1. Formation & Assent
   * RSC § 18 Manifestation of Mutual Assent
     + Manifestation of mutual assent requires that each party either make a promise or begin/render performance (Meeting of the Minds)
   * RSC § 19 Conduct as Manifestation of Assent
     1. Manifestation of mutual assent may be wholly or partly by written or spoken words, other acts, or by failure to act
     2. Conduct is not effective as MOA unless he intends to engage the conduct and knows /should know the other party may infer assent from his conduct
     3. Conduct may be a MOA even though the actor does not in fact assent -- subject to contract defenses
   * RSC § 22 Mode of Assent
     1. MOMA generally occurs through offer/acceptance
     2. MOMA may occur although neither offer nor acceptance can be identified and the moment of formation cannot be determined
   * Cases
     + **Embry v. Hargadine** [§19] (One year employment contract for salesman; disputed assent) -- Formation requires only a reasonable man intend and understand a contract to be formed regardless of subjective intent
     + **Luck v. Zehmer** [§18] (Real Property sale on napkin while at bar) -- Subjective intent does not override objective manifestations of such intent
2. What Constitutes an Offer?
   * RSC § 24 Offer Defined
     + An offer is the manifestation of willingness to enter into a bargain -- made in such a way to justify another’s understanding that his assent will conclude the bargain
   * RSC § 26 Preliminary Negotiations (Advertisements/ Solicitation of Bids)
     + A manifestation of willingness to enter into a bargain is not an offer if the receiving party knows/should know the person making it does not intend to conclude a bargain until he has made a further manifestation of assent
   * RSC § 29 To Whom an Offer is Addressed
     + The manifested intention determines who has a power of acceptance -- (2) such power may be created in a specified person, specified class of persons, or anyone who makes a specified promise/renders specified performance
   * RSC § 33 Certainty
     + Even if a manifestation of mutual assent is intended as an offer, it canoe form a contract unless the terms are reasonably certain with regard to all material terms
   * RSC § 27 Existence of Contract Where Written Memorial is Contemplated
     + Manifestations of an intention to adopt a written memorial of an agreement does not preclude formation; however, the circumstances may show the agreements are preliminary agreements
   * RSC § 25 Option Contracts
     + An option contract is a promise which meets the requirements for formation an limits the promisor’s power to revoke an offer -- option must be supported by consideration
   * Cases
     + **Empro v. Ball Co.** [§27] (Letter of intent included phrase “subject to incorporation in formal…) -- Preliminary agreements are enforceable only if there is an objective intent to be bound by the terms already settled
     + **Leonard v. PepsiCo** [§26] (Kid tried to buy jet with Pepsi points) -- Absent some clear and plain language to the contrary, advertisements are not enforceable merely because someone accepts the terms
     + **Harris v. Time** [§33/26] (Time mailer offering free watch for opening / trick) -- Advertisements can form unilateral contracts if it (1) calls for specific performance without further communication (2) contains some mechanism for notice of performance) (“Law disregards trifles” doctrine)
3. Revocation
   * RSC § 35 The Offeree’s Power of Acceptance
     + An offer gives the offeree a continuing power of acceptance until that power of acceptance is terminated under § 36
   * RSC § 36 Methods of Termination of the Power of Acceptance
     + Power of acceptance is terminated by 1) Rejection or Counter offer 2) lapse of time 3) revocation by the offeror 4) death/incapacity of one party or by the non-occurrence of any condition of acceptance
   * RSC § 37 Termination of Power of Acceptance Under Option Contract
     + Power of Acceptance under an option contract is not terminated by rejection/ counter-offer, by revocation, or by death/incapacity unless the requirements are met for the discharge of a contractual duty
   * RSC § 42 Revocation by Communication from Offeror Received by Offeree
     + An offeree’s power of acceptance is terminated when the offeree receives a manifestation of an intention not to be bound
   * RSC § 43 Indirect Communication of Revocation
     + Power of acceptance is terminated when the offeree receives knowledge of definite action inconsistent with an intention to be bound made by the offeror
   * Cases
     + **Dickinson v. Dodds** [§43] (Unilateral option contract not supported by consideration; π sold property to another) -- Unilateral contract may be revoked until accepted -- revocation may be communicated through a third party)
     + **Smith v. Wheeler** [§37] (False recital of nominal consideration on one-year option for land) -- False recital of nominal consideration creates an implied promise to pay when can be enforced by the other party -- no revocation
4. Acceptance
   * RSC § 19 Conduct as Manifestation of Assent
     + Manifestation of mutual assent may be wholly or partly by written or spoken words, other acts, or by failure to act
