Epstein, Contracts, Fall 2011

Points to keep in mind:

* Remember reputational effects – don’t sue just to make a quick buck
* Good faith is crucial – what determines whether you can sue someone for breach if did it in good faith?
* There’s a bias toward interpreting Ks such that they are enforceable
* Purpose of K law is to put innocent party in as good position as had K been performed (expectation), or if impossible, at least to put him in as good a position as had he not entered into the K (reliance). But don’t get any damages if expectation would have been –ve.
	+ If you get expectation damages (essentially fulfillment of the K), you don’t also get reliance costs b/c those were expected to be incurred to earn $$ on the K.
	+ If you get reliance damages, they can’t exceed the value of the K, otherwise that means it was a losing K.
* Mention when there’s a knife-edge problem (usually there is) = not sure which party is in breach
* In contract cases, assume the other party is a scoundrel
* Posner prefers expectation to reliance damages b/c forces the breacher to internalize the cost he imposes on the other party. But if breacher stands to gain more than innocent party would lose, that’s **efficient breach** and he should do it. Good b/c economically efficient, but bad if (1) K was precursor to others, (2) K had subjective value, or (3) cost of renegotiation is high. Should renegotiate instead. Also if expectation damages are always allowed, can cause overreliance.
* If no actual damage results from breach, there’s no grounds for suit (e.g. lack of 1st class judges)
* Expectation and reliance damages can cause overreliance where the contractee does other transactions while banking on the first one and holding contractor liable for the consequential damages if he breaches. To prevent this,
	+ Innocent party must mitigate (e.g. cover, find alternative employment)
	+ Breacher only liable for reasonably foreseeable damages
	+ If breach would be especially costly, innocent party must take extra precautions (*Muldoon v. Lynch*) or tell the other party at time of contracting (*Hadley*)
	+ **Epstein:** Include clauses ex ante that specify what the breacher is responsible for
* If buyer repudiates 🡪 don’t subtract out overhead from damages to seller (would have incurred this anyway)
* Obvious, but when you breach you don’t get your reliance costs, but can get restitution (either the value to the owner or the amt you put in, whatever is less so result favors innocent party)
* Contract requires:
	+ Bargained-for exchange (UNLESS merchants trade boiler-plate forms🡪knock-out rule)
	+ Consideration
		- If not consideration, then at least reliance. Injured party can then use promissory estoppel to get expectation damages, or only reliance if a court finds that justice so requires. [equitable estoppel says that you can’t say you didn’t do something that you did.] Without either cons. or reliance, is a bare promise
* Questions to ask of a fact pattern:
	+ Enforceable contract?
		- If yes, reliance is lower bound, and can get expectation damage if can prove it. Expectation subsumes reliance.
		- If no, restitution if there’s unjust enrichment and/or mutually known expectation of compensation.
	+ When did breach occur?
		- After partial performance (must always try to mitigate):
			* Buyer breached before benefit conferred on buyer 🡪 expec. damages
				+ When buyer breaches, expec. D is profit + reliance costs
			* Seller breached before benefit conferred on seller 🡪 expec. damages
				+ When seller breaches, expec. D is either [cost of cover - K price + incidentals - **expenses saved**; get CD if can’t cover] or [K/market price differential w/o CD]

The latter could either mean (1) cost of completion; or (2) market value of completed contract

* + - * + If all of buyer’s costs incurred before K signed or after breach 🡪 no damages
			* Breach occurs after some benefit conferred 🡪 K damages, but breacher can get restitution subtracted from the damages
		- After full performance 🡪 must pay remainder of unpaid contract price
	+ Damages foreseeable and communicated?
	+ Winning or losing contract?
		- Innocent party gets rel. cost - sum of expected loss from the bad venture
		- If benefit conferred, breacher gets restitution subtracted out of those damages
* Promise to do a successful medical operation (*Hawkins v. McGee*)
	+ **BL:** Only award damages for failure to perform successful operation, not for pain & suffering or negative impacts of operation
		- Expectation damages = value of perfect hand - value of injured hand + other fairly anticipated consequences that couldn’t be avoided w/ reasonable care
	+ **Epstein:** Consider social context – patients accept risk associated w/ operations

BREACHING BUYER, NO BENEFIT CONFERRED ON BUYER

* Construction contract, contractee (buyer of the construction product) repudiates (*Luten Bridge*)
	+ **BL:** Award **expectation damages (profit** (inc. overhead) **+ reliance costs)**. Innocent party has responsibility to mitigate – stop working after the breach & not incur further costs.
* Employment contract, employer repudiates (*Shirley MacLaine*)
	+ **BL:** Employee gets anticipated salary plus interest, but must try to mitigate by accepting comparable employment. Should incentivize mitigation through severance package.
		- If employee gets unemployment or ins. payment b/c of the termination, doesn’t get deducted from what employer must pay b/c the “collateral source” rule from torts allows punitive penalties in this instance. But there must be bad faith.
* Contract to sell goods, buyer repudiates (*Neri v. Retail Marine*)
	+ **BL (**2-703**):** Repudiation can be either non-acceptance of goods, or failure to pay. If the repudiation results from a substantial breach by the seller, buyer has a right to repudiate. If the seller doesn’t breach, or the breach is minor, buyer’ repudiation is wrongful and seller’s remedies can include:
		- Cancelling the contract
		- Withholding delivery
		- Stopping delivery by third party deliverymen
		- Re-selling to a third party and recovering any damages the resale doesn’t cover
		- If buyer improperly rejects goods, seller recovers damages (2-708)
			* Either damages = (1) market/contract differential + incidentals - benefit conferred on seller (e.g. the down payment if one was made) and amount saved from not having to do the deal; OR, in lost volume case, (2) expected profit (include overhead) + incidentals - benefit conferred on seller and amount saved from not having to do the deal.
				+ #2 is used in *Neri* b/c market price didn’t change so market/contract differential is zero. [In *Vines v. Orchard Hills*, buyer’s repudiation benefited seller so seller gets no damages (including no LD). Buyer gets down payment back. **Epstein:** Not worth the cost of litigating. Since value of the house could have gone up or down, just award the LD so long as is reasonable.]
				+ Seller should have to prove that would have been profitable for him to produce/sell the unit involved in the contract.
		- If buyer accepts but doesn’t pay for the goods, or if seller can’t resell the goods, seller recovers the price (2-709):
			* Seller must hold for the buyer the goods in questions.
		- (2-710, 2-715): Seller never gets CD b/c can always cover by borrowing.

