**CONTRACTS OUTLINE**

Table of Contents

**Which Promises Get Enforced?**

* Three Theories of Contract Law p. 1
* Enforceable Contracts p. 1
* Bargains & Adequacy p. 3
* Reliance and Promissory Estoppel p. 4
* Past Actions as Consideration p. 6

**Contract Formation**

* Offer p. 7
* Acceptance p. 9
  + Acceptance by Promise
  + Acceptance by Performance
  + Choice in Acceptance
  + Revocation
* Counter-Offer & Battle of the Forms p. 14
* Assent in the Electronic Age p. 16
* Precontractual Liability p. 17
* Indefiniteness p. 18
  + Requirement Contracts
  + Exclusive Dealing Contracts

**Policing the Bargain**

* Overreaching/Duress p. 20
* Fraud/Misrepresentation p. 22
* Unconscionability/Standard Forms p. 25

**Terms of the Contract**

* Parol Evidence p. 26
* Interpretation p. 29
* UCC/Custom Trade Usage p. 31

**Performance**

* Substantial Performance p. 32

**Excuses for Nonperformance**

* Mistake p. 34
* Impracticability/Frustration p. 36

**Remedies for Breach**

* Specific Performance p. 39
* Expectation/Reliance Damages p. 40
* Limitations on Damages p. 42

Which Promises Get Enforced?

**Three Theories of Contract Law**

* Autonomy – promisors have a moral obligation to keep their promises and promises have a corresponding moral right to the promisor’s promise
  + Generates individuals’ right to form, revise and pursue their own conception of the good – *contract law helps justify this right*
  + Individual autonomy and trust in the other party
  + Ex-post perspective on enforcement – adjudication is a mechanism of resolving a dispute between litigants
  + Three critiques:
    - Moral obligation is unproved
    - Courts do not enforce all promises
    - Discomfort with state enforcing moral rights/obligations
* Economic – Promises are enforced to establish rules that will encourage socially desirable promise-making behavior by future parties
  + Focus on net social desirability of enforcement
  + Adjudication is a mechanism for creating rules that will provide incentives to parties in the future [*ex-ante perspective*]
  + Assumes that market participants are voluntary autonomous actors
* Pluralist – Multiple goals: efficiency, individual autonomy, and fairness
  + Efficiency & autonomy should give way when one party is less capable of protecting itself and needs the court to do so

**Enforceable Contracts**

* RST § 1 – ***A Contract*** ***is a promise or set of promises*** for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty
* RST § 2 – ***A promise*** ***is a manifestation of intention*** (external manifestation) ***to act or refrain from acting in a specified way,*** so made as to *justify* the promisee in understanding a commitment has been made
  + Conditional promises are enforceable
  + Opinions are not promises unless it’s the opinion of a paid expert
* RST § 4 – ***A promise may be made with words*** either oral or written, or may be ***inferred*** wholly or partly ***by conduct***
* Consideration is used by courts to distinguish between enforceable and unenforceable promises
  + What was bargained for in the exchange of promises/performances
  + RST § 71 – ***Consideration*** if performance or a return promise is bargained for
    - ***Bargained for*** if it is *sought by the promisor* in exchange for his promisee and is *given by the promisee* for the promisor’s promise
      * When there is a bargain it implies that there was a value-maximizing exchange (get something in return)
    - ***A Performance***is an *act* other than a promise, a *forbearance*, or the creation, modification, or destruction of a *legal relation*
      * Act(s) of forbearance where the offeree is given the choice
      * Conduct that will produce the specified result
    - The promise induced the return promise/performance which was in turn induced by the promise (*reciprocal bargain*)
  + Functions:
    - Evidentiary – some proof of the existence of a contract
    - Deterrent/cautionary – protects against the enforcement of rash, impulsive actions (unreasonable promises b/c joking/duress, etc.)
    - Legal framework for the expression of intention to be bound
      * We only want to enforce promises made seriously
    - Fairness – if one party relied (to his detriment) on the promise, the promisor must fulfill it
    - If we didn’t enforce promises, they’d mean nothing at all
  + Consideration is useful iff the courts can figure out if there is consideration
    - *Often just a conclusion the court reaches, not used in determination*
* *Hamer v. Sidway* – Uncle made a promise to his nephew that if he refrains from certain actions until he is 21 he would pay him $5,000.
  + Once 21, nephew wrote a letter to his uncle that he held up his end of the bargain, uncle agrees (via. Letter) that he owes the $5K, but he’s going to hold onto it until the nephew can take care of it + interest
  + When uncle dies, P (nephew’s mother in law) sues executor for the money
  + ***Consideration exists if there is a benefit to the promisor, OR forbearance/ detriment to the promisee*** [Benefit-Detriment Test (outdated)]
    - Nephew’s forbearance of his freedom of choice was a detriment
    - Detriments distinguish between promises with a detriment to the promisee and those where there is no consequence to the promisee (gift)
    - This is a broad definition though since most agreements restrict the promisee’s freedom to act in a certain way
      * BUT, potentially the uncle did benefit emotionally from the nephew’s good behavior [Court doesn’t ask this]
        + *The source of the benefit is the promisee, not the making of the promise* (giving money)
  + The promise was made for the purpose of getting something in return (**exchange**)
* *Kirksey v. Kirksey* – P is D’s sister-in-law. D invites P to come live on his property and he will give her a place to live, work the land, raise her children
  + He kicks her off the land after two years
  + The Court found that his promise to give her a place to live was a mere gratuity
  + ***A gratuitous promise is not enforceable even if one party reasonably relied on it to his or her detriment***
    - The detriment is just a *condition* of receiving the gift and if that condition doesn’t do anything to benefit the promisor – no consideration
      * He could’ve received some benefit from her settling the land, but the court does not consider that argument