     + Conduct is not effective as MOA unless he intends to engage the conduct and knows /should know the other party may infer assent from his conduct
     + Conduct may be a MOA even though the actor does not in fact assent -- subject to contract defenses
   * RSC § 30 Form of Acceptance Invited
     + Unless otherwise indicated by the language or the circumstances, a offer invited acceptance in any reasonable manner and medium
     + In cases of doubt, offer is interpreted as inviting acceptance by promise or by performance -- at the offeree’s choice (RSC§32)
   * RSC § 63 Time When Acceptance Takes Effect (***Mailbox Rule***)
     + Acceptance is operative as soon as put out of the offeree’s possession, without regard to whether it reaches the offeror but
     + Acceptance under an option contract is not operative until received by the offeror
   * RSC § 61 Acceptance Which Request Change of Terms (***Counter-Offer***)
     + An acceptance which request change or addition to the terms of the offer is not invalidated unless the acceptance is made to depend on assent to the changed or added terms (Could be Acceptance + request/ Acceptance + offer)
   * RSC § 54 Acceptance by Performance; Necessity of Notice (***Unilateral K***)
     + When an offer invited acceptance by performance, no notification is necessary to make acceptance effective unless requested by the offer
     + If one who accepts by performance knows/should know an offeror has no adequate means of learning of performance, the duty of the offeror is discharged unless (a) offeree exercises reasonable diligence to notify the offeror of acceptance (b) offeror learns of performance or (c) the offer indicates notice is not required
   * RSC § 45 Option Contract Created by Part Performance or Tender
     + Where an offer invites acceptance by performance, once you start performance an option contract is created until complete performance
   * RSC § 69 Acceptance by Silence or Exercise of Dominion
     + Silence = Acceptance only when
       - (1) offeree takes benefit (2) with reasonable opportunity to reject (3) and should know compensation is expected
       - Offer allows acceptance and offeree intends to accept w/ silence
       - Where due to previous dealings it is reasonable that offeree should notify the offeror if he does not intend to accept
   * Form Contracts
     + Form contracts in e-commerce require adequate notice and knowing consent for there to be an operative manifestation of assent
     + Accepting a product with full knowledge of the terms constitutes acceptance of the terms
   * Cases
     + **Ardente v. Horan** [§61] (Counter-offer wanting to keep furniture) -- Power of acceptance terminates upon rejection of the counteroffer
     + **Carlill v. Carbolic Smoke Ball Co**. [§54] (Advertisement w/ enough info to be an offer) -- Notice of acceptance need not precede performance
     + **White v. Coriles & Tift** [§54] (Contract for construction work; π brought wood upon estimate) -- Not in enforceable K; no objective manifestation of assent, Δ sought further agreement
     + **Hobbs v. Massasoit Whip Co**. [§69] (Eelskins salesman sent product to repeat customer) -- Business practice = acceptance by silence when offeree takes benefit, knows compensation is expected; and could have rejected
     + **Specht v. Netscape Communications** -- Adequate notice and Knowing consent are required for a manifestation of assent
     + **Register.Com, Inc. v. Verio, Inc.** -- Accepting a product with full knowledge of terms constitutes acceptance of the terms
5. Interpreting Vague/Ambiguous Terms
   * Vague/Ambiguous Definitions
     + Vague terms include disputes that arise over whether and to what extend words used were meant to apply beyond their agreed core meaning
     + Ambiguous terms are those which are susceptible to multiple reasonable meanings
   * RSC § 201 Whose Meaning Prevails
     + If neither party is aware of the meaning of the other attaches, neither is bound by the meaning of the other, even if this means a failure of mutual assent
   * RSC § 202 Rules of Aid in Interpretation
     + Words and other conduct are interpreted as a whole in light of all the circumstances. Unless the parties intentions can be discerned, language is interpreted in accordance with the generally prevailing meaning (Technical terms get prevailing technical meaning)
     + Wherever reasonable, intend is interpreted as consistent with each other and any relevant Course of Performance, Course of Dealing, or Usage of Trade
   * Cases
     + **Raffles v. Wichelhaus**[§201] (Cotton on ship “peerless”) -- When there is a latent ambiguity, courts cannot impose on a party a contract different than what they agreed to
     + **Oswald v. Allen** [§201] (Swiss coins and an old lady) -- When any term used to express an agreement is ambivalent and the parties have understood it in different ways, there can be no contract unless one should be aware of the others meaning
     + **Weinberg v. Edelstein** [§202] (Not my women’s dresses) -- Court unable to ignore a universal trend in dress making (usage of trade) although π may be damaged by the interpretation.
     + **Frigaliment v. BNS** [§202] (What is the meaning of chicken) -- Alternative trade usages favor the most widely accepted; when departing from the norm must be overwhelmingly clear
6. Gap Filling
   * Gap Filling is the process of supplying terms when contracts are silent on a particular issue (Implied in fact/Implied in law)
   * RSC § 34 Certainty and Choice of Terms; Effect of Performance / Reliance
     + Terms may be reasonably certain even if it empowers one or both parties to make a selection in the course of performance
     + Past performance may remove uncertainty and establish an enforceable bargain has been formed
     + Action in reliance on an agreement may make remedies appropriate even though uncertainty is not removed
   * RSC § 204 Supplying an Omitted Essential Term
     + When the parties to a bargain sufficiently defined to be a contract a term reasonable under the circumstances is supplied by the court
       - If the parties objectively intended to be bound -- the court should supply a term; if the parties lacked understanding of the allocation of risk or the gap could be filled by too many reasonable ways-- no contract
   * Cases
     + **Sun Printing v. Remington Paper** [§204] (Paper contract which contained floating price term) -- When important terms are left unfilled, moving party has burden of showing not material; court cant make K from agreement to agree
     + **Wood v. Lady Duff** [§204] (My name is my name) -- obligation may be imperfectly expressed yet instinctive, where such is the case a term will be supplied
7. Form Contracts
   * RSC § 211 Standardized Agreements
     + When a party knowingly manifest his assent to a form contract, he is bound unless the other party has reason to know that knowledge of a term would preclude assent; that particular term is void
     + Taking the product is a manifestation of assent to the terms -- if given sufficient notice and opportunity to reject then one is bound , subject to unconscionability (ProCD)
   * Cases
     + **Carnival Cruise Lines v. Shute** [§211] -- Notice and opportunity mean you are bound regardless if you read terms
     + **Caspi v. Microsoft Networks** [§211] -- in absence of fraud one is bound by form contract; automatic inquiry notice
     + Step-Saver v. Wyse [UCC]
     + ProCD v. Zeidenberg [UCC]
     + Hill v. Gateway 2000 [UCC]
     + Klocek v. Gateway [UCC]
8. Parol Evidence
   * RSC § 209 Integrated Agreements
     + An integrated agreement is a complete and final expression of an intent to be bound. Writing determined (matter/law) in view of completeness and specificity triggers parole evidence unless evidence establishes writing not a complete expression
   * RSC § 210 Completely and Partially Integrated Agreements
     + A completely integrated agreement is a complete/exclusive statement of the terms; whether completely or partially integrated is a matter of law
   * RSC § 213 Effect of Integrated Agreement on Prior Agreement (Parol Evidence Rule)
     + A binding integrated agreement discharges prior agreements to the extend it is inconsistent with them
     + A binding complexly integrated agreement discharges prior agreements to the extend they are within its scope
     + Incomplete expressions may be rendered inoperative or incomplete by parol evidence
   * RSC § 214 Evidence of Prior or Contemporaneous Agreements/Negotiations
     + Extrinsic evidence is admissible to establish 1) the writing is or is not an integrated agreement 2) complete or partial integration 3) the meaning of the writing 4) grounds for invalidation 5) grounds for granting/denying remedies
   * RSC § 216 Consistent Additional Terms
     + Evidence of a consistent additional term is admissible to supplement a partially integrated agreement
     + A writing is partially integrated if it omits a consistent additional term which has 1) separate consideration or is 2) naturally/reasonably omitted
   * Cases
     + **Thompson v. Libbey** [§213](logging contract) -- completeness is judged as a full expression within the four corners; if all material terms are present the writing is assumed to be complete.
     + **Brown v. Oliver** [§210](Hotel Furniture) -- General principle/if element contained in writing then expression complete; if missing to material fact then evidence admissible
     + **Pacific Gas v. GW Thomas** [§210](indemnity clause/stream turbine) -- rational interpretation requires atleast a preliminary consideration of credible evidence (Matter/law)
     + **Trident Center v. Conn General Life Ins** [§210](LA Office building) -- establishes broad reading of Pacific Gas requiring consideration of all extrinsic evidence -- wrong
9. Statute of Frauds
   * RSC § 110 Classes of Contracts Covered
     + Contractual duty of an executor for duty of his decedent
     + Contractual duty to answer for the duty of another (Surety)
     + Contract made upon consideration of marriage
     + Contract for the sale of land
     + Incapable of preforming within one year
     + Goods over $500; securities; property worth over $5000
       - Writing must contain all material terms and be signed by the person whom enforcement is sought (RST§131)
   * RSC § 125 Contract to Transfer, Buy, or Pay for Interest in Land
     + Any contract for land is within SOF regardless of whom the transfer is to be made. Once transfer has been made the promise can be enforced regardless of SOF
   * RSC § 129 Action in Reliance; Specific Performance
     + Specific Performance may be enforced on contracts for sale of land notwithstanding SOF if there has been reasonable detrimental reliance and justice requires enforcement
   * RSC 130 Contract Not to be Performed Within a Year
     + When one party completes performance, the one year provision does not prevent enforcement of the promise
   * Cases
     + **Riley v. Capital Airlines, Inc.** [§129] (K for methane canceled by Δ after additional tanks brought) -- Although K is canceled going forward, entitled to reasonable good faith reliance damages
     + **Ohanian v. Rent-a-Car** [§§129, 110] (Rental salesman for life) -- Contract was capable of performance within one year therefore SOF does not apply; K enforced
10. Bargain Theory
    * RSC § 71 Requirement of Exchange; Types of Exchange
      + Consideration requires mutual intent + Inducement and can be given through third parties. (Intent evidence by objective gain or loss undertook)
    * RSC § 24 Offer Defined -- Comment B (Gratuitous gifts)
      + Promise performable on a certain contingency is not enforceable -- there must be an element of exchange
    * RSC § 81 Consideration as Motive/ Inducing Cause (Ulterior Motive)
      + Ulterior motives for inducement do not prevent it from being consideration
    * RSC § 79 Adequacy of Consideration; Mutuality of Obligation
      + There are no requirements of equivalence in the values exchanged or mutuality of obligations
    * RSC § 364 Effects of Unfairness
      + Specific Performance or injunction will be refused if such relief would be unfair because the exchange is grossly inadequate or the terms of the contract are otherwise unfair
    * Cases
      + **Johnson v. Otterbien Univ**. [§24](Promise to make gift) -- Promises that create no duties before performance are generally gratuitous promises
      + **Hamer v. Sidway** [§71]( Uncle pay nephew to stop smoking/ drinking) -- Consideration may be supported by undertaking some detriment
      + **Kirksey v. Kirksey** [§24] (Widowed sister-in law/ territory claiming scheme) -- No duty to transfer land because promise not supported by consideration -- mere gratuitous promise
      + **Dahl v. Hem Pham**. [§71](New drug trials for 1 year supply) -- Consideration in unilateral K is performance; duties are created upon performance.
      + **US v. Stump Home Specialties** [§79](Posner) -- Law does not require that consideration be adequate or equal in weight to what the accepting party is giving up
11. Past Consideration/Moral Consideration
    * RSC § 86 Promise for Benefit Received
      + A promise made in recognition of a benefit previously received is binding to the extent necessary to prevent injustice
      + A promise is not binding under (a) if the benefit was a gift, promisor wasn’t made unjustly enriched, or to the extent the promises’ value is disproportionate to the benefit
    * Cases
      + **Moore v. Elmer** [§86] (I bet you die… ☹) -- Past performance cannot be consideration for a new promise unless the parties agreed that compensation for performance would be rendered at a later date (preexisting duty)
      + **Mills v. Wyman** [§86] (Father refuses to pay (adult) sick son’s medical bills) -- No moral duties except voluntary revival of an inoperative obligation
12. Modification and the Preexisting Duty Rule
    * RSC § 89 Modification of Executory Contract
      + A promise modifying a contractual duty under a contract not fully performed is binding if such is fair and equitable in view of circumstances not anticipated ex ante; to the extent provided by statute or to the extent justice requires
    * Cases
      + **Stilk v. Myrick** [§89] (Sailor pay increase when two people deserted) -- There was a preexisting duty to complete voyage -- enforceable modification required additional consideration; one cannot use emergency to force modification
      + **Alaska Packers’ Assn. v. Domenico** [§89](Alaska fishing trip) -- Where a promise is simply a repetition of a subsisting legal duty, it cannot be consideration for a new promise
13. Promissory Estoppel
    * RSC § 90 Promise Reasonably Inducing Action or Forbearance
      + A promise which the promisor should reasonably expect to induce good faith action/forbearance by the promisee and which produces such action is binding to the extent justice requires
      + A charitable subscription or marriage settlement is binding under (1) without proof the promise induced any action
    * Cases
      + **Ricketts v. Scothorn** [§90](Granddad pays GD to stop working) -- When one relies on a promise to their detriment and such promise was given with the intent to induce such detriment -- lack of consideration does not void agreement
      + **Allegheny College v. Bank of Jamestown** [§90]-- Charitable subscriptions (promises to pay upon death through estate) are enforceable even if unbargained for
      + **Goodman v. Dicker** [§90] (radio franchise denied after reliance)--Justice requires one who acts to his detriment upon good faith reliance which the promisor is aware is protected.
      + **Hoffman v. Red Owl Stores Inc**. [§90](Grocery store chain)--Promissory estoppel does not require all terms be comprehensive; reliance measures can be given without such
14. Implied Duties / Warranties
    * RSC § 205 Duty of Good Faith Performance
      + Every Contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.
    * Cases
      + **Goldberg Corp. v. Levy** [§205] (Gross-profit clause that allowed termination) -- When business diversion is taken solely to drop sales and cancel K, GFP is breached
      + M**utual Life NY v. Tailored Woman** [§205](Fur Business/5th floor) --The exercise of contractual rights (although in manners unanticipated) does not constitute breach of GFP
      + **Stop&Shop v. Ganem** [§205] (Grocery Store w/ % payment) -- Omission of a term is evidence no such term exist; fair-market rent suggest *risk allocation* didn’t require operations and the duty cant be implied w/o clear implication
      + **Great American Cookie Co** [§205](Posner) -- Breach of GFP is a negative duty -- broken when a contractual provision is invoked dishonestly for a purpose contrary to those which the contract is made.
      + Step-Saver v. Wyse [UCC]
15. Anticipatory Repudiation
    * RSC § 250 When a statement or Act is a Repudiation
      + A party’s language must be sufficient positive and reasonably interpreted to mean the party will not or can not perform
      + Mere expression of doubt is not enough but language which reasonably interpreted is a statement of intention not to perform except on extra-conditions = repudiation
    * RSC § 251 When Failure to Give Assurance May Be Treated as Repudiation
      + Where reasonable grounds arise to believe there will be a material breach one may demand adequate assurance of due performance and may suspend any performance which he has not received the agreed exchange until assurances are met
      + Failure to provide assurances in reasonable time may be repudiation and entitle one to damages
    * Cases
      + **Hochester v. Edgar**[§250](Courier on 3-month journey) -- After renunciation of the agreement; π is free to consider himself free from and obligations and sue for breach
      + **Harrell v. Sea Colony, Inc** [UCC] (Condo sale) -- Anticipatory repudiation requires a definite and unequivocal manifestation of intention not to perform -- not mere request
      + **Scott v. Crown** [UCC] (Contract for sale of wheat/ demand through agent) -- Demand for assurances must be clear and written; cannot demand assurance beyond the contractual duties established; incorrect demand for assurance may lead to anticipatory repudiation by demanding party
16. Material Breach
    * Material Breach from Common Law
      + Question of whether the nature of the breach jeopardized the promisee’s confidence in future performance -- similar conduct to anticipatory repudiation but w/o forewarning
      + Some contracts expressly empower victim of breach to cancel contract -- absent such provision the victim of a breach cannot cancel if there has been substantial performance
        - Reference to how much performance has been completed and how much is uncompleted (Lane)
    * RSC §241 Circumstances Significant in Determining Whether A Failure is Material
      + In determining materiality the following is important: 1) extent will deprive injured of expected benefit 2) extent injured party can be adequately compensated for benefit he will be deprived and 3) extent breaching party will suffer
      + If not material, then anticipatory repudiation and other party can ask for assurances and then stop performance. If material then all duties discharged not just suspend performance
    * Cases
      + **Lane Enterprises v. LB Foster** [§241](Contract for special steel coating)--Questioning ability to meet material term of contract are grounds for assurances, failure to provide allows party to seek third party to coat steel and sue for difference. Minor breach>Assurances>If no assurance>Material Breach
17. Improper Means: Misrepresentation
    * RSC § 159 Misrepresentation Defined
      + A misrepresentation is an assertion that is not in accord with the facts
    * RSC § 162 When a Misrepresentation is Fraudulent or Material
      + A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest assent and the maker
        - 1) knows/believes assertion not in accord with the facts
        - 2) does not have confidence that he states or implies for the assertion
        - 3) knows he does not have the basis that he states or implies for the assertion
      + A misrepresentation is material it it would likely induce a reasonable person to manifest assent or if the maker knows that it would likely induce the recipient to do so
    * RSC § 164 When a Misrepresentation Makes a Contract Voidable
      + If assent is induced by either a fraudulent or material misrepresentation which the recipient was justified in relying, the contract is voidable
      + If assent is induced by a 3rd party is fraudulent or material misrepresentation which the recipient was justified in relying, the contract is voidable unless the other transacting party in good faith without reason to know of the misrepresentation gives value or materially relies to their detriment
    * RSC § 167 When a Misrepresentation is an inducing cause
      + Inducing cause = substantial contribution to the decision to manifest assent
    * RSC § 168 Reliance on Assertions of Opinion
      + An assertion of opinion is one that expresses only a belief without certainty or expresses only a judgment as to quality, value, authenticity, or similar matters.
      + Within reason, recipient of an assertion of opinion mat interpret that assertion as 1) the facts known to that person are not incompatible or 2) that he knows facts sufficient to justify the opinion
    * RSC § 169 When Reliance on an Assertion of Opinion is Not Justified
      + One is not justified in relying on assertions on opinion unless 1) relationship 2) expertise 3) particularly susceptible
    * Cases
      + **Vokes v. Arthur Murray**[§§168, 162](Old lady dance lessons) -- A statement by a party having superior knowledge may be regarded as a statement of fact although it would be considered opinion if the parties were on equal terms -- unequal opportunity to become appraised of the truth
18. Improper Means: Economic Duress
    * Common Law
      + Duress is based on Δ’s conduct not π’s circumstances/necessities; if the act would not constitute duress w/o the surrounding circumstances then it cannot under the circumstances. Δ must interfere with 3rd party monies or otherwise contribute to the circumstances (Headley)
    * RSC § 175 When Duress by Threat Makes a Contract Voidable
      + If assent is induced by an improper threat that leaves the victim with no reasonable alternative; the contract is voidable
      + If assent induced by 3rd party improper threat; contract voidable unless good faith reliance w/o reason to know
    * RSC § 176 When a Threat is Improper
      + Threat is improper if threatens 1)crime or tort 2) criminal or civil prosecution 3) threat results in breach of GFP
      + Threat is improper if resulting exchange is not on fair terms and 1) threatened action results in harm which does not benefit the making party 2) effectiveness of the threat is significantly increased by prior unfair dealings or 3) threatens use of power for illegitimate ends
    * Cases
      + **Hackley v. Headley**[§176](Logging contract where π was shorted a disputed $2200) -- When a party threatens something which he has a legal right to do; there can be no duress
      + **Austin Instrument v. Loral Corp**[§176](Gov contract for radar, 40/40 parts) -- Economic duress happens when one party has 1) threatened to breach by withholding needed goods 2) goods cannot be obtained from another source and 3) the ordinary remedy for breach would not be adequate (Sorta different)
      + **US(Crane) v. Progressive Enterprises**[§175](sub-part quote which expired for gov contract; price at time of shipment) -- to claim economic duress, the buyer must atleast display protect against the higher price to put seller on notice the modification is not freely entered into; gave objective assent so secret intention can not override that assent at a later date
19. Improper Means: Undue Influence
    * RSC § 177 When Undue Influence Makes a Contract Voidable
      + Undue influence is the unfair persuasion of a party 1) who is under the domination of the persuading person or 2) who by virtue of special relationship is justified in assuming the party will not act in a manner inconsistent with their own welfare
      + If a party’s assent is induced through undue influence, the contract is voidable -- voidable if induced by third party unless good faith reliance w/o reason to know
    * Cases
      + **Odorizzi v. Bloomfield School District**[§177](Gay teacher) -- Undue Influence includes taking unfair advantage of another’s weakness of mind or taking a grossly oppressive and unfair advantage of another’s necessities or distress -- in this sense it is over-persuasion. Factors include 1) unusual time and place 2) insistence on quick action/consequences to delay 3)many v one 4) absence of third party advisors and unwillingness to allow consultation
      + Other case?
20. Improper Means: Unconscionability
    * RSC § 208 Unconscionable Contract of Term
      + If a contract or term is unconscionable a court may 1) refuse total enforcement 2) refuse specific enforcement 3) limit application of the term to avoid unconscionable results
        - C(a) --determination made in light of all circumstances
        - C(c) -- gross disparity in the values exchanged may be evidence of unconscionability
        - C(d) -- gross inequality + unreasonably favorable terms
    * Cases
      + **Williams v. Walker-Tomas Furniture** [§208](Rent-A-Center term) --gross inequality of bargaining power + unreasonably favorable terms may = unconscionable -- reasonably opportunity to understand terms?
      + **Baby M** [§208](Surrogate mother unhappy with $10,000) -- Δ was fully aware of the terms and assumed the risk; such is not grounds to void
      + **In re: RealNetworks**[§208](Failing to provide fair notice of contents and reasonable opportunity to read/understand the terms are grounds for procedural unconscionability
      + **Discover Bank v. Superior Court**[§208](compel arbitration on individual basis) -- When a waiver shields Δ from responsibility for its own fraud or willful injury; such is unconscionable ///***Dissent***--Class actions are a means to enforce law not to be construed with substantive law to be enforced
      + **ATT Mobility v. Concepcion** [§208](SCOTUS overrules *Discover Bank*) -- A court may not rely on the uniqueness of an agreement to arbitrate as the basis for state-law precedent that enforcement is de facto unconscionable; preemption requires the enforcement of arbitration clauses
      + **Ryan v. Weiner**[§208]-- Courts look at 1) sophistication of parties 2) notice of unfair terms 3) unequal bargaining power
21. Mutual Mistakes
    * RSC § 151 Mistake Defined
      + A mistake = belief/assumption not in accord with the facts
    * RSC § 152 When Mistake of Both Parties Makes a Contract Voidable
      + When mistake of both parties at formation as to a basic assumption has a material effect on the agreed exchange of performances; the contract is voidable (except under §154)
      + Account is taken of any relief by way of reformation, restitution, or otherwise
    * RSC § 154 When a party Bears the Risk of a Mistake
      + A party bears the risk when 1) it is expressly allocated to him 2) conscious ignorance 3) reasonable in the circumstances
    * RSC § 157 Effect of Fault of Party Seeking Relief
      + Fault in failing to know or discover the facts ex ante does not bar one from avoidance or reformation -- unless such failure amounts to a breach of GFP or reasonable standards for fair dealing
    * RSC § 158 Relief Including Restitution
      + (2) court may grant relief on such terms as justice requires
    * Cases
      + **Sherwood v. Walker**[§154](barren cows) -- A party who has given assent founded upon mistake of a material fact, such as subject matter of the ale, price, or some collateral fact materially inducing the agreement, may avoid the contract
22. Unilateral Mistakes
    * RSC § 153 When Mistake by One Party Makes a Contract Voidable
      + When unilateral mistake at formation as to a basic assumption has an adverse material effect on the agreed exchange of performances, K is voidable if the party does not bear risk under §152 and 1) enforcement would be unconscionable or 2) other party had reason to know of or caused the mistake
    * RSC § 160 When Action by One Party is Equivalent to an Assertion (Concealment)
      + Action intended or likely to prevent another from learning a fact is equivalent to an assertion the fact does not exist
    * RSC § 161 When Non-Disclosure is Equivalent to an Assertion
      + Non-disclosure of a known fact is equivalent to an assertion the fact does not exist only if 1) disclosure is necessary to prevent conflict with past assertion 2) disclosure would correct a material mistake and non-disclosure is a breach of GFP 3) disclosure would correct mistake as to contents or effects of an K 4) where the other person is entitled to know due to a special relationship of trust/confidence
    * Cases
      + **Laidlaw v. Organ**[§160](War of 1812/ sale of tobacco) -- Where information is equally accessible to both parties in due diligence, parties are not bound to communicate such information
23. Impracticality and Frustration of Purpose
    * RSC § 261 Discharge by Supervening Impracticality
      + Where, after formation, performance is made impracticable without fault by the occurrence of an event the non-occurrence of which was a basic material assumption -- duty to perform is discharged unless language or custom indicate the contrary
    * RSC § 262 Death of a Party
      + If a person is necessary for performance, his death / incapacitation is DFI
    * RSC § 263 Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance (*De Facto Impracticality*)
      + If a specific thing is necessary for performance, its failure to come into existence, destruction, or material deterioration is DFI
    * RSC § 265 Discharge by Supervening Frustration
      + Where, after formation, a party’s principle purpose is substantially frustrated without fault by an event the non-occurrence of which was a basic material assumption, remaining duties are discharged unless language/custom indicate the contrary
    * Cases
      + **CNA v. Arlyn Phoenix** [§262](Movie star drug over-dose) -- Death renders a personal services contract impossible to perform in all situations
24. In general
    * RST § 346 Availability of Damages
      + An injured party has right to damages for any breach by a party to the contract unless the claim for damages has been suspended or discharged
