Contracts Outline - Bar-Gill - Fall 2008

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Consideration

I. Basic Consideration (Bargain Theory)

A. **Basic Rule**: Contract = Promise + Consideration

1. Contract: "A promise or set of promises for the breach of which the law gives a remedy" (R2K §1)

a) Consideration (performance or a return promise) must be bargained for (R2K §71.1)

(1) Performance = an act other than a promise, a forbearance or the creation modification or destruction of a legal relation (R2K §71.2)

(2) Bargained for: sought by promisor – and given by promisee – in exchange for the promise (R2K §71.2)

b) Sufficient Consideration → NO NEED FOR gain to the promisor; loss to the promisee; equivalence of values; mutual obligation(R2K §79)

c) A promise is consideration if the performance of it is consideration (R2K §75)

d) Consideration need not of itself induce promise, nor need return promise be of itself induced by initial promise. (R2K §81)

2. **Underlying Test**: Did the benefit, detriment or counter-promise induce the promise?

B. Policy

1. Why require consideration?

a) We don't want to enforce gift promises b/c we don't want the law intervening in family matters

2. Inducement is an objective test, whereas magnitude of consideration is a subjective test.

C. Cases!

1. *Kirksey v. Kirksey* (AL S.Ct., 1845): Brother in law told sister in law to leave her land and come live with him and he would give her a nice place to stay. She did; later he kicked her off the land. Gift promise, not K; moving did not count as consideration.

a) RULE: Gift promises are not enforced.

b) No bargain: named condition required for gift-promise performance

2. *Hamer v. Sidway* (NY Ct. App, 1891): Uncle promises nephew $5K if he doesn't sin until he's 21. Nephew follows through. Yes K; forbearance counts as consideration.

a) RULE: bargained for promises are enforced

3. *Langer v. Superior Steel* (PA S.Ct. 1932): Man promised pension if he maintains loyalty to the company and doesn't work for anyone else. Yes K

a) RULE: Exchange of money for forbearance creates an enforceable contract

4. *Jara v. Suprema Meets* (CA Ct. App., 2004): Son/owner and partner made promise to Dad/investor *after infusion of cash* that executive comp. wouldn't be raised w/o all three agreeing. No K.

a) RULE: No enforcement, unless the exchange of promises are clearly related to each other.

II. Adequacy of Values

A. **Basic Rule**: We don't test adequacy of values.

1. Exceptions:

a) Bogus Legal Claim (R2K §74.1): valid as consideration ONLY IF uncertainty as to law; or promisor believes to be valid.

b) Illusory Promise (R2K §77): no K if alternative performances

(1) Ex. to the Ex: all alts → consid; or circumstances likely to eliminate non-consid.

c) Non-consideration doctrines: Fraud, Mistake, Duress, Unconscionability

B. Policy

1. Ex ante: non-enforcement *hurts* weak party. (Not so, ex post)

C. Cases!

1. *Apfel v. Prudential* (NY Ct. App., 1993): "Novelty to the buyer" was acceptable to make a securities-selling software program adequate consideration for a contract, even though the idea wasn't new.

2. *Fiege v. Boehm* (MD Ct. App, 1956): Declining to sue for bastardy was sufficient consideration, even though defendant wasn't actually father, though he could have been.

a) RULE: R2K §74.1

3. *Batsakis v. Demotsis* (???):

III. Pre-Existing Duty Rule

A. **Basic Rule**: a pre-existing duty can't serve as consideration (R2K §73)

1. Exceptions

a) Performance similar to the pre-existing duty counts as consideration if it "reflects more than a pretense of a bargain." (R2K §73)

(1) "in applying this section it is first necessary to define the legal duty." Consideratin is satisfied if the duty is "doubtful" or the subject of an "honest dispute."

b) Modification!!!

c) "Fair and equitable" in unanticipated changed circumstances. (R2K § 89a)

2. Remember: pre-existing duty can come out of earlier contract (modification overlap!), from an official duty, from an employer-employee relationship.

B. Policy

1. We don't want to create an I'll-give-you-100%-effort market if there is already supposed to be 100% effort.

2. Avoid hurting others. (Bribe the mailman hypo.)

C. Cases!

1. *Levine v. Blumenthal* (N.J. S.Ct. 1936): There was a K for a year's store rent, with a three-year renewal option at a higher price. After a year, shopkeeper asked for lower price, which was granted with everything else remaining the same. No *new* K; old price still applied.

2. *Alaska Packers Assn v. Domenico* (9th circ., 1902): Boat workers agreed to a season-long contract then tried to renegotiate for a higher price once they arrived in Alaska. No K, b/c no new consideration.

3. *Angel v. Murray* (R.I. S. Ct., 1974): Unexpected rise in number of homes in middle of multi-year trash collection contract. City Council approved price increase to contractor. New K, b/c of changed circumstances.

a) RULE: Similar performance in unexpectedly changed circumstances can count as new consideration.

4. *Kelsey Hayes v. Geltaco* (E.D.Mich, 1990): Widget company going out of business in middle of exclusive supply contract. Kept open at loss specially for D, while raising prices. No K, entered under duress.

a) Bar-Gill thinks this was wrongly decided.

IV. Mutuality of Obligation

A. **Basic Rule:** Courts are reluctant to police agreements that appear one sided, provided they were bargained for. Any limitation on the party with discretion – usually good faith – will suffice.

1. **Old Rule**: No 'free way out' of contracts.

2. Types of Contracts this rule allows:

a) Output/Requirements Contracts: measures quantity by the output of seller or needs of buyer, subject to:

(1) Good faith

(2) Not "unreasonably disproportionate" to stated estimate or normal/otherwise comparable prior output [UCC 2-306(1)]

b) Exclusive Dealings: One person is sole seller or sole buyer. Subject to:

(1) Good faith.

(2) Best effort to supply goods (seller)/promote their sale (buyer) [UCC 2-306(2)]

3. **Underlying Test:** Is there any limitation (including good faith) on the party that appears to have a free way out?

B. Policy:

1. Output/Requirements contracts allocate the risk of price and quantity fluctuations, given quantity and price uncertainty

a) Buyer: protected against unexpectedly high quantity and unexpectedly high price.

b) Seller: protected against unexpectedly low price (Quantity determined by seller)

C. Cases!

1. *Rehm-Zieher v. F.G. Walker* (Ct. App. KY, 1913): FGW required to sell as much whiskey as requested, RZ released "for any unforeseen reason". No K b/c allows R-Z a free way out.

2. *McMichael v. Price* (S.Ct. OK, 1936): Price would sell as much sand as possible and buy it exclusively from McMichael, who would ship it at a set price. Yes K, b/c Price's ability to set quantity at zero meant going out of the sand business.

3. *Wood v. Lucy, Lady Duff-Gordon* (NY Ct. App., 1917, Cardozo): Lucy entered a contract giving Wood the exclusive right to market her clothing. She then endorsed a line without going through Wood and claimed there was no K b/c Wood could do nothing and bankrupt her. Yes K b/c parties intended one *ex ante* with "best efforts" implied.

4. *Omni Group v. Seattle-First* (Ct. App. WA, 1982): Omni agreed to buy land at a set price after the completion of an engineering study, a right that they eventually waived. Yes K, provided study was conducted in good faith.

V. Formality

A. **Basic Rule**: Formality doesn't create a contract and lack of formality doesn't destroy it.

1. Exceptions: signed writing in the following cases

a) Pennsylvania

b) NY (subset of transactions)

c) UCC contracts

(1) Waiver or Renunciation of Claim of Right After Breach (UCC §1-107)

(2) Firm Offers: formality will suffice (i.e. no consideration needed) if merchant offers to hold open offer to buy/sell goods for a period of time less than 3 months. (UCC §2-205)

(3) Modifications of Sales contracts, w/ price > $500 (UCC §2-209)

B. Policy

1. Should formality be basis for contractual liability?

a) Depends on what you care about more:

(1) Keep gift promises away from law → formality doesn't imply K.

(2) Prevent uncertainty about intent to be bound → formality should imply K

C. Cases!

1. *Thomas v. Thomas* (Queens Bench, 1842): Dying man asks that wife be given a house if she pays nominal rent, remains unmarried, keeps it in good condition. Yes K, b/c consideration exists.

a) BAD LAW!!!

2. *In Re Greene* (SDNY, 1930): Man uses various devices of formality (nominal and other "good and valid consideration," seal) to promise to take care of former lover. No K. "Parties may shout consideration from the rooftops" but that doesn't make it so.

a) GOOD LAW!!!

