**Limits of Contracts**

1. Contracts against **public policy**
   1. R. §179: Sources of policy: relevant legislation and the protection of public welfare
   2. R. §178: Balancing policy with enforcement of contracts
      1. Strength of the policy
         1. Furtherance by not enforcing the contract
         2. Seriousness of misconduct in the contract
         3. Directness of the contract’s connection to policy
      2. Strength of the contract
         1. Justified expectations of the parties
         2. Resulting forfeiture by the parties
         3. Interest in enforcement
      3. ***Shaheen***: Policy dictates that birth of a child cannot be an injury
      4. ***Baby M***: Policy, from the adoption statute, dictates that contracting to sell babies is immoral
         1. Contrast with the original decision, that the best interests of the child were the primary policy issue
2. Contracts where a party lacks **capacity**, R. §12
   1. R. §13: Under guardianship for mental illness, no capacity at all
   2. R. §14: Infant (under 18), capacity to enter only voidable contracts until day before 18
   3. R. §15: Mentally ill but not under guardianship, voidable if…
      1. Unable to understand the contract and its consequences
      2. Or unable to act reasonably about the contract and the other party has reason to know
      3. Also, if other party unaware of mental illness, not voidable if unjust
   4. R. §16: Intoxicated and other party has reason to know, and…
      1. Unable to understand contract and its consequences
      2. Or unable to act reasonably in the transaction
      3. ***Lucy***: Zehmer was drunk, but he seemed to act reasonably and understand the contract
3. Contracts where one party was induced by **duress or undue influence**
   1. R. §174: No contract in event of physical duress
   2. R. §§175-6: Contracts are voidable if entered into under improper threat
      1. §176(1): Threat improper even if contract fair if threatened with…
         1. (a) Crime or tort
         2. (b) Criminal prosecution
         3. (c) Bad faith use of civil process
         4. (d) Otherwise breach of good faith
      2. §176(2): Threat improper if contract unfair and if…
         1. (a) Contract causes harm to promisor and little benefit to promisee
         2. (b) The threat is stronger because of prior unfairness
         3. (c) The contract is otherwise an abuse of power
      3. §175(2): If a third party induces, the contract is voidable unless the other party relies materially on the contract or gives value to the promisor without knowledge of threat
      4. ***Odorizzi****:* Did not argue, but could have argued both §176(1)(a), blackmail, and §176(2)(a), no benefit
   3. R. **§177: Contracts voidable if entered into under undue influence**
      1. **§177(1):** Persuasion by domination or by person justifiably thought to have best interest at heart
      2. ***Odorizzi***: Test for undue influence, but it may be just supplying the language for an assessment
         1. Unusual location of the influence
         2. Immediate decision required even when not necessary
         3. Emphasis on consequences of the decision
         4. Multiple actors pressuring a single individual
         5. Absence of legal counsel
      3. §177(3): If a third party exerts undue influence, the contract is voidable unless the other party relies materially on the contract or gives value to the promisor without knowledge of threat
4. Contracts that are **unconscionable**
   1. Two elements to unconscionability: surprising and unfair terms
      1. Unfair process (if alone, improper threat or undue influence)
      2. Unfair substance (can be this alone sometimes)
   2. R. §208, UCC §2-302: Unconscionable terms may be excised from a contract or the whole contract voided
   3. R. §211(3): Unconscionable terms in form contracts
      1. When a party has reason to believe that the other would not assent if aware of a term, that term is void
      2. Interpreted narrowly
         1. ***Carnival Cruise***: Ouster clauses are not sufficiently unfair, create economic benefit to promisee
         2. ***Caspi***; Ouster clauses in click-through agreements still enforceable
   4. ***Williams***: Williams had little ability to understand K, lack of options for lower interest, loss of property
   5. Policy concerns:
      1. Freedom to contract for whatever one wants
      2. Price advantages from seller-favorable terms (defense’s argument in *Williams*)

General concepts in the UCC

1. UCC §1-103: Common law or other law applies wherever the UCC does not explicitly override it
2. UCC §2-102: Covers transactions for goods
3. UCC §2-105: Goods consist in anything movable except money as well as unborn animals and crops
4. UCC §2-106: Limited in scope to present and future sale of goods

**Damages**

1. **Remedies**
   1. R. §346: Availability of damages
      1. §346(1): Parties can claim damages unless the claim “has been suspended or discharged”
      2. §346(2): When there are no damages under any other remedy, parties can recover nominal damages
   2. R. §347: **Expectation** damages
      1. §347(1): Loss in value of other party’s performance resulting from failure or deficiency
      2. §347(2): Plus incidental and consequential damages as well as any other damages
      3. §347(3): Minus any costs or losses avoided by not having to perform
      4. Policy: Efficient breach
         1. If breaching party loses by performance, other gains less than breaching party loses
         2. Should breach and pay expectation, encourages efficiency
         3. Relational contracts kept, efficient relationship
      5. Expectation damages under the UCC, mostly the same as R. §347
         1. UCC §1-106: Put parties in position had both parties performed, liberal administration of remedies
            1. ***Tongish***: Consider third parties, Coop’s contract with Bambino relevant to benefit of bargain
            2. It is irrelevant to expectation what each party would do after performance takes place
         2. Recovery for buyer breach
            1. UCC §2-706: Cover, difference between cover price and contract price

UCC §2-710: Plus incidental damages, consequential damages left out until 2003 revisions

No way into common law in §2-706 until 2003

* + - * 1. UCC §2-708: No cover, difference from market price at time of tender and contract price

Leads to systematic overcompensation of seller and inconsistent with §2-713

UCC §2-708(2): Backdoor to common law if insufficient remedy

* + - 1. Recovery for seller breach
         1. UCC §2-712: Cover, difference between cover price and contract price
         2. UCC §2-713: No cover, difference from market price at time of breach and contract price
      2. UCC §§2-710, 2-715: Incidental and consequential damages
         1. §§2-710, 2-715(1): Incidental damages are damages incurred as a direct result of breach

e.g., storage of goods not sold, costs of stopping delivery, etc.