**Bargains and Adequacy**

* Adequacy doctrine – The court won’t investigate the adequacy of consideration, especially if values are uncertain or difficult to measure (mix of bargain/gift)
* Nominality doctrine – Courts wont enforce contracts supported by nominal/sham consideration (or gifts)
  + There has to be some threshold of adequacy (especially if monetary value)
  + Stating the existence of consideration doesn’t overcome no consideration
* *Batsakis v. Demotsis* – War-torn Greece, D borrowed the equivalent of $25 from P in exchange for a note saying she borrowed $2,000 and would pay it back with interest
  + ***Inadequacy of consideration doesn’t render a contract unenforceable***
    - If there is some consideration, the court can’t apply value to it
  + A bargain ex-ante that seems good to the parties can’t be questioned just because ex-post it turns out poorly for one side
    - She got exactly what she bargained for (according to her testimony)
      * She made an assessment of the risk and agreed to the terms
        + Court doesn’t judge if her bet was good or bad
  + There is a possible alternative story of duress or unconscionability, but those reasons are not offered here and the court just looks at the contract on its face
    - Could look to nominality saying no one would pay $25 for $2,000
* *Wolford v. Powers* – D promised to give Ps son $10,000 if they named him after D
  + ***The court can’t evaluate the adequacy of consideration***
    - Parties place value on the pleasure derived from the action, the court can’t decide if this is adequate or not [*autonomy argument*]
  + *No market value = can’t objectively place a value on it*
    - The court has a less of a reason to place a value if the consideration is gratification of a desire
  + There are factors that point to it not being a gift – he jumped through hoops
    - *Signaling function* – wanted it to be enforced, went out of his way to ensure his “gift” would be enforced
* RST § 17 – The formation of ***a contract requires a bargain*** in which there is a ***manifestation of mutual assent*** to the exchange and consideration
  + Need a “*meeting of the minds*” where parties give actual and apparent assent
    - Element of the agreement
  + Sufficient consideration is just an element of the exchange (can be binding w/o)
* RST § 79 – ***Adequacy of Consideration/Mutuality of Obligation***:
  + If there is consideration, there is no additional requirement of
    - Benefit to promisor/detriment to the promisee;
    - Equivalence of the valued exchanges; or
    - “Mutuality of obligation” = bilateral contract (both bound/neither bound)
  + Courts should honor the value parties place on their respective performances
  + Sham consideration (where the consideration was a mere formality and not bargained for does not satisfy §71

**Reliance and Promissory Estoppel**

* RST § 90 – ***Promissory Estoppel*** exists when:
  1. The promisor should reasonably expect his promise to induce an action or forbearance by the promisee,
  2. The promise induces such action or forbearance, AND
  3. Injustice can only be avoided by the enforcement of the promise
  + Injustice may depend on the *reasonableness* of the reliance, its *definite and substantial character* in relation to the remedy, or the *formality* of the promise
    - Table-banging test
  + If a promise is made to benefit a third-party and it is foreseeable that the third-party relies on the promise – enforcement is the same
  + It’s an *alternative* for consideration rather than a form of consideration
* *Feinberg v. Pfeiffer Co* – P worked many years for D, board decided to offer her a pension. NOT bargained for, but once she retired she relied on the payments.
  + New management took over and stopped the payments claiming gift
  + ***Promissory Estoppel***justifies continuing the payments
    - She retired ***relying*** on the pension and it was ***reasonably expected*** that she rely on it (assume she would’ve kept working)
    - She cannot obtain a job anymore due to her age – ***injustice***
  + She could’ve bargained for the pension (*implied bargain*)
  + Formality of the discussions are those that you might find in a bargain/contract
    - D preempted the bargain with the structure of what the bargain would be
    - Value-maximizing business transaction to both sizes
* *Hayes v. Plantations Steel Co.* – P announces he’s going to retire, D: “we’re going to take care of you.” P comes in every year to check to make sure the payments will continue
  + ***Promise did not induce reliance because he had made the decision prior to it***
    - Pension did not deter retirement or employment elsewhere
  + P says he retired in anticipation of a pension – *hopeful/wishful thinking, NOT PE*
  + Not as valuable to the company, *he had no actual bargaining power ex-ante*
  + Looks a lot more like a gift, he has to check to make sure they’ll continue
* If we ***only enforced promises with consideration***, people would be far more likely to make promises without having to worry about enforcement
  + People would be less likely to rely on promises
    - BUT we want promises to have reliance so promisees can engage in productive activities to help the economy
      * People making promises they don’t mean isn’t productive
  + People who care about their reputation and/or have moral reasons to accept promises would still keep promises
    - More often made by those with a close, trusting relationship so legal intervention is not necessary and might lead to poor outcomes
      * *It’s useful to have some promise not enforced*
  + Enforcing a category of promises without consideration allows for greater productivity and value-maximizing behavior
    - Minimizes insincere promises and maximizes productive reliance
* ***Enforce promises without consideration if it looks like one that could’ve come from a bargain and has all the other conditions that are in a binding contract*** (Andy)
* ***Charitable Subscriptions*** are binding under RST § 90 without proof that the promise induced an action or forbearance (if requirements 1 and 3 are met?)
  + Probability of reliance is enough to make the promise enforceable
  + Charitable institutions can’t get back costs and are mean to provide a product at a price lower than the cost of producing the good
    - Cannot survive without an influx of money from other people – if we want them to survive we want to make pledges enforceable
  + *Salisbury v. Northwestern Bell* – D gave P a letter saying it would give $15,000 and converted to a pledge card which was treated like a normal pledge card (even though not signed) and assigned to a third-party [reliance]
    - ***Donations to charity are enforceable even without detrimental reliance***
      * RST § 90 and Public Policy
    - The letter was more formal and specific which suggests something like the conditions we get when there is a bargain
  + *Congregation Kadimah v. De Leo* – Guy on death bead says he will give money to the congregation, executor of the estate says the promise is not enforceable
    - ***Oral donations are not enforced if not relied upon, even under RST § 90***
    - A hope or expectation is not the same as reliance (including $ in budget)
    - Deciding to name the room after him didn’t *induce* the promise so no consideration [*some indication that reliance and consideration are imp*]
      * No conditions place on how the money was to be used or what D had to do in order to get the money
    - *Seems like a gift*
    - Expressly runs against the RST

