Alex Mueller - Contracts Fall 2018

Introduction to Contract Law: The Basics

- What is a contract?
  - A contract is a promise that the law recognizes as a duty or for which the law provides a remedy
  - A contract is a legally recognized promise/obligation
- Where do we find contract law?
  - Rules of Contract
    - Embodied in the law, general default rules of contract law that may be contracted around
  - Restatements (Second) of Contracts – R2d
    - This is only PERSUASIVE authority
    - Embodies much of the common law of the states, but is neither exclusive nor pervasive in scope
  - Uniform Commercial Code – UCC
    - This is MANDATORY, STATE authority but only is PERSUASIVE authority at the FEDERAL level
  - Convention on Contracts for the International Sale of Goods (CISG)
    - This is MANDATORY, FEDERAL authority
    - This is a treaty between countries that governs only INTERNATIONAL, COMMERCIAL sales between MERCHANTS
- What is the purpose of contract law?
  - To help settle disputes between parties which have entered into legal obligations w/ undefined terms
  - To reinforce extralegal factors like reputation, moral principles, and reciprocity which usually force us to honor contract obligations
  - Helps to make contractual negotiations more efficient b/c there is no need to bargain over every, single term
  - To facilitate the building of social value

UCC

- Uniform Commercial Code (UCC) is a uniform body of laws governing commercial dealings
  - Has been adopted by all 50 states
    - Despite some slight variations, we will assume pure uniformity across all jurisdictions in the course
- Article 2 governs sales of goods
  - Goods are all things that are moveable at time of agreement

  - Does not apply to real estate transactions, contracts for services, contracts for intellectual property (patents, trademarks), or contracts to lease goods, what about insurance?
  - DOES apply to contracts between merchants + consumers, merchants + merchants, and consumer-consumer sale of goods (buying a bike from owner at a yard sale)
- Does NOT supplant consumer protection statutes
- It does not displace common law unless in particular conflict (§ 1-103). In essence, common law fills in the gaps that the UCC does not cover
- Parties may, subject to some limitations, vary the provisions of the UCC by agreement
  - Exceptions: good faith, diligence, reasonableness, and care

CISG

- UN Convention on International Sale of Goods (CISG) is a treaty that, having been ratified by 87 countries, acts uniform international sales law
  - In United States, can be treated as federal law that is a supreme law of the land
  - Applies when parties to a contract have places of business in states signatory to the treaty
  - If a party has multiple places of business, the place of business that has the 'closest relationship to the contract and its performance' controls
    - A contract between a U.S. subsidiary of a Chinese company + a U.S. company would NOT be subject to the CISG
  - Most U.S. trading partners (NOT the UK) are parties to the CISG
- Applies to sale of goods, similar to the UCC's Article 2
  - Where sale of goods takes place between business in U.S., UCC applies
  - Does not apply to liability of seller for death/personal injury caused by goods, UCC does
- Designed to govern sale of goods for commercial uses
  - Does not apply to consumer transactions, UCC does
  - Does not apply to sale of goods for personal use (household items)
  - Does not apply to contracts where the predominant part of the sale involves services, or to contracts involving real estate
- Parties may by contract agree that CISG does not apply at all

---

Mutual Assent

Intention to be Bound: Objective Theory of Contract

- Old Subjective Theory of Assent
  - Meeting of the Minds: actual intention of a party, rather than their words or conduct, determines its legal obligations

- Objective Theory
  - One is either bound or not bound, not by one's secret intent, but by the reasonable interpretation of their words and actions
  - Holmes: The terms of a contract will be determined by what a normal speaker of English, under the same circumstances, would think the terms meant
  - This avoids two problems w/ the subjective approach: (1) adversarial approach used to subvert purpose of contract and (2) unreliability of subjective intent
  - Promisor's intent to not be bound is not entirely insignificant, but for the most part, law looks for a sufficient expression of apparent commitment to perform
  - As long as offeror could reasonably conclude that offeree knew of offer + accepted, doesn't matter if offeree was subjectively unaware of the offer
  - R2d § 20 offers modified objective approach - we ordinarily look at the objective meaning unless one party knows/has reason to know

Rules - Manifestation of Assent

- **R2d § 20: Effect of Misunderstanding**
  - No manifestation of mutual assent (and thus no contract) if parties attach materially different meanings to their manifestations and
    - There are two reasonable meanings and neither knows or has reason to know what other meant (mutual mistake) ; OR
    - Each party knows or has reason to know the meaning attached by the other
  - You have manifestation of assent to the meaning attached by a party if:
    i. That party does not know or have reason to know of any different meaning attached by the other; AND
    ii. The other knows or has reason to know the meaning attached by the first
- **R2d § 21: Intention to be Legally Bound**
  - Don't need to intend (actually/apparently) to be legally bound in order to form a contract. However, if one manifests an intent that a promise is not legally binding, it may prevent formation of contract

Ray v. William G. Eurice & Bros.

Owners (P) entered a contract with builders (D) for the construction of a home. Builders submit 3 page building specifications. Plaintiff informs builder that he will have lawyer draw up separate contract. The new contract references a separate 5 page specification document that is dated the same as the 3 page specs. Builders sign the contract and subsequently refuse to perform after realizing the specs referenced in the contract were not the ones they submitted.Circuit court entered judgement in favor of the D on grounds that there was no "meeting of the minds" between parties, citing differences in intended meaning of an integral term. **Absent fraud, duress or mutual mistake, one having the capacity to understand a written document who reads and signs it, or, without reading it or having it read to him, signs it, is bound by his signature in law**. It is clear

that there was no fraud or duress present in the formation of the contract. If there was a mistake, it was a unilateral one made by the defendants, as the plaintiff's intend meaning of the terms is the same as expressed in the contract. Hence, the court ruled the builders **cannot avoid performance of the contract due differences in the clearly expressed terms of the contract and those it subjectively intended to be bound to**.

Offer and Acceptance - Bilateral Contracts

- *Offer*: A manifestation of willingness to enter an agreement under defined terms
- *Bilateral Contract*: Term of art referring to a contract formed by the mutual exchange of promises
- Two rules for interpreting contractual offer that appeared in the cases below:
    a. Interpretation of an offer or acceptance is not what the party making it intended to mean, but what a reasonable person in the position of that party would have thought it to mean.
    b. What can be interpreted as a definite offer should not require additional communication or expression of assent on behalf of the offerer. This is what distinguishes and offer from an invitation to make an offer.
- Classic Principles of Offer and Acceptance
    a. Power of acceptance created by an offer is terminated by by the offeree's rejection, the offeror's revocation, or death/incapacitation - 2nd Restatement Sec. 36
    b. A "qualified" or "conditional" acceptance constitutes only a counteroffer (*proposing a substituted bargain*) and is the functional equivalent of a rejection of the original contract as it applies to power of acceptance - 2nd Restatement sec. 39 & 59
    c. Common law generally provides that an offer is freely revocable at any time prior to acceptance, terminating power of acceptance, so long as notice is provided to the offeree and there is no pre-existing promise to leave offer open. Promise not to revoke over fixed period of time -- an *option* -- must be supported by consideration

Rules - Bilateral Contracts

- **R2d § 22 - Mode of Assent: Offer by One party and Acceptance by the Other**
    - A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined
- **R2d § 24 - Offer Defined**
    - An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it
        - Gives the offeree the power of acceptance
        - If offeree manifests her acceptance, a binding K has been formed

        - Offeree's power of acceptance is lost if she rejects the offer, counteroffers, delays too long in accepting the offer, (time limit may be explicit or implicit), or if offeror revokes
- **R2d § 26 - Preliminary Negotiations**
    - A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent
        - Exchanging communications about the type of things to which parties would be willing to agree (e.g. to do, to pay) does not constitute an offer
- **R2d § 36 - Terminating the Power of Acceptance**
    - An offeree's power of acceptance may be terminated by
        - counter-offer or rejection (unless the offeror has manifested a contrary intention or an intention to take it under further advisement) by the offeree; OR
        - Lapse of time; OR
        - Revocation by the offeror; OR
        - Death or incapacity of the offeror or offeree
    - Additionally, the non-occurrence of any condition of acceptance under the terms of the offer terminates the offer
- **R2d § 38 – Rejection**
    - Offeree loses power of acceptance if he rejects it, unless offeror manifests intent otherwise (e.g. keeps offer open)
    - Manifestation of intent not to accept counts as a rejection unless there is also manifestation to take offer into further consideration
- **R2d § 39 - Counter-Offers**
    - Counter-offer is offer made by original offeree relating to same subject matter with proposed substituted bargaining different from the original
    - Counter-offeror terminates power of acceptance unless offeror has manifested a contrary intention or unless the counteroffer manifests a contrary intention of the offeree
- **R2d § 43 - Indirect Communication of Revocation**
    - An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect
        - Generally, a revocation by the offeror does not become effective until it is received by the offeree
- **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
- **R2d § 58 - Necessity of Acceptance Complying with Terms of Offer**
  - Acceptance must comply w/ requirements of the offer as to the promise to be made or performance to be rendered
    - Acceptance must be unambiguous + unqualified in order for a contract to be formed. Silence, with exception, rarely amounts to acceptance
- **R2d § 59 - Purported Acceptance which Adds Qualifications**
  - A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer
- **R2d § 60 - Acceptance of Offer which States Place, Time, or Manner of Acceptance**
  - If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded
- **R2d § 63 - Time When Acceptance Takes Effect**
  - Unless the offer provides otherwise:
    - An acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror
    - However, an acceptance under an option contract is not operative until received by the offeror
      - A rejection made after an acceptance has been made does not undo an acceptance
- **R2d §69 - Acceptance by Silence or Exercise of Dominion**
  - Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
    - Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation
    - Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer
    - Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
  - An offeree who acts inconsistent with the offeror's ownership of offered property is bound by the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if he allows it

Lonergan v Scolnick

Plaintiff alleges he agreed to purchase land from defendant after making inquiry via mail. Defendant responded with letter providing a "rock-bottom" price instructing the plaintiff to act fast, as a potential buyer is likely in the coming days. Plaintiff interpreted this as an offer to purchase land at the minimum price and opened an escrow. However, the defendant had already sold the land to a third party by the time the plaintiff received the letter and "accepted the offer".The Court held there was no contract formed between the parties because a definite offer was never made. **If from a promise, a manifestation or the circumstances at the time, the "offeree" knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, then that person has not made an offer**. Court references another case within the jurisdiction in which similar communication between parties was deemed to be purely preliminary (i.e. negotiations). The plaintiff had reason to know that the communication was not intended as "an expression of fixed purpose to make a definite offer" which requires no further assent on behalf of the offeror. The letter sent by the plaintiff may be viewed as an invitation to make an offer, but not an offer in and of itself.

Izadi v. Machado Ford, Inc.

A car dealership (D) ran a print advertisement for a trade-in promotion. The promotion allowed for a minimum trade-in allowance of $3000 with the purchase of a (emphasis on the "a") new Ford. However, this offer was qualified by a provision in small print that limited the application of the allowance to two specific models that were not mentioned anywhere else in the advertisement. The plaintiff interpreted the offer as applicable to any model Ford and brought and action for breach of contract and fraud when the dealer wouldn't recognize this interpretation. The Court found that an objective interpretation of the advertisement, as **it would be perceived by a reasonable person, would be the same as the plaintiff's: an unqualified offer** for a $3000 trade-in allowance with the purchase of **any** new Ford. This runs contrary to the traditional rule that advertisements are merely invitations for offers unless they "invite acceptance without further negotiation in clear, definite, express, and unconditional language. Additionally, the Court found that the advertisement deliberately sought to make the public believe that an offer similar to the plaintiff's interpretation exists. It appealed to reasoning in which **courts have an interest, on public policy grounds, on upholding offers that sellers had intended to be deceptive**.

Normile v. Miller

Plaintiffs make an offer on a home with a time-for-acceptance provision. The realtor, with whom the defendant has listed the property for sale, modifies several terms of the offer and returns it. The plaintiffs do not immediately accept the new terms and the property is eventually sold to another party. When the plaintiffs are informed that the property was sold, they promptly accept the new terms and make a deposit. Plaintiff's seek specific performance on the grounds that they accepted a valid offer. The Court held the realtor never expressed any assent to the original terms of the contract and the "conditional

acceptance" and modification effectively serve as a rejection of the original offer and a counter-proposal. The counteroffer did not include the time-for-acceptance provision of the original offer, so there was no promise made to the plaintiffs to hold the offer open for a period of time. The defendant reserved the right to revoke the offer so long as it provides notice to the offeree, which it did. **An offer is freely revocable at any time before it has been accepted by the offeree, which terminates the offer (so longs as offeree is notified either directly or indirectly) and strips offeree of their power to revive the offer by any subsequent attempts to accept.** Thus, there was no valid offer for the plaintiffs to accept and no contract between the parties was ever formed.

Offer and Acceptance - Unilateral Contracts

- A unilateral offer generally includes an implied *subsidiary promise* not to revoke in exchange for initiation of the invited performance so long as offeree's performance is timely. In beginning to render performance, offeree is providing both manifestation of assent and consideration for this option contract
  - Part performance or tender furnishing consideration in exchange for the subsidiary promise is the basis for the *substantial performance doctrine*
  - In these option contracts, the offeree is not bound to complete the performance
- Historical Development
  - Traditional unilateral contract theory was very liberal with regards to offeror's freedom to revoke at any time. Modern approach attempted to ameliorate this
  - Llewellyn criticizes modern approach dichotomy of bilateral vs unilateral, arguing there are very few instances in which true unilateral contracts are formed. These are where there is skepticism about a party's ability to perform and hence offeror has no interest in promissory acceptance (i.e. show, don't tell)
- A unilateral contract can be viewed as a way for offerors to insulate themselves from the risk of non-performance. However, to remedy this potential imbalance, the court has adopted certain ways of protecting offerees whom must first render performance in order for the offeror to be bound to its promise
  - May also provide benefit offeree in situations where he is unsure about his ability to perform, as it allows him to attempt performance without binding him to full completion
- Some modern courts tend to disfavor unilateral contracts
  - Bilateral preferable because it establishes immediate rights
  - Will only treat as unilateral if expressly clear that promissory acceptance is inadequate and performance is necessary to accept

Rules - Unilateral Contracts

- **R2d §32 - Invitation of Promise or Performance**
- In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by performing, as the offeree chooses

  - When it was clear that the offeror sought an act and only an act in exchange, a promissory acceptance by offeree is insufficient
  - If the offeree simply began performance w/out making a return promise, the offeror would remain free to revoke until the offeree's completion of performance
- **R2d § 45 - Option Contract Created by Part Performance or Tender**
  - Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins performing
    - Only applies when it is unambiguous that it is a unilateral contract by which the offeror intends acceptance to be by performance
    - In many cases, especially where performance being invited would take time, beginning performance caries with it an implied promise for offeree to complete performance (i.e. no option contract, but a mutually binding one)
  - The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer

Cook v. Coldwell Banker

Real Estate firm (D) orally announced incentive program awarding end-of-year bonuses to agents that surpassed various sales milestones. Towards the end of the year, the defendant announced a modification to the program in which bonuses would not be paid until the following spring. Plaintiff, whom qualified for highest bonus percentage on the commission-based scale, had planned to stay with firm throughout the entire year so as to receive the bonus. The plaintiff departed from the firm after the end of the bonus cycle but prior to the awarding of bonuses. The defendant refused to pay out the bonus, resulting in the plaintiff bringing an action for breach of contract. Trial court awarded judgement in favor of the plaintiff and the defendant appealed on the grounds that the plaintiff neither provided sufficient consideration nor an acceptance to the bonus offer and that it was free to revoke. The court determined that the defendant's offer constituted a unilateral contract offer in which it would pay a bonus in exchange for continued at-will employment. The plaintiff's continued employment, which was induced by the promise of a bonus, serves as both consideration and acceptance in this unilateral contract. The court cited a general rule of contract law which states **unilateral offers may not be revoked when *substantial performance* necessary to accept the offer has been rendered**. The court found the plaintiffs continued employment, induced by the promise of a bonus, constituted substantial performance. In this light, the defendant had no right to revoke the offer and its failure to render performance of its promise is a breach of contract.

Sateriale v. R.J. Reynolds Tobacco Co.

Tobacco company (D) operates customer loyalty program which issues certificates with the purchase of its products which can be saved and redeemed for merchandise. This program is frequently advertised and runs for nearly two decades before the defendant abruptly

announces its retirement. All customers enrolled in the program are notified 6 months before the planned deprecation date. However, the plaintiffs allege that the defendants stopped acknowledging the program immediately after the notice was provided. The plaintiff's, stuck with thousands of the rewards certificates that they have unsuccessfully attempted to redeem, file a class action complaint for breach of contract. The court does not accept the tobacco company's defense that no valid offer existed since the advertisements are typically interpreted in the eyes of the law as merely invitations to make offers. The court states the rule for **an advertisement constituting a valid offer requires that the advertiser promise, in clear terms, to render performance in exchange for something requested and the recipient of the advertisement would reasonably conclude that rendering the requested performance would result in a contract**. The plaintiffs allege that the promise of the defendant in the unilateral contract was to make certain merchandise redeemable throughout the program's lifespan, which the court determines was a promise the defendant clearly breached by not redeeming certificates in the programs final six months.

Definiteness and Postponed Bargaining

- Incomplete Bargaining 2 different situations:
    a. Agreement to agree - parties have reached agreement on a number of things but left for future agreement one or more terms (*Walker*)
    b. Formal contract contemplated - parties have reached agreement on at least the major provisions of the agreement but they contemplate the execution of a formal written K (*Quake Construction*)
- Reasons for leaving terms open
    a. Parties don't realize they hold different understandings about unaddressed terms
    b. Costs of continued bargaining might not be justified
    c. A party believes that a dispute over unaddressed terms would result in their favor, either as a matter of law or due to bargaining leverage
    d. Parties may have agreed to designate certain terms for postponement
        - *Ambiguity promotes agreement* - If a dispute over a term would prevent an agreement, postponing these terms may lead to a contract that wouldn't have otherwise been formed
    e. Another form of incomplete bargaining is the "formal contract contemplated" in which parties have reached agreement on essential terms, but contemplate the later execution of a formal written contract
        - Both UCC and R2d acknowledge an agreement in principle may be enforceable even if further negotiation on certain terms or execution of a formal written contract is contemplated, though they each treat these differently

    - Another perspective holds that in executing a letter of intent, parties are binding themselves to negotiate in good faith
- When is a K sufficiently definite to be enforceable vs. when is it just an agreement to agree? 2 Threshold Questions:

    a. Evidence surrounding intent to enter an agreement: was there a clear manifestation of mutual assent?
    b. Granting that there is evidence of an intent to enter an agreement, were the terms sufficiently indefinite that we wouldn't want to enforce the agreement?

Rules - Definiteness

- **R2d § 27 - Existence of Contract Where Written Memorial is Contemplated**
    - Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations (thus not a contract)
        - This will be a fact-specific, evidentiary determination based on business norms, other communications, etc.
        - Parties can specifically provide that negotiations are not binding until a formal agreement is executed
- **R2d § 33 - Certainty**
    - An offer can't be accepted unless the material terms of the contract are reasonably certain
    - Reasonably certain defined as providing a basis for determining the existence of a breach/giving a remedy
    - Fact that one or more terms are left open or uncertain may show that manifestation of intent is not intended to be understood as an offer or acceptance

Walker v. Keith

Defendant agrees to leases plot of land to plaintiff for ten years at a fixed monthly price and with an option for the lessee to extend the lease for another ten years. The renewal option did not define a fixed monthly price, but stated that a price would be agreed upon at the time of renewal based on present business conditions and value of the rental property. After the original ten year lease expires, the two parties fail to agree upon a new rental price for the extension. In declaratory judgement proceeding to determine whether plaintiff exercised the option, the court ruled in favor of the plaintiff. The defendants appealed on the grounds that the terms of the extension lacked the sufficient certainty to be enforceable. The court maintained that **in order to be binding, an agreement must be sufficiently definite for a court to ascertain its exact meaning, and that leaving terms open for future determination without identifying a method for this determination would render an agreement unenforceable**. An agreement to agree is not an enforceable contract, hence no legal obligation exists until an agreement is actually reached. In the case

at hand, fixed rent is clearly a material term which has not been defined, nor has been defined a method for ascertaining it. The court concludes that the lessee's option was thus illusory, not enforceable, and it is not the role of the courts to force an agreement where none such exists.

Quake Construction v. American Airlines

Jones Corp. awards construction contract to Quake (P) on behalf of American Airlines (D). Jones notifies Quake that they were awarded contract and requests the license numbers of the subcontractors that it plans to use. Quake responds that subcontractors won't provide license numbers unless a signed subcontract agreement was in place. To induce agreement between Quake and subcontractors, Jones sends a letter of intent laying outlining the details of the agreement to Quake and stating that a formal contract will be ready for signing soon. At the end of the letter, it states that Jones reserves the right to cancel the letter of intent if parties cannot agree on a fully executed subcontract agreement. Terms of the contract are discussed and modified orally in following days. Immediately after a meeting with government officials and subcontractors in which Jones designates Quake as the general contractor for the project, American Airlines informs Quake its involvement is being terminated. Quake sues for breach of contract, arguing letter of intent is enforceable. Fact that parties anticipate formal agreement doesn't render prior agreements as mere negotiations. **If parties intend for terms to be binding, the lack of a formal recitation of the terms is not defeating**. Hence, a letter of intent is enforceable if parties intend for it to be binding. Illinois Supreme Court disagrees with trial court's finding that cancellation clause was an agreement not to be bound until a formal written agreement was entered. Instead, intent in the letter was ambiguous since there is no need for cancellation if parties hadn't intended the letter to have a binding effect. In light of this ambiguity, the court finds the case was improperly dismissed for failure to state a claim.

Consideration

In General

- "Bargained-for-exchange" theory:
  - Definition of consideration in which there is reciprocal inducement of a party's detriment by the other party's promise. Holmesian test of "reciprocal conventional inducement, each for the other" is commonly employed by courts.
  - If a promise is made (i.e. detriment to the promisor) and the promiser has no real interest in the detriment incurred by the offeree in exchange, the promisee's detriment is simply incidental or conditional to their receipt of the benefit, not consideration
  - **Actual** negotiation between parties isn't necessarily required
  - Reflected in R2d § 71
- "Benefit/Detriment" theory:

  - Consideration is defined in terms of benefit to the promisor or detriment to the promisee (See *Hamer*)
  - Has deep roots in Anglo-American common law and has largely been replaced by the bargained-for-exchange theory
- Contractual disputes on the basis of insufficient consideration are rare.
  - They are of much greater academic/intellectual significance than practical.
  - If they do arise, it is typically in the context of contract modifications, options contracts, or family agreements
  - Hence, differences in the two theories about seem to be marginal since nearly every contract will satisfy both with the exception of some family promises or edge cases that may go unenforced under the bargain theory
- Illusory Promise: a promise that appears on its face to be so insubstantial as to impose no obligation on the promisor. Promisor is not bound to anything - performance is optional

Rules - Consideration

- **R2d § 71 - Consideration**
  - To constitute consideration, a performance or a return promise must be bargained for
  - A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise
  - The performance may consist of:
    - an act other than a promise, or
    - a forbearance, or
    - the creation, modification, or destruction of a legal relation
  - The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person
- **R2d § 79 - Adequacy of Consideration; Mutuality of Obligation**
  - If the requirement of consideration is met, there is no additional requirement of:
    - Benefit to the promisor or a detriment to the promisee (formalizes departure from benefit/detriment); or
    - Equivalence in the values exchanged

Hamer v. Sidway

Uncle promises nephew $5000 if he refrains from smoking, drinking, gambling, and cursing until he is 21. Nephew turns 21 and Uncle informs him that he intends to give him, but will hold it $5000 on interest. Uncle dies without paying anything and nephew sues for breach of contract. Estate contends there was insufficient consideration. Court acknowledges definition of consideration which consists of any right/profit/interest/benefit accrued to a party **or** some forbearance/detriment/loss/responsiblity undertaken by the other party. Court does not consider whether the consideration is of any substantial value, simply that it

is promised or done by a party in exchange for the promise made to him. Abandoning a legal right or freedom of action in exchange for a a promise is meets this definition. Thus, the court rules that the nephew placing a limitation on his freedom of action (i.e. drinking, smoking, etc.) upon faith of the uncle's promise is sufficient consideration, whether or not it was of any legal benefit to the uncle.

Pennsy Supply, Inc. v. American Ash Recycling Corp.

Paving subcontractor brought breach of contract/warranty action against defendant, seeking to recover costs it had incurred because of defective aggregate that it obtained from recycling company. Defendant offered aggregate for free though never indicated that it was defective. Trial court dismisses claim for lack of consideration in contract formation. Court cites "Bargained-for-exchange" theory in which the detriment incurred must be the **"quid prop quo" of the promise and the inducement for which it was made**. In the agreement, the relationship between the consideration and the promise was one of **reciprocal inducement**. The court determines that these elements were present. The avoidance of the disposal cost induced the defendant to offer the aggregate for free. Likewise, the promise of the aggregate induced the plaintiff to incur the cost of collecting and taking ownership of the aggregate.

Dougherty v. Salt

An aunt issues a promissory note for $3,000, payable at her death, to her 8 year old nephew for being a "nice boy". Aunt dies and the boy's guardian brings action against executrix of her will. Appellate court reverses trial courts dismissal, holding that the note was sufficient evidence of consideration. Court held that the note was a voluntary and unenforceable promise of an executory gift. The promise was neither accepted or offered for any other purpose (no reciprocal inducement), nor was not conditional on anything other than the aunt's death.

Marshall Durbin Food corp. v. Baker

In attempt to retain executives from leaving the company due to uncertainty about the future of the company, majority owner enters into agreement with plaintiff. The agreement provides entitlement to termination/early retirement compensation triggered by specific conditions, so long as he maintains his employment at will. Among these conditions was death or incapacitation of the majority owner. The majority owner falls terminally ill and is declared incapacitated. Plaintiff announces his resignation, but the board of directors claim the agreement was not valid and voted to repudiate it. Plaintiff sues for breach and company asserts lack of consideration as an affirmative defense. Trial court rules in favor of plaintiff and defendant appeals. Court rejects defendants claim that plaintiff provided no consideration since he was not bound to a promise to refrain from seeking employment. The plaintiff offered consideration by continuing his employment until condition was triggered, which is the acceptance of a unilateral contract. The court found the plaintiff's continued employment to have **induced** the company's promise - the purpose (retaining management during a period instability) for which it was offered. Hence, there was consideration for the contract.

Contract Formation Under UCC Article 2

UCC and Mutual Assent

- **UCC**: Uniform law proposal, seeking to govern the sale of goods, that must be enacted by a state legislature to take effect. Preexisting principles of common law supplement the UCC unless they conflict.
  - Has been adopted either partially or in whole by every state
  - Applies to both consumer and commercial goods
  - Goods generally defined as moveable property. IP, real estate, leases, and services are not goods
- Predominant Purpose Test:
  - Used to determine if transaction falls under scope of UCC Article to if it is for a mix of goods and other forms of property/services
  - It does this by attempting to ascertain the primary purpose of the transaction
- Formation under the UCC
  - More liberal approach to indefiniteness of terms than the common law, emphasizing the parties intent to be bound even if some terms are left open.
  - § 2-204. Formation in General
    i. A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract
    ii. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined
    iii. Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy
  - § 2-305: Allows contract even if open price term and supplements reasonable price at time of delivery, unless parties only intend to be bound insofar as a fixed price can be agreed upon.

Jannusch v. Naffziger

Defendant purchases food truck business, including the truck itself, from plaintiffs. While having paid $10,000 for the right to purchase the business but not signing a formal contract, defendant takes ownership and begins operating the business. After the income was lower than expected, defendant tries to return food truck. Court rules that **UCC should govern this transaction after applying the predominant purpose test, as it was predominantly for the food truck and not the intangible components of the business**. While defendants contend no contract existed due to incompleteness of terms, court found that the essential terms of the contract had been defined as required for enforcement under UCC. Additionally, **parties expressing intent to be bound while some terms are still indefinite is sufficient to establish a contract.** The parties' conduct, by transferring

the goods, clearly show the sale has taken place. That the signing of a formal written contract was still outstanding does not make the agreement unenforceable under certain conditions. Hence, returning the truck was breach of contract.

E.C. Styberg Engineering Co. v. Eaton Corp.

Engineering company (P) sues auto-part manufacturer (D) for breach of contract. Parties began negotiated agreement for P to custom manufacture part for D's transmissions. Since additional machinery needed to make custom part, P needed to secure minimum-purchase contract to cover the capital investment. D responded with letter indicating willingness to commit to minimum quantity. While negotiations still ongoing, production of initial units begin and D cancels order. Court cites Ohio's adoption of UCC stating a contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract (i.e. intent to be bound). However, **there is still the requirement for essential terms of the contract to be defined**, including the quantity. The communication between parties clearly showed that negotiations over these terms were still ongoing. Additionally, the purchase order for 250 units at quoted price does not show intent to be bound to minimum quantity of 13,000 units. Hence, court found that there was no contract.

Qualified Acceptance: Battle of the Forms

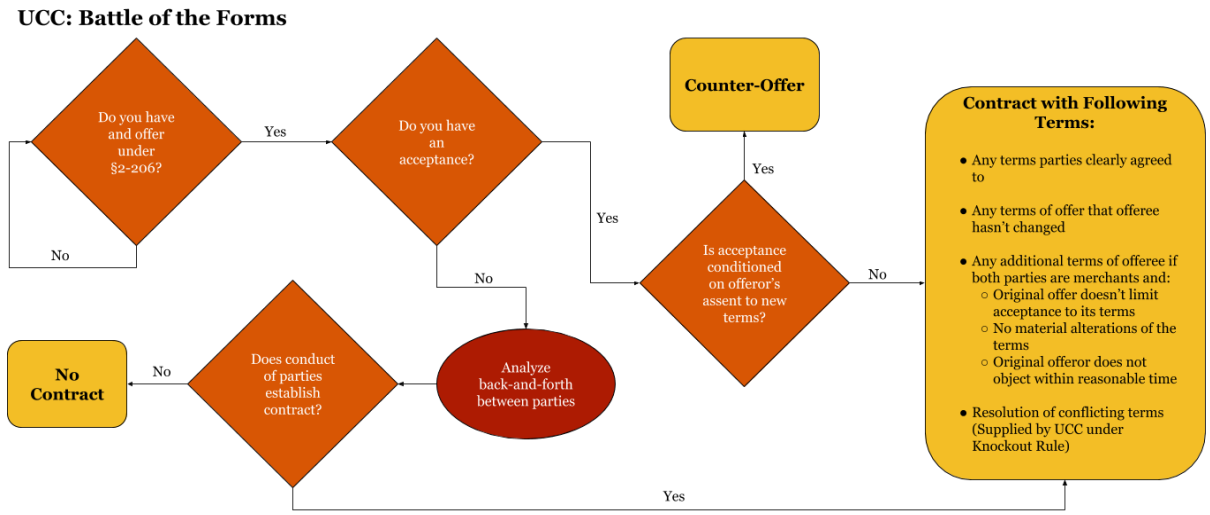
- Common Law Approach
  - Mirror Image Rule - Varying acceptance has the effect of only a counter offer. Offeror is master of the offer and any attempt to accept according to different terms is a rejection and a new offer in which the original offeree assumes role as master.
    - Restatement (Second) §59 appears to support this rule, though *comment a.* indicates Restatement is trying to steer courts closer to the UCC.
  - Last Shot Rule
    - A party impliedly assented to and thereby accepted a counter-offer by conduct indicating lack of objection to it.
    - Both parties submitted their own terms, but terms last submitted prior to performance control the contract
    - Tends to favor sellers over buyers since sellers typically "fire the last shot" (i.e. send the last form). Buyers then accept by performing (receiving goods)
- Improvements over common law approach
  - UCC treatment of varying acceptance is viewed as an amelioration of strict mirror image rule, as it permits non-matching communications to form a contract if the parties apparently intended that they should. In many contexts, terms of offer an acceptance are rarely identical
  - CL Last shot rule can drag out negotiations since last form is what controls. It also enables unsophisticated persons from being exploited by last offeror

Rules - Qualified Acceptance

- **UCC § 2-206 - Offer and Acceptance in Formation of Contract**
  - Unless otherwise unambiguously indicated by the language or circumstances
    i. An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances
    ii. An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably (within a reasonable time) notifies the buyer that the shipment is offered only as an accommodation to the buyer
      - "But" clause - Acknowledges the sending of non-conforming goods, but doing this to accommodate buyer. Permits buyer to retain and pay for them or reject the (hence defeating the contract). This is not seen as an acceptance but as a counteroffer by the seller (no risk of breaching buyers original offer)
  - Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.
- **UCC § 2-207 - Additional Terms in Acceptance or Confirmation**
  - Offeror's definite and seasonable expression response to offer is valid, even with additional or different terms, unless acceptance is expressly made conditional on offeror's assent to new terms, in which case it constitutes a counter offer.
  - The conditional nature of the acceptance, to the extent necessary to constitute a counter-offer, must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless additional/different terms are included in the contract.
  - The changed/additional terms become part of the contract between merchants unless:
    i. the original offer limits acceptance to its terms
    ii. they materially alter terms of the original offer
    iii. offeror objects to new terms within a reasonable time from notification
  - Where acceptance is "expressly conditional", conduct by parties recognizing existence of a K is sufficient to establish K even where the writings of the parties do not otherwise establish a contract. In these cases, terms are writings on which parties agree along with supplementary terms
  - Comments
    - Where parties are not both merchants, there is still a K, but additional terms are only proposals to modify and must be assented to as a modification

    - Knockout Approach - Where there are conflicting terms in different forms, both terms dropout and term is supplied by UCC default
- **CISG (Art. 16)**
    - Appears to follow common law approach similar to mirror image rule
    - Material changes are counter-offer, but different terms that are not material nor objected to become part of K.
    - Material terms include: price, payment, quantity, place/time, etc. Thus most changes are considered material

Battle of the Forms: Visualized



Princess Cruises, Inc. v. General Elec. Co.

P brought suit against D for breach (contract & express warranty) seeking to recover revenue lost while a ship was out of service for repair in excess of the period agreed to in the contract. Lower court entered judgment shipowner on breach of contract claim. D appealed, contending UCC was improperly applied. Applying the primary purpose test, court determines the contract was for services (ship repair) instead of sale of goods. Thus, contract guided by common law and not the UCC. **Under the common law, an acceptance that varies the terms of the offer is a counteroffer which rejects the terms of the original offer. Additionally, an offeror who proceeds under a contract after receiving the counter offer can accept the terms by performance**. P's performance and silence about the modified terms gave D every reason to believe P assented to new terms and contracts. Since modified terms of contract limited liability of D, court reverses and remands lower court's original judgement for P.

Brown Machine, Inc. v. Hercules, Inc.

Seller of manufacturing equipment (P) sued buyer (D) for breach of indemnity clause. D submitted purchase order which contained language that expressly limited acceptance to

the terms stated and any additional/modified ones are rejected unless agreed to in writing. P responds with order acknowledgement, which contained all purchase order terms plus indemnity clause. Trial court entered judgement for P and D appealed. Applying UCC, CoA determined D's purchase order constituted an offer, not an acceptance, because the initial price quotation was only an invitation to make an offer (i.e. D would not have reasonably believed price quotation to be an offer). UCC holds that an offeree's response to an offer operates as a valid acceptance, despite new/modified terms, unless offeree's acceptance is made expressly conditional on offeror's assent in which case the acceptance operates as a counter-offer. Court rules that P's acceptance of purchase order was not made "expressly conditional", meaning it did not clearly manifest its unwillingness to proceed with the sale unless D agreed to additional terms, therefore it was not a counteroffer but an acceptance with additional terms. Under UCC, **such terms of a qualified acceptance become part of the contract unless (1) the offer expressly limits acceptance to its terms; (2) they materially alter terms; or (3) original offeror provides notice objecting to these terms within a reasonable time**. Since the purchase order limited acceptance to its terms, the additional indemnification provision did not become part of the contract. Thus, court rules there was no breach.

Paul Gottlieb & Co., Inc. v. Alps South Corp

P brought action against D seeking damages due to D's nonpayment of bill in a contract to purchase fabric. D had grew increasingly discontent with the quality of P's fabrics. D asserted counterclaim for breach of warranty. Both parties were awarded damages, but D was awarded significantly more in the counterclaim. TC asserted that limitation of P's liability in finished goods contract is considered, under UCC, **a material alteration and is thus not part of the contract**. P appealed. Court identified Florida code adopting UCC which provides standard recitation of the UCC qualified acceptance rule. Typically, terms that materially alter a contract would result in surprise if incorporated without express awareness by the other party. Thus, D **must show that it cannot be assumed a reasonable merchant would have consented to the additional term**. Court holds that limitation of damages is not the type of material term which would cause surprise or hardship, as explicitly identified in UCC § 2-207 comment 5. Thus, court rules TC erred in awarding damages beyond the limitation

---

Electronic and Layered Contracting

In General

- Browse-wrap terms: internet provider has established terms of use of its website. Terms say that by using the site, the user agrees to the provider's terms.
  - Terms normally accessible by clicking a button, but user is not required or even encouraged, to scroll through terms and is not required to click any agreement button.

  - User's purported agreement to provider's terms comes simply from browsing the site
    - e.g. "by accessing/browsing/using this site, you acknowledge that you agree to be bound by these terms. If you do not agree to these terms, do not use this site."
    - Browse-wrap terms NOT considered part of the contract
      - Rationale - Do not necessarily know of the terms so you could not make a choice to accept
- Clickwrap terms
  - Before completing the purchase of the product, the purchaser must scroll through the seller's terms of sale and click an "I agree" button. If the purchaser refuses to do so, the seller will not complete the sale
  - Treat additional term as an accepted part of the K unless unconscionable
    - Rationale - assume that if you clicked, you made a choice + made an autonomous decision
- Shrinkwrap agreements
  - Purchaser orders a product and receives it. Often, but not always, a warning on the outside of the package informs the purchaser that the product contains the seller's contract terms + that the use of the product constitutes the purchaser's agreement with those terms. After removing the wrapping, the purchaser can inspect the product and review the contract terms
  - Terms tell purchaser that he may return product to seller w/in a certain # of days
  - Terms also say that if the purchaser does not return the product w/in that period of time, the purchaser agrees to the seller's contract terms.
  - Perspective A (Layered/Rolling Theory) - Ps do not enter contract at the time of purchase, but by expressly providing the terms and conditions with delivery of goods. Retaining the goods beyond the specified period is an acceptance
    - Burden falls on seller to show reasonable invitation in clearly expressed terms
    - Vendor makes offer by shipping goods and is thereby the master
    - Easterbrook identifies this as the most efficient approach, as it provides predictability and lowers transaction costs
    - UCC § 2-207 does not apply under this approach because no binding agreement exists before delivery, hence no terms are changed or modified
  - Perspective B - P's enter agreement at time of purchase. Any terms and conditions that were not expressed at the time of purchase (i.e. shrinkwrapped terms) are thus viewed as proposal for additions.
    - UCC § 2-207 establishes rule that proceeding with contract after a change or addition in terms is no sufficient to show consent. Not binding unless party expressly agrees.

- Easterbrook: This would require sellers of goods to disclose full terms and conditions at the point of sale
  - Might be unreasonable or too burdensome, especially where there are several terms/conditions

DeFontes v. Dell, Inc

P brought a class action suit on behalf of purchasers of D's computers and service contracts. D contends the proceedings and compel arbitration as required by the terms and conditions agreement and that, by accepting delivery, the purchaser agreed to all terms. The document did not state that the purchaser could reject the terms by returning the computer, but did provide that the customer could return the computer if not satisfied. TC found that the opportunities to review the terms and conditions were insufficient to give rise to a contractual obligation. D appealed. CoA holds that a when a product is delivered with a shrinkwrap agreement, additional terms become part of the contract, provided the agreement expressly gives the consumer the right to reject by returning the product for a refund in a reasonable time. However, the **purchaser of goods will only be bound by additional terms in a shrinkwrap agreement if the agreement makes clear that the purchaser can reject the terms by returning the goods** It is unreasonable to expect a seller to inform a consumer of every term at the moment of a purchase. **Formation is complete once the purchaser accepts the terms after a reasonable time to reject**. Since terms and conditions failed to make clear that it could reject terms by rejecting goods, court rules the additional shrinkwrap terms are not binding. TC decision was affirmed.

Feldman v. Google

P bought ads from D through pay per click advertising, where he'd be charged every time someone clicked on his ad. P contends that he did not have notice of and did not assent to the agreement, despite "Yes I agree to terms" before being allowed to proceed with ad purchase (this is necessary step). **A "clickwrap" internet agreement will be enforced if it sufficiently provides the user reasonable notice of the agreement's applicable terms and conditions.** Traditional contract law principles apply to click-wrap agreements: **need reasonable notice of terms and manifestation of assent**. Click-wraps normally achieve both. Court found that a reasonably prudent internet user would have been aware of terms and that P manifested assent by clicking "Yes I agree". Thus, the terms of the agreement were binding despite his failure to read them.

Hines v. Overstock

P did not scroll down to the bottom of the page to view the terms because it was not necessary to do so to effectuate purchase. D attempts to enforce arbitration clause contained in these terms, arguing that visitors accept them when making purchase on the site. Link to terms not prominently displayed, nor did not prompt users to review the terms prior to the purchase. **An Internet purchase agreement that fails to provide a consumer with adequate notice of its terms and conditions is not enforceable**. Court

holds that this does not constitute actual or constructive notice of the terms, hence the arbitration clause is not binding.

Promissory Estoppel

Promissory Estoppel in General

- Promissory Estoppel
  - Unbargained-for reliance as a substitute for consideration in contractual enforcement

Rules

- **R2d § 90 - Promise Reasonably Inducing Action or Forbearance**
  - Promissory estoppel will be found when:
    i. The promisor reasonably expects his action or promise will induce action
    ii. Promisee acts in reliance on this promise
    iii. Injustice may only be avoided through enforcement
  - Remedy will be limited by what justice requires (see reliance damages)
  - Does not explicitly use "detrimental reliance" language, but the phrase is often used to refer to that section's requirement that the promise induce "action or forbearance" by the promise
- General rule in land transfers: when the donee has made substantial improvements to the land in reliance upon the promise to convey the land, courts will enforce the promise even if no consideration

---

Promissory Estoppel in Charitable and Family Contexts

- Tend to be gratuitous, not part of bargained-for-exchange
  - Most promises in the family context are actuated by feelings of affection and altruism rather than by the expectation of quid pro quo.
  - The extent to which the law imposes legal obligations between persons in the family context is, for the most part, based on the relationship of the parties
- Promissory estoppel provides court with a tool to reach equitable resolutions to intra-family disputes
  - Makes enforceable what would otherwise be an unenforceable promise, when there has been reliance on that promise
- Charitable Subscriptions
  - R2d §90(2) states no consideration or reliance necessary for charitable promise to be enforceable
    - Court's have been extremely reluctant to apply this

- *King* Court - needs to be promise with donative intent and then reliance on that promise

Harvey v. Dow

D, parents of P, own land and promise to give land to son and daughter at some point in the future, thought there is a great amount of indefiniteness in the promise. D helps P build house on the land, including doing the construction, obtaining permits, and securing line of credit to finance it all. However, P ultimately has falling out with family. D refuses to give her the deed to land which P needs for a mortgage. The promise relied upon need not be express, but can be inferred from the other party's conduct. In this case, P's encouragement and assistance with both the construction of and improvements made to the home appear to be such **conduct that implies a promise** and that D should **reasonably expect to cause reliance** by P.

King v. Trustees of Boston University

MLK Jr made decision to deposit manuscripts and other materials with the Trustees of Boston University (BU) (D). He sent letter stating "I intend each year to indicate a portion of the materials deposited with [BU] to become the absolute property of [BU] as an outright gift from me, until all shall have been thus given to [BU]. In the event of my death, all such materials deposited with [BU] shall become from that date the absolute property of [BU]." When the materials were deposited, BU indexed the papers, made them available to researchers, and hired trained staff to take care of the papers and assist researchers (in reliance on promise). Upon MLK's death, his wife (P), sought the return of the materials to his estate. P filed suit and TC determined that MLK made an enforceable, charitable pledge to D. P appealed, arguing there was no indication of bargained-for-exchange that would have bound MLK to his promise. CoA defined charitable pledge as an "oral or written promise to do certain acts or give...property to a charity or for a charitable purpose". **In order to be enforceable, there must be promise to give property to a charitable institution and consideration or reliance on the promise.** CoA found MLK expressed intent in his letter to transfer property in installments and then absolutely upon his death, which might reasonably be construed as a promise to make a charitable pledge. Additionally, the indexing of the papers and other activities by D went beyond that obligated of a simple bailee, evidence of D's reliance to eventually take full ownership of the property. Thus, TC judgement affirmed.

Promissory Estoppel in Commercial Contexts

- UCC
  - Promissory estoppel is not recognized as a defense to non-enforcement under the UCC
- How do PE cases fare under traditional bargain contract theory
  - *Katz*

        - P incurred no legal detriment, as he had no right to continue his employment
    - *Aceves* - hard to see an acceptance
        - PE is a more natural fit than a typical K
        - Very indefinite terms - what constitutes "working with someone"?
- Option Contracts
    - An option contract can be made binding and irrevocable by subsequent action in reliance upon it it even though such action is neither requested nor given in exchange for the option promise
    - When an option is conditioned upon a performance of certain acts, the performance of the acts may constitute a consideration to uphold a contract for option. However, there is no such condition imposed if the acts wer not intended to benefit nor were they incurred on behalf of the option
        - Distinction from unilateral contract is fuzzy?
- Unilateral Contracts
    - Offer inviting performance (and not promissory acceptance) caries implied promise not to revoke once performance begins. The start of performance serves as consideration which makes subsidiary promise binding
    - Merely acting in justifiable reliance on an offer may, in some cases, serve as sufficient reason for making the subsidiary promise binding (see §90)
    - Reasonable reliance resulting in a forseeable prejudicial change in position affords a compelling basis for implying the subsidiary promise not to revoke

Rules

- **R2d § 87 - Option Contract**
    - An offer is binding as an option contract if it:
        - Is in writing and signed by the offeror, recites a purported consideration for the offer, and proposes an exchange on fair terms within a reasonable time; OR
        - Is made irrevocable by statute
    - An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice
- **R2d § 45 – Option Contract Created by Part Performance**
    - If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response there to, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered with the time stated in the offer
    - Comment b - Main offer includes an necessarily implied subsidiary promise that if part of performance is given (i.e. consideration), offeror will not revoke offer and acceptance will occur when performance is complete.

- **UCC §2-205 Firm Offers**
  - An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror
    - Gives assurance that it will be held open, even where offer not supported by consideration
- **UCC 2-104: Merchant + Between Merchants**
  - "Merchant" means someone who deals in goods, even if employ someone else to do the dealing

Katz v. Danny Dare, Inc.

D offers P to pay an annuity in exchange for his early retirement. P acquiesces and eventually starts working part-time at another business. D ceases payments and is sued. Trial court rules in favor of D, reasoning agreement wasn't enforceable because P didn't have to do anything/give up any legal right and the alternative was termination of his employment. Upon appeal, CoA reviews case. While not a contract because Katz incurred no legal detriment, as he had no unconditional right to remain employed, it could nonetheless be enforceable under theory of promissory estoppel. Court holds that **in order for the doctrine of promissory estoppel to apply, there must be:**

1. **A promise**
2. **Detrimental reliance on that promise**
3. **Only way to avoid injustice is to enforce the promise**

CoA finds that there was clear and definite promise. It also determined that P voluntarily gave up earnings to his own detriment in exchange for the promise. It can't be said that termination was P's only alternative, as it was clear D was taking every measure to avoid doing so. Finally, court held corrective justice was necessary as there is no other way for P to recover lost earnings in reliance on D's promise. Hence, the court reverses trial court's decision.

Aceves v. U.S. Bank, N.A.

P defaults on mortgage and files for Chapter 7 bankruptcy. D, who purchased mortgage, promises to work with P on reinstatement/loan modification if P files for less protective Chapter 13 bankruptcy. D forecloses and doesn't attempt to co-operate until after the home was auctioned. P brings action seeking relief for promissory estoppel, among other claims. Court identifies requirements for promissory estoppel claim in CA as:

1. **A promise on clear and unambiguous terms**
2. **Reliance by promisee**
3. **Expectation of reliance must be reasonable and forseeable by promisor**

4. **Promisee was injured by reliance**

The court determined that D's promise was unambiguous: it wouldn't foreclose without first engaging it negotiations. Additionally, the court held that D should have foreseen P's reliance on the promise because it was offered for the sole purpose of inducing P to file Chapter 13, which it did. Finally, P's reliance on the promise resulted in several rights and protections under Chapter 7 bankruptcy to be surrendered and this ultimately allowed D to foreclose. Thus, the court determined P stated a claim for promissory estoppel.

Berryman v. Kmoch

P and D enter agreement for option contract for the purchase of land. D has right to exercise option within 120 days in exchange for providing $10 or "other valuable consideration". D never actually makes the payment and P requests a release from the option days later. P sells the land to another party and D attempts to exercise the option. P seeks declaratory judgement that option is null and void. Court holds that option contracts require consideration in order to be binding; **an "option contract" without consideration (or reliance that can satisfy promissory estoppel) is no more than a mere offer to sell**. Court rejects the promissory estoppel defense as P could not have reasonably relied on the option while knowingly failing to pay $10. Thus, in the absence of consideration, there is nothing here more than an offer to sell the land. Thus, D's receipt of reliable information that the land had been sold served as an effective revocation of the offer

---

Restitution

Unjust Enrichment and Pure Restitution

- Restitution is a remedy used when one person is unjustly enriched at the expense of another, typically when there is a failure to exchange promises/some other problem in K formation
- Two central elements of restitutionary recovery:
    a. Enrichment of one person - Some sort of benefit conferred upon an individual unofficiously
        - Person acting officiously (i.e. "thrusting" their services on another and demanding payment) is not entitled to restitution
    b. Circumstances where the retention of benefits without recompense would be unjust to another person
        - Person acting without intent to charge (i.e. offered as a gift) is also not entitled to restitution
- Contract implied in law
    – An obligation imposed by law, regardless of either parties assent, applied as a legal fiction to remedy unjust enrichment

  - Commonly referred to as a quasi-contract, though restitution and unjust enrichment don't always arise in contractual contexts
  - Unlike true contracts, they do not arise under the traditional bargaining process and are not subject to the same rules
- Contract implied in fact
  - Distinct from restitutionary claim insofar as the party receiving the benefit requested it
  - Law infers a bargain to pay
  - Like express contracts, contracts implied in fact are real contracts

Rules - Restitution

- **Restatement (Third) on Restitution**:
  - § 1 - A person who is unjustly enriched at the expense of another is subject to liability in restitution
  - § 20/21 - Protection of Another's Life or Health/Property
    - A person who provides care required for the protection of another's health or property is entitled to restitution to the extent needed to prevent unjust enrichment (measured by a reasonable charge for the services in question), if the circumstances justify (i.e. emergency/necessary services OR reasonable to assume person would consent) the decision to intervene without request

Credit Bureau Enterprises, Inc. v. Pelo

D involuntarily hospitalized and refuses to provide compensation for hospitalization because it was both unnecessary and agreed to under duress. Hospital assigns claim to P for collection. P ultimately unsuccessfully sought judgement in small claims court and appealed. Decision was reversed and D appealed. Court references Restatement of Restitution §116 which asserts *a person who has supplied services to another (with intent to charge), despite acting without the other's consent, is entitled to restitution if the services were necessary to prevent the other from suffering serious harm and there was no reason to know the person would not consent**. Facts surrounding D's hospitalization demonstrate that it was necessary at the time. Thus, D's refusal to assent to an express contract is irrelevant because he is legally obligated to pay for his services under an **implied contract in law**.

Watts v. Watts

P and D ended a nonmarital cohabitatation relationship. P brought action claiming that she was entitled to equitable division of the couple's assets. Lower courts dismiss P's case for failure to state a claim. Court ultimately determines that P is able to a claim on two separate theories of recovery. The first of these theories is that P quit her job and career training in reliance on D's promise to support the family. The court holds that a change in one's circumstances in performance of an agreement seems to suggest there was indeed an agreement. Further, other courts have recognized domestic contributions as adequate

consideration in an agreement to share property. Hence, the court rules D has pleaded the facts necessary to state a claim for breach of contract. The second theory of recovery was based onf D's acceptance and retention of P's services (both domestic and financial) with full knowledge of P's expectation of sharing wealth accumulated during their relationship. Court holds that **to recover for unjust enrichment, P must show that a benefit was conferred on D, knowledge/appreciation of the benefit by D, and acceptance and retention of the benefit under circumstances making it unequitable to do so**. Court determines P is able to demonstrate all of these elements and is therefore able to state a claim.

Promissory Restitution

- Bears similarity to both classical contracts and pure restitution
  - Like classical contract insofar as the obligation rests on the assent of the promisor
  - Like pure restitution insofar as no bargain-for-exchange has taken place
- Material Benefit Rule
  - There is sufficient consideration in promise to pay for past services if promisee confers a material benefit upon the promisor, hence these type of promises are enforceable
  - Ratification theory - Promise to pay for material benefit accrued in the past can viewed as a ratification and therefore an implied invitation of this benefit
  - R2d § 86 asserts a variant of this rule
  - Not accepted by all courts
- Classic View
  - Moral obligation is not sufficient consideration by itself. The only exception is in cases where some obligation had previously existed but has since become unenforceable (e.g. due to passage of time)
  - While an individual may be bound by moral conscience to recompense for past services rendered, they are not bound by law
- Difference from pure restitution
  - Promissory restitution does not do much more than pure restitution, but such differences occur at the margins

Rules

- **R2d § 82 - Promise to Pay Indebtedness**
  - Promise to pay a prior contract debt is binding if the indebtedness is still enforceable
  - Following facts operate as such a promise unless otherwise indicated
    i. Voluntary acknowledgement of prior debt
    ii. Voluntary transfer of money made as interest payment for prior debt
- **R2d § 83 - Promise to Pay Indebtedness Discharged in Bankruptcy**

  - An express promise to pay all or part of an indebtedness of the promisor, discharged, or dischargeable in bankruptcy proceedings begun before the promise is made, is binding
- **R2d § 84 - Promise to Perform a Voidable Duty**
  - A promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise, is binding
- **R2d § 85 - Promise to Perform Voidable Duty**
  - A promise to perform a voidable contract is binding
- **R2d § 86 - Promise for Benefit Received**
  - A promise made in recognition of a previous benefit is binding to prevent injustice
  - A binding promise must rest on an actual benefit, as opposed to pure gratitude or sentiment and must not have been conferred as a gift

Mills v. Wyman

Son of D returns from voyage at sea gravely ill and is too poor to seek care. P gives provides him with shelter and comfort until he died. D writes letter to P showing gratitude for the care provided and promises to recompense for any expenses that had been incurred. D breaks promise and P subsequently brings action to recover. Court identifies the general rule which maintains promises offered without consideration cannot be enforced, regardless of the moral implications. While acknowledging that some courts have recognized a moral obligation as sufficient consideration to a promise, the court asserts that this rule is to be limited to cases where some other consideration had previously existed. The services provided by P occurred before any promise was made and were not a benefit to D (in the legal sense). Thus, the court held that while D may be bound by conscience, he is not bound by law.

Webb v. McGowin

P falls off of mill and is severely injured while attempting to prevent it from falling on top of D. P's injuries render him physically unable to work and D promises to pay $15/week out of gratitude for saving his life. D kept promise and made payments for 8 years until his death. P bringing action against D's estate for refusing to continue payments. The court applies rule where **there is sufficient consideration in promise to pay for past services if promisee confers a *material benefit* upon the promisor**. It also acknowledges the rule applied in *Mills v. Wyman* where for a moral obligation to constitute consideration there must have existed some prior legal obligation. However, it identifies qualification to this rule in cases where a material benefit is conferred. In such cases, subsequent promise to pay is a *ratification* of the benefit provided, suggesting a previous request/invitation for the benefit was implied. Saving D from serious bodily harm is a material benefit and it was provided to P's detriment. Hence, the court ruled that the agreement is enforceable

Statute of Frauds

The Statute of Frauds: General Principles

- The Statute of Frauds
  - Refers to any statute (or body of law) that requires certain types of contracts to be in writing in order to be enforceable
    - No one statute of frauds but a series of state statutes + state common law + UCC
  - Not an issue of contract formation, but one of contract enforcement
    - Need a K before SoF becomes applicable
    - Must still satisfy other formation requirements in addition to writing requirement
  - Contract governed by the SoF can be enforced against a party that signed, not one that didn't. Both parties might have contracted parties but, if the SoF applies, K can only be enforced against the party that signed
  - Minimum requirements to satisfy the SoF:
    i. K must be signed by the party charged (i.e. party against which performance is sought)
    ii. The essential terms must be listed
- Justifications
  - Statute of Frauds is supposed to ensure that courts only enforce true contracts (evidentiary function)
  - Prevents accidental/unintentional Ks from being made
  - Ensures people understand the gravity of what they're obligating themselves to do (seriousness of undertaking reflected in the level of formality)
  - Reinforces social expectations requiring writing
  - Fraud prevention
- Consequences
  - Formation of contract that appears to be valid, with requirements mutual assent and consideration satisfied, may nonetheless be unenforceable due to SoF and lack of a writing
    - A party may thus still be defrauded
  - Risk of not enforcing oral contracts that both parties want enforced

---

Statute of Frauds and Non-Goods

- Questions to be raised when SoF is asserted as defense against enforcement
  a. Is the contract at issue one of the types to which the SoF applies?
  b. Has the SoF been satisfied?
  c. Are there other factors in the case (i.e. reliance or tendered performance) which might invoke an exception?
- Part Performance Exception to SoF

  - Generally only applicable to land in the cases of non-goods
  - Unequivocally referable test criticized in restatement - should be based on actual reliance
- Promissory Estoppel Exception to SoF
  - In contracts that don't involve the sale of land or goods, part performance may be important in determining whether a court should apply the promissory estoppel exception
  - Higher threshold than § 90
  - Some courts don't enforce this exception

Rules

- **R2d § 110 - Statute of Frauds: Classes of Contracts Covered**
  - The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception
    - A contract of an executor or administrator to answer for a duty of his decedent (the executor-administrator provision);
    - A contract to answer for the duty of another (the suretyship provision—one party assumes liability for the debt of another)
    - A contract made upon consideration of marriage (the marriage provision)
    - A contract for the sale of an interest in land (the land contract provision)
    - A contract that is not to be performed (completed) w/in one year from the making thereof (the one-year provision)
- **R2d § 129 – Land: Action in Reliance**
  - A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement
- **R2d §131 - General Requisites of a Memorandum**
  - Unless additional requirements are prescribed by the particular statute, a contract within the SoF is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
    - Reasonably identifies the subject matter of the contract
    - Is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
    - States with reasonable certainty the essential terms of the unperformed promises in the contract
- **R2d §132 - Several Writings**

  - The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction
- **R2d §133 -Memorandum Not Made as Such**
  - Except in the case of a writing evidencing a contract upon consideration of marriage, the Statute may be satisfied by a signed writing not made as a memorandum of a contract (e.g. informal letter, meeting minutes, etc)
- **R2d §134 - Signature**
  - The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer
    - Courts generally have low bar for determining what constitutes a signature: use of letterhead, initials, today the typed out names at the bottom of an employment agreement, electronic signatures
- **R2d §139 - Consequences of Non-Compliance: Enforcement by Virtue of Action in Reliance**
  - A promise which the promisor should reasonably expect to induce action by the promisee and does so in fact is enforceable, notwithstanding the Statute of Frauds, if injustice can be avoided only by enforcement of the promise
  - Following circumstances significant in determining whether injustice can be avoided only by enforcement of the promise

a. availability + adequacy of other remedies, particularly cancellation + restitution
b. The definite and substantial character of the action or forbearance in relation to the remedy sought
c. The extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence
d. The reasonableness of the action or forbearance
e. The extent to which the action or forbearance was foreseeable by the promisor

Crabtree v. Elizabeth Arden Sales Corp

P alleges he entered a contract with D to serve as a sales manager for 2 years. In negotiations, he insisted on a definite term of employment. Parties eventually agree to contract in which P would receive periodic increases in pay over the course of two, as evidenced by unsigned memo. P receives first pay increase, as evidenced by payroll change card signed by authorized employee of D. Upon date where P was scheduled to receive 2nd pay increase, D refused to approve it. P ends employment and brings suit. D asserts SoF as a defense to enforcement. **To satisfy the statute of frauds, the memorandum evidencing the contract may be pieced together out of separate writings. All material terms must be set out in various writings and at least one writing must be signed while the unsigned document must on its face refer to the same subject matter or transaction as that set forth in the one unsigned. Oral testimony allowed to link writings even though they didn't expressly refer to each other.** Court holds that it is apparent that each of the separate writings refer to the same transactions on their face, and if not, the

references made in the writings are of the type that invite PE to furnish an explanation. Thus, court affirms lower TC's decision to admit PE and ultimately award judgement to P.

Beaver v. Brumlow

Verbal agreement by D to sell land for a home site to P. P's take possession of land (with D's consent), liquidated retirement investments to finance home and improvements, purchased a house and moved it onto the property (to which expressly approved in writing), and began significant improvements to the land. Agreement never formalized despite P's wishes, and D's attempt to restructure agreement as a lease and evict Ps. Ps bring suit. D acknowledges verbal agreement but assert SoF as a defense. Court points to doctrine of part performance as a well-settled exception to the SoF in the jurisdiction. Where an oral contract not enforceable under SoF has been performed to such extent as to make it inequitable to deny effect to it, equity may remove it from the SoF and decree specific performance. **However, there must be performance unequivocally referable to the agreement, performance which alone and without the promise is unintelligible and what lead an outsider with knowledge of the circumstances (minus the oral agreement) to conclude such a contract existed**. Where a party takes possession of the property and makes valuable, permanent, and substantial improvements to it, specific performance usually result. Additionally, failure to specify price will not defeat contract where part performance and/or transfer has occurred (reasonable price supplied to prevent inequitable result). Thus, court affirms judgement ordering specific performance.

Alaska Democratic Party v. Rice

D promises P a job. P moves to AK for that job. When she arrives, D tells her that she won't be able to have the position. P had a job in MD she alleges could have continued indefinitely, but had resigned from in reliance on D's promise. There was never a written agreement as required by SoF (2-year employment contract so § 110 one-year provision applies). Court applies **doctrine of promissory estoppel to enforce an oral contract that falls within scope of SoF**. Here, D should have reasonably expected to induce P's action by their promise (getting her to quit and move to Alaska was deliberate) and that reliance lead to damage (no jobless and on polar opposite side of country). Using criteria from § 139(2), court determines that circumstances are sufficient to remove the promise from the SoF and award damages as needed to avoid injustice.

UCC Statute of Frauds and the Sale of Goods

- Differences from common law:
  - Sale of goods over $500
  - Possibly less terms needed
  - Merchant Confirmation Rule
    - Submit written confirmation a reasonable period of time after the contract was formed

    - Other party must receive confirmation, have reason to know its content (satisfy sub-part 1), and fail to object within 10 days
  - Specially manufactured goods exception
    - Justification - These goods are hard to resell because they are tailored to the specific buyer
  - Promissory estoppel exception (courts are split on whether it exists in UCC)
  - Seems to suggest that if it is clear there is a contract based on parties' intention to be bound, the SoF should not be a bar to enforcement
    - UCC makes exception if party admits, either explicitly or implicitly (through its conduct) that there is a contract
    - Courts have generally taken the view that wre the asserted contract is for one unit of the good in question, even payment of only part of the price is sufficient to validate the entire contract
  - Using SoF defense is equivalent of denying existence of enforceable K
    - Justified because once party acknowledges contract, thinks it is ok to go outside Sof

Rules (UCC)

- **UCC §2-201: Statute of Frauds**
  - Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a K for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing
  - Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given w/in 10 days after it is received
  - A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
    - If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the sellers' business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; OR
    - If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; OR

- With respect to goods for which payment has been made and accepted or which have been received and accepted. [part performance]

Buffaloe v. Hart

Oral agreement for P to buy 5 barns for $20K (in 4 installments) from D. P had possession of barns because he had already been renting them. P then sells the barns to other buyers whom provided offers + down-payments. P writes first installment check to D, who accepts it. Next day, D informs that she changed mind and sold to other party. P brings suit. Court applies UCC since barns are moveable and in excess of $500. **Under UCC, check is a sufficient writing if it indicates contract of sale between parties and is signed by the party (or agent) against whom enforcement is sought**. Here, the check was signed by P and not D, so check is not sufficient to satisfy UCC writing requirement. However, UCC also holds that SoF can be satisfied where there is delivery by the seller and unconditional/voluntary acceptance by the buyer that can be inferred by his conduct, such as through taking physical possession of the good. This also applies to buyer, who is expected to deliver something accepted by the buyer as performance. Since P had already taken possession of the land and D appeared to have accepted check, the conduct of the party is sufficient to indicate existence of a contract to a reasonable mind

---

Contractual Meaning - Interpretation and Parol Evidence

Interpretation

- Interpretation
  - Refers to the process by which a court gives meaning to contractual language when the parties attach materially different meanings to that language
  - Modern definition collapses, into a single term, both the process of determining the meaning parties attributed to contractual language and judicial role in determining the legal effect of the language
  - Problems in this area are focused on what the purpose of the contract is, what the subjective intents of the parties are, and what evidence to use in interpreting the contract
- Historical Approach (Subjective)
  - Where parties attribute materially different meanings to language, contract was not formed because formation required a meeting of the minds
  - Holmes argues for an external approach to interpretation because subjective one was to difficult to enforce and external method is fair because a speaker should always expect words to be understood in accordance with normal usage
- Objective Approach
  - Williston - Words and conduct should be interpreted in accordance with the standard of a reasonable person familiar with the circumstances rather than in accordance with the subjective intention of either party

  - Modern law has departed from the extreme objectivist approach - possible to interpret a contract in a way in which neither party intended nor desired
- Modern Contract Law Approach
  - Corbin layed foundation: In interpreting K, court should answer two questions:
    i. Whose meaning controls the interpretation of the contract
    ii. What was that party's meaning
  - This would prevent court from imposing meaning that differed from what both parties understood
  - R2d § 201 adopts this approach
  - Even after applying array of interpretation tools, may be appropriate for court so conclude that the parties did not intend to make an enforceable agreement
    - However, where it is clear that parties intended to be bound or where there has already been a good deal of performance, rescission may be inappropriate

Rules

- **R2d § 201 - Whose Meaning Prevails**
  a. Where the parties have attached the same meaning to a promise/agreement/term; it is interpreted according to that meaning.
  b. Where the parties have attached different meanings to a promise/agreement/term, it is interpreted according to the meaning attached by one of them if at the time the agreement was made:
    - That party did not know/have reason to know of any different meaning attached by the other
    - The other knew/had reason to know meaning attached by the first party
  c. If neither party knew/had reason to know the other's different meaning, there is no contract due to lack of mutual assent
- **R2d § 202 – Rules in Aid of Interpretation**
  a. Words and other conduct interpreted in light of circumstances; principle purpose of the parties (if ascertainable) given great weight
  b. Interpret the contract as a whole, including supplements
  c. Language is interpreted in accordance with generally prevailing meaning, or in accordance with usage in respective technical field if technical/term of art, unless otherwise stated
  d. Use, with great weight, course of performance to understand nature of contract where agreement involves repeated occasion for performance or objection by knowledgeable party
  e. Interpret intent as consistent w/ course of performance, dealing, and trade usage wherever reasonable
- **R2d § 203 - Standards of Preference in Interpretation**
  - In interpreting agreement, following standards of preference are generally applicable:

    - An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect
    - Hierarchy of weight: express terms > course of performance > course of dealing > trade usage
    - Specific terms and exact terms are given greater weight than general language
    - Separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated
- **R2d § 204 - Supplying an Omitted Essential Term**
  - When the parties have not agreed with respect to a term which is essential to determining rights/obligations, term reasonable in light of circumstances is supplied by the court
- **R2d § 206 - Interpretation Against the Draftsman**
  - In choosing among the reasonable meanings, generally prefer the meaning that operates against the party who supplies the words/writing
    - The application of this varies by the circumstances and jurisdiction. Some don't see need where both parties are sophisticated. Others limit to cases where one party is solely responsible for language
- **R2d § 207 - Interpretation Favoring the Public**
  - In choosing among the reasonable meanings of a promise/agreement/term, generally prefer a meaning that serves the public interest
- **R2d § 211 - Standardized Agreements**
  a. Where party signs/manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement
  b. Term of standardized agreement, where reasonable, interpreted as treating alike all those similarly situated
  c. Where other party has reason to believe the other party manifesting such assent would not do so if they knew writing contained a particular term, the term is not part of the agreement
- **R2d § 222 - Usage of Trade**
  a. Usage of trade is a usage so regularly observed in place/field as to justify expectation that it will be observed with respect to a particular agreement
  b. Unless otherwise agreed, a trade usage in the field that parties are engaged in or a usage of which they know (or have reason to) gives meaning to their agreement
- **R2d § 223 – Course of Dealing**
  - Course of dealing is sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. Gives meaning to agreement unless otherwise agreed.

- **UCC § 1-303 – Course of Performance, Dealing, and Usage of Trade**
  a. A course of performance is same as in R2d
  b. Course of dealing is same as in R2d
  c. A trade usage is same as in R2d
  d. Course of dealing, course of performance, and usage of trade are relevant to ascertaining particular meaning of terms and may supplement or qualify them
  e. Course of dealing, course of performance, and usage of trade must be construed whenever reasonable as consistent with each other. If they conflict: express terms > course of performance > course of dealing > trade usage
  f. A course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance
  g. Evidence of a relevant trade usage offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party

Canons of Interpretation: Standard Maxims

Use these to figure out the starting question of what is the meaning of an ambiguous express term prior to proceeding down the hierarchy of weight:

1. Noscitur a sociis. The meaning of a word in a series is affected by others in the same series; or, a word may be affected by its immediate context. Look to the terms in a list to determine the meaning of an ambiguous term
2. Ejusdem generis. A general term joined w/ a specific one will be deemed to include only things that are like the specific one. (cattle, hogs, and other animals. Wouldn't include house-dog but might include sheep being raised for market)
3. Expressio unius exclusio alterius. If one or more specific items are listed, w/out any more general or inclusive terms, other items, although similar in kind, are excluded. ("I'm selling my cattle and hogs." Excludes sheep and house-dog; If regulating X, Y, Z means you are not regulating D)
4. Ut magis valeat quam pereat. An interpretation that makes the contract valid is preferred to one that makes it invalid. (like canon of constitutional avoidance)
5. Omnia praesumuntur contra proferentem. I cut you pick. Interpretation Against the Draftsman if there are two reasonable meanings. (incentivizes parties to draft fairly. Employed very vigorously in a form K. Not employed vigorously where a K has gone back and forth a lot)
6. Interpret contract as a whole. Every term should be interpreted as part of the whole and not as if isolated from it. ("chicken" meant same thing each time term appeared in K)
7. Purpose of the parties. Principal/common purpose will govern. If purposes obscure, go to "plain meaning."
8. Specific provision is exception to a general one. If two provisions of a K are inconsistent and if one is "general" enough to include the specific situation, the specific provision will be deemed to qualify the more general one (and to control in attributing meaning).

9. Handwritten or typed provisions control printed provisions
10. Public interest preferred. That interpretation which favors the public interest controls
    - Modern courts have held that usage of same term in statute/legislation is not completely determinative

Frigaliment Importing, Co. v. B.N.S. International Sales Corp.

Dispute over the term chicken after D ships P chickens that didn't meet its expectations. P contends chicken means "broiler" (young, baking chicken) While D contends chicken is a general term which also encompasses fowl (old, stewing chicken). Court holds that P failed to meet burden of showing that the term was used in the narrow sense. It first recognizes ambiguity of the term and looks to the rest of the contract (other express terms) to aid in its interpretation. This doesn't resolve ambiguity. Nor are there any course of performance/dealings that can aid in interpretation. Court uses combination of trade usage and definition to ascertain an objective meaning. **A party is bound by the other's meaning if that party had reason to know the other party's meaning while the other had no reason to know of the different meaning ascribed by the first party**. Here, the objective meaning coincides with D's subjective understanding and it had no reason to believe that P's own understanding departed from the objective one.

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

P's plant burglarized. Insurance policy defined “burglary” as requiring visible damage to exterior of premises. Visible damage was to interior, though outside door could have been forced open without leaving visible marks. P contends it was obvious this was an outside job. Purpose of contract was to cover only external burglary, not internal employee theft. Court recognizes this is a case involving an insurance contract of adhesion, where the majority rule has held that the insured is not bound to know its contents. Here, whatever terms buried in such a contract do not eviscerate the reasonable meaning of such a term. **Where other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement**. Such reason includes a bizarre/oppressive definition of a term or evisceration of a terms standard meaning. There was nothing that would lead P to reasonably expect "third party burglary" to require the appearance of visible marks on the exterior. Thus, the objectively reasonable expectation should be enforced and the policy should cover.

Parol Evidence Rule

- Parol Evidence - Evidence, either written or oral, that is extrinsic to a written agreement
    - Under rules of evidence commonly employed in US courts, any evidence to be prima facie admissible into court must be "relevant" -- rationally probative of some fact material to the parties' dispute

- Parole Evidence Rule - Rule that such evidence will be excluded from the trier of fact. However, the rule has many exceptions and intricacies
  - When the parties have mutually agreed to incorporate (or "integrate") a final version of their entire agreement in a writing, neither party is allowed to contradict or supplement that written agreement w/ extrinsic evidence (written or oral) or prior agreements or negotiations between them
  - Not a rule of evidence, but a rule of substantive law
  - Does not define was is affirmatively admissible, but only operates to exclude evidence that would otherwise be admissible as rationally probative of some fact at issue
  - Rationale:
    - To avoid inconvenience and injustice that would result if extrinsic evidence were admissible to contradict or vary the terms of a written agreement
    - Enforces a clear ex ante approach to what is a contract
    - Makes court more efficient because there is less evidence to contemplate
- Complete Integration - When parties have mutually agreed to integrate a final version of their entire agreement in a writing, neither party will be permitted to contradict or supplement terms with parol evidence
- Partial Integration - When a writing is intended to be final only with respect to a part of their agreement, the agreement may be supplemented by external evidence, but terms cannot be contradicted
  - Rather than find a contract to be partially integrated, Court more frequently treats it as complete but with ambiguity, allowing PE to be admitted
- The correct application of the parol evidence rule requires that the court first determine whether the writing in question is intended to be a final expression of the parties agreement. How is this determined?
  - Four Corners Rule - Question must be determined from the four quarters of the writing without resort to extrinsic evidence. A substantial number of jurisdictions till generally adhere to this approach
  - Others jurisdictions have adopted the contextual approach that is reflected in R2d - A writing cannot of itself prove its own completeness and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties
    - Corbin - A finding of integration should always depend on the actual intent of the parties
- Exceptions to Parol Evidence Rule
  - Interpreting ambiguity - Parol evidence is admissible for the purpose of aiding the interpretation of ambiguity in a contract. While traditionally only applicable when contractual terms were ambiguous prima facie, modern courts are more likely to admit evidence that a party offers to demonstrate special meaning of terms that don't appear unclear on their face. Rather than determine whether an agreement is only partially integrated, courts are more likely to treat it as complete and then rely on the ambiguity exception.

  - Subsequent agreements - Rule does not apply to agreements made after the execution of the writing
  - Oral conditions precedent - Parol evidence rule not applicable to evidence purported to show that a written agreement's effectiveness was subject to an oral condition
  - Defenses to formation - Rule does not apply to evidence offered to show contract was invalid, such as due to fraud (both in the execution and inducement), duress, undue influence, incapacity, mistake, or illegality
  - Reformation - Rule does not bar evidence used to establish that part of the agreement was omitted due to mistake and, thus, a party is entitled to a remedy such as judicial reformation of the contract. Generally, one must show clear and convincing evidence that both parties intended to include the term in their written agreement
  - Collateral agreements - Traditionally, the exception only applied to agreements about a subject distinct from the transaction in the writing. However, modern courts more are more flexible and may justify admission of parol evidence even if related to the transaction in writing. Intersects with partial integration in instances where additional agreement is not furnished with separate consideration. UCC only excludes this evidence if the writing is clearly intended to be a complete and exhaustive statement of all terms
- Merger Clause - states that the writing is intended to be final and complete; all prior understandings have been "merged" into or superseded by the final writing. Purpose is to tell courts we intend this to be a fully integrated agreement
  - Some courts give full acknowledgement to these clauses and do not allow PE
  - Other courts do not, especially in a contract of adhesion or a situation where there is unequal bargaining

Rules

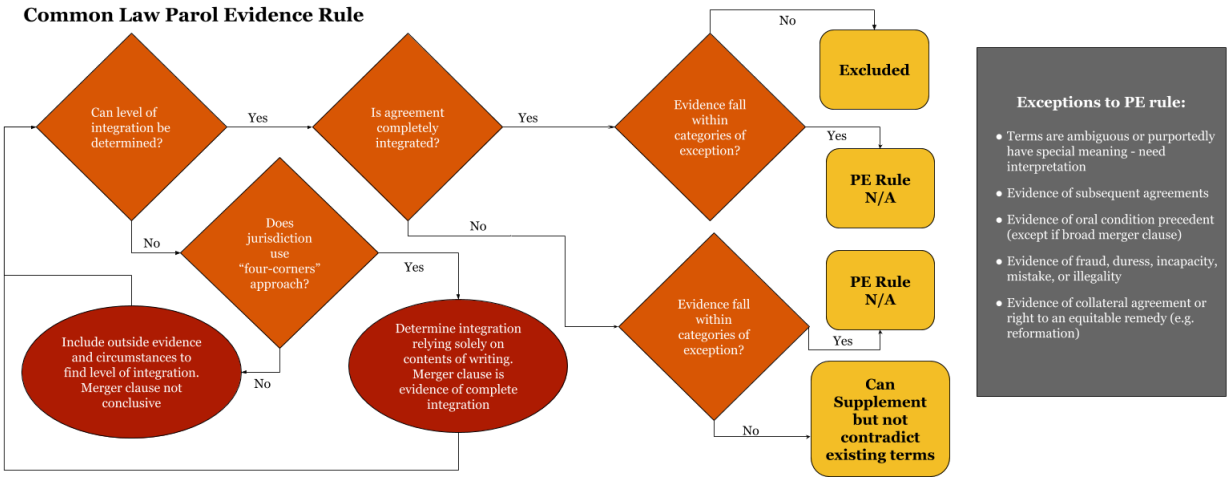
- **R2d § 210 - Completely and Partially Integrated Agreements**
  a. A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement
  b. A partially integrated agreement is an integrated agreement other than a completely integrated agreement
  c. Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule
- **R2d § 214 - Evidence of Prior or Contemporaneous Agreements and Negotiations**
  - Agreements and negotiations prior to or contemporaneous w/ the adoption of a writing are admissible in evidence to establish
    - That the writing is or is not an integrated agreement
    - That the integrated agreement, if any, is completely or partially integrated
    - The meaning of the writing, whether or not integrated

    - Illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause
    - Ground for granting or denying rescission, reformation, specific performance, or other remedy
- **R2d § 215 - Contradiction of Integrated Terms**
  - Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing
- **R2d § 216 - Contradiction of Integrated Terms**
  - Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated
  - An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
    i. Agreed to for separate consideration, or
    ii. Such a term as in the circumstances might naturally be omitted from the writing
- **R2d § 217 - Integrated Agreement Subject to Oral Requirement of a Condition**
  - Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition
- **UCC §2-202 - Final Written Expression: Parol or Extrinsic Evidence**
  - Terms w/ respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
    - By course of dealing or trade usage or by course of performance
    - By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement

Decision Tree

- Is there a writing?
  - If not, PE rule does not apply
- What is the level of integration (standard used to determine this varies by jurisdiction (4 corners v. contextual approach))?
  - If partially integrated, exclude PE of contradicting terms
  - If completely integrated, exclude both supplemental and contradicting terms
  - If neither, PE rule does not apply

Common Law Parol Evidence Rule: Visualized



Thompson v. Libby

P and D have agreed on terms for sale of logs subject to a written agreement. P brings action claiming quality of logs breached warranty that, while not included in the writing, was agreed to orally. Lower court admits evidence. State supreme court holds that the writing, on its face, appears to be a complete expression of the entire agreement. Though recognizing even completely integrated agreements may require external evidence to help reach a better understanding of contractual language, **no ambiguity exists in the writing at issue and hence PE is to be excluded (four corners rule)**. Additionally, it rejects application of the "collateral agreement" exception, as a quality warranty is a term of the sale and not a subject distinct from the writing. Thus, the court rules the lower court erred in admitting the parol evidence.

Taylor v. State Farm Mutual Automobile

Insurance company (D) provides representation for P in suit arising out of car accident, though court enters judgement against P for an amount in excess of his policy limits. P sues D for bad faith in failing to settle matters within policy limits. D moves for summary judgement on grounds that P had signed release which waived any potential contractual claims against D. Trial court denies D's motion, holding the contractual language was ambiguous and parol evidence is needed. Jury awards judgement in favor of P, but CoA finds no ambiguity and that parol evidence was improperly admitted. State supreme court holds that it is important, when interpreting contract, that it attempt to ascertain and give effect to the intention of the parties at the time of contractual formation. Thus, the court rejects rule that writing must be ambiguous on its face in order for PE to be admitted. **If a judge considers the offered external evidence and it supports conclusion that the contractual language is reasonably susceptible to differing interpretations, the evidence is admissible to help determine the intended meaning**. It ruled that external evidence supported P's contention that the contractual claims waived in the release didn't

extend to bad faith claims and that there were multiple reasonable interpretations of the language. Hence, the court agreed with the trial court and vacated CoA's decision.

Supplementing the Agreement: Implied Terms, Obligation of Good Faith, and Warranties

Implied Terms

- Why imply terms?
  - Fairness considerations
  - Off-the-rack convenience: probably what parties would've chosen if had negotiated; process of agreement-making less costly if can rely on background terms—inefficient to continue bargaining
  - Eliminate most problems of lack of consideration or lack of mutuality
- Implied-in-Fact
  - A term the court finds to be "implicit" in the parties' words or past conduct, though not literally expressed, is a term implied-in-fact
- Implied-by-Law
  - Terms the court doesn't find in the parties agreement, even in taking broad view, but are made part of the agreement by operation of the rules of law rather than the parties themselves
  - Example: Gap-filling provisions of UCC Article 2.
- Best or Reasonable Efforts
  - Many recent decisions follow principle recognized in *Wood* in which implied obligation to use reasonable efforts prevents vague or indefinite promise from being illusory
  - Influenced UCC §2-306, which imposes a "best efforts" obligation in cases where the contract calls for exclusive dealing
  - Most courts define "best efforts" in terms of reasonableness or diligence, which takes into consideration the parties capabilities

Rules - Implied Terms

- **UCC § 2-306 - Output, Requirements, and Exclusive Dealings**
  - If term is "how much buyer can sell" or "how much seller can manufacture" must be measured in terms of good faith (commercial reasonableness)
  - If buyer and seller have exclusive dealings, each side must give best effort to supply and sell
- **§ 2-309 - Absence of Specific Time Provisions; Notice of Termination**
  a. If not agreed upon, the time for shipment/delivery/any other action under a K shall be "a reasonable time", which is dependent on the circumstances and particular industry of the dealings. This also extends to time for payment

b. Where K provides for successive performances but is indefinite in duration, it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party. Period must be reasonable enough so as to allow non-terminating party to seek substitute arrangements
c. Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable
    - *Raynor* court - "Requirement of a reasonable notification does not relate to the method of giving notice, but to the circumstances under which the notice is given and the extent of advanced warning of termination that the notification gives"

Wood v. Lucy, Lady Duff- Gordon

P and D have agreement where P has exclusive right to sell/license D's fabric designs, subject to her approval, and in return D would get one half of all profits derived. The right was to last at least 1 year, but D breaks agreement. P sues for damages and D contends there was no contract because P was not bound to anything. Court asserts that a promise may be unexpressed in a writing, but implied so as to establish a contract. The court held that P's promise to pay half of profits was an implied promise to use reasonable efforts in order to bring such profit into existence. **An implied obligation to use reasonable efforts will prevent a somewhat indefinite promise from being illusory.** Unless P made reasonable effort to do so, D could never get anything and contract would have made very little sense. Thus, the implied promise is what induced D's promise. Court rules there was mutuality of obligation and claim for breach was improperly dismissed by the lower court.