      + If the breach caused no loss or the amounts not proved under the rules of this chapter, a small sum fixed w/o regard to the amount of loss will be awarded as nominal damages
25. Expectation Damages
    * RST § 347 Measure of Damages in General (Loss of Value in Performance)
      + Subject to the three limitations -- the injured party has a right to damages based on his expectation interest ***as measured by*** (a) expected value ***plus*** (b) any other loss including incidental or consequential loss caused by the breach ***minus*** loss avoided from not having to perform
    * RST § 348 Alternative to Loss in Value of Performance (Cost of completion or diminution in value)
      + If the breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty -- he may recover damages based on
        - (a) the diminution in market value caused by the breach
        - (b) the reasonable cost of completing performance if that loss is not clearly disproportionate to the probable loss of value
    * Substantial Performance w/ regard to Damages (JYK)(GJW)
    * Cases
      + **Hawkins v. McGee** (Surgery on hairy hand) -- Damages = expected value - actual value -- includes profit prevented by breach, losses sustained, and other reasonably anticipated damages - losses prevented by preach
      + **Sullivan v. O’Connor** (Nose job gone wrong) -- When a person is put trough more pain than expected had performance been as expected -- the difference is recoverable as a proper part of expectancy value
      + **Jacob & Young v. Kent** [§348] (Reading pipe in the house) -- When a contract has been substantially performed, the remedy resulting from the breach may be mitigated to the difference in value from the goods to be attained and performance value (diminution in value)
      + **Groves v. John Wunder Co.** [§348] (Gravel screening company -- Grade A land) -- Where a breach is willful (bad-faith), substantial performance does not mitigate damages
      + **Peevyhouse v. Harland Coal Mining** (Strip mine failed to restore the land) -- When 1) the provision breached was incidental to the main purpose and 2) the relative economic benefit from performance is grossly disproportionate to the cost of performance, damages are limited to diminution in value from incomplete performance
26. Reliance Damages
    * RST 349 Damages Based on Reliance Interest
      + As an alternative to §347; injured party has a right to damages based on his reliance interest including expenditures made in preparation for performance or during performance -- less any loss avoided the breaching party can show with reasonable certainty
      + Cases
        - **Anglia TV v. Reed** [§352] Listed in Certainty of harm -- applies reliance measure when it is impossible to measure expectancy
27. Restitution Damages
    * RST § 371 Measure of Restitution Damage
      + If a sum of money is awarded to protect a party’s restitution interest, it may as justice requires be measured by 1) the reasonable value of the benefit received by in terms of what it would have cost him to obtain the same from another person or 2) the extend to which the other’s property has been increased in value or his other interest advanced
        - Restitution is usually a better remedy when the market price > K price
    * RST § 373 Restitution When Other Party is in Breach
      + (b) A party has no right to restitution if he has fully performed and the other party has fully performed except for nonpayment of a definite sum of money
      + (a) A party is entitled to restitution for any benefit that he has conferred on the other by way of part performance or reliance on any material breach
    * RST § 374 Restitution in Favor of Party in Breach
      + Breaching party can recover the value of work performed less damages caused by thee breach (value measured by the lesser of the K price or market price)
    * Cases
      + **Neri v. Retail Marine Corp** [§???] (Boat dealer kept deposit after K to buy was canceled) -- Retail dealers with an unlimited supply of standard-priced goods are entitled to recover net profit of one sale in the event of a breach of contract to buy
      + **Vines v. Orchard Hills** [§374] (Condo K breached but condo resold for higher value) -- only if breaching party meets burden that innocent party has sustained a net gain may a claim for unjust enrichment be sustained -- no liquidated damages if no damage whatsoever flowed from breach
      + **Britton v. Turner** [§374] (Independent contractor leaves job early) -- π entitled to value of work completed minus the damage caused
28. Specific Performance
    * General Rule
      + Equitable relief available due to the inadequacy of monetary damages to in placing the injured party in the place he would have been in
    * Land
      + SP is the default rule for land -- damages are inadequate b/c land is presumed to be unique (Loveless v. Diehl)
    * Unique Goods
      + SP is also available is the goods are unique or in circumstances arising under UCC § 2-716
      + Uniqueness refers to the difficulty of replacing -- transaction cost are a good way of judging replaceability/uniqueness of a good
    * Personal Service Contracts
      + Personal service contracts are not subject to specific performance due to “indentured servitude” problems
      + Injunction from performing talents elsewhere have been granted in some circumstances (*Chicago Coliseum v. Dempsey*)
    * Cases
      + **Loveless v. Diehl** -- established land is presumed unique