**Past Actions as Consideration**

* ***The Andy Principle*** – Enforcing promises that arise out of situations that look like situations in which a bargain would have occurred, but for transaction costs being too high, and we’re pretty sure that the terms are reasonable
  + Apply the principle (& RST §86) when there’s a promise with high transaction costs that impede the ability to bargain (lack of time, emergency, unconscious) &
    - There’s an expectation of payment
    - Certainty and reasonability of terms
    - Bargain would have occurred
    - Incentive effects for future parties (*Economic theory*)
* *Webb v. McGowin* – P saves D from a falling block and is injured. D promises to pay P (28 days later) & makes payments until dies. Executor doesn’t want to continue paying
  + ***When promisee cares for promisor/promisor’s property even without a request, it is sufficient consideration for the enforcement of a subsequent promise to pay***
  + Promisor was personally benefited/enriched by the promisee’s sacrifice
  + Part-performance of the promise before it was taken away & there was time in between for him to think about the promise
    - Indicates D intended to be held to the promise
  + In a bargain context we’re pretty sure D would’ve bargained for his life (Andy)
    - No chance to bargain
* *Mills v. Wyman* – Adult son of D was taken care of by P, son dies, D promises to repay P for costs in a letter, then reneges on his promise
  + ***Moral obligation as sufficient consideration should be limited***
  + Promise was made immediately as a “shock-reaction”
  + Arguably no benefit because D has no legal duty to support his son
    - Any benefit was not conferred personally to D
  + Might encourage the wrong people to attempt rescues
* RST § 86 – ***A promise made in recognition of a benefit previously received*** by the promisor from the promisee is binding to the extent necessary to prevent injustice
  + NOT binding if the promisee conferred the benefit as a gift (gray areas) or the value of the promise is disproportionate to the benefit
  + Facts that lend to enforcing promises for past performances
    - Definite and substantial character of the benefit received
    - Formality in the making of the promise
    - Part performance of the promise
    - Reliance on the promise/probability of reliance
  + If you *confer a benefit by mistake* you may get restitution, but may be denied to avoid prejudice to the recipient of the benefit
    - IF the recipient subsequently promises to pay = bound by that
  + If you impose your service without the promisor’s request, it’s less likely to be enforced (*high-pressure sales tactic*) [unjustly enriched]

Contract Formation

**Offer**

* *Lucy v. Zehmer* – P approached Ds multiple times about buying their farm, Ds always said not interested. One night, at a party P offers $50,000 to buy it, parties draw up an instrument saying Ds will sell the farm for $50K, signed by both Ds (was redrawn to include both names)
  + ***A party’s outward manifestation of intent determines assent to a contract***
    - Ds try to say it was a joke, actions were reasonably interpreted as serious
  + If both parties knew it was a joke, both would know Ds promise wasn’t binding
    - *Focus on the understanding of the promisee, not intention of promisor*
  + A lot of evidence that a reasonable person would believe it was a real contract (*normal interactions of a business transactions*):
    - Written instrument with specific and clear language, signed by all parties
      * Redrafted upon Ds request
    - Sale for a reasonable amount of money
    - Went back and forth with “negotiations
* ***Objective intent*** is better than subjective intent because
  + Courts might have difficulty determining subjective intent
  + Promisee relies on it and modifies his behavior based on objective intent
  + Transaction costs would be very high for promisee to have to investigate
  + Easier to commit fraud if rely on subjective intent
  + Incentivizes parties to be clear ex-ante (difficult to determine intent ex-post)
  + Autonomy notion – we want to be able to rely on others’ objective intentions
* The Josh Principle – ***Cheapest cost avoider***, we place losses on parties that are in the best position to avoid them
  + Minimizes the costs of entering into contracts when you rely on a default rule of what the majority would do – idiosyncratic people can opt out of the default rule
* *Leonard v. Pepsico* – Pepsio ad featured a Harrier jet with 7 mill point price, wasn’t in the catalog for promotion, P tried to sue for breach of contract
  + ***If a reasonable person wouldn’t consider it to be an offer, you can’t accept***
    - *Ads are often considered to be invitations to offer*
* *Dyno Construction v*. *McWane, Inc.* – P sues for damaged pipes ordered from D, whether or not there is relief depends on if the limited liability clause is included which depend on when there was an offer
  + P says the price quotation sent by D on 11/22 was an offer
  + D says purchase order with clauses is the offer
  + Price quotations are normally considered invitations to offer so D wins
    - ***Unless there’s a clear indicator that the parties are deviation from the norm, apply the default rule***
      * It’s evolved from a practice in the industry
  + There’s a reasonable inference that there was an offer on the table – ambiguity
    - ***Dolly Principle*** – assume ambiguous offers are NOT offers
      * *Incentivizes the offeror to make more clear offers*
      * If you presume ambiguous offers are offers, there’s always the argument that it’s too ambiguous to be considered an offer
* *Lefkowitz v. Great Minneapolis Surplus Store, Inc.* – Newspaper advertisement that D is selling three of three items for $1, first come first serve, P (male) comes and says he accepts the offer in the newspaper, D refuses to sell to him (offer just for women)
  + Sues for a breach of contract – ad = offer (no specification about women)
  + *Typically retail advertisements aren’t offers, they’re invitations to make an offer*
    - Worried about being bound if demand exceeding supply
      * Ad indicates there are only 3 of each item so not an issue here
  + ***A clear, definite advertisement that invites a particular action is an offer***
  + One item is worth “up to” $100, others have explicit value
    - Don’t get reimbursed for the “up to” because the value is speculative
  + “House rule” of women only should’ve been know by the second time he tried
* RST § 18 – ***Manifestation of mutual assent*** to an exchange requires that each party either make a promise or begin performance
  + Assent must be visibly manifested
  + If one party is deceived into thinking the other manifested assent, the “joker” is held to the promise
  + If both parties manifest and intention that the bargain isn’t serious, no assent
* RST § 19 – ***Conduct that manifests mutual assent*** includes written or spoken words, acts or failure to act (*Can assent in any way if not specified by a party*)
  + Actions are not mutual assent unless the party intends to act and knows or has reason to know that the other party may infer that he assents from the actions
    - Reason to know = information from which an ordinary person would infer that the fact in question does or will exist
    - Need a conscious will to engage in the manifestation of assent
  + A party may manifest assent even though he doesn’t (fraud, duress, etc.)
* RST § 24 – ***An Offer*** is the manifestation of willingness to enter into a bargain made to justify another person in understanding that acceptance is invited and will conclude it
  + In the normal exchange of promises/offer of a promise for an act, the offer is a promise and is only revocable until accepted

