

(“These are probably only good as samples, because in retrospect I think they are too long”)

I. THE SOURCES OF CONTRACT LAW

a. **Restatement (2d) of Contracts** - synopsis of the common law.

b. **Uniform Commercial Code (UCC)**

- i. Article 2 applies to sales of goods– moveable goods, including the unborn young of livestock. Does NOT apply to real estate. Most of Article 2 applies to merchants and non-merchants.
- ii. Revised **UCC § 2-201** Any K for a sale of goods over \$5,000 must be in writing (statute of frauds).

II. MUTUAL ASSENT (OFFER AND ACCEPTANCE)

1. Objective theory of assent

- a. **Restatement § 17** (CB 290) the formation of a K requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
- b. **Restatement § 18** (CB 290) – manifestation of mutual assent requires that each party either make a promise or begin or render a performance.
- c. **Lucy v. Zehmer** (drunken sale of farm on back of restaurant check). Objective theory of assent, reasonable person standard. D’s actions indicated it was a serious offer, P believed it and acted accordingly.
- d. *Subjective intent* matters when both parties share the same subjective intent. (“Horse”/ “cow” example, also if Lucy and Zehmer had said, “let’s play a Christmas joke”.)

2. Offer

- a. **Offer Defined (Restatement § 24)** - An offer is the manifestation of willingness to enter a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.
- b. **Offer v. Promise** – an offer is a conditional commitment, a promise is an unequivocal commitment
 - i. Tiffany example – Father says to daughter, “if you meet me at Tiffany I will buy you a bracelet”. That’s a promise, not an offer b/c going to Tiffany is a requisite condition to getting the bracelet.
- c. **Certainty of terms**
 - i. **Restatement § 33** – an offer must contain reasonably certain terms.
 - ii. **UCC § 2-204** – one or more terms in a K can be left open and there is still an enforceable K as long as the parties intended to form a K and there is a reasonably certain basis for providing an appropriate remedy.

- d. **Firm Offers/Option Contracts**
- i. **UCC § 2-205** – firm offer rule applies to merchants only. No consideration required to keep an offer to buy/sell goods open – such a firm offer not revocable but must be separately signed by the offeror. Cannot be held open for more than 3 months.
 - ii. **Restatement (2d) § 87 - Option Contract** – contract within an offer to keep an offer open. Offer is binding as an option if it is in writing by offeror and recites a purported consideration.
 - iii. **Restatement (2d) § 45 – Option K created by part performance** - start of performance of a unilateral K creates an option K. The offeror’s duty to perform is conditional upon completion of performance.
 - iv. **Restatement § 62 – start of performance where offer invites either performance or promise.** Where an offer invites acceptance by either performance or return promise, the effect of start of performance is acceptance. Such an acceptance operates as a promise to render complete performance.
- e. **Most ads are not offers**
- i. **Leonard v. Pepsico** (Harrier Jet commercial) reasonable objective man standard An ad is not an enforceable offer when it could not be considered by an objective, reasonable person as a true offer, and is actually an obvious joke)
 - ii. **Carlill v. Carbolic Smoke Ball Co**: Here, the ad was not a mere puff and instead constituted an offer. Acceptance was purchasing the smoke ball, using it as directed, and then contracting the illness. Did not have to give notice until after those things occurred. Where acceptance by performance is allowed, and no notice is explicitly requested the offeree can accept by performance.
 - iii. **Nebraska Seed Co. v. Harsh**: (X bushels of millet seed, or thereabouts) An advertisement of a product is not an offer if it contains general, non-specific terms. Facts: Defendant’s letter stating what seed he had was not an offer, but only a request for bids. Plaintiff thought the D had offered and they had accepted. Court says that D’s telegram was not an offer but an invitation to trade because the D did not write, “I offer to sell to you.” It is more like an advertisement. “The mere statement of the price at which property is held cannot be understood as an offer to sell.” Advertisements as a general rule are invitations to deal, not offers.
 - iv. **Lefkowitz v. Great Minneapolis Surplus Store**– store ad for mink coat for \$1 first-come, first-serve, is an offer because it is specific enough – not meant to apply to the whole world.

3. **Acceptance**

- a. **If offer stipulates manner of acceptance, that governs**
- b. **If offer is silent, any manner reasonable (UCC § 2-206 [CB 303])**
- c. **Unilateral v. bilateral contracts**

- i. *Bilateral K* – where offer may be accepted by a promise, offeree may also accept by performing, but must inform offeror that he is doing so. E.g., **White v. Corlies and Tift** (Builder begins work on office suites before acknowledging “upon an agreement” letter). If accepting by performance, actions must be clear and unambiguous action of assent. Also, if parties are not in the same place, notification may necessary to make acceptance effective.
- ii. *Unilateral K* – **Restatement § 54**- if offer specifically calls for performance, if offeree performs, no notice to offeror required to make acceptance effective. E.g. **Carbolic**.

4. **E-Commerce and Mutual Assent**

- a. To make the licensing agreement enforceable consumer must have opportunity to read and understand terms of contract:
 1. terms of license clearly presented to user
 2. assent to terms must occur before the user accesses software
 3. manifestation of assent must be clear and must have a choice between assenting/not assenting
 4. deliberate assent – default setting is non-assent
 5. user must have ample time to read the terms can’t scroll by automatically
 6. terms of the license must be readily understandable by average reader
- ii. **Caspi v. Microsoft Network** (forum selection clause in online subscriber agreement of MSN was binding on subscribers). Subscribers manifested assent by clicking on “I agree.”
- iii. **Ticketmaster v. Tickets.com** (*Ticketmaster.com* had terms and conditions on the bottom of its website preventing copying and deep linking. You did not have to assent to the terms before continuing to the event page. *Tickets.com* linked to the event pages of *Ticketmaster.com*, bypassing the terms and conditions page.) Court held that there was no breach of K by *Tickets.com* because the terms and conditions were at the bottom of the page, you had to scroll down to get to them, you did not have to affirmatively assent, and no evidence that *Tickets.com* knew about the terms.
- iv. **Specht v. Netscape Communications** (Netscape’s SmartDownload included an arbitration provision in its license agreement. To get to the license agreement, you had to scroll down to the bottom of the page and did not have to click on “I agree”. You did not have to view or agree to the license agreement before downloading the software). Court held that the Ps were not bound by the license agreement because it was not an unambiguous manifestation of assent. The mere act of downloading was not sufficient to manifest acceptance.
- v. **Specht v. Netscape Communications Corp.** (appeal of previous case). Affirmed the lower court’s ruling.
- vi. Law school professor’s letter to software company does not invalidate contract; he was already bound at that point

5. **Terminating power of acceptance (Restatement § 36)**

- a. **Death or incapacity of the offeror or offeree**
 - i. Hypo about the aunt/nephew going to funeral

- b. **Revocation by the offeror**
 - i. **Restatement § 43** – indirect communication of revocation is still a revocation. i.e. if you hear about revocation from a third party the power of acceptance is still terminated.
 - ii. **Dickenson v. Dodds** (P wanted to buy land from D, D promised to hold offer open but then sold land to someone else, P heard about this from a 3rd party, then rushed to the train station to try to accept offer) - notification of revocation terminates the offer, even if it comes from a third party. **Restatement § 43** – indirect communication of revocation is still a revocation.
 - iii. **Petterson v. Pattberg** (P goes to D's house to pay off the mortgage early and get the agreed-upon discount, and D says "I revoke" as P is holding out the money) an offer to enter into a unilateral contract can be revoked at any time before the performance (tendering the money would have made the offer irrevocable).

- c. **Rejection or counteroffer by the offeree**
 - i. *Counteroffers* – (**Restatement § 39 - mirror image rule**)
 - 1. **Ardente v. Horan** (real estate sale; wanted furniture too). A conditional acceptance, or one that adds terms, is a counteroffer/rejection under the mirror image rule.
 - 2. *UCC – mirror image rule does not apply; UCC § 2-207, battle of the forms, applies instead.*
 - ii. **Restatement § 37** – rejection of an option/firm offer does not terminate the power of acceptance.

- d. **Lapse of time** – an offer remains open for a reasonable time under the circumstances unless the offer itself stipulates a time by which it must be accepted. (Reasonable time can vary by item b/c of active trading markets affecting price.) If there is a time period in which the offer is valid, that is binding.

6. **Agreements to Agree**

- a. Agreements to agree generally not enforceable
 - i. **Restatement § 33** – an offer must contain reasonably certain terms
 - ii. **Empro Manufacturing Co. v. Ball-Co. Manufacturing, Inc.** (buyer wanted to purchase assets of the seller and take a 10-year note secured by the assets of the company acquired. They had a letter which was basically an agreement to agree, which the court said was not enforceable.

III. DISCERNING THE AGREEMENT

A. Misunderstanding

1. **Restatement § 201(2) (CB 391)**: no manifestation of mutual assent (and thus no K) if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know of the meaning attached by the other. Objective theory of assent only works when there is an objective referent. When objectively terms are ambiguous, there is no rational basis for choosing one party's terms over the other. Neither party is bound by the meaning attached by the other.
 - a. **Raffles v. Wichelhaus** (*Peerless* case – buyer had in mind a different ship Peerless than seller. One ship arrived later than the other. Because the price of cotton fluctuated, the timing of the ship's arrival affected price.) No K here because there was no basis to determine whose definition of "Peerless" should prevail.
 - b. **Oswald v. Allen** (swiss coin collection case). Parties differed as to meaning of "swiss coin collection". Court found that there was no K because no rational basis for choosing one party's definition over the other.

B. Mutual Mistake

1. **Restatement § 152 (CB 1050)** – where a mistake of both parties at the time of K has a material effect on a basic assumption of the K and neither party bears the risk under the K, the K is voidable by the adversely affected party.
2. **Restatement § 154 (CB 1050)** – a party bears the risk of mistake when:
 - a. Risk is allocated to him by the K;
 - b. He is aware, at the time the K is made, that he has only limited knowledge but contracts anyway (conscious ignorance);
 - c. The risk is allocated to him by the court on the grounds that it is reasonable to do so.
3. **In order for there to be a mutual mistake:**
 - a. Both parties are mistaken
 - b. Material effect on the agreed exchange
 - c. Mistake as to a basic assumption of each of the parties
 - d. Unless he or she bears the risk of the mistake
 - i. The contract expressly or impliedly assigns the risk to one party (*Messerly*)
 - ii. Other factor assigns the risk – the person held/owned the object (*Wood*) or is an expert (*Messerly*)
 - iii. Conscious ignorance (*Wood*)
4. **Sherwood v. Walker** ("barren" cow was sold to Sherwood by Walker, cow turned out to be pregnant and thus worth a lot more). Court ruled that this was mutual

mistake regarding a material fact, so no K. If this case were decided after the development of the Restatement section, it would have gone the other way because the seller of the cow assumed the risk.

