Massive outline

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Policies of Contract:

- Individual autonomy.
- Efficiency:
  - economic intercourse is most efficient when its participants desire it and are free to bargain which each other to reach mutually desirable terms.
- Imbalance of bargaining power and adhesion.
- The morality of keeping a promise.
- Accountability for conduct and reliance.
- Commercial and social values.
  - economic efficiency.
  - fairness in transaction and protecting weak parties.

Statute of Frauds

Traditionally, the statute of frauds requires a writing signed by the defendant in the following circumstances:

- Contracts in consideration of marriage.
- Contracts which cannot be performed within one year.
- Contracts for the transfer of an interest in land.
- Contracts by the executor of a will to pay a debt of the estate with their own money.
- Contracts for the sale of goods above 500$ (UCC 2-201).
- Contracts in which one party becomes a surety (acts as guarantor) for another party's debt or other obligation.
  This can be remembered by the mnemonic "MY LEGS": **M**arriage, one **y**ear, **l**and, **e**xecutor, **g**oods, **s**urety.

Efficient Breach

The defendant's cost to perform would exceed the benefit that performance would give to both parties.

- Pro:
  - It's efficient and best serve the interests of the party by maximizing the social welfare.
  - matches the underlying doctrines of contract law (no punitive remedy)
- Con:
  - pecuniary considerations only,
    - ignore moral obligation (liability, fiar dealing, faithfullness).
    - doesn't consider the consequences of breach not measurable in economic terms (inconvenience, disappointment, or frustration).
  - unable to measure value with certainty (Assumes that market competitive and stable, the costs and benefits of performing and breaching can be gauged).
  - Increase the transaction fee and information cost.
  - Breaching is itself inefficient because contracts move things around. move the goods from where they have lower value to someone who values it more. move the source from low value users to high value users. so enforcing contract is efficient.

I. Remedies

- **I. Expectation:** the value of the performance to her based on the purpose of the contract, as gleaned from its wording and the circumstances surrounding the contract's formation, based on the objective standard.
  Expectation restores the plaintiff to as if the contract is performed. Hawkins.
  Expectation measured by market value at breach. Acme Mills.
  Profit returned to plaintiff. disgorgement. Laurin v. DeCarolis. Only measure of compensation.
  - Calculation.
    - damage = plaintiff's loss in value caused by the defendant's nonperformance.
      = compensatory (contractual value - received)
      + any other loss (consequential and incidental damages)
      - cost or loss plaintiff avoided by not having to perform.
    - damage = gross profit (total contract price - direct costs)
      + reliance expenditure (that cannot be reasonably saved)
  - Ways to prove damage:
    - Damages based on a substitute transaction. (cover). 2-712 vs. 2-706
      Caveat: If the plaintiff's damage is prohibited under the principle of mitigation (unreasonable cover), then the market price will be used for the damage. "without unreasonable delay and on reasonable terms."
    - Damages based on the market value of the promised performance. (no cover). 2-713 vs. 2-708.
      Caveat: which time and place? The time and place that most closely approximates the market that the aggrieved party would reasonably have entered to obtain the substitute.
    - Loss of income in a contract for services when it's not possible to find a substitute.
      Caveat: Puts plaintiff in a better position than he should have been if contract was not breached. But service has no monetary value, so not a better position.
    - Incidental damages.
      cost of taking whatever reasonable action is needed to protect and enforce the plaintiff's rights under the contract. (transaction cost of mitigation).
    - consequential damages.
      Loss or injury suffered in other transactions that were dependent on this contract, or for loss or injury otherwise caused by the breach.
  - **Rest**. When loss in value <u>to the injured party</u> is not proved with reasonable certainty.
    - Relating to property.
      - If delayed the use: Rental value or interest on the value of the property.
      - If defective or unfinished construction:

        - □ diminution in the market price of the property, if completing price is clearly disproportionate to the probable loss in value to him.
        - □ reasonable cost of completing performance of remedying the defects, if that cost is not clearly disproportionate to the probable loss in value to him.
        - □ cost of completion, is the cost of completion is smaller than the diminution in market price.
    - Anything.
        - Reliance.
          expenditures made in preparation for performance or in performance.
            - □ Counter 1: prove the amount of the loss (in a losing contract), and have it subtracted.
                - ◆ Counter counter 1: prorated according to the cost that has been invested.

- **II. Reliance: Rest**. 349 and comment a.
  As an alternative to expectation when hard to show expectation. Chicago Coliseum. Sullivan.
  Entertainment events hard to show expectation. Chicago Coliseum.
  Future career projection hard to show expectation. Sullivan.
  Future profit too speculative to show expectation. Security stove.
  Reliance can be recovered pre-contractually if expectation of general service can always be counted on. Security Stone.
    - **Aim:** to refund expenses wasted or equivalent loses by the plaintiff in reliance on the contract, thereby restoring her to the status quo ante.
    - **Theme:** prejudiced in that something of value has been WASTED OR LOST AND CANNOT BE SALVAGED. If has other purposes, then defeat reliance.
    - **Essential reliance:**
      directly based on the contract and essential to fulfilling the party's contractual commitment. "is necessary to".
        - **Calculation**
            - should be prorated with consideration of the expected cost and benefit.
            - burden shifted to defendant.
            - When a lost contract is proved by defendant, some court just deduct it, some would prorate the lost against the incurred cost.
            - But when value is not "of essence" in the contract, the defendant cannot prove lost by using market value.
    - **Incidental reliance**:
      incurred as a consequence of and incidentally to the contract, for the purpose of enjoying or taking advantage of the benefit expected from the contract. "as a means to obtain the benefit of performance".
        - difference from essential reliance damage.
          depends on the interpretation of the party's obligations under the contract.
        - usually incurred after the contract formation, or the plaintiff can reasonably rely on the defendant even before the contract formation (a carrier is always available).
        - In form of lost opportunity or other gain sacrificed.
          only recoverable if the defendant foresaw or reasonably should have foreseen the possibility of the loss or expenditure being incurred, and both the amount and nature of the loss or expenditure were reasonable.
            - defendant's counter: mitigation; usable and not wasted; can recoup.
            - defendant's counter: may be prorated too if proved there'll be a loss overall.
    - Reliance's problems:
        - Reliance is hard to measure.
        - Reliance creates bad incentives for promisee – if you get reliance damages, you have an incentive to incur costs before breach.
        - It leads the promisor to break promises too often because reliance is:
            - Systematically undercompensatory.
            - Not effective at getting the promisor to take into account the interests of and costs to the promisee when breaching.

- **III. Limitation.**
    - **Cover of completion vs. market value change**.
      Cost of completion (higher) awarded instead of market value change. Groves. Of essence.
      market value (lower) awarded instead of cost of completion 95 times more . Peevyhouse. Incidental to contract.
      Cost of completion (lower) awarded instead of difference in market value. Louise Caroline Nursing Home.

market value vs. cost of completion

• cost of completion is disproportional to the value to him. -- prevent waste.
• What is of essence and what is incidental?
• A windfall to the plaintiff.
  • Is economic consideration justified?
• Manifested intention and circumstances of the contract formation.
  • Brought home to the defendant the essence of contract?
• Respect contract autonomy.
• Who bears the cost.

      Whether it's fair or not to use the cost of completion instead of market value drop, depends on whether the breached performance was a significant part of the consideration exchanged for, and whether intended the breached performance was a material term of the contract. "of essence".
    - **Offset.**
        - Subtract the direct cost (variable cost) of performance that is saved because of the breach.
          Caveat: direct cost (variable cost): incurred solely in the process of and for the purpose of performing. Fixed cost or overhead is not saved by the breach and hence won't be subtracted.
          Caveat 2: If she cannot save the variable cost reasonably, then it shouldn't be deducted.
          (gross profit is total contract price - direct costs)
        - Offsets for part payment and salvage.
        - Offsets the loss if defendant can show that plaintiff entered a losing contract. Especially limit reliance.
            - Plaintiff: only offset to the extend of invested percentage.
        - Hamper the consequential damage:
            - ◆ Hard to definitely prove.
            - ◆ Hard to establish the probability that the breach was the only reason why plaintiff suffered the consequential damage.

        - Point 2 has be to made clear with defendant at the signing of the contract. "of essence".
        - Precaution, mitigation is not possible.
        - hard to show the actual harm and to place a plausible money value on her injury.
    - The limitation of **foreseeability**.
      Either following the natural course of event or the other party knows. Hadley.
      Out of proportion consideration shows the parties didn't negotiate the distribution of cost. Globe refining.
      The foreseeability is enough, not actually foreseeable. Prutch.
      Emotional stress not foreseeable, cannot foresee degree, no negotiate, no market standard, no award. Valentine.
      "Emotional tranquility" is not of essence. Emotional stress denied when house burned. Hancock.
      Policy: ensures that the extent and scope of damages is consistent with what was reasonably contemplated by the parties at the time of contracting.
      Policy: the requirement of foreseeability encourages the parties to disclose and thus facilitate economical efficiency and fairness.
        - **Rest**. Damage are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
            - Loss may be foreseeable as a probably result of a breach because it follows from the breach:
                - In the ordinary course of events. or
                - as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
            - A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

        - counter: hard to draw the line between probable and possible.
        - Tacit agreement: whether the consideration given to her reflected the extent of risk assumed. (second guessing).
        - Theme: relationship between the information available to the breacher and the loss.
    - **Mitigation.**
      Seller breached. Buyer did not cover reasonably. Entered forward contract. Missouri Furnace Co.
      Buyer breached. Seller cover resonably. Neri.
      Seller breached. Buyer's cover price based on actual damage (bulk vs. retail). Illinois Central.
      No reward for self-incurred cost after notice of breach. Luten bridge.
      Overhead is not deduced from cost saved. Leingang.
      Deductable cover limited by lost volume. Kearsarge.
      Mitigation not required if contradicts pliantiff's career goal. Parker.
      Mitigation not required if it's an inferior job. Billeter.
      What is failed mitigation?
        - "bad faith", "unreasonable", "dishonest, opportunistic, vindictive", "failed to conform to community standards of rationality."
        - Plaintiff's counter: couldn't incur "undue risk, burden or humiliation."
        - Reasonableness in UCC: 706, 712 reasonable in cover. 715 bar mitigation ground damage. 704(2) scrape or complete. 709 reasonable attempts to resale.
        - Link: not reasonably foreseeable, breaks the chain of causation.
          Plaintiff's counter: defendant is the wrongdoer. lenient standard on plaintiff.
        - Burden bore by defendant.
        - Plaintiff's counter: lost volume is not substitute. **Rest** Show:
            - could and would have entered the subsequent contract;
            - could have had the benefit of both.
            - Counter: Usually operates at optimum capacity, the second may not be profitable.
    - **Causation.**
      Have to show a probably link without too many variables that could have intervened.
    - **Reasonable certainty**.
      "on the preponderance of the evidence."
        - elements:
            - whether the plaintiff has proved injury.
            - whether the plaintiff has provided sufficient evidence to enable the factfinder to determine the count of the loss.
        - limit compensatory, consequential damages.
          "Although purely speculative and conjectural damages will not be awarded, the plaintiff does not have to prove loss with exactitude."
        - New business:
          A typical example of lost profit denied for uncertainty. Mindgame.
          Lost profit recoverable if proved with certainly. Fera.
          Publisher breach. Too speculative. Freund.
            - Hard to prove profitability;
            - Projections are questionable;
            - Similar entities not comparable;
            - Economic environment is different.
            - Plaintiff's counter: did careful calculations before opening.

- **V. Liquidated damage clause/Limited Liability Clause.**
  LDC cannot be a punishment. Vines.
  When hard to prove damage, easier to show reasonableness of estimation. Pacheco.
  Disproportional LDC would be deemed a penalty. Muldoon.
  LLC generally will be upheld (different from LDC). Samson Sales.
    - When is LDC deemed a penalty? The difference between estimation at K and the actual damage may only be due to difficulty of estimation.
    - The judge weighs and put the burden of the proof on the apprehensible party: Some states put the burden on plaintiff, some on defendant.
    - Does not prevent specific performance.
    - If the estimation at K price is reasonable then will be upheld. If hard to estimate, more chance to be upheld. The difference between the estimation at K and the actual damage actually shows that it's hard to estimate or it's indeed easy to estimate. But equity requires a balance (the estimation can be reasonable and very wrong).
    - Reasonableness of LDC.
        - Either reasonable compared to a reasonable estimation of damage at the formation of contract.

        - Some court holds that if reasonable at K formation, then no duty to mitigate.
        - The harder to prove, more lenient to establish reasonability.
    - Or reasonable compared with the actual damage. Probability.

should we allow LDC	or not?

• certainty. Predictability.
• Judicial economy.
  • But low economic efficiency (flow of goods to higher valued persons).
• Autonomy.
  • what choice? uninformed choice. Asymmetry of the information.
  • The plaintiff cannot know that the clause will be ruled invalid. then defendant can take advantage.
• Encourage better drafting.
• liquidated damage is a way to put a price on noneconomic damages. (how much I value it.)
• insurance is an alternative. The requirement of an alternative is put on the party for whom it's easiest.
• it allows the built-in of foreseeability factor. Communicates the importance.
• We shouldn't limit how people do business. LDC is a bet and should be respected. LDC is an important part of the BARGAINED FOR contract.
• Given the "certainty" element in proving damage, LDC is for the hard-to-prove damages.
• LDC is a way of showing reliability (bidding for a project).
	• ruins the essence of contract.
	  • expectation is not punitive.
	  expectation is based on the actual damage.
	  • ruin the efficiency of market.
	  ○ efficient in that it's clear?
	  ○ liquidated damage is a way to put a price on noneconomic damages.
	• Imposition.
	• High discrepancy between expectation damage and LDC shows unfairness.
	• We want to limit bad business practice.
	• ppl are bad at understanding probability and tends to underestimate small possibilities.
	• The harder it is to estimate the actual damage, the more possible that the estimation in LDC is off.
	• Undifferential damage looks like penalty.
	• Forfeiture is bad language.
	• Zero damages. **Vines**.
	• LDC in K is different from the facts. (delay vs. abandon).
	• Reasonable at K formation should be enough. And the high salary I got later can be a low probability event, and can show why the LDC was why I signed this contract.
	• LDC is about damage. When the actual damage is known and much less, LDC is unfair.
	  • But it shows how much I value LDC at the beginning
	• LDC encourage ppl to act in irrational ways.

- **LLC** is treated differently than LCD.
    - LLC are enforceable unless they are unconscionable (imposed by improper bargaining).

- **VI. Specific performance.**
  Rest. 356, 359, 360.
    - Three scenarios:
        - sale of land. (Vendor and vendee).
            - Specific performance is the rule because damage is inadequate, and unique (location matters).
        - sale of goods.
            - 2-709. full price for the seller. when the goods cannot be resold. or it goes bad. read it.
            - 2-716 for buyer.
                - unique, then specific performance.
                - special circumstances may allow specific performance.

          Manchester.
          Curtice.
        - sale of services.
          Negative injunction but not involuntary servitude. When expectation is hard to measure or inadequate. **Chicago coliseum. Wagner**.
    - Restatement Second § 360 (162):
        - To determine if damages would be adequate, following circumstances are significant:
            - the difficulty of proving damages with reasonable certainty,
            - difficulty procuring suitable substitute performance by means of money,
            - likelihood that an award of damages can be collected.
    - Factors to consider:
        - Is a substitute available?
        - Are the contract terms definite and certain?
        - Is enforcement feasible?
        - Is the breaching party insolvent?
        - Is it a personal service contract?
    - Is the noncompetition clause valid?

Court: rewrite and reduce length.
Court: Void. free to compete. one: don't want to rewrite the contract. two: to prevent people from putting excessive terms (expecting court to rewrite). third approach: reduce but only if the clause is drafted in good faith of employer.

- **VII. Arbitration.**
    - Advantage: won't go public. for the background or industrial background.
    - Can give punitive reward.
    - Not bound by state law.
    - Frist choice: the law chosen by the parties. can be another country's law. Neutral.

- Second choice: non-state law, soft law, contract principles drafted by international organization.
- Third option: state rule and equity.
- Fourth: only in equity.

II. Grounds for enforcing promises.

Why not to enforce gift?

- Not bargained for. Promise is on a whim.
- Killing gift is socially bad.
- Do not bring goods to ppl who value them most. The value doesn't reflect how ppl value it.

Three ways to enforce a charitable promise: I & I. recognized as unilateral K when hospital starts acting.

- Unilateral contract recognizing consideration.
- P.E. for justice.
- Public policy.

Four ways of enforcing a promise:

- **I. Enforced as Contract by recognizing consideration.**
  - **Requirement of consideration. Rest 71**
    - To constitute consideration, a performance or a return promise must be bargained for.
      - **Whitten. No inducement. Husband didn't sought no calling.**
      - **Ricketts, money given to granddaughter without seeking a return promise.**
    - Bargained for defined:
      - it is sought by the promisor in exchange for his promise.
      - it is given by the promisee in exchange for that promise.
    - The performance may consist of
      - an act other than a promise;
      - a forbearance; **Hamer. Forbearance from smoking.**
      - the creationd, modification, or destruction of a legal relation.
    - Caveats:
      - 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.
      - Usually do not consider whether there's a consideration if the intent is clear.
      - Can be small recognized for policy reasons. **Earle. Peace of mind as a consideration (funeral).**
      - Moral consideration is not a consideration.
      - Nominal consideration is no consideration.
  - **Settlement of claim as a consideration. Rest 74**:
    - good faith forbearance to assert an invalid claim can be consideration in some courts.
      - Reasonably doubtful at K formation.
      - Subjectively believed by surrender.
    - must has actual legal merit in some other courts (hard to determine sometimes).
    - **Fiege. Not to sue the father. Good faith believe in a later proven wrong claim is consideration.**
    - **Michael Jordan. Not to sue MJ. For justice. Extortion and bad faith.**
  - **Past consideration recognized for restitution in some courts. Rest 86.**
    Webb. Moral consideration established promise based on past rescue.
    Harrington. Moral obligation not recognized. Promised by did not pay. No intend.
    Webb and Harrington make bad social policy.
    Schoenkerman. Moral obligation recognized but rewarded restitution (lower than promise).
    - A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
    - Reward is the lower of the promise or the restitution.
      - Both the promise and the benefit are needed for remedy and only the lower satisfies both.
      - when restitution is lower than the promise, then use restitution.
    - Examples of recognized past consideration:
      - promise to pay an obligation on which the statutory period of limitations has run.
      - bankrupt debtor's promise to pay a discharged debt.
      - promise to pay a contract obligation incurred while a minor.

- **II. Restitution (QM). Webb, Harrington, Schoen. Rest. QM. 112, comment. Rest. 86 comment note.**
  - Unjust enrichment.
    - Unjust:
      - Intent to charge (Good Samaritan do not get money). **Schoen no intent**.
      - Not intermeddler (no imposition):
        - Immediate action is required.
        - Advance assent is impractical.
        - Has no reason to believe the recipient would not wish for the action to be taken.
        - When service is easy to be rejected, acceptance demonstrates it's not intermeddling.
    - Enrichment:
      - Benefit received. Measurements see restitution in remedy.
  - Past consideration recognized by **Rest 86**. **Webb**.

  - **IV. Unjust enrichment and restitution.**
    Defendant breach K. Not capped by K price (28% completion). Market price not offset by losing contract. Coastal.
    Plaintiff choose restitution because restitution recovers more in a losing contract (quantum meruit). Costal.
    Defendant breach K. Not capped by K price. Quantum meruit can give more than expectation. Schowasnick

Defendant breach K. Capped by K price (near completion). Oliver. For length, for equity, for difference.
Plaintiff barred from quantum meruit, no windfall even defendant breached. Oliver. Contradicting Costal.
No K. No enrichment. Restitution for equity. Kearns.
No K. No enrichment. Damage cannot be measured. No restitution. Boone.
Plaintiff breach K. Recovered restitution under quantum meruit. Less defendant's loss. Lowest of KP, Benefit, Market P. Britton.
Plaintiff breach K. Plaintiff recovered K price less defendant's loss. what could be the loss? Lowest of above 3. Pinches.
Plaintiff breach breach K. lowest of KP, Benefit, Market P. Vines.
Plaintiff willful breach no compensation.