**Acceptance**

* RST § 50 – ***Acceptance*** of an offer is a manifestation of assent by the offeree to the terms made of the offer in a manner invited or required by the offer
  + *Acceptance by performance* – at least part of what the offer request is performed and the offer includes acceptance by performance (= return promise\_
  + *Acceptance by promise* – offeree has to complete every act essential to the making of the promise
* RST § 30 – ***The Form of Acceptance*** can be specified by the offeror, but if not, an offer invites acceptance in any manner and by a reasonable medium
  + Acceptance may be made by:
    - Affirmative answer in words
    - Performing/refraining from performing a specified act
    - May allow the offeree to make a selection of terms
  + The offeror is entitled to insist on a particular form of acceptance and complying with that is necessary to make acceptance effective
    - Language referring to the particular mode of acceptance is often understood as a suggestion rather than a limitation (other modes are not precluded)
      * Sometimes it’s intended to be more important (time limit)
  + If acceptance form isn’t specified the offeree can accept using any reasonable form – looked at from the perspective of the offeree
* RST § 52 – An offer ***can only be accepted*** by the person whom it invites to furnish consideration
  + An offeree can assign his right after acceptance, but he can’t have someone else accept for him (even in death)
  + If you know you’re not the intended offeree, you can’t accept the offer even if the offeror doesn’t know that you are not the intended offeree
* RST § 69 – ***Acceptance by silence*** is only allowed when:
  + The offeree takes the benefit of offered services, knowing they were offered with the expectation of compensation (and had an opportunity to reject them)
    - If services are being rendered with an expectation of being compensated and the offeree could prevent the mistake, he accepts the offeror’s offer of services and must pay/perform according to the terms
  + The offeror gave the offeree reason to know remaining silent accepts the offer and the offeree intends to accept the offer by remaining silent
  + Because of prior dealings, the offeree knows he should notify the offeror if he doesn’t intend to accept the offer
  + OR under the exercise of dominion if the offeree does something contrary to the offerors property it is holding, the offeree is bound in accordance with the offered terms unless they are manifestly unreasonable
  + Generally look to the value-maximizing of the situation
    - *Works if the cost of acceptance is so high relative to the cost of rejection and you value a good more than the price*
      * Can still accept contracts we don’t want, but active acceptance can make us reject contracts we like
* **Acceptance by Promise:**
  + RST § 55 – ***Acceptance by promise*** may create a contract in which the offeror’s performance is completed when the offeree’s promise is made
    - When the offeror’s performance in the contract is done at the time of making an offer – applications, offers that include money with the offer
      * Acceptance may be implied from the offeree taking the offered benefits
  + RST § 56 – It is essential to an ***acceptance by promise*** that the offeree exercise reasonable diligence to ***notify the offeror*** of acceptance
    - Failure to notify may discharge the offeror’s duty to perform
    - Can be bound without notice if the offeree gets a benefit from the offeror
    - Enforcement depends on a change of position in justifiable reliance on the promise (no notice, offeror is relying on no acceptance)
* **Acceptance by Performance:**
  + RST § 53 – An offer can be ***accepted by the rending of performance*** *only if* the offer invites such acceptance
    - Performing *does not* constitute acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance
      * Reasonable diligence safeguards against unintended acceptance
    - If acceptance by promise is not allowed, performing *does not* constitute acceptance if before the offeror performs his promise, the offeree manifests and intention not to accept
  + RST § 45 – ***When acceptance is only allowed by rendering performance***, (no promissory acceptance allowed), an option contract is created when the offeree begins performance
    - The offeror only has to perform once the offeree completes performance
      * Bound unless not completed (offeree doesn’t have to, but he has to have a reasonable chance to complete before revocation)
    - Offeror can revoke until the offeree has begun performance
    - *Preparing for performance is NOT enough for acceptance*
  + RST § 25 – ***An Option Contract*** is a promise that meets the requirements for the formation of a contract and limits the promisor’s power to revoke and offer
    - Put down a down payment, or pay for the option to buy something later
  + RST § 54 – If the offer invites ***acceptance by performance, no notification*** is necessary to make the acceptance effective unless the offer requests notification
    - If the offeree accepts by performing and has *reason to know the offeror won’t learn of the performance*, the contractual duty of the offeror is discharged unless:
      * Offeree exercises reasonable diligence to notify the offeror of acceptance;
      * Offeror learns of the performance within a reasonable amount of time; OR
      * Offer indicates that notification of acceptance is not required
    - Beginning the performance temporarily bars revocation, but the offeror is entitled to notification that the offer has been accepted
      * No notification, offeror has no duty
* **CHOICE in Acceptance:**
  + RST § 62 – ***If there is a choice between acceptance by performance or promise*,** beginning performance is an acceptance by performance
    - This acceptance is a *promise to render or complete performance*
      * Unless it’s an option contract, the offeree is expected to be bound
    - If performance requires cooperation by the offeror, there is an offer only if the acceptance can be completed by tender of performance
* **Revocation (by offeror):**
  + RST § 42 – ***Revocation by the offeror*** terminates the offerees power of acceptance when it is received by the offeree
    - An offeror can revoke an offer as long as it’s not accepted before revocation
    - A revocation that comes after acceptance could be looked at as an offer to modify or rescind the offer
* **Rejection (by offeree):**
  + RST § 39 – ***A rejection*** terminates the power of acceptance unless the offeror manifests a contrary intention
    - A manifested intention NOT to accept an offer is a rejection unless the offeree manifests the intention to think about it further
  + RST § 40 – ***Rejection or counteroffer*** does not terminate the power of acceptance *until it is received by the offeror*
    - It must be received because of the offeror’s reliance
      * Will rely on whatever response gets to him first
* *Ever-Tite Roofing Corp. v. Green* – D (offeror) signed a document that explicity stated the work/price/payment to have P (offeree) re-roof their home. P could accept in writing OR by starting the work.
  + Offeree drafted the contract, but NOT the offeror because don’t want to make an offer for Ds to accept if they can’t get financing so Ds have to make the final offer once they are approved
    - Expressly stated it’s only binding once P accepts
  + P loaded up two trucks and drove to D’s house where there was another set of workers already working – sues for breach of contract
  + ***Offers can be accepted within a reasonable amount of time, and if acceptance occurs before notification of revocation there is a binding contract***
  + Using §50 and §30, since P could accept in writing or by starting the work, P’s loading the truck & driving there constituted acceptance before notification of revocation was received [§ 42] (No notification of acceptance was *necessary* §54)
    - Acceptance when began performance
    - Revocation when they saw the others working there (after)
  + Using § 62, since accept by performance or return promise, once P begins performance, it acts as a return promise and he must COMPLETE the job
    - So here it would be unjust to put the loss on P once he accepts
  + NOT preparation of performance because
    - Unrecoverable costs were incurred (travelling, loading the truck)
      * *Relationship-specific investment*
    - Under Josh Principle Ds could’ve said something to reject the offer
* *CIaramella v. Reader’s Digest Association, Inc.* – P sued RD, they drafted a settlement agreement after negotiations, parties *said it would not be effective until executed*, P says it’s ok (attorneys says “deal!”), but then looks at it again and decides she won’t sign it.
  + No explicit offeror and offeree
  + ***Four-Part Test for Contested Agreements:***
    - Express reservation to be bound without a signed contract?
      * Yes = factor towards not enforcing
      * No = factor towards enforcing
    - Partial performance of the contract
      * Yes = enforcing
      * No = not enforcing
    - Were all the *material terms* (not choice of law) agreed upon?
      * Yes = enforcing
      * No = not enforcing
    - Is the agreement the type of contract usually committed to writing?
      * Yes = not enforcing
      * No = enforcing
  + **Contract as a cliff** (no contract until you reach a certain point)
  + There are general independent reasons to have a contract memorialized in writing:
    - Clear delineation of the terms (doesn’t do more for negotiations)
    - In the case of misunderstanding (for the court? – if a dispute arises)
    - Clarification, all specific terms are there (again, to look back on)
* *Corinthian Pharmaceutical v. Lederle* – Non-conforming goods (don’t match the offer) are not acceptance of a purchase order provided the seller makes clear the shipment is only a courtesy (**UCC §2-206**)
  + COUNTEROFFER, not acceptance
  + *Price Quotations are invitations to make an offer and can be accepted by any reasonable medium*
* **Leval Test** for binding agreements prior to memorializing in writing:
  + Fully binding preliminary agreements – parties agree to all the points that require negotiation
  + Binding preliminary commitments – parties agree on certain terms and are only bound to participate in good faith negotiations
* *Pavel Enterprises Inc. v. A.S. Johnson Co., Inc.* – P (contractor) used D’s (subcontractor) bid in their bid for a job which was initially awarded to a third party (D knew this) who then backed out. NIH subsequently notifies P that they have the contract (informally).
  + P says D is the subcontractor and P goes and “accepts” D’s bid
  + D “revokes” their bid due to a mistake in their estimates
  + Then NIH officially awards the contract to P, but D refuses to do the work
  + The sub-bid is an offer so D would be locked in on the condition that P received the bid. Since P didn’t formally receive until *after* D revoked, **no acceptance**
    - ***It’s a traditional bilateral contract with a condition on it***
  + Theories on possible contracts
    - Promissory estoppel/ detrimental reliance [**Drennan**]
      * P relies on sub-bid in putting its bid to the party so it should be binding for a “reasonable period of time”
        + Irrevocable offer from the sub-contractor
      * Subs will be more careful with their bids, more costly
      * GC will have a bound sub, no incentive to check the numbers, and they can shop around for the best sub
      * *No detrimental reliance here because D did not foresee reliance when they thought P lost and P didn’t rely on bid substantially*
    - Unilateral accept by performance
      * Sub could be bound once its bid is use in the general bid (partial performance), but the GC then wouldn’t be bound to use the sub
        + § 45 option contract – GC can still shop around
    - Traditional bilateral contract (sometimes conditional) [**Baird**]
      * Sub can withdraw until acceptance, GC is exposed
        + Incentivizes the GC to check sub’s bids, but subs don’t have to be careful b/c they know they can withdraw
    - Josh Principle
      * Could find either party in a better position to avoid the loss
  + ***Since transaction costs are never 0, the rule of law matters in that if the loss allocation is wrong in the law, the parties may be unable to bargain around it because of high transaction costs***
    - Theoretically businesses can decide what the norms are in their circumstances and contract around the law, but only if costs are 0 which is never the case so we need a “cheapest cost avoider” type of rule
* RST § 51 – ***Part performance without knowledge of an offer***, an offeree who learns of an offer after part performance may accept by completing the requested performance
  + If the offeree performs completely without knowing about the offer, it didn’t induce the performance and it’s not binding
* RST § 36 – Offeree’s ***Power of acceptance may be terminated*** by:
  + Rejection or proposal of a counteroffer
  + Time-lapse (no longer a reasonable period of time
  + Revocation by the offeror before acceptance (must be received by offeree)
  + Death or incapacity of either party
  + If they don’t comply with any condition of acceptance under the terms of the offer

**Counteroffer and Battle of the Forms**

* RST § 39 – A ***counter-offer*** is an offer made by an offeree to the offeror proposing a substituted bargain that differs from the original offer, but relates to the same matter
  + The offeree’s power of acceptance is then terminated unless there is a contrary intention by either party to leave it open
  + It must be capable of being accepted or continues negotiations (not a rejection)
  + An inquiry about the possibility of different terms, a request for a better offer, or a comment about the terms is NOT a counter-offer
    - These are either too indefinite (proposing a modification), or they still manifests an intention to keep the original offer open
  + An offeree can also expressly say they’re keeping the original offer open and just making a potential counteroffer for the offeror to consider
* Two outdated views on counteroffers/performance (limited by UCC §2-207):
  + Mirror Image Rule – Offer only accepted if the offeree agrees to the *exact* terms
    - Any variance was a counteroffer that extinguished the original offer
  + Last Shot Doctrine – Parties are bound to the terms of the last offer made before performance commenced
    - When parties begin performing before final terms are agreed to
* *Ionics, Inc. v. Elmwood Sensors, Inc.* – P sent purchase order (OFFER) that notified remedies were in addition to those in law AND acceptance can only be based on their terms. D sent back an acknowledgement that there were no legal remedies and their acceptance was conditional
  + ***If parties for a sale of goods act as if there is a contract, UCC §2-207(3) applies***
    - (P’s terms stand because they are the default rules)
    - APPLIES 2-207 INCORRECTLY BECAUSE AFTER IT SAYS NO CONTRAC UNDER 1, IT USES 2 TO REASON WHY THEY KNOCKOUT
* ***UCC §2-207*** – Applies when there is a sale of goods (not just merchants)
  + **An additional rule is something that does not have a default rule (otherwise the default rule is assumed in the first contract and the second includes a *different* term)**

1. Statement of acceptance operates as an acceptance even if it has *additional* or *different* terms from the offer **unless** acceptance is expressly conditional on assent to the additional or different terms
2. *Additional* terms are considered proposals for addition to the contract. Between Merchants they become part of the contract **unless**
   1. Offer expressly limits acceptance to terms of the offer
   2. Additional terms material alter the contract
      1. If the clause negates standard warranties, requires a guaranty, complaints have to be made in a materially shorter time than customary/reasonable, seller reserves the power to cancel upon the buyer’s failure to meet any invoice when it’s due
   3. Offeror notifies (or notified) offeree of its objection to the terms
      1. Prior notification of objection if there are different terms from the first contract (notified that they’d only accept term 1)

(*If any of these are satisfied, the first party’s terms govern*)

*Different terms* can be treated in three different ways:

1. Treat them like additional terms
   1. If they meet any of the three conditions under 2, they fall out
2. They fall out no matter what because (2) doesn’t apply
3. Contradictory terms knock each other out & UCC gap fills
4. If the parties act as if there is a contract, then there is a contract
   1. Terms that both parties agree on are in the contract
   2. Supplemental terms that are allowed under (2) are part of the contract
   3. UCC gap-fills any terms that are knocked out
   * **Order of operations for UCC**:
     + Ask if offeree made his acceptance contingent
       - If yes, no contract under (1), go to (3)
         * Contract contains only the terms on which the parties agree and other terms are filled by the UCC
       - If no, contract under (1), go to (2)
         * If parties are merchants, additional terms are accepted **unless**

Offer expressly limits acceptance to its terms

Additional terms materially alter the contract

There is notification of rejection

* + - * + *If parties are NOT merchants, additional terms are rejected unless the offeror explicitly accepts them*
        + Different terms are treated in three different ways

Just like additional terms (comment 3)

Conflicting terms knock out and UCC fills

Different terms are rejected and offeror’s terms hold

**Assent in an Electronic Age**

* ***Most Electronic assents aren’t genuine assents, but we enforce them anyway***
  + *We want acts that manifest assent and availability of terms at low cost*
  + Know the parties aren’t going to read, but assume that the rules are benign and arise out of a working market
    - Any super terrible terms would be found out by aggressive consumers or just not enforced by courts
* *Hill v. Gateway 2000, Inc.* – P orders a computer from D and then the computer arrived there were terms in the box (*stuck a clause in the contract*)
  + P says offeree by responding to the ad
    - D is actually considered the offeree and included “additional terms”
  + Judge says §2-207 doesn’t apply if they aren’t forms [*probably not true*]
  + ***P had a reasonable opportunity to accept or reject and manifested assent***
    - P had an option to inspect and send back the computer (and terms)
      * Terms were considered proposals until the 30 day time runs
  + **Even if you don’t read a contract, you cant be held to its terms**
    - Robust competitive markets generate terms consumers like so it’s ok
    - Reduce transaction costs
  + ***Take away points:***
    - Draw an inference about desirability/enforceability of terms depending on if they are derived from a relatively working market or market failure
      * *Default rules* are good in a working market
    - If terms are SO terrible there may be more intervention
    - Might want to enforce the contract because of the Andy Principle
      * A reasonable person would’ve agreed to the terms ex-ante
      * *Not a real assent, but we impose it on people who don’t read*
        + Don’t blame them for not reading, but it’s ok to impose it because a reasonable person would’ve assented to it
* *Jerez v. JD Closeouts* – Terms and conditions on a website for goods are not readily available or clear when purchasing the goods
  + Simply having terms available somewhere on the website is not enough
    - ***Sellers need to provide consumers with a reasonable opportunity to read/accept the terms***
* *Fteja v. Facebook* – Terms and conditions are in a clear like when you click accept
  + Putting the terms in a visible place allows the consumer to manifest an assent (checked the little box accepting the terms)
    - ***As long as consumers have a reasonable opportunity to look at the terms and conditions they are manifesting assent to them***
  + Consumers don’t have any bargaining power, but if it’s super outrageous the courts won’t enforce it anyway
  + We don’t really want people to waste time reading terms, assuming they arise out of a **working market**

**Precontractual Liability**

* *Hoffman v. Red Owl Stores, Inc.* – P and D discuss for 3 years P running one of D’s supermarket stores. P jumps through a lot of hoops that D lays out in order to get the store – moves family, sells bakery, leases a small grocery store, sells when profitable, etc.
  + P relied on a promise that if he does all these things, he’ll get a franchise
    - (No contract because they’re still in the negotiation stage)
    - *A promise under promissory estoppel does not need to be so comprehensive that it’s an offer*
  + ***Promissory estoppel*** can be used here as a means for granting damages
    - A distinct basis of liability without regard to bargain, contract, or consideration [***reliance damages*** are allowed]
  + We don’t want to deter people from making investments if they thought the other party could pull out at any time
    - **Don’t want to let parties string other parties along**
* *Dixon v. Wells Fargo* – P and D reached an agreement to enter into loan modification, D told P to stop making payments and 2 years later began foreclosure proceedings
  + ***Promissory estoppel can be used to resume negotiations if P meets the criteria***
    - Normally an “agreement to agree” would not bind parties to a final agreement, but P is just trying to restart negotiations
  + We can use promissory estoppel to smooth out the “contract cliff” so parties can’t start adjusting their behavior as they get close to that point/stringing others along
  + Justice and efficiency concerns
  + *Problem with non-definite PE is that you don’t know exactly how to enforce it* 
    - ***Limit promisee’s recovery to his or her reliance damages***

Here that’s restarting negotiations

* RST § 87 – An offer is ***binding as an option contract*** if it
  + is in writing/signed by the offeror, produces a purported consideration, AND proposes an exchange on fair terms within a reasonable time

OR

* + is revocable by statute
  + If the offeror should reasonably expect its offer to induce action or forbearance by the offeree before acceptance and does induce such action/forbearance it is binding to the extent necessary to avoid injustice (*like promissory estoppel)*
  + Payment can be consideration, but still have to worry about nominality
    - Sometimes that can still be sufficient for a short-time option proposing an exchange for *fair terms*
      * If its an appropriate preliminary step for a socially useful transaction there is sufficient substantive basis for enforcement
  + Reliance must be substantial and foreseeable by the offeror

**Indefiniteness**

* **Dolly Rule** – Don’t enforce indefinite contracts
* *Quantum meruit* – If a contract was performed for a promise to pay the reasonable value of the services it will be decided depending on the market value
* *Varney v. Ditmars* – P (architect) hired by D who tells him that he will give him a “fair share” of the profits Jan 1. (P was fired before Jan 1)
  + “Fair share” is vague, indefinite, and uncertain – no amount can be computed from what was said **no clear remedy**
    - Fair an reasonable in a sale of goods = market value (quantum meruit)
    - A share of profits is uncertain and affected by other uncertain facts
      * Can’t figure out the parties’ intent (conjecture)
  + ***The material terms of a contract must be definite and certain in order for it to be enforceable***
  + Cardozo dissent – if P proved what a “fair share” would be, he could win
* *D.R. Curtis, Co. v. Mathews* – P approached D about selling his grain, orally agreed to an amount, but that amount changed at harvest depending on the protein content
  + It’s customary in the industry not to set the price of wheat until the protein contents are set
    - ***Indefinite terms, but infer from behavior that they meant to be bound***
  + UCC §2-305 allows binding contracts for a sale of goods even if no price is settled as long as there is an intent to be bound
    - Remedy is based on market value and an objective formulation on what the parties would’ve put in their contract if it were more specific
      * *There is a market substitute for the indefinite term*
    - If the price is left open to be established by a later agreement and they fail to reach a later agreement, they’re still bound to perform
  + If courts can figure out what the parties meant when they put in the indefinite term, they can fill in the term to enforce
  + *Joseph Martin, Delicatessen v. Schumacher* – An agreement to agree w/o a price term is unenforceable without a market price
* **Requirements Contracts**
  + UCC §2-306(1)-If quantity is measured by the output of the seller or requirements of the buyer, the actual output/requirements may be any that occur in good faith
    - If there’s an estimated quantity, it cannot be unreasonably disproportionate
    - If there’s no estimated quantity, it cannot be totally different from any normal or otherwise comparable prior output or requirements
    - Good faith = honesty in fact in the conduct or transaction
      * Between merchants it includes observance of reasonable commercial standards of fair dealing in the trade
  + *Eastern Air Lines v. Gulf Oil Corp.* – A contract for an ongoing relationship between airline & oil co. with indefinite terms because parties don’t know the state of the world. Price of oil based on a specific index. Oil crisis = two-tiered system which the index doesn’t take into account
    - Requirements contracts benefit both parties
      * Seller is guaranteed sales, assume they won’t have excess output
      * Buyer has an assured source of supply, doesn’t want to end up in a city without fuel to purchase
    - ***As long as parties to a requirements contract are acting in good faith with their demands, the contract is enforceable*** (UCC § 2-306)
      * Quantity is not indefinite just b/c of change in requirements
    - UCC § 2-208 – the parties themselves know best what they have meant by their agreement and their action under the agreement is the best indication of what that meaning was
      * Custom in the industry to “fuel freight” so it doesn’t violate reasonable commercial standards
        + Long part of the established course of performance
    - Established course of performance (relationship) + established usages of trade + contract = should be upheld as agreed upon
* **Exclusive Dealings Contracts**
  + UCC § 2-306(2) A lawful agreement for exclusive dealing imposes (unless otherwise agreed) an obligation by the seller to use best efforts to supply the goods an by the buyer to use best efforts to promote their sale
  + *Wood v. Lucy* – P has exclusive rights to endorse D’s favor on goods. D endorses another line of products without P’s knowledge – sues for breach of contract
    - There’s nothing in the contract about reasonable efforts by D, but it’s implied – no value of a contract where D is just at P’s mercy
      * Acceptance of an exclusive agency is an assumption of duties
    - ***Reasonable effort should be consistent with what the majority of the people in the same situation would want*** (*Andy Principle)*
      * Treat the actors in an exclusive dealings contract as a single unit trying to maximize the joint interest
* RST § 33 – A manifestation of an intention that is understood as an offer cannot be accepted to form a contract unless the ***terms of the contract are reasonably certain***
  + Reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy
  + Leaving open terms of a bargain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance
    - Actions of parties may show conclusively that they intended a binding agreement even if terms are missing or left to be agreed upon
      * Uncertainty about incidental terms don’t negate an agreement
      * An unspecified amount of time is just a reasonable amount of time
    - If parties decide they won’t be bound w/o a specific price agreed upon, they’re not bound, but if it’s for a sale of goods the price is a reasonable price at the time of delivery
      * If nothing is said about the price, it’s left to be agreed upon or fixed by the market
  + The *more important the uncertainty*, the stronger the indication that the parties don’t intend to be bound

Policing the Bargain

**Overreaching and Duress**

* *Can always argue a benign story and a malign one*
* Common law pre-existing duty rule v. UCC & RST allow for “good faith” modifications
* Pre-existing duty rule:
  + *Alaska Packers’ Ass’n v. Domenico* – D hires fishermen (Ps) to work on their fish farm in Alaska. When they get there, Ps demand more money citing net issues, D employee offers more, but when they return to SF, D refuses to pay higher rate
    - Ps want more for what they already contracted to do (preexisting duty)
      * ***Can’t demand compensation for something he has a duty to do***
        + No consideration = no modification
    - Enforce imperfect foresight modifications, but don’t enforce modifications that are just a change in distributional wealth (exploiting costs of a party)
    - If is a working market – modifications are made to benefit both parties
      * Monopoly – bargaining power is unequal so no reason to enforce
  + RST § 73 – ***Performance of a clear legal duty*** owed to a promisor is not consideration, but a similar performance IS consideration if it differs from what was required by the duty in a way that reflects more than a pretense of a bargain
    - A duty is one which any remedy ordinarily allowed by the law for that kind of duty is still available (*there has to be a legal remedy for a duty to be breached*)
    - If the legal duty is doubtful or the subject of honest dispute, or there is an additional performance besides the duty = consideration satisfied
    - Public official promises have a legal duty to the public
  + Can argue that it’s a NEW CONTRACT or party is agreeing to do more work
* *Wolf v. Marlton Corp* – P is building a house for D, D wants out, P won’t allow it so D threatens to re-sell the house to someone who would be unfavorable to D
  + ***A threat can be improper or wrongful even if it’s lawful***
    - Did P believe D would carry out the threat and was fearful of the result?
      * *What the threat reasonably induces the party to do*
  + Improper because it would’ve harmed P and done nothing to D (RST § 176)
* *Austin Instrument, Inc. v. Loral Corp.* – P provides parts to D for its contract with the gov, P wants to provide all parts in the second contract and if D says no it will stop delivering goods under the first contract
  + **Economic Duress** if immediate possession of needful goods is threatened or withholding of goods was threatened unless some future demand is agreed to
    - No reasonable alternative source of supply of the goods
    - Ordinary remedy for breach of the contract isn’t available b/c of time
  + Threat deprived D of its free will = duress
* **Duress** challenges conditions under which parties voluntarily assented to terms
  + Value-minimizing exchange
  + Situation monopoly combined with an exploitative price
  + Dire need with only market price charged – *can be value-maximizing as indicated by the market, but not necessarily voluntary*
  + Problems with the underlying market
    - Should contract law take market as a given or should it take into account any underlying taint in the market?
* UCC § 2-209 – Enforce modifications to contracts made benignly (in good faith) and don’t enforce those that were made malignly (in bad faith)
* RST § 89 – A ***promise modifying a duty*** under a contract not fully performed on either side is binding if it’s fair and equitable under circumstances not anticipated by the parties, to the extent provided by statute/justice requires b/c of a material change of position in reliance on the promise (*UCC idea*)
  + Includes adjustments to ongoing transactions
  + Only allowed if there’s an objectively demonstrable reason for seeking a modification such as circumstances not anticipated when the contract was made
    - **Both parties** have to not expect the new circumstances
* RST § 174 – If a conduct that appears to be a manifestation of assent by a party that doesn’t intend to do so is ***physically compelled by duress***, it’s not effective as assent
  + Physically forced to do something w/no intention of doing it
  + NO CONTRACT (not voidable, void)
* RST § 175 – If manifestation is ***induced by an improper threat*** that leaves the victim with no reasonable alternative, the contract is voidable by the victim
  + If it’s induced by a non-party, it’s voidable by the victim unless the other party to the transaction relies on it in goo faith without reason to know of the duress
  + There has to be both an improper threat AND no reasonable alternative
    - A reasonable alternative might be a legal remedy or availability of goods from other sources
  + The improper threat must induce the making of the contract in that the duress substantially contributes to the decision to manifest assent
    - Subjective test – weak/cowardly/timid people need more protection
* RST § 176 – An ***improper threat*** is one that is a crime or tort or would result in one, a threat of criminal prosecution, the use of civil process + bad faith, or a breach of duty of good faith and fair dealing under a contract with the recipient
  + A threat is also improper if the resulting exchange is not on fair terms AND
    - It would harm the recipient and would not significantly benefit the party making it (leaking embarrassing photos, etc.)
    - The effectiveness of the threat in inducing assent is significantly increased by prior unfair dealing
      * The party making the threat has an advantage over the other by unfair dealing (manipulative conduct)
    - What is threatened is otherwise a use of power for illegitimate reasons
  + Threatening civil process is improper if the person threatening doesn’t believe there is a reasonable basis for the action

**Fraud and Misrepