistake
    - Incorrect prediction of future events also does not qualify as a mistake
    - **R2D §151**
      - Not merely misunderstanding ambiguous terms in a contract
  - Fact was a **basic assumption of the contract**
    - Something you would not have entered into the agreement without
  - Mistake had a **material effect**
    - Results in severe imbalance or adverse effect
      - Costs one party a lot more or gives other party a windfall → major effect on price
    - Even if mistake was mutual, one party was adversely affected
  - **Adversely affected** party did *not* **bear the risk** (key in most cases)
    - Just have to show they didn't bear the risk
      - Usually, when seller is a professional dealer and buyer is just an ordinary customer, seller tends to bear risk
    - If adverse party *did* bear the risk, it is *not* voidable
      - Courts are more worried about buyers- not bearing risk is a higher bar
      - A clerical error (seller) trumps this and a party does not bear the risk for this, as mistake doctrine is sympathetic to clerical error
        - *Seller doesn't bare the risk of a clerical error (because that just happens to human beings) - but they **do** bear the risk of errors in value or judgment*
    - Seller carrier risk: Neither buyer nor seller know of true value of something and item turns out to be way more valuable than expected
    - **R2D §154**
      - Determining who bears the risk:
        - When risk is allocated by the contract
          - Usually allocated to the party agreeing to deliver or complete a project
          - If party has conscious ignorance

                - Aware of limited knowledge but acts on limited knowledge without attempting or bothering to find out more
        - When risk is allocated by the court
            - Court has thumb on the scale for buyers
            - Court considers parties' ability to investigate
            - Investment in superior knowledge (graduate school)
            - Expense of investigation
        - *No UCC section covering this; in sale of goods, this is governed by common law*
- If it is a mutual mistake → contract is voidable
- If it is a unilateral mistake, must ask:
    - Would enforcement be unconscionable?
    - Did the other party have reason to know the mistake or was it their fault?
        - If yes to *either* question, the contract is voidable by adversely affected party
            - Note: unilateral mistake is the same issue as nondisclosure
- **Mutual Mistake**
    - **R2D §152**: When mistake of both parties make a contract voidable
        - When mistake of both parties at time of contract formation was made as to a basic assumption on which contract made has a material effect on agreed on exchange of performance, contract voidable by adversely affected party unless he bears the risk of the mistake
    - *Stees v. Leonard*
        - P entered into a contract with D to construct a three story building but after building fell down twice, they discovered the soil was quicksand and that the land would have to be drained
        - Court ruled that the builder bore the risk in this case since they were the experts in the situation and should have had the land inspected
            - Nothing short of impossibility would get D out of the contract
        - Risk and responsibility for determining whether the property is suitable for the planned construction falls on the builder, not the property owner, when the contract is silent
        - **Adversely affected party *does* bear risk here**
    - *Renner v. Kehl*
        - Both parties (buyer and seller) thought the land would be good for jojoba cultivation but it turned out that it wasn't
        - Court voided the contract and awarded restitution damages on both sides (deposits, land improvements, rent for time spen there)
            - Risk of mistake was not allocated among the parties

        - No conscious ignorance
    - Would not have been a mutual mistake if:
        - Buyer did not tell of intention of using land for jojoba
            - Not basic assumption then
        - Would have bought land even if they knew
            - Not basic assumption of contract then
        - Had a "Buyers Beware" clause that allocated risk to buyer
    - **Adversely affected party *does not* bear risk here**
- **Unilateral Mistake**
    - **R2D §153:** Contract voidable by adversely affected party
    - Classical: no duty to disclose → no relief for a unilateral mistake
    - Realist: court differentiates between clerical error (which would be unconscionable to enforce) and mistakes in judgment (we can let the other party benefit from superior knowledge)
        - Most common situation is when there is a mistaken bid in construction contracts
            - If there was no reliance, they are generally let out of mistaken bids
- Damages
    - If contract rescinded/voided, then there is restitution and no reliance damages

2. Impracticability (Seller's Doctrine)

- Classical: no hardship; no unforeseen hindrance short of complete impossibility can excuse a contract
    - Very strict standard → basically needed to be an act of god
    - *Taylor v. Caldwell*
        - P to lease music hall from D for 4 days, hall destroyed by fire. Continued existence of hall an implied condition of the contract
        - Court said both parties excused from performance because neither assumed the risk of this contingency → *not foreseeable*
    - *Eastern Airlines v. Gulf Oil Corp*
        - Energy crisis, the government invented a two-tier pricing mechanism.
        - Court held that both parties should have foreseen the energy crisis when the contract was created, even those outside of the oil industry were aware, and that they could have protected themselves
        - Gulf claim that price indicator not working as intended unsuccessful due to *foreseeability* of contingency, assumption that contingency has been allocated
            - To win on this, they would have to prove that it would literally make them go bankrupt not just that it would be costly
- Realist: includes supervening events but not just a unforeseen hindrance

    - Rationale should be fairness and reasonableness after the fact
    - Event/contingency the non-occurrence of which is a basic assumption of the contract
    - Extremely high bar that requires there to be no reasonable alternative
- Comparing impracticability and mistake:
    - **Higher bar for impracticability**
        - Cannot have alternative ways to perform
    - Mutual mistake requires a material effect while impracticability has to get rid of any reasonable alternative
        - Mistake only requires substantial effect
    - Courts more forgiving of cases where ex ante both parties made an honest mistake vs. wanting to change contract based on something that happened after formation
- Elements (**R2D 261**)
    - **Occurrence of event/contingency**
    - **Non-occurrence of which is a basic assumption of the contract**
        - "Not fairly to be regarded as within the risks assumed under the contract"
        - How to decide if a party assumed the risk?
            - For risks assumed under contract, look at:
                - Express terms in contract
                    - Was the price higher to compensate one party for taking on the risk?
                - Implied terms and surrounding circumstances
                - Custom and usage
            - For risks allocated by court, look at:
                - Who is the superior risk bearer
                    - Insurance etc.
            - Foreseeability
                - Was it unforeseen?
                - Was it reasonably foreseeable?
                - Does not automatically mean that the supervening event was provided for (*Transatlantic*)
    - **The event's occurrence made performance impracticable**
        - Meaning no reasonable alternatives
            - Does not include market fluctuations or financial position
            - *Transatlantic Financing Corporation v. U.S.*
                - P to deliver a boat of cargo to port. Usual route through the Suez Canal closed, had to change route, sought additional compensation for change. May have been foreseeable, but too many contingencies to assume they were all allocated. Because of possible foreseeability, stricter with element