      + **Scholl v. Hartzell** -- Since the corvette is not unique π must file monetary damages; even if it is rare it is possible to find elsewhere (unlike *Sedmark*)
      + **Sedmark v. Charlie’s Chevrolet** -- Sedmark’s have no adequate remedy at law because they cant get another of this kind, year, mileage, condition, single ownership without considerable expense, trouble, delay, or inconvenience
29. Three Limitations on Damages
    * Generally
      + Damages are recoverable if 1) the damage was reasonably foreseeable ex ante 2) can be measured with reasonable certainty 3) and the injured party reasonably avoided damage flowing from breach
    * Foreseeability of Harm
      + RST § 351 Unforeseeability and Related Limitations on Damages
        - 1) Damages the breaching party did not have reason to foresee as a probable result of the breach at formation are not recoverable
        - 2) Loss may be foreseeable a) in the ordinary course of events b) as a result of special circumstances the breaching party had reason to know
        - 3) Court may limit foreseeable damages by excluding recovery for loss of profit, allowing for good-faith reliance or other remedies if it concludes justice so requires to avoid disproportionate compensation
      + Cases
        - **Hadley v. Baxendale** [§351] (mill shaft delayed in transit) -- Where special circumstances are not communicated, the damage cannot reasonably e considered a foreseeable consequence -- only those reasonably foreseeable are recoverable
        - **Martinez v. Southern Pacific** [§351] (Surface mining equipment delayed in transit) -- Loss profits are not recoverable, but capital goods have a foreseeable use value equal to the rental value or an interest value which is foreseeable and recoverable.
    * Certainty of Harm
      + RST § 352 Uncertainty as a Limitation on Damages
        - Damages are not recoverable for loss beyond an amount the evidence permits to be established with reasonably certainty
      + Cases
        - **Chicago Coliseum Club v. Dempsey** [§352] (White heavyweight champ repudiates champ to fight black champ) -- Damages for loss of profit (expectancy) are not susceptible to certain determination, therefore reliance damages are recoverable
        - **Anglia TV v. Reed** [§352] (Dad from Brady Bunch canceled performance in England) -- π may claim pre-formation expenditures provided they would reasonably be in contemplation of the parties as likely to be wasted if the contract was broken -- when expectancy cannot be proved with curtained reliance interest allows recovery of those reasonably in contemplation of the parties at formation
    * Avoidability of Harm
      + RST § 350 Avoidability as a Limitations on Damages
        - Damages that could have been avoided without undue risk, burden, or humiliation are not recoverable except to the extent that he has made reasonable but unsuccessful efforts to avoid loss
      + Cases
        - **Rockingham County v. Luten Bridge** [§350] (After canceling bridge for political reasons, π completes bridge) -- After notice of repudiation π has duty to not increase the damages flowing from the breach -- no right to complete performance to pile up damages
        - **Shirley Parker v. TCFFC** [§350] (Canceled musical / western film offer) -- Employees are not required to seek/accept different or inferior employment to mitigate damages -- Δ must show employment was substantially similar to that deprived of
        - **Neri v. Retail Marine Corp** [§??] Here in syllabus -- place above with restitution
30. Contracting Around the Default Rule
    * RST § 355 Punitive Damages
      + Punitive damages are not recoverable unless the conduct constituting the breach is also a tort for which punitive damages are recoverable
    * RST § 356 Liquidated Damages
      + Damages for breach may be stipulated and liquidated in the agreement only at an amount reasonable in the light of anticipated or actual loss caused by the breach and the difficulty of proof of loss (Posner says must reference)
      + A term fixing unreasonably large liquidated damages is unenforceable as contrary to public policy as a penalty
    * Cases
      + **Kemble v. Farren** [§357] (Theater sues actor for nonperformance under LD clause) -- When a very large sum becomes immediately payable in consequence of a minor breach, courts have always granted relief by directing juries to assess the real damages sustained
      + **Lake River Corp v. Carborundum** [§356] (Contract breach between corporations) -- LD clauses must be a reasonable estimate at formation of likely damages; the need for estimation must be shown by reference to the difficulty of measuring damages ex post
        - If damages are east to determine ex post or estimate greatly exceeds reasonable upper estimate -- then it is a penalty clause
        - Posner calls refusal to enforce penalties paternalistic at best and refusal overlooks cost/benefit analysis by party & value of clause
      + **Wassenaar v. Towne Hotel** [§356] (Hotel employment contract -- LD clause & other employment) -- Once a liquidated damages clause is found to be reasonable, it cannot be recalculated on mitigation of damages grounds
31. Tortious Interference with a Contract
    * To be liable for inference with contractual relations, actor must 1) have knowledge of the contract and 2) actively persuade contracting party to breach
      + Knowledge doesn’t require appreciation of whether agreement is binding
    * Punitive damages under a tort claim are available

Five part analysis to checklist

* + Was there formation?
  + What are the terms?
  + Was there a breach?
  + Are there defenses to the contract?
  + What are the remedies flowing therefrom?