Liebel v. Raynor Manufacturing Co.

P and D reach agreement for exclusive dealer-distributorship where P becomes exclusive distributor of D's products and D is the exclusive supplier of the products to P. Length of the agreement was for an indefinite amount of time. After sales decrease, D notifies P that the relationship is being terminated and P sues for breach. Trial court awards summary judgement for P on grounds that indefinite agreement could be terminated by either party and any time. CoA applies UCC, citing case law in which similar dealership agreements were treated for the sale of goods. UCC provides that **in the absence of specific time provisions, reasonable notification to the other party, within a reasonable time period, is required in order to terminate the contract**. Court rules that, in light of the significant investment P had in the agreement, the notice given was not reasonable as a matter of law. P did not have enough time to sell off inventory. Thus, court vacated the summary judgement.

The Implied Obligation of Good Faith

- Disputes over parties failure to act in good faith arise when their conduct is not forbidden or, in some cases, even expressly permitted, but nonetheless improper and actionable
  - Background principle: **neither party shall do anything to prevent the right of the other party to receive the fruits of the K**
  - Good faith does not apply to bargaining process - different set of standards guiding this type of conduct
  - Polices against opportunistic behavior
  - Protects the reasonable expectations of the contracting parties
- All contracts are deemed to include an obligation of good faith binding on both parties
  - UCC § 1-304 "Every contract or duty within its cope imposes an obligation of good faith in its performance and enforcement"
  - R2d §205: Duty of Good Faith + Fair Dealing: Every contract imposes upon each party a duty of good faith + fair dealing in its performance and its enforcement
- "Excluder" view of good faith
  - Good faith does not have a definition of its own, but rather serves to exclude a wide range of "bad faith" conduct
  - Concerned more with refraining from certain conduct than in adhering to a standard of positive conduct

Rules - Good Faith

- **R2d § 205 - Duty of Good Faith + Fair Dealing**
  - Every contract imposes upon each party a duty of good faith + fair dealing in its performance and its enforcement
- **UCC § 1-201**
  - Good faith means honesty in fact (subjective standard) AND the observance of reasonable commercial standards of fair dealing (objective standard)
    - NEED BOTH
    - Some states don't require reasonable commercial standards for non-merchants, just honesty-in-fact
- **UCC § 2-103**
  - Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade
- **UCC § 1-304 Obligation of Good Faith**
  - Every contract or duty w/in the UCC imposes an obligation of good faith in its performance and enforcement
    - Does not create an additional duty that can be independently breached and become actionable
    - Instead, directs courts to interpret terms of contracts w/in the commercial context in which they are created to determine if terms

were breached (Was P deprived of the benefit of the bargain? Did D destroy P's right to fruits of the K?)

- **UCC §1-302 - Variation by Agreement**
  - Under the UCC , provisions can be varied by agreement but obligations of good faith, diligence, reasonableness, and care may not be disclaimed by agreement
  - However, the parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable (including time limits/deadlines for performance)

Morin v. Baystone Construction

Auto manufacturer hired D to build a new addition to its factory. D hired P to complete the aluminum walls for the addition. Pursuant to the contract, the walls were to be made out of class/grade of aluminum with distinctive appearance. K also provided all work was subject to final approval by auto manufacturer's agent. Walls put up but don't have desired appearance so agent rejected them. D hired another contractor to replace them and these were accepted. D refused to pay P for the balance of the contract price Morin successfully brought suit. D appealed. Court holds that reasonable person standard is employed to approximate what parties would have expressly provided with respect to a contingency they did not see, had they forseen it. Thus, because reasonableness is not always accurate guide to party's intentions in all cases (matter of personal taste), it is not used in all cases. **In a contract containing a standard owner's satisfaction clause, satisfaction is judged by a reasonable person standard when the contract involves commercial quality, operative fitness or mechanical utility which other knowledgeable persons can judge; in the alternative, satisfaction depends on the owner's good faith judgment when the contract involves personal aesthetics or fancy.** The contract in this case falls in the former category (the aesthetic qualities of the aluminum factory walls are clearly secondary to the functional ones). Thus, when judged by standard of commercial reasonableness, P satisfied its contractual obligations and is entitled to recovery.

Locke v. Warner Bros

P, an actress, enters contract with D, a movie studio, to get first look on any of P's movie ideas. $750,000 guaranteed over 3 yrs. D never options to pick up any of her ideas. P contends that D never had any intent in exercising the option when it made the deal, nor did it make any serious attempts to consider them - its sole purposes for entering into K was to help on of its employees settle litigation w/ P. Court holds that in **K that confers discretionary power to one party that affects rights of another, a duty is imposed to exercise that discretion in good faith and in accordance to fair dealing**. Since this is a matter involving tastes/judgement, subjective standard of good faith, applied by the trier of fact, is controlling here. Even though K expressly provides right for D to pass up on P's ideas, categorically rejecting them irrespective of their merits is conduct in violation of this obligation of good faith. Evidence of D's refusal to work with P is a triable issue of material fact, hence summary judgement was inappropriate.

Warranties

- Traditional rule: caveat emptor - let the buyer beware
  - Seller bore nor responsibility at all for the quality of the product he was selling unless he expressly guaranteed it or gave a "warranty"
- American courts gradually reversed rule of caveat emptor by imposing obligations on the seller as to the quality of the good she was selling
  - Implied warranties were obligations not based on actual agreement of the parties but instead imposed by law on the seller
  - Express warranties are obligations based on sellers representation of the good and or conduct
  - Whether or not warranty served as a "basis of the bargain" is important here
- Parol evidence rule doesn't create a problem for implied warranties in UCC sale of goods context but comes into play if trying to claim there was an oral express warranty not reflected in written agreement (may be allowed in if K only partially integrated)
- Common Law Implied Warranty of Workmanlike/Skillful Construction
  - Building must be constructed in a reasonably good and workmanlike manner
  - Independent of of the contract, thus not extinguished after builder's performance is complete, though application of this warranty to subsequent purchasers varies by jurisdiction
  - Must be reasonably fit for the intended purposes
- Overwhelming majority of states also recognize implied warranty of habitability in residential leases
  - Implied warranty, e.g., that landlord comply w/ building codes, make repairs and keep premises in a fit + habitable condition
  - Rationale: tenants dependent on landlords to maintain the condition of a building; inequality in bargaining power between landlord/tenant
- Outside the contexts of goods (UCC) and homes/leases (common law), warranties are either express or non-existent

Rules - Warranties

- **UCC § 2-313. Express Warranties**
  a. Express warranties by the seller are created by:
     i. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise (unless there is clearly no reliance)
     ii. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description
     iii. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model (not as much when only a description is offered)

b. To have an express warranty, seller doesn't need to use words like "warrant" or "guarantee" or have a specific intention to make a warranty. BUT an affirmation merely of the value of the goods or a statement of the sellers' opinion or commendation of the goods does not crate a warranty (most common application: a written or oral express warranty given by a seller or manufacturer of a consumer product concerning the quality or nature of the goods (the car will get at least 25 miles/gallon; this washing machine is a 1999 model))

- **UCC §2-314 - Implied Warranty of Merchantability**
  - A merchant who regularly sells goods of a particular kind impliedly warrants to the buyer that the goods are of good quality and fit for the ordinary purposes for which they are used ("Merchant" must be more than selling good in isolation)
  - To be merchantable, goods must:
    i. Pass w/out objection in the trade under the description used in the contract
    ii. If fungible, must be of fair/average quality w/in the description [majority can't be the worst of the sellers' bunch
    iii. Are fit for the ordinary purposes for which such goods are used
    iv. Run, w/in the variations permitted by the agreement; relatively homogeneous
    v. Adequately contained, packaged, and labeled as the agreement may require
    vi. Conform to the promises or affirmations of fact made on the container or label if any
    vii. Other implied warranties, unless excluded or modified, may arise from course of dealing or trade usage
- **UCC §2-315 - Implied Warranty of Fitness for a Particular Purpose** (Extends beyond merchants)
  - Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified an implied warranty that the goods shall be fit for such purpose
    - "Particular purpose" differs form the ordinary purpose for which the goods are used
- **UCC § 2-316 - Exclusion or Modification of Warranties**
  a. Warranties are inoperative to the extent unreasonable
  b. To exclude or modify the implied warranty of merchantability, the language must mention merchantability and, in the case of a writing, must be conspicuous.

c. Expressions such as "as is" or "with all faults" which calls buyer's attention to exclusion of warranty are sufficient. No implied warranty for defects that were discoverable through examination of goods

Bayliner Marine Corp. v. Crow

P buys a boat that can't be used in a way he intended, despite high price. The specific model was not included on any of the spec sheets and he was unable to test ride. He sues for breach of warranty under three theories. An express warranty is created that the goods shall conform to the description/affirmation of fact. Court ruled D didn't breach express warranty because boat in the descriptions was no the specific boat purchased by P. **Statements purporting to be the sellers opinion commendation about the goods do not create a warranty.** Thus, P's statement about the quality of the boats performance did not create an express warranty. Moving on to issue of merchantability, **For a good to be merchantable, it must be such that it would "pass without objection in the trade" and "are fit for the ordinary purposes for which goods are used"**. The first element concerns whether significant segment of the buying public would object to buy the goods. The second element concerned with goods are "reasonably capable of performing their ordinary functions". Court determined there was no evidence that the boat sold to P was not merchantable under that standard. Finally, an implied warranty for fitness of purpose is created if seller **has reason to know any particular purpose for which goods are required and the buyer is relying on seller's skills or judgement to select suitable goods**. Thus to establish implied warranty for fitness of purpose, **buyer must prove he made known to seller the particular purpose for which the goods were required**. Court found D did not establish P had knowledge of the fact that a boat incapable of traveling faster than 30 mph was unacceptable, thus no breach under any of the theories asserted by P.

Speight v. Walters Development Co.

P purchases home from party that originally had it constructed over a decade prior. After P takes ownership, defect which was unbeknownst to original owners leads to damage. P sues builders. **Implied warranty of workmanlike construction** is judicially created doctrine implemented to protect home buyers against address inequity existing between them and experienced builders. In order for there to be breach of this warranty, a **Buyer must show that house was constructed to be occupied as a home, that it was purchased from the party who constructed it for sale, that it was not fit at the time of purchase, and the buyer was both unaware at the time of purchase and suffered damages.** Court identifies that the same public policy justifications support extending this warranty to subsequent buyers, who are in no better position to discover defects as those who purchase from builder. Court argues claim not barred by statue of limitations because P could not have gained actual or imputed knowledge when the statute of limitations expired. Thus, D held liable for breaching this warranty.

Avoiding Enforcement: Incapacity, Bargaining Misconduct, Unconscionability, and Public Policy

Incapacity

- Infancy/Minority Doctrine
  - **Traditional Rule**: A minor who disaffirmed a contract for the purchase of a good is not required to make restitution to the seller for substantial diminution in the goods value absent a showing that the minor misrepresented his age or willfully destroyed the property. The fact that the minor has benefited from a service/good in the past is not grounds to deny right of avoidance.
    - Limitation on necessaries. Minor liable for the value of items one needs to live (i.e. food, clothing, and shelter)
    - Court views obligation to make restitution is to bind minor to obligation they have privilege to avoid under the law
    - *Dodson v. Shrader* departs from this traditional rule
- Incapacity due to mental illness
  - **Modern approach** asserts "where a person has some understanding of a particular transaction which is affected by mental illness or defects, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made"
    - Inquiry into capacity focuses on understanding or conduct at time of transaction only
    - Contrasted with Minority Doctrine - Whereas minor can generally disaffirm even if restoration cannot be made, mentally incompetent person is required to make restoration unless special circumstances are present
  - **Traditional "cognitive" test** is an inquiry into a persons capacity to understand the nature of a transaction
- Contract can be rendered void for incapacity in other contexts, such as intoxication, if demonstrated that the other party in a transaction had reason to know of the other's inability to understand the nature and consequences of the transaction

Rules - Incapacity

- **R2d § 14 - Infants**
  - Unless a statue provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's 18th birthday
  - Comment c -If consideration has been dissipated while in the minor's possession, the other party is without remedy unless the infant ratifies the contract after coming of age
- **R2d § 15 - Mental Illness or Defect**
  - Person incurs voidable contractual duties by entering into a transaction if by reason of mental illness if he is unable to reasonably understand the

nature/consequences of the transaction and the other party has reason to know of his condition
  - Where other party is without knowledge or of reason to know of the mental illness or defect, the power of avoidance terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust
- **R2d § 16 - Intoxicated Person**
  - Person incurs voidable contractual duties by entering into transaction if the other party has reason to know that by reason of intoxication he is unable to understand the nature/consequences of the transaction

Dodson v. Shrader

P is a minor who purchases truck from D. Truck experienced engine issues and ultimately blew up. P tried to rescind purchase and requested refund, but D refused. P brought action seeking to avoid contract under infancy doctrine. In balancing rights of innocent merchants and protection of minors, court adopts rule that **minor is not permitted to recover full amount without allowing compensation for any depreciation or damage to the purchase while in their possession. Where the minor has not been subject to overreach or undue influence and the contract is fail/reasonable, the minor may recover the purchase price less reasonable compensation to the vendor for the use of, depreciation or willful/negligent damage to the goods while in the minor's possession.**

Sparrow v. Demonico

P claims that mediation agreement was unenforceable because it she had experienced a mental breakdown at the time of assenting and lacked the capacity to authorize such an agreement. Court acknowledges the possibility of avoiding a contract due to mental/emotional related incapacity at the time of the transaction, even if the condition is not chronic or persistent. However, court also recognized the placement of **burden on P to provide medical evidence supporting claim of incapacity** is important to guard against fraudulent claims or plaintiffs who innocently, yet erroneously, convince themselves of suffering distress. Since P failed to provide medical evidence of her condition or evidence that her condition could feasibly result from the alleged cause, the court held there is no evidence that a reasonably competent person would not have entered into it.

Duress and Undue Influence

- Basic formulation of standard for duress
  a. One party involuntarily accepted terms of another
  b. Circumstances permitted no other alternative
    - "No choice but to agree to the other party's terms or face serious financial hardship"
    - "What constitutes a reasonable alternative is a question of fact depending on the circumstances of each case"

c. Such circumstances were result of wrongful coercive acts of the other party ("actual inducement")
    - No analytically precise standard of "wrongfulness" is provided, but courts have held that such an act need not be illegal.
        - Can be a breach of the duty of good faith or fair dealing
        - Would harm the recipient and would not significantly benefit the party making the threat
    - In the context of economic duress, there must thus be a showing that duress resulted from D's wrongful and oppressive conduct and not by P's necessities

- Other formulations emphasize the suppression of ones free will and judgement
    - Those claiming coercion typically seek to avoid the contract or any modifications/settlements

Rules - Duress

- **R2d § 174 - When Duress by Physical Compulsion Prevents Formation of a Contract**
    - If a party is compelled by physical duress to assent, assent is ineffective
- **R2d § 175 - When Duress by Threat Makes a Contract Voidable**
    - If a party's assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the K is voidable by the victim
    - If a party's assent is induced by someone who is not a party to the K, the K 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
        - What is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
        - What is threatened is a criminal prosecution
        - What is threatened is the use of civil process and the threat is made in bad faith, or
        - The threat is a breach of the duty of good faith and fair dealing
    - A threat is improper if the resulting exchange is not on fair terms, and
        - The threatened act would harm the recipient and would not significantly benefit the party making the threat,
        - The effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
        - What is threatened is otherwise a use of power for illegitimate ends
- **R2d § 177 - When Undue Influence Makes a Contract Voidable**
    - Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between

them is justified in assuming that that person will not act in a manner inconsistent with his welfare
  - A party's assent, if induced by other party's undue influence, makes the K 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 undue influence either gives value or relies materially on the transaction

Totem v. Alyeska Pipeline

P and D in contractual relationship to transport pipeline construction materials. After several unexpected delays, D terminated the contract. P submits termination invoices to which D is unable to provide a timeline for payment. Strapped for cash and under pressure from several other creditors, P agrees to settlement for substantially less than original invoices. P later brings action seeking full payment under claim that the release was agreed to under economic duress and that P had full knowledge of P's vulnerable state and used it as leverage to reach a settlement. Court rules that the claim economic duress, P must demonstrate that it had no reasonable choice but to agree to the other party's terms or face serious financial hardship and that the lack of reasonable alternatives was the result of D's wrongful conduct. Court found the circumstances surrounding the claim, that D exploited P's impending bankruptcy to reach a settlement, might reasonably support finding of D's conduct as wrongful. Thus court concludes the claim is improperly disposed off in the lower court's granting of summary judgement.

Misrepresentation and Nondisclosure

- Rescission
  - Equitable remedy commonly used is instances of misrepresentation and nondisclosure
    - In such cases under modern law, victim has choice between tort action for damages or avoiding the contract by way of rescission
  - Judicial return of the parties to the status quo that existed before the contract was formed
    - Requires injured party to return any money or property he has received
    - May not be available where property has since been transferred to another party
- Fraudulent Inducement:
  a. Defendant made false representations as a statement of existing and material fact
  b. Defendant know representations to be false or made them recklessly without knowledge
  c. Defendant made representations intentionally for the purpose of inducing another party to act upon them

   d. Other party reasonably relied and acted upon representations - a representation is material when so substantial as to influence the other party
   e. Other party sustained damages
- Fraud by Silence (Fraudulent Nondisclosure):
   a. Defendant had knowledge of material facts not reasonably discoverable by other party
   b. Defendant under obligation to communicate such facts
   c. Defendant intentionally failed to do so
   d. Plaintiff reasonably relied on defendants representations as being complete and sustained damages as a result
   - Court may take into account differences in the levels of intelligence between parties, the nature of the relationship, and the degree to which information is readily discoverable or verifiable.
- Negligent Misrepresentation
   a. Person supplying false information has failed to exercise reasonable care or competence in obtaining/communicating the information
   b. Person relying upon false information is the intended beneficiary of the information supplied
   c. Damages are suffered by relying party in transaction that negligent party is trying to influence

Rules - Misrepresentation

- **R2d § 164** - A contract is voidable if a party's manifestation of assent is induced by either fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying.
   - "Material" misrepresentations may be made innocently but nonetheless render contract avoidable
- **R2d § 162** - Defines fraudulent to include an assertion made as true but without knowledge or confidence by the maker whether it is true or false, and thus may include statements that are made recklessly or negligently
   - An opinion defines an express of a belief, without certainty, as the existence of a fact. These are typically given a certain degree of leeway, but statements of opinion may be actionable in certain relationships (e.g. fiduciary, expert reliance, etc.)
   - An opinion can also be actionable for misrepresentation if it can be demonstrated that it was not genuinely held

Syester v. Banta

Over period of several years, 68 year old widow pays D in return over 3000 hours of dance lessons. D's inducement of the sale of the lessons is borderline exploitative and fraudulent. After P terminates relationship with P and expresses intent to bring action, D uses questionable tactics in order to sign a release containing terms which, if signed in good faith, would bar all claims related to the transactions between D and P. D asserts the terms

of the release as a defense, but jury awards judgement in favor of P. Court asserts **a settlement/release fairly entered into is binding and enforceable unless there exists fraud in its execution**. To claim fraud, one must establish (1) a representation was made, (2) it was false, (3) it was material, (4) the party making the statement knew it was false, (6) the injured party relied upon the statement in entering into the contract Upon appeal, CoA determined that the jury was properly instructed and, as a questions of fact, court held there was reasonable evidence that might reasonably support finding of misrepresentation if believed by the jury. Finally, court affirmed the award of punitive damages, citing the "greed and avariciousness" demonstrated by D.

Stechschulte v. Jennings

D enters agreement to sell home to P. Over duration of D's ownership, there had been issues with water leaks to which D consulted with a contractor and ultimately applied temporary solution. In disclosure addendum section related to leakage, repairs, and stains, D failed to indicate these issues. Instead, he suggested that full warranty repairs had corrected the issue. P signs disclosure section with terms acknowledging the claims were made to the best of the non-expert seller's knowledge and that there is no reliance on any representations except those fully set forth in writing. P takes ownership of the home and then brings action against D after experiencing leakage. D claims the Buyer Acknowledgement as a defense. Lower court awards summary judgement in favor of D. State supreme court holds that P's acknowledgement there their was no reliance on representations made by the seller does not extend do the disclosures made in (or intentionally omitted from) the disclosure form. Thus, the Buyer Acknowledgement form does not protect D against failure to make accurate and complete disclosures. Court found that D's statements and omitted facts in the disclosure reasonably support the contention that D failed to make complete and accurate representations. Thus, court rules summary judgement was improperly awarded and remands all claims to lower court.