- How to measure.
  - Plaintiff's restitution can get more than expectation if he doesn't breach.
  - market value of the benefit.
    - Quantum meruit. (for service)
      Quantum valebant. (for goods).
    - maybe cost when market value cannot be predicted.
    - Can use the contract price as an indication when hard to tell.
      Contract price - lost of the defendant (cost of completion/loss of value).
  - recipient's ultimate net fiscal gain (when equity calls for it).
    - Objectively.
    - Subjectively.
- When to use which?
  - Chose by the plaintiff or the court.
  - Which measure of remedy to use? As equity so requires.
    - Market value is preferred.
    - The lowest measure of relief if there's some fault on the part of the conferrer. Lower of KP, or benefit confirmed, or market price.
    - disproportionality.
    - Dishonest or improper conduct by the beneficiary.
    - Agreed compensation for a requested benefit.
    - discretionary measurement of benefit.
- When plaintiff breaches (Neri, Britton)
  - Remedy:
    - No K remedy.
    - Minority approach: no restitution remedy. But higher standard on establishing "breach". Similar results.
    - Majority: lowest of KP, or benefit confirmed, or market price, minus defendant's loss.
      - Defendant's loss (expectation):
        - Cost of modification to where applicable.
        - Cost of value to those that cannot be changed.
        - Value can be estimated based on KP as the value conferred on defendant.

- **III. Promissory estoppel.**
  When promisee incurred some loss in relying justifiably on the promise.
  - Substitute for contract or closer to tort depending on judges' view.
    - Use cases to argue.
  - Elements.
    - **Rest 90 (1)**. **I & I.**
      - A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
    - Must be a promise.
    - Objective analysis on promisor's intent.
      - Promisor's reasonable expectation that the promisee would rely on it.
    - Objective analysis on promisee's reliance.
      - In fact induced promisee's action or forbearance.
    - Consequence of the reliance.
      - Necessary to avoid injustice.
    - Limited as justice requires.
  - Elements from **Logan.**
    - A promised by the promisor.
    - Made with the expectation that the promisee will rely thereon.
    - Which induces reasonable reliance by the promisee.
    - Of a definite and substantial nature and
    - injustice can be avoided only by enforcement of the promise.
  - Remedy:
    - Reliance (to remedy the unfair result, tort origin). **Logan. Goodman**.
    - Full extent of K. **Ricketts**.
    - Which one to use would be based on the similarity between fact pattern and past cases.
  - For just.
    - A comparative evaluation of the fault and responsibilities of the parties. - equitable estoppel.
    - Gifts - **I&I. Enforced as a public policy of securing donation.**
    - A duty to bargain in good faith.
      - In commercial settings.
        - Yes. **First Int'l Bank**.
    - P.E. vs. Statute of Fraud.
      - No. **Sterns (employment setting). Boone.**

        - In employment settings.
            - No. **Goldstick**. Freewill of employment.
        - For establishing an option contract.
    - **Rest 139**
        - represents consideration to be trusted in real estate.
- **IV. Torts.**
    - Breach of contract can form a COA in tort.

Tort and contract	Just contract	Tort only	Contract, maybe tort.
Sullivan, Hawkins. Medical malpractice COA in Tort.	Hart Ludwig. No duty from breaching the contract (Stopped performing a promise).	Cupou. Negligent isrepresentation qualifies COA in Tort.	Samson. Negligence in setting up the alarm may be enough to create Tort negligence COA.

III. Offers and Acceptance. Rest 17-70.

Assent.

- General rule: whether parties have assent is decided with an objective view. **Embry. Hawkins.**
    - UCC has no such rule. use common law.
    - **Pepsi. Coke lizzard**.
- variations:
    - subjectivity considered. not to enforce illegal contracts. In pari delicto. **NY trust.**
    - No fault in either party for the ambiguity. And no damage to say No K. **Raffles.**
- Policy:
    - Protect freedom of K.
    - protect reasonable reliance.
- Usually both parties need to have the intent to enter into a K.
    - Exception: Pine tree. Employee handbook.
        - Policy: Treat employees evenhandedly.

K formation through the offer and acceptance model.
Offer and acceptance. Very few UCC provisions.
Common law is moving away from the rigid "mirror image rule" or objective rule.

- **UCC:**
    - **2-204:** agreement is enough; Definite time of K formation is not known is ok; missing term ok if agreed and reasonable remedy posible.
    - **2-206**: acceptance can be any manner; notice within reasonable time is needed even if performance can be acceptance.
- K or not?
    - If not disputed, then K!
    - three major situations when we ask the question K or not:
        - K or not?
        - which is offer and which is acceptance?
        - which state's law apply.
- **Offer.**
    - **Rest. 24:** 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.
    - Is it an offer?
        - Elements of an offer:
            - must be communicated and known to the offeree.
            - manifest a desire to enter into a contract.
                - specify performances to be exchanged.
                - terms that will govern the relationship.
            - directed at some person or group of persons.
            - must invite acceptance.
                - specific manner is respected.
                - not mentioned: court decides is reasonable and timely.
            - give the reasonable understanding that acceptance will create the contract.
                - distinguished offer and proposal.
        - Factors in relation to interpretation **Rest. 33(2)**.
            - Look at the wording.
            - comprehensiveness and specificity of the terms indicates intent.
                - **Moulton. No limit on quantity. No offer.**
                - **Smoke ball. Ads. Limited ppl, bonus in the bank. Yes offer.**
                - **Pepsi. Ads open to everyone not enforceable.**
            - relationship of the parties, previous dealings, prior communications.
            - common practices or trade usages.
            - Fairness.
                - **Pine river. Handbook=offer for unilateral K.**
                - **Pepsi. Ads. Rediculous interpretation. No offer.**
- **Acceptance.**
    - Offer accepted when put in the mail box. Only in acceptance. **Rest. 63**.
        - Exception:
            - Receiving is acceptance for option contracts.
            - does not apply to counteroffer or rejection.

        - Complex with rejection. **Rest. 40**.
            - Offeree sends both acceptance & rejection (changes mind)
                - Rejection sent before acceptance? Doesn't terminate until received, but acceptance sent after sending rejection is not bindin g unless received before the rejection.
                - Acceptance sent before rejection? Is binding as soon as dispatched.
    - Contract term can change it.
        - Stipulated time of acceptance starts to run after receiving. **Caldwell. 8 days to accept.**
    - Policy:
        - offeror could have specified but did not.
- Form of acceptance.
    - usually stipulated by the offeror.
    - if not exclusive, then flexible. Any method is ok. **Allied Steel. Performance started without signing. Acceptance.**
        - Policy: It's clear P won't accept without the clause.
        - Policy: who should we protect?

- **Termination of power of acceptance. Rest 36.**
    - Rejection.
    - Lapse of time.
    - Counteroffer. **Rest. 39**
        - Expressing acceptance with change of term is counteroffer.
    - Death or mental disability of offeror.
        - The death of the time controls but not the time when the party learns about it.
        - Death after acceptance does not terminate contract. **Davis v. Jacoby. Died after acceptance.**
    - Revocation.
        - The offeror has the power to revoke the offer at any time before its acceptance.
            - Caveat: saying that it'll be held open is not good enough.
            - Exception: Firm offer. Four ways of making a firm offer:
                - Consideration; start of performance (unilateral K); 87.1; 2.205. P.E. Drennan.
        - Revocation only effective when communicated to the offeree.
            - Directly from offeror; Indirect from others; reasonable standard.

Option Contract and Firm Offers

- **To bind a firm offer:**
    - Generally: consideration.
        - Can be money or work.
    - For a unilateral contract
        - Start of the performance.
    - **Rest** 87.1.
        - in writing and signed by the offeror.
        - recites a purported consideration for the making of the offer.
        - (unimportant) proposes an exchange on fair terms within a reasonable time; or
        - is made irrevocable by statute. UCC 2-205
    - For sale of goods: **UCC 2-205**.
        - gives assurance that it will be held open.
        - is not revocable for lack of consideration.
        - during the time stated. or
            - reasonable time if no time is stated. but
            - not longer than 3 months.
        - be separately signed by the offeror.
    - Using P.E.
        - **Drennan. The miscalculated subcontractor and the general contractor.**
        - Rest 87(2). Really, it's just about general contractor and subcontractor.
- **Caveat**: Rejection does not end the firm offer.

Unilateral Contract

- **Formation.**
    - Value, or detriment must still exist. with mutual consent.
    - Unilateral contract cannot be accepted before beginning of performance.
    - Promise contracted for action.
        - The start of action forms an option contract.
        - The completion is the acceptance
- **Examples:**
    - **Pine River. Unilateral offer in handbook is a contract, employee's consideration is work.**
    - **Smoke Ball. Advertisement and reward.**
    - **I & I. recognized as unilateral K for social policy of protecting charity.**
- **Rest. approach on unilateral contracts. UCC has no unilateral contract clause.**
    - **Specified to be performance only? 45. performance starts - firm offer. Notice of commencement may be needed.**
    - **Didn't say? 32+62. performance starts - bilateral.**
    - Unilateral contract is only recognized when the offeror firmly states a promise is not sought for, but only the action is wanted.
        - In 45: Real unilateral.
            - Offer: performance only, does not invite the promise to perform.
            - Offeree starts performance.
            - Option contract formed. Offeree free to walk away.
        - In 62:

        - Offer: choose between promise or performance as acceptance.
        - Offeree starts performance.
        - Contract formed. Offeree bound by K.
    - In 32:
        - When there is doubt whether it is unilateral or bilateral, interpret as 62.
    - Outcome:
        - Unilateral contract is only recognized when the offeror firmly states a promise is not sought for, but only the action is wanted.
  - Policy consideration:
    - for justice! on whether we recognize the offeror as wanting a promise or not.
    - **David v. Jacoby 32 + 62. Offer interpreted as bilateral for justice (P gave up everything to come to US).**
- **Revocation:**
  - Irrevocable after performance begin since option contract starts.
  - Caveat: Preparation for start is not counted as performance.