BREACHING SELLER

* Construction contract, contractor breaches (*Groves v. Wunder*; *Swedish Church*)
	+ **BL:** Can’t cover, so expectation damages = either (1) cost of completion or (2) difference in market value had work been completed. Can only apply (1) if not disproportionate to probable loss of value.
		- *Peeveyhouse*: Cost of completion would have been way higher than the difference in market value. Since the *remedial work was merely incidental* to the point of the K, only have to pay difference in market value.
		- 352:Careful not to overcompensate innocent party. No speculative damage awards, e.g. for a book, game, or business w/ no prior sales and no comparison point – but use expert testimony to try to prove what profits would have been.
	+ **Epstein:** If subjective value, damages = cost of completion; if no subjective value, damages = market value had work been completed (diminution value)
		- If market value of finished product drops mid-contract, parties should renegotiate contract price
	+ The other way to pick btwn the two is to ask what the parties would have agreed to ex ante had they foreseen the change that led to the breach.
* Contract to participate in an event, participant breaches (*Dempsey*; *Anglia Television*)
	+ **BL:** Expectation damages if you can reasonably estimate them (formula is profit = revenue - cost). If not, then reliance damages are the lower bound.
		- Reliance is all expenses between signing of contract and the other side’s breach (as long as expenses fall under standard industry practice – see *Globe Refining v. Landa*). If expenses incurred prior to signing of contract, these are at your risk until the contract is signed, after which, they are included in reliance.
			* *Anglia TV* disagrees – pre-K expenditures get included in rel. damages. The industry context is important.
	+ **Epstein:** Need to be creative to estimate expectation damages.
* Contract to sell goods, seller breaches (*Acme Mills*)
	+ **BL (**2-712**):** Either (1) cover (in a fungible market), in which case damage = cost of cover - contract price + incidentals - **expenses saved**. Breacher must notify of breach to enable mitigation of damages. If innocent party can’t find cover that is substantively equivalent, gets consequential damages. Alternative is (2) damages = contract/market price differential (at time of breach) without CD.
		- If cover cost or contract/market price difference is –ve b/c market price falls, buyer gets no damages b/c is better off w/o the contract (like in *Acme Mills*)
		- If goods to be sold are not specific, seller may sell to another party if he can get replacement for original buyer, but assumes risk of loss if uncontrollable events destroy the goods. If particular goods are specified, seller must sell to original buyer, but buyer assumes risk of loss due to uncontrollable events.
	+ **Epstein:** Should have specified the good to be delivered – that way, if seller sells to another party it’s a conversion issue. If seller makes money off the sale, innocent party gets the profit; if loses money off the sale, innocent party still gets value of the good.
		- Another consideration is whether third party is a **bona fide purchaser**. If he is, is not liable to original buyer. The way to ensure there is always notice about sales of property is to post on a bulletin board.
	+ **BL (**2-712**):** Innocent party may choose method of cover, no matter how exp. (as long as sticks w/ it), and hold breacher liable for cost (i.e. *Missouri Furnace v. Cochran* is wrong).
		- BUT, if innocent party is indifferent as to whether or not to cover, he can’t turn to the more expensive covering option b/c this would make him better off than had the contract been fully performed (e.g., *Illinois Central R.R. v. Crail*).
	+ **Epstein:** Agrees. In fact, innocent party should be encouraged to take long-term deal b/c is more secure and should be worth the same in the end anyway because of arbitrage.
		- Important for innocent party to say whether the new K is meant as cover or not to prevent it from being opportunistic and claiming it’s a separate K if the value of the good later goes up.
	+ 2-610: If there’s anticipatory repudiation, innocent party is discharged of all duties (in fact must stop performance to mitigate) and can sue right away (as long as he himself is ready to perform), or can wait a commercially reasonable time to see if breacher will perform. Allowed sue right away b/c breacher might peace out (*Hochster v. De La Tour*).
* Contract to sell land, seller sells gravel from the plot before handing over the land (*Laurin*)
	+ **BL:** Damages = value of the gravel sold
		- Could argue that b/c contract not completed, buyer doesn’t yet own the land, so damages should just be diminution value, but this would deprive buyer of the chance to sell the gravel himself.
	+ **Epstein:** Depends on whether gravel was sold before contract was signed (in which case should get diminution value) or after (in which case it’s conversion and should get value of the gravel). Also need to know if seller had access to a market that the buyer didn’t.

DAMAGES FOR LOSING CONTRACT

* Typical contract is assumed to be winning – otherwise parties wouldn’t have made it. Damages for breach are (**BL** (349)):standardexpectation if can reasonably estimate (e.g. hard to estimate first-time ventures), otherwise reliance damages
* In a losing contract there are 3 options:
1. *Armstrong Rubber*: (349):Damage to innocent party = reliance cost - amount of expected loss from the bad venture (can’t exceed reliance cost). Note: Can’t count expenses not directly attributable to the breach as reliance costs (i.e. the investment in the rubber scrap reclaim department)
	1. The breacher still gets restitution though – **subtract this** out from the damage award to the innocent party.
2. *Algernon Blair*: Damage to innocent party = restitution in quantum meruit (“what was earned through its services”).
	1. Downside is this allows innocent party who part-performed to recover more than the K price if the K would have been losing. Argument that this isn’t so bad though b/c the innocent party gets overcompensated, we’re less worried about that as about unjust enrichment of the breacher.
	2. To prevent recovery of more than contract price, should:
		1. Include a clause limiting damages up to contract price
		2. Monitor and negotiate throughout performance of a complex contract that builds on itself to address problems while still small
		3. Use progress payments to ensure compliance as you go
3. *Kehoe v. Rutherford*: Innocent party recovers in damages the proportion of the K price equal to the percentage of the K completed by the date of the breach. (Not used outside this case)
* **Epstein:** If contract would only be losing for one side, they should offer to pay a sum to get out of the deal

DAMAGES FOR UNENFORCEABLE CONTRACTS

* Buyer or seller breaches
	+ **BL:** No exp./rel. damages b/c K unenforceable (*Boone v. Coe*). But yes restitution if: (1) benefit has been conferred (unjust enrichment), or (2) even if no benefit conferred, innocent party performed work w/ expectation, known by breacher, that would receive compensation (*Kearns v. Andree*). These create an implied promise and thus a quasi-K.
		- Unclear what happens when work wasn’t requested but had to be done in preparation for the K and is not useful toward a potential future K (*Curtis*).
		- If contract is fully executory, no restitution, b/c no benefit has been conferred.
* Breach of employment part-way through
	+ Best strategy is to combine *Stark v. Parker* and *Britton v. Turner* rules: Pay employees pro-rata (*B v. T*) and give them big bonus as the end of the working cycle (*S v. P*). This system most likely to prevent breach by employee while preventing employer from firing right before paying.
		- If K is “entire contract”, performance must be completed before payment can be demanded (like in *S v. P*). This is **only true if the K is entire**.
		- For breach wrt goods, innocent party can reject if hasn’t received benefits and not have to pay; but w/ services, can’t reject b/c already received benefit, so must pay restitution.
* Market value of the work performed is the preferred measure of restitution b/c it most approximates what the K price would have been had there been an enforceable K. But if it’s a bad faith breach, can choose to award the lowest measure of restitution. Either way, don’t choose a measure of restitution that is disproportionately large or small.
	+ When benefit conferred has different values for the two parties, award the lower amount, possibly unless the breacher was not in good faith.
* If $$ is paid on unenforceable K, can’t recover it – considered discharge of non-legal obligation.

LIQUIDATED DAMAGES

* LD clause is way to avoid paying CD. **BL (356):** LD clause is enforceable if is a **reasonable forecast** of the actual injury from breach (both too much and too little is no good), **injury is actually caused** by the breach and not some other factor, and if **injury is difficult to measure**.
	+ **Epstein:** (Disagreeing with *Honeywell*):Just b/c LD clause is much lower than actual damage doesn’t mean it should not be enforced – e.g., need to consider that insurer has to average out cost among all customers, the possibility of customer fraud, and insurer’s interest in preventing burglary to protect its reputation.
	+ *Muldoon v. Lynch*: LD clauses for subjective damages count as penalties rather than compensation (b/c subjective damage can’t be measured) and are barred.
	+ **Epstein:** Even if damage is only subjective, LD clauses should be allowed if they refer to this damage, especially b/c damage hard to calculate. B/c the clause will reduce the instance of breach, it’s a good idea. Of course, the clause needs to specify that damages only apply to deficiency on the part of the other party – natural events shouldn’t count.
* LD clause unlikely to be enforced if it’s a flat sum regardless of the severity of the breach. More likely to be enforced if the better the performance, the less the damages.
* *Piers for bridge over Delaware River case*: LD clause for penalty per day of delay is punitive b/c the city hadn’t yet built the road connecting to the bridge on the other side of the river.
* **Epstein:** Where unclear whether an LD clause would be enforceable (e.g. camp case), parties should agree in the contract to a sliding scale allowing a refund at different amounts increasing up to the date of performance.
	+ Arguments for enforcing LD clauses:
		- Freedom of contract
		- Saves $$ rather than court having to determine the right amount in each case
		- Encourages buyer to take extra precaution when outcome is esp. important
		- The parties themselves are better able to assess harm from breach than a judge
		- It’s the parties’ own money on the line
	+ Arguments against enforcing LD clauses:
		- Ks made far in advance of disputes and don’t appreciate impact of future breach
		- Damages should aim to compensate, not punish
		- Courts don’t like seemingly unjust results
		- Take away court’s enforcement authority

EQUITY ENFORCEMENT

* Instead of expectation, reliance, or restitution, can use **specific performance**:
	+ Use where:
		- Breach is wrt a **non-interchangeable good**, like real estate. Even though real estate is sometimes commoditized, still use SP b/c is usually not and in the few cases where buyer does simply intend to flip, giving SP would lead to slippery slope. Also, doesn’t burden courts like w/ leases, construction, or continuing services. Also, cleans up title and eases later sale. If 3rd party purchaser is bona fide, is protected, and harmed party has to resort to expectation damages.
		- D breaches in a **business association** b/c worry about other members defaulting (*Manchester Dairy*).
		- Trust or bankruptcy involved – **many actors** so damages too complicated.
		- **Value hard to ascertain**, there’s **no suitable substitute**, or **damages wouldn’t be collectable** (360).
			* Can use SP to enforce a long-term outputs or requirements K, b/c value is hard to determine given fluctuating market price and possibility that production will decrease (like in case w/ long-term K for metal scraps)
	+ Don’t use where:
		- Value is ascertainable, like billboard rental (*Van Wagner*). **Epstein:** Should have contracted that if block-wide development is approved, K is terminated and owner gives a sum to renter. Renter would accept b/c gets interim profit plus sum at the end.
		- Seller doesn’t have the good to give to buyer (*Paloukos v. Intermountain Chevy*).
		- **Harm** to D would be **disproportionate** (like would be in *Van Wagner*).
		- K is for a **lease, construction, or employment** b/c (1) difficult to enforce, (2) bad to force undesired relationship, and (3) services not unique.
* Use injunction where:
	+ SP difficult to implement
	+ Goods are perishable so time is of the essence (*tomato canning case*)
	+ Employee possesses superstar talent (*Lumley v. Wagner*) or trade secrets.
		- Anti-competition clauses enforceable during life of the K. Afterward, need to weigh interest of employer in having the restriction and interest of society in there not being a monopoly. Consider:
			* time – 1 year is reasonable or 4 if selling entire business
			* geography – reasonable to restrict if ex-employee moving to where customers are located. But don’t protect potential customers.
			* occupational nature
* Parties can’t include equitable relief clause in K – for courts to decide.
	+ **Epstein:** Still good to include equitable relief clause b/c suggests to courts that this is good idea. BUT, don’t give relief if P is a cartel.
* +ve of equitable relief:
	+ It’s quick, and if court mistakenly requires SP or enjoins, can later award expectation damage to the party wrongly required to do SP or enjoined.
	+ Forces parties to negotiate w/ each other to find a solution that is mutually beneficial.
* If can’t use injunction because it’s too late and good/service was sold to another party, go back to expectation damages.

PROMISES GROUNDED IN THE PAST

* (86): Promise to compensate for past act is binding if both promisor benefitted (*Webb v. McGowin*) and past act was done w/ expectation of compensation. This is b/c moral obligation + later promise = binding K. True both for benefit to the person and the person’s property.
	+ Exception – Promise is only binding to the extent necessary to prevent injustice. Thus, if an act done as devious sales tactic, the promise is unenforceable if you guilt other party into promising to pay. But even so, if the promise wasn’t coerced, can be found binding.
* (86): Promise not binding if promisor didn’t benefit (*Mills v. Wyman*) – even if the past act was done for humanitarian reasons – b/c was no consideration
	+ Exception – promise is binding if merely removes technical barrier to recovering debt that would otherwise be due (i.e. SoL expired, debt incurred by infants or bankrupts) or if promise is renewed after it was previously found unenforceable b/c of duress, etc.
	+ **Epstein:** All promises to compensate for past acts should be enforceable – the promise should turn the moral obligation into a legal one.
* (86): If promise is binding, is enforceable only up to value of the benefit promisor received. If not calculable, liquidated sum promised is enforceable unless disproportionate to the benefit.

GIFT PROMISES AND CLOTHED PROMISES

* So long as promise is bare (i.e. a gift promise), is only completed upon delivery of the gift – can’t sue for performance before then.
* (71): Unenforceable as a bare promise (*Kadimah*) BUT can be clothed through ***bargained for*****consideration** (either beneficial to promisee or detrimental to promisor) OR **reliance**.
	+ E.g.: *Hamer v. Sidway* was conditional gift/unilateral K (i.e. unenforceable) when made, but became clothed by consideration when nephew refrained, induced by the promise
		- Would have been bilateral K had nephew promised to refrain
		- When clothed, turned into an option K, so promisor can’t revoke once performance is begun
		- If *Allegheny* treated as conditional gift, same rule as *Hamer*. If treated as bilateral K (b/c school assumed duty to use $$ as requested), it’s binding.
* In bilateral Ks, consideration must exist on both sides
	+ Courts won’t question adequacy of consideration unless is peppercorn consideration (*Fischer v. Union Trust Co.*) where there’s no prospect of mutual gain (*Batsakis*) or it’s clear to both sides that the consideration is a mere pretense.
	+ (71): Refraining from asserting an ultimately invalid claim cannot be consideration unless the party was confused about the facts of the claim or thought the claim was valid (e.g. dad offers to pay son if stops complaining that dad gives more $$ to other kids. If son knows his complaint is not legally valid, dad’s promise is not binding.)
* (77): If A promises to do something for B in return for B’s promise, B’s promise isn’t consideration if it reserves the choice of alternative performance that wouldn’t have been consideration if independently bargained for.
	+ E.g. A promises B to act as B’s agent for 3 yrs. B agrees but reserves the right to terminate whenever. B’s agreement isn’t consideration b/c he hasn’t promised anything
	+ E.g. A promises B to act as B’s agent for 3 yrs. B agrees but reserves right to terminate on 30 days notice. B’s agreement is cons. b/c promises to employ for at least 30 days.
* INSTALLMENT/MULTIPLE GIFTS RULE: Each gift is individual – just because you pay the first does not mean the other party can sue if you don’t pay other installments (e.g. cotton allotment case)
* Reliance on promise clothes it and allows invocation of promissory estoppel even if there wasn’t any bargained for exchange or consideration.
	+ (90): Promise is binding if: (1) made w/ the expectation that promisee will rely (2) does induce reliance (either action or forbearance); (3) reliance on the promise is justifiable; (4) enforcing the promise is only way to avoid injustice
		- Charitable pledges don’t need consideration or reliance to be binding, but the more of that you have, the more likely binding.
			* **Epstein:** Promises to charities shouldn’t *ever* be enforceable b/c would lead to moral hazard of recipients rushing to rely on gifts. Plus, market will take care of itself anyway – people don’t want to reneg on a gift to a charity. Also, if you really meant to give the gift, could have executed it right away, put it in your will, or gifted it in trust.
		- Can’t usually use PE w/ familial gifts (*Kirksey*), unless promisor died w/o paying but also w/o revoking the gift b/c then it looks like he meant it (*Hamer*; *Ricketts*)
	+ PE can get you expectation damages, but is often limited to reliance (*First Nat’l Bank*)b/c the damage remedy is only to the extent necessary to avoid injustice – shouldn’t put promisee in better position than performance would have done.
		- If the grounds for PE are shaky, likely to only get reliance damages.
		- Instances where will get expectation: (1) Where there’s also consideration (e.g. refraining from buying ins. served as consid. in *Siegel v. Spear*); (2) Award SP if only way to avoid injustice; (3) Full expec. if can’t calculate rel. costs (*Ricketts*)
	+ Debate about whether to enforce PE for an oral promise that would otherwise be in the SoF. Case where employer offers 5 yr employment Ksays no b/c rel. would be too easy to show (though can still get restitution); (139) says yes if PE helps avoid injustice.
	+ Promises made during pre-K negotiations usually not grounds for PE unless it’s clear they were meant to be relied upon.
	+ (69)(1)(c): If were prior dealings, K is binding unless offeree notifies offeror otherwise
		- Tension in *Prescott v. Jones* btwn barring silent acceptance (b/c would give free option for the month he doesn’t pay for ins.) and maintaining mutually beneficial relationship.
	+ If relied on waiver/release (modifies the K), makes the promise binding (*Fried v. Fisher*) whether or not there’s consideration.
		- **Epstein:** The effect of binding the promise is proper, but don’t think abt it in terms of PE which doesn’t make sense if reliance on the waiver/release proved not to be detrimental. Instead, treat it as a release of a debt to perform.
	+ If grounds for PE are insufficiently promise-like or definite, PE can be denied (p.281).

UNILATERAL K (= CONDITIONAL PROMISE) & OPTION K (= FIRM OFFER WITH CONSIDERATION)

* Unilateral K is an offer of a promise for some performance (promise for promise would be bi- K). Common law: Offeror can revoke any time until completion of performance. BUT (45): part performance or other reliance turns the unilateral K into an option K (i.e. irrevocable).
	+ *Petterson v. Pattberg*: Prevailing view says should view as firm offer. If viewed as unilateral K under common law, court is right that offeror can revoke 1 second prior to performance and prevent P from collecting K damages. But P could still use PE for costs incurred in preparation to perform.
* 45: Option K created from a unilateral K by part performance or tender (and breach would yield expectation damages). Option K only limits the promisor not to revoke. As master of the promise, he can set the terms of acceptance, but only offeree is free to cancel (may do so any time before performance is complete).
	+ In Brooklyn Bridge e.g., if you incurred reliance to get ball and offer is revoked before you start pushing, certainly don’t get expec., but might get rel. dam. – court would have to rule that purchasing the ball is integral to the perf. & foreseeable (*Ragosta v. Wilder*).
* 87: The other kind of option K is created when an offer is in writing, signed by offeror, is limited to a reasonable length of time, and recites a consideration in exchange for leaving open the option. Is revocable until consid. has been given, rel. has occurred, or perf. has been started.
* Wrt goods, though, no consid. needed. 2-205: A written offer for sale of goods is a firm offer (i.e. irrevocable) for the period of time it specifies, or if none is specified, for reasonable period.
	+ Allowing revocation would undermine the incentive for offeree to put in costs to examine the offer. But “reasonable” shouldn’t be construed too broadly b/c options are valuable and it’s not likely an offeror would have meant to grant one for free for too long a time.

WHEN PROMISES BECOME ENFORCEABLE

* Enforceability requires meeting of the minds on at least the major K terms: the good, the price, delivery date. Use what’s written in the K as objective manifestation of intent, so if there’s actual disagreement of intent but reasonable person would think only one understanding could be meant by the words, K is enforceable (*Embry*). But if both meanings are equally likely, no K.
	+ 20: No K if the parties meant different things & neither knew or had reason to know the other’s meaning, or both knew or had reason to know other’s meaning (chicken case).
		- If you are aware of an ambiguity and other party isn’t, you have duty to tell him. The meaning the court will ascribe is that of the party who only knew of his own meaning.
	+ YES K if parties acted as though there’s a K.
	+ In *Flower City* court held that didn’t know industry understanding so no meeting of minds. **Epstein:** Should rely on industry understanding to interpret K clauses. In *Flower City*, should have used test to bar amateurs from market.
	+ No K if one party was joking and the other party knew it. But if other party took it seriously and the contract appears to be manifest intention of the parties, is binding.
* 2-601: Perfect tender rule: K only binding if followed exactly per the terms (*Raffles*).
	+ BUT, to protect against buyers rejecting goods that are slightly off as a pretext for avoiding the sale when the market price has dropped, the buyer has to inform the seller of its intent to reject, and seller get the chance to correct.
	+ **Epstein:** If the goods are standardized, so long as correct goods are delivered K should be enforceable even if not tendered perfectly. If goods are not perfect substitutes, then:
		- Before delivery: buyer can reject, or parties can negotiate compensation rather than void the K
		- After delivery: award damages to compensate for the difference in the goods