Available for buyer or seller breach

* + - * 1. §2-715(2): Consequential damages are damages incurred as an indirect result of breach

e.g., lost profits, lost earnings, lost prestige, etc.

§2-715(2)(b): Including injury to person or property resulting from breach

Available only for buyer breach, no mention in seller breach

* + - 1. UCC §2-717: Deduct any payments remaining on the contract from remedies
  1. R. §349: **Reliance damages**
     1. Recover expenditures in preparation or performance, less costs that still incurred without breach
     2. ***Anglia TV*, *Mistletoe***: Disguised expectation, expect to recoup losses (see below on uncertainty)
  2. R. §371: **Restitution**
     1. Two alternative forms of restitution:
        1. R. §371(a): Recover value of what other party received in cost to obtain it on an open market
        2. R. §371(b): Recover amount other party’s property value increased or “other interests advanced”
     2. Restitution when the other party is in breach
        1. R. **§**373(1): Entitled to recover value of benefits conferred on the other party through performance
        2. R. **§**373(2): Unless all performance is complete and only payment remains, then no restitution
        3. ***Bush***: Breach, recover full deposit even though would have lost money because not breaching party
           1. Additional rule from *Bush*, implicitly: no negative damages!
     3. Restitution for the breaching party
        1. R. **§**374(1): Breaching party may recover benefits conferred to other minus losses caused by breach
        2. R. **§**374(2): If performance is to continue, no restitution provided the amount that would be restituted is reasonable as an implied liquidated damages clause
        3. ***Britton***: Recover due wages minus the loss sustained by the need to hire more expensive labor
        4. ***Vines***: Recover condo deposit despite that was liquidated damages bc value of condo has gone up
     4. Special restitution provisions under the UCC
        1. UCC §2-711(1): When seller breaches, buyer may recover up to amount paid from seller, at the least
        2. UCC §2-718(2)(b): When buyer breaches, can recover 20% of deposit up to a maximum of $500
           1. Unless this amounts to an unenforceable penalty, cf. *Vines*
     5. Restitution in quasi-contract
        1. ***Cotnam***: Recover price for *ex ante* benefits conferred, even though the patient ultimately died
        2. Policy: creates proper incentives to perform in emergency
           1. Cannot recover if intended a gift, only if intended a paid service

Who has the burden to show that it was not a gift?

* + - * 1. Does charge rate matter, or would a clinic doctor and a high-end doctor receive the same?
  1. R. §357, UCC §2-716: **Specific performance**
     1. R. §357(1): May require performance if it remains possible
        1. R. §359: Allowed only if money remedy inadequate
           1. R. §360: Money remedies may be inadequate if…

§360(a): Difficult to prove losses monetarily

§360(b): Difficult to acquire replacement using money remedy

§360(c): Difficult to collect money remedy because promisor insolvent – rare

* + - 1. UCC §2-716(1): Allowed when goods are unique or in “other proper circumstances”
         1. UCC §2-716(2): Court can insert new just terms to cover payment of price, damages, etc.
         2. UCC §2-716(3): Replevin of goods if promisee cannot cover or if made a security deposit
    1. ***Loveless***: Land unique, specifically perform; like *Tongish*, irrelevant what other plans after performance
    2. ***Cumbest***: Actually unique radio, made himself, could not replace, promisor must return
    3. ***Sedmak***: Corvette not strictly unique, but special edition, difficult to replace, evidence of difficulty
    4. ***Scholl***: Would have accepted market value, market thicker for these Corvettes, no specific performance
    5. ***Mary Clark***, R. §367(1): No specific enforcement of personal service contracts
       1. Dignity issues, 13A issues, public policy
    6. Other common law rules
       1. R. §361: Liquidated damages clause, still allowed
       2. R. §362: Terms too uncertain to provide an appropriate basis, disallowed
       3. R. §363: Promisee’s consideration not secured to the satisfaction of the court, disallowed
       4. R. §364(1): Unfair to enforce a contract term, disallowed
          1. R. §364(2): Unless equally or more unfair not to enforce the contract
       5. R. §365: Against public policy, disallowed
       6. R. §366: Burden of enforcement too heavy on the court, disallowed
       7. R. §368(1): Promisor could void the contract, disallowed
       8. R. §368(2): Promisee could void contract, still allowed unless consideration cannot be secured
       9. R. §369: Breaching party seeks, still allowed provided breach does not discharge other party
    7. R. §357(2): Negative injunctions, reduce losses to the promisee
       1. R. §367(2): Injunctions against personal service will not be issued if would force performance
       2. ***Corsetti***: Could prevent opera singer from singing elsewhere in NY, maybe in Newark, not in LA
       3. Consider nationwide media, what if only way to reduce losses bars from working anywhere?