        - Not impracticable - cost increase *must be positively unjust*
    - Note: Impracticability is an all-or-nothing claim
        - P cannot sue for more money yet claim impracticability
        - Impracticability voids contract and P is paid market rate, not necessarily as good as contract rate
- **UCC 2-615:**
    - Delay in delivery or non-delivery in whole or in part by a seller 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
        - Where causes affect only part of capacity, seller may allocate product and delivery among contracts and regular customers in any manner which is fair and reasonable
        - Must notify buyer seasonably of delay or non-delivery + estimated quota available for buyer
- **UCC 2-613:**
    - Contract is avoided if goods that are required for performance of contract suffer a casualty without fault of either party before risk of loss passes to the buyer
        - Limited to "identified" goods
            - If identified goods that are no longer available, easier to apply impracticability
            - Not applicable if any goods in the market would do
- **Force Majeure Clause (Risk Allocation Clause)**
    - Excuses a party from performance if one of a list of things occur
        - There needs to be specificity in the list → cannot be overly broad
            - Will not enforce "or any similar reasons" or "any other reasons"
            - Often uses maxims here to interpret what was provided for
            - Often includes phrase "act of g-d"
    - *OWBR LLC v. Clear Channel*
        - Canceling because of the economic downturn not the terror act itself so no application of Force Majeur
            - Not close enough to the listed reasons to justify no performance
                - Maybe if it was September 12, 2001 not January 2002
    - *Kama Rippa Music*
        - "Act of god, earthquake, strike, civil commotion, acts of government, and delays in the delivery of material and supplies, or *any similar or dissimilar reason*."

- Any similar or dissimilar reason: seems like it is just protecting against any contingency
    - Courts often use *ejusdem generis* to interpret "or any other reason" into "or any similar reason"
- A better option would be "strikes or acts of labor unions, first, floods, earthquakes, or acts of god, war, or other conditions or contingencies beyond its control"
    - Maybe "emergency hospitalization of necessary employee"

3. Frustration of Purpose (Buyer's Doctrine)

- **Exact inverse of impracticability**
    - Could still execute the contract but it no longer has any value to them
        - Performance would be worthless
- No Frustration of Purpose in UCC
        - Still have **R2D 265** as common law background law
        - Can also reason by analogy to **UCC 2-615**
- What is the "principal purpose" of a contract?
    - In *International Harvester v. Wendt*, IH does not have a frustration of purpose claim
        - Mutual profitability is not sufficient
- Elements (**R2D 265**)
    - Occurrence of an event or contingency
    - Non-occurrence of which was basic assumption of contract
    - Occurrence of which **substantially frustrates the principal purpose**
        - Cannot just be profitability
        - *Krell v. Henry*
            - D rents apartment to watch royal coronation parade but the king gets sick right before and parade is cancelled so D cancelled and didn't pay the remainder of the money
            - Court held that both parties understood the coronation to be the reason for renting the room (implied condition) so the fact that the parade did not occur frustrated the purpose of the contract and excused nonperformance
                - *Compared to taxi on derby day*
                    - A flat is special while any cab can take you to the derby day
                    - Principal purpose of taxi is transportation while the principal purpose of the flat is to watch the parade
        - *Chase v. Paonessa*

- D contracts with city to construct a median and P subcontracts to supply concrete barriers, but city cancels project due to protests after P had already produced half the barriers ordered
- D claims frustration of purpose successful:
    - Protests getting contract canceled was an event
    - Basic assumption
        - Court says even though both parties knew that the city could cancel the contract at any time, P couldn't have foreseen it would be canceled in such a major way because if they had, they would have allocated the risk to D in the contract
            - Therefore P does not bear risk and can void contract
            - What if Chase had produced all the barriers?
                - P may not be excused from paying
                - May give reliance damages – split the difference
                - Wonder if there are cover possibilities – ask if they could sell to someone else

- Frustration of Purpose vs. Impracticability
    - Frustration of Purpose aimed more specifically at the reason for entering the contract vs. Impracticability is aimed more at circumstances in which performance is impractical, burdensome, or egregious due to unforeseen circumstances
    - Frustration of Performance Example:
        - Renting out beach property for purpose of having party, then law enacted not allowing large gatherings by the water
        - Purpose of rental contract not frustrated
    - Impracticability Example:
        - Buying rare wood from supplier, unforeseen circumstance makes it much much harder to obtain and egregiously costly
            - Purpose intact but just impracticable
- **Review of Differences**
    - Mutual mistake- **both** parties at **time contract was made**, **mistaken about basic assumption** of contract, mistake had **material effect**, and the **adversely affected** party **doesn't bear risk**
    - Impracticability/Frustration of Purpose- **event occurs**, **non occurrence** of which was **basic assumption** of contract (**risk of it not allocated** by contract, custom,

or court) that **makes performance impracticable** (seller, supplier) or **substantially frustrates party's principal purpose** (buyer, lessee, recipient)

- Mutual mistake vs. impracticability
  - Prefer mutual mistake because it is *much easier to prove* material effect than to prove impracticability of performance

VII. PERFORMANCE AND BREACH

1. Conditions and Constructive Conditions

- If promises are independent: if A doesn't perform, B still owes return performance
    - Historically, employment contracts were independent
    - Today, very few independent contracts; assume promises are dependent
- If promises are dependent: fulfillment of A's promise is constructive condition of B's promise
    - Each contracting party regards performance by the other party as a condition of its own obligation to perform
    - Failure to perform on one side obviously furnishes an excuse for non-performance on the other
- Presuming promises are dependent:
    - If A doesn't perform and it's a material breach, B doesn't have to perform and gets damage
    - If A performs substantially and it is a "minor" breach/departure,B still has to perform (like by paying A for work done) but A may still have to pay damages for whatever loss is sustained
- Express vs. Constructive Conditions
    - **Express condition**: if not fulfilled (e.g., if not satisfied w/house painting), contract not enforceable, don't have to pay
    - **Constructive condition**: rule = substantial performance, still have to pay if it's only a minor breach