Unconscionability

- Definition
  - One party's lack of meaningful choice (typically due to lack of understanding or unequal bargaining power), K terms unreasonably favor the other party
  - Idea that a grossly unfair bargain should be unenforceable
  - Judged as to the time the K is made; not based on developments after K formed
- Procedural and Substantive Unconscionability
  - Need both, but on a sliding scale
  - **Procedural** - What went into the process of making the K; conspicuousness + intelligibility of a clause; oppression or surprise because of the unequal bargaining power (may reflect lack of choice);
  - **Substantive** - Terms that are "overly harsh" or one-sided; outrageously unfair so as to shock the judicial conscience; no many would accept; commercially

unreasonable; applies to purpose + effect of the terms along with allocation of risk between the parties

Rules - Unconscionability

- **R2d § 208 - Unconscionable Contract or Term**
  - If a court finds the contract or any clause of the contract to have been unconscionable at formation, it may refuse to enforce the contract, enforce it without unconscionable clause, or limit application of clause so as to avoid an unconscionable result
- **UCC § 2-302 - Unconscionable Contract or Clause**
  a. Identical to R2d §208
  b. When unconscionability is claimed, parties shall be given a reasonable opportunity to present evidence as to its commercial setting, purpose and effect

Williams v. Walker-Thomas

Furniture store (D) leases items to customers who make series of installment payments. Ownership is not conferred until final payment is made, at which point title passes to customer. Lease agreements contained unique provision that every time a new item was leased by a customer, balance would be dispersed across all items previously leased. This would allow D to repossess all previous purchase by that customer. P buys stereo and defaults, resulting in D repossessing all items. P sues on unconscionability grounds and trial court grants judgement for D. CoA rejects lower court holding that it lacked power to deny enforcement on unconscionability grounds. Court defines unconscionability as the absence of meaningful choice on the part of one of the parties combined with terms that are unreasonably favorable to the other party. CoA adopts rule that **contracts containing element of unconscionability should not be enforced and the court should determine this in light of the circumstances**.

Higgins v. Superior Court of LA County

P's are orphaned and are taken in by family. P's are featured on television program where family's home is renovated. Contract contained arbitration clause. After show and renovation, family kicks out P's from home. P sues and family and TV producers, whom petition to enforce arbitration clause. P contends clause was unconscionable. Court identifies **two different components to unconscionability: procedural (oppression or surprise because of the unequal bargaining power) and substantive (terms that are "overly harsh" or one-sided). Both must be present in order for there to be unconscionability (though not to the same extent).** Court finds procedural - P wasn't party who drafted K (i.e. contract of adhesion), there was no attempt to highlight clause, and Ps were young, unsophisticated, and vulnerable. Court also finds substantive component - th clause is only applicable to disputes raised by P, thus D can compel arbitration but still allow themselves to seek relief in court if necessary.

Quicken Loans, Inc. v. Brown

P reluctant to sign loan agreement, but after several calls from D urging her to do so, she signs 81 page document containing significantly different terms than those offered to her and excluded documents that would by conducive to her understanding. P defaults and brings suit. TC awards damages to P and D appeals. CoA holds that mortgage is unconscionable if party conceals important terms with the intent to mislead and induce borrower to enter agreement. Clearly an element of procedural unconscionability based on parties' relative bargaining power. CoA also found the exorbitant cost of the loan to be evidence of substantive unfairness. Hence, TC ruled properly in declaring contract unconscionable.

Public Policy

- Process of contract formation is untainted but a K may still be unenforceable because the K itself violates or runs contrary to public policy and can be voided
  - Comes up in context of family law/children + covenants not to compete. Classic example is contract to commit a crime
  - There is also a strong policy interest in freedom of contract so there must be a well-established basis for any public policy that would deny enforcement of a K

Rules - Public Policy

- **R2d §178 - When a Term is Unenforceable on Public Policy Grounds**
  a. A promise or other term of an agreement is unenforceable on public policy grounds if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed by a public policy against its enforcement [balancing test]
  b. In weighing the interest in the enforcement of a term, take account of:
     - the parties' justified expectations
     - any forfeiture that would result if enforcement were denied, and
     - any special public interest in the enforcement of the particular term
  c. In weighing a public policy against enforcement of a term, take account of:
     - the strength of that policy as manifested by legislation or judicial decisions
     - the likelihood that a refusal to enforce the term will further that policy
     - the seriousness of any misconduct involved and the extent to which it was deliberate
     - the directness of the connection between that misconduct and the term.

Valley Medical Specialists v. Farber

Physician (D) with specialized area of practice enters employment contact containing a restrictive covenant (non-compete) with P. After D ends employment and begins practicing in the same area, P brings action for break and seeks injunction. Court asserts that **a**

covenant is not valid unless it protects some legitimate business interest outside of simply shielding a business from competition. It also acknowledge doctor-patient relationship is special and not like ordinary commercial contexts because free movement and competition among physicians is a prerequisite to optimal care, thus it must consider the reasonableness in each case. **A covenant is unreasonable if it provides restrictions greater than that needed to protect and employer's legitimate interests or is outweighed by the detriment to the employee or public** (e.g. patients). Court finds both to be true in this case, thus the covenant is unenforceable on public policy grounds

In re Baby

TN Supreme Court holds that **a contract is unenforceable on public policy grounds only when its terms clearly violate the public policy of the state**. Since state took neutral legislative stance on surrogacy arrangements, there is no clear public policy prohibiting such agreements. However, surrogacy contracts may not circumvent the statutes governing a person's status as a legal parent or the statutory procedures for terminating parental rights. Here, the portion of the juvenile court's order terminating the surrogate's parental rights prior to childbirth in the absence of statutory authority contravenes public policy

---

Justifications for Nonperformance

Changed Circumstances: Impossibility, Impracticability, and Frustration

- Contract liability is strict liability. The obligor is therefore liable in damages for breach even if he is without fault and even if circumstances have made K more burdensome or less desirable than he had anticipated
- However, court may still grant relief in extraordinary circumstances which make performance so vitally different from what was reasonable to be expected as to alter the essential nature of that performance. In such cases, court must determine whether justice requires departure from general rule that obligor bears the risk.
- Three distinct grounds for discharging: (1) circumstance has made own performance impracticable; (2) circumstances have so destroyed value of other party's performance as to frustrate his own purpose in making the contract; (3) obligor won't receive performance in exchange due to obligee asserting impracticability or frustration
  - Impossibility – cannot be performed
  - Impracticability – drastic change in circumstances make it unreasonable to perform
  - Frustration of Purpose – principle purpose of contract defeated by unanticipated change circumstances
- Justifications

- Contracts are silent on the basic assumptions that may radically change, so these doctrines try to help re-create what the parties might have wanted
- There is an efficiency interest in having default rules for parties to contract w/, b/c there is less for parties to negotiate over

Rules - Impossibility, Impracticability, and Frustration

- **R2d § 261** – Impracticable where change in a basic assumption of contract without fault. In such circumstances, duty is discharged
  - Generally either due to "acts of God" or acts of third parties (e.g. government)
- **R2d § 262** – Death or incapacity of person necessary for performance impracticable if effects basic assumption of contract
- **R2d § 263** – Destruction/deterioration of thing necessary for performance impracticable if non-occurrence was basic assumption
- **R2d § 264** – Duty made impracticable by need to comply with government regulation, if non-occurrence was basic assumption
- **R2d § 265** - Where after a contract is made and a party's principle purpose for making it is substantially frustrated without his fault by the occurrence of an even, the non-occurrence of which was a basic assumption on which K is made, then remaining duties to perform are discharged unless language or circumstances indicate otherwise
- **UCC § 2-615 – Excuse by Failure of Presupposed Conditions**
  a. Delay in delivery or non-delivery in whole or in part by a seller who complies w/ (b) + (c) is not a breach if performance has been made impracticable by something happening + basic assumption of K was that such a think wouldn't happen OR by good faith compliance w/ govt regulations or orders whether/not later prove to be invalid
  b. When things in (a) only affect a part of the seller's capacity to perform, he must allocate production + deliveries among his customers but may include regular customers not then under K as well as his own requirements for further manufacture. May allocate in an fair and reasonable manner.
  c. Seller must notify the buyer seasonably that there will be a delay or non-delivery and when allocation is required under (b), of the estimated quota then available for buyer.
  - Comments:
    - Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen thing which alters the essential nature of the performance. Rise or collapse in the market is not itself a justification. However, severe shortage of raw materials due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, which cause a marked increase in cost or altogether prevent the seller from securing the supplies necessary to his performance are all justified circumstances.
    - Government interference cannot excuse unless it truly supervenes in a way as to be beyond the seller's assumption of risk; same goes if party claiming excuse causes or colludes in inducing the government action

- Seller must fulfill the K to the extent the supervening contingency permits + must take account of all customers

Waddy v. Riggleman

P entered into a contract to purchase a tract of land from D for $22,500, with closing to occur on or before a certain date over two months later. The agreement required the D to convey title to the land free and clear of all liens and defects. D's attorney prepared contract and was charged with obtaining the relevant mortgage releases, which he failed to do in timely manner. Ds backed out of the agreement and P files suit against D and two banks that had liens on property. D subsequently sells property, adversely affected the 48 acres sought by P, to a third party (D2).TC dismisses complaint, holding that that the transfer of the land was impossible and that time was of the essence in closing on the sale. P appealed. CoA reviewed the impracticability of the sale and concluded that the elements needed to assert impracticability as a justification for non-performance were not satisfied by P. For performance to be impracticable, **must show more than mere increase in difficulty and reasonable efforts to overcome obstacles to performance**. Likewise, **supervening event making performance impracticable must be without fault by D**. D's failure to obtain mortgage releases, for which they had 2+ months to complete, does not give rise to impracticability. A **party can't by its own act place itself in a position to be unable to perform and then subsequently plead that inability as an excuse for nonperformance.** Hence, CoA rules TC erred in dismissing complaint.

Mel Frank Tool & Supply, Inc. v. Di-Chem Co.

P leases warehouse space for D to store chemicals, though nature of chemicals unknown to P at the time. Term included in the agreement provides that D make no unlawful use of the warehouse space. At some point during lease, the city changed the fire code to prohibit hazmat storage and D fails inspection. While building could be brought up to could, P and D fail to reach agreement about sharing costs to do so. D notifies P of intention to vacate since it can't legally store chemicals. P brings suit for breach and D asserts affirmative defense of failure, fraud in the inducement, and impossibility. TC found for P and D appealed. Court holds that the facts of the dispute fall within the parameters of **"frustration of purpose": where the principal purpose of the contract is substantially frustrated to the extent where it is not fairly to be regarded as within the risks assumed and the non-occurrence of the frustrating event was a basic assumption of the contract. In cases where a subsequent government regulation prohibits tenant from legally using premise for its original intended purpose, then the tenant's purpose is substantially frustrated and is thereby relieved from further obligation to pay rent, unless there is a serviceable use for property consistent with a provision of the lease.** However, D failed to provide any evidence that all of the chemicals stored on the property were hazardous, hence there is still some serviceable use and the D's purpose isn't entirely frustrated (the **fact that property isn't as useful as originally intended isn't sufficient to establish frustration**). Thus, court affirms ruling that D breached.

Modification

- Consideration for contract modification
  - UCC and CISG generally do not require more consideration for modification
  - R2d will require consideration for modification of contractual duties
- Pre-existing duty rule
  - Merely promising to perform an existing obligation will not serve as valid consideration for additional return compensation from the other party
  - Today, courts accept even a small/modest addition/alteration of performance as enough to satisfy rule

Rules - Modification

- **R2d § 73 - Performance of a Legal Duty**
  - Cannot modify w/out consideration. Performing a legal duty already owed to a promisor, where there is no honest dispute about what the original bargain intended, is NOT consideration. But a similar performance is consideration if it is different from what was required by the duty in a way that reflects more than a pretense of bargain
- **R2d § 89 – Modification of Executory Contract**
  - Promise modifying duty under K is binding if:
    i. If it is a fair and equitable modification in view of the difference in circumstances anticipated and actual (e.g. forces of nature that complicate performance); OR
    ii. If it is allowed by statute; OR
    iii. To the extent that justice requires enforcement where party materially + justifiably changed his position in reliance on the promise (neglected in *AK Packers*)
- **UCC § 2-209 – Modification, Rescission, and Waiver**
  a. Modification does not need new consideration except where special circumstances (good faith still applies; reasonable commercial standards of fair dealing in the trade; modification without legit commercial reason and extortion are barred)
  b. Agreements that exclude modification unless in writing cannot be rescinded or changed unless mutually consented to in writing
  c. Must satisfy Statute of Frauds
  d. May operate as waiver if does not modify correctly
  e. May retract waiver unless there has been detrimental reliance or lack of notice of retraction
- **CISG Art. 29**
  a. Contract may be termed or modified by agreement, no need for additional consideration
  b. However, may not waive the written requirement unless there is detrimental reliance on it

Alaska Packers v. Domenico

Contract for services whereby P's man a fishing vessel from San Francisco to AK and work fishing season. Contract paid base salary plus piece rate on fish caught. In middle of performance, Ps stopped work and demanded compensation be doubled. D acquiesces and work resumes. At end of season, D only compensates P according to the original contractual terms. P argues both suspended performance and demands were justified because D deliberately equipped ship with bad nets to prevent paying for excess fish that would be written of as spoilage due to limited production capacity. Question for CoA was whether or not the modified terms of the contract were supported by sufficient consideration. CoA holds that D consented to demands without consideration, as it was based upon agreement for P to render exact same services that it was already contractually obligated to perform. **Where parties enter a new agreement under which one party agrees to do no more than he was already obligated to do under an existing contract, the new agreement is unenforceable for lack of consideration.** Additionally, this can't construed as a voluntary waiver of breach of the original contract and agreement to a new one because it was coerced by the non-performing party. Thus, CoA rules there are no grounds for legally enforcing modified terms of the contract and the original terms, which D satisfied, control the contract.

Kelsey-Hayes Co. v. Galtaco Casting

P has 3 year agreement with D for castings used in auto parts. D facing financial trouble and informs P of 30% increase in the castings that is necessary to keep operating. If P does not consent, it will lose its supply and cause serious delays down the supply chain. Not wanting to create such disruptions and lose goodwill with P's customer base, P acquiesces to price increase. However, when it comes time for payment, P doesn't pay for entirety of the castings, but rather makes a payment equal to all of the castings at the original price. P seeks declaratory judgement that it isn't required to pay increased price. While **UCC Article 2 holds that modification needs no consideration to be binding, the presence of certain circumstances serve as an exception which includes bad faith (which can extend to economic duress)**. D's attempt to coerce a promise was both wrongful (threaten to breach with no attempt to negotiate) and left P with no reasonable alternative (no other source of castings, would create significant disruption and loss of goodwill with customers), two required elements of economic duress. Finally, there must be some showing of protest to the price increase and that the agreement was not freely entered into, which P clearly did. Thus, court rules that the modified price is not enforceable.

Consequences of Nonperformance

Express Conditions

- Conditions

  - Used to protect parties against various types of risk, including those that would affect the value of future performance
  - Often an event in which a contractual party has some, albeit limited, control over
  - Uncertainty is necessary. The mere passage of time, to which there is no uncertainty, can't be conditioned on
  - Non-occurrence is not breach unless duty of party was to bring about its occurrence
  - Usually required to be expressed in clear and unambiguous language
  - A condition subsequent is a duty owed but subject to discharge on the happening of an event after that duty had already arisen
- Distinction between express conditions and promises
  - Condition requires strict compliance to be satisfied
  - Substantial performance is not applicable to conditions
- Express conditions are strictly enforced with the following exceptions:
  - Disproportionate Forfeiture - Nonoccurence excused to prevent forfeiture
  - Waiver - Obligor whose duty is expressly dependent on a condition may be under a duty to perform despite the nonoccurence of that condition if he has, by word or conduct, waived the right to insist on fulfillment of the condition before performing the duty (R2d § 84)
  - Estoppel - A material condition can be overcome by estoppel based on obligor's expression of intention not to insist on it followed by obligee's prejudicial reliance
  - Prevention of Condition - Condition excused if the promisor wrongfully hinders or prevents condition from occurring
- **Decision Tree**
  a. Is it an express condition?
  b. If yes, no need to perform if not satisfied UNLESS
    - Waived : obligee waived the right to insist on fulfillment of the condition before performing [where non-material to the agreed exchange OR consideration received for the waiver despite fact that it is a material change]
    - Excused
      - Non material AND forfeiture (non-occurrence of the condition would cause disproportionate forfeiture on the part of the obligee)
      - Party in breach contributes to non-occurrence of the condition (some courts hold possibility of prevention of the condition by the obligor was a risk assumed by the obligee)

Rules - Conditions

- **R2d § 84 - Promise to Perform in Spite of Non-occurrence of a Condition**

  - Waiver is effective without consideration or reliance but only if condition was immaterial and the other party did not assume risk of its non-occurrence
- **R2d § 224 - Conditioned Defined**
  - An event, not certain to occur, which must occur, unless non-occurrence is excused, before performance under a contract becomes due
- **R2d § 225 - Effects of the Non-Occurrence of a Conidtion**
  - Effects of the Non-Occurrence of a Condition
    i. Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused
    ii. Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur
    iii. Non-occurrence of a condition is not a breach by a party unless he has a duty that the condition occur
- **R2d § 226 - How and Event May Be Made A Condition**
  - An event may be made a condition either by the agreement of the parties or by a term supplied by the court
- **R2d § 227 - Standards/Preferences with Regard to Conditions**
  - Because conditions have a sharp edge, courts try to interpret things as not conditions. Interpret things away from being conditions where it would be fair to do that unless the language is very very clear
    - Interpret in a way to reduce obligee's risk of forfeiture, unless the event is w/in the obligee's control or the circs indicate that he has assumed the risk.
- **R2d § 229 - Forfeiture**
  - Refers to the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantial, as by preparation or performance on the expectation of that exchange. In determining whether forfeiture is disproportionate, court must weight extent of obligee's forfeiture against importance to obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if condition is excused. Court may excuse the nonoccurrence of a condition where disproportionate forfeiture would otherwise result, unless the conditioning event was a material part of the parties' exchange
- **R2d § 245**
  - When a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused

enXco Development Corp v. Norther States Power Co.

Contract allows termination upon condition of failure of P to obtain a license necessary to proceed with wind-energy project. P doesn't apply for license until late. P encounters delays that result in them failing to obtain the license in time. D terminates the contract, causing P to lose millions since resale price of the infrastructure it had purchased had significantly declined. D also had economic incentive to avoid contract as the profitability of

wind-energy had decreased since the project's outset. P brings suit for breach, asserting doctrines of temporary impracticability and disproportionate forfeiture as defenses to strict enforcement of the condition precedent. CoA asserts **impracticability requires the party be without fault and only excuses condition precedent if the condition is not a material part of the contract and forfeiture would result**. CoA rules this is not applicable to P since it waited nearly 2 years to apply for license and the various delays were reasonably foreseeable. It also rules there was no disproportionate forfeiture as P retained all of the project assets and real property.

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

D leased commercial property to a restaurant for a 10-year term, with an option to renew for another 10-year term. The lease required the restaurant to inform D at least six months prior to the end of the lease term if it wished to exercise the option. P buys lease from restaurant and has it modified so the option would increase to 24 years. D regularly informed P about lease obligations, but never provided reminder notifications about the lease extension. P is notified two weeks before expiration that they need to vacate and D refused to honor exercise option since deadline had passed. Court holds that tenant may suffer forfeiture when negligently failing to exercise option to extend lease when it has made in good faith improvements to the property intending to renew a lease. Court must weigh gravity of the fault by negligent party with the gravity of the hardship. In such case, **if landlord would not be prejudiced by the delay in notice and the lessee would sustain substantial loss otherwise, then there is equitable interest in protecting against this forfeiture**. Hence, court rules the case should not have been dismissed.