The requirement of certain in the contract terms.

- **Rest. 33(2). and UCC 2.204(3).**
  - **K reasonable certain if the language of agreement, interpreted in context and in light of applicable legal rules, provides enough content to establish an intent to contract, a basis for finding breach, and a means of providing a remedy.**
- **Material aspect uncertain - no K.**
- **Three ways of uncertainty.**
  - Ambiguity.
  - Vague term.
  - Omitted term.
- **Rest. 33** certainty.
  - **Moulton**. Too uncertain, no K.
  - terms of the contract must be reasonably certain.
    - reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
  - The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.
- **The letter of intent** is not a K, but requires a good faith in negotiation (Farnsworth). **Empro. goodman**.
- **Illusory And Alternative Promises. Rest. 77**: **no example?**
  A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless
  - each of the alternative performances would have been consideration if it alone had been bargained for; or
  - one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.
- **When the terms are uncertain**: Which one to use?
  - Fill in the subject to and make it a K, or
  - Too indefinite, no K.

The good faith requirement of contract.

- In common law. **Rest. 205**:
  - Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
  - does not include the process of negotiation. no need to negotiate in good faith under common law.
- In Franchise situation: **Amana. 10 day notice is good as stipulated in K. Goodman. Bad faith => reliance damage.**
  - good faith is preventing opportunistic interpretation of K.
- Good faith is used when K is not clear such as in an output contract. **Wood v. Lucy.**
- **In UCC.**
  - **UCC 1-304:** obligation of good faith in its performance and enforcement.
  - **UCC 1-201**: honesty in fact.
  - Exclusive dealing requires good faiths. **Feld v. Levy. Loss of profit does not satisfy good faith.**
    - "Only if its losses from continuance would be more than trivial, which, overall, is a question of fact." **Feld**.
    - **UCC 2-306 (2):** A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.
- For a contract with no specific termination clause. **UCC 2-309 trumps UCC 1-304**. **Corenswet. "10 day notice" upheld.**
  - **UCC 2-309:** Valid for a reasonable time unless agreed may be terminated at any time by either party.

IV. Parole evidence, and stuff

3 ways of interpreting ambiguous or vague terms:

- 4 corners rule. Only the fully integrated K. Willston's approach.
  - Hard to decide what's "fully integrated." Example?
- Focus on intent of parties (past negotiations and outside parol evidence). Corbin.
  - **Mitchill**. **This is what we use. Hatley.**
  - **Pacific Gas. Allowed parole evidence for parties' intent. can not know what the parties meant without looking at outside evidence.**
- Look at it as a reasonable person would. **WR Grace**.

Parole evidence rule

- Policy:
  - the quality of parol evidence and the clarity of K.
  - figure out the true intent of the parties v. excluding unreliable or dishonest evidence.
  - Control jury's decision making.
  - promotes efficiency.
  - encourage better dealing.

- **Rest**: "might naturally be omitted".
- **UCC2-202**: "would certainly have been included."
- 3 conditions parole evidence to vary a written K:
    - The oral agreement must be a collateral one.
    - Consistency. it must not contradict express or implied provisions of the written K. Flexible interpretation.
        - Direct contradiction disallow parol evidence.
        - Scope of the warrantee too broad then specific parol evidence allowed. **Husky Spray. UCC 2-202. warrantee v. words**.
    - Naturally out. it must be one that parties would not ordinarily be expected to embody in the writing.
        - **Mitchill. Buy house and remove ice house. Not admissible cuz usually would be in writing. Integrated.**
        - **Hatley. Used parties' intent and admitted parole evidence. Scribbled. Not integrated. For justice.**
- **Rest. 209**. If 209 is satisfied, then **Rest. 213**.
    - **Rest. 209**: Integrated K is a complete agreement with specificities and details. Decided by the court.
    - **Rest. 213**: Integrated K discharge parole evidence that either contradicts or is within the scope of K.
- **UCC 2-202 "intent." UCC 2-207. UCC says parole evidence is a way of interpretation.**
    - UCC 2-202
        - "to explain" the K.
        - would the term certainly have been included in the doc had it been agreed to?
        - allow course of performance, course of dealing or trade secrets. but **Rest.** does not mention.
        - parol evidence admissible even if the writing is intended as a final expression.
            - policy: presumes that party would rely heavily on custom and trade conventions.
    - More lenient for using parol evidence.
    - As long as there's no direct contradiction and not to change the K, it's admissible. **Husky Spray.**
- Fraud trumps PER.
    - **Lipsit. Employer case.**
    - **Sabo. cannot use PER permitted through fraud to argue K.**
- PER and SoF
    - SoF is not a basis for challenging the existence of K.
    - RER only applies to written K. It operates to exclude both oral and written evidence.
    - SoF can be satisfied by writing that were never effective or intended to be integration of agreement.
    - **Rest. 156**. If reformation of a writing is otherwise appropriate, it is not precluded by the fact that the contract is within the Statute of Frauds.
- Policy:
    - Satisfying intents of parties.
    - Facilitate justice.

Random points:

- **Rest. 209**: contract was integrated.
- **Rest. 210**: integration was complete.
- **Rest. 213-216**: oral term is inconsistent w/ written agreement, is within its scope, does not bear on its interpretation, and would not naturally be omitted from the writing

Random points:

- **Fraud, mistake**, or other bases for invalidating or avoiding the K can **allow parol evidence** even if contradicted.
- parole evidence not allowed beteeen condition K formation and the condition precedent.
- parol evidence can be interpreted as to be another independent K and thus admissible. **Mitchell icehouse dissent**.
- merger clause is a strong indication of integration but not absolute.
- Judges consider the following when determining if document is integrated.
    - 1.Type of document
    - 2.Type of parties
    - 3.Context: how formal was the process: were lawyers present?
- PER means we don't need to look at external evidence beyond the fully integrated contract. But, there could also be an Interpretation problem, which can apply at any time.
- Interpreting the promise:
    - Law must provide set of background conditions-default rules (language about how contract is to be interpreted)
    - Practical constraints limit the completeness of contracts. Law is counted on to fill in blanks
    - Most contractual disputes involve either facts or proper meaning to be ascribed to facts (our primary concern)
- If it looks like a fully integrated contract, judge will interpret it as four corners.
- Only conditional delivery can be admitted as evidence in court (not applied in **Hatley v. Stafford**)
- Fraud: **LaFazia and Lipsit**
- If there's ambiguity, we go to Parol--> if parol is also inconclusive--> we go to the next layer--> extrinsic evidence
- Allowing PER when the document is complete was revolutionary. If meaning of K is not clear, we still look at parol. PER is not just about adding evidence but also explaining.
- **Diff between common law and UCC? UCC says that explanation is all it takes to use parol (more generous approach).**
- **Oral condition** to be admitted as evidence: as long as it's essential to understanding which led to agreement between parties (**Hatley** court). Other courts draw a distinction between diff types of oral conditions:
    - 1. inadmissible if changes the terms of the contract.
    - 2. admissible if conditional delivery: when document itself looks fine but there was an oral agreement that it wouldn't be enforced unless it is delivered in a certain way.

PER and Fraud

- Generally when fraud is claimed, court would ignore parol evidence rule, but court worries that it's too lenient so later even in fraud claims parol evidence is only allowed if it's extrinsic (not contradicting the express terms of K).

Remedies for improper bargaining

- **Rescission**.
  - Aggrieved party can choose to continue with the K.
    - Compensatory damage may be available to compensate for improper bargaining or tortious act.
  - Aggrieved party can choose to rescind:
    - Restitution to both parties though justice may treat them differently.
  - Aggrieved party can choose to adjust the terms of the K to correct the consequences o improper bargaining.
    - May not be possible if the unfair term is of essence.
    - May be the only available remedy if the term is not serious.

Unfair bargaining summary
- Background rule: free to K. No duty to disclose. Laidlaw.
- Unfair bargaining toolbox gives the courts ways to deal with behaviors that crossed the line from hard bargaining to unacceptable exploitation.
- Policies:
  - curbing abuse. fairness.
  - market interference.

Unfair bargaining: Misrepresentation
- **Rest.159: an assertion not in accord with the facts.** something that you know is wrong.
- Types of misrepresentation.
  - Fraudulent. You knew and deliberately lied.
  - Negligent. You should have known.
  - Innocent. You didn't know it was not the fact.
- PER does not bar evidence for proving fraud. **Sabo. Lipsit. Trumped merger clause.**
- PER still applies to negligent or innocent misrepresentation.
- Misrepresentation must be justifiably relied on by the P.
  - A clear disclaimer clause in K can make it hard to show P justifiably relied on the misrepresentation.

Unfair bargaining: Fraud
- It's a tort. thresh hold is high. but can do a lot of things.
  - When enforcing K doesn't work, go fraud. **Lipsit**.
- **Elements:**
  - Deliberate dishonest intent. intend to induce the other party to enter the K.
  - Offeror knows it's false.
    - Fraud is based on factual misrepresentation, not opinion.
  - Offeree must have relied on it justifiably.
    - Used a mixture of objective and subjective view (favoring P).
  - Materiality. Not mentioned in **Rest**.
- **Types of fraud**:
  - Affirmative statement. Fraud.
  - concealment. Fraud.
    - **Rest. 160**: concealment: you hide the truth = misrepresentation.
  - **nondisclosure**. When the line is crossed between facts that may fairly be kept private and those that must be revealed?
    - (**UCC 1-304, 2-306**. Good faith only affects the performance and enforcement, and doesn't pertain to negotiation.)
    - **Rest. 161:** nondisclosure amounts to affirmative statement if:
      - the party knows that disclosure of that fact is necessary to correct a previous assertion. or
      - where there is a relationship of trust between the parties.
      - the party knows that it is necessary to correct the other party's mistake as to a basic assumption of the K, and nondisclosure would violate the duty of good faith and fair dealing.
      - Two considerations:
        - whether the information should be treated as the property of the party who possesses it.
        - whether the information is readily available on diligent inquiry.
      - **Current interpretation: if you said something that derails other party from reaching the truth.**
    - **Ways to bypass duty to disclose:**
      - imposition.
      - actually not know, but had a guess and bet on it. Sherwood.
    - **Rest. 162**: It can be fraud if one makes an assertion without confidence in its truth or without a known basis in fact.
      - **Jordan** case.
- **Remedy**: can be economic or noneconomic.
  - Keeping K: compensatory: usually the overpayment or the cost to cure.
    - Expectation. **Lipsit.**
  - Rescission: restitution. **Sabo. Lipsit.**
    - restitution is sometimes hard to quantify so borrow from reliance.
  - Tort-based remedy root gives punitive damage or K price sometimes.
- **Negligent and innocent misrepresentation**.
  - Only remedied if material. **Rest.162, Rest. 164**
- Is it possible to exclude by contract a subsequent claim of fraud?
  - No. **Lipsit. employer case**.
  - Yes. **LaFazia. deli case**.
    - Insofar as parties have specifically written that they were not induced by other party, fraud is not recognized.
- Distinguish **Lipsit** and **LaFazza**.
  - **Lipsit.** Fraudulent claim can be said to be extrinsic to what's written in the document. What was said to Lipsit induced him to sign an document, but the document didn't contradict what was said to him. It simply lacked any terms that addressed the inducement.
  - **LaFazia**. Fraudulent claim is intrinsic b/c it conflicts w/ the actual terms of the document.

Disclaimers:

- If disclaimer is generic then it doesn't count.
- If disclaimer is specific it may be considered.
    - Lipsit: Mitchill claim doesn't apply
    - LaFazia: Mitchell claim seems to apply

Canons of interpretation for the judge. Rest. 203-207. P430

Rhetorical moves -not anymore meaningful than commonsense. They are internal mechanisms for interpreting contract w/o looking outside of contract.

- Specific prevails general
- expressio unius est exclusio alterius (b/c I have included A, I have excluded B and C).
- contra proferentem (interpretation against the drafter to encourage the drafter to do better next time).
- Not ad absurdum (if literal interpretation of contract nonsense, then we favor the sensible interpretation). **Chicken case**.
- We interpret Clause A in a way that is coherent with Clause B.
- Good faith. Presumption of fairness.
- Presumption against forfeiture.

Interpretation. Rest. 203 - 207. UCC 1-303(e), 2-208(2).

- **Steps of tackling interpretation. K words utmost important. UCC 1-303(e) 2-208(2). Rest. 203(b).**
    - **Start with the K term. (parole evidence to introduce new evidence?)**
    - **Then course of performance after K. What parties did in this K. The chicken case.**
    - **Then course of dealing. Conventional exchange in the past six years.**
    - **Trade usage. what do others do.**
- **UCC 2-202** introduce us into interpretation.
- **Frigaliment** takes interpretation apart.
- **UCC 1-303**'s lenient rules for admitting parole evidence:
  Pacific Gas v. Drayage.
    - Course of performance.
    - Course of dealing. **Nitrogen (an exception). MP decreases after K formation with a history of dealing.**
    - Trade usage: others.
- Argument for alternative interpretation must be judged against a reasonable standard. **Federal Dep. V. WR Grace**
- Question of interpretation: usually leads to:
    - One meaning (**Embry**: if we accept what ER said, a contract was formed; **Pacific Gas v. Thomas; Hawkins v. Mcgee)**
    - Reasonable person standard (**Frigaliment** the chicken case).
    - No Contract (**Raffles**):
    - But, commonly there will be a resolution of dispute so don't rush to the Peerless no contract principle.
- **Rest. 212: Interpretation.**
    - If interpretation of integrated agreements depends on credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from that evidence, then it's a question for of fact (jury).
        - **Hawkins v. McGee** (jury decided if doc said he would return the hand to 100%).
    - Otherwise question of interpretation is a matter of law (judge).
        - **Embry** (judge interpreted that if ER really said something then it creates a contract).
    - Frigaliment takes interpretation apart
- **Last shot rule**
    - offer followed by acceptance that doesn't match it is a rejection/possible counteroffer.

Mirror image rule

- acceptance is mirror image of offer. A real meeting of the minds happened. One document w/ two signatures is the best example of this.
- When it's not a mirror image:
    - counter offer that void the original offer.
- It makes the new doc with a new term an counter offer.

Deviant acceptance at common law.

What's the example of added term accepted? Ford is contradictory: added term ignored.

- Definition of deviant acceptance rule:
    - **introduction of new or variant terms kills the offer and contract formation must start over from scratch.**
- But there's several **exceptions** to it.
- Key issue in deviance acceptance cases is **whether acceptance is absolute** (w/ perhaps a mere inquiry attached) **or conditioned.**
- Acceptance may be valid despite conditional language **if acceptance is clearly independent of the condition .**
    - (if vendee replies w/ signed contract, a deposit, and then a letter requesting certain conditions in the house, it's not an absolute acceptance b/c of a request for a gratuitous benefit) --> no K
- Offer --> qualified response (i.e. rejection) --> a counteroffer ? (if yes) -->could be accepted
    - But real negotiations are much messier than this idealized process. By the time an agreement is reached it's nearly impossible to identify the offer or acceptance.
- Today there's a greater tolerance of incomplete agreements (UCC 2-204 and Rest. S22)
- When offer that created the power of acceptance is a binding option, events that ordinarily terminate acceptance (including deviant acceptance) don't have that effect, and contract remains.

2-207 is an attempt to simplify the rigidity of common law mirror image rule. 2-207(2) Only for merchants

- **Three ways to form K:**
    - Additional term or partial rejection of some term is C.O + acceptance. Just like common law but burden of offeree to make it clear to cancel the K. K!
        - Unless the offeree makes it clear the acceptance requires the term. which one to choose from?:
            - If the offeree makes it clear the acceptance requires the specific term. then offeror's acceptance is needed.

        - When there's contradiction, then only the overlapping rules remain. knock-out rule.
            - Add in the gap filler.
- 2-207 (2): what to do with the additional clause in the counter offer, not different terms.
    - strike out: material change. 207 (2)b.
    - rejection by offeror.207 (2)a.
        - Counter: 207(1): I made it clear the K requires my changed term, 2-207(1) after coma (no K).
            - counter counter: if your r firm on ur added term, then you should not perform at all (yes, K).
        - counter: 207 (2) is for additional term, here we have different terms, so knock out.
- What to do with contradicting terms? All over the place.
    - minority: fall out of the offee's term, keep the offer's term.
    - knock the contradicted term. gap filler. majority.
- Three ways:
    - ABC, +, AB-C+D = K. AB-C+D will not form a K in common law: in common law, ABC is replaced, and K forms only with acceptance.
        - **Different formation rule in common law and UCC**. Performance indicates agreement.
        - D depends on 2-207(2).
        - C either fall out (keep offerer's) or knock each other out. **Richardson. Knocked out warrantee.**
            - UCC 2-205: another example of difference between UCC and common law.
    - ABC, +, AB-C+D = K. "-C +D" is essential. Then counter offer.
    - Third way?
- ProCD isn't really a battle of form situation. no multiple forms. what's the normal way of analyzing formation?
- Kloeck is not between merchants, thus not addition of terms. **2-207(2) requires merchants!**

UCC 2-207 v. common law

- In common law, the force of the last K is more emphasized than the original document. Last shot rule.
- In UCC, the later doc may not change the original terms.

Contract formation through exchange of forms: Battle of the Forms.

- Disagreement over a few terms while the rest of the language is standardized
- 1st question: is there a K (i.e. a meeting of the minds)?
    - Even if there is a contract, determining what the parties talked/negotiated about is impt.
    - Mirror image rule is applied under common law. But the mirror image rule leads to the last-shot result (party that submits an acceptance w/ additional/different terms gets those terms to be part of contract), so the **UCC** rejected mirror image rule and replaced w/UCC **2-207: 3 ways of contract formation:**
        - One path: first document has a lot of strength.
        - Second path: second document has more strength if acceptance of additional/different terms is expressly made conditional.
        - Third path: all the conflicting terms drop out and UCC provisions fill up the gaps. -**knockout rule**
- Solution to the messy formation of contracts where it's impossible to identify what's the offer, counteroffer, acceptance is to use 2-207:
    - Standard interpretation of rule:
        - 2-207 (1): --> 207(2)
            - §2-207 (1) second part (unless acceptance is expressly made conditional on assent to the additional or different terms.) = Common Law (CL)
            - §**2-207(3): simplest version**. All the terms that agree are part of the contract but those that disagree are out.

Random points:

- Courts treat battle of the forms in the same way as exchange of forms in which certain elements are left unaddressed in the contract. Apply **2-204(3) principle of filling in missing terms w/ Code's off the rack terms or referring to custom/usage of parties of their trade**. Thus, incompleteness of exchanged forms is no bar to finding a bargain.
- Since the Richardson case, 2-207 has been revised.

Conduct as Assent: The Implied Contract

Underlying rule is freedom of contract. Implied K is an exception.

- **Policy: punish bad business. compensate reasonable ppl to increase efficiency.**
- **Rest. 69. Acceptance by silence or exercise of dominion.**

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

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

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer. contradicting the mailing business statute. "yes at the beginning" is not written here! The statute says even if you eat it, that's ok, by law.

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

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

- **Rest. 69**:
    - Effect of failing to reply to offer **(silence as acceptance).**
        - watching kid mowing lawn.
            - Duty to speak to preserve your freedom of K.
                - does the offerer's understanding of "not rejecting means acceptance" reasonable?
    - Limits on offeror's power to bring about a contract by claiming the other party's failure to reply or act constitutes as acceptance
    - Failure to reply operates as acceptance only in the following cases:
        - **When offeree takes the benefit of offered services with reason to know that compensation is expected and a reasonable opportunity to reject them. Credit card.**
        - **When offeror has let the offeree know that silence or inaction = acceptance**
        - **B/c of past dealings the offeree knows (or should reasonably know) to notify offeror if they do not accept.**
    - If offeree does something to interfere w/ offeror's ownership of offered property, they become bound by the offered terms unless the terms are unreasonable.

- But, if the offeree's act is somehow wrongful against the offeror, it is only considered an acceptance if approved by the offeror.
- The performance of the parties manifested an implied contract.
- **Martin v. little brown. Has the intention to charge, but is unsolicited and does not meet the exception of "no assent required." is the intent of offeror reasonable? No either. Intermeddler! No K implied in fact, No K implied in law.**

Implied in fact. There's an implied assent.
Implied in law - QK - QM. Resitution. Unjust enrichment. No assent at all. No K at all.

Monrone v. Monrone.
Implied K in fact? No. Public policy: we have abolished common law marriage legislatively, because too many suits (widow suing for rights after partner dies).Thus we do not recognize this implied in fact K.
QK? No, gift. No intent to charge.
Express K? Yes. talked about how to deal with separation. statute of fraud. write it down.

The Privilege of Silence
- Silence will not constitute an acceptance in the **absence of a duty to speak.**
- When does duty exist?
  - If the offeree enjoys the benefit.
  - if prior dealings between the parties or other circumstances make it reasonable for the offeror to expect the offeree to give notice of rejection.
  - Duty to speak was replaced w/ reasonable understanding.
    - Requisite reason to know.
  - If there's any special relation.

Good samaritan (no payment) v. implied contract (pay).

Random points
- Contract exists when it's based on your intentions (you wanted it) -contract by fact.
- **Officious intermeddler, volunteer** -no contract
- Sort of contract that you should have wanted (contract implied by law/quasi contract)
- If contract is not recognized/enforced, you can sue under QK, but can only get restitution. Courts are more likely to consider QK situations in commercial settings, whereas in personal relationships they don't usually recognize implicit contract

Contract implied in facts
Contract implied in law.

Mistake, impracticality, and frustration of purpose
K turned out to be very different form the original one.
- General:
  - Mistake has to be:
    - Material
    - The party seeking it should not bear the risk.
    - error of facts.
  - impracticality, frustration
    - concerning the impact of supervening events on the transaction.
- Mistake
  - General:
    - mistake only exists in error in facts, not error in judgment.
      - **Sherwood**. recognized as error in fact but there's a dissent.
    - incorrect prediction of future events is not a mistake.
    - mistake is different from misunderstanding.
  - mutual mistake v. unilateral mistake
    - factual assumption so shared by the parties, that that is a joint premise of their bargain.
    - The truth of a fact only affects one of the parties.
  - mutual mistake:
    Beachcomber. coin.
    Sherwood(according to majority).
    - an error of fact.
    - basic assumption on which the K was made
    - material effect on the agreed exchange of performances.
    - the adversely affected party must not have borne the risk of the mistake.
  - **Assumption of risk.**
    - **Organ**: the buyer assumed the risk.
    - **Sherwood**: the seller never assumed the risk.
  - **Risk allocation. Rest. 154**
    - Risk can be allocated:
    - 1) in agreement;
    - 2) if party is aware he has limited knowledge about mistake but treats it as sufficient;
    - 3) court allocates risk to him on grounds that it is reasonable to do so
      - One way to allocate risk is with a warranty:
  - **Warranty**: **UCC 2-313** (express). **UCC 2-316** (implied)
    - If there's a mistake, you can only recover for one thing, rescission.
    - Warranty gives you a better outcome, because it can increase remedies

        - Can you disclaim a warranty?
            - As-is clauses, no-warranty clauses, and similar types will disclaim the warranty. But, if disclaimer is very inconspicuous, it may be considered fraud. **LaFazia**.
    - **Unilateral Mistake**
        - **Star Paving v. Drennan**
            - When there is an offer on the table that is too good to be true.
            - If the offer was for $700 it would be a clear mistake. But the court didn't agree that the $7000 offer was low enough to be considered a mistake.
            - First, he says he didn't enter the contract (K)
            - Then he says, he did enter a contract, but tried to rescind it (doctrine of mistake)
            - Subcontractor tried to invoke doctrine of mistake. When he made the bid for $7000 he claimed that it was a unilateral mistake that was recognized by both parties. Court ruled that there was not a big enough difference between market price-$10,000 and the bid made by subcontractor, which suggests mistake was not palpable.
        - Similar Doctrines, but they need to be distinguished depending on facts.
            - Mistake
            - Warranty
            - Non-Disclosure --> fraud--> rescission (S 161)
    - **Distinguish Tribe v. Sherwood**.
        - Why isn't mistake used in Tribe?

Warranty

- **Tribe** could have used warranty argument but it was never breached
- **UCC 2-711** (one remedy buyer can always count on is to cancel)
- Hawkins: 100% perfect hand. yes warrantee.
- Tribe: no warrantee.
- opinion v. warrantee.
- elements:
    - assumption of risk.
- Expectation damage of breaching warrantee. 2-715 2 (b). consequential injuries. sought by tribe.
- warrantee: expectation.
- UCC-2-314: express warrantee. implied warrantee: merchantability, fits specific purpose.
- UCC 2.315
- UCC 2.316: can be disclaimed. husky: has to be conspicuous.

Risk allocation.

Impossibility: Mistake and impossibility are structurally diff but risk allocation is essential in both situations.

- **The question to ask: did the parties make the implied assumption?**
- Both mistake and impossibility pave the way for restitution.
- When you plead impossibility you are not questioning the existence of a contract. Rather, you excuse one party from performance.
- **Taylor v. Caldwell**: Contract is bigger than the agreement. There is a difference between interpretation of agreement and construction of contract.
- **Bunge v Recker**. -seller is inclined to perform even though crop was destroyed by weather. Theory of impossibility doesn't apply b/c according to contract, seller could have purchased soybeans anywhere in the US (clause for allocation of risk).
- Mirror image of that case was in **Snipes Mountain v. Benz**. Find out that written contract is not fully integrated, and the term "from my field only" is not inconsistent w/ the contract. Seller/farmer is discharged from his contractal duties if there's an act of God b/c contract does not allocate the risk to him.
- Sometimes courts will discharge party's obligation if it has become impractical (too unforeseeably expensive). Consider the **Westinghouse uranium contract**. This is diff from the **Lily v. Feld**(breadcrumbs case), which was an output contract. In Westinghouse case, allocation of risk in contract means that any increase in market price will be borne by Westinghouse. Parties then bargain in the shadow of the law, and renegotiate the contract price. Dawson uses this case as a model example of not interfering w/ contracts b/c parties will fix the contract themselves. Posner applies an economic analysis to this case.
- Extension: performance is technically possible, and not even that cumbersome, but it doesn't really make sense (parties don't want it anymore).

Impracticability & Frustration. UCC 2-615. UCC 2-613.

Imposibbility	
Impracticability: performance is still possible but costs have become astronomical: Courts decide impracticability by determining assumption of risk.	Frustration

- **Impracticality. UCC 2-615. UCC 2-613.**
    - event has made the performance as agreed impracticable.
    - nonoccurrence of the event must have been a basic assumption on which the K was made.
    - the impracticability must have resulted without the fault of the party seeking to be excused.
    - party must not have assumed a greater obligation than the law imposes.
- **Rest. 264 with Comment a**
    - A basic assumption of a contract for the performance of a duty is that no domestic of foreign government regulation will prevent that performance. So if the compliance to such regulation prevents performance, the party that owes performance is expected to pay damages for non-performance rather than violate the law.
- **Rest. 265 frustration.**
- **Note: Allocating risk by circumstances**
    - Fighting ques is usually whether contract, read in context reveals implicit allocation of risk: whether a promise unconditional on its face was in fact "conditioned" on some person or thing
    - Posner suggests identifying the "superior risk bearer" b/c of an ability to diversify purchases geographically and reduce the risks from unfavorable weather. Posner believes the Bunge and Snipes Mountain case was decided based on this economic analysis. Makes economic sense to place liability on the bigger party.

Comment: Relief following discharge

- (**Henry v. Krell**): D abandoned claim of £25 so court didn't have to rule on whether money already paid on contract must be restored. Also, since £50 was no due until June 24, court didn't have to decide on if the £50 was already due before the coronation was cancelled
- Court ruled on "suspension in midari" leaving in place obligations already matured

- This approach was subsequently rejected by American courts
- **Compromise: reliance losses are deductible from restitution claims, and they are collectible to the extent any payment or performance that was due from opposite party before the supervening event occurred**

Tension between freedom of contract/autonomy and the judges' regulatory function

- UCC 2-302 established policing function of courts
- Modern courts are equipped w/ various rules, doctrines, standards to intervene b/c of abuse in bargaining or defect in substance of the bargain (e.g. violation of a positive rule of law)

Incapacity.

Mental Illness

- **Rest.15** of Restatement: Ks are voidable by reason of mental illness if:
  - Cognition test: unable to understand nature and consequences of transaction
  - Volition: unable to act in a reasonable manner regarding the transaction and **other party has reason to know**--

Random points:

- If contract is made on **fair terms** w/o other parties **knowledge** of mental illness, voidability terminates when the contract has been so performed in whole or in part that avoidance would be unjust.
  - Fair terms, no knowledge, restitution impossible.

Steps in argumentation:

1. not bound to contract, revoke offer **(formation of contract)**.
2. are bound contractually but can rescind the contract (**rescission due to unilateral mistake**)
3. Reformation-an exceptional remedy granted in courts of equity (**clear to court that there was a mistake**-parties both knew they meant $7000 but wrote $700 -a mistake in integration)

- Element of Risk (S 154 in Restatement Second of Contracts)
  - **Mutual mistake:**Assumption of risk: heart of mutual mistake analysis. Nothing in the contract shows that risk was assumed. An express warranty is a clear assumption of risk.
  - Posner's economic analysis when there's no explicit assumption of risk: Party closest to source of info is the one bearing that risk

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Chap 5.

REVISION OF CONTRACTUAL DUTY

Unfair bargaining: Duress
Alaska; Farnum; Wolf.

- by physical compulsion or economic interest.
- **Rest.174**: physically compelled.
- **Rest.175**, **Rest.176**.
  - Elements:
    - one of the parties must make a threat;
      - an indication of intent to do or refrain from doing something so as to inflict some harm, loss, injury, or other undesirable consequences that would have an adverse effect on the victim's person or personal or economic interests.
    - the threat must be improper;
      - it could include any threatened behavior that goes beyond the legitimate rights of the party applying the pressure, or that constitutes an abuse of those rights.
        - threat to engage in vexatious litigation,
        - to withhold a performance or property to which the victim is entitled
        - to disclose information that would embarrass the victim
        - do something spiteful or vexatious purely for the sake of hurting the victim.
      - It is not proper to threat for consequences that can lawfully and properly be pursued.
    - induce the apparent assent;
    - leaves the victim no reasonable alternative but to agree.
      - should not be burdensome.
  - Fair dealing when a third party threatened the second party will be respected except in extreme situation. **Rest. 174**.
- Remedy: Voidable K.

Modification of K

- Policy: fairness. Did the parties reached an assent to modify the K?
- needs new consideration: Legal Duty Rule:
  - If K2 is achieved through duress it is invalid.
    - **Alaska Packers.**
    - **Farnum v. Silvano**: Consent was voidable b/c it was done under duress--> rescission and restitution.
    - **Wolf v. Marlton**.
- when parties agreed but no consideration:
  - **UCC 2-209**.
    - replaced the issue of consideration from K modification and focusing instead on whether the modification was in good faith.
      - Evaluate good faith: overall commercial circumstances and the business justifications, or other factors.
      - no-oral-modification clause must be complied with.
  - **Rest.89**: Usually consideration is needed in common law cases, except authorized by Rest.89:
    - when the party benefitted by the promise of modification has acted to her detriment in reliance on it, under circumstances in which it would be unjust to refuse enforcement. **P.E**.
    - when the modification was motivated by unforeseen supervening difficulties.

- **Levine**?

Unfair bargaining: Undue influence

- concerned with cases of abuse of trust.
- **Rest.177**. restricted to dependence and trust.
- Remedy: voidable.
- Elements:
  - a relationship of trust and dependency existed between the victim and the other party.
  - this relationship gave the other party dominance over the victim and imposed on him the duty not to act contrary to the victim's interests.
  - the dominant party abused this position by unfiarly persuading the victim to enter a K adverse to the victim's interests.

Mutual Rescission:

- We can argue for K2 to be enforced if K1.5 (mutual rescission) can be injected between the two contracts **Schwartzreich v. Bauman-Basch**
- Mutual rescission is a type of intermediate contract: I agree to release you from duties and you agree to release me from duties. This reasoning cleverly bypasses LDR.

NO ORAL MODIFICATION (NOM)clause:

- Common law idea: you can always rescind through mutual agreement.
  - But UCC changes this idea to mean that any modification must be changed in writing until you get to subsections 4 & 5 of **2-209**, which are identical to the common law, and allows oral modification
- **Waiver:**
  - Hypo: hired as a research assistant, and asked to show up at 9. You keep showing up at 9:15 and proff says "don't worry about it every time." Later on proff asks bursar to reduce pay by 15 min. You have a claim for waiver here.
  - Waivers have to do w/ **minor conditions** of a contract
  - **2-209(4):**although there is no modification in writing, it may look from your behavior that you're waiving the no-modification clause.
  - Waiver can be retracted: unless it materially changes the position of the waiver
  - **Levine v. Blumethal**: waiver doesn't apply here b/c payment is not a minor condition of the contract.
  - Payment of sum of money cannot be satisfied by lesser sum of money
    - Property, service, etc is different than a sum of money. So even if payment of lesser sum of money doesn't satisfy, if it comes w/ some kind of tangible good or service, it provides additional consideration, is sometimes accepted.
  - But sometimes the payment of lesser sum is enough to show **accord and satisfaction** when:
  - Credit is **immature**: satisfies contractual interest b/c it's made before it's contractually due
  - Credit is **disputed**: even though parties disagree over how much to pay, once it's cashed there's accord and satisfaction
  - Credit is **unliquidated**: know you're owed a sum of money but not sure how much
- S17 K : Bargain:
  - Consideration
    - 2-209(1)
      - K2 is valid even if there's no**consideration**but on all other points it's still exposed to invalidation under other common law doctrines (1-103b for example invalidates it for duress).
    - With disputes, other interests kick in
    - Accord and satisfaction: If one party cashes check that says "in full payment" it will be hard to dispute later. So, if other party writes "not in full payment" and cashes it, common law allows this. But, UCC 1-308 says as long as you cash check you acquiesce to the fact that it's full payment. The only thing you can do is send the check back.
  - Assent:
    - 2-209(2)
      - No oral modification (No Oral Modification)
    - 2-209(4) and (5): waivers
      - Intentional relinquishment of a contractual right
      - Only have to do with minor provisions

STANDARDIZED / BOILERPLATE AGREEMENTS

- **Carnival**.
- Policy:
  - saves time. reduce costs.
  - optimized through time and practice.
  - big compnanies need it, cannot say it every time.
- Random points:
  - shrinkwrap can be merely a statement of what was agreed on. **ProCD OK.**
  - if shrinkwrap is a modification, then no cuz no modification after K formation. **Klocek, used UCC.**
  - Only enforcing if reasonably expected and fair.
- 2-316: disclaimers on warranty/liabilty
  - Hidden in fine print isn't a valid disclaimer
  - **ProCD v. Zeidenberg**: acceptance of terms by failing to object. faire and reasonable.
  - Carnival Cruise: you get cruise tickets after purchasing them over the phone, and they include terms of liability on the back--> binding
  - **Hill v. Gateway**: Hills could have read the terms if they wanted to. They are still bound if they didn't read them.
  - **Sharon v. Newton**: high school cheerleading minor contract. Father was given a form, which was clear, and he signed it --> **consent**. Form becomes binding.
- You can attack a form by saying consent did not occur. If consent did occur, you can argue that it's not valid for the following reasons
  - **Rest. 211:**forms are binding on the customer unless terms **exceed reasonable expectations**(shifts liability to a consumer in a way he did not expect--waives gross negligence for example) **Broemmer**
  - **Unconscionability:**
    - **Williams**(furniture case): Posner's stance against unconscionability b/c we don't want to disable weaker/poorer parties from engaging in contracts: she made a rational decision.

        - Unconscionability can be procedural (how we got to yes) or substantial. Usually both need to be present for the argument to work
    - examples: **Richardson**.
    - Public policy
        - (Those who believe contracts are about autonomy find these two principles troublesome: unconscionability and public policy

UNCONSCIONABILITY

Williams v. Walker-Thomas. cross collateralization clause.

- Usually in **consumer transactions**. But
    - a K is not unconscionable merely because it is on standar terms drafted by an economically powerful party.
    - not confined to consumer transactions.
    - not to disturb the allocation of risks because of superior bargaining power.
- unconscionability is an equitable relief, only available for equitable purpose. Only for good ones.
- **Rest. 208. UCC 2-302**. same.
    - whether in the context of the commercial background and transactional circumstances, the K or term is so one-sided as to be unconscionable.
    - absence of meaningful choice
        - Sometimes even a meaningful choice can be negated by a gross inequality of bargaining power. Manner in which contract was entered is also relevant
    - Not to uphold if harsh, oppressive, or unexpected.
    - examines both the process of bargaining and the resulting K terms.
- Unconscionability must be **procedural and substantive**
    - Procedural: there has been some kind of improper conduct.
        - Fraud, duress, undue influence all figure in.
        - may include pressure; deception; unfair persuasion.
    - substantive: term is so unfair or one-sided.
    - one element may be enough if very unconscionable.
- **Policy**: 2 purposes of unconscionability doctrine:
    - Prevent unfair surprise
    - Prevent oppression
- **Remedy**:
    - Void K. Restitution.
    - Adjustment of terms.
        - severing.
        - altering.

ILLEGALITY, PUBLIC POLICY, AND FREEDOM OF K

In re baby M. Illegal and against policy.

NY trust. Illegal.

- **policy:**
    - respect the assent and reliance of ppl.
    - public interest.
        - so harms the public interest that it should not be recognized as valid.
        - Balancing the policy of enforcing K and the other public policies.
        - Example: **disclaimer** (exculpatory clauses)
            - enforcing K v. tort policy of holding a tortfeasor liable.
            - easier if K is not well-bargained.
            - examines the dislaimer first. adhesion? explicit? intent?
            - restrictively to cut down the scope of disclaimer.
            - scope and extent is important. negligence maybe, gross negligence no.
            - common activity?
            - used by large amount of ppl?
            - extent of control over the person or property.
    - respect of laws.
        - a K is illegal if it contravenes a statute or a rule of common law.
    - For illegal K: in pari delicto: leave the guilty parties as they are. **NY trust.**
    - violation of public policy: adjustment or in pari delicto.
        - Noncompeting covenant. **Torborg remanded to determine the time period.**
            - public policy of not stifling competition or restrict a person's freedom to earn a livelihood by full participation in the market.
            - not per se invalid.
            - assess its impact on competition and on the interests o f the party who's restrained.
- **Remedy**:
    - void.
    - voidable.
    - adjustment.

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2 guiding principles but lots of **exception s**around them.

- **Assent/Consent:**
    - Unconscionability is one type of exception
        - Posner doesn't like the paternalistic aspect of contract law, and likes to interpret everything around assent b/c it's squared in autonomy.
- **Consideration:**
    - S90: promise reasonably inducing action or forbearance is binding if injustice can be avoided only by enforcement of promise
    - S86: legal doctrine rule: promise for benefit previously received is binding to the extent necessary to prevent injustice
    - S89: modification of executory K: new agreement is enforceable even if it's incompatible w/ doctrine of consideration

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ORDER OF PERFORMANCE

- To minimize the risk that one party that will not perform we ask first for the performance of the party that is likely not to fulfill it (who has a bigger flight risk?):
  - Pizza-delivery first, then pay. Contract formed at the time of phone call.
    - Promise to deliver the pizza is an independent promise. Payment is dependent on the previous promise.
  - Movies-pay first, watch movie second
- When the conditions are due at the same time, no party can demand the performance of the other unless they are also prepared to perform concurrently.
- **Determine order of performance through:**
  - **Intention of parties**
  - **Condition precedent to the payment of money**

Breach by Repudiation

- Standard rule is that breach occurs when it is reasonably certain that a party is not going to meet its obligation under the contract.
- If one party demands midcourse that it won't perform its contractual duty unless the other do something not required by K, this counts as an **anticipatory repudiation**.
- One problem is distinguishing anticipatory breach from breach by non-performance. Restatement S253 spells out diff.

Entire (whole) v. divisible (separate) contracts:

- Contracts for services or goods: Contracts are generally presumed to be entire
  - Examples:
    - 3-layer birthday cake for $30. Whole contract b/c any portion of misperformance goes to the entire contract. If baker fails to make the third layer, you don't just pay for 2 layers.
    - Haircut
    - Painting
- Separate contracts: you're in art school taking voice and piano lessons. Voice teacher is wonderful but the piano teacher is awful. Can you pay for one but not to the other? Yes. You can't say you have a problem with the entire contract b/c it is clear that they are separate services and must be judged accordingly
- Many situations are in between entire and separate
  - progress payments
  - Object to partial breach.
  - Use common sense to determine this.
  - Chicken case (Frigaliment). 2 different contracts: one for large chicken, the other for small ones. If we change the fact pattern and the seller has decided to fulfill the large part of the contract w/ very old birds (fowl) while the buyer objects before they are even shipped. Assume that buyer is right -that old birds are a breach-and decides to hire a different seller.
    - One side will argue that they are two separate contracts
    - Other side will argue that these are related purchases, so it's a total breach

Rest. 227. Reduce forfeiture.

INTERPRETING CONDITIONS

- 2 different interpretations:
  - Express conditions --> strict liability
  - Promises
- When we determine breach , it easier to determine breach of a condition than a promise
- Conditions can also be promises:
  - If it rains: condition that can't be a promise
  - If pizza hut delivers: condition is a promise
  - If nephew does not smoke: condition might be a promise but isn't interpreted as such in this case b/c uncle can't sue if nephew doesn't smoke
- In a case of insurance **Howard v. Federal Crop Ins. Corp**
  - It was a condition (doesn't go to the heart/essence of consideration)
    - Essence of contract (where exchange of consideration happens):
      - Premium covers losses (**promise**)
      - File claim in one month (**condition**to recovery)
- Even when you end up granting that something is a condition, you can get rid of it w/ a doctrinal tricks. Conditions can be excused with:
  - Impossibility
  - Disablement
  - Prevention (**Conley**): happens in between the two parties when on party fails to make it possible for other to comply w/ condition)
  - Constructive fulfillment (**Pitney Bowes**)
  - Reinterpret condition as a promise (**Howard. v. Federal insurance**)
  - Waivers: intentional relinquishment of known right; do not need consideration or reliance; only apply to conditions that are very **margina**l to contract
    - Hamer v. Sigway: if you do not smoke --> $5,000
      - In this case, abstaining from drinking is consideration
    - Clark v. West: if you do not drink --> $6/pg
      - Ancillary: doesn't go to the heart of the contract b/c publishing company just cares about the quality of the book rather than if Clark drinks. So this condition can be waived, while in Hamer v. Sigway it can't.
- **Timeliness**: condition is timed: if it's put in boilerplate and there's great forfeiture, it's not strictly interpreted.

CONDITIONS OF SATISFACTION

- Rest. 228 (Satisfaction Of The Obligor As A Condition):
  - If a K makes one party's duty to perform expressly conditional on that party's being **satisfied** with the other's performance, the court will usually presume that an **objective** standard of "**reasonable**" satisfaction was meant.
  - If the parties clearly intend that one's **subjective** satisfaction should control, the ct will honor that intent. (Normally in bargains re: **taste or ones w/third party**)
- Standard:

- In Ks relating to operative fitness, utility, or marketability---provision is construed as a matter of law as imposing only the standard of satisfying a reasonableperson. (i.e for normal use we rely on reasonability test)
- In other Ks---a subjectiveconstruction of "satisfaction" provisions is made where the agreements provide for performance involving "fancy taste, sensibility or judgment" of the party for whose benefit it was made (ex making a garment, painting a picture etc.). (For special use, we check if there's good faith)

- Hypo: K between owner and contractor w/ architect as the judge of the work done. Architect denies certificate of satisfaction. Here the standard is reasonableness. The difference is forfeiture. Renovation is built into the house so there's no way to transfer those services. Unreasonable withholding of certificate of satisfaction can be cured by the court w/ standard of reasonableness (hire another architect to make reasonable judgment)
- A spectrum between material total breach and exact performance.
  - Material total breach -------- substantial performance (easier to find if QM is not available like in NY ------ exact performance.
  - Damage will substract damage of the other party.
- **Pinches**: Court decided that it wasn't substantial performance b/c church really didn't comply w/ contract. So Pinches can't recover in accordance w/ contract price. He has to rely on restitution damages: quantum meruit. If Pinches was in NY, no quantum meruit but the standard for specific performance is extremely generous.
- In the building cases, failure to obtain approval from engineers or architects means that "the benefit of work actually performed and materials actually furnished could be appropriated by the owner without payment"---> In building Ks, there may be recovery for **substantial performance**
- When "satisfaction" contracts involve taste, fancy etc., a jury may only inquire as to whether the party is honestly dissatisfied, not as to whether the dissatisfaction is reasonable.
- Most cases conform to **Rest. 228**---if it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition [that the obligor be satisfied with the obligee's performance] occurs if such a reasonable person in the position of the obligor would be satisfied.
- **"The reasonable person standard is employed when the K involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge. The standard of good faith is employed when the K involves personal aesthetics or fancy."**

BREACH

- There are 3 types of agreements: (1) always independent –clearly promise (2) always dependent –clearly condition (3) **measured by substantial performance**.
  - **Rule**: If A's performance is substantial, B's duty (to pay) isn't relinquished. But B can still sue for damages. If A's breach is material, B doesn't have to perform and can sue.
  - If we assume dependency of obligations, why are we saying that one party still has to perform even though not all conditions were satisfied (albeit the breach is insignificant)? **Court says that it is a matter of fairness and equity**. Want to prevent forfeiture.
  - Also want to prevent unjust enrichment if a guy gets a house and doesn't have to pay.
  - For goods, we have a **perfect tender rule**. **Why are service contracts different?** Because goods are resellable. Services you can't give back! Also, a matter of **unjust enrichment**. You can't give back the pipes on D's property.
    - i) **Services contracts–rule of substantial performance**(breach must be material in order to excuse the other party's performance)
    - ii) **Goods contracts–perfect tender rule**
  - Now, assuming that perfect performance is not required (only substantial performance), what are the damages for breach? **Difference in value VS. Cost of Completion**

- Rest 2nd, 251: when a failure to give assurance may be treated as a repudiation:
  - Obligor commits a breach by non-performance that would of itself give the obligee a claim for damages for total breach
  - Obligor's failure to provide w/in a reasonable time such assurance of due performance as is adequate in the circumstances of particular cases may be treated as repudiation
- **Construction cases:**
  - Plante v. Jacobs (sloppy, no oral modification clause, parol evidence) contrasts well w/ Jacob & Youngs v. Kent
    - Cardozo: not every minor sin should be considered a repudiation.
  - Jacobs & Young v. Kent:
    - No procedural unconscionability
    - Reading pipes are not any different from the ones contractor put in (still wrought iron pipes). P can prevail on the contract as written.
- Difference between suing under UCC and common law is warranties (receiver of goods can rely on them and establishing breach of warranty is relatively easier). Also the idea of rightful rejection. With services, something less than perfection is expected (according to Cardozo). With goods, perfection is expected. **Standard of breach under common law is anything less than substantial performance. Standard of breach under UCC is anything less than perfection (perfect tender rule).**
  - **2-205:Firm Offers.**
  - An offer by amerchantto buy or sellgoodsin 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.
  - **2-207:Additional Terms in Acceptance or Confirmation**
  - (1)A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
  - **2-209(1)**: Anagreementmodifying acontractwithin this Article needs no consideration to be
  - binding.
  - **2-209(2)**no oral modification: A signedagreementwhich excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except asbetween merchantssuch a requirement on a form supplied by themerchantmust be separately signed by the other party.
- **Warranty provisions**
  - **2-601:**perfect tender rule: subject to the provisions of this Article on breach in installment contracts (Section2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections2-718and2-719), if thegoodsor the tender of delivery fail in any respect to conform to thecontract, thebuyermay
    (a) reject the whole; or
    (b) accept the whole; or
    (c) accept anycommercial unitor units and reject the rest.

UCC	CL
franchise	Services
Computer software	

- Printing business cards? Not sure if it's goods or services. There are other mixed situations. When there's elements of both goods and services, courts can either identify the center of gravity of the transaction (look for the dominant factor) or split the contract in two and use UCC for one and CL for the other

Trussell – Decker.

- has the transaction gone far enough that restitution/rescission is not possible?
- court refuses to grant rescission b/c trussell has done as much as he could and b/c it is just too far from the beginning of the contract to grant rescission

- substantial performance is a standard, not a rule

- Way to limit PTR (perfect tender rule):
  - UCC 2-612 (subst impairment in installment K)
  - 2-602 (reject in reas. time)
  - 2-605 (failure to particularize)
  - 2-508 (seller's right to cure defect -> add'tnl time)
  - If seller may offer discount for defects buyer can decide to keep goods and ask for dmgs (2-606)

- Formation 2-200's offer, acceptance, revocationNOT the same as Rejection of Good's 2-600's
  - If after you accept, you keep it for a while, then you can only reject if there's substantial impairment (much like common law) 2-608

Plateq v. Machlett

- Since tanks were custom made, seller can't resell -> P wants K.P (expectation damages)
- P: Buyer's engineer OK's the tanks. They've accepted
- D: delivery, then installat'n, then testing -> seller may need to cure defects
- P lost my confidence to be able to perform
- Seller: 2-605 (you failed to particularize)
- Buyer: 2-602 (i notified all along)

Fortin v. Ox-Bow (power boat)

- Seller 2-602 (reas. time reject'n)
- Buyer: boat was never accepted -> P.T.R. 2-601
- Seller: 2-608 buyer already accepted!
- Before acceptance: P.T.R. (any nonconformity is good reason to reject 2-601)
- v. After acceptance: subst impairment 2-608
- (same set of factors as subst. perf)