OFFER/ACCEPTANCE

* Generally, offer can be revoked prior to acceptance or part performance UNLESS it’s a firm offer
* Difference btwn offer and invitation to treat: latter can be revoked if someone wants to buy b/c the other party’s desire to buy would be the offer, not an acceptance.
	+ “I am eager to sell and would not take less than X” is only an invitation to treat unless evidence of prior bargaining is shown (background info is important).
	+ “I offer as many widgets up to 10 at $10 a piece that you wish to order w/in next 90 days” is an invitation to treat.
	+ Quoting a price estimate is simply an invitation to treat.
	+ “offer” rather than “sell” and lack of specified quantity suggest an advertisement rather than an offer (*Moulton*). **Epstein:** Rather than reading the message literally, court should have assumed it to be an offer up to the quantity in stock.
		- An ad that doesn’t constitute an offer means the buyer’s statement is the offer.
	+ If offer is made via ad, decide whether enforcement requires notification of acceptance or mere perf. by reading the words. If binding, offeror can revoke only for those not already relying and must do so equally as publicly as the offer was made (*Smoke Ball*).
		- **Epstein:** Should specifically condition the offer to target who you want.
	+ Test for whether communication is mere preliminary negotiation or offer is whether reasonable person would interpret it as an offer
* When K doesn’t indicate otherwise, acceptance must be communicated by offeree to offeror for K to be valid. Posting the winning bids in a publication doesn’t constitute communication and a sub isn’t justified in relying on the publication (*Southern California Acoustics*).
	+ There’s a debate in the construction context btwn *Gimbel Bros.* – if the acceptance of the sub’s offer isn’t communicated, promise to use it isn’t binding (reliance on the bid isn’t enough) – and *Drennan* – if general relies on sub’s bid and sub intended its bid to induce reliance, promise to use it is binding.**Epstein** agrees w/ latter, although it should have raised eyebrows that the sub’s bid was so much lower than the others. This is the better rule b/c it agrees w/ 87 that reliance makes an offer irrevocable.
* 63: Mailbox rule: Acceptance is effective when put in the mail, rather than at receipt b/c closes the deal faster. If acceptance is made through a means counter to that specified by the offeror, is still effective but only on receipt (alternative is to treat it as a counteroffer). Other communications, like a rejection, are effective when received.
	+ Exceptions: (1) Acceptance of an **option K** is only operative when received by offeror (both parties can rescind until then). (2) 64: When offer and acceptance are **instantaneous** (e.g. in person, email), K is made upon receipt of acceptance.
	+ To avoid MB rule, offeror could specify that offer binding only when receives acceptance
	+ 36: Offeree’s power of acceptance terminated by: (1) his own rejection or counteroffer; (2) lapse of time specified; (3) revocation by offeror (including if offeree learns that the good was sold to someone else); (4) death or destruction of a thing necessary for perf.
* 2-206: Unless offeror specifies otherwise, any reasonable means of acceptance is fine, incl. just shipping the goods requested. Starting perf. counts as acceptance if communicated to offeror.
	+ Shrink wrap acceptances are fine unless their terms are unconscionable (*ProCD*).
	+ 69: Even silence can serve as acceptance when: (1) offeree benefits, has opportunity to reject, and should know that offer bore the expectation of compensation; (2) offeror said silence constitutes acceptance and offeree intends to accept through silence; (3) previous dealings indicate that silence indicates acceptance (e.g., *eel skins case*).
* Conditional acceptance is a counteroffer. Thus if original offeror agrees to the condition, he has accepted and becomes the offeree.
* 59: **Mirror image rule**:In the service context, offer and acceptance must be identical to constitute a K. Any variance in the acceptance is a counteroffer and thus a rejection. If offeree conditions his acceptance on the offeror accepting the exact terms of the counteroffer, there’s no K until offeror has accepted.
	+ If the acceptance differs and is accepted, it’s not a rejection but becomes accepted under the **last shot rule**.
* 2-207: In goods context, exchange of discrepant boiler-plate forms still constitutes acceptance b/c assumption is that nobody reads the forms
	+ If terms are btwn merchant and consumer, additional terms are proposals and must be accepted by the offeror or they don’t get incorporated.
		- *Klocek v. Gateway*: Buyer is offeror. Since he didn’t agree to the additional arbitration clause in Gateway’s acceptance and b/c Gateway didn’t condition acceptance on buyer’s agreement to the clause, clause is excluded.
		- *Hill v. Gateway*: Different approach. B/c buyer didn’t reject the comp. w/in 30 days, presumed to have accepted Gateway’s additional arbitration clause.
	+ If terms are btwn merchant and merchant:
	+ **If additional/different terms** in acceptance **don’t conflict** w/ terms in the offer, they get incorporated UNLESS the offer limits acceptance to the terms of the offer or the offeror objects to the additional terms after seeing them.
		- (1) If offeror limits acceptance to its terms and offeree does too, there’s no K. But if the parties act as though there IS a K, you move into 2-207(3) land and knock out the conflicting terms, add gap-fillers, and treat the K as existing. (2) If offeror limits acceptance to its terms and offeree does not but adds additional terms, the additional terms don’t get added. (3) If offeror does not limit acceptance to its terms but offeree does and adds a term, can argue either that no offer is formed and you move into 2-207(3) land, or that the offeree’s terms control b/c then at least one party gets what it wants.
	+ **If additional/different terms** **conflict** and are major terms (e.g. choice of forum; arbitration), voids the K. If are minor (e.g. indemnity clauses in *Union Carbide*), knock out both conflicting terms and substitute gap-filler provisions.
		- **Epstein**: Problem w/ the knockout rule is that it’s unclear where the parties are left when gap-fillers don’t exist or are wrong. Should use the business efficacy rule to create the most plausible term, but that’s a last-option.
		- Minority view: If additional terms are minor and conflict, offeror’s terms control
		- Super-minority view: Offeree’s additional minor conflicting terms control
	+ Easterbrook’s position in ProCD is that 2-207 can be disregarded wrt standard form transactions where it would cause havoc. Buyers always have the right to reject the goods w/in a reasonable time after inspecting the K
	+ Epstein says the way to address conflicting terms is to go with the background expec.

INDEFINITE PROMISES

* (33): Indefiniteness of 1 or more terms suggests there’s no agreement, but it doesn’t kill the K unless there’s no basis for determining whether there’s a **breach** and who did it, or for giving appropriate **remedy**. 2-204: If it’s clear that parties **intended** to make a K, the K is not defeated.
	+ **Epstein**:*Sun Printing* is wrong – even though there are 2 indefinite terms, reasonable to assign the higher price in the range offered, and let breaching party choose timeframe. Party should surrender on the not-so-important term.
	+ **Epstein**:*Empro v. Ball-Co.* is wrong – if there’s a prelim. deal but subject to negotiation, don’t kill K due to indefiniteness (yet) b/c parties wouldn’t have put in so much effort if thought deal wouldn’t be binding. There’s a duty to continue negotiating in good faith.
	+ If there’s no clause as to how payment should be made, fill it in from past experience btwn the parties or from the industry standard.
* If duration of the K is uncertain, terminates after a reasonable time or after giving reas. notice
* (2-306): If K is for however much seller makes or buyer needs, is binding up to a reasonable amt.
	+ Either party can get out of the deal by leaving the business, but there’s a good faith req. that they won’t cut back production or purchasing simply to pursue more profitable activities.
* (2-306): If K is for exclusive dealings, implies that seller must use best efforts to supply the goods (or services) and buyer must use best efforts to promote their sale. In *Lady Duff-Gordon*, court found implied obligation for agent to make good faith effort to market goods.
	+ Good faith effort = same effort as if he himself derived full benefits from efforts. To counter agency problem, monitor performance. Damages for breach = difference between actual profits and profits that would have been earned if had made full effort.
	+ Exception to 2-306: If party explicitly retains right to do what it wants w/ other party’s good or service, other party can’t claim damages b/c no consideration and b/c too indefinite (*Davis v. General Foods*). **Epstein**: Should still find implied obligation b/c otherwise people would stop sending recipes.

PAROL EVIDENCE

* Q of whether to allow parol evidence only arises if K is written and final. If oral, parol is allowed.
* Test #1 (on the decline) 🡪 “Four corners rule” = if K is understandable w/o parol evidence, don’t admit the parol evidence. The K in *Mitchill* makes sense w/o the icehouse provision.
* Test #2 🡪 parol evidence admissible if it: (1) is collateral to the written agreement; (2) doesn’t contradict written provisions; (3) wouldn’t be expected to be in the writing.
	+ I.e., *Mitchill v. Lath* turns on whether tearing down icehouse would be expected to be in the writing. Fact that she cares abt appearances suggests yes, so oral promise not admitted b/c should have been in the writing.
	+ Of course, if the parol promise were supported by its own consideration, it would be a separate agreement and enforceable separate from the K at hand.
* Test #3 🡪 Williston: A merger clause suggests K is final and no parol evidence allowed unless it’s clear the K is incomplete
* Test #4 (dominant view) 🡪 Corbin: Allow parol evidence that shows the intent of the parties
	+ Parol evidence NOT allowed if it contradicts a K term, but admitted if:
		- shows fraud, duress, mistake, or other reason to invalidate (214)
		- shows the written K wasn’t intended to be a final agreement
		- adds a term that is consistent, non-contradictory, and additional to the K
		- adds a term that would naturally be omitted from the writing (216)
		- supports a different interpretation of a term (*damaged turbine and indemnity clause case*). Can include (1) previous conduct btwn the parties; (2) conduct after signing the K that both parties accepted; (3) trade usage
	+ Weigh likelihood of each meaning. If tie, D wins b/c P has burden of proof (chicken case)
	+ **Epstein**: Provided its purpose is to clarify, should admit parol evidence if is credible (i.e. he said/she said not credible, but credible if written by 3rd party observer).
* 213: A written K discharges earlier inconsistent agreements, but not contemporaneous writings.
	+ Later oral agreements and actions ARE admissible. E.g. oral waiver or modification is allowed. E.g. an action taken that is accepted by both parties and that contradicts a K term can constitute waiver of the term.

NON-DISCLOSURE, MISTAKE, MISREPRESENTATION – SOMETIMES GROUNDS FOR VOIDING K

* If you make an inadvertent mistake and the other party hasn’t yet relied on it, you can and must correct it (e.g. sub adding a cost term it forgot to include on a bid b4 the general submits his bid)
* If you give info that you originally believe to be correct, but then learn it’s false, you have duty to correct the misrepresentation.
* Generally, if you make an informational mistake wrt the K, you bear the cost. Certainly where parties are at arm’s length 🡪 no duty to disclose (*Laidlaw v. Organ*).
	+ If info is public, both sides equally expected to learn it on their own
		- In the case of the home purchase w/ termites, buyer gets no damages b/c had a duty to conduct due diligence
	+ If into is concealed (i.e. possessor didn’t incur costs to get it), duty to disclose.
		- An industry insider must correct the newcomer’s misconception if he knows the other might be making a mistake (*Flower City*)
		- If info isn’t disclosed, innocent party can either void the K or negotiate.
	+ If into is private and obtained through cost, not fair to force disclosure – should be trade secret. Possessor of info can lie w/o it being fraudulent.
* If parties are in fiduciary or confidential relationship 🡪 duty to disclose (*Jackson v. Seymour*). Party w/ contractual upper hand has high standard in dealing w/ other party’s property. Good faith not enough – must fully disclose all elements that bear on the transaction and should get 3rd party advice on how to proceed.
* If there’s mutual mistake/misrepresentation as to nature of the good/service that both parties based their entry into the K on (i.e. error in substantia), 2 opposite opinions:
	+ **BL:** K is voidable whether or not misrepresentation was fraudulent b/c: (1) parties didn’t agree on what was being transacted and were both sure that it was other than it was (*Sherwood* majority and Roman law agree); (2) if seller expressly warranted that he was selling something and the thing turns out to be different, buyer should get rescission b/c of breach of warrantee (*Stradivarius case*)
	+ K is binding b/c parties took on possibility of there being mistake and factored into the price (*Sherwood* minority). Losing party misjudged and shouldn’t be saved by the law.

IMPOSSIBILITY AND FRUSTRATION: CHANGED CIRCUMSTANCES JUSTIFYING NON-PERFORMANCE

* Impossibility/frustration suspends obligations that accrue after the intervening event (b/c the expectation of mutual gain is wrong); everything that happened beforehand continues.
	+ Death or illness of either party causes impossibility in a service K.
	+ 467: Impossibility is satisfied by impracticability – where added expense of performance is extreme and unreasonable (*Park Land v. Howard*) – so long as the **change in** **circumstances wasn’t contemplated** by the parties and **party himself isn’t at fault** for bringing impossibility about.
		- Change in market price not grounds for impracticability (e.g. *Groves v. Wunder*).
		- In Suez Canal e.g., K was interpreted not to require going through the canal b/c the price only *suggested* that would be the route. B/c, in addition, the added expense wasn’t extreme, no impossibility. If K was interpreted the other way, impossibility would void the K, so shipper would be entitled to restitution in quantum meruit of the extra shipping cost.
	+ Exception to impossibility rule if parties explicitly contracted to proceed no matter what.
	+ Frustration arises if the state of the world that both parties assume the K is based on ceases to exist (e.g. coronation in *Krell v. Henry*). Can prove assumption through uniqueness of the circumstances (e.g. room specially positioned to see event). Again, party himself can’t be at fault if he wants to use a frustration defense.
		- Arguably, the king’s illness wasn’t beyond the contemplation of the parties, so could say the K should be binding – the price would have been higher had the agreement been that the occurrence of the event was a condition for the K.
* Wrt a **lease** (exclusive use), no impossibility. Lease = buying the property for a limited time 🡪 lessee assumes risk of both casual gain & loss (*Paradine*).
* Wrt a **license** (for particular purpose, service obligations, short-term), impossibility arises. Thus, in e.g. of burned music hall, renter need not pay (*Taylor v. Caldwell*).
* If K is partially completed but performance is ruined and has to be redone (e.g. partial building destroyed), purchaser not liable b/c hasn’t yet taken ownership. Doesn’t create impossibility for performer – just more expensive so too bad (*Tompkins v. Dudley*).
	+ ***Epstein***: Could have contracted in the risk allocation. Better – should have bought ins.
* **How do you allocate the loss** from impossibility? The goal is to share the burden of the loss.
	+ If $$ was paid in advance or reliance expenses were put in to prepare for performance, **British Rule** = let the $$ lie. **American rule** = restitution (we go by American rule).
	+ If no $$ paid in adv.: (#1) split the loss – lessee needn’t pay, but owner isn’t liable for lessee’s loss either UNLESS there’s suspicion of bad faith b/c the party holding the property at time of the accident has the best chance of preventing the accident. If good faith, there’s no moral hazard that owner burned his own stuff to evade K obligations.
		- Similarly, the estate of a deceased person w/ special skills not liable for breach.
	+ (#2) Assign the risk of loss to the superior risk-bearer who can best prevent the risk from materializing or insure against it at lower cost.
	+ (#3) Allow renegotiation so both parties can salvage economic gain.

DURESS AND COERCIVE RENEGOTIATION

* K signed under duress (i.e. overcomes party’s free will) is voidable UNLESS it still involves consideration, even if inadequate (i.e. *Batsakis* K not voidable b/c consideration she got was her life, therefore not peppercorn – where there’s *no* prospect of future gain).
	+ Threat to do something you’re allowed to do isn’t grounds for duress.
	+ If after the coercion is removed the coerced party acts as though the agreement is binding, he ratifies it and it becomes binding.
* K signed due to coercive renegotiation is voidable: Could say this is b/c the new term has no new consideration. But sometimes the alternative is getting nothing so getting *any* benefit IS consideration (disagreeing w/ *Levine*). Could instead say K only voidable if only reason the party is renegotiating is b/c it knows it has other side over a barrel and thus takes away his free right to choose (*Alaska Packers*).
	+ Mere threat during coercive renegotiation not enough to void though – threat needs to be combined w/ **impossibility of finding replacement** AND **inadequacy of the ordinary remedy for breach**, e.g b/c of ruined reputation (Navy contractor case).
	+ In the case of economic duress, if threatened party doesn’t direly need the perf., new term deemed ok. Even if does direly need performance, if threatening party doesn’t know this, not considered economic duress (Epstein’s taken on *Hackley*).
		- **[**Partial payment counts as full satisfaction of an accord if there’s an unliquidated claim (i.e. a bona fide dispute over the price owed), like in the *“partial payment” check case*. If it’s clear what the price is (i.e. claim is liquidated), you can accept the partial payment and then sue for the rest.**]**
* 73: Doing what you’re already bound to do isn’t consid. for a renegotiation. Small things, like paying early or by different means, can count as consideration though (must be bargained for)
* BUT, 89: Waiver/modification in the service context is binding if ANY OF THE FOLLOWING: (1) fair in light of the unanticipated circumstances; (2) was relied upon
* AND 2-209: Waiver/modification in the goods contexts is binding even w/o consideration if done for legit business reasons & in good faith (i.e. no coercion). [This overturns *Levine*.] E.g. if the sub in the Navy case demanded higher pay b/c its costs had increased, that could be legit grounds for forcing renegotiation.
	+ Waiver/modification may need to be in writing if the agreement requires this.
* Rather than waive/modify, parties can mutually agree to rescind K and make new one. Even if one side’s performance is unchanged, it’s deemed consideration (e.g. case where K was to work for $90/wk, but when employee said he had a better offer they replaced the K w/ $100/wk). But if the new K is more favorable for only one side, there’s doubt that the parties mutually agreed and court will probably not enforce.
* Enforce K if you paid a small sum for a high rate of return w/ a high risk (gold mine case).

GOOD FAITH, STANDARDIZED TERMS, AND UNCONSCIONABILITY

* Only bar firing at-will employees if violates public policy, e.g. can’t fire for doing something statute requires. Have to balance between need to protect employees, who depend heavily on their Ks, vs. need to protect freedom of K and employer’s ability to fire. Courts will find implied good faith requirement in enforcing K provisions generally per 205 (e.g. *Lady Duff*), but not at-will Ks. Also require good faith in these contexts:
	+ Land – can’t buy if you know it’s not owned by the seller
	+ Long-term labor Ks – can’t make an offer to induce someone to breach their K
	+ Parity – can’t give equal employees different benefits
	+ Fiduciary – have to treat other guy’s money as you would treat your own
	+ Lying – not allowed to lie
	+ Imply good faith where it would protect mutual gains through the K – e.g. *Lady Duff*
* 211:Signing a standardized agreement makes it binding even if the signer didn’t read the terms, UNLESS important terms aren’t called to his attention. BUT, if other party has reason to believe the signer wouldn’t have signed if he’d known K contained particular term, the term is dropped. (2-302: Unconscionability allows court to either strike the term or even the K). Can infer party wouldn’t sign if term is bizarre, oppressive, or undermines purpose of the K.
	+ **Procedural unconscionability**: Term constitutes “unfair surprise”. It wasn’t bargained for b/c signing party wouldn’t have signed had it known of the term.
		- In finding procedural unconscionability, courts will look at: parties’ relative bargaining power, affected party’s education level, use of fine print and legalese, whether seller used high-pressure tactics.
	+ **Substantive unconscionability**: Term unreasonably favors one party – “oppressive”.
	+ Typically need to find at least substantive, if not both, for the clause/K to be voidable
		- Unlikely to find unconscionability if it’s a business person affected b/c expected to read the K.

CONDITIONS AND INTERDEPENDENCE

* **Dependent condition** = you do not have to perform your half of the promise until the other guy has performed or is ready to perform (238). This **minimizes cumulative credit risks** on both sides (requires less trust). This also implies that you can’t sue until you’ve tendered performance
* **Independent promises** = you still have to perform even if the other guy hasn’t
* 234: Unless the contract or circumstances (e.g. when performance by both parties will necessarily take different amounts of time) say otherwise, default rule is that conditions are dependent if performance on both sides can be rendered simultaneously. This is possible when:
	+ The same time is fixed for the performance of each party
	+ A time is fixed for the perf. of one of the parties and no time is fixed for the other
	+ No time is fixed for the performance of either party
	+ The same period is fixed within each party is to perform
		- Where each party is to perform in different periods, the promises are independent. This is the case w/ the deed coming from Amsterdam in *Van Lint*. But you only have to perform if you think the later performance will happen.
* From the context in *Kingston*, it makes sense to hold the conditions as dependent so the apprentice can’t sue for the company before giving security to the owner. You want to **run the risk of exposure toward the side the will have the easiest remedy** if other side breaches.
* In *Pitney Bowes*, claiming disability benefits requires using appeal options before going to court. One way to argue is that b/c employer didn’t notify P of this, which was a condition precedent, P gets the benefits. Other way is that P had notice b/c lawyer got a copy of the employee manual so it’s only a formality to require actual conveyance of notice (same in the case of the football player who got injured). There’s a bias toward upholding the K term even if it’s a formality.
* Failure to perform a condition precedent entitles the other party not to perform. But it doesn’t entitle him to claim damages unless there was a promise to perform the condition.
	+ E.g. Insurance company only has duty to pay out insurance on the condition that premiums have been paid. But doesn’t get damages if the insured don’t pay premiums
	+ There’s a req. that a party who conditions his duty on something in his control has to make a good faith effort to realize the condition (e.g. owner w/ the architect and loan).
		- If he doesn’t allow other party to perform a condition, other party gets full K damages if can show was ready to perform (cancelled performance b/c of snow)
		- 251: If you reasonably believe other side won’t perform, **can demand assurance** (e.g. credit report, personal guarantee) and suspend your performance until it’s given. If assurance not given, that’s anticipatory repudiation.
			* If demanded assurance is too much, can be seen as a refusal to perform unless the other side agrees to forced modification – thus a repudiation.
			* If don’t ask for assurance, can still cancel w/o liability, but if turns out other party is able to perform, you’re the breacher.
	+ Even though the innocent party is entitled not to perform if the condition isn’t met, it may want to simply pay less than it would otherwise have had to as a hedge against the court finding that the condition wasn’t precedent but rather was independent (e.g. Con Ed could have cancelled the pension b/c employee acted in bad faith but may choose to reduce the pension instead).
* If a clause is treated not as a condition but merely as a promise, then substantial breach of the promise is grounds for damages, but not for discharge of other party’s duty (= forfeiture).
	+ 261: In the event of ambiguity, clauses are treated as mere promises (*Federal Crop Ins.*). But if a promise goes to the root of the K, it’s likely to be treated as a condition.
* If a term is a condition precedent, and the condition is promised, then nonoccurrence of the condition is ground for both discharge of the other party’s duties and damages.
* 227: When there’s ambiguity in reading conditions, we **prefer an interpretation that reduces the risk of forfeiture** UNLESS it’s clear that the party standing to forfeit his gain from the K assumed the risk that the event wouldn’t occur.
	+ Where it’s unforeseeable that the condition wouldn’t occur (e.g. owner of a construction project defaulting), the promise to pay must still be fulfilled – the condition that was assumed will occur is simply treated as the time for payment. We do this b/c we want to minimize the risk of forfeiture.
	+ It would suggest that the party assumed the risk if the sum promised him is more than the reasonable compensation for his work, or if he was give some $$ down and promised more after occurrence of the condition.
* A condition can be waived if it only would have benefited the waiving party (if it would have benefited both parties you’d need a modification). Waiver needs no consideration and can be implied by the waiving party’s actions that suggest it waived the condition.
	+ Not likely to find that a condition is waived if it goes to the root of the K.
* If you waive a condition, you have a duty to perform if that condition isn’t met – most obviously if other party relied on the waiver, but even if not (e.g. publisher waived condition not to drink when he accepted the manuscript even though he knew P had drunk and told P don’t worry)
	+ 229: A court itself may waive a condition if it would result in disproportionate forfeiture and is not central to the K (e.g. not reporting the damage in the specified time to the insurer; plowing the field being grounds for denying any insurance recovery).

SUBSTANTIAL PERFORMANCE AND DAMAGES

* Breach is likelier to be considered material if:
	+ Occurs earlier on in the performance of the K
	+ Breach is willful
	+ Quantitatively serious
	+ Doesn’t pose disproportionate forfeiture to the breacher
* 253: Anticipatory repudiation is a total breach. It releases other side of its obligations and entitles it to sue for damages (if it can show it’s ready to perform). To constitute anticipatory repudiation an action must be definite, unequivocal, and absolute.
	+ An example of anticipatory repudiation is when you demand something not in the K and say you won’t perform unless you get it.
	+ *Wholesale Sand & Gravel*: On the one hand, repeatedly saying you’ll complete the work despite the wet ground and not showing indicates repudiation. On other hand, he had 90 days to perform, so still had time and could have come after ground dried. Also, not likely that company would forfeit its future profits and accept liability to pay K damages.
		- Could also claim impossibility b/c of wet ground or that owner breached his duty to supply a suitable work space.
	+ If you’ve anticipatorily repudiated, you can retract it until your next performance is due, unless the other party has already relied on the repudiation and changed his position.
* Even when breach is material, breacher must be given the opportunity to cure UNLESS cure is impossible or there’s reason to believe cure won’t be successful.
* After material breach, harmed party can repudiate the K immediately (as long as it can show it’s ready to perform) and sue for K damages. Or he can use it as leverage to alter but continue the K. When breach is minor (i.e. breacher substantially performed), breacher has to pay damages for any harm caused, but other party’s duties are not discharged and K continues. It’s still a +ve sum gain for both parties so try and preserve the K.
	+ *K & G Constr.*: The sub’s working in a workmanlike fashion is a condition precedent to being paid, so court viewed knocking down the wall as a material breach and ground for ending the K & suing for K damages. If general opted not to repudiate the K, would only be justified in withholding pay for the period completed if the damage caused and still to be paid exceeded this amount. If general is justified, as in this case, sub’s stopping work turns the partial breach into a total one and justifies general’s repudiation.
	+ *Ziehen*: There being a cloud on the title in the executory period prior to a land sale is not a material breach b/c assumption is that the seller will be able to pay off the mortgage
	+ *Tipton*: Not paying for the first batch of dressed hogs is a material breach, so seller was justified in withholding delivery of second batch. (The K was not entire.)
		- When a K is severable into separate Ks, the seller cannot refuse the second delivery if the buyer hasn’t paid for the first batch. The value of the first batch is the same notwithstanding what happens wrt the second batch. Seller can sue for damages for the non-payment, but he still has to deliver on the second K. But if seller has reason to believe payment for the second K won’t be made, doesn’t have to deliver.
* If you breach after you’ve substantially performed (= your breach is only minor), you get K damages minus the damages you have to pay. Damages you pay are:
	+ If market value increased: cost of correction (b/c this is cheaper)
	+ If market value dropped or if would be economically wasteful to correct: If no subj. value 🡪 diminution. If subj. 🡪 cost of correction
		- Point is to pick the damage remedy that is cheapest and not to overcompensate the breacher.
	+ If there are multiple defects, don’t have to apply the same damage rule to all but you can if it would simplify things.
* In construction K, completed performance is substantial even if not exactly to specs (*Plante v. Jacobs* w/ the misplaced wall), unless exact detail is the point of the K or was explicitly specified (dissent in *Jacob & Young v. Kent* w/ the Reading pipe, saying consumer preference matters especially given the house was a custom-built mansion).
	+ For goods, material breach allows rejection (after breacher gets chance to cure, unless timing is crucial in which case can’t cure). But if there’s substantial performance (= goods are basically right), only get difference in value if the goods work as substitutes.
	+ Can’t reject goods if just an excuse b/c of change in market conditions
* In *Worcester Heritage Society*, restorer substantially performed but neither side is happy b/c it’s a losing K for the restorer and it’s going too slow for the society 🡪 allow rescission conditional upon restitution to the restorer for the work he did.
* In the *onions shipped from Australia case*, seller can’t sue buyer for rejecting the onions, which were less than what was ordered, b/c seller hadn’t yet substantially performed. But neither could buyer sue, b/c seller could claim impossibility from the gov’t taking the extra cargo space.

3RD PARTY BENEFICIARIES

* § 302: Intended beneficiary can recover on the K (incidental cannot). **Beneficiary is intended** unless otherwise specified **IF** recognizing his right to performance seems to be the **parties’ intent** or performance of the promise will **satisfy** the promisee’s **obligation to pay him $$**
	+ Rather than 3rd party beneficiary, could view as a trust or bailment w/ obligation to deliver to 3rd party, in which case 3rd party would certainly be able to recover on the K.
	+ In the water company case, individual couldn’t have been beneficiary of company’s K w/ the city to provide water b/c there’s no way the company agreed to assume the risk for all people in the city given the meager K price.
* *Seaver v. Ransom*: **Opposite argument** (though not the law). Assumption is that 3rd party beneficiary can’t recover on the K b/c wasn’t in privity w/ original parties and b/c original parties can change the arrangement w/o beneficiary’s consent. Exceptions are when there’s pecuniary duty (like in *Lawrence v. Fox*); beneficiary is close family (like dependent niece on this case); K expressly says so.
* 311: Unless K says duty to 3rd party beneficiary can’t be discharged/modified, original parties can modify up until completed performance, even if they only changed their minds b/c of changed circumstances. Exception if beneficiary relied, which is assumed if he hears about the K

ASSIGNMENT AND DELEGATION

* Assignment is fine if you give notice to the other contracting party (a novation – actually substituting one party for another or replacing one obligation to perform w/ a different one – requires consent of the other contracting party). Even where assignment is fine, other contracting party can demand assurance that performance will be the same.
	+ Exception is either unique service K or when there was something special abt the original parties’ relationship that the assignee doesn’t have. This is b/c of the no surcharge rule = don’t want the transfer to burden the other contracting party more than he would have been otherwise.
		- In these situations, remedy = other contracting party can refuse to perform. But if assignee’s performance doesn’t differ substantially, assignment is fine.
		- Freedom of assignment is protected above the freedom to prohibit assignment by K, but CAN include a clause that says it’s only allowed if assignee is up to par.
* By accepting the rights, an assignee also accepts the obligations to the other contracting party
* You assign rights; you delegate duties. Delegation allowed wrt fungible goods only, and even then, the delegor remains secondarily liable in case the delegee doesn’t perform.
* The law frowns on assigning part of a right – have to assign the whole thing.
* Assignee can use defenses against the party the assignor contracted w/ (who becomes an intended 3rd party beneficiary of the assignment) that he’d be able to use against the assignor himself (e.g. fraud in the case where assignor didn’t tell assignee heating plant was broken)
* A gratuitous assignment is revoked if assignor dies, assigns the same right to someone else, or notifies the assignee of the revocation.
	+ Exception – gratuitous assignment is irrevocable if it should reasonably induce reliance on the assignee and it does induce reliance. This is assumed if assignee hears abt the K.
* *Homer v. Shaw*:Assignment can be terminated if original parties renegotiate, so long as renegotiation is in good faith and not simply to get out of the assignment.

INDUCEMENT OF BREACH OF K

* You can only sue someone who induces the party you contracted w/ to breach if he knows about the K and if the induced party has a special skill or if breach involves trade secrets
	+ To be able to sue if someone induces away your specially skilled employee, make the K public (don’t need to disclose all details)
	+ Damages are injunction against continuing the inducement. Can also try expectation damages, but can be really hard to calculate.

Presence of a third party can help check against abuse, so more likely damages will be awarded.

There’s an implied warrantee of title (i.e. buyer can assume seller was in a position to sell), implied warrantee of fitness of product (i.e. buyer can assume product he buys is at least minimally serviceable), and implied warrantee of merchantability (i.e. buyer can assume product is good enough to resell)

If the subject of a K is illegal, K won’t be enforced (*Baby M*)