Material Breach

- Constructive Conditions
  - Doctrine dealing with one party's performance being dependent (conditioned) on, though not expressly, the performance of the other party's performance.
  - If one party fails to perform or tender performance, is it sufficient justification for the other party to withhold their performance?
  - Minor or immaterial deviations from the contract do not amount to failure of a condition to the other party's performance
- Willful Breach - May or may not bar recovery when there is substantial performance
  - Cordozo in *Jacob & Youngs* - Willful transgressor not able to recover under the substantial performance doctrine
    - Other cases have relied on this
  - Corbin - Willful breach does not automatically bar recovery, but motive of breaching party is factor in determining substantial performance
- Total Breach
  - Does not mean party has breached **all** of their obligations, but that breach is sufficiently serious to justify discharging the other party
  - Significant from partial breach in two ways:

    i. Partial breach does not discharge non-failing party
    ii. Total breach allows injured party to recover both actual and future damages arising out of breach
  - Different from material breach insofar as material breach only suspends one's duty to perform. When material becomes total in §242, party is discharged from performing

Rules - Material Breach

- **R2d § 234 - Order of Performance**
  - Performances that can be rendered at the same time are due simultaneously unless otherwise prescribed in contract
- **R2d § 235 - Performance, Breach, and Discharge**
  - Full performance of duty under contract discharges duty
  - When performance of duty under contract is due, any non-performance is a breach
- **R2d § 237 - Effect on Other Party's Duties of a Failure to Render Performance**
  - It is a condition of each party's remaining duties to render performance that there be no **material** failure by the other party to render performance at an earlier time
    - Comment a - Material failure to perform suspends, at least temporarily, other party's duty and discharges it can no longer occur
- **R2d §241 - Determining Material Failure**
  - Following circumstances are significant in determining whether failure to render performance is material:
    i. Extent to which the injured party will be deprived of expected benefit
    ii. Extent to which injured party can be adequately compensated for deprived benefit
    iii. Extent to which party failing to perform will suffer forfeiture
    iv. Likelihood party failing to perform will cure failure in light of circumstances
    v. Extent to which party failing to perform comports with standards of good faith and fair dealing
- **R2d §242 - Determining Discharge of Duties**
  - Following factors relevant in determining whether material failure discharges remaining duties:
    i. Those stated in §241
    ii. Extent to which delay would prevent injured party from making substitute arrangements
    iii. Extent to which extent to which agreement provides for performance without delay (time is of the essence clause)
- **UCC § 2-601 - Buyer's Rights (Perfect Tender Rule)**
  - Buyer can reject goods if they or the tender of delivery fail in any respect to conform to contract, regardless of how material

    - If choose to accept, this decision is final if seller knows of acceptance
- **UCC § 2-601 - Rightful Rejection**
    - Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless buyer notifies seller
- **UCC § 2-508 - Revocation of Acceptance**
    - Buyer can revoke acceptance of goods whose non-conformity substantially impairs its value if it was accepted on the assumption that the non-conformity would be cured and wasn't or if non-conformity wasn't discovered either by difficulty or seller's assurance
    - Must occur within reasonable time after buyer gains grounds to revoke
- **UCC § 2-508 - Cure of Improper Tender**
    - Seller can cure goods rejected for non-conformance my notifying buyer and doing so within period for which performance is allowed
    - Seller can have further reasonable time to substitute conforming tender if they had grounds to believe original tender was acceptable and notification is given to buyer

Jacob & Youngs, Inc. v. Kent

P is a general contractor that built residence for D. Contract stated that P was to be paid $77,000 and included specification that all pipes used be manufactured in Reading, PA. About a year after construction is completed, D learns that pipes not in spec. Replacement of the pipe, however, would require substantial additional work and expense by P. Additionally, the pipe used was of the same quality and was only supplied due to innocent mistake by P. P doesn't fix and D refuses to make final payment on contract. P brings uit. TC denies introduction of evidence showing pipe installed was of the same quality as Reading pipe, leading jury to find for D. The CoA reversed and granted a new trial. State supreme court must balance purpose of the contract with fairness of making P correct defect or liable for breach. Deviations from contract where purpose is frustrated outweigh fairness to party that fails to fully perform. However, where significance of the default (in light of the purpose) is small in comparison to the oppression of the forfeiture or burden of correction, courts become more flexible. Court **owner is entitled to money which would enable him to complete partial performance, unless cost of completion is grossly/unfairly disproportionate to good being attained, in which case the measure should be the difference in value.** In this case, where cost of replacing piping would be very expensive, court holds that allowance to D should be difference value between pipe used and Reading pipe, not the cost of replacement. Dissent argues P should not avoid liability for negligent failure to adhere to contract, regardless of quality.

Sacket v. Spindler

D agrees to share stock to P in installment payments due on specific dates. Stock delivered in full once last payment made. P fails to make final payment on specified day. After several weeks of correspondence between parties and P's continued failure to make payment, D refused to sell. P sues for breach claiming D's refusal was an unlawful repudiation of the

contract. D brings counterclaim for breach. TC rules in favor of D, holding P's failure to pay was breach. P appealed. CoA maintains **D's repudiation is justifiable if and only if P's failure to pay can be considered a total breach rather than a partial breach**. Extent of breach depends on materiality. Court considers factors for determining materiality as provided in the Restatement. They ultimately conclude D was justified in terminating the contract on the basis that Sackett's actions created extreme uncertainty as to if he would be able to perform. Also, P's failure to perform went beyond innocent negligence and could be categorized as willful.

Anticipatory Repudiation

- Performance not yet due, but there are reasonable grounds to doubt the willingness or ability of the other party to perform. Anticipatory repudiation, and **advance refusal to perform**, guards against prospect of nonperformance without committing breach itself
  - Innocent party still runs the risk of breaching if anticipatory repudiation is not justified. Safer seek assurances rather than repudiate and be liable
- Distinguished from "total breach" (where other party is justified in treating her performance obligations as discharged) insofar as there is no total breach at the time of repudiation since performance is not yet due
- Party that issues anticipatory repudiation can generally still retract, unless:
  a. The other party relies and changes position
  b. The other party notifies of acknowledgement of the repudiation (through notification or its conduct)

Rules - Anticipatory Repudiation

- **R2d § 250 - When Statement Acts as Repudiation**
  - A repudiation is:
    - A statement indicating that the obligor will commit a total, material breach OR a voluntary act which renders obligor unable or apparently unable to perform. If a statement, language must be reasonably interpreted to mean party cannot or will not perform (not merely doubtful or indefinite)
- **R2d § 251 Failure to Give Assurance Treated as a Repudiation**
  - Where reasonable to believe that obligor will totally breach, obligee may demand adequate assurances of performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives assurance
  - Obligee may treat as repudiation obligor's failure to reassure within reasonable time
- **R2d § 253 Breach + Discharge of Duties**

  - Where obligor repudiates a duty before committing breach and before receiving all of the agreed exchange, repudiation alone gives rise to claim for damages for total breach
  - Where K requires performances, one party's repudiation of duty to perform discharges other party's remaining duties to perform
- **R2d § 256 Retraction of anticipatory repudiation**
  - Can retract a repudiation so long as other party has not materially changed his position in reliance on repudiation OR other party indicates to the repudiating party that he considers the repudiation final
- **UCC § 2-609 – Reasonable Assurances**
  - When reasonable grounds for insecurity (according to commercial standards), party may demand (in writing, though not necessarily if done unambiguously) adequate assurance of due performance and may suspend any performance (if commercially reasonable) for which he has not received the agreed return until receive assurance.
  - Failure to provide assurance within reasonable time (no more than 30 days) can be construed as a repudiation
- **UCC § 2-610 - Anticipatory Repudiation**
  - If party 1 repudiates pre-performance, party 2 may await performance (for a commercially reasonable time), OR resort to remedy (even if he has notified repudiating party that he would await the latter's performance and has urged retraction)
  - In either case, can suspend own performance, but if awaiting performance beyond commercially reasonable time, can't recover avoidable damages
  - Not as strict as restatement when it comes to demonstrating intent not to perform: action which reasonably indicates a rejection of the continuing obligation is sufficient
- **UCC § 2-611 - Retraction of Anticipatory Repudiation**
  - Can retract unless aggrieved party has materially changed his position or indicated that he considers the repudiation final
  - Retraction reinstates repudiating party's rights under the K with due excuse + allowance to aggrieved party for any delay caused by the repudiation
- **CISG Art. 71-73**
  - Reasonable time instead of 30 days
  - May suspend performance if apparent other party will not perform as result of some deficiency, his creditworthiness, or conduct in preparation to perform
  - Installment Ks are treated separately but if grounds to believe future installments will be breached, can declare future installments avoided

Truman L. Flatt & Sons Co. v. Schupf

D agreed to sell P a parcel of land. Contract for sale of land was contingent upon P's successful rezoning of the property. P faced opposition to proposed rezoning at public meeting. P sends D a letter indicating that there was strong opposition to the rezoning

request, but that it was still interested in the property though at a lower price since it is less valuable to them now. D responds to letter rejecting the requested modification of the price term. P sends another letter stating that it still intended to purchase the property for the original price. D responds by informing them they considered contract to be voided and won't be selling P the land. P brings action seeking specific performance and TC awards summary judgement in favor of D. P appeals, arguing its request to change the price didn't constitute a repudiation, and even if it did, it was quickly retracted. Referencing UCC, CoA holds that **language that under a fair reading, a statement of intention not to perform or to perform only if non-contractual conditions are met, constitutes a repudiation**. Court rules that P's letter was not a clearly implied threat of non-performance. Additionally, both UCC and Restatement provide that **repudiating party can retract the repudiation unless the other party has since cancelled or materially changed his position (in response to repudiation) or has otherwise indicated that they considered repudiation final**. Since D did not attempt to seek or sell the property to other buyers (i.e. no change in its position) and only provided notice that it considered the contract repudiated after the repudiation has been revoked, CoA determines TC erred in awarding summary judgement to D.

Hornell Brewing Co. v. Spry

D approached P seeking distribution rights for Arizona Tea in Canada. P grants exclusive distribution rights in an oral agreement. D begins to fall behind on payments, but it informs P that it has secured a line of credit for $1.5 million. D continues to miss payments, leading P to send letter stating it would allow relationship to continue and extend allowable outstanding balance if D could show proof of line of credit. D doesn't respond so P moves to terminate relationship. D refuses to sign agreement ending relationship. P seeks declaratory judgement that relationship had been properly terminated. Court identifies UCC as controlling body of law. **UCC authorizes a party upon reasonable grounds for insecurity to demand adequate assurance of due performance and until he receives such assurance, if commercially reasonable, suspend any performance for which he has not already received the agreed return.**. The court holds that D's falling behind on payments was reasonable ground for insecurity and that P's request for adequate assurance was proper. P failed to substantiate its purported line of credit and thus multiple failures by D to respond constituted a repudiation

---

Expectation Damages

Contract Damages in General

- Three principle purposes for awarding contract damages
    a. Expectation – make whole through compensating as if fully performed
        - "Benefit of bargain" - put you in as good a position as you would have been had K been fully performed as promised/bargained for
        - Protects π's net expectation: includes incidental + consequential damage

- Non-conforming goods? Difference between value of goods promised and those delivered
- For total breach: also include cost avoided + loss avoided

b. Reliance – restoration to the position you would have been in if the K had never been made (compensates for loss arising out of reliance on K)
   - Larger than expectation damages if you made a bad deal (where one would sustain a loss even if the K had been performed)

c. Restitution – take back from D what was given and kept unjustly

---

Computing the Value of Expectation Values

- Components of Calculation
  - Loss in value: value of what should have been received - value of what was actually received
  - Other loss: consequential + incidental damages
    - Consequential damages include injury to person or property caused by the breach
    - Incidental damages include additional costs incurred after the breach in a reasonable attempt to avoid loss (costs of trying to mitigate)
  - Cost avoided: Savings from avoiding expenditure that would have been incurred if no breach
  - Loss avoided: Loss avoided by the salvage/reallocation of resources devoted to original contract
- Expectation damages for total breach

```
general measure = loss in value - other loss - loss avoided - cost avoided
```

- Expectation damages for partial breach

```
general measure = loss in value - other loss
```

- Peevyhouse Rule
  - Where provision breached was merely incidental to contract's main purpose and where the economic benefit which P would receive from completing performance is grossly disproportionate to cost of completion, damages are limited to the difference/diminution in value resulting because of non-performance.
  - Most courts vary from this rule, but it is still valid law in OK

Rules - Expectation Damages

- **R2d § 344 - Purpose of Remedies**

- Allows expectation damages, among others, which it defines as interest in having the benefit of the bargain by being put in as good a position as he would have had K been performed

- **R2d § 347 - Measure of Damages in General**
  - Injured party has right to damages based on his expectation interest as measured by
    i. Loss in value to him by other party's deficiency
    ii. Any other loss, including incidental and consequential, caused by breach
    iii. Cost or other loss avoided by not having to perform
- **R2d § 348 – Alt. to Loss in Value of Performance**
  a. If breach delays use of property and loss is not recoverable with reasonable certainty, may use rental value or interest as proxy
  b. If only part performance may get damages on (1) loss of market value caused by breach or (2) cost of completion, if not disproportionate to loss in value
  c. If based on condition of fortuitous event, may get value of conditional right
- **UCC § 2-706 Seller's Resale Including Contract for Resale**
  - Seller may resell the goods concerned or the undelivered balance thereof. Where the resale is reasonable and made in good faith, the seller may recover the difference between the resale price and the contract price together with any incidental damages, but less expenses saved in consequence of the buyer's breach
- **UCC § 2-708 Seller's Damages for Non-acceptance or Repudiation**
  - Measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided
- **UCC § 2-709 Action for the Price**
  - When the buyer fails to pay the price as it becomes due, seller may recover,along with incidental damages, the price:
  a. of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
  b. of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
- **UCC § 2-710 Seller's Incidental Damages**
  - Any commercially reasonable expenses incurred in stopping delivery, in the transport, care and custody of goods after the buyer's breach, in connection w/ return resale of the goods or otherwise resulting from the breach
- **UCC § 2-715 Buyer's Incidental + Consequential Damages**
  - Incidental: any expenses reasonably incurred in connection with handling rightfully inspection rightfully rejected goods, or in connection w/ effecting cover (if commercially reasonable), any other reasonable expense incident to the breach.

Peevyhouse v. Garland Coal & Mining Co.

D, a mining company, contracts to stripe mine on P's farmland. As part of the agreement, D promised to restore land following its use. However, once mining is complete, D fails to make restorations. D argues the remedial work would be extremely costly and would only provide a very small benefit to P. TC awards P $29k that is needed to complete remedial work. Court holds that since the remedial work was **only incidental to the contract's main purpose and cost of completion disproportionate to its benefit, P should be compensated for the diminution in value due to non-performance, not the cost of completion.** Thus, court rules damages should be $300, not $29K.

Crabby's Inc. v. Hamilton

D executed a contract to purchase restaurant owned by P for $290k. P assigned his interest in the contract to an L.L.C. established to operate new restaurant. Contract has provision to use reasonable diligence in obtaining a loan and provide written loan commitment within 30 days or the contract terminated automatically. D gets loan but never submits written loan commitment to P. Following 30 day period, P takes steps showing its intent to proceed with transaction. D backs out 2 days before closing date, as it found a better deal. P didn't sell the restaurant until nearly 12 months later for $235,000. P files suit, claiming damages for difference between contract price and eventual sale price. TC awards in favor of P and D appeals, arguing no breach because contract automatically terminated. Court holds contract not terminated because conduct of both parties following 30 day window shows intent to proceed with contract (i.e. contingency clause is waived). **Damages should thus be difference between contract price and fair market value.** Using eventual sales price as proxy, P should be awarded $55k in loss of value, plus $40k in other loss, for a total of $95k in damages.

Handicapped Children's Ed. Board v. Lukaszewski

P, a school, hired D as employee for 2 year contract. D commutes 45 minutes to job and attempts to leave for something close by. P won't allow her to resign. D eventually resigns, citing health issues caused by situation. P attempts to find replacement and hires only candidate, whom has qualifications which command higher salary than D. P brings suit claiming damages for the additional expense of paying D's replacement. Court holds that **damages for breach of an employment contract include the cost of obtaining other services equivalent to that promised but not performed, plus any foreseeable consequential damages.** P attempted to mitigate loss by hiring the least expensive qualified replacement available and acted reasonably. Thus, in order to put P in position for which it bargained, it should be awarded difference between salaries.

Restrictions on Expectation Damages: Foreseeability, Certainty, and Causation

- General Damages

  - Loss resulting from breach that is foreseeable as probable (or natural) result of the breach
    - "Natural" in the sense that it accords with common experience of ordinary persons
  - Need not make special showing
- Consequential Damages
  - Loss that results in the non-ordinary course of events, must be forseeable
  - Applies to collateral contracts as in *Florafax* since losses not directly arising out of contract
  - Also apply to any damage to property/persons caused by failure to conform to contractual warranties

Rules - Foreseeability, Certainty, and Causation

- **R2d § 351 - Unforeseeability + Related Limitations on Damages**
  - Not liable for loss that the party in breach did not have reason to foresee as a probable result of breach when the K was made. Foreseeable = in the ordinary course of things (general/direct) OR as a result of special circumstances that the breaching party had reason to know (consequential/special).
    - Court may limit damages for foreseeable loss if justice so requires to avoid disproportionate compensation (e.g. excluding lost profits, limiting to reliance, etc.)
- **R2d § 352 - Uncertainty as a Limitation on Damages**
  - Damages not recoverable for loss beyond amount that evidence permits to be established with reasonable certainty
  - Uncertainty of the exact amount does not preclude recovery as long as sufficient evidence shows extent of damage by just and reasonable inference
- **UCC § 2-710 - Seller's Incidental Damages**
  - Any commercially reasonable expenses incurred in stopping delivery, in the transport, care and custody of goods after the buyer's breach, in connection w/ return resale of the goods or otherwise resulting from the breach.
- **UCC § 2-715 Buyer's Incidental + Consequential Damages**
  - Incidental: any expenses reasonably incurred in connection with handling rightfully inspection rightfully rejected goods, or in connection w/ effecting cover (if commercially reasonable), any other reasonable expense incident to the breach.
  - Consequential:
    - Any loss resulting from general or particular requirements which seller at time of contracting had reason to know and which could not be reasonably prevented by cover or otherwise
    - Injury to person or property proximately resulting from any breach of warranty
      - Not proximate if buyer unreasonably failed to inspect good

    - Not subject to foreseeability test, though particular needs of the buyer must generally be made known to the seller
- **UCC § 2-719 – Contractual Modification and Limitation of Remedy**
    - Parties can agree to provide for remedies in addition to or instead of those provided by UCC and may limit or alter the measure of damages
    - Resort to provided remedies is optional unless parties expressly agreed it to be the exclusive remedy—in which case it is. If the provided remedy fails its essential purpose, have UCC to back up
    - May limit or exclude consequential damages unless unconscionable
- **CISG Art. 74**
    - Will allow damages for loss and loss of profit, as long as foreseeable at the time of conclusion of the contract

Hadley v. Baxendale

Crank shaft in a mill owned by P broke, causing entire milling operation to shut down. P sends employee to office of D, a carrier service, who informs D that new shaft must be sent immediately. D's clerk seems to provide assurance that it will be delivered hastily. Delivery was delayed due some neglect on behalf of D. P's mill remained shut down during this time, thus causing lost profits for which P sues. D objects to this, claiming lost profit damages were too remote. **Court rules that extent of damages should be limited to (1) those arising naturally from breach (directness) or (2) those that could be reasonably contemplated by parties at time of contract (foreseeability)**. However, if circumstances were unknown to D (i.e. no awareness of mill's shutdown), he can only be liable for damages that would arise generally (i.e. in the majority of such cases under ordinary circumstances). Court rules that the special circumstances were not communicated to D and that in great multitude of cases with ordinary circumstances, such consequences would not arise naturally. Hence, D not held liable for the consequential damages.

Florafax International, Inc. v. GTE Market Resources, Inc.

Floral products marketer enters agreement with P, a floral clearinghouse, whereby P will handle direct consumer orders and place corresponding outbound orders. Contract was initially for 1 year w/ a month-to-month renewal thereafter and termination rights with 60 days notice, terminable at any time. P subcontracts D to provide telecom services for 2 years. D was aware of P's contract and knew it would be challenged by the volume of calls, but accepted the work despite questions around its profitability. D ultimately unable to handle the volume and evidence that they made little attempt to increase its capacity. As result of D's poor performance, floral marketer terminates agreement with P. P terminates its agreement with D and is forced to assume D's responsibilities. P filed suit against D seeking to recover lost profits from other contract and other damages. Court awards incidental damages incurred by P in setting up own call center to assume D's responsibilities following the breach. Court also asserts that **future/anticipated profit is recoverable in breach actions if: 1) the loss is within the contemplation of parties at time of formation; 2) the loss flows directly or proximately from the breach; and 3) the loss is capable of reasonable and accurate measurement/estimate.** Here, court

found that D clearly had within its contemplation the potential for lost profits. D goes on to contend it should only be liable for lost profits over the 60-day notification period. Court recognizes that, upon a breach of contract claim, no party may recover more in lost profits or other damages than that party could have gained by full performance of that contract. Thus, **to recover lost profit damages, party must show that such profits were reasonably certain to have been made absent the breach.** Court holds P provided sufficient evidence to establish such reasonable certainty, as its agreement with the floral marketer was intended, by both parties, to be a long/continuous one. Thus, court permits recovery of consequential damages for lost profits over the remaining duration of P and D's contract.

Restrictions on Expectation Damages: Mitigation

- Mitigation is a restriction on recovery, not technically a duty
  - One can freely accumulate avoidable losses, they just won't be able to recover
  - Court has interests in the reduction of social waste
- Failure to mitigate in employment context is an affirmative defense w/ burden on employer to prove availability substitute employment and no reasonable mitigation efforts taken
- If unsure of breach, may use reasonable assurances or declaratory judgment to determine whether you will need to mitigate
  - Continuing performance where there is substantial reason to believe K has been repudiated may result in accumulating unrecoverable damages
- If volume seller, no real duty to mitigate, damages based off of lost profits resulting from breach
  - Reselling goods to avoid loss where other goods in inventory could have been sold instead results in loss of volume of business
  - "If he would have entered into both transactions but for the breach, he has “lost volume” and a second transaction is not a substitute for the first."
  - This obviously doesn't account for fixed costs (contribution margin is a better term here than "profit") nor does it apply where what is being sold has limited capacity (e.g. personal services)

Rules - Mitigation

- **R2d § 350 - Avoidability as a Limitation on Damages**
  - Injured party can’t recover for loss that it could have avoided w/out undue risk, burden, or humiliation - must make reasonable efforts to avoid loss
    - Can recover where reasonable efforts were unsuccessful
    - Lost Volume Seller principle recognized in the comments
- **UCC § 2-708 - Sellers Damages for Non-Acceptance or Repudiation**
  - You get incidental damages for costs reasonably incurred minus any credit you got for proceeds of resale (with exception of lost volume sellers)
- **UCC § 2-715 - Buyer’s Damages**

  - Consequential: any loss which could not be reasonably prevented by cover or otherwise
  - Imposes good faith requirement
- **CISG Article 77**
  - Non-breaching party has a duty to mitigate the loss, including loss of profit. Breacher may claim reduction in damages in the amount of loss that should have been mitigated but there was failure to do so

Rockingham v. Luten Bridge Co.

P, a contractor, enters K with a county (D) to construct a bridge. County commission reverses its position on the bridge contract, but P proceeds with construction in hope that a change in the makeup of the commission will result in the restoration of the agreement. County had neither desire nor any use for a completed bridge, but P completes bridge anyways and brings suit for breach to recover full contractual price. Court asserts that **in the case of a breach while the contract is still executory, non-breaching party has a duty to mitigate. It cannot simply continue performance and allow the damages to pile up.** This is an extension of the general rule that breaching party should not be held liable for damages that need not have been incurred. Thus, court holds that damages should be limited to those incurred up to the point of the repudiation plus profit that would have been realized upon its completion.

Maness v. Collins

P sells manufacturing operation to D, but is retained by new ownership to serve in a managerial role. He enters 3 year employment contract which includes non-compete provision. Leadership installed by new owners undermines P in his new role to the point where he becomes severely disgruntled. Relations between P and D continue to sour and P is ultimately let go. P spends time unemployed constructing himself a new home. He brings suit for breach of the employment contract. D contends that there was just cause in P's termination and, even if there was breach, that he failed to mitigate his damages. Court finds that there was no cause behind P's termination. Moving on to the issue of mitigation, court holds that **failure to mitigate damages arising out of termination is an affirmative defense. Breaching party must show the availability of suitable and comparable substitute employment and that P failed to take reasonable diligence in his pursuit of employment.** The terminated party is not allowed to simply sit idly. Plaintiff is precluded from recovering only if proof shows that the amount he would have earned equaled or exceeded amount he would have earned under the original employment K. Since D provides no evidence that suitable/comparable work was available and that P could have obtained it through reasonable efforts, court holds D liable.

Jetz Service Co. v. Salina Properties

P is laundry equipment service from which P leases machinery for its building and for which P receives monthly payment. Months into contract, D breaches by replacing P's machines with its own. P is forced to move machinery into warehouse where it sits idly

until eventually being re-serviced elsewhere. D breaches b/c sees how much money they can make. P sues for entirety of lost profits. Court applies traditional reasonable certainty rule when determining damages for lost profit. However, **instead of limiting the recoverable damages to lost profits during the period where machines sat idly, court uses "lost volume seller" measure of damages which refers to lost volume of business that a non-breaching seller incurs on buyers breach. When seller resells entity he expected to sell to original buyer, he deprives himself of what would be a separate additional sale by merely substituting the buyers.** Since P had other machines it could have used to satisfy sale to other party, awarding damages minus loss avoided doesn't capture net profit that would have resulted if contract had been fully performed. Thus, court rules P should be awarded the expected profits from contract following the breach

---

Nonrecoverable Damages

- Attorney's fees, emotional distress (plus other non-economic injuries), and punitive damages are usually not compensable
  - Generally justified because the prevent windfalls to the non-breaching party and take away from the stability of risk allocation in contract
  - However, many times this may lead to drastically undercompensating parties and could be justified as foreseeable – consequential damages

Rules - Nonrecoverable Damages

- **R2d § 353** - No emotional distress damages unless:
  - Breach also caused bodily harm
  - Emotional harm is a particularly likely result of breach due to nature of the contract or breach (medical contexts or where emotional concerns are essence of the contract)
- **R2d § 355** - May not recover punitive damages unless an accompanying tort allows for it (e.g. (personal injury, fraud in the inducement, or breach of fiduciary duty)
  - Rationale: Would put P in better position than before (windfall) and culpability is not a consideration in contract law

Erlich v. Menezes

Court does not permit recovery of damages for emotional distress arising out of breach of contract to construct a home. **Breach of contract is tortious only when it violates a duty independent of the contract. Tort damages allowed in contract cases where there is physical injury or in specific types of contracts due to public policy reasons (i.e. bad faith in insurance), but not where just a negligent breach. No emotional distress recovery where mere property damage or economic injury**.

Zapata v. Hearthside Baking

P, a cookie tin manufacturer, sues D, a cookie baker, for breach after D refused to pay $900,000 in past orders to get new contract leverage. P also attempts to recover attorney

fees. CISG does not allow for recovery of attorney's fees in America even though foreseeable w/ breach. **Punitive damages not allowed except in torts and attorney fees can't be used as a pretext for making breaching party pay punitive damages**

Alternatives to Expectation Damages

Reliance Damages

- Party can recover reliance damages for breach even if they can't prove expectation damages with reasonable certainty
- A party may not recover money spent in reliance on the contract if it can be proven that full performance would have resulted in a net loss for the injured party
  - An award for reliance on the contract must reflect any loss that the injured party would have suffered had the contract been fully performed (subtracted from reliance damages)
  - Embodies principle that a party shouldn't be able to escape bad bargain through reliance damages
- An award of damages will not be reduced due to an injured party's failure to mitigate when the facts are clear that both parties had the same opportunity to mitigate
- Promissory Estoppel Contexts
  - Judges have discretion to limit remedy as justice requires
    - May limit relief to damages measured by extent of reliance (i.e. out-of-pocket expenses) instead of full expectation damages
    - Majority of jurisdictions have adopted this approach
  - Some courts hold that relief P.E. cases should ALWAYS be measured by actual reliance

Rules

- **R2d § 349 - Reliance Damages**
  - As an alternative to expectation damages, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, minus any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed (burden on D to show that the K would have been a losing one)

Wartzman v. Hightower Productions, Ltd.

P establishes and capitalizes new corporation to finance attempt to break world record. D hired as law firm and provides guidance, though fails to comply with securities regulations and informs P that securities specialist needs to be hired to straighten things out. P can't afford it and D refuses to pay. Record breaking attempt indefinitely postponed. P brings suit. **If expectation damage for lost profits can't be shown w/ reasonable certainty**

(i.e. too speculative) money spent in part performance, in preparation for, or in reliance on the K are recoverable. Court holds P was injured due to its reliance on the contract; it sold stock and incurred substantial obligations in reliance on the contract. Additionally, **if D can establish that full performance would have resulted in a net loss for P, then reliance damages can be limited or excluded altogether**. D was unable to establish that P would have suffered a net loss from its venture, so this exception is not applicable here. Court also found that P did not fail duty to mitigate as suggested by P. P lacked the funds necessary to hire a securities specialist, **a substantial obligation that P is not required to incur in order to mitigate**. Further, D had the same opportunity to mitigate and refused to do so. Thus, court holds P should be permitted to recover reliance damages.

Walser v. Toyota

P initiates process to become dealer of cars sold by D. Three step process: Application, letter of intent containing conditions, and then formal agreement. P completes first step and D informs them that letter of intent approved and "they were [their] dealer". D later informs them that this was a mistake and letter had not been approved. P had already purchased facility for dealership. P files suit seeking full relief (including lost profits) under theories of breach and promissory estoppel. TC awards relief on promissory estoppel grounds, but limits damage to out of pocket expenditures, which was **price paid minus FMV**. P appeals. CoA points to Restatements description of remedies available in promissory estoppel cases, providing that, **where appropriate, relief may be limited to that measured by the extent of P's reliance rather than the terms of the contract. Thus, this places the damages decision within the trial judge's discretion**. Here, D provided evidence showing that a formal dealership agreement was far from certain while P did not demonstrated any opportunity lost by virtue of relying on the promise. CoA asserts that it won't interfere with lower court discretionary decisions so long as it "remains within the range of choice" (it did), accounts for all relevant factors (it did), and does not constitute a clear error judgement (it doesn't). Thus, CoA affirms TC's judgement

---

Restitutionary Damages

- Based on concept of unjust enrichment, so breaching party may still claim in restitution
  - This may create perverse incentives
- Restitution damages sometimes put a party in a better place than expectation damages, causing commentators to disagree over this doctrine
  - Justified because party may get good deal, if they breach, court should be able to take away that good deal and give fair market value of services
- Three ways restitution comes up as a damage remedy
  a. Modern contract law - a remedy for breach
     - Non-breaching party can choose restitutionary rather than ED for breach of K UNLESS she has already performed all of her duties under

the K and nothing is due from the other party than a payment of money for that performance, in which case only expectation damages are available

b. Breaching part may even be entitled to restitution if he conferred a benefit to the other party by part performance

c. If K unenforceable for some reason, either or both parties may be entitled to restitutionary relief for benefits conferred (e.g. Statute of Frauds, incapacity/mutual mistake, etc.)

Rules - Restitutionary Damages

- **R2d § 370 - Requirement that Benefit be Conferred**
  - In order to get restitution damages, you have to have conferred a benefit on the other party through part performance or reliance
- **R2d § 371 - Measuring Restitution Damages**
  - Restitution damages may as justice requires be measured by either (non-breaching party can choose):
    i. The reasonable value to the other party of what he received (based on what it would have cost him to get it from someone else); OR
    ii. The extent to which the other party's property has been increased in value or his other interests advanced
      - Measure is unaffected by any loss which would have been incurred in complete performance (though any payments already made must be subtracted)
      - Breaching party is limited to lesser of (a) or (b)
      - Must be shown w/ reasonable certainty
- **R2d § 373 - Restitution When Other Party Is in Breach**
  - On a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance
  - The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance
- **R2d § 374 - Restitution in Favor of Party in Breach**
  - If a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach (i.e. value of part performance conferred minus expectation damages)
  - To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable

in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss
    - Restitution not available for party that intentionally varied terms of the contract, as they are acting officiously
- **R2d § 375 - Restitution When Contract Is Within Statute of Frauds**
    - A party who would otherwise have a claim in restitution under a contract is not barred from restitution for the reason that the contract is unenforceable by him because of the Statute of Frauds unless the Statute provides otherwise or its purpose would be frustrated by allowing restitution
- **R2d § 376 - Restitution When Contract Is Voidable**
    - A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence or abuse of a fiduciary relation is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance
- **R2d § 377 - Restitution in Cases of Impracticability, Frustration, Non-Occurrence of Condition or Disclaimer by Beneficiary**
    - A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance

Coastal Steel v. Algernon Blair

D entered into a contract with P for P to supply equipment and perform steel erection on hospital. P began performance, but D refused to pay for some of the performance in dispute over contractual obligations. P terminated performance (28% complete) and brings suit. TC rules that D's actions constituted breach and that P was justified in terminating performance. However, it also held that P would have lost money on the contract had it completed performance and thus denied recovery. P appealed. **CoA held that suit seeking restitutionary damages allows an injured party to recover the value of services given, regardless of whether he would be able to recover expectation damages in a claim of breach. The measure of damages is the reasonable value of performance provided, regardless of any loss which would have been incurred by complete performance**. While contract price may be evidence of this reasonable value, it does not measure value of performance. Rather, **damages are measured by the amount for which the injured party's performance could have been purchased at the time of performance**. Court thus rules that damages are recoverable and remands to lower court for determination of this value. Since P would not have gotten expectation damages (due to projected loss) or reliance damages (can't exceed expectation), P is still able to recover restitutionary damages which put them in a better position than if full performance would have taken place

Lancellotti v. Thomas

P agreed to buy a luncheonette business from D and rent the premises. $25,000 for the business plus promise to build (and pay for) an addition. P paid the $25,000 and began

operating the business. Problems during construction of the addition, which D's must ultimately complete. About a year in, P stopped operating the business. It hadn't paid any rent up to that point. P filed a complaint seeking the return of his $25,000, despite concession that it owed D for rent. TC held in favor of the D, denying P recovery and awarding D the rent money owed. P appealed. Traditional rule prohibited recovery of any damages by breaching party. However, CoA, in applying modern rule, held that it is **possible for breacher to get restitutionary damages if value of its part performance was in excesses of loss caused to non-breaching party**. Purpose of contract law is not to punish parties for willful breach. Would be allowing a windfall if permitting non-breaching party to recover expectation damages will still retaining the value of performance that had been rendered

Ventura v. Titan Sports, Inc

Jesse "the Body" Ventura, sues the WWF. He contends contracts did not include right to royalties for further publicity in action figures and VHS, despite WWF's distribution of such. Court holds that **where there is a gap in an express contract (or no enforceable contract at all), but party has conferred an uncompensated benefit unknowingly (not officiously or gratuitously) and other party has been unjustly enriched, then P can get restitutionary damages. The restitutionary damages for benefits conferred are available even if contract is unenforceable due to impracticability, impossibility, frustration of purpose, or other issue in formation.**

Specific Performance

- Specific performance is allowed through court's discretionary equitable power
- Courts treatment of specific performance in general (under common law)
  - Specific performance may be allowed for land
  - Specific performance will not be allowed for personal service contracts
  - Specific performance only allowed when damages at law are inadequate
- Potential bars to specific performance
  - Where there is significant hardship upon D
  - Where D has entered contract with a 3rd party and 3rd party would be harmed by specific performance
  - Where performance would run contrary to public policy
  - Where definiteness/certainty of terms is insufficient
  - Where burden of enforcement to court would be too high
  - Where enforcing would be unfair
- UCC only allows for specific performance when goods are similar

Rules - Specific Performance

- **R2d § 359 – Effect of Adequacy of Damages**
  - Will not order specific performance if damages adequate

  - Will not deny specific performance if damages are good for only part
  - Specific performance will not be denied simply because there is another remedy (though may be considered in exercising discretion)
- **R2d § 360 - Factors Affecting Adequacy of Damages**
  - Difficulty of proving damages w/ reasonable certainty
  - Difficulty of getting a suitable substitute performance w/ money
  - The likelihood that an award of damages could not be collected
- **R2d § 362 - Effect of Uncertainty of Terms**
  - Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order
- **R2d § 363 - Effect of Insecurity as to the Agreed Exchange**
  - Specific performance or an injunction may be refused if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court
- **R2d § - 364 Effect of Unfairness**
  - Specific performance or an injunction will be refused if such relief would be unfair because
    i. The contract was induced by mistake or by unfair practices
    ii. The relief would cause unreasonable hardship or loss to the party in breach or to third persons, or
    iii. The exchange is grossly inadequate or the terms of the contract are otherwise unfair
  - Specific performance or an injunction will be granted in spite of a term of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons.
- **R2d § - 365 Effect of Public Policy**
  - Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy
- **R2d § 366 - Effect of Difficulty in Enforcement or Supervision**
  - A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial
- **R2d § 367 - Contracts for Personal Service or Supervision**
  - A promise to render personal service will not be specifically enforced
  - A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living
- **UCC § 2-716 - Buyer's Right to Specific Performance or Replevin**

  - Specific performance may be decreed where the goods are unique or in other proper circumstances
  - The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just
  - The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered
- **CISG Article 28**
  - Court is not required to order specific performance unless it would also do so under its domestic law
    - Some European countries more liberal w/ specific performance—pick your forum carefully
- **CISG Article 46**
  - If goods don't conform w/ the K and this is a fundamental breach of the K, buyer may require (with reasonable notice)
    - Delivery of substitute goods, OR
    - Repair of the non-conforming goods, unless this is unreasonable
- **CISG Article 62**
  - Seller may require buyer to pay the price, take delivery or perform his other obligations

City Stores v. Ammerman

P to assist D in re-zoning proposal efforts necessary to build shopping mall. In exchange, P would get option contract to occupy space in mall. D granted re-zoning and began leasing store spaces. It refused to lease space to P because of better competing offer. P brought suit seeking specific performance. An option is a unilateral contract that exists as a continuing offer for either a fixed or reasonable period of time and may be enforced through specific performance if its terms are reasonably definite. While letter expressing offer was not very clear as to terms of option contract, such terms can be ascertained from leases already signed with similar businesses. Since **other forms of damages (ED in particular) too difficult to calculate**, denying specific performance due to lack of definiteness would leave P without a remedy. For this reason, and because it would also place no hardship upon D, court rules that specific performance is an adequate remedy

Reier Broadcasting Company, Inc. v. Kramer

Football coach (D) has contract giving exclusive broadcast rights on his interviews/appearances to P, a radio station. The school at which P coaches signs a deal with another station in which coach is expected to appear on that station's broadcasts. P wishes to enforce restrictive covenant against D. Since this is categorized as a personal service, court cannot issue specific performance to force D to continue appearing on P's broadcasts, but it can order injunction to prevent him from appearing on competitor's

broadcast. However, court holds that where specific performance would be unavailable to enforce affirmative covenant in an agreement(e.g. personal services), an injunction to enforce a negative covenant would amount to indirectly enforcing the affirmative part. Despite restatement's view that such injunction is only unavailable if it would leave party without reasonable means to make a living and D's primary employment was as a coach (not a broadcast guest), court prevents enforcement.

Agreed Remedies

- Common law allows party to write in damages into contract for breach
  - Will generally enforce unless it is seen as a penalty
  - Old common law rule: determines reasonability at time of contract – anticipated
  - New rule: determines reasonability at time of breach – actual damages
    - If actual loss is much less than liquidated damages, some courts will just strike down the liquidated damages clause. (Dissent in Barrie School) (Majority disagrees)
- R2d uses an OR—reasonable in light of anticipated OR actual loss (9th Cir. follows this in UCC, commercially sophisticated actors context)
  - Some odern courts read "or" as an "and" (must be both reasonable in anticipation and in actuality)
- R2d seems to say only use liquidated damages if actual damages are hard to figure out
  - Courts really focus on the reasonableness part of it
  - In Barrie School, evidence of loss appeared to be ascertainable. Why court determine that actual loss difficult to tell?
    - Deference to an institution about how complicated it is to figure out what the loss of one child due to breach might be ex ante—that's why they contracted to this.
  - Some courts require mitigation even in cases where K has liquidated damages, *Barrie School* court did not
- Unconscionability can bar enforcement of these clauses

Rules - Agreed Remedies

- **R2d § 281 Accord and Satisfaction**
  - An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty
  - Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of the obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord

  - Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach
- **R2d § 356 - Liquidated Damages + Penalties**
  - Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty
  - A term fixing unreasonably large liquidated damages is a penalty + unenforceable on public policy grounds (aim is not punitive)
- **R2d § 361 - Effect of Provision for Liquidated Damages**
  - Specific performance or an injunction may be granted even though there is a provision for liquidated damages
    - A contract provision for payment of a sum of money as damages may not afford an adequate remedy even though it is valid as one for liquidated damages and not a penalty
- **UCC § 2-718 - Liquidation of Damages**
  - Parties may agree to damages at an amount reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise getting an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. An unreasonably small amount might be stricken under unconscionability
- **UCC § 2-719 - Contractual Modification or Limitation of Remedy**
  - An agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy
  - Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act
  - Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not

Barrie School v. Patch

D enrolled their daughter in a private Montessori school (P). Parties entered into a re-enrollment agreement that required D to pay a $1,000 non-refundable deposit and to notify the P in writing by May 31 if they intended to withdraw their daughter before the end of the school year. If D notifies after that date, they agreed to pay the remaining tuition

balance of $13,490 pursuant to a liquidated damages clause. D notifies of withdrawal after deadline and demanded the return of their deposit. P brings suit for breach and sought the remaining tuition balance for the academic year plus fees. P filed a counter-claim for return of deposit. TC held that the liquidated damages clause was valid/legally enforceable, but P failed mitigate its damages. P appealed. State supreme court held **a non-breaching party has no duty to mitigate damages where the parties agree to a valid liquidated damages sum in the event of a contract breach**. Liquidated damages differ from mitigation of damages. While mitigation is part of a court's determination of actual damages that have resulted from a breach, a liquidated damages clause is an agreed-upon sum by both parties in order to replace any determination by a court of an actual loss suffered by the injured party. Once a court has found that a liquidated damages clause is valid and binding upon the parties, it does not need to make any determination regarding actual damages. Court identifies three essential elements to valid/enforceable liquidated damages clause. First, there must be clear and unambiguous terms for a specific sum. Second, the damages must reasonably compensate the injured party. Third, liquidated damages clauses, by their nature, are binding before the fact and may not be altered to correspond to actual damages determined after the breach. All of these elements were satisfied, thus the clause is binding and P had no obligation to mitigate. **Dissent** - majority decision undermines basic principles of contract law pertaining to the equity and reasonableness of contract remedies. Remedies are meant to be compensatory, not punitive. Must consider totality of the circumstances in determining whether a liquidated damages clause is fair and reasonable. Here, amount in the clause is grossly disproportionate to, and in excess of, the harm suffered. Additionally, the School owed a duty to mitigate its damages in an attempt to avoid any purported loss