1. **Limitations** on damages
   1. Foreseeabilityof harm
      1. R. §351: Damages must be those party in breach could foresee as a “probable result” of breach
         1. §351(2)(a): Forseeable if within the ordinary course of events, or…
         2. §351(2)(b): Special circumstances of which the party in breach had reason to know
      2. UCC §2-715: Damages need be foreseeable, no “probable” requirement
      3. ***Hadley***: No reason for supplier of crankshaft model to know that mill had no spare, unforeseeable
         1. Note: This rule also applies to cost of cover, cost must also be foreseeable
         2. Pooling equilibrium: Same price, preferred ex post, no foreseeability rule, low risk players drop out
         3. Separating equilibrium: Allowed to bargain, preferred ex ante, contract around foreseeability rule
      4. ***Hector Martinez****:* Harm for loss of use of dragline not the most likely result but still foreseeable
      5. ***Morrow*: No tacit agreement to be liable for loss of coin collection, unique but considered elsewhere**
      6. **Policy: Do not hold parties responsible for harms they cannot plan around**
   2. Uncertaintyin the amount of harm
      1. R. §352: Damages cannot be recovered beyond what can be “established with reasonable certainty”
         1. ***Dempsey***: Coliseum Club’s damages for not hosting the fight were speculative, no recovery
            1. Unusual position mostly rejected, usually would try to estimate
      2. R. §349: When profits cannot be determined at all, and a venture is terminated by breach, assume zero
         1. ***Anglia TV***: Profits from the production presumed zero, recover expenses would have recouped
         2. ***Mistletoe***: Profits from company presumed zero, recover what had already paid to breaching party
            1. Defendant had burden to show would have continued to lose money
      3. Policy: Do not allow recovery beyond what the actual damages likely were
         1. Err on the side of undercompensation
         2. Breaching party is the one with moral problems, why not err on the side of overcompensation?
   3. Mitigation obligation
      1. R. §350: Damages not recoverable for harms promisee could have reasonably avoided
         1. §350(1): Avoid without undue risk, burden or humiliation
            1. ***Parker***: Burden to show intangible damage from less authority, prestige, happiness
            2. Generally speaking, do not force inferior employment as it is hard to prove losses
            3. Also, need to avoid behavior that courts might interpret as a settlement
         2. §350(2): Not precluded if made a good faith but unsuccessful attempt to mitigate
      2. ***Rockingham County***: County need not pay for the rest of the bridge, stopping work easy
      3. Seller’s mitigation obligation under the UCC
         1. UCC §2-706: Resale, entitled to difference between resale and contract price
         2. UCC §2-708: No resale, entitled to difference between market at time of tender\* and contract price
            1. §2-708(2): Unless this would be inadequate to compensate the seller, in which case lost profits
            2. ***Neri***: Fungible good, would have sold another boat without breach, recover full lost profits
      4. Policy: Give promisee benefit of the bargain, further losses are the promisee’s own fault
         1. Necessary to efficient breach
            1. Otherwise promisee recoups promisor’s gains by performing and taking expected losses
            2. So no one would breach when it is efficient to do so
            3. Negotiation also reduces this incentive, creates windfall for promisee
         2. Moral debate
            1. Schiffren: Mitigation is not morally required
            2. Fried: Mitigation is morally required, avoid loss to others where possible
   4. Liquidated damages clauses
      1. R. §355: Punitive damages are not recoverable unless a breach of contract comprises a tort
      2. UCC §2-719: Alternative remedies, including liquidated damages
         1. §2-719(1)(a): A contract may provide for a form of remedy different from standard remedies
         2. §2-719(1)(b): This remedy is optional unless otherwise stated
         3. §2-719(2): These remedies are enforceable unless they “fail of [their] essential purpose”
         4. §2-719(3): Consequential damages may be excluded unless unconscionable
            1. Limitations on personal injury recoveries are prima facie unconscionable
            2. Limitations of economic losses are not prima facie unconscionable
      3. The tests for whether liquidated damages are punitive under §355
         1. ***Lake River***: Posner, *ex ante* inquiry
            1. Reasonable estimate of damages at the time of contract
            2. Necessary because damages appeared at the time of contract to be difficult to measure
         2. R. §356, UCC §2-718(1): Allow *ex post* inquiry instead
            1. Reasonable estimate of anticipated or actual damages
            2. Necessary due to difficulties in proof of loss, either at the time of contract or the time of breach
            3. UCC only: inconvenience or nonfeasibility of otherwise obtaining an adequate remedy
         3. Ultimately, four different inquiries
            1. Strict *ex ante* inquiry: Enforce parties’ intentions at the time of contract
            2. Strict *ex post* inquiry: Enforce reasonable clauses only
            3. Look both *ex ante* and *ex post*: Dislike enforcing liquidated damages clauses
            4. Look either *ex ante* or *ex post*: Prefer to enforce liquidated damages clauses
      4. ***Wassenaar***: Contract breached by hotel layoff, necessary *ex ante* but unnecessary *ex post*, enforced
      5. ***Kemble***: Refuse to enforce reasonable clause against actor as could have been unreasonable
      6. ***Vines***: Refuse to enforce clause not reasonable *ex post* on condo sale because value of condo went up
      7. Consider whether applies to liquidated damages that are too low as opposed to too high
      8. Policy arguments
         1. In favor of liquidated damages
            1. Control exposure to risk
            2. Avoid uncertainty and delay of using judicial system, keep cases out of court
            3. Encourages economic efficiency (roller coaster example, avoid overinvestment problem)
            4. Correct inadequate judicial remedies
         2. Against liquidated damages
            1. Right of public law to determine remedies
            2. Create and enforce *in terrorem* agreements
            3. Can be punitive in nature
         3. Moral arguments:
            1. Posner: Enforce, let adults contract how they want
            2. Schiffren: Enforce, encourage performance as moral

**Assent and Contract Formation**

* 1. Requirements for contract formation
     1. R. §3: Agreement=manifestation of mutual assent; bargain=agreement to exchange promises/performances
     2. R. §17(1): Formation of a contract requires a bargain in which there is a manifestation of mutual assent
     3. UCC §2-204(1): Contracts may be made in any way sufficient to show agreement
     4. UCC §2-204(2): A contract may exist without certainty about when it came into existence
     5. UCC §2-204(3): A contract does not fail if parties intend a contract and there is reasonable basis for remedy
  2. Characteristics of a **manifestation of mutual assent**
     1. R. §18: A manifestation of mutual assent involves making a promise or beginning performance
     2. R. §19(1): Manifestation of mutual assent may involve written or spoken words or acts or failure to act
     3. R. §19(2): Assent if party intends act and knows or has reason to know could be interpreted as assent
        1. Thus can be contract without intent to enter contract if could reasonably be interpreted as assent
        2. ***Embry*:** “Go ahead, you are all right” could be reasonably interpret as McKittrick assenting
        3. ***Texaco v. Pennzoil*:** Objective, outward manifestations of intent only; secret intent irrelevant
        4. ***Lucy*:** Zehmer manifested assent, too long and drawn out to be reasonably seen as elaborate joke
     4. R. §19(3): Assent may be manifested when there is no assent, as under duress; then contract is void
  3. Making an **offer**
     1. R. §22: Forms of assent
        1. R. §22(1): A manifestation of mutual assent usually takes the form of offer followed by acceptance
        2. R. §22(2): But it need not take that form, can have contract when offer and acceptance not obvious
     2. Nature of offers
        1. R. §24: An offer manifests willingness to enter a bargain and also that assent will create a bargain
        2. R. §26: A manifestation of willingness to enter a bargain is not an offer if the other party knows or has reason to know that the manifesting party does not intend assent to create a bargain
           1. ***Nebraska Seed*:** Reasonable interpretation was show willing to sell seed, standard in business
           2. ***Leonard v*. *Pepsico*:** Not in magazine, ad not reasonably interpreted as offer, unreasonable price
           3. R. §27: **Agreements in principle**, agreements to continue negotiations

***Empro*:** No contract with Ball-Co as everything subject to a future agreement, just a ritual

***Texaco*:** Four factor test for determining existence of contract against agreement in principle

Express statement that only formal writing binds (declaration suggests already bound)

Partial performance by disclaiming party (Getty, here; only 2 days, drafted declaration)

Assent on all essential terms (seem to be)

Magnitude of the contract requires writing (court concludes irrelevant)

* + 1. R. §29: Who may accept an offer
       1. R. §29(1): Manifested intent in the offer determines who may accept the offer and create a bargain
       2. R. §29(2): An offer may empower a person, specific group, or any person who performs a task
    2. R. §33: Certainty of terms
       1. R. §33(1): An offer cannot be accepted unless terms of the offer are reasonably certain
       2. R. §33(2): Terms are reasonably certain if they create a basis for determining breach and remedy
       3. R. §33(3): Terms left open may show that manifestation of intent not an offer or acceptance
       4. R. §34(1): Can have reasonably certain terms even if parties may choose terms during performance
       5. R. §34(2): Past performance under agreement may remove uncertainty and establish a contract
       6. R. §34(3): Reliance on agreement may mean remedy appropriate even when there is uncertainty
       7. R. §204: Court can supply terms to fill gaps
       8. Cases dealing with uncertain terms
          1. ***Nebraska Seed*:** Many terms of shipment open, could have filled but do not have to be
          2. ***Leonard v*. *Pepsico*:** Gaps suggest no offer, again could have filled but unreasonable
          3. ***Empro*:** Collateral for the loan not mentioned, court could not reasonably fill gap

Empro could have said they would agree to anything Ball-Co proposed

But they did not, and other reasons facts insufficient to create a contract anyway

* 1. **Acceptance** and **revocation** of an offer
     1. Acceptance of an offer
        1. R. §30(1): Acceptance allowed through words, performance, inaction or with some terms omitted
        2. R. §30(2): When not stated, acceptance can be in any manner reasonable in the circumstances
        3. R. §32: When there is doubt, promisee may accept by promise or by performance
        4. R. §35: Offeree has power to accept offer, contract can be created by acceptance while the offer stands
        5. R. §62: When offeree chooses promise or performance, either is acceptance and promise to complete
        6. Acceptance by performance
           1. R. §54(1): Notification not needed for acceptance by performance
           2. R. §54(2): If offeree has reason to know offeror will not learn of acceptance, contract void unless…