VI. Antecedent Benefit

A. **Basic Rule**: Previously received benefit + promise to pay → enforceable "to the extent necessary to prevent injustice." [R2K § 86]

1. EXCEPTIONS
    a) Benefit was conferred as gift
    b) Promisor hasn't been unjustly enriched
    c) Value of promise is disproportionate to benefit

B. Basic Test

1. Low TCs →no enforcement
2. High TCs → enforce, if parties would've wanted *ex ante*

C. Cases!

1. *Mills v. Wyman* (S. J. Ct. MA, 1815): D's grown, ill son stayed in P's house and was cared for by P. The son died and D wrote promising to pay, but reneged. No consideration.
2. *Webb v. McGowan* (S. Ct. AL, 1935): Working for D in a factory, P lept over a banister to divert a 75 pound package that was speeding toward D on the floor below. D promised to pay P. Consideration.
3. *Harrington v. Taylor* (S. Ct. NC, 1945): P prevented D's wife from murdering him by sticking her hand in front of a swinging ax. No consideration.
    a) Probably wrongly decided under R2K.

VII. Detriment in Reliance

A. **Basic Rule:** Promise + Reliance → enforceable IF [R2K §90]

1. Promise should/does induce action or forbearance
2. Injustice can be avoided only by enforcement of promise
3. LIMIT: remedy limited "as justice requires"

B. Charitable subscription/marriage settlement → enforceable w/o action or forbearance [R2K § 90(2)]

C. Cases!

1. *Ricketts v. Scouthern* (S. Ct. NE, 1898): P stops working in reliance on D's gift, which was expressly given for that purpose.
2. *Allegheny Col. V. National Chautauqua Bank* (NY Ct. App., 1927): D promised P upon her death provided the provisions of her will be met. Later, she reneged on the promise. Allegheny sued 30 days after her death, when – under the promise – they were to receive the money. Conditions of gift amounted consideration.
3. *Congregation Kadimah v. Deleo* (S. J. Ct. MA 1989): D was visited by P several times during a prolonged illness, during which P promised to donate $25,000 to D. D planned to use the money to turn a basement storeroom into a library in the decedent's honor. No consideration.
4. *Blinn v. Beatrice* (S. Ct. NE, 2006): P, D's employee, received an offer from another hospital. P's boss told him that they 'had at least five more years of work to do' and that the hospital wanted him to stay. P turned down the offer but was fired later. Consideration, under promissory estoppel.

5. *Cohen v. Cowles* (S. Ct. MN, 1992): At the close of a close gubernatorial race, P, an employee at a media firm advising the Independent-Republican ticket, leaked damaging information about the opponent to D. P was promised confidentiality, but editors overruled the decision. When the news was leaked, D was fired. Promissory estoppel.
6. *All-Tech v. Amway* (7th Circ., 1999, Posner): P, D's distributor, took advantage of D's "TeleCharge" phone program and made a large investment. The program eventually flopped. P claims that it was lured in to the business by a series of misrepresentations by D. Nothing to do with promissory estoppel.
7. *Feinberg v. Pfeiffer* (Ct. App. MO, 1959): D promised P $200/month after retirement. The pay was discontinued. P testified that she retired "because she wanted a rest" but did so relying on the retirement money to pay the bills. Promissory estoppel.

VIII. Statute of Frauds

A. "Within the Statute"

1. Goods > $500 [UCC § 2-201]
2. Interests in Land [R2K §§ 110, 125(1)]
3. R2K § 110:
    a) The executor-administrator provision
    b) The suretyship provision
    c) The marriage provision
    d) "A contract that is not to be performed within one year."

B. Compliance with the Statute Requirements [R2K § 131]

1. a writing
2. signed by the party to be charged
3. identifies the subject matter of the contract
4. identifies the parties
5. indicates that a contract has been made (or offered by the signer)
6. states the essential terms of the unperformed promises

C. Effect of Noncompliance

1. No enforcement, but Restitution (R2K §§ 138, 139(2)(a)).
2. Enforcement based on Reliance
    a) General: R2K § 139
    b) Interest in Land: R2K § 129
    c) Sale of Goods (UCC): Not clear
    d) Enforcement based on Admissions [UCC § 2-201(3)(b)]

D. Cases!

1. *PBR v. Autozone* (S. Ct. CO, 2005): K that can be performed within one year, but has an option for multi-year renewals is NOT subject to statute of frauds.
2. *Crabtree v. Elizabeth Arden* (Ct. App. NY, 1953): P agreed to oral employment K for two years, w/ pay increases. A year later, P was denied the second of his negotiated pay increases. Various pay change paperwork was filed. K; memoranda satisfy statute of frauds.

3. *DF Activities Corp. v Brown* (7th Circ., 1988, Posner): P wanted to purchase a Frank Lloyd Wright chair from D, and they may have contracted orally. (D denies it.) D backed out and sold for a much higher price, and P sued. No K, under statute of frauds.

Assent

IX. Objective Test of Assent

A. **Basic Rule**: A contract is formed with the objective manifestation of mutual assent. [R2K §17]

1. Assent requires that each party either [R2K §18]
    a) Make a promise
    b) Begin performance
    c) Render performance
2. Conduct may be taken for assent ONLY IF [R2K §19]:
    a) Party intends to engage in the conduct
    b) Party knows or has reason to know that the other paryt may infer assent from the conduct
    c) Assent by conduct does not require that the party intend to assent
3. UCC §2-204 Sale of Goods
    a) Only requires a "manner sufficient to show agreement," including conduct by both parties that recognizes intent to contract.
    b) "moment of making" may be undetermined
    c) Ambiguity is no obstacle IFF
        (1) Parties intended to make a contract
        (2) "reasonably certain basis" for appropriate remedy
4. Definition of 'Agreement' [UCC 1-201(3)]: 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act"

B. Policy

1. Why use the objective test for assent?
    a) Certainty
    b) Protect those who rely on the contract
    c) Induces mutually beneficial transactions by promoting clarity
        (1) Parties want to avoid accidental assent, so they'll be precise in actions and words
    d) Reduces litigation costs, b/c will be difficult to find out subjective cost for assent
    e) Objective test allows courts greater control over K

C. Cases

1. *Embry v. Hargadine* (St. Louis Ct. App, 1907): Employee was working without K during the Xmas season spoke to manager and threatened to quit unless he had a K for next

year. Manager said "go ahead, you're all right" and employee stopped looking for work. Yes K, because assent was manifested whether boss meant it or not.

2. *Lucy v. Zehmer* (S.Ct. WVA, 1954): Quasi-drunken bar conversation leads to 45 minute negotiation to sell a farm, with the K written on a back of a napkin. Both 'sellers' signed, per insistence of buyer. Yes K, because jesting doesn't matter if behavior induces reasonable person to infer a real agreement.

X. Misunderstanding

A. **Basic Rule:**

1. **Blame Test:** Enforce the contract against the party that should be blamed (knew or had reason to know the other party's meaning) [R2K §20]

a) No 'mutual assent' if

(1) parties "attach materially different meanings to their manifestations"

(a) AND

(i) Neither knows other's meaning OR

(ii) Both know other's meaning

b) One party's view (A) controls IF:

(1) A doesn't know/have reason to know B's meaning, but B knows/has reason to know A's

2. **Mutual Misunderstanding**: if both parties mean X, that meaning carries even if the contract says Y.

a) Difference from classical contract law

b) Qualification to the objective theory of assent

(1) Note: evidence remains objective test; the difference in mutual misunderstanding is that the evidence must demonstrate intent, not manifestation of intent

3. How is this different from mistake?

a) Chelsea:

(1) mistake is you're wrong about something factual about the world (e.g. pregnant cow)

(2) confusion as to meaning of the terms

B. Policy

1. Certainty in contracting

2. Protect reliance on Ks

3. Blame Test → borrow from tort theory and enforce against 'negligent' party, who is likely least cost avoider

4. Objective meaning and test reduce litigation costs so no hunting is necessary to discern parties' intent

C. Cases

1. *Raffles v. Wichelhaus* (Court of Exchequer, 1864): Cotton to be delivered on the 'Peerless' but one party meant the October 'Peerless' and the other the December 'Peerless.' Mutual misunderstanding → No K.

a) Bar-Gill thinks the case is wrongly decided, that the Buyer knew of the ambiguity and tried to get out of it b/c the prices were unfavorable to him.

XI. Offer

A. Basic Rule: 'Offer': gives offeree right to accept, thereby creating bargain [R2K § 24]

1. Test: Does communication exhibit 'manifestation of willingness to be bound'
2. Exceptions

a) 'Invitation to Deal': willingness to enter a bargain NOT an offer if party 'knows or has reason to know' that the offeror intends a further manifestation of assent to seal the deal [R2K § 26]

b) 'Uncertainty' Test → NOT offer. K MUST provide: [R2K § 33]

(1) "basis for determining the existence of a breach"

(2) Basis "for giving an appropriate remedy"

c) Limited Stock Argument: If there is a potential offer by advertisement , whether it is an offer may depend on the number of people to whom it is addressed.