2. Substantial Performance & Material Breach

- Relief for parties when the other party has breached the contract
    - Always safer to pay and then sue
        - Not paying risks the court finding that the other party's breach was not material and then you are the breaching party by not paying/performing
- **Common Law: Material Breach vs. Substantial Performance**
    - ***Substantial Performance is only for Restatement Contracts***
    - If you substantially performed, it was not a material breach
    - If you materially breached, you did not substantially perform
    - There's been a breach. But was the breach material enough to justify nonperformance by either party?
    - **Rule**: *If* a party has substantially performed, then D *cannot* withhold his performance, but *can* recover damages for difference in value
        - Court considers whether it was an innocent mistake, whether the breach is proportional to the scope of the job

- *Jacob & Youngs v. Kent*
  - D refused to pay for the remainder of the balance on the house built because some of the pipe was the wrong brand - would be a great cost for demolition, unjust → don't assume parties wanted this unjust result, so make that the presumable intention.
    - Court held that D was entitled to difference in value in pipes, which is nothing, not cost of redoing the house
      - Pipe basically the same thing - trivial and innocent mistake, not fraudulent or willful. Specifying brand = setting quality standard
        - To ensure that the brand requested was used, P could have:
          - Included a clause saying "no substitutions"
          - Stipulated that substitutions are subject to approval; using careful language to indicate what specifications are important.
          - Could have written in specific reasons for why he wanted those specific pipes- brand loyalty, politics, or any other reasons beyond objective value
    - Court weighed **4 factors in coming to their decision:**
      - Purpose to be served (high quality plumbing, want a good house)
      - Desire to be gratified (want a good house)
      - Excuse for deviation (not willful, was just an honest mistake)
      - Cruelty of enforced adherence (immense expense to tear it all down)
    - This decision shows that courts are more about using principles of fairness and justice in enforcing contracts and holding parties to what they intended, not enforcing every tiny detail of the contract when it's not reasonable to do so

- **UCC: Perfect Tender Rule**
  - **2-601: Perfect Tender Rule**
    - If the goods fail to conform in any respect, you have the right to:
      - a) reject the whole; or
      - b) accept the whole; or
      - c) accept any commercial unit or units and reject the rest.
    - Buyer has the right to reject goods if they are non-conforming in any way

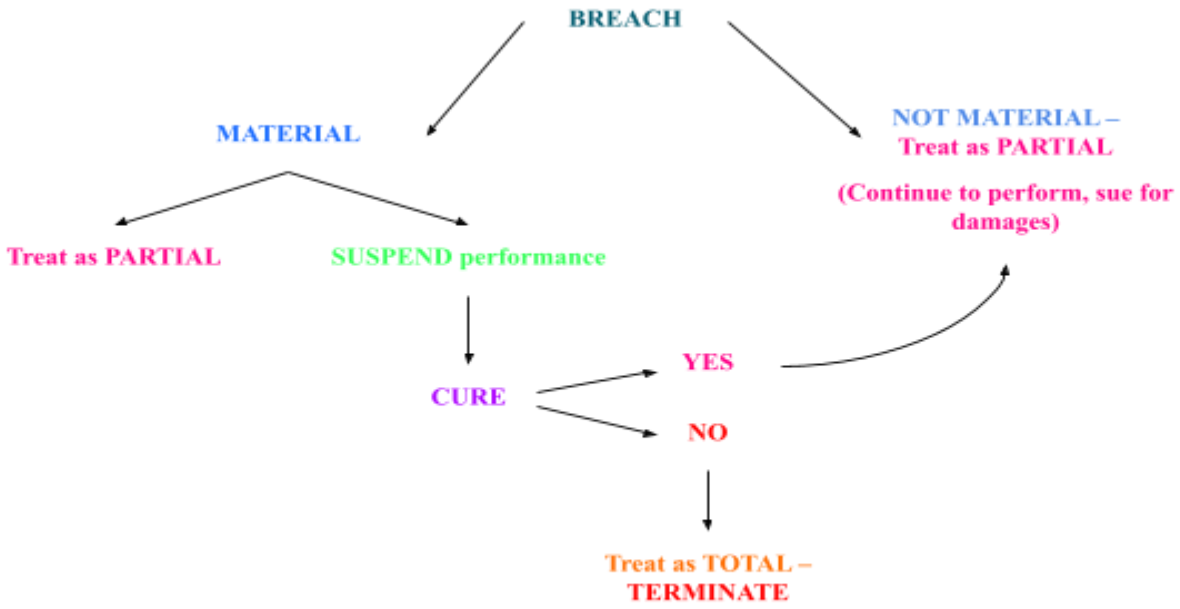
- Broad right to reject
- "Margin of departure" much narrower here
    - Probably because goods are more uniform in character than services which are less categorical or consistent everywhere
- When services and goods are mixed together in a contract, it must be determined which one predominates

- **Perfect Tender Rule mitigated by:**
    - **UCC 2-508: Right to Cure by Seller**
        - Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, **the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery**
            - Seller has the right to cure if the time has not passed, and give you conforming goods as long as the time for performance has not yet expired
                - Can send new ones and fix as long as there is still time
            - If seller had reasonable grounds to believe that the goods would be acceptable or knew they were nonconforming but still believed that buyer would nevertheless take them if appropriate price adjustment was made, they have further time to cure outside of the contract time
    - **UCC 2-608: Revocation of Acceptance in Whole or in Part**
        - Can revoke acceptance *if* non-conformity substantially impairs its value to him AND
        - Either did not realize the defect on initial inspection *or* you had reason to assume non-conformity would be cured by seller and it hasn't been
        - Must revoke promptly → before any change occurs in the condition of the goods
    - **UCC 2-612: Installment Contract Breach**
        - Contract authorizing delivery of goods in separate lots to be separately accepted
        - Buyer can reject any installment that is non-conforming
            - When nonconformity of one or more installments substantially impairs the value of the whole contract, then there is a breach of the whole