(a) offeree exercises due diligence to notify,

(b) offeror learns of acceptance some other way, or

(c) offer explicitly says no notification required

* + - * 1. UCC §2-206(2): Acceptance by performance fails if offeror not aware within a reasonable time
        2. ***White***: Offer allows acceptance by performance, but cannot accept contract for building office just by buying lumber, no diligence to notify, would not learn of acceptance in natural course
      1. R. §61: Acceptance requesting change binding unless manifests intent not to be bound w/o change
         1. ***Ardente***: Furniture with house for same price interpreted as intent to be bound with modification
         2. Last Shot Doctrine: Last proposal holds in the common law
         3. Mirror Image Rule: Can only be contract if both parties manifest assent to identical writing
      2. R. §§63-66: Mailbox Rule, binding when sent, reasonable if customary, must properly dispatch
      3. R. §69(1): Acceptance by silence only when…
         1. (a): Offeree takes benefit with reasonable time to reject and knowledge compensation expected
         2. (b): Offeree intends to accept by silence, and offeror gave notice that acceptance by silence allowed
         3. (c): Past dealings suggest that should be interpreted to accept unless otherwise give notice

***Hobbs***: Shipment of eelskins standard, did not inform were not paying and allowed skins to rot for three months, acceptance by silence

* + - 1. Acceptance in the UCC
         1. UCC §2-206(1)(a): An offer may allow acceptance in any reasonable manner in the circumstances
         2. UCC §2-206(1)(b): An offer to buy goods for shipment can be accepted by promise or by shipment
    1. Revocation of an offer
       1. R. §36(1): Ways to terminate the power of acceptance
          1. §36(1)(a): Rejection or counter-offer by offeree
          2. §36(1)(b): Lapse of time
          3. §36(1)(c): Revocation of the offer
          4. §36(1)(d): Death or incapacity of offeror or offeree
       2. R. §36(2): Offer may also specify conditions that, if they do or do not occur, will terminate the offer
       3. R. §§42-43: Offer terminated when offeree hears revocation or that offeror acted inconsistent with offer
          1. ***Dickinson***: Dickinson heard Dodds selling property to someone else despite offer not expired, tried to accept but too late, offer revoked when Dickinson heard Dodds selling to someone else

Consider, however, would be analyzed differently under promissory estoppel, invited to wait

* + - * 1. ***Petterson***: Attempt to tender payment at door, informs of revocation of offer before can pay

Arguably, collecting money should be beginning performance, or attempt to tender should

Note that Petterson may have known of Pattberg’s intent to revoke, so some fishiness

* + 1. Option contracts
       1. R. §25: An option contract is one in which the promisor is limited in ability to revoke offer
       2. R. §37: May only revoke option contract if requirements for discharge of contractual duties met
       3. R. §45(1): Option contract created when acceptance only by performance and performance begun
          1. ***Carlill v. Carbolic Smoke Ball***: Offer to pay if become ill with flu an option contract

Adler says: Not an option contract, nothing to be provided, not like the runaway dog

* + - * 1. Also consider the oil search case, begin search for oil, first one to find gets the contract for payment
      1. R. §45(2): Offeror need not perform until after the offeree has completed performance in such a case
  1. **Filling in terms** in the UCC
     1. UCC §2-305: Price
     2. UCC §2-308: Place of delivery
     3. UCC §2-309: Time of delivery
     4. UCC §2-310: Time of payment
  2. UCC §2-207: **Battle of the Forms**
     1. §2-207(1): A timely and definite acceptance is an acceptance even if there are additional or different terms
     2. §2-207(2): Between merchants, additional and (comment 3) different terms join contract unless…
        1. (a) the offer limits acceptance to terms of the offer
        2. (b) the terms materially alter the contract
        3. (c) notification of objection has been given or is given within a reasonable time (comment 6)
           1. Note: Consider if the objection in the acceptance, might be different on a literal interpretation
           2. Common law says no contract if objection, UCC would say there is a contract minus additional term
     3. §2-207(3): If parties act like have a contract, have a contract on the terms they agree on plus default terms
     4. Confirmations: can add additional terms, cannot add different terms
     5. Acceptance: can add additional or different terms, run through §2-207(2)
     6. ***StepSaver***: Box-top license does not change because material alteration, TSL admits did not apply anyway, confused by comment 2 into thinking confirmations could add different terms
     7. ***Union Carbide***: Sales tax not added because material alteration, unfair surprise, Posner likely overstates the case as “any term offeror would not have agreed to”, going into unconscionability territory
     8. ***ProCD***: Offer and acceptance with notice of additional terms in shrinkwrap license, enforced
        1. Policy: Price inflation from too many buyer protections
        2. Treat limits on product like inability of car to achieve high mpg
     9. ***Hill***: Only one form, says Easterbrook, so §2-207 does not apply; terms stay even though no prior notice
     10. ***Klocek***: Contract for sale and confirmation, no notice, term drops out as not merchants for §2-207(2)
     11. Computer cases
         1. UCITA §112: Must have an opportunity to review in order to manifest assent, in computer transactions
         2. UETA §14: Contracts can be formed by interaction with an electronic agent
         3. ***Specht***: No notice given of additional terms in license, would have to have scrolled down, unenforced
         4. ***Register***: Notice each time accessed database after access, infer notice for future, enforced
            1. Apple analogy, returning to the farmstand each time, sign asking for payment
     12. Common law provisions
         1. R. §211(1): A party that agrees to a writing adopts the writing as an integrated agreement
         2. R. §211(2): That writing enforced where reasonable no matter whether parties understand it or not