(1) ALT: conditional offer w/ condition: until stock is exhausted.

B. Policy

C. Cases

1. *Lonergan v. Scolnick* (CA Ct. App., 1954): Newspaper ad to sell property. Buyer inspects land and writes to confirm right place. Seller says "decide fast" but sold property letter arrived to Buyer. No K b/c 'buy fast' isn't an offer.

2. *Lefkowitz v. Great Minneapolis Surplus Store* (MN S. Ct., 1957): On two occasions, the plaintiff responded to an advertisement that claimed 3 items of valuable merchandise would be sold for $1 on a first-come-first-served basis. Each time, the plaintiff was the first to arrive at the store's sales desk and each time he was turned away by a "house rule" that prohibited the sale to men. Yes K, nothing left open for negotiation and all the conditions were fulfilled.

3. *Leonard v. Pepsico* (SDNY, 1999): In a 'Pepsi Stuff' commercial, the company displayed several things that could be bought by accumulating 'Pepsi points.' The commercial ended with a Harrier Jet for 7,000,000 points. Even though the jet wasn't in the Pepsi Stuff Catalog – which the advertisement mentioned – the plaintiff accumulated the necessary points and requested the jet. No K, no offer b/c the facts wouldn't lead a reasonable person to conclude it was an offer.

XII. Acceptance

A. Affirmative Communication

1. **Basic Policy:** 'Mailbox Rule' Acceptance is valid as soon as it leaves the offeree's possession, irrespective of whether it reaches the offeror. [R2K §63(a)]

a) Doesn't apply in face to face or "by telephone or other medium of substantially instantaneous two-way communication." [R2K §64]

2. Cases

a) *Adams v. Lindsell* (King's Bench, 1818): Seller sent wool offer through the mail to the wrong address, with reply to come "in course of post."; it arrived late. The plaintiffs responded immediately, but in the interim the defendants made other arrangements. Yes K, because otherwise there would be constant bouncing confirmations back and forth.

B. Acceptance By Silence

1. **Basic Rule:** No acceptance by silence. ONLY exceptions (Silence+ standard):

a) Offeree takes the benefit "with reasonable opportunity to reject" [R2K §69a]

b) Offeror has given reason to understand that assent can be given through silence AND the offeree *intends* acceptance through silence [R2K §69b]

(1) Requires s

c) Previous dealings indicate silence is OK. [R2K §69c]

2. Policy

3. Cases:

a) *Russell v. Texas Co.* (9th Circuit, 1956): Offeror sent the offeree a revocable license saying that "your continued use of the roadway, water, and/or materials will constitute your acceptance." Company received the communication on October 30, but continued to use the land for months before rejecting the offer. Yes K, offeror was clear that continued use was acceptance.

b) *Ammons v. Wilson* (MS S. Ct.1936): A travelling salesman made an arrangement with offeror for shortening orders, subject to the approval of offeree. Two years later, after engaging in several transactions, offeror placed an order. He didn't hear back for twelve days and the order was then rejected.

C. Acceptance by Performance

1. **Basic Rule**: Offeror may invite acceptance by performance, which waives need for notification to offeror, unless specifically requested. [R2K §54(1)]

a) Acceptance by performance → option contract at beginning of performance [R2K §45]

(1) Offeree isn't bound to complete

(a) Not working hard/stalling = exercising right not to complete

(2) Offeror is bound IF offeree completes

b) Acceptance by performance OR promise →beginning of performance = acceptance

(1) Offeree IS bound to complete

(2) Preparations for performance

(a) Essentially reliance 87(2) → avoiding injustice

(3) **BEWARE OF THIS EXCEPTION!!!**

c) Firm Offer: agree to keep offer open for set period of time → options K!

(1) Sale of Goods → No CN required [UCC 2-206]

d) UCC (Goods!) allows acceptance "by any medium reasonable under the circumstances." [UCC 2-206]

e) Qualifications

(1) IF Offeree has reason to know offeror can't learn of performance "with reasonable promptness and certainty" → offeror obligation discharged UNLESS:

(a) "Exercise reasonable diligence to notify" [R2K § 54(2)(a)]

(b) Offeror learns of the performance within a reasonable time [R2K § 54(2)(b)]

(c) Offer indicates that notification of acceptance isn't required

2. Policy

a) Prevent 'Frozen Lake hypo': I'll pay you to swim in a frozen lake for 60s. You jump in. At 59s, I say 'never mind' → K still exists.

b) 'Dog' hypo: I post signs offering reward for lost dog. Impractical to get acceptance from everyone who will look.

3. Cases!

a) *Ever-Tite Roofing v.Green* (Ct. App. LA, 1955): P to fix roof after credit check, with acceptance by performance. Crew arrived to find another crew there. Yes K, acceptance at the loading of trucks.

(1) What does OBG think about this?

b) *Carlill v. Carbolic Smoke Ball* (QB, 1893): Yes K, when P fulfilled all conditions of advert; used product and got flu anyway.

c) *Glover v. Jewish War Vets* (DC Muni Court, 1949): D offers to pay for murder info. P goes to cops, then finds out about the offer. No K, P was induced by duty, not offer.

d) *Scoular v. Denny* (CO Ct. App. 2006): D makes offer. P says 'price not available.' Later, P relies on acceptance on price, *then* calls D; phone convo unclear. Price goes up and D sells elsewhere. Maybe K, b/c 2nd phone convo was unclear.

e) *Marchiondo v. Scheck* (NM S Ct 1967): D offered to P, a broker, to sell real estate on commission and issued a contract with a six-day time limit for acceptance. D revoked on the morning of day six, and service buyer accepted the offer later that day. P broker sues alleging partial performance. Yes K; partial performance → option K.

D. Termination of Offer

1. **Basic Rule:** Five ways to terminate [R2K §36]:

a) Rejection/counteroffer [R2K §38]

(1) Terminates unless offeror "has manifested contrary intention"

(2) Manifestation of "intent not to accept" = rejection

(a) UNLESS: "take it under advisement"

(3) Counteroffer = rejection, substituted offer [R2K §39]

(a) Underlying Test: Can it be accepted?

b) Lapse of time [R2K §41]

(1) Specified time, OR "reasonable time"

(a) Reasonable time is question of fact →jury

(b) Mail: return letter before midnight on day of receipt is reasonable

c) Revocation ("manifestation of intent not to enter K") [R2K §42]

(1) Includes "definite action inconsistent" with intent to enter K [R2K §43]

d) Death/incapacity of either party

e) Non-occurrence of condition of acceptance

2. Limitations on Revocation Power

a) Firm Offer/Option K: [R2K §87]

(1) Binding if

(a) In writing

(b) Signed by offeror

(c) Recites purported consideration

(d) Proposes an "exchange on fair terms within a reasonable time"

(2) Binding "to the extent necessary to avoid injustice" inf should (and does) induce action or forbearance in offeree before acceptance.

(3) UCC 2-205: can't extend beyond three months!

3. Policy

a) Limit revocability to protect reliance, thereby encouraging negotiations.

b) *Ex Ante:* Offeror wants to relinquish revocation power to ensure offeree thinks about offer, BUT offeree might want to allow revocation to induce making of offer

4. Cases!

a) *Hendricks v. Behee* (SD MO, 1990): D withdrew offer before hearing of P's acceptance, which was signed but not mailed. No K.

b) *Dickinson v. Dodds* (Chancery, 1876): D made time limited offer to sell real estate, then negotiated a different deal. No K.

(1) Not an option K b/c no consideration; P should have paid for exclusive right of acceptance, as no sane person would give it away for free.

c) *Baird v. Gimbel* (2nd circ, 1933, Cardozo): Subcontractor made mistake in pricing linoleum, but contractor relied on it in submitting bid. No K, b/c contractors didn't think there was acceptance purely by putting in bid.

(1) Bad law!!

d) *Drennan v. Star-Paving* (S Ct CA, 1958): Same as Baird, but Yes K, on reliance grounds.

(1) Good law, b/c ex ante interests are aligned.

(2) If not followed, gen contractors could keep shopping for better subs.

XIII. Special Types of Contract (Commercial, Shrinkwrap, Clickwrap)

A. Commercial Contracts

1. Sale of Goods?

a) If Yes → UCC

(1) Immaterial changes → K [Last shot rule]

(a) Mostly not followed!