5. **Wood v. Boynton** (Wood sold a “topaz” to Boynton for \$1, turned out to be an uncut diamond. She went back and gave them \$1.10 and they refused to return it.) Court ruled that this was not a case of mutual mistake, it was a case of conscious ignorance under Restatement § 154(b).
6. **Lenawee County Board of Health v. Messerly** (Messerlys sold land to the Pickles, building was condemned because of faulty sewage system, Pickles want to void the K.) Court held that K was not voidable because the “as is” clause in the K expressly assigned the risk to the Pickles (Restatement § 154(a)).
7. *Hypo* – Seller sells painting for \$500, turns out to be a Monet worth \$500K. Under the Restatement, seller bears the risk because he could have had it appraised.
8. *Hypo* – P sued employer for wrongful discharge. Motion for summary judgment was pending, in the meantime employer agrees to settle for \$75K. Earlier that morning, judge granted motion to dismiss. Here, there was no mutual mistake because in settling, the employer took the risk, it knew there was a motion pending.

C. Filling Gaps in the Terms

1. **UCC § 2-204 – Open Terms** - one or more terms of a contract can be left open and there is still a K, unless no basis for a remedy.
2. **UCC § 2-305 – Open Price Term** – You can conclude a K for sale even if the price is not settled. In such a case the price is a reasonable price at the time of delivery if:
 - a. nothing is said as to price
 - b. the price is left to be agreed by the parties and they fail to agree;
 - c. the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
3. **UCC § 1-303 – Course of performance, course of dealing, and usage of trade**
Course of performance is repeated performance within the same K; course of dealing is sequence of conduct under previous Ks, usage of trade is any practice having regularity in a profession to justify an expectation it will be observed.
 - a. Express terms prevail over everything
 - b. Course of performance prevails over course of dealing and usage of trade
 - c. Course of dealing prevails over usage of trade

- d. Usage of trade is last.
4. **Parol evidence rule** – where the contract is clear, evidence of a contrary or previous agreement (parol evidence) is not admissible. Parol evidence is admissible to fill gaps in terms.
 - a. **UCC § 2-202** – parol evidence is admissible as long as it explains, does not contradict, the terms of an agreement. Types of admissible parol evidence include:
 - i. Course of performance
 - ii. Course of dealing
 - iii. Usage of trade
 5. ***Frigalment Importing Co. v. BNS International Sales Corp.*** (P, a Swiss importer, sent an order to D, American poultry exporter, for 75K lbs of “Grade A Chicken.” D sent stewing chicken instead of boilers and fryers. Dept of Ag regulations included both definitions under “Chicken.”) Court held for the D. This is similar to the *Peerless* case, but there was performance under the first K, and there was some sensible basis for choosing between the conflicting understanding of the term.
 6. ***Sun Printing & Publishing Assn. v. Remington Paper & Power Co.*** (P, Sun Printing, had a K to buy paper from Remington. The K said the parties would agree on a price, no higher than the Canadian price, and the length of time that price would prevail. D failed to sell paper, P demanded they sell it for the Canadian price for the 12-month period). Cardozo ruled no K here because it was an agreement to agree. If this case had been decided after the UCC were adopted, the court would probably have found a K, and supplied the missing price term per **UCC § 2-305**.

D. Requirements/Output/Exclusive Dealings Contracts

1. **UCC § 2-306** – A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in **good faith**, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
2. **Illusory Promise** - an illusory promise leaves complete discretion to perform or not in the hands of the purported promisor. Example: if I feel like it, I will buy all my textbooks from you, but whatever textbooks I need, you have to provide. I’m not actually promising anything, but you are. Requirements/output Ks are not illusory promises, there *is* mutuality of obligation.
3. **Requirements Contracts** - ***New York Central Iron Works v. United States Radiator Co.*** The court held that even though radiator co had no way of knowing

iron works co would need so many more radiators, the iron works co was dealing in good faith and the agreement was enforceable. If they had wanted to put a maximum in the K, they should have done so. This was NOT an illusory promise, it was a requirements K.

Eastern Air Lines, Inc. v. Gulf Oil Corp. (Eastern had a requirements K with Gulf saying it would buy all its jet fuel from Gulf at a certain price, Gulf wanted out b/c price of fuel went up, tried to argue that this was an illusory promise.) Court ruled in favor of Eastern. This was not an illusory promise b/c Eastern had to buy all of its jet fuel from Gulf. **UCC § 2-306** imposes a “good faith” requirement on the buyer in requirement Ks, so Eastern could not buy more than it needed and resell it.

4. **Exclusive Dealings Ks.** ***Wood v. Lucy, Lady Duff-Gordon.*** (Wood had an exclusive dealings K with Lucy, to market her designs. She sold her designs to Sears, he sued.) Cardozo ruled that Lucy did violate the K and that there was a mutuality of obligation because Wood made an implied promise to use reasonable efforts to sell Lucy’s designs. The **UCC § 2-306** imposes a “best efforts” requirement in exclusive dealings Ks.

E. Identifying the Terms of the Agreement

1. Standard Form/Adhesion Contracts

- **Benefits:** Standard form Ks are expedient, save time/money for both parties, cheaper than individually negotiating every K.
 - **Restatement § 211** “Standardized Agreements” CB 437
 - i. adopt all provisions of form as integrated agreement
 - ii. treats all similarly situated alike notwithstanding their knowledge or understanding of the terms.
 - iii. if offeror knows offeree would not assent if he knew the writing contained a particular term, that term is not part of the agreement.
- c. ***Carnival Cruise v. Shute*** (Shutes bought ticket on Carnival Cruise, Mrs. Shute was injured, the ticket agreement contained a forum selection clause limiting suits to Florida.) The forum selection clause was reasonable, results in lower costs, and is enforceable. Ps were given notice of clause, their attorney admitted that.
 - d. ***Caspi v. Microsoft Network*** (forum selection clause in online subscriber agreement of MSN was binding on subscribers). Subscribers manifested assent by clicking on “I agree.” They had every chance to read the terms and they clicked on the box that said, “I agree.”
 - e. ***ProCD v. Zeidenberg*** (Zeidenberg bought ProCD selectphone in the store, which included a “shrinkwrap licensing agreement.” The box said “additional terms inside.” ProCD wanted to enjoin Zeidenberg from selling the contents, he argued he was not subject to the licensing agreement.) Court held that D

was bound by the shrinkwrap agreement – he received adequate notice on the box that there were additional terms inside.

- f. **Hill v. Gateway 2000** (The Hills bought a Gateway computer over the phone, returned it after 30-day warranty, did not want to be bound by the arbitration clause.) There was no notice on the box that there were important terms inside. But court rules that the Hills are bound by the arbitration agreement because it is common knowledge that computers come with warranties and that information has to be somewhere. The Hills were bound by the terms whether they read them or not. If they did not want to be bound by the terms they should have returned the computer.
- g. **Klocek v. Gateway** (Klocek bought a Gateway computer, which contained terms and conditions in the box, including an arbitration clause.) Public policy favors arbitration clauses and they should be enforced. But here, the arbitration agreement constitutes an additional term under **UCC § 2-207** and Klocek did not specifically assent to it, so it is knocked out.

- 2. **Battle of the Forms – UCC § 2-207 (Mirror-image rule does not apply under the UCC.)**
 - a. **UCC § 2-206(3)** – a definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.
 - b. **UCC § 2-207** – if K is confirmed by a record that contains additional or different terms, there is a K and the terms are those that are agreed to in the records of both parties; those that the parties agreed to even though there is no record; and terms supplied by the UCC. I.e., different or additional terms are knocked out, and the UCC fills in the gaps. Example, **UCC § 2-310** – in the absence of an agreement, payment due upon delivery.

IV. ENFORCEABILITY OF PROMISES

a. Statute of Frauds

- A. Developed to deal with overenforcement of agreements.
- B. **Restatement (2d) § 110**: no enforcement unless written memorandum if:
 - 1. K for sale of land
 - 2. K that is not to be performed within one year from the making
 - 3. K for the sale of goods for the price of \$5000 or more (**revised UCC § 2-201**)

b. Intent to be Legally Bound

- A. **Restatement § 21** (CB 660) – you don't have to say you intend to be legally bound for there to be a K, but if you say you do not intend to be legally bound, that controls.
- B. We presume no intent to be legally bound with:
 1. family promises
 2. social promises
 3. joking promises
 4. gentlemen's agreements.
- C. **Ferrera v. A.C. Nielsen** (Ferrara was fired for falsifying time sheet, sued under implied K and promissory estoppel, saying that an employee handbook limited Nielsen's right to fire employees.) Court held that the employee handbook was not binding, because:
 1. Conspicuous disclaimer on page 1, there is an express contract in writing, the employees had to sign that they had read the entire manual (including disclaimer) => so clear the court rules as a matter of law that there is no contract
- D. **Evanson v. Colorado Farm Bureau** Employee handbook disclaimer in this case was clear but not conspicuous, and the employer treated the handbook provisions as binding. Court doesn't find for employer, remanded case to jury
- E. **Eiland v. Wolf** (medical student was not allowed to graduate, complained that this decision by school violated the student catalog, which he had used as a reference throughout his schooling.) Court held there was no K because the catalog included an express reservation of rights and disclaimer (that catalogue's terms could be changed).

c. Consideration

A. Bargain theory of consideration

1. **Restatement (2d) § 17** (CB 290) – except as stated in subsection (2), the formation of a K requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
2. **Restatement § 71.** (CB 617) To constitute consideration, a performance or return promise must be bargained for. A promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
3. **Reciprocal inducement** – another way to describe a bargained-for exchange is the concept of reciprocal inducement. **Restatement § 81** (CB 618) - the promise has to be one inducing factor in causing action or forbearance on the part of the promisee. The promise does not have to be the *sole* motive or factor.
4. **Johnson v. Otterbein.** (D promises to give university \$100 plus interest to pay off debt, changes mind.) There was no consideration in this case under the bargain theory – this was a *gratuitous promise*. There might have been

consideration if the university had given D public recognition, e.g., put a scholarship in his name.

5. **Dahl v. Hem Pharmaceuticals Corp.** (Dahl had chronic fatigue syndrome, enrolled in study testing experimental medication in exchange for company's promise to give them Ampligen. Company did not perform, argued that because Dahl performed voluntarily and was free to withdraw, no obligation and thus no consideration.) Court held that petitioners performed by being subject to tests, and incurred detriment of being tested on in exchange for promise of a year's treatment of Ampligen. There was thus consideration.

B. Forbearance

1. **Restatement § 71** – in a bargained-for exchange, a performance may consist of a forbearance.
2. **Hamer v. Sidway** – (Uncle promises to pay nephew \$5,000 for refraining from smoking, drinking, swearing, gambling. He accepts and performs.) K is enforceable because P's forbearance of a legal right represented consideration.
3. **Dyer v. National By-Products, Inc.** (CB 655) (employee lost his right foot in job accident, his sole form of relief was workers' comp, but he did not sue because he thought he had a valid personal injury claim. P claimed this was in exchange for his employer's promise to continue his employment. He was then laid off by his employer. He sued for breach of K.) Court ruled that even though Dyer did not have a valid claim, he believed he did in good faith, which constituted consideration.
 - a. **Restatement (2d) § 74** (CB 657) If claim is doubtful or clearly invalid but the plaintiff – in good faith – believes claim is valid, that is sufficient consideration.
 - b. Some courts do not follow the Restatement – they require the claim forborne must have some merit in fact or law to constitute consideration.