        - Even if non-conforming goods are accepted and acceptance is not revoked, buyer can still sue for contract damages

- **<u>Protections for Breaching Party:</u>**
    - Substantial Performance Rule
    - Right to Cure under UCC
    - Restitution
    - <u>Divisibility:</u>
        - If contract consists of several and distinct items and the price to be paid by other party is apportioned to each item to be performed, contract is severable
        - *Gill v. Johnstown Lumber*
            - P to drive logs to D's location, <u>paid by foot of logs delivered</u>, could not complete but still paid for completed portion
            - Numerical divisibility not enough - other party must be getting what they paid for (wouldn't pay based on mileage for logs that only made it halfway)

3. Suspending Performance and Terminating the Contract, Anticipatory Repudiation, Retracting a Repudiation



Important not to suspend unless the other party has clearly repudiated because it could turn you into the breaching party

- **Repudiation**
  - The rejection or refusal to honor contract obligation or terms of the agreement
  - **When does breach justify suspending or terminating a contract?**
    - If you think the other party's breach is material, you can:
      - Treat it as partial performance
        - Continue performing and then sue for damages
      - Suspend performance
        - If party cures, then resume performance
        - If party doesn't cure, then treat it as a total breach and terminate the contract
          - Risky approach because if the breach isn't material, you have now breached by suspending performance and will owe damages
  - *Walker v. Harrison*
    - Lease contract for a billboard with maintenance by Walker and during lease, billboard has tomato, graffiti, cobwebs, and rust
    - Telegraph to Walker saying repudiation of contract and that he was withholding payment but this was actually considered to be the material breach in the situation, not the failure to clean up
    - Factors the court used to determine whether there was a material breach:
      - Extent to which the injured party will obtain the substantial benefit that he could have reasonably anticipated
        - *Court says it is just a tomato and that doesn't really block Harrison from obtaining substantial benefit of sign*
      - Extent to which the injured party may be adequately compensated in damages of lack of complete performance
        - *Court says H easily could have hired someone to clean it and gotten a receipt and then been compensated in damages*
      - Extent to which the party failing to perform has already partly performed or made preparations for performance
        - *Court says H did have use of the neon sign*
      - Greater or less hardship on the party failing to perform in terminating the contract
        - *Court says it could be hard for W to not get paid for the sign*
      - The willful, negligent, or innocent behavior of party failing to perform

        - *Court doesn't think this is obviously bad faith since W does go and clean tomato in the end*
    - Level of uncertainty that the party failing to perform will perform the remainder of contract
        - *W ends up cleaning tomato so therefore, there is no great uncertainty about him performing the remainder of the contract*
- In this situation, Harrison could have:
    - Grinned and beared it while continuing to ask W to do maintenance
        - If H said do it yourself, he could treat that as repudiation
    - Had somebody else clean & claim damages bringing the receipt
    - Threatened to stop paying unless breach is cured by a certain time, *but* that risks being interpreted as repudiation too
    - Drafted the condition into the contract as an express term saying "if it isn't completed within a week of having received notice, I have the right to deduct damages" which could ensure W cleans the sign

- **UCC 2-717: Deduction of Damages From the Price**
    - Statutory option for withholding damages from the price of contract
        - But this risks being repudiation if not a material breach
    - Better to hire someone else to perform and keep the receipt then sue for damages

- **Anticipatory Repudiation**
    - When either party repudiates performance before date for performance has arrived
        - Normal repudiation: when a party repudiates after performance has already begun
    - *Hochster v. De La Tour*
        - P to work for D as a courier, sued 2 months before set to begin after D repudiated
            - **UCC 2-610: Anticipatory Repudiation**
                - When either party repudiates performance not yet due, aggrieved party may await performance for a commercially reasonable time or resort to any remedy for breach, and in either case, may suspend his own performance
                - Recipient of repudiation can:
                    - Make other arrangements
                        - Want to mitigate damages

        - Go to court immediately even before time for performance occurs
        - Ignore repudiation and await performance
            - This is at his own peril since there is a duty to mitigate
        - Repudiation can be withdrawn but NOT if there is a material change in reliance on the repudiation
            - Reliance on repudiation usually means recipient tried to get contract filled by someone else
                - Ex: got a new job, hired a new worker, etc.
            - Aggrieved party may make repudiation final simply by **saying so**, even in absence of reliance
                - Ex: write saying "if you don't retract the repudiation in 3 days, I will accept a new bid" → if they don't retract within 3 days, their right to repudiate ends (after the 3 days pass)
    - Express v. Implied Repudiation
        - Express: clearly and unequivocally state intention to repudiate
        - Implied: put it out of power to substantially perform
            - Done something that shows they will not be performing
                - Ex: A agrees to sell house to B and then sells house to C
                    - Implied repudiation because A can no longer sell the house to B and perform contract
    - *McCloskey & Co. v. Minweld Steel Co.* (not UCC)
        - Subcontractor D had trouble finding steel to build buildings and asked for P's help but P treated this as an anticipatory breach so he went and found someone else to do the job
        - Court held that D's letter was not anticipatory repudiation because they weren't stating that they wouldn't go through with contract, just that they needed help
            - Dangerous for P to treat letter as repudiation → should have waited for breach or offered to help instead because now they are the breaching party
            - Letter showed intention was not to repudiate but was an attempt to confront the problem
- **UCC 2-609: Right to assurance of performance**

- When reasonable grounds for insecurity arise respecting performance of either party, other party may demand adequate assurance of due performance and suspend his own performance until receiving assurance
    - Determined according to commercial standards
    - After 30 days, not receiving assurance *is* repudiation of contract