(2) Material changes → K, ONLY IF accepted

(a) Usually: both terms knocked out and gap fillers used

(i) Prize earlier form? Or knock out conflict?

b) If NO → R2K

(1) Perform?

(a) If Yes → Last Shot Rule:

(i) K with last form = offer

(ii) Performance → acceptance

(b) If No→ Mirror Image Rule

(i) If we have two forms that are not perfectly identical → no K

2. **Basic Rule, R2K:** A purported acceptance that is conditional on additional or different terms is a counter-offer. [R2K § 59]

3. **Basic Rule, UCC:** Acceptance with additional terms → acceptance with proposals for addition. [UCC § 2-207]

a) Exceptions

(1) Acceptance is expressly made conditional on assent to diff terms.

(2) Between merchants, terms → K UNLESS:

(a) Offer limits acceptance to the terms of the offer

(b) Terms materially alter K

(c) They're objected to "within a reasonable time" after notice

(3) Conduct can imply contract, with terms "on which the writings of the parties agree" with the UCC providing the gap-fillers.

4. Cases!

a) *Minneapolis and St. Louis RR v. Columbus Rolling Mill* (SCOTUS, 1886): P tried to accept earlier price offer, but change the quantity. D said it couldn't sell that quantity at that price. No K, alteration is rejection unless specifically accepted.

b) *DTE Energy Technologies v. Briggs Electric Inc.* (ED MI, 2007): D put in purchase order for generator to P. P sent order acknowledgement w/ forum selection clasue to D. D partially paid, then refused full payment alleging cost delays. P sued. D's form controls.

(1) Purchase order was offer. Ackowledgement was 'counter-offer'. UCC 2-207(3) applies.

c) *Textile Unlimited, Inc. v. ABMH* (9th Circ, 2001): A fine print arbitration clause (for yarn sales) is not binding without express consent of parties.

B. Consumer Contracts - Shrinkwrap

1. Basic Rule: Two options

a) How choose between option 1 and option 2?

b) Option 1: Seller's form = acceptance/confirmation + additional terms

(1) Did buyer accept by not returning?

(a) Yes → Seller's terms control

(b) No → UCC gap fillers control

c) Option 2: Seller's acceptance expressly conditional on assent to additional terms

(1) Acceptance = counteroffer in this case → seller specifies how to accept

(2) Did buyer accept by not returning?

(a) Yes → Seller's terms control

(b) No → No K.

2. SEE COMMERCIAL CONTRACTS FOR BLACK LETTER LAW!!!

3. Be ready to police this with unconscionability!

4. Cases:

a) *Hill v. Gateway 2000* (7th Circ, 1997, Easterbrook): Shrinkwrap contract had binding arbitration clause if computer kept for 30 days. Challenge to K happened after expiration. Seller's terms binding.

(1) Should've been decided under UCC 2-207

b) *Klocek v. Gateway* (D KS, 2000): Same as above, except 5 days to return instead of 30. Seller's terms invalid, b/c purchaser was offeror → form was un-accepted counter offer, and offeree (Gateway) proceeded anyway.

C. Consumer Contracts – Clickwrap

1. Basic Rule: K is binding as long as terms are reasonably accessible.

a) UCITA § 112: Two part test

(1) Available so it "ought to call it to the attention of a reasonable person"

(2) "permit review"

b) SEE COMMERCIAL CONTRACTS FOR BLACK LETTER LAW!!!

2. Cases:

a) *Specht v. Netscape* (2nd Circ., 2002): The link to agreement terms – including a binding arbitration clause – were not immediately viewable when a piece of software was downloaded. Terms not binding, b/c "reasonably prudent Internet user" would not have learned of them, therefore no notice.

XIV. Problems With Assent

A. Implied Contracts (Liability Absent Express Promise)

1. Basic Doctrine

a) **Basic Rule:** Silence → acceptance ONLY IF [R2K §69]:

(1) Offeree takes the benefit with a reasonable opportunity to reject

(2) Offeror states silence = acceptance AND offeree intends silence to be acceptance

(3) Previous dealings (or otherwise) make it reasonable for offeree to accept by silence

b) Property cases exception: If offeree does anything that is inconsistent with offeror's ownership → acceptance of K.

(1) EXCEPTIONS:

(a) terms are "manifestly unreasonable" → No K

(b) action taken by offeree is harmful to offeror → K only if offeror still wants it

c) Contract Theory vs. Restitution Theory

(1) Contract

(a) K implied in fact when:

(i) Receving party knows other party expects something in return

(ii) There is an "opportunity to reject"

(2) Restitution

(a) Quasi Contract: K implied in law if receiving party is unjustly enriched

(b) Three elements [*Bailey v. West*]:

(i) Beneft conferred on defendant

(ii) Appreciation of benefit

(iii) Acceptance and retention by defendant of benefit under circumstances where it would be inequitable to withhold payment

(c) Do we use restitution theory to police Ks even if K theory says no K?

2. Policy

a) Key Question: Why wasn't an explicit contract made?

(1) Low TCs → No K

(2) High TCs → Yes K, if high TCs explain lack of K.

b) Hypos

(1) Cohabitation

(a) A supports B as if married, then they separate. Legal obligation to support?

(i) Arg for: Fulfills R2K § 69. Restitution law also applies.

(ii) Arg Against: Policy – don't intervene in family relationships absent gift-promise and reliance.

(a) Are TCs low? Hurts relationships to talk about breakup

(2) Unwanted Violinist

(a) Don't enforce violinist's demands. Low TCs, no reasonable opportunity to reject. Policy: don't want to create market for annoying violinists.

(i) How strong is the policy argument? It relies on community standards.

3. Cases

a) *Bailey v. West* (RI S. Ct., 1969): During ownership dispute over lame horse, it was dropped off at P's horse farm. P eventually sold horse and sued for care costs. No implied K, under contract or restitution analysis. Low TCs!

b) *Day v. Caton* (S. Ct. MA, 1876): P built a wall that was half on D's property, claiming an express agreement to be paid for it. D denied the agreement. Implied K, b/c D had opportunity to reject. (Low TCs for rejection!)

B. Indefiniteness/Gap-Filling

1. **Basic Rule:** IF bargain rises to the level of K AND reasonable term missing → court supplies [R2K §204]

2. **UCC Rules:**

a) IF parties intended to make a contract AND there is a "reasonably certain basis for giving an appropriate remedy" → Still K. [UCC 2-204(3)]

b) Open Price Term [UCC § 2-305]

(1) Unsettled Price

(a) Unsettled price, intent to conclude contract anyway → reasonable price at time of delivery IF

(i) Nothing is said as to price OR

(ii) Price is left to be agreed, and negotiations fail OR

(iii) Price standard agreed upon is not set or recorded

(2) One Party to Fix Price

(a) "price to be fixed" by a party → duty of good faith

(b) IF party has price fixing responsibility and fails → cancellation, OR other party sets reasonable price

(3) No intent to be bound unless price fixed/agreed → No K.

(a) Remedy:

(i) return goods OR

(ii) pay their reasonable value at time of delivery

c) Absence of Specified Place of Delivery [UCC §2-308]

(1) Default rule:

(a) Deliver to place of business (can be residence)

(b) Exception:

(i) 'Warehouse hypo': Identified goods which to the knowledge of parties is in some other place → that place is place of delivery

d) Absence of Specific Time Provisions [UCC §2-309]

(1) If not specified or agreed upon → reasonable time

(2) If successive performances, indefinite in duration → valid for reasonable time, may be terminated at any time by either party.

(a) How does reasonable time matter in this case?

3. Cases!

a) *Varney v. Ditmars* (NY Ct. App, 1916): P worked for D and received a raise and a promise for a "fair share of the profits." Later, he was fired. No K, absent an industry meaning, fair share of profits is too vague.

b) *Griffith v. Clear Lakes Trout* (S. Ct. ID, 2007): D agreed to buy fish at "market size" from P with "continuous and systematic delivery." Market conditions changed – P wanted old definition – and D wanted a different size of fish, before breaching for other reasons. Yes K, b/c ex ante intentions were the same.

(1) I don't get this case doctrinally.

c) *Metro Goldwyn-Mayer v. Scheider* (Ct. App. NY, 1976): Yes K, when the only unfilled provision in an agreement is the start date of a performance, that could be established through industry standard.

d) *Martin Delicatessen v. Schumacher* (NY Ct. App., 1981): Lease agreement included "right" to renew for five years, at a "price to be agreed upon." No K for extension, agreements to agree are unenforceable.

e) *Oglebay Norton v. Armco* (OH S. Ct., 1990): For nearly 30 years, parties worked amicably under a contract to ship iron ore with a two-tiered pricing mechanism: (1) regular net rates as established by the leading shippers or, absent #1, (2) mutual agreement. #1 was eliminated and parties couldn't agree. Enforced arbitration, as parties manifested intent to be bound.

(1) Basically UCC § 2-305.

C. Pre-Contractual Liability

1. **Basic Question:** What did the parties want?

a) Relevant facts

(1) What is left to be agreed upon

(2) Link formula (link bet. Prelim agreement and final K)

(3) Partial performance

2. **Three Options**

a) Traditional: not enforceable (168th and Dodge)

b) Enforceable (Texaco)

(1) MAJOR OUTLIER!

c) Duty to negotiate in good faith (Copeland)

(1) OUTLIER!

3. Liability absent Preliminary Agreement

a) Promissory Estoppel

b) Implied promise to negotiate in good faith.

4. Cases!

a) *168th and Dodge v. Rave Reviews* (8th Circ, 2007): Parties signed letter of intent, but D mentioned need to clear it through board. Deal fell through and D signed with somebody else. No K, there was no "manifestation of intent to be bound."

b) *Hoffman v. Red Owl* (S. Ct. WI, 1965): P contracted to operate a grocery store if he invested $18K up front. D upped the needed capital input to $26K, then broke off the agreement. Yes K, promissory estoppel.

(1) Super-duper OUTLIER!

c) *Copeland v. Baskin Robbins* (Cal. Ct. App., 2002): P took over ice cream factory based on D's willingness to enter co-packing agreement. Agreement to negotiate in good faith, which D breached.

d) *Texaco v. Pennzoil* (SCOTUS, 1988): Pennzoil sued Texaco for swooping in on a deal – announced, but not finalized – under the common law tort of "inducement of breach of contract." Yes K, major outlier on pre-contractual liability.

XV. Problems With Bargaining

A. Mistake

1. **Definition:** "a belief that is not in accord with the facts" [R2K §151]

2. Types of Mistake

a) Mutual Mistake → voidable by adversely affected party UNLESS [R2K §152, 154]

(1) Risk allocated to her by agreement

(2) He is aware of own limited knowledge but acts as if sufficient

(3) "Reasonable" that court allocate risk to her

b) Unilateral Mistake →voidable if mistake maker adversely affected AND

(1) K enforcement would be unconscionable

(2) Other party had reason to know of mistake

(3) BUT STILL LIABLE IF:

(a) Risk allocated to her by agreement

(b) He is aware of own limited knowledge but acts as if sufficient

(c) "Reasonable" that court allocate risk to her

3. Policy

a) Impose cost on party that could have avoided more easily ('least cost avoider')

b) Impose risk on the efficient risk bearer.

4. Cases

a) *Boise Junior College v. Mattefs Construction Co.* (S. Ct. ID, 1969): D submitted a bid with a clerical mistake, but withdrew before reliance. Each company competing was required to make up the cost difference to the school district if they decided to reject the contract. No K, met 5 part mistake test:

(1) Material mistake
(2) Will enforcement be unconscionable
(3) Not result for negligence
(4) Other party won't be harmed
(5) Prompt notice is given

b) *Beachcomber Coins v. Boskett* (NJ S. Ct., 1979): D sold a fraudulent coin to P; both believed it to be genuine at the time. No K, classic mutual mistake w/ no allocation of risk.

c) *Sherwood v. Walker* (S. Ct. MI, 1887): P bought cow from D, who claimed she couldn't breed. $80 sale was agreed upon then D refused to take money or hand the cow over b/c cow could breed and was thus worth $1K. No K, mutual mistake went to heart of K.

d) *Lenawee County v. Messerly* (S. Ct. MI, 1982): P inspected the property, then bought it for $25,500, including an "as is" clause, stipulating that the purchaser "agrees to accept same in its present condition." Five days later, P found sewage leaking from the ground; seller didn't know. Yes K, b/c as is clause allocates risk.

B. Fraud

1. 2 ways to invalidate for Fraud

2. Test 1: (BOTH A+B =YES → voidable K) [R2K §164(1)]

a) Was assent induced by fraudulent or material misrep?:

(1) **Fraudulent** IF maker intends to induce assent AND

(a) Knows or believes assertion not in accord with facts
(b) Does not have the confidence that he states or implies the truth
(c) Knows he does not have the basis for that he states or implies the truth

(2) **Material?:**

(a) Misrep. is material if would be likely to induce reasonable assent in person (or target)

b) Was cheated party "justified in relying" on party?

3. Test 2: Misrepresentation of **contract term** → No Assent. [R2K § 163]

4. Definitions:

a) Assertion → misrepresentation IF not in accord w/ the facts
b) Non-disclosure → assertion IF:

(1) Party knows disclosure "is necessary to prevent a previous assertion from being" not in accordance with facts
(2) Party knows disclosure would correct mistake about a basic assumption
(3) Party knows disclosure would correct mistake about the contents of a writing
(4) Other party is "entitled to know" b/c of "a relation of trust and confidence"

5. Policy
   a) Finding Oil Hypo
6. Cases!
   a) *Laidlaw v. Organ* (SCOTUS, 1817): P bought tobacco but didn't disclose information about NOLA battle that would have changed price, when asked. D took it back by force. No fraud, b/c no duty to disclose.
   b) *Hill v. Jones* (Ct. App. AZ, 1986): P bought house from D after visiting several times and subjected it to a termite inspection which came up clean. D did not disclose previous termite infestations P or termite inspector, who missed the damage. Fraud, nondisclosure of material terms = fraud

C. Duress
1. **Basic Policy:** Improper threats may make Ks voidable.

2. Question 1: Is threat improper? [R2K §176]
   a) Threat → improper IF
      (1) Crime or tort,
      (2) criminal prosecution,
      (3) bad faith use of the civil process,
      (4) breach of duty of good faith and fair dealing
      (5) resulting exch. not on fair terms AND
         (a) threatened act would harm victim, but not benefit perp
         (b) effectiveness of threat increased by prior unfair dealing
         (c) threat is "a use of power for illegitimate ends"

3. Question 2: does "improper threat" make a K voidable? [R2K § 175]
   a) IF assent is induced by party's improper threat that "leaves the victim no reasonable alternative" → victim can void K.
   b) IF assent is induced by threat from non-party → K is voidable
      (1) EXCEPTION: other party to the transaction:
         (a) Gives value or relies materially on transaction in good faith AND
         (b) Doesn't have reason to know of duress
4. Policy

a) Adopt the perspective of the threatened party
(1) No reasonable alternative?
(2) Is there free will/ voluntary assent?
b) Adopt the perspective of the threatening party
(1) Is the threat "improper"
(2) Is it credible?
(a) Specifically to deter duress?

5. Cases!

a) *Rubenstein v. Rubenstein* (S. Ct. NJ, 1956): D demanded transfer of property to pay for autistic child's care, making threats of gangster violence and specific reference to arsenic. D's father was serving a life-sentence for arsenic murder scheme. K invalidated under duress, P "deprived of the exercise of his free will."

b) *Austin Instrument v. Loral* (Ct. App. NY 1971): D supplied radar sets to the USG, and P was a subcontractor for it. P received a second subcontract and demanded additional responsibilities and price increases in the *first* contract. P stopped delivery and D agreed to the terms b/c of inability to find another supplier. K invalidated under duress, "a wrongful threat precluded the exercise of free will."

D. Unconscionability

1. **Basic Policy**: IF K or term "unconscionable at time K is made" → court can: [R2K §208]
a) Refuse to enforce
b) Enforce w/o unconscionable term
c) Limit application of any unconscionable term to avoid any unconscionable result

2. UCC § 2-302: same as R2K, except "parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination [of unconsc.]"

3. Procedural v. Substantive Unconscionability
a) Procedural test: Is there a meaningful choice?
(1) Policy:
(a) Lack of knowledge/understanding
(b) Lack of voluntariness – Monopoly
b) Substantive test: is
(1) Policy: Evidence of bad procedure
c) Procedural Unconscionability

4. Policy
a) [R2K §208 cmt. a]
(1) Determination "is made in the light of its setting, purpose and effect"
(2) Relevant factors:
(a) Weakness in the contracting process

(b) Gross disparity in the values exchanged [R2K §208 cmt. c]

(c) Public policy

(i) Used to invalidate, as well.

(d) Oppressive as a whole

(i) Even if no weaknesses in process/no one term unconsc.

(3) Overlaps with: contractual capacity, fraud and other invalidating doctrines

b) Inequality between parties isn't an issue, but "gross inequality" is.

5. Cases!

a) *Williams v. Walker-Thomas* (DC Circ, 1965): Uneducated P bought furniture from Walker-Thomas. Fine print in K said that Williams would own none of the furniture until she had paid in full. P fell behind on the payments and D repossessed all of her furniture. Unconscionable, no reasonable opp. to understand terms b/c of fine print and deceptive sales practices.

b) *Jones v. Star-Credit* (S. Ct. NY, 1969): P bought $300 fridge on credit for a total price of $1,235. After paying $620, the P defaulted. Unconscionable, D "took advantage of the poor and illiterate."

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Performance

XVI. Parol Evidence Rule (PER)

A. **Basic Policy:** PER decides whether or not to include terms not in the writing to which the parties have agreed, when the parties intend that a writing shall be the final expression of some or all of the terms of the agreement.

B. Working it out:

1. Is the K integrated with respect to the issue we're dealing with?

a) Yes → no parol evidence allowed

b) No →Apply one of three tests

(1) Sale of goods → UCC Standard

(2) All oral agreements excluded ('Mitchill')

(3) Oral agreement is relevant only if we conclude that it might naturally be made separate. ('Masterson')

2. Integration Test:

a) Is the relevant section of the K "a complete and exclusive statement" of the terms of the agreement?

3. UCC §2-202: Where the two parties writings are in agreement, evidence of a prior agreement or oral agreement can "explain or supplement" terms:

a) "by course of performance, course of dealing, or usage of trade" AND

b) "by evidence of consistent additional terms"

(1) UNLESS: "court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

4. Cases!

a) *Mitchill v. Lath* (Ct. App. NY, 1928): P bought a parcel of land from the D on the condition that an ice house across the way from the land be removed, which they agreed to do orally. When D didn't remove the icehouse, P sued in equity for its removal. Term excluded, b/c it would ordinarily be expected to appear in K.

b) *Masterson v. Sine* (S. Ct. CA, 1968, Traynor): P sold D (brother in law) ranch w/ an option to buy it back within the decade at same price. P went bankrupt and the trustee in bankruptcy sued to exercise the option contract. The court prevented D from introducing oral evidence that the parties wanted the ranch kept in the family. Term included, court should have considered the evidence

c) *Alaska Northern* v. *Alyeska* (S. Ct. AK, 1983): P and D exchanged letters of intent, before agreeing on a price and signing the letters. No K, letters were 'partially integrated' but P's interpretation of their limitation to price alone was flawed.

d) *Suburban Leisure v. AMF Bowling* (8th Circ., 2006): P had an oral contract with D to sell merchandise. Later, the they entered into e-commerce agreement (including a binding arbitration clause) whereby P agreed to provide delivery and installation of D's products sold on D's website. P then terminated the oral agreement. Arbitration clause doesn't bind, b/c oral agreement not integrated into e-commerce.

XVII. Interpretation

A. **Basic Guidelines:**

1. Great weight to parties' principal purpose. [R2K §202(1)]
2. Interpret writings as a whole [R2K §202(2)]
3. Genearlly prevailing meaning applies [R2K §202(3a)]
4. Technical terms are given their technical meaning [R2K §202(3b)]
5. Course of performance given "great weight" IF "repeated occasions for performance" w/ "opportunity to object" [R2K §202(4)]
6. Wherever reasonable, interpret parties' assent in accordance w/ e/o [R2K §202(5)]
7. Reasonable/lawful > unreasonable/unlawful [R2K §203(a)]

B. **Hierarchy**:

1. Mandatory terms
2. Express terms [R2K §203(a)]
3. Business Norms [R2K §202]
    a) Course of performance –w/in K
    b) Course of dealing – old Ks
    c) Trade usage

4. Default Terms
5. General Standards of Reasonableness and Good Faith [R2K §§204, 205]
6. Interpretation favoring the public [R2K §207]
7. Interpretation against the drafter [R2K §206]

C. **UCC Standards:**

1. Course of Dealing can be used to interpret parties' expressions and other conduct [UCC § 1-205(1)]
2. Usage of trade/course of dealing "give particular meaning to and supplement or qualify" K terms [UCC § 1-205(3)]
3. Wherever possible construe express terms and UofT/CoD consistently, but express terms control in conflict. [UCC § 1-205(4)]

D. Cases!

1. *Pacific Gas v. G.W. Thomas* (S. Ct. CA, 1968, Traynor): D agreed to replace the cover of a steam turbine and to "indemnify … against all loss … resulting from … injury to property, arising out of or in any way connected with the performance of this contract." D also agreed to buy $50,000 worth of insurance. D caused $25,000 worth of damage. Court should have included course of dealing evidence.

2. Firgaliment Importing v. BNS (SDNY, 1960, Friendly): Of the many possible meanings of chicken, the one that controlled was the definition in DOA regulations referenced obliquely in the K.

3. Nanakuli Paving v. Shell (9th Circ. 1981): P entered into a contract with D to buy asphalt in Hawaii's small market, with price posted at time of delivery. Hawaii business custom allowed for informal, trust based price protection for asphalt buyers; when the prices went up the K's would continue at the old price. Shell conformed w/ price protection several times before stopping. Term included.

4. Confold v. Polaris (7th Circ., 2006, Posner): D signed P's Non-Disclosure Agreement for a consulting contract. Later, D requested designs for a different, but related K; P's was considered. D rejected all bids, then used design similar to P's. Nondisclosure didn't apply, b/c two different Ks.

XVIII. Duty of Good Faith

A. **Basic Rule:** "every contract imposes … a duty of good faith and fair dealing." [R2K §205]

1. UCC § 1-201(19): " 'Good faith' means honesty in fact in the conduct or transaction concerned"
2. UCC § 1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

B. Bad faith → Breach of Contract

C. Policy

1. Prevents ex post opportunism
2. Prevents inefficient precautions against opportunism
3. Tracks parties' *ex ante* will [Posner in Market Street]

D. Cases!

1. *Patterson v. Meyerhoffer* (Ct. App. NY, 1912): D and P agreed that P was to purchase four houses at an auction and sell them to D. Orally, they agreed that P would purchase the fifth house in the foreclosure sale for himself. Before the sale, D said she would not perform and outbid P on all houses, saving herself $620. D breached, by preventing P from performing part of the K.

2. *Market Street Associates v. Frey* (7th Circ, 1991): Duty of good faith lies on spectrum between fiduciary duty and tort liability. Doesn't require total candor, but deliberate taking advantage of a partner in a long term K has negative social consequences.

3. *Feld*

XIX. Warranties

A. Definition: An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised.

1. Statement about facts already in existence

B. Express Waranty created by: [UCC §2-313]

1. Affirmation of fact or promise + part of basis for bargain → express warranty
2. Description of goods + part of the basis for bargain → express warranty
3. Sample or model + part of basis for bargain → express warranty
4. EXCEPTION:
    a) Seller's opinion/commendation of the goods

C. Implied Warranty

1. Merchantability (Fitness for ordinary purpose) [UCC § 2-314]
    a) "reasonable expectations" test
2. Fitness for a Particular Purpose [UCC § 2-315]
    a) Seller has reason to know of "particular purpose for which the goods are required" + relying on seller's skill or judgment to get suitable goods → implied warranty goods are fit for purpose
        (1) HYPO: light hiking boots for Everest trip bought at EMS

D. Disclaiming Warranties: [UCC § 2-316]

1. Requirements to disclaim
    a) Must mention merchantability
    b) IF writing MUST BE conspicuous
    c) IF Implied warranty MUST BE Conspicuous writing
2. Example language to disclaim implied warranties
    a) "as is"
    b) "with all faults"
3. IF buyer has examined goods in a way that ought to have revealed defect OR refused to examine goods → no implied warranty
4. Course of dealing or usage of trade can disclaim warranty.
5. Contract may limit remedy [UCC § 2-719(1)]

E. Case!

1. *Henningsen v. Bloomfield Motors* (S. Ct. NJ, 1960): Ps injured in car crash. Disclaimer of warranty clause disclaimed the "implied warranty of merchantability," which is the presumption that a good is fit for the use for which it was intended. Clause not valid, on public policy grounds.
    a) Disparity of bargaining power
    b) Courts invalidate "contractual provisions which clearly tend to the injury of the public in some way"

XX. Conditions ("an event, not certain to occur, that must occur before performance" [R2K § 224])

A. Key Questions:
    1. Is the term a promise or a condition?
    2. How should we deal with ambiguity?
    3. When is a failure material?

B. **Basic Policy:**
    1. IF condition doesn't occur/ isn't excused → Performance can't come due [R2K §225]
    2. IF condition can't occur/isn't excused →duty is discharged [R2K §225]
    3. Non-occurrence IS NOT Breach UNLESS party is under duty for condition to occur. [R2K §225]

C. Promise v. Condition
    1. Promise - A's breach means B can:
        a) B can withhold performance for material breach
        b) A's substantial performance → B must perform – damages
    2. Condition: A fails to satisfy → B can withhold performance

D. When is something NOT a condition? [R2K § 227]
    1. If any doubt → reduce the obligee's risk of forfeiture
    2. If any doubt → duty imposed is preferred over:
        a) Condition
        b) Condition +duty
        c) UNLESS: K is of the kind where only one party has a duty
    3. If Forfeiture b/c of non-occurrence of condition would be "disproportionate" → court may excuse
        a) UNLESS: condition was material

E. When is a failure material? Factors for consideration [R2K § 241]
    1. Severity of damage to injured party
    2. Availability of compensation
    3. Extent of non-performer's forfeiture
    4. Likelihood that non-performer will cure failure
    5. Extent to which non-performer comports with good faith and fair dealing

F. Policy
    1. Induce efficient care in fulfilling condition
    2. Risk allocation

G. Cases!

1. *Dove v. Rose Acre Farms* (Ct. App. IN, 1982): D optional bonus system to promote timeliness; to participate (whatever the specific bonus) employee couldn't miss a day of work, even for illness. In the 10th week of 12 week sched., P came down with srep and missed two days of work. Condition not satisfied.

2. *Wal-Noon v. Hill* (Ct. App. CA, 1975): P and D entered a lease contract that allocated roof repairs to D, and insisted that notices be "personally served or sent by United States registered mail…" P installed an air conditioning unit on the roof, the roof began to leak. Pmade arrangements for repairs on their own without informing the D. D not liable for damages, b/c notice was a condition of the lease.

XXI. Substantial Performance

A. Key Question: What can a party do when it doesn't receive exactly what it asked for?

B. Answer: One of the three below, whichever makes the most sense. (Lots of discretion)

1. Self-Help: not pay

a) Perfect Tender Rule [UCC § 2-601]: if goods fail in any respect to conform to the contract, buyer may:

(1) Reject the whole

(2) Accept the whole

(3) Accept any commercial unit or units and reject the rest

2. Pay now, sue later: doctrine of independent promises

a) I have made a promise to pay you, which I still must fulfill. Once that's done, I'll sue you for breach of yours.

b) **Independent promise**. A promise that either is unqualified or requires nothing but the lapse of time to make the promise presently enforceable. • A party who makes an unconditional promise must perform that promise even though the other party has not performed according to the bargain. -- Also termed unconditional promise.

3. No payment for material breach, but payment less DiV for non material breach

a) Substantial Performance Rule:

(1) Material Breach → no pay

(2) Non-Material Breach → Pay, less DiV

(a) Factors for consideration [R2K §241]

(i) Severity of damage to injured party

(ii) Availability of compensation

(iii) Extent of non-performer's forfeiture

(iv) Likelihood that non-performer will cure failure

(v) Extent to which non-performer comports with good faith and fair dealing

C. Cases!

1. *Jacob and Youngs v. Kent* (Ct. App. NY, 1921, Cardozo): D hired P to build a house and the K included a specification for Reading pipe. Near the end, D found that the pipe

installed, though equal in quality, wasn't Reading pip. D's architect hadn't noticed the problem. Substantial Performance rule, b/c problems aren't material.

2. *Plante v. Jacobs* (S. Ct. WI, 1960): P contracted for pre-fab house, but living room wall was built one foot off from where earlier. Substantial Performance, b/c court says you expect pre-fab houses to be crappy.

XXII. Impossibility

A. **Basic Policy:** If a "basic assumption" of a K is predicated on an event not occurring, occurrence → discharges duty to perform [R2K §261]

1. Similar events

a) Death/incapacity of person necessary for performance [R2K § 262]

b) Destruction, Deterioration or other non-existence of necessary thing [R2K §263]

c) Prevented by new govt. regulation [R2K § 264]

d) Frustration of purpose: if party's principal purpose for the contract doesn't occur→ No K. [R2K § 265]

e) Unknown condition that makes performance impracticable [R2K § 266]

2. If rules will result in injustice, court may grant relief "as justice requires" [R2K §272]

B. UCC: Impracticability resulting in delay or non-delivery → not breach PROVIDED [UCC § 2-615]

1. allocates resources "fairly and reasonably" if partial performance is possible

2. "seasonably" notifies buyers

C. Cases!

1. *Taylor v. Caldwell* (QB, 1863): P entered into a contract with D to rent the Surrey Gardens for a concert. Before the fulfillment of K – and through no fault of either of the parties – the concert venue burned down. No K, impossibility.

2. *Dills v. Town of Enfield* (S. Ct. CT, 1989, Peters): P entered into a contract with the D to build an office park on town property, which was to be sold to P before development. K allowed P to terminate and reclaim a deposit after preparing satisfactory construction plans, if P couldn't find mortgage financing. K allowed D to pull out, retaining the deposit, if P failed to submit acceptable plans. Recognizing it wouldn't get financing, P failed to submit plans. Performance not excused, b/c parties thought it up *ex ante*.

3. *Centex v. Dalton* (S. Ct. TX, 1992): P hired D to buy a group of savings and loan institutions. Regulatory agency approved the deal, then, P learned that the agency probably would not allow D's fee to be paid, but went ahead with the deal anyway. Performance excused, b/c of need to comply w/ regulation.

4. *Krell v. Henry* (QB, 1903): D rented a room from P for the purpose of watching the coronation of Edward VII. K made no explicit mention of the procession, which was cancelled due to Edward's poor health. Performance excused.

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Breach

XXIII. Basics of Remedies

A. Expectation Damages [R2K § 344a]: Set non-breaching party in as good a position as s/he would have been if performed.

1. Standard measure of damages!!! [R2K §347, UCC § 1-106]

B. Reliance Damages [R2K § 344b]: Set non-breaching part in as good a position as s/he was *ex ante*

1. Alt phrasing: what costs were incurred in relying on the contract
2. Party can choose if it wants [R2K §349]

C. Restitution Damages [R2K § 344c]: Set breaching party in *ex ante* position

1. Alt phrasing: no unjust enrichment

D. Cases!

1. *Sullivan v. O'Connor* (S. J. Ct. MA, 1973): P contracted for a nose job, which was to constitute two operations overall. D botched it w/o negligence and three operations were required in toto, plus P's nose was disfigured. P was a well-known entertainer, so there may have been professional consequences, though she couldn't claim loss of employment. Reliance Damages, b/c this is like a tort.

2. *Hawkins v. McGee* (S. Ct. NH, 1929): P's hand had been badly injured some years before. D, a doctor, repeatedly pressed P's dad to allow him to 'experiment' with a skin graft operation, and promised a 'three or four days in the hospital' and a '100% perfect hand' after the operation. The operation was botched. Expectation Damages.

XXIV. Anticipatory Repudiation

A. Key Question: What do you do if you know a counterparty is going to breach?

B. **Basic Policy:** [R2K § 253]

1. Repudiation before breach, w/ part performance by injured party → breach
2. Repudiation under exchange of promises before performance → discharge duties

C. Other Key Stuff

1. Repudiation: "statement … or voluntary affirmative act which renders the obligor unable or apparently unable to perform without breach" [R2K § 250]
    a) UCC: can be retracted before next installment due → K resumes [UCC § 2-611]
2. Demand assurance: Suspicious party may demand "adequate assurance of due performance" and may suspend performance until it's received
    a) Non-reassurance → breach. [R2K § 251]
    b) UCC: higher standard - "reasonable grounds for insecurity" [UCC §2-609]
3. Insolvency → same rights as demand of performance [R2K § 252]
4. Impracticality + non-reassurance → discharge of duty to pay damages [R2K § 254]

D. Cases!

1. *Hochster v. De La Tour* (QB, 1853): P agreed to work for D on a tour of the continent starting in June. On May 11, D pulled out and on May 22, P sued. He also secured an appointment on a trip leaving July 1, which would have taken place during D's now-cancelled trip. P can sue before time of K.

2. *Taylor v. Johnston* (S. Ct. CA, 1975): P contracted for two horses to stud with D's horse. Before performance was possible, D sold horse, writing a letter 'releasing' P from his 'reservations.'After threat of lawsuit, arrangements were made to stud. There were several opportunities to stud, but new owners had horse booked on all of the relevant days. Eventually, Ps bred their mares with another stud. No anticipatory repudiation, P denied D chance to perform.

XXV. Expectation Damages

A. **Basic Policy:** ED's are the default remedy, but aggrieved party can choose RelD if s/he wants.

1. Seller's remedies:

a) Expectation Damages [UCC § 1-106]

b) Resale, where Resale = EM

B. UCC Damages

1. Expectation damages at time/place of tender. [*§§ 2-713, 1-305*]

a) Market/K, Cover/K or Resale/K differential. [*§§ 2-706, 2-708, 2-712*]

2. Seller Breach (Buyer's Options):

a) Cancel, recover payment, sue for damages. [*§ 2-711*]

b) Cover and sue for difference. [*§ 2-712*]

3. Buyer Breach (Seller's Options):

a) Withhold goods, stop delivery, cancel, sue for damages. [*§ 2-703*]

b) Resell and sue for difference. [*§§ 2-706, 2-709*]

C. Lost Profit Rule → Seller gets K value IF

1. Fungible good (no real estate).

2. Seller must prove he could have solicited second buyer absent breach.

3. Seller must prove he could easily have performed both contracts.

D. Cases!

1. *American Mechanical Corp. v. Union Machine* (App. Ct. MA, 1985): P contracted with D to sell land and equipment for $135K. Three weeks later, D repudiated, knowing that P was in financial difficulty. Bank seized the assets and sold the equipment for $35K and bought the land itself for $55K. Expectation damages, K-actual sale.

2. *Locks v. Wade* (Sp. Ct. NJ, 1955): D repudiated K to lease jukebox for 2 years. P was able to rent jukebox to s.o. else. Damages to P for K price minus cost of perf. Rule: Where supply in mkt is unlimited, lessor should not be deprived of benefit of bargain.

XXVI. CoC v. DiV

A. **Basic Rule**: Wronged party can choose between CoC and Div.

1. Exceptions

a) Trivial and innocent breach = *Rivers v. Deane*

b) Incidental to main purpose.

c) Grossly disproportionate or windfall profits.

d) Economic waste = *Jacob & Youngs*

2. Ideally, should depend on *ex ante* intention of parties

a) Secure physical result (e.g. *Peevyhouse*) → DiV

b) Gain market value (e.g. *Schectman*) → CoC

B. Cases!

1. *Peevyhouse v. Garland* (S. Ct. OK, 1962): P negotiated a K for D to strip-mine its property, which included a specifically negotiated provision that D had to perform remedial work to set the property right. D didn't do the remedial work. Work would have cost $29,000, but the property value would have only increased $300. DiV, "the contract provision breached was merely incidental to the main purpose in view."

2. *American Standard v. Schectman* (NY App. Div., 1981): P conveyed buildings and equipment to D for $275K plus the removal of equipment, demolition of the structures and the grading of property down to one foot below the grade line. D did not perform the specified grading. CoC.

3. *Rivers v. Deane* (NY App. Div., 1994): CoC to make house safe, where an addition made it unsafe.

XXVII. Limitations on Expectation Damages

A. Mitigation

1. **Basic Rule:** avoidability by non breaching party w/o undue risk, burden or humiliation → no recovery

a) Exception: good faith effort [R2K § 350]

2. Cases!

a) *Parker v. Twentieth Century Fox* (CA S. Ct., 1970): P was signed to perform in a musical that D cancelled. Instead D offered her the lead in a Western with an almost identical contract. Provisions allowing her to choose the director and the dance director were stripped, and production was to be in Australia as opposed to California. P turned the contract down and sued for the full salary specified in the original contract. No failure to mitigate, b/c new role was different and worse.

B. Foreseeability

1. **Basic Rule:** Only foreseeable damages are recoverable. [R2K § 351]

a) Examples:

(1) follows from breach in ordinary course of events

(2) party in breach had reason to know of special circumstances

b) Court may limit if "justice so requires" to "avoid disproportionate compensation"

2. Cases!

a) *Hadley v. Baxendale* (Ct. Exchequer, 1854): A broken mill shaft was shipped for repair to Greenwich, and P, the buyer, requested 'special entry' in the log to

hasten delivery. D, the shippers, negligently delayed delivery and P lost profits. No foreseeability, shippers never said reason for urgency.

C. Certainty

1. **Basic Rule:** Damages only awarded if they can be established with "reasonable certainty" [R2K § 352]

2. Cases!

a) *Kenford v. County of Erie* (Ct. App. NY, 1986): D contracted for P to build and operate a domed stadium in Buffalo. They set out a 20 year lease default and entered into negotiations for a mutually acceptable 40 year lease. Those negotiations failed, and the stadium building never began. P sued for breach. No damages for lost profits, b/c the model for prediction had too many variables.

XXVIII. Reliance Damages

A. **Basic Policy:** Aggrieved party can choose RelD. [R2K § 349]

B. Cases!

1. *Security Store v. American Railway Express* (Ct. App. MO, 1932): P manufactured a furnace and wanted to exhibit it at a convention and employed D to ship the furnace. P made arrangements for the exhibit, such as renting space and booking a hotel room. P also advised D of the purpose of the shipment. D assured package would arrive before a specific date, but failed to deliver. Reliance damages, b/c no breach but reliance was worthless.

XXIX. Restitution ('Unjust enrichment')

A. **Basic Policy:** Only used to the extent that aggrieved party has conferred a benefit on the other party by part performance/reliance. [R2K § 370]

1. Measure: [R2K § 371]

a) Reasonable value of what was received

b) Extent to which the other party's property value has increased or other interests advanced

2. IF injured party has performed AND nothing else is due but money → NO restitution [R2K §373]

3. ODD EXCEPTION: ResD → BREACHER if benefit conferred > loss in breach. [R2K §374]

B. Quantum Meruit = Unjust enrichment!

C. Cases!

1. *Bernstein v. Nemeyer* (S. Ct. CT, 1990, Peters): D's offered negative cash flow guaranty for investment by promising to lend partnership amount that expenses exceeded cash receipts. Despite good faith efforts and provision of $3 mil under guaranty, D's breached. No restitution, under discretionary standard, b/c no unjust enrichment.

2. *U.S. v. Algernon Blair* (4th Circuit, 1973): D refused to make payments for crane rental, and P terminated its subcontractor agreement in the construction of a naval hospital. Because P provided labor and equipment to appellee, who breached the subcontract and retained those benefits without paying for them, appellant was entitled to recover damages in quantum meruit, the value of the services provided.

3. Britton v. Turner (S. Ct. NH, 1834): P breached contract for employment once 5/6 of work was through. P recovers value of services, under quantum meruit.

XXX. Specific Performance

A. **Basic Policy:** Prefer damages over specific performance. [R2K § 359]

1. Damages for part of the K, don't preclude SP for other parts.
2. SP can't be refused purely on the pretext that there is another remedy.
3. Personal service K → NO SP

B. Cases!

1. *Laclede Gas v. Amoco* (): D contracted to supply propane gas distribution systems to various residential developments in MO, until natural gas mains were extended there. P could request propane to any development it saw fit; D bound self by form K. D breached. Specific performance, other remedies are inadequate.

2. *NIPSCO v. Carbon County* (7th Circuit, 1986, Posner): P, public service provider, switched to oil from coal and breached contract with D, a coal supplier. No specific performance, b/c economically inefficient.

3. *Walgreen v. Sara Creek* (7th Circuit, 1992, Posner): D contracted with pharmacy P not to allow another pharmacy in the shopping center, then breached. Specific performance, b/c parties should calculate damages through negotiation.

4. *ABC v. Wolf* (): D, a sportscaster, breached an agreement to negotiate with ABC in good faith, and grant it right of first refusal for 3 months after Ks end. No SP, b/c we don't do that for personal service Ks.

5. *Curtice Brothers v. Catts* (S. Ct. VT, 1874): P was a canning plant that contracted to buy tomatoes from the farmer D, who breached. SP, b/c it was an odd output K, and P might not be able to find tomatoes elsewhere.

XXXI. Liquidated Damages

A. Definition: damages stipulated in the contract

B. **Basic Policy:** LD enforceable ONLY IF reasonable. [R2K § 356]

C. Cases!

1. *Southwest Engineering v. US* (8th Circuit, 1965): P performed construction work for D. K stipulated damages for delays. Some extensions were granted, but D enforced damages provision for those that weren't. Liquidated damages enforced, b/c loss hard to quantify.

2. *United Air Lines v. Austin Travel* (2nd Circuit, 1989): Liquidation damages for cancellation of travel booking system were 80% of the remaining monthly fees due under the K; 80% of variable charges for the month preceding termination, multiplied by the months remaining in the K; 50% of the average monthly booking fee revenues (using previous months as a basis for calculation). Unenforceable, unreasonable liquidated damages.

3. *Leeber v. Deltona* (S. J. Ct. ME, 1988): Condo contract stipulated that initial deposit (15% of total price) would serve as liquidated damages in the event of breach. FL courts have enforced similar provisions before, and it's consistent w/ Florida law. Enforceable.