C. Past Consideration – Past consideration does not support a present promise.

1. **Moore v Elmer** (“Madam Sesemore” predicted Elmer's death, Elmer doubted and agreed to pay if her prediction was right and he died before a certain date. The note Elmer wrote promising this also said it was in consideration of her previous sittings with him.) Court held that the previous sittings did not constitute consideration, because they occurred in the past (she already gave service and was paid). You can't bargain for something you already have. Note: this was a wager and thus probably illegal. Note: this is a wager (and consequently probably illegal)
2. **Mills v. Wyman** (son fell ill, Good Samaritans take care of him. Afterwards, the father makes a promise to pay them and doesn't. Caretaker sues father to collect on his promise.). Court holds that father's promise is not enforceable because this was not a bargained-for exchange. The father's promise comes after services rendered to son.

- a. A moral obligation is not sufficient consideration to support an express promise. D had a moral obligation here, but that is not enough to warrant enforcement.
 - b. A legal obligation is always sufficient to support an express or implied promise. Had the father been legally liable for support of son, the promise could be viewed as impliedly offered and accepted in return for that liability.
 - c. Under **Restatement § 71 (4)**, CB 617, the performance or return promise can benefit a third party. Here, the father could have contracted with the caretakers to care for his son, but he did not.
 - d. Son himself could be liable under quasi-contract (Cotnam)
3. **Exception in cases of affirmative defense (statute of limitations, infancy, bankruptcy, etc.)**
- a. There's no actual consideration, but courts find the promise enforceable b/c long before, there was a bargain.
 - b. These are affirmative defenses => once D makes a promise, he's chosen to waive his affirmative defense
 - c. Common law allows this for bankruptcy, new statutory law does not (statutory law now trumps common law)

D. Moral Consideration

1. **Mills v. Wyman** (sick son, Good Samaritan). The father's moral obligation to the caretakers was not sufficient consideration.
2. **Webb v. McGowin** (CB 630) (Webb prevented a pine block from dropping on McGowin and injured himself instead. McGowin agreed to pay Webb a certain sum every 2 weeks for the rest of his life. McGowin died, estate stopped payments, Webb brought suit. D argued there was no consideration.) Court held:
 - a. Promise was a settlement of a quasi-contractual claim the P had against the deceased. The promise was impliedly in exchange for the services rendered.
 - b. Moral obligation based on prior material benefit is consideration when
 - i. Benefit is to promisor
 - ii. There is a material benefit, and
 - iii. Promisor makes executory promise to pay
3. **Restatement § 86**: (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice. (2) A promise is not binding under Subsection (1)(a) if the promise conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched, or (b) its value is disproportionate to the benefit.
 - a. *Webb* would come out the same.

- b. *Mills* might be reversed, except the promisor himself (not his son) must receive the benefit.
- c. Not all states follow the Restatement – this is an example of the drafters indicating what they believe the best policy is.

E. Requisite conditions *Meeting a Requisite condition is not consideration.*

- 1. Homeless guy walking to Sears – that is a requisite condition to the guy getting the gift of a coat. Another example: if you hold out your hand I will give you \$500. The holding out your hand is a requisite condition.

F. Settlement agreements

- 1. *Hypo*: (Art hits Ruth in crosswalk. Art settles for \$17,000 in consideration of Ruth forever releasing all claims. Before he pays, Art gets info that it was Ruth’s fault, he refuses to pay.) Court will enforce settlement as long as Ruth in good faith believed she had a claim.
- 2. *Hypo*: Seller delivers fence posts to buyer for \$100,000. Buyer alleges 5% are too short but uses them all anyway. Buyer pays \$50,000 “in full satisfaction of obligation.” Seller cashes check and sues for \$48,000 [acknowledges the 5% too short]. Matter is settled. Buyers note and check is offer of settlement. Seller’s deposit is acceptance.

G. Contract Modification

- 1. **Pre-existing duty rule** – if a K modification involves one party merely fulfilling a preexisting duty under the first K, agreement fails for lack of consideration.
 - a. ***Stilk v. Myrick*** (2 of 10 seamen on a ship deserted, the captain promised to divide the deserters’ wages among the remaining 8, and later refused. Seaman sued.) This promise is unenforceable for lack of consideration. The seamen promised to do everything they could to get the ship to destination, including doing more work if necessary. Because under the new agreement they were merely fulfilling their pre-existing duties under K-1, there was no valid consideration. Promise not enforceable.
 - b. ***Alaska Packers’ Assn. v. Domenico***: (Ps went as employees of D from San Fran to Alaska as crew/fishermen. When they got to Alaska they had a labor strike for higher wages, no other available work force, supervisor gave in to demands but subsequently refuses to pay increase). Promise to pay more not enforceable b/c no consideration – workers only agreeing to do under K-2 what they had already agreed to do under K-1.
 - c. In both cases, the extra pay in K-2 is like a gift promise: there is no bargain or exchange.

- 2. **Evading the pre-existing duty rule**

- a. There are ways to make modification acceptable:
 - i. Modify the duty of the seller
 - ii. Lighten burden of the promise (give them more time to pay)
 - b. *Hypo*: debtor owes creditor \$1000. Payment is due today. Debtor can/will pay only \$800. Creditor says if you give me \$800, the full debt is cancelled. There is no consideration for the promise to relive the \$200. Some courts will enforce the agreement because the law favors settlement, others will say no, still owe \$1000 because of the pre-existing duty rule.
 - i. Creditor could say if you pay by COB one day early we will give you a \$200 discount. Modify the duty of the debtor in some way.
3. **Theory of Unforeseen Circumstances**
- a. **Restatement § 89** (CB 647) – a promise modifying a K is binding:
 - i. if the modification is fair and equitable in view of the circumstances not anticipated by the parties when the K was made; or
 - ii. to the extent provided by statute;
 - iii. to the extent that justice requires enforcement in view of material change of position in reliance on the promise.
 - b. **General rule** (or another way to state Restatement § 89) - to enforce a K modification you need:
 - i. A second promise, e.g., a promise to pay more,
 - ii. Unanticipated circumstances, and
 - iii. Price must be reasonable, just, and fair.
 - c. ***Brian Construction and Development Co. v. Brighenti*** (contractor hired subcontractor to do “everything requisite and necessary” to remove rubble. There was a lot more rubble than either party anticipated, they both agreed subcontractor would do the work and contractor would pay more, then subcontractor just walked off the job.)
 - i. Court held that the second agreement was a valid and binding K notwithstanding the pre-existing duty rule and the lack of consideration, because the rubble was not in the contemplation of the parties at the time of the K.
 - ii. This is not a case of mutual mistake because the K expressly assigned the risk to the subcontractor, and he is the expert about rubble.
4. **UCC § 2-209** (almost universally followed) CB 648 – Dispenses with requirement of consideration for modifications of sales of goods Ks but

requires good faith (honesty in fact and observance of fair dealing in the trade)

- a. *Hypo*: Sale of specialized instruments for \$1 million. A few months after contract, price of titanium (key ingredient) goes up 15%. Buyer agrees to increase price to \$1.1 million. The new contract is legally binding, no consideration necessary.
- b. *Hypo*: What if seller bought all the titanium it needed when the cost was only up 5%? Seller would have trouble collecting the full \$1.1 million here because it doesn't meet the good faith test. You can't increase the price to get a higher profit.

H. Exceptions to Consideration Requirement

- a. **Option Ks** – **Restatement § 87**. (most states **DO NOT AGREE**)
 1. In writing, signed by offeror
 2. Fair exchange within a reasonable time
 3. Recites a purported consideration (doesn't require tender, just recitation). **This is where most state disagree.**
 4. *Example: Dickens v. Dodds* – option would have been binding if he had put any money down, even 5 ¢.
5. **Firm Offer Rule**– **UCC §2-205**: no consideration required if:
 - a. Offer **by a merchant** to buy or sell goods
 - b. Separately signed by offeror
 - c. Offer open for a reasonable time (if not stated, no more than 3 months.
6. **UCC § 2-209** – **K modification. (CB 648)** UCC § 2-209- “an agreement modifying a K within this Article needs no consideration to be binding.” But it does require **good faith**. Modification agreement need not be in writing.
7. **Re-affirming a legal duty** – if you made a promise that was not enforceable because of an affirmative defense such as infancy, statute of limitations, and you later re-affirm that promise, no consideration is necessary.

I. Adequacy of Consideration: Courts won't look to the adequacy of consideration because the value of things is very subjective, and courts do not want to get involved with the valuation of things exchanges. However, they must find that (1) what is being exchanged has some value, and (2) that the agreement really was bargained for.

1. **Newman & Snell's State Bank v. Hunter** (insolvent deceased, widow traded with the bank – she got his worthless note they got her note, kept the worthless stock of deceased's insolvent company as collateral.) Court is willing to scrutinize the adequacy of consideration when one what one side is getting is valueless:
 - a. Exchange for widow's note with deceased's note was not consideration b/c deceased's note had no value.

- b. If the maker of a note was insolvent but still alive and the note was transferred to a 3rd party there would be consideration b/c of the possibility of future payment.
 - c. Paying for the worthless note may be consideration if the note itself had sentimental value, or the widow/father/etc. was motivated by keeping the deceased's good name intact.
2. **Schnell v. Nell** (wife bequeaths \$ in her will to Ps, but on her death property goes to husband, so Ps enter written agreement with husband. Agreement says they will get \$200 each in exchange for 1¢, and in consideration the love and affection D bore his wife, and services she rendered to him.) Court holds agreement fails for lack of consideration because:
- a. "services, love and affection" of the late wife represent past consideration.
 - b. Even if they had agreed at the beginning of the marriage:
 - i. Family promises usually not legally binding
 - ii. Preexisting duty rule: these are duties a spouse must already provide.
 - c. 1¢ not sufficient – merely nominal – a formality. You can't exchange one sum of \$ for a greater sum of \$ and say there was consideration.

d. Promissory Estoppel

A. Basic Elements:

Promise

Reliance:

Reasonable

Justifiable

Definite and substantial

Enforcement necessary to avoid injustice.

B. Substitute for consideration – if a P cannot prove K and breach, the fallback is often promissory estoppel. Suing on the basis of promissory estoppel acknowledges there was no consideration but asserts promise should be enforceable anyway.

C. Restatement (1st) § 90 A promise is enforceable to the extent necessary to prevent injustice if:

- 1. the promisor should reasonably expect to induce action or forbearance
- 2. of a definite and substantial character
- 3. and such action or forbearance is in fact induced.

D. Restatement (2d) § 90 (CB 741) a promise is binding if:

- 1. Promise is relied on
- 2. reliance is reasonable

3. reliance results in action or forbearance
4. injustice can only be avoided by enforcement of the promise.
 - a. A charitable subscription or a marriage settlement is binding w/o proof that the promise induced action or forbearance.

E. Development of the concept as a consideration substitute

1. Family Promises

- a. **Ricketts v. Scothorn** (grandfather gives \$ so granddaughter doesn't have to work. She quits job and relies on money. He dies, estate D refuses to pay rest of note). Court held that the promise was enforceable b/c she relied on it to her detriment.

2. Promises to Convey Land

- a. **Greiner v. Greiner** (mother promises son an 80-acre tract of land. He moves there, makes improvements to the land, mother tries to eject him). Court rules in favor of son, said he reasonably relied on her promise, and it induced definite and substantial action. Court wants to avoid unjust enrichment (mother getting benefit of improvements for free). Remedy is specific performance (expectation interest); she has to give him the deed.

3. Charitable Subscriptions

- a. **Allegheny College v. National Chautauqua Bank of Jamestown** (woman agreed to pay college \$5K after her death for the creation of an endowment in her name. Paid \$1K while still alive, then repudiated.) Court (Cardozo) held that this was an enforceable K because duty assumed by college to maintain endowment in her name was sufficient consideration.
- b. **Hypo:** what can you do to make such a promise binding? You have to do or give something in exchange – start a scholarship in their name, put up a plaque.

4. Promises of a Pension

- a. **Feinberg v. Pfeiffer Co.** (P worked for D for 37 years at which time D promised her a retirement annuity of \$200/month for life. D worked for 2 more years then retired. D paid for 7 years then had a change in mgmt and cut payment down to \$100, when P sued.) Court held:
 - i. No consideration because she was free to retire at any time, D didn't bargain for her to keep working.
 - ii. Promise enforceable anyway b/c P relied on the promise, suffered a detriment of definite and substantial character, and injustice could only be avoided by enforcement.

5. Construction Bids –enforceable promises in the negotiations process

- a. ***Drennan v. Star Paving Co.*** (contractor working on bid to build school in Lancaster school district. D submitted a bid to P for paving work. P relied on the D's bid in submitting his own bid. He won the K, and then D tried to revoke his bid.) P awarded expectation damages because the court found an implied subsidiary promise on the part of D not to revoke the offer.
- b. ***Restatement § 87(2)*** CB 728 – an offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option K to the extent necessary to avoid injustice.

F. Promissory estoppel as an independent cause of action – previous cases showed promissory estoppel as a substitute for consideration. Now we look at promissory estoppel as a cause of action.

1. ***Goodman v. Dicker*** (P is not granted a radio store franchise although he was reassured it would be granted. Upon this reassurance, he had incurred expenses.) Company was estopped from asserting the defense of lack of consideration. Promise is enforceable. Reliance damages were awarded (not lost profits).
2. ***Hoffman v. Red Owl Stores, Inc.*** (P applied for a supermarket franchise from D, who said raise \$18,000 and it's yours. P sold his current business, took a job that would train him, and put a down payment on the land. P was repeatedly told by D that all looked good. D demanded more money than P could pay, then D backed out.) Court finds that there was no K, because large number of terms not agreed on. But applies promissory estoppel as an affirmative cause of action, awards reliance damages.

G. Modern application and limits

1. **Courts are reluctant to find promissory estoppel**
 - a. K claims based on consideration are 10 x as successful
 - b. Approach: begin with proving consideration and then use PE as a backup
2. **Illusory Promises cannot be reasonably relied on and so are not enforceable**
 - a. ***Spooner v. Reserve Life Insurance Co.*** (life insurance co created bonus program, in letter explaining this stated it could be discontinued at any time.) "Promise" not enforceable because it was not reasonably relied on under Restatement § 90 and because under Restatement § 21, company manifested an intent not be legally bound.
3. **Lack of an actual promise**
 - a. ***Ypsilanti v. General Motors*** (GM pulled out of town of Ypsilanti after being given tax abatements.) There was no actual K because the statute did not create a binding promise. Second, PE fails b/c

GM's "promise" not enforceable - in fact there was no promise. People even said that at the town hall meeting.

4. **Reasonableness of reliance**

- a. **Alden v. Vernon Presley** (Elvis promised Alden, mother of his fiancée, that he would pay off her mortgage. He died, the estate refused to pay. Alden assumed the entire mortgage anyway, relieved her ex-husband of responsibility to pay). Court held the promise was not enforceable because Alden's reliance was not reasonable (she knew the estate was refusing to pay when she incurred the liability).

V. PERFORMANCE AND BREACH

a. Performance

A. Implied Duty of Good Faith

1. **Negotiating** – there is no affirmative duty to negotiate in good faith, but you can't negotiate in bad faith (see nondisclosure). Good faith isn't triggered until there is a K.
2. **Restatement § 205** – every K imposes duty of good faith and fair dealing in performance and enforcement.
3. **Revised UCC § 1-304** – obligation of good faith in performance of K (binds everyone, not just merchants). Parties cannot waive this duty in the K.
4. **Revised UCC § 1-201** – good faith means honesty in fact (subjective standard) & observance of reasonable commercial standards of fair dealing (objective standard)
5. **Wood v. Lucy** – In exclusive dealings Ks, you must make reasonable efforts under the Restatement, and best efforts under UCC § 2-306(2). Under the UCC, the one w/ exclusive right (Wood) has to lose money if necessary to generate income for the principal (Lucy).
6. **Eastern Airlines** – Requirements Ks - Eastern could not ask Gulf to sell it more fuel than it needed (to resell and profit), this would violate the good faith requirement. UCC § 2-306(1).

b. Conditions

A. Constructive conditions (condition implied by law) – if not complied with, there is a material breach. We are not using this term, we're talking about "material breach" instead.

B. Express condition – K expressly states a condition must be satisfied to generate obligation

1. **Carbolic Smoke Co.** – buyer had to purchase, use ball as directed, and get flu before company was obligated.
2. Another example: Fire insurance policy – your house must burn (condition precedent) before the insurance co is obligated to pay.

3. **Inman v. Clyde Hall Drilling Co.** (union worker gets fired, sues company for breach of K, K he signed had provision saying must give 30-day written notice of claim). P failed to comply with express condition of K, which required 30-day written notice of claim. Thus the P loses the right to seek damages. Note: Ks can bind the parties as to how disputes will be resolved.

c. Breach

Any breach immediately gives rise to a cause of action. If the breach is immaterial, the damages awarded may be nominal (5 cents, \$1).

A. Anticipatory Repudiation – can take the form of an oral statement or action/inaction (failure to pay, etc.) Statement or action must be clear and unambiguous to constitute anticipatory repudiation.

1. **UCC § 2-609**. *Right to adequate assurance of performance.*
 - a. If there are reasonable ground for insecurity with respect to performance of either party, the other party may in writing demand adequate assurance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not received the agreed return.
 - b. Between merchants the reasonable grounds for insecurity and the adequacy of assurance shall be determined by commercial standards.
 - c. Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
 - d. After receipt of a justified demand, failure to provide w/in a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances is a repudiation of the K.
2. **UCC § 2-610**. When either party repudiates the K in a way that materially affects its value to the other party, the nonbreaching party may:
 - a. Await performance for a commercially reasonable time;
 - b. Resort to any remedy for breach, even though he has notified repudiating party he would await performance;
 - c. In either case suspend his own performance.
3. **UCC § 2-611**. *Retraction of anticipatory repudiation.*
 - a. Until repudiating party's next performance is due, he can retract his repudiation unless aggrieved party has cancelled K or materially changed his position or indicated he considers repudiation final.
 - b. Retraction can be by any method which clearly indicates intent to perform, but must include any assurance justifiably demanded by aggrieved party (see § 2-609).
 - c. Retraction reinstates the repudiating parties rights under the K with due excuse and allowance to the aggrieved party for any delay caused by the repudiation.

4. **Harrell v. Sea Colony, Inc.** (Sea Colony entered a K to sell a condo to Harrell, Harrell asks to back out, signs release but stipulates that he must get deposit back. Sea Colony refuses to return deposit, saying Harrell repudiated.) Harrell wins because his statement of “repudiation” was not clear and unambiguous. A request to cancel a K is not anticipatory repudiation.
5. **Scott v. Crown.** (Seller had 3 contracts to sell wheat to Buyer. Seller hears that Buyer has failed to pay other vendors, and is worried Seller won’t pay him. Seller refuses to deliver the grain, tells Buyer’s driver that he wouldn’t deliver until they talked to Buyer to settle some questions. Two weeks after suspending performance, Seller sends letter demanding assurances.) Court held that there were reasonable grounds for insecurity, but the demand for assurance was not made in compliance with UCC § 2-609 – notice was not in writing, he merely said he wanted to “settle some questions” (not clear enough).

B. Material Breach – material breach has 2 consequences: (1) discharges duties of the non-breaching party; and (2) it allows for recovery of damages

1. **Restatement § 275.** In determining whether a breach is material, the court will consider:
 - a. Most important - the extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated.
 - b. Also very important - the greater or less uncertainty that the party failing to perform will perform the remainder of the K. Other factors include:
 - c. The extent to which the injured party may be adequately compensated in money damages for lack of complete performance. (if the injured party can be compensated in money damages, that allows the court to award them and the K to continue – i.e., no material breach).
 - d. The extent to which the party failing to perform has already partly performed or made preparations for performance;
 - e. The greater or less hardship on the party failing to perform in terminating the K;
 - f. The willful, negligent, or innocent behavior of the party failing to perform. This is the least important factor.
2. **Jacob and Young v. Kent.** (P built a country home for D, accidentally puts in wrong brand of pipe, D withholds final payment of \$3K.) Court holds that the breach was immaterial (you have to look at it in the context of the entire contract) and the P gets the final payment.
3. **B & B Equipment Co. v Bowen.** (B & B hired Bowen to be 3rd partner in business, he stopped devoting full time and efforts. Bowen argued the K was not for employment, it was for sale of stock, so B & B breached.) Court held that securing Bowen’s services was the real purpose of the K, and the breach was material.

4. *Shawn Kemp Example*. (Shawn Kemp had K with Reebok, made disparaging comments to a newspaper about Reebok shoes, Reebok terminated K). We don't know if this would have been deemed a material breach, because it was settled. The rumor is that Kemp had to pay Reebok a lot.

C. Perfect Tender Rule – UCC provision, applies to sales of goods, including specially manufactured goods (in practice, courts are sympathetic to makers of specially manufactured goods.)

1. **Three things mitigate the harshness of the perfect tender rule:**
 - a. Ability to cure (UCC § 2-508),
 - b. Revocation of acceptance triggers material breach rule instead (UCC § 2-608),
 - c. Installment Ks don't apply the perfect tender rule (UCC § 2-612).
2. **UCC § 2-601 - "Perfect Tender" Rule**. If the goods fail to conform in any way to the K, the buyer may (1) reject the whole; (2) accept the whole; (3) accept any commercial unit or units and reject the rest.
3. **UCC § 2-602(1) – Manner and Effect of Rightful Rejection**. Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
4. **UCC § 2-606 – What Constitutes Acceptance of Goods?** Acceptance occurs when buyer:
 - a. After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming, or that he will retain them despite the nonconformity; or
 - b. Fails to make an effective rejection, but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
 - c. Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by seller.
 - d. Acceptance of a part of any commercial unit is acceptance of that entire unit.
5. **UCC § 2-607 (1)-(2). Effect of Acceptance:**
 - a. (1) Buyer must pay at K rate for any goods accepted;
 - b. (2) Acceptance of goods by buyer precludes rejection of goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for nonconformity.
6. **UCC § 2-608 – Revocation of Acceptance in Whole or in Part (material breach rule applies)**. The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (if there was a material breach).

- a. On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured;
 - b. Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances;
 - c. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the grounds for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until buyer notifies seller of it;
 - d. A buyer who so revokes has the same rights and duties with respect to the goods as if he had rejected them.
7. **UCC § 2-508 (1) and (2) – Cure by Seller of Improper Tender or Delivery.**
- a. (1) Where goods are rejected for nonconformity seller can cure as long as the cure happens within the K time for delivery.
 - b. (2) If buyer rejects under perfect tender rule, where seller reasonably believed goods would be acceptable to buyer under circumstances, and seasonably notifies buyer, he may have further reasonable time to substitute a conforming tender. This assessment is based on usage of trade and course of dealings. In cases where it is the first time a merchant has dealt with a customer, you can't apply this rule, because how would the seller know the buyer would accept?
8. **UCC § 2-612 – material breach rule in installment Ks.** The perfect tender rule does NOT apply to each installment; the material breach rule applies. If the nonconformity substantially impairs the value of the entire K, the buyer can get out of the entire K. However, if the parties wish, the installment K itself can stipulate that the perfect tender rule applies.
9. **Ramirez v. Autosport.** (couple traded in old van, bought new one, which wasn't ready on time, cushions were wet, etc.) Either the defects or the late delivery would be enough to trigger the perfect tender rule in this case.
10. **Problems on breach**
- a. **Harrison's Dry Cleaners –**
 - i. *If the sign said "Narrison's"* that would be a material breach because the point of the K was to identify a particular person's business. Even though it is hard to identify money damages, and there would be a great hardship on the seller (they can't resell the "Narrison's sign), the court would say this is a material breach.
 - ii. *Harrison misses one monthly payment.* One payment out of 100 is probably not material breach. If it is 2 in a row, more likely. Courts will examine when the missed payment occurred – if it was the first one, they're more likely to deem the breach material. At some point nonpayment becomes material, but there is no bright line as to where.

- iii. *Tomato/cobwebs on sign, Sylvia's wouldn't clean it, so Harrison withheld rent.* Under factor number one, Harrison has the sign, so he has the material benefit of the K. They could figure out money damages by hiring someone else to clean the sign, and compensating Harrison for that. This was an actual case, and the court said it was not a material breach.
- b. Cookoo Clocks –
 - i. *if Tiffany delivers all of the clocks 3 days late*, under the UCC perfect tender rule the store can accept or reject all 40 clocks.
 - ii. *If Tiffany delivers 38/40 clocks*, the buyer can reject all 38 under the perfect tender rule. UCC § 2-508(2) might apply, which states that if Tiffany had a reason to believe the delivery would be satisfactory, Tiffany might get further reasonable time to deliver the 2 clocks. Also, Tiffany has until COB to deliver the 2 remaining clocks.
 - iii. *If the K called for 4 installments of 10 clocks each, and the first installment was 2 days late, and only contained 8 clocks*, buyer can reject the installment if it substantially impairs the value of the K (subjective standard). If the buyer were going to resell the clocks right away, this might be a material breach. This is UCC § 2-612(2). Under UCC 2-612(3), buyer can get out of the whole K if the nonconformity substantially impairs the value of the whole K. Here, buyer might believe that all subsequent installments will be short on clocks, and late, and might be able to get out of the K, because the first delivery was short and late.

VI. DEFENSES TO CONTRACTUAL OBLIGATION

a. Lack of Capacity

A. **Restatement §12**, CB 950: Capacity to contract: No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances. A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is:

1. Under guardianship, or
2. An infant, or
3. Mentally ill or defective, or
4. intoxicated.

B. Infancy

1. **Restatement §14**, CB 963: Unless the statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's 18th birthday.

2. **Infants are generally allowed to disaffirm Ks.** No set age. Many states have lowered age from 21 to 18.
3. **Webster Street Partnership v. Sheridan** (CB 951): Minors that contracted to rent an apartment were able to disaffirm contract. Since they could have lived at parents' houses, the apartment was not a necessary. They didn't have to pay *anything*, not even rent for the time they occupied the apartment.
4. **Necessaries:** If item/service contracted for was a necessary, contract against minor is enforceable:
 - a. **Halbman v. Lemke** (CB 956) – car is generally not a necessary.
 - b. **Zelnick v. Adams** (CB 957) – legal services can be necessities.
 - c. Education – grade and high school are necessities, not college.
5. **Adults Contracting for Minors:** States may allow adults/guardians to contract for minors, in which case minor can't disaffirm upon reaching majority.
 - a. **Brooke Shields v. Gross** (CB 958) – holds that contract is valid because legal guardian (Brooke's mom) consented for her. Statute specifically allows a parent to affirm contract when minor involved. Minor's wishes/best interests irrelevant. Strong dissent emphasizing the need to protect minors, even from parent/guardian when they act not in best interests.
6. **If a minor willingly misrepresents age, court may**
 - a. Allow party who was lied to to bring a tort action of misrepresentation against infant who is still allowed to disaffirm; or
 - b. Allow K avoidance on grounds of fraud.

b. Obtaining Assent by Improper Means

A. Misrepresentation

1. **Generally – Restatement § 164** CB 971 – if a party's manifestation of assent is induced by a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the K is voidable by the recipient.
2. **Intentional Misrepresentation** - What must be proven by a party who wants to get out of a contract on the basis of misrepresentation? Must show that the representation is:
 - a. False/fraudulent
 - b. Relied upon
 - c. Reliance is justified
3. **Restatement § 162** CB 971 – a misrepresentation is fraudulent if maker intends his assertion to induce assent and the maker:
 - a. Knows or believes the assertion is not in accord with the facts, or

- b. Knows that he does not have the confidence that he states or implies in the truth of the assertion;
 - c. Knows that he does not have the basis he states or implies for the assertion.

- 4. **Vokes v. Arthur Murray** (CB 975) – Intentional misrepresentations were made to induce woman to purchase dance lessons. The court says that the dance company had better knowledge of the lady’s dance ability, and by telling her she was better than she was, they are guilty of misrepresentation, which allows her to avoid contractual obligations. They knew the statements they were making were false.
 - a. **Restatement §169 (b)**, CB 979 – reliance on a statement of opinion is justified where the party making the statement has special expertise about the matter.

- 5. **Negligent Misrepresentation** – must demonstrate misrepresentation of a material fact that was reasonable relied on. May have cause of action in tort as well. This is an assertion made under circumstances where a reasonable person would not have made the statement b/c they know they don’t have all the facts.

- 6. **Innocent Misrepresentation** – party makes a false statement but believes it to be true. Even if it is an honest mistake, K can be voided if the misrepresentation is material.
 - a. **Halpert v. Rosenthal** (CB 966) – Case of seller of a house telling the buyer that there were no termites in the house. Holding - a misrepresentation, even an innocent one, if relied upon (and could be foreseen to be reasonably relied upon) by the other party, is sufficient to void a contract. It would be an injustice to force someone to stay in a contract when they were not told the truth. This is true even if the person who didn’t tell them the truth doesn’t know they didn’t tell the truth.

- 7. **Nondisclosure**
 - a. **Restatement § 153** (CB 1055) – mistake of one party makes a K voidable if he does not bear the risk of the mistake and the other party knew of the mistake.
 - i. *Ex*: Kid buying baseball card – he knew the cashier was mistaken about the value, so K probably voidable.
 - b. **Restatement § 160** (CB 1059) – action intended to prevent another from learning a fact is equivalent to an assertion the fact does not exist.
 - c. **Restatement § 161** (CB 1059) – nondisclosure is treated like an assertion that the fact does not exist where disclosure of the fact would correct a mistake of the other party as to a basic assumption on which the party is making the K.

- d. **Laidlaw v. Organ** (p. 1055) – One party didn't share with the other party that peace had broken out, changing the price of tobacco. The court says that if both the people have means to have access to the same information, then the one person isn't bound to reveal their knowledge to the other party. There's no obligation to disclose information that is extrinsic in nature and publicly available to everyone. The other party has the responsibility to make himself knowledgeable of market conditions. BUT compare this to §160 and §161; might be decided differently today. No answer is not the same as a lie. No obligation to share anything when there are multiple complex factors affecting market conditions.

B. Duress

ANYTIME YOU DISCUSS DURESS, FOLLOW WITH AN ALTERNATIVE AND CLEANER ARGUMENT BASED ON UCC § 2-209 AND R2D § 89 OF MODIFICATION REQUIRING GOOD-FAITH AND LEGITIMATE COMMERCIAL REASON.

1. **Elements of duress:**
 - a. Improper or wrongful threat of breach by one party;
 - b. No alternative but to accept the proposed modification
 - c. Ordinary remedy for breach is inadequate.
2. **Restatement § 175** – CB 995 - duress by threat makes a K voidable: if a party's manifestation of assent is induced by an improper threat that leaves the victim with no reasonable alternative, the K is voidable by the victim.
3. **Restatement §176**: when a threat is improper (1) a threat is improper if:
 - a. what is threatened is a crime or tort
 - b. what is threatened is a criminal prosecution
 - c. what is threatened is the use of the civil process in bad faith
 - d. the threat is a breach of duty of good faith and fair dealing under a contract(2) a threat is improper if the resulting exchange is not on fair terms, and
 - a. the threatened act would harm the recipient and would not significantly benefit the actor
 - b. the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by party making the threat
 - c. what is threatened is otherwise a use of power for illegitimate ends
4. **Austin Instrument v. Loral**, CB 988 (Gov't defense contractor who subcontracted to Austin. Austin only partially delivered. Austin threatened to stop delivery of additional parts (contracted for previously) unless Loral

agreed to higher prices. Loral couldn't find replacement parts in time, and to not be able to would mess up their relationship with the gov't and jeopardize future work. Loral, when acceding to Austin's demands, wrote in a letter that they didn't have any other choice but to meet Austin's conditions. No other remedy at law available due to time constraints. "Classic case" of duress. Court holds not enforceable.

5. **United States v. Progressive Enterprises** (CB 992) – Option contract (firm offer) for buying equipment. The time specified in the contract lapsed, seller says that price has increased (this is offer to modify the contract – no consideration necessary, see §2-209). Buyer agrees to higher price, the seller performs by delivering equipment. Buyer only pays amount in first option contract. Court says that the buyer didn't object right away, and in fact, agreed to pay the higher price. Seller acted reasonably. No duress, contract is enforceable. **Market fluctuation has been recognized as justification for contract modifications**; must be negotiated in good faith.
6. Most frequently alleged form of duress in contract litigation occurs when one part threatens to breach the contract unless it is modified in his favor, or a new one drawn up (remember **Alaska Packers**, too)

C. Unconscionability – courts won't often find Ks unconscionable b/c it takes away from basic freedom of K.

1. **Restatement §208**, p. 1015: Unconscionable Contract or Term
If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable terms as to avoid any unconscionable result.
2. **UCC §2-302**, p.1015: Unconscionable Contract or Clause
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
3. **Procedural Unconscionability**– a party was wrongly induced to enter into the contract
 - a. Belief by the stronger party that the weaker party will not fully perform the contract
 - b. Knowledge of the stronger party that the weaker party will be unable to receive substantial benefit from the contract
 - c. Knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental

- infirmities, ignorance, illiteracy, or inability to understand the language of the agreement
4. **Substantive Unconscionability** – unfair terms – if terms are grossly unfair, court will not enforce, even if consideration was present.
 - a. Courts won't often find contracts unconscionable because it takes away from basic freedom to contract.
 - b. If terms are grossly unfair or parties have greatly disparate bargaining power, court may void contract.
 5. **Williams v. Walker Furniture** (p. 1010) – Buyer bought items on credit. Contract stated that when multiple goods outstanding, each item carried a balance. (Unless *all* were paid off, *none* were paid off). Buyer defaulted on payment, so seller sued to repossess. (Writ of replevin). Court holds the contract is void on grounds of unconscionability. The bargaining power of the two parties was grossly unequal, and the buyer couldn't have been said to have assented to the terms. Example of procedural unconscionability and substantive unconscionability.
 6. **Wille v. Southwestern Bell Telephone Co.** (p. 1018) – Telephone company listed incorrect business phone numbers of an air conditioner salesman. The contract specified that the phone company would only be liable for damages for the cost of the ad. The plaintiff sued for lost profits and cost of replacement ad. Plaintiff argued that the terms were unconscionable. The court disagrees and holds that freedom to contract is important public policy, too. Both parties were experienced with contracts of this type, and so no unfair/unequal bargaining power. Court also notes that there were several parts of contract that were more favorable to the guy and not the company. This indicates good faith in contract writing.
 7. **In re REALNETWORKS** (p. 1023) – Plaintiffs contend that the License Agreement is unconscionable because it failed to provide fair notice of its contents and did not provide a reasonable opportunity to understand its terms before it was enforced. Court finds that the agreement is valid because it gave ample opportunity to review, did not bury terms in legalese or too small print, and could (despite plaintiff's allegations to the contrary) be printed.
 8. **Carnival Cruise v. Shute** (Mrs. Shute was injured on ship, protested the forum selection clause). Supreme court held that the forum selection clause was not unconscionable b/c it did not preclude recovery by the Shutes – the term itself was not unfair.

D. Public Policy Even when bargained for freely, if a K violates public policy, the K will be void. When considering matters of public policy, the court looks at: (1) the legislature's intent in adopting particular statutes, (2) the public reaction to matters related to public policy concerns.

1. **Restatement §179**, p. 57: Bases of Public Policies Against Enforcement. A public policy against the enforcement of promises or other terms may be derived by the court from:
 - a. Legislation relevant to such a policy, or

- b. The need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example,
 - i. Restraint of trade
 - ii. Impairment of family relations
 - iii. Interference with other protected interests.
2. **Restatement §178**, CB 57: When a Term is Unenforceable on Grounds of Public Policy - A promise of other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms. In weighing interest for enforcement, account is taken of:
 - a. Parties' justified expectations
 - b. Any forfeiture that would result if enforcement were denied, and
 - c. Any special public interest in the enforcement of the particular term

In weighing a public policy against enforcement of a term, account is taken of:

 - Strength of that policy as manifested by legislation or judicial decision
 - Likelihood that a refusal to enforce will further that policy
 - Seriousness of any misconduct involved and the extent to which it was deliberate, and
 - The directness of the connection between that misconduct and the term.
3. ***In the Matter of Baby "M"*** (CB 19) – Although the lower court found the contract to be valid as both parties bargained for and knew what they were agreeing to, the appellate court found that the contract was void because it violated public policy. Court finds that “contract” violates adoption laws by mandating termination of parental rights (which you can't do), it violates public policy by allowing the sale of a baby (which you can't do), and it doesn't provide any way for the mother to revoke. Further, public policy states that it is best for child to be raised by both biological parents. Can't terminate rights without good cause.
4. ***Carnival Cruise v. Shute*** (CB 424) – Ticket had clause of forum-selection requiring all suits to be brought in Florida. Plaintiff argues that they were not given proper notice of the terms printed on the back of the ticket. Public policy tends to limit forum-selection clauses because they limit ability to sue. However, here the court found that the forum-selection clause here was proper, as it wasn't an unreasonable attempt to avoid litigation.
5. **Public policy changes over time.** Unlike when *Carnival Cruise* was decided, there is now a federal arbitration statute, because it's been decided that it's actually more in the public interest to have arbitration rather than trials.

6. **Covenants not to compete** – Courts will enforce if reasonable in geographic location and time. Most states allow “blue penciling,” which lets the trial judge edit an unreasonable clause so as to make it reasonable. Some states, though, do not allow this. A clause is either enforceable or not.
 - a. *Problem for Chapter 16* – a dentist terminates her employment so she can start her own practice. Her employment contract states that she is barred from practicing dentistry anywhere in her state for 5 years. Most courts would find this an unreasonable restriction, both in geographic location and in time. (Reasonable restrictions might be a bar from practicing in the same town for 1 year, for example).

VII. REMEDIES

a. Two different types of remedies

- i. Money damages (action at law)
- ii. Specific performance (action in equity)

b. Specific Performance- Specific performance is granted only if your remedy at law is inadequate for goods and real estate contracts, but NOT services contracts

i. Contracts for Services

1. NO Specific Performance available

- a. ***The Case of Mary Clark, a Woman of Colour*** (former slave, indentured servant trying to get out of K.) court said that K is not enforceable, it is like slavery. Tension with freedom of K. Court noted that the long relationship involved was a factor.

2. Negative injunctions may be granted if employee is a person of exceptional and unique knowledge, skill, ability in performing the service called for and there was no other comparable substitute. Also must be stipulated in K.

- a. ***Lumley v. Wagner***: (P tried to prevent singer from performing for someone else) The court may grant a negative injunction restraining the party rendering the service from performing for another employer during the contract period if stipulated in K.
- b. ***Ford v. Jermon***: (P tried to prevent actress for performing for someone else) Negative injunction is but a mitigated form of slavery. Negative injunction remedy denied.
- c. **Why are they inappropriate?**
 - i. **Restatement § 367**: Negative injunctions will not be enforced if enforcement is likely to compel a performance of the original K or if it leaves the employee without other reasonable means of making a living.
 - ii. If we have a policy against forcing people to work for others, to do it in a backhanded way is untenable.

- iii. Court says this is a harsh result (~ penal) for the defendant—how will she support herself? Contradicts right to make livelihood.
- iv. Courts want to respect employees’ right to change their minds => in theory the employee remains liable for money damages (that’s more of a theoretical right than a practical right).
- d. **Dallas Cowboys v. Harris**: (Harris’ K bound him to play for the Dallas cowboys and no one else). Court allowed a negative injunction here.
 - i. If the employer can cover, then there is no need for interfering with the employee’s livelihood because its interests are minimal in comparison to the substantial interests of the employee
 - ii. If employer can’t cover, (i.e. find someone of equal skills, knowledge etc), then the injunction may be granted.

3. **Courts have adopted different approaches to the enforcement of negative injunctions/covenants not to compete.**

- a. Some courts insist there be an element of competition present. If the alternative work isn’t harming the employer – customers, trade secrets, etc – then a negative injunction is not enforceable. (See **Lumley** where competitor was in the same city)
- b. Some courts treat negative covenants differently based on sale of business/employment contract
 - i. By statute in CA negative covenants for employees are not enforceable

ii. **Contracts for Land**

- 1. Specific performance is always available
- 2. The property in question is unique and therefore money damages are inadequate (**Lucy v. Zehmer**) (**Greiner v. Greiner**)
- 3. Seller can’t get SP b/c they should be indifferent about who buys the land

iii. **Contracts for Goods**

- 1. General rule is courts will not allow for specific performance for contracts involving personal property.
- 2. **Exception:**
 - a. Where there is no adequate remedy at law
 - b. Where the specific articles or property are of particular, sentimental, or unique value
 - c. Where due to scarcity the chattel/good is not readily obtainable in the market (**Cumbest v. Harris**- stereo system, took him a lot of years to build)
 - d. Where the subject matter is of a sufficiently unique nature under “other proper circumstances”
 - e. See **Sedmak v. Charlie’s Chevrolet Inc.**: The car “in mileage, condition, ownership and appearance” would be difficult to obtain in

the market, if not impossible, without considerate delay, expense, and inconvenience.

- f. Includes if you have someone already performing the K (**Eastern v. Gulf**): Court granted specific performance of the contract. Other proper circumstances.

iv. **Reasons for Enforcing/Not Enforcing Specific Performance**

1. FOR: Historical basis of relief granted by courts of equity => no adequate remedy at law
2. AGAINST: Specific performance is awkward and cumbersome
3. AGAINST: In personal service K area its too similar to slavery (policy consideration)
 - a. Not practical/socially desirable to force people to work together if they don't want to.
4. AGAINST: Ability to monitor compliance => "Supervisory Difficulties" (practical consideration)
 - a. Easier to enforce performance for goods and land than services.
 - b. Due process requires a clear order to D (non-compliance can result in a fine or imprisonment) => K must be reasonably certain or "plain" (practical consideration).
5. AGAINST: "Unclean hands doctrine" => a person asking for help from a court of equity must itself be acting equitably
 - a. Are the terms fair? (Court insist that the terms are not unfair)

v. **Buyer's Remedies/specific performance**

1. **UCC § 2-716—Buyer's Right to Specific Performance or Replevin.** (CB 197)
 - (1) Specific performance may be decreed *where the goods are unique* or in *other proper circumstances*.
 - (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
 - (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

vi. **Seller's Remedies/specific performance**

1. **UCC § 2-709—Seller's Right—ACTION FOR PRICE**
 - (1) When buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages under the next section, the price:
 - (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
 - (b) of goods identified to the contract if the seller is unable after reasonable efforts to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price **he must hold for the buyer** any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to collection of the judgment . The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

c. Three damage interests in a K:

i. **Expectation interest** (put the injured party back in the position he would be in had the K been performed)

1. **Hawkins v. McGee** (hairy hand case). The expectation interest is the proper measure of damages – the difference between a perfect hand and the hand the D ended up with.
2. *Medical Ks* – many states won't allow recovery of expectation interest damages in medical Ks. Patient shouldn't believe everything a doctor says because some statements are meant to be therapeutic.

ii. **Reliance interest** (put the injured party back in the position he would be in had the K never been entered). **2 major uses for reliance damages: (1) Parties in a losing K may seek reliance damages instead, and (2) if lost profits are too speculative.**

1. **Restatement (2d) § 349** – as an alternative to expectation damages, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the breaching party can prove with reasonable certainty the injured party would have suffered had the K been performed.
2. **Losing K** – the P can recover reliance damages minus any loss suffered by performance of the K, which must be proved by the breaching party. Ex: **Mistletoe**.
3. **Uncertainty of harm** – in cases where lost profits are too speculative, court may award reliance damages. Ex: **Dempsey**, Winston cigarette case.
4. **Shaheen v. Knight** (failed vasectomy, sued doctor). He could probably have gotten reliance damages – cost of labor, delivery, fee paid to doctor for vasectomy.

iii. **Restitution interest** (put the breaching party back in the position he would be in had the K never been entered). Avoids unjust enrichment of breaching party.

1. Two elements
2. **No right to recover costs not directly benefiting other party under Restitution:** You recover only what you gave to the other party, and nothing

is subtracted. There was no unjust enrichment. (The whole point of restitution is to prevent unjust enrichment).

3. **Bush** (flour sale) P was entitled to recover full amount, undiminished by the amount he would have lost in losing contract.
4. CONTRASTED WITH *Mistletoe*: P sued for reliance damages - Breaching party could have proved how much P would have lost (would have offset reliance damages).

A. EXPRESS CONTRACT

1. **P IS INNOCENT: *Bush v. Canfield*** CB 236 (Contract for 5000 barrels of flour at \$7.00. \$5000 deposit paid. At time of breach, flour was worth \$5.50) Court says: D neglected its duty, we shouldn't defer to D's interest and position, provide expectation interest, and allow him to profit from the breach.
 - a. Dissent: shows compassion for D BUT we see the absurdity in logic because if there had been no downpayment, P would have had to pay \$3000!!!
 - b. P might also want to recover 1) interest on the money and 2) transportation costs of wasted trip to New Orleans (reliance). BUT See *Mistletoe*: D must establish the amount of P's loss and that will reduce the reliance recovery.
2. **UCC §2-711**: When seller breaches, buyer may recover 1) any advance made and 2) maybe expectation based on cover/fair market value
3. **P HAS BREACHED: *Britton v. Turner*** CB 243 (Employment contract for \$120 for year, employee breaches after 9 ½ months)
 - a. By breaching, P lost his rights on the contract and is not entitled to recover
 - b. D has been unjustly enriched: he received the benefit of the labor. (If P had performed a little further, we'd let him sue on the contract. This is only a little worse)
 - c. P is awarded \$95 (prorated \$120) => NOT based on K price – (P has no rights under the contract) this is presumably a fair market value of the labor. If the fair market were higher than K price, P would only get K price.
 - Should there be some penalty for breaching the K? We don't always want to punish the breaching party.
 - The contract price for the service cannot be exceeded. You'd be rewarding a breaching plaintiff. By breaching P has lost its rights on the contract, but D is the innocent party and retains its rights under the contract and should pay no more than originally contracted for.

- If D had to hire substitute employee for 2 ½ months at \$20/month? D retains rights under the contract and pays P \$120-\$50 => \$70
4. *Ex: Construction Contract* (K price = 100,000, K1 is paid nothing breaches after incurring \$60,000. Owner hires K2 to complete for \$55,000)
 - a. K1 gets \$45,000 => we're interested in protecting expectation of the Owner!!!
 5. **Vines v. Orchard Hills, Inc.** CB 247 Trial Court: Breaching party awarded full deposit b/c real estate had increased significantly => Seller suffered no loss by virtue of the breach (If there is no loss then liquidated damages clauses don't apply)
 - a. Connecticut Supreme Court. Reverses b/c you must find market value at the time of the breach. That's the time the innocent party suffered the loss
 6. **Restatement §374**: If a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach. (2) That party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

B. IMPLIED-IN-FACT CONTRACT

1. Courts treat these as actual contracts (general rule is expectation damages, etc.)
 - a. Person goes in to get a haircut (nothing is said)
 - b. Contractor calls lumber yard, requests specific volume/type of wood, its delivered while Contractor is at lunch
 - c. Neighbors who have talked about common fence, one builds it the other doesn't say anything

C. IMPLIED IN LAW – QUASI CONTRACT

1. **Cotnam v. Wisdom** CB 251 (Doctor gets restitution for performing surgery on accident victim, though victim died)
2. **Martin v. Little, Brown and Co** CB 255 (P informs D of copyright infringement) => No recovery. There was no unjust enrichment of D
 - a. This is not an implied-in-fact contract b/c they've never even talked about *anything* (no prior relationship or understanding)
 - b. Also quasi-contract is to recover based on action necessary to preserve life or property.
 - c. Case says that quasi-contracts may be upheld "in spite of the party's contrary intention." That's not true in all cases,

only when you perform someone else's *legal obligation*.
(*feeding daughter example*).

3. Why allow P to recover in *Cotnam* by not in *Martin*???
 - a. Expectation of payment in *Cotnam*
 - b. *Martin* was a volunteer (didn't suggest or raise the topic of compensation)
 - Note: There is no legal obligation to render medical services (there must be some voluntary action by the doctor) We don't want to discourage doctors from "volunteering"
 - c. **In *Cotnam* action was required was necessary to protect life or property, not in *Martin*.**
 - d. How would P negotiate in *Martin*? I'll reveal information if you agree to give me x% of value you gain

d. Calculating Damages

- i. **Expectation damages:** D (damages) = X (expenses) + P (profit) – A (amount already paid) = C (K price) – Y (costs avoided) – A (amount already paid)
- ii. **Construction Ks:** Owner breaches, Contractor entitled to expenses + lost profits. Contractor breaches, owner entitled to expenses + cost of completion.
- iii. ***Jacobs and Young v. Kent*** (owner wanted Reading pipe installed, contractor installed Cohoes pipe instead, which was just as good in terms of quality.) Court had to choose between *replacement measure* (cost to redo the construction and put Cohoes pipe in) and *loss in value* measure (difference in value between house with Reading pipe and house with Cohoes pipe). The general rule is replacement cost, but here the court applies the loss in value rule, awarding Ps \$0. This is because awarding replacement measure damages would result in *economic waste*.

Buyer

Cover (2-712)
Market damages (2-713)
Consequential damages (2-715)
Incidental (2-715)
Specific Performance (2-716)

Seller

Resale (2-706 part 1)
Market damages (2-708 part 1)
Lost profits (2-708 part 2)
Incidental (2-710)
Action for price (2-709)

iv. Buyer's remedies:

1. **UCC § 1-106** – remedies to be liberally administered to put the nonbreaching party back in the position he would be in had the K been performed.
2. **UCC § 2-712** – “Cover” – buyer may cover by purchasing substitution goods. Damages are difference between the cost of cover and the K price plus incidental or consequential damages.

3. **UCC § 2-713** – Measure of buyer’s damages for nondelivery or repudiation is difference between the **market price** at the time of the breach and K price plus any incidental and consequential damages.
4. **UCC § 2-715** – Buyer’s incidental and consequential damages. Incidental damages include expenses incurred in inspection, receipt, transportation, and care of goods rightfully rejected, and any commercially reasonable expenses in connection with effecting cover. Consequential damages include any loss resulting from general or particular requirements of which the seller at the time of contracting had a reason to know.
5. **UCC § 2-718—Breaching Buyer can get restitution damages.** If buyer is breaching party, buyer can get restitution damages. (advance minus seller’s damages caused by buyer’s breach.) See **Neri**.
6. **Tongish v. Thomas** (Tongish had output K to sell sunflower seeds to Coop, who was going to resell them to Bambino. Tongish breached to get higher price from another buyer). Question was whether UCC § 1-106 or UCC § 2-713 should apply. Court said that UCC § 2-713 should apply, because it was the more specific part of the statute. Coop therefore got, instead of lost profits (55 cent handling fee per hundredweight), the difference between the market price and the K price. Much higher damage award, because the court did not want to reward a breach.

v. Seller’s Remedies

1. **UCC § 2-706 (1)** - Seller’s right to **resale** damages, but is not required to resell.
 - a. $\text{Damages} = \text{K price} - \text{resale price} + \text{incidental/consequential damages} - \text{cost avoided}$.
2. **UCC § 2-708 (1)** seller’s **market damages** – difference between market price and K price.
 - a. $\text{Damages} = \text{K price} - \text{market price} + \text{incidental/consequential damages} - \text{cost avoided}$.
3. **UCC § 2-708 (2)** seller’s **lost profits—Seller’s right to lost profits**
4. Lost Volume Sale: If a seller of goods or services has the capacity to supply the full demand for those goods or services, a breach by one buyer is not substituted for by a subsequent sale of the goods or services to another customer who would have bought the goods or services in any event. The breach has caused a loss of volume of the P’s sales (b/c he lost profits from K’s he could have entered) and can only be compensated for by an award of lost profits.
 - a. $\text{Damages} = \text{lost profit} + \text{incidental/consequential damages}$
5. **UCC § 2-708. Seller’s Damages for Nonacceptance or Repudiation** (1)**Seller’s Market Value**— Subject to subsection (2) and to Section 2-723:(a) the measure of damages for nonacceptance by the buyer is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided in Section 2-710, but less expenses saved in consequence of the

buyer's breach; and (b) the measure of damages for repudiation by the buyer is the difference between the contract price and the market price at the place for tender at the expiration of a commercially reasonable time after the seller learned of the repudiation, but no later than the time stated in paragraph (a), together with any incidental or consequential damages provided in Section 2-710, less expenses saved in consequence of the buyer's breach.

(2) **Seller's Lost Profit**— If the measure of damages provided in subsection (1) or in Section 2-706 is inadequate to put the seller in as good a position as performance would have done, the measure of damages is the profit (including reasonable overhead) that the seller would have made from full performance by the buyer, together with any incidental or consequential damages provided in this Article (Section 2--710)

6. **UCC § 2-710. Seller's Incidental and Consequential Damages**

(1) Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach. (2) Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise (3) In a consumer contract, a seller may not recover consequential damages from a consumer.

e. **Limitations on Damages**

i. **Remoteness or Foreseeability of Harm.** Special/consequential damages only awarded in circumstances where the breaching party was aware of should have been aware of the P's special circumstances. (reasonable foreseeability rule)

1. **UCC § 2-715 (2)** Buyer's consequential (special) damages include damages arising from a circumstance the seller had reason to know at time the K was formed. In other words, a reasonable person would have inferred that the consequential damages would arise.
2. **Restatement (2d) § 351** – Damages are not recoverable for loss that the party in breach did not have a reason to foresee as a probable result of breach when the K was made. Loss may be foreseeable because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances that the breaching party had reason to know.
3. **General damages** – Look to the nature of the K itself (why do people usually enter such Ks?) to determine what are general damages. Usually general damages includes the lost use value (like in *Martinez*) in the case of a delay in shipment. In construction Ks, general damages include profits. In the *Tongish* case, for example, general damages would be the difference between the

market price and K price, because you assume people enter such Ks to make profit.

4. **Hadley v. Baxendale** – (P shipped broken mill crank shaft, the delay in shipping caused special damages such as lost wages, lost profits.) The court held that the D was not liable for the special damages, because the D did not have a reason to know of the special circumstances, and these were not damages that would arise in the normal case of breach.
5. **Hector Martinez and Co. v. Southern Pacific Transportation Co.** (Martinez shipped the dragline by train, it was damaged and delayed.) Court ruled that Martinez could not get lost profits, but he could get general damages in the form of the fair rental value of the dragline during this period. Also could get interest at the market rate.

ii. Uncertainty of Harm

1. **Restatement § 352** – Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.
2. **Chicago Coliseum Club v. Dempsey** (Jack Dempsey agreed to fight Harry Wills at the Chicago Coliseum Club and then repudiated the K. P sued for expectation damages, including lost profits.) Court held that it would not award full expectation damages because the calculation of lost profits was too speculative. P could get reliance damages, though.
3. **Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co.** (Squib). Profits are rejected as a calculation of damages when they are too dependent on the fluctuations of the market.
4. **Anglia Television Co. v. Reed** (Reed contracted to play a part in a TV movie in England then backed out. Anglia sued not for expectation damages but for reliance damages, including costs incurred before the K was entered into.) In contrast to Dempsey, here the court allowed recovery of costs entered into before the K was signed, because Reed should have foreseen that those costs would be wasted by his breach.
5. **New Business Rule** – with a new business injured by breach, there may be no method to determine lost profits, so the P might be restricted to recovery of his reliance interest. This is not true with established business who can provide a reasonable method of determining lost profits.

iii. Avoidability of Harm

1. **RULE:** The victim of a breach has a duty to take reasonable efforts to avoid actions that increase the other party's damages.
2. **Restatement § 350:** CB 140 - **Avoidability as a Limitation on Damage:** (1) Damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation. (2) The injured party is not precluded from recovery by the rule stated in subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

a. Construction Contracts

- i. **Rockingham County v. Luten Bridge Co.**: Upon receiving notice of repudiation, the non-breaching party may recover an amount sufficient to compensate their expenses to date, incurred prior to the repudiation PLUS profit which would have been realized if it had been carried out in accordance with its terms.
- b. **Duty to Mitigate: Employment Contracts**: Not required to take work that is *inferior* or *different*. Inferiority is measured by the quality of the substitute employment in relation to his reasonable interest in career development and personal dignity.
 - i. **Shirley Maclaine Parker v. Twentieth-Century Fox**:
 - 1. **Duty to Mitigate**: Employee (non-breaching) must make a reasonable effort to obtain substitute employment. Courts recognize duty to avoid social idleness and not to build up damages.
 - 2. **Substitutability**: Substitute employment must be substantially similar or comparable to the original work. It is not if it is inferior or different.
 - 3. **Hecht's Employee Example**: Manager who is terminated before K expired does not have to take a clerk job for less money, if it does not want to, because it is not comparable. (Would get paid less and inferior compared to supervisor position.)
 - ii. **Chicago Coliseum v. Dempsey**: Non-breaching party may not recover expenses incurred trying to get breaching party to perform. Incurring additional expenses after notice of non-performance is at one's own risk.

iv. Liability & Recovery- Can be limited

- 1. **Express Limitations on Consequential/Incidental Damages**
 - a. Parties can limit their liability under default rules by including a warranty clause to be the exclusive remedy for breach, and excludes other foreseeable losses.
 - b. Parties are free to contract, but must have at least minimum adequate remedies (this is vague).
 - c. **UCC § 2-719. Contractual Modification or Limitation of Remedy**:
 - (1) The agreement may provide for remedies in addition to or in substitution for those provided in UCC and may limit or alter buyer's damages. Remedy is optional unless expressly agreed to as exclusive.
 - (2) Where an exclusive or limited remedy is determined to fail of its essential purpose, remedy may be provided by UCC;
 - (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.

2. Liquidated Damages v. Penalty Clauses

a. **UCC § 2-718. Liquidation or Limitation of Damages.**

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

b. **Liquidated damages are generally enforceable because:**

- i. It is reasonable for parties to mutually agree on set of damages in case of breach (which can provide for damages for that which court cannot grant i.e. lost profits for a one-shot deal).
- ii. The amount fixes that which is not accurately ascertainable
- iii. Reduces litigation costs and delay on that point

c. **Exceptions are made for damages that are punitive in nature:**

- i. “Blunderbuss clause”— Liquidated damages stipulated for ANY breach, however minor is not enforceable
- ii. When amount of damages is grossly disproportionate to actual harm caused.
- iii. See ***Kemble v. Farren*** (singer, if he breached he would have to pay like 1,000 pounds.)

d. **Validity is Determined By Reasonableness Under Totality of Circumstances**

- i. **TEST:** At the time of K formation and/or breach:
 - Did the parties intend to provide for damages or for a penalty?
 - Is the injury caused by the breach one that is difficult or incapable to ascertain with accurate estimation at the time of the contract?
 - Are the stipulated damages a reasonable forecast of the harm caused by the breach?
- ii. Once reasonableness is determined, other factors, including proof of actual loss, are no longer relevant
 - It is would be antithetical to policies in favor of liquidated damages to allow a recalculation to credit the breaching party
- iii. See ***Wassenaar v. Towne Hotel***: When Towne Hotel (D), terminated Wassenaar (P) prior to their employment contract's expiration date, P sued for damages under a liquidated damages clause in the contract. Liquidated damages for payment in full was enforced.

e. **Policy Against Penal Damages**

- i. Avoid unjust enrichment of non-breaching party
- ii. Deter efficient breaches of K

- Theory of Social Gain- Compensatory damages are sufficient to make everyone whole again and the breach will result in a greater net social gain (Hypo of Farmer's berry picker)
- iii. Disincentive to engage in business (wouldn't want to enter in K)
- iv. See **Lake River Corp. v Carborundum Co.** where Judge Posner discusses penalty damages effect on efficiency of breaches

Rest. §355—Punitive Damages

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

Rest. § 356—Liquidated damages and penalties

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

E. Enforceability

- v. **Marvin v. Marvin** CB 591: Court notes that there are a lot of these relationships today (lots of cases, unmarried, gay/lesbian) Different courts take different approaches (see NY/IL cases)
 - a. Family Law Act does not govern. Was meant to apply to individuals who are married. => Rights of parties are subject solely to judicial decision.
 - b. P is seeking 2 remedies: 1) Property settlement (Court puts emphasis here) 2) Future support (not an issue here unless the contract clearly provided for it)
 - c. 3 ways D could be liable
 - I. Express contract: **Marone v. Marone** (NY) Most states will allow for express contract b/n 2 people living together not married. IL is only state that will not allow enforcement of express contract (Legislature repealed common law marriages => marriage act is only way for division of property/alimony)
 1. Freedom of contract => they're capable of making binding agreements for whatever they want to
 2. Would be unenforceable if explicitly for sexual services
 - II. Implied-in-fact contract: NY will only enforce express contracts => **Marone**: when you let juries free to judge, you're opening the door to "emotion-laden afterthought that is likely to distort reasoning"
 1. Joint checking accounts, property taken in both parties' names (she'd have a claim in common law too).

III. Implied-in-law liability (quasi-contract) *quantum meruit*

1. Court finds remedy here: Benefit of services – value of support and fee received
 2. There must be an expectation of compensation
 - a) **Marone**: it is presumed that services rendered in the home and for family are gratuitous and there's no expectation of compensation
 - b) *Dissent*: thinks implied-in-law is bad policy
- b. There's a variety of views on contract claims for common-law marriage!!
- a. No contract will support recovery (IL)
 - b. Express contract only will support recovery (NY)
 - c. Every theory we've discussed supports recovery (*Marvin*)

TYING TOGETHER THE LAST TWO CHAPTERS

Restitution	Reliance	Expectation
Bargaining context <ul style="list-style-type: none"> - Innocent party: deposit (<i>Bush</i>) - No contractual liability – no mutual assent (<i>Peerless</i>) - Mutual Mistake (<i>Sherwood</i>) - Contract rescinded - Losing contract - P is breaching party: Benefit incurred – harm caused (<i>Britton</i>) 	Bargaining context <ul style="list-style-type: none"> - Extent of harm is too uncertain (<i>Anglia, Dempsey</i>) - Losing contract – if P is the innocent party - Promises relied upon before a contract is actually formed (<i>Red Owl, Goodman</i>) 	Bargain and consideration
Quasi-contract (implied-in-law) <i>Cotnam, Marvin</i>	Gift/Promissory Estoppel <ul style="list-style-type: none"> - reasonably relied upon (<i>Feinberg, Richetts</i>) - can be limited as justice requires 	Promissory Estoppel <ul style="list-style-type: none"> - too difficult to determine reliance damages
Sometimes it's all you can get (<i>Britton</i>)	Sometimes it's all you can get	
Sometimes the party wants that (losing contract)	Sometimes the party wants that (losing K)	

Expectancy is usually best, most desired, reliance is next weakest, restitution is usually the weakest

GENERAL CONCEPTS WHICH WE'LL SEE THROUGHOUT OUR CAREERS

1. Remedies in other courses are almost always for redressing a harm (reliance)!! We deal here with expectation measure mostly.
2. Reliance: law protects reliance when there's a breach by another party

- a. Causes a detriment
 - b. Must be justifiable/reasonable (this is a major reason for denying recovery)
 - c. Also appears in Misrepresentation
3. Misrepresentation
 - a. Especially in corporations and securities regulation
 - b. Everything from innocent to intentional, for the differences, there are different remedies
 - i. Intentional: money damages in tort
 - ii. Innocent: rescission and restitution
 4. Non-disclosure
 - a. *Posner*: Prior to having spouse sign agreement, you can't withhold material information => if there's something the other side should know, you must be forthcoming
 5. Mutual Mistake (risk allocation)
 - a. We applied reasons for allocating risk to one party or another
 6. Role of Formalities (Seen mostly in wills and trusts)
 7. Notion of freedom of contract
 - a. Importance to economic system
 - b. Courts do not engage in second guessing the values parties put on things in an exchange
 8. Historical move from status to contract
 - a. We still have certain obligations attached to status
 - i. We cannot vary our ethical responsibilities by contract with our clients
 9. Settlement contracts
 - a. Very important socially – that's the way most disputes are resolved

EXAM

1. What will P's lawyer argue (what legal theories are there that establish a cause of action)?
2. 3 ways to defend (assuming the facts are right)
 - a. Attack cause of action
 - b. Different spin on the facts (reasonable person wouldn't agree)
 - c. Defenses
3. Strengths and weaknesses of every side and argument
4. Which issues really merit discussion
5. Analysis should be objective
6. Integrate facts where they're needed and relevant
7. Court almost invariably starts with the UCC provisions (that's the law!!!)
 - a. Go to the important/appropriate words
 - b. You don't have to cite specific cases/restatement/sections => Though these indicate your knowledge of the subject matter