VIII. REMEDIES REPRISAL

1. Refresher on Expectation Damages vs. Specific Performance

- What is the rule for specific performance?
    - **R2D 359-360:**
        - When damages are inadequate, it may be appropriate to compel specific performance
            - When you can't get a substitute reasonably
                - Ex. real estate
            - When damages are too hard to calculate
            - Can't collect damages
                - Party does not have any money
    - **UCC 2-716:**
        - When goods are unique
            - Therefore cannot get a fair substitute
                - Ex. *Laclede v. Amoco*'s unique terms in their deal
        - When it is appropriate in other proper circumstances
    - Cannot get SP for personal service contracts because it violates Thirteenth Amendment for forced labor
        - But, you can order SP to employ someone/to get a job back - although there's still an argument to be made that there would be bad blood/not favorable
- *Walgreens v. Sara Creek*
    - P seeks specific performance to prevent D mall owner from leasing storefront to competing pharmacy
    - Efficiency Factors (Posner)
        - For specific performance:
            - Shifts burden to parties to figure out price
                - Bargain amongst themselves
            - Let market decide price → more accurate information
            - Court won't have to set expectation damages
            - Giving specific performance doesn't mean they have to go through with it
        - For expectation damages (cons of SP):
            - Only two parties bargaining → creates a bilateral monopoly
            - Negotiations might break down
            - Injunction for SP involves costly supervision from courts
            - Third party costs/externalities
                - Public interest

- Removes incentive for parties to price competitively because injunction creates artificial non-competitive environment

2. Measuring Expectation Damages

Expectation Damages Calculation

Two formulas (both will always come out the same)

- **Loss in value - loss avoided - cost avoided + other loss**
  - Loss in value: difference between value expected & value received
  - Loss avoided: the loss that could reasonably been avoided by finding substitute
  - Costs avoided: expenses didn't incur bc stopped performance (costs you would have had if you had gone onto perform contract)
    - Includes costs reasonably could have avoided by stopping at time of breach
  - Other loss
    - **Incidental**: expenses incurred trying to mitigate damages
    - **Consequential**: harms caused by the breach; e.g. pain and suffering
      - Consequential damages have the most limits on them
- **Lost profit - loss avoided + reliance costs + other loss**
  - Lost profit: profit would have made if K performed
  - Reliance costs: out of pocket costs (intangibles)
  - (loss in value - cost avoided = lost profits + reliance costs)

How to get from expectation damages to reliance damages → subtract profits from expectation damages

Remedies Calculation

- **Recipient/buyer's remedies - UCC 2-711/712**
  - **Replacement price - K price - cost avoided + other loss**
  - If reject goods as nonconforming, what options for buyers?
    - Cover (**2-712**)
      - Get **cover price - K price** as damages
  - If other goods out there but don't buy them
    - **2-713** - get market price - contract price
      - But buyer must prove market price
  - If no replacements are available?
    - SP (replevin)
  - **Problem 2**: Same contract, but this time, the builder breaches after the owner has paid $50,000. The owner therefore withholds payment of the remaining balance,

and gets another builder to finish the job for $70,000. The owner also incurs $10,000 of costs because of the delay. What are the owner's damages?

- **UCC 2-712 formula:**
  - **Replacement price - contract price - cost avoided + other loss**
    - This is the same as formula 1 because (replacement price - contract price) (loss in value - loss avoided)
    - UCC doesn't apply but there are parallels between buyer/recipient so it is illustrative because
    - (70k + 50k) - 100k - 0 costs avoided + 10k = 30k
- **Formula 1: Loss in value - loss avoided - cost avoided + other loss**
  - 100,000 - 30,000 - $50,000 + 10,000 = $20,000

- **Seller's remedies - UCC 2-703/706**
  - **K price - resale price - cost avoided + other loss**
  - **Lost profit + reliance cost - loss avoided + other loss**
  - What if the seller decides not to resell? Remedy?
    - Contract price - market price
      - Burden to show market price
  - What if they are unique goods that no one else wants?
    - 2-209 Action for Price (+ incidentals)
  - **Problem 1 (suppliers remedy):** A builder contracts to build a house for $100,000, and projects her costs to be $90,000. The owner breaches without having paid anything. The builder has spent $35,000 on materials and labor, but later saves $5000 by using certain materials for other jobs. What are the builder's damages?
    - **Formula 1: Loss in value - loss avoided - cost avoided + other loss**
      - **$100,000 – $5000 – $55,000 + $0 = $40,000**
    - **Formula 2: lost profit - loss avoided + reliance costs + other loss**
      - **($100,000 – $90,000 = $10,000) - $5000 + $35,000 = $40,000**

Seller/UCC 2-703 Buyer/UCC 2-711

Resell and recover damages – 2-703(d) and 2-706 K price – resale price + incidentals – cost avoided	Cover – 2-711(a) and 2-712 Cover price – K price + incidentals + consequentials – cost avoided
No resale where resale possible – 2-703(e) and 2-708(1) K price – market price + incidentals – cost avoided	No cover when cover possible – 2-711(b) and 2-713 Market price – K price + incidentals + consequentials – cost avoided
Resale not possible – 2-703(e) and 2-709 Full K price for goods identified to K	No cover possible – 2-711(2)(b) and 2-716 Specific performance or recover goods identified to K

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Cover

- **UCC 2-712(2):** "Goods not identical but commercially usable as *reasonable* substitutes under the circumstances"
    - Roughly same quality and terms but can get better/higher quality ones if similar or same quality is not available
    - Always better to cover; encouraged by the court
- *Laredo Hides Co. v. H&H Meat Products Co.*:
    - Cowhide case when H&H repudiated K, Laredo was forced to purchase hides on spot market
    - Court held that it was reasonable for Laredo to purchase from open market even though grossly more expensive because of the nature of the product and therefore could recover for cost incurred from having to replace

        - Importance of cover being 'reasonable'
            - If D shows cover is unreasonable, then P will only recover the reasonable cost of damages
- Calculating damages with cover:
    - **Price of cover - contract price + incidental damages - costs avoided**

- **Lost Volume Seller**
    - Circumstances when a seller should not have resale value subtracted from their damages because they could have made both sales (demonstrate that demand is higher than supply)
        - Establishing that the second sale is not a replacement for the initial one that was breached since they would have made that sale anyway
            - Supply must be higher than demand
    - *Davis v. Diasonics*
        - Hospital would not take the equipment so they had to sell it to another but allege they would have gotten the second sale anyway and therefore, need to recover fully from hospital in order to be in as good a position as they would have been if hospital had performed
        - Resale price same as contract price, yet can claim lost volume seller if they have capacity and profitability to make second sale
    - **UCC 2-708: Seller's Damages for Non-Acceptance or Repudiation**
        - If **2-706** doesn't fully compensate seller, give lost profits and incidentals (if resale isn't replacement for first sale)
- **Losing Contract**
    - If A and B have a contract and B breaches but A would have lost money by fully performing the contract, what can A recover?
        - A can get restitution damages for reasonable value of services they have already rendered
            - Restitution not reliance! If A was inefficient and expenditures were unreasonable, then tough to get damages
        - Courts cap at contract price even if reasonable value of performance exceeds contract price