**Contract Interpretation**

1. The parties’ **subjective interpretations** of terms
   1. R. §200: Interpretation of a contract term is ascertainment of its meaning
   2. R. §201(1): If parties have the same subjective interpretation of a term, that meaning prevails
   3. R. §201(2): If parties have different interpretations, one party’s interpretation prevails if…
      1. §201(2)(a): A knew B’s interpretation, and B did not know A’s interpretation, B prevails
      2. §201(2)(b): The same as (a), if A had reason to know and B did not
   4. R. §201(3): Otherwise, if there is no single objectively reasonable interpretation, mutual assent fails
      1. ***Raffles***: Two different *Peerless* ships, two objectively reasonable interpretations, no contract
         1. Gilmore: The term “ex *Peerless*” referred only to the situation of non-arrival, was immaterial
         2. Simpson: The term “ex *Peerless*” was used to calculate time of arrival, necessary to contract
         3. Adler: Negative damages could have helped, breach in October, recover seller’s gains
      2. ***Oswald***: Two coin collections, one called the Swiss Coin Collection but both containing Swiss coins
         1. Again, two objectively reasonable interpretations, added bonus of language barrier
         2. Query whether Mrs. Allen should have known that there would be confusion and why did not clarify
      3. ***Frigaliment***: Narrow v. broad meaning of “chicken”, no evidence as to usage of trade, no contract
2. **Objective interpretations** of terms
   1. R. §202(1): Words and conduct are considered; if parties’ purpose is discernable, it is given great weight
      1. ***Morrow*: Price can indicate presence of terms, including implicit promises to insure/assume risk**
   2. R. §202(2): Writings are taken as a whole
   3. R. §202(3): General prevailing meanings of words and terms are used unless there is a technical meaning
   4. R. §202(4): Acquiescence to performance without objection is given great weight in interpretation
   5. R. §202(5): Interpret using express terms, course of performance, course of dealing, usage of trade
      1. UCC §1-205 and UCC §2-208 make that into a hierarchy
      2. Consider objections to course of performance, as in dairy-restaurant spat over “mid-week”, Adler says the restaurant waived its objections by accepting the butter but did not change the contract
3. **Gap filling** of essential terms not supplied
   1. Two forms of judicial gap-filling
      1. Implied-in-fact terms, terms the parties actually agreed to but left out of agreement
      2. Implied-in-law terms, default terms supplied without guidance from the parties
         1. Consider implications on high-value minority parties, separating equilibrium
         2. Still, write the default rules to favor the majority
         3. ***Hadley***: High-value minority promisees must contract around the default rules
   2. R. §34(1): Can have reasonably certain terms even if parties may choose terms during performance
   3. R. §34(2): Past performance under agreement may remove uncertainty and establish a contract
   4. R. §34(3): Reliance on agreement may mean remedy appropriate even when there is uncertainty
   5. R. §204: Court can supply terms to fill gaps
      1. ***Texaco***: Since intent to be bound was manifested (see above), not too many gaps, fill them
      2. ***Sun Printing***: No way to determine intervals for indexing of price of paper, no contract, should have said had an option to buy paper at index price, would take any reasonable interval Remington proposed
   6. UCC §2-306: Output contracts, requirements contracts and exclusive dealings contracts
      1. §2-306(1): Quantity in good faith and not unreasonably disproportionate to estimate or prior dealing
         1. ***NY Central Ironworks***: Limit to cases of no speculation, would not have agreed if speculation allowed and would be unconscionable, but here Radiator gambled and lost, will have to pay
         2. However, not decided under UCC, the unreasonably disproportionate clause would have barred
      2. §2-306(2): Best efforts clauses are implied in all exclusive dealings contracts unless otherwise stated
         1. ***Wood v. Lucy***: Imply best efforts, financial benefits to strong efforts anyway
         2. Consider econ motivations for no best-efforts clause, jewelry designer, way to get Macys to take risk
4. **Extrinsic evidence**, parol evidence rule
   1. Terms and definitions
      1. R. §110: Classes of contracts covered by the Statute of Frauds
         1. Under the common law: Wills, surety, marriage, land, duration of >1 year
         2. Under the UCC: Goods >$500
            1. UCC §2-201(1): Writing required, (2) confirmations can suffice
            2. UCC §2-201(3): Unless specially manufactured, or party admits contract, or payment tendered
      2. R. §209: Integrated agreements writings constituting a final expression of a term or terms of a contract
      3. R. §209(3): When the parties reduce an agreement to a writing that appears to be sufficiently complete and specific to be a contract, it is taken to be an integrated agreement
      4. R. §210: Completely integrated if contains all terms; partially integrated if contains only some terms
      5. UCC §2-201: Writings are powerful but can be augmented by other sources
   2. R. §213: Parol evidence rule: Agreements inconsistent with or in scope of integrated agreement superseded
      1. UCC §2-202: Final writings may not be contradicted by other agreements at time of contract
      2. ***Brown***: Unreasonable to allow evidence of sale of furniture with hotel, no price difference, inconsistent
      3. ***Thompson***: Writing purports to be complete contract, no mention of warranty on logs, no warranty
   3. Ways in which parol evidence might be admitted
      1. R. §214: Prior agreements and negotiations are still allowed to determine…
         1. §214(a): Integrated status of the agreement
         2. §214(b): Complete or partial integration
         3. §214(c): The meaning of the writing
         4. §214(d): Invalidating causes like duress or mistake
         5. §214(e): Grounds for granting or denying rescission, reformation or any sort of remedy
      2. R. §216(1): Consistent additional terms can supplement non-completely integrated agreements
         1. UCC §2-202(b): Evidence of consistent additional terms allowed unless writing specifically excludes
      3. R. §216(2): A writing is not completely integrated if it excludes a consistent additional term agreed to for separate consideration or which might naturally have been omitted from the writing

**Breach and Enforceability**

1. **Consideration**: Required to form a contract under R. §§1, 3, 17, 18
   1. R. §71, 79: Induce promisee to do something of value to the promisor that would not otherwise perform
      1. Promise to give money if pay rent, has to matter that rent be paid, and that the promisee himself pay
      2. ***Johnson***: Money to university to pay off debt, university would pay off debt anyway, no inducement
      3. ***Hamer***: Cared that nephew stopped smoking/drinking/gambling, induced performance, consideration
   2. Exceptions to the requirement of consideration to create a contract
      1. R. §81: Need only intent to induce, does not matter if would have done so anyway if had intent
      2. R. §86: Past consideration allowed “to the extent necessary to prevent injustice”, will not grant disproportionate value, can enforce if renewing old promise, e.g. pay after statute of limitations runs
         1. Similar to quasi-contract with explicit promise, clarifies the existence of a quasi-contract
         2. ***Webb***: Save man’s life, promise to pay stipend, material benefit, past consideration allowed
            1. Must be true emergency, where parties could not have reasonably contracted at the time
            2. Also must not be intended as a gift but rather expecting remuneration
         3. ***Mills***: No past consideration, no material benefit as son saved was an adult
         4. ***Moore***: No past consideration, promised to pay if prediction of death correct, no material benefit
      3. Contract modification rules
         1. ***Stilk***: Sailors desert, others demand raises, no consideration, worries about coercion, old rule
         2. ***Alaska Packers***: Fishermen object to netting, refuse to work w/o raises, no consideration
            1. Question whether the nets were rotten; if they were, would lead to *Brian Construction*
         3. R. §89: Three-part test for when can modify without consideration
            1. Modification “fair and equitable” in light of circumstances not anticipated by the parties

***Brian Construction***: Trouble in excavation, modify even though contract said “all work”

***Stump Home***: Does not solve coercion, slight consideration, unconscionability better

Other problem with never enforcing: Damages speculative; could tell courts to be generous

* + - * 1. To the extent provided by statute
        2. To the extent that justice requires in light of changed positions in reliance on the promise
      1. UCC §2-209: No consideration needed for contract modification at all

1. **Promissory estoppel**
   1. When reliance on a promise, award reliance damages, independent of contract remedies
   2. R. §87, UCC §2-205: No consideration needed for firm offers (offers where promised to be held open)
      1. Would result in a different outcome in *Dickinson*, e.g.
      2. ***Baird***: No promise to leave the offer open, according to J. Hand’s interpretation (dubious)
      3. ***Drennan***: Promise to leave the offer open, binding, according to J. Traynor’s interpretation
         1. Problem with this: Is this reasonable? Allows the contractor to shop around after getting the offer
         2. Alternative solutions
            1. Acceptance by performance when used offer in contract bid, contract exists and bound
            2. Get an option contract by using the bid, contractor could still drop but subcontractor could not
         3. Ultimately, contractor and subcontractor inducing one another, should be no consideration issues
   3. R. §90: When should expect promise to induce and it does, the promise is binding if justice so requires
      1. That is, if the promisee reasonably relies on the promise, the promise can be binding
      2. ***Ricketts***: Money gift, comments about no grandchild should work, quit in reliance, promise enforced
         1. Difference from *Hamer*, no inducement as need not quit job to get money, just reliance
         2. Also, court claims using equitable estoppel pre-promissory estoppel’s establishment
      3. *Johnson* would come out differently under R. §90 as charitable donations now always binding
   4. ***Hoffman***: Attempt to open a Red Owl franchise, chain yanked, a lot of detrimental reliance
      1. Too many gaps to create a contract, says the court, so look to estoppel, reasonable reliance, recovery
      2. If insufficient terms for contract, what’s the basis for reliance? What was promised?
         1. Theory A: They implicitly promised to cover his costs if a deal fell through
         2. Theory B: They implicitly promised to bargain in good faith (both of these invoke a bit of Anglia)
         3. Theory C: Make assumptions based on standard franchise agreements, there was a contract
         4. Theory D: No recovery because reliance is unreasonable and there was no contract
         5. But the court is just vague, thinks was promise of a franchise but terms too vague for contract
      3. Damages: removes award for lost profits from the grocery, but this was really reliance
   5. Equitable estoppel, reliance on misrepresentation
      1. ***Goodman***: distributor represents that franchisor will give franchisee franchise, act in reliance on that
         1. Theory A: Distributor would benefit, consideration, implicit promise to cover expenses, contract
         2. Theory B: Reliance on representations of distributor reasonable, equitable estoppel appropriate
         3. Tort explanations, do not quite succeed
            1. R.2 Torts §526: Fraudulent misrepresentation from lies, no confidence in accuracy or no basis
            2. R.2 Torts §530: Misrepresentation of third person’s intent if meet §526
2. **Immaterial and material breach**
   1. R. §237: One parties remaining obligations are discharged if the other party material breaches
      1. R. §241: Factors to consider in determining whether a breach is material
         1. (a): Deprivation of benefit to promisee
         2. (b): Ease of adequate compensation
         3. (c): If party breaching will “suffer forfeiture” (give up something of value, receive no payment)
         4. (d): Likelihood of cure of the failure, taking into account assurances
         5. (e): Extent to which there is good faith and fair dealing
      2. R. §242: Factors to consider if a material breach discharges the duties of the other party
         1. (a): See §241
         2. (b): If the promisee will prevent reasonable substitute accommodation
         3. (c): If a specific date of performance is not important, unless it is
      3. R. §243: When damages for total breach can be claimed
         1. (1): If the injured party’s remaining duties are discharged
         2. (2): If the breaching party subsequently repudiates
         3. (3): Unless only remaining duty of breaching party is payment, in which case breach is not total
      4. ***Jacob & Youngs***: Build house with Reading pipe, fail to use only Reading pipe, but equivalent quality
         1. Majority: No deprivation of benefit, same quality, “Reading” meant only high quality pipe
         2. Dissent: Explicitly calls for Reading pipe, clause in contract requiring rebuilding, idiosyncratic value
            1. Query whether that clause was void as a penalty
   2. R. §250: Repudiation is an act of statement definitively indicating intent to breach
   3. R. §251: Demand assurance if expect breach, can treat lack of assurance in reasonable time as repudiation
   4. R. §348(2): Recover either difference from market or cost of completion if not disproportionate to value
      1. ***Groves***: Regrade land after rented to gravel miner, plan to sell, high cost and low value to regrade
         1. Majority: “Willful” breach, should have to pay cost of completion, believe idiosyncratic value
         2. Dissent: Cannot have idiosyncratic value, commercial land
      2. ***Peevyhouse***: Coal mining on farm, another regarding clause, again high cost and low value to regrade
         1. Majority: Restoration provision “incidental”, not the main purpose, and market difference so small
         2. Dissent: Should have anticipated cost, probably built into the contract, believe idiosyncratic value
3. **Failure of a basic assumption**
   1. Mutual mistake
      1. R. §§151-2: Mutual mistake on a basic assumption with material effect, avoidance unless bears the risk
         1. §152(2): Materiality takes account of relief by reformation, restitution, etc.
      2. R. §154: Party bears risk if allocated, if limited knowledge but acts as if sufficient, or if reasonable
         1. Might say silence in the contract leaves loss where it lies, lack of risk-conferring condition
            1. What if parties just never thought of it? We can’t know this, go with a simple default rule
         2. Alternatively, might say what parties would have agreed to had they expressed a condition
            1. ***Sherwood***: Consider contract price to see if gambling, conscious gamble implies no mistake

Alternatively, court assumes parties would have had an avoidance clause

* + - * 1. Party in the best position to know should bear the risk

***Nester***: Conscious gamble as to whether wood is valuable, risk implicitly assigned

***Wood***: Same, gamble as to whether stone valuable

Generally, owner in best position to know, *Wood* different had jeweler been an expert

* + 1. R. §155: Mistake of the writing will allow reformation of the contract
    2. R. §157: Negligent lack of knowledge does not foreclose avoidance or reformation
    3. R. §158: When a contract is voided or reformed by virtue of mistake, restitution is available
  1. Unilateral mistake
     1. R. §153: Indiv. mistake allows avoidance if unconscionable or other party knew and risk not assumed
        1. ***Laidlaw***: Not under obligation to reveal, want to encourage parties to invest in knowledge
           1. Other party accepted risk of insufficient information
           2. Different from typo cases because there do not want to encourage overinvestment in care
     2. R. §§159-60: Misrepresentation, preventing another from learning a fact is asserting it does not exist
     3. R. §161: When nondisclosure is equivalent to an assertion that a fact does not exist
        1. (a): When knows necessary to prevent previous assertion from being a misrepresentation
        2. (b): When non-disclosure would be in bad faith and fail to correct other party’s mistake
        3. (c): When knows of a mistake in the writings
        4. (d): When obligated to reveal the fact due to relationship and trust
     4. R. §§162-4: Fraud/misrepresentation block assent, contract voidable if reliance on fraud
  2. Uncertainty about future facts
     1. Cost avoidance: party who could most easily avoid risk bears it
     2. R. §§261, 263: Impracticality, destruction of necessary element
        1. ***Taylor***: Music Hall burns, least cost avoider owner but industry standard was that fire an excuse
     3. R. §265: Frustration of purpose
        1. ***Paradine***: Army destroys land, purpose of rent eliminated, stands for *caveat emptor*
        2. ***Krell***: Apartment rented, view coronation, coronation cancelled, purpose frustrated, voidable