3. Cost of Completion and Diminished Value

Diminished Value Rule

- If a breach results in an unfinished performance, you can get cost of full performance (expectation damages) or diminished market value
    - Diminished Market Value

        - The difference in market value before and after performance
    - **R2D §348(2): When to use Diminished Market Value instead?**
        - Loss in value to the nonbreaching party is hard to prove with a reasonable certainty
        - When the cost of fixing problem that D caused by mistake or nonperformance is clearly disproportionate to the diminished value D caused
            - Lurking in the background here is also the idea that the court doesn't believe that the plaintiff actually values the performance as much as the contract is worth

Diminished Market Value vs. Cost Measure	
Reasons to Use DMV	**Arguments in Favor of Cost Measure**
Economic Waste ** Often "remedying" just means tearing down a physical structure, which would be wasteful. (e.g., *Jacob & Youngs*)	Monetary Value of Land is *Irrelevant* Just b/c land turned out to be worth little doesn't mean party shouldn't have to do the work
When Difference in Price is Too Big/Disproportionate** *Peevyhouse* expanded "economic waste" – where price difference is just grossly out of proportion, it seems like it's just not worth it to remedy.	Get What You Paid For If you pay for something, you should get what you paid for (*Jacob & Young*)
Windfall Unjust enrichment of nonbreaching party (e.g., *Jacob & Youngs* – would be a windfall to give Kent all this money; he doesn't really value it at $77K)	Unjust Enrichment of Breaching Party Unjustly enriching coal mining company in *Peevyhouse* for not restoring land, when they said they would
** = *biggest factors to focus on in these cases*	Land Has a Special Value Land has special and unique status (*Peevyhouse*)

Facts	*Jacob & Young*	*Groves*	*Peevyhouse*
	Pipe used was not Reading Pipe	W: gets right to remove gravel, use G screening plant, removing G as competitor. G: gets $105K and promises that land would be restored at the end. Land was not restored.	G: gets right to strip mine P's property for 5 years. P: gets money for the lease and a promise to restore the land at the end.

Cost to remedy performance / market value differential	Cost to remedy performance: - To tear up the house, $77K Market value differential: - $0	Cost to remedy performance: - $60K to restore the land Market value differential: - $12K Ratio: 5:1	Cost to remedy performance: - $29K to restore Market value differential: - $300 Ratio: 100:1 roughly
OUTCOME	Diminished market value	Cost of completion / remedy performance	Diminished market value

- **Awarding specific performance instead of DMV**
    - Might not order specific performance because you suspect party doesn't actually really value performance as much as they are saying
        - In *Groves*, ordering SP would allow them to bargain to get closer to subjective value and they probably would have settled for a lower amount
        - In *Peevyhouse*, if they really wanted the land back, they would get it and show they actually valued the land
            - If they went through the trouble to put it in the contract, then DMV would undermine validity
                - Sometimes considered better way to get at true value but not default in the past
        - In *Jacob & Youngs*, they likely did not value pipes that much so they should give DMV

4. Limitation on Damages

Damages must be all 3:

- Avoidability
    - To what extent should the injured party avoid loss once breach occurs?
- Foreseeability
    - How can we limit damages for things a party cannot reasonably foresee?
- Reasonably certain
    - How certain does the damage amount have to be in order for the party to recover?

Avoidability

- Duty to mitigate

- Duty to try not to increase damages after a breach and, if you do, your damages will be limited
    - Limited to not include those that could have been avoided without undue risk, burden, or humiliation
        - **R2D §350**
    - Not an actual legal duty
        - Just a limitation on recovery
- Non-breaching parties should try to find a substitute and then recover for the difference!

- *Rockingham County*
    - P made a contract with D to build the bridge, but decided didn't want to, and notified builder → D continued to perform and complete performance of bridge despite notice of breach
        - D did not exert a duty to mitigate so therefore, when they sue P for damages, they will have to subtract the cost they could have avoided from stopping from the damages
- **UCC 2-704(2): Breach of contract for sale of goods unfinished**
    - Seller has a choice to:
        - 1. Stop performance and sell as salvage
        - 2. Complete goods and resell them
        - 3. Any other reasonable manner
    - Must decide using commercially reasonable judgment
        - Seller should make the reasonable decision, even though will likely get the same amount in expectation damages either way
        - Buyer must prove seller acted unreasonably
- **Mitigating Loss in Employment Contracts**
    - Standard used is whether employment substitute is "different or inferior"
    - *20th Century Fox*
        - Test is whether the other job is "comparable or substantially similar" offer → you don't have to take a "different or inferior" job
            - Policy concern: the money amount won't make her whole because there are intangible career costs – not just about a job that pays the exact same but also accounts for career costs concerns too
    - In CA, the presumption is pretty high that the job is not the same unless they're really the same job; sympathetic to employees – recognizing very low pay is in itself a lack of honor and respect
        - When making exam arguments, play down the facts by turning to trade usage
    - *Remember*: mitigating losses doesn't *require* you to take the other job → just

had the duty to take a similar/equal job so <u>if you don't, you can just have damage reduced to account for the salary you could have made</u>

<u>Foreseeability</u>

- Determination if the type of damages at issue could have been reasonably foreseen
    - *Hadley v. Baxendale:*
        - Crankshaft was broken so they asked common carrier to ship to manufacturer so that they can make a new one and the common carrier promised to send in reasonable time but they don't, and the delay caused mill to shut down and lose profits
        - Court decided that the mill shutting down and losing profits was not *reasonably foreseeable* by the common carrier
            - Reasonable scenarios that made it not reasonably foreseeable that mill shut down, such as having another shaft, mill defective in other ways
            - Under ordinary circumstances, a broken shaft wouldn't stop a mill → more likely inference
        - **Hadley Rule** - *Majority Approach*
            - Two kinds of damages:
                - <u>Damages that naturally arise from the breach itself</u>
                    - Can always recover these damages
                - <u>Damages that arise from special circumstances</u>
                    - Only get these damages if the circumstances were reasonably supposed to have been in contemplation of both parties at the time they made the contract as a probable result of hypothetical breach
            - **R2D §351- Limitation on Hadley Rule**
                - 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**
                    - "Limiting as justice requires" to avoid disproportionate compensation
                    - Using foreseeability as the limit, except on the far end where it leads to injustice – then we'll have flexibility to cap it
        - **Kenford Tacit Agreement Test** - *Minority Approach*
            - Kenford argued to get consequential damages for loss in appreciation of surrounding property

- Court considered the nature, purpose, and particular circumstances and held the parties did not contemplate the ***liability*** Erie county took on, as opposed to contemplating the loss
    - **Tacit Agreement Test:** Did the parties contemplate assuming liability for the loss? Did the breaching party **tacitly agree** to take responsibility for it?

- Policy: Why limit damages for foreseeability?
    - Premise of contract is voluntary obligation → only care about what the parties intended
        - Thus, damages should only include the ones within your reasonable contemplation when taking on the contract
    - No eggshell rule like in torts to 'take the plaintiff as they are'
        - Doing so would create too much liability for businesses

Certainty

- How certain do damages have to be?
    - **R2D §352: Uncertainty as a Limitation on Damages**
        - Reasonably certain as established by evidence
            - Mostly applies to consequential damages
            - Damages that come about as a result of breach, not the difference between contract price and resale price
                - Ex. lost profit, loss of reputation, loss of goodwill
                    - Part of "other loss"
            - To determine this, parties bring in experts and present evidence (market data, business records of similar enterprises) showing what the damages should be
            - Like doctrine of definiteness, if parties can show they actually can be determined objectively, then it won't fail
    - *Fera v. Village Plaza*
        - P and D contract to lease space in a shopping center and agree to a ten year lease → anticipatory breach by D and leased to someone else so P sues on lease for lost profits and jury awards about $200k
        - Court of Appeals uses "New Business Rule" to says that generally, there can be no lost profits for new businesses since they can't be estimated accurately
        - Supreme court reinstate jury award, saying there shouldn't be a blanket rule for new business
            - Court says that if the parties can show enough evidence of the damages to allow the factfinder to make a decision then that will work
        - What about mitigation?

- Could argue that 10 year term of lease probably suggests a duty at some point to mitigate damages so maybe shouldn't recover lost profits for the whole time period

Emotional Distress

- In general, cannot recover for emotional distress
    - Not foreseeable and not certain
    - *Add that emotional distress and consequential damages are not usually recovered under employment contracts because they are uncertain and viewed as punitive
- No damages for **emotional distress** unless:
    - Tied to physical injury stemming from breach
        - **R2D §353: Loss Due to Emotional Disturbance.**
            - Recovery excluded unless breach also caused bodily harm and breach is of such a kind that serious emotional disturbance was a particularly likely result
    - Non-pecuniary value (weddings or funerals, or something similar)
        - Foreseeable that these situations could cause emotional harm

Liquidated Damages & Limited Liability Provisions/Clauses

What happens when you try to contract around the Hadley foreseeability rule? By…

1) waiving liability for consequential damages;
2) capping liability for consequential damages; or
3) specifying the entire remedy for breach through a liquidated damages provision

- **Liquidated Damages Clauses**
    - Sum a party to a contract agrees to pay if they breach and, because of good faith effort to estimate actual damages in advance, are legally recoverable
    - Must test whether it is limited damages or penalty:
        - Legitimate Liquidated Damages **UCC 2-718/ R2D 356**
            - Reasonable in light of anticipated or actual loss caused by the breach and difficulties of proof of loss
            - **2-718(2)** also talks about deposits that are nonrefundable and says they cannot exceed $500 under any circumstances
        - Penalty
            - Not enforceable since punitive damages are not allowed in contract
- *Wasserman's Inc. v. Township of Middletown*
    - Red flag for damages to refer to gross receipts in commercial contracts and not profit since gross receipts do not necessarily reflect a party's actual losses

        - "**Second Look**": Must compare anticipated vs. actual damages to assert whether anticipated damages were unreasonable
            - Good for harm that is difficult to measure at time of formation
            - Modern trend of assessing reasonableness of liquidated damages at both time of forming K, and at time of breach
        - 2 ways of proving unreasonableness:
            - Anticipated damages were unreasonable
            - Anticipated damages turned out to be unreasonable based on actual damages
        - Courts can also consider comparable bargaining power
            - Might say that Liquidated Damages Clause would be unfair for consumer contracts of adhesion
- *Gustafson & Co. v. State*
    - Take or pay clauses → sometimes upheld
        - Common in oil/gas contracts
    - Graduated scale of liquidated damages for each day the project was delayed was held acceptable → **good faith effort to fix compensation for loss & convenience caused by delay**

- **Limited Liability Provisions**
    - **UCC 2-719: Contractual Modification or Limitation of Remedy**
        - Consequential damages *can* be limited/excluded *unless* unconscionable
            - Personal injury losses are not limitable
            - Commercial losses can be limited
        - Court may choose to sever unconscionable parts
            - Ex. cutting out the personal injury part and leaving the commercial aspect

Remedies Review

A. Two Ways of Looking At Contract Damages

1. Classical/Ex Ante - What damages would parties have assumed risk for at time of K-ing?
- What did the two parties actually intend?

2. Realist/Ex Post - Now that we have this mess, how do we clean it up, split losses equitably?

*Most of the rules we have to some extent try to balance these.
I.e. Foreseeability rule under R2D → about the damages they would've reasonably contemplated at the outset, but we also place a limit on it (so there's no injustice).
I.e. liquidated damages → we take a second look, to see if they're reasonable in light of anticipated harm but also actual harm.

B. Defendant's Arsenal of Arguments to Limit Damages:

1. Foreseeability – shouldn't have to pay for losses that couldn't have been reasonably foreseen.
2. Mitigation – shouldn't have to pay for losses you could reasonably have avoided.
3. Uncertainty – shouldn't have to pay for damages that are too speculative or hard to calculate, like lost profits for a new business, or damages for emotional distress.

C. The Remedy of Exit - only if material breach, can withhold own performance

- Everybody would prefer to use this remedy, to avoid going to court.
- Self help!
- But we learned when we did material breach that that can be risky. You have to be really certain the other party is repudiating the agreement before you have right to withhold your own performance. Otherwise you're the breaching party.

D. Two Ways of Looking at Reliance Damages

1. Classical: Expectation damages are the default rule = lost profits + reliance costs (+ other loss - loss avoided). Where profits are hard to prove/uncertain, reliance damages are simply an alternative mode of measuring expectation = ~~lost profits~~ + reliance costs (+ other loss – loss avoided)

2. Fuller & Perdue/Realist: The reliance interest may also be seen as the *primary* interest protected by contract law. Expectation damages are just a good way to protect full reliance, including hard-to-ascertain opportunity costs.

- Sometimes give reliance when expectation seems too high, or in promissory estoppel R2d 90 cases.
- So, reliance damages are usually given when: expectation profits are too hard to prove, or expectation seems too high. In R2d90 cases, reliance damages are the recommended damages.

In practice, as we've seen, reliance damages may be awarded not only when expectation damages are uncertain, but -- as in *Sullivan v. O'Connor* -- where expectation just seems too high, or where the court is skeptical about the claim itself, and reliance damages seem like the best way to "split the difference," or give rough justice. Section 90 explicitly encourages courts to limit damages to reliance in cases of promissory estoppel by saying damages "may be limited as justice requires." (On the other hand, there are promissory estoppel cases, like *Ricketts v. Scothorn*, in which expectation damages are awarded -- that fits with a view of promissory estoppel as just another route to a normal contract situation, an alternative to consideration after which all the normal contract rules kick in.)

E. Restitution -- A Remedy for All Seasons

1. *Restitution as primal remedy*

Remember, restitution is a *non-contractual* recovery--its foundation is not in promise or agreement (or reliance) but in *unjust enrichment*: P has conferred upon D a benefit, which D has unjustly retained; D should now return the benefit (or its cash value).

2. ***As an alternative remedy for breach of contract***
Though the remedy is non-contractual, a P may sometimes make use of it as an alternative route to damages for breach of contract. The main situation in which P will want to do this is one in which she has a **losing contract -- i.e. has conferred benefits well above her expected return from the K.**

- "Losing K" → when expectation is too low

3. ***Restitutionary recovery by breaching party***
Typical case: D makes a down-payment under a K; later breaches the K. D is entitled to get down-payment back offset by P's damages. While a few courts have held that a breaching party, especially a "willfully" breaching party, gets nothing, most courts allow the breaching party to get restitution, but never more than her expectancy had she performed the contract. UCC allows a deposit back less than $500 nonrefundable.

- Could be that the breaching party's damages are offset by some payment they already made.

4. ***Restitution as a flexible remedy in unenforceable contract situations.***
Think of the situations we've seen where there was a contract, but it's void for one of a variety of reasons – it's in violation of the Statute of Frauds or the statute of limitations, one party lacked capacity to contract, it's illegal, or there is some other valid defense to the contract. In those cases, P may still get restitution if she has conferred a benefit on D and D has been unjustly enriched.

- Many doctrines that can void a K – mistake, unconscionability, etc. Any time these K's are voided, the only possibility is restitution – either party getting back benefits that have been conferred on the other.

5. ***Emergency no-K situations***
Patient lies bleeding in the street. Police call an ambulance, which takes the unconscious patient to hospital, where nurses and MDs treat her. She recovers, they sue for fees.

N.B.: The most difficult issues in any restitution claim are usually issues about how to measure the benefit in the hands of the defendant. Restitution cases raise issues not unlike those in *Groves* and *Peevyhouse* -- is the fair market value of the benefit conferred the fair market value of the work done to the property, or the enhanced market value of the property itself? Unlike the *Groves/Peevyhouse* situation, where we are using market value only as a proxy for difficult-to-determine subjective value, under restitution, it really is the market value we care about, because the remedy is "off the K" so we're not concerned with divining the subjective value of the K performance to the parties at the time of contracting.

F. Measuring expectation:

1. Basic Formula: Loss in value – loss avoided – cost avoided + other loss OR
Lost profits + reliance costs – loss avoided + other loss

2. Buyer's & Seller's remedies under UCC – see 2-703 and 2-711

a. Cover/K price differential + incidentals/consequentials
b. Market price/K price differential + incidentals/consequentials
c. Action for price or SP if no resale/replacement possible
d. Lost-volume seller can get lost profits + incidentals instead [2-708(2)]

3. In case of unfinished or defective construction, if cost to complete performance or remedy defect is clearly disproportionate to probable loss in value to injured party, may recover damages based on diminution in market value caused by breach.

F. And don't forget . . . if good is unique or damages are inadequate, you can get specific performance! See UCC 2-716 for goods.

- SP is now offered way more than it historically was. Used to be offered for real property, heirlooms, special unique products.
- Now, that rule has been somewhat expanded → given whenever damages are inadequate/it's not possible to cover. Under UCC, if good is unique/other proper circumstances, expand what falls under those two categories. I.e. Laclede v. Amoco, even though propane isn't uniquely good, the K terms were unable to be replicated and so order of SP was appropriate.
- And also in case of specific constructions, SP might solve some of your problems in knowing how much ppl really valued.

G. Bad faith breach – Although normally, punitive damages are not awarded for K breach, you may be able to get punitive damages if you can prove a "tort of bad faith breach."

- This is about malicious bad faith breach. Can throw in a tort claim here and try your luck to get punitive damages.

H. And the other thing that's rare in K is <u>damages for emotional distress</u> → They usually fail under both foreseeability and certainty grounds. Can only recover for bodily injury (Hawkins, Sullivan) or known emotional events that are K's for non pecuniary values (weddings, funerals) or in employment K's when there are harassment/civil rights suits. Best for emotional damages to have receipts (of therapy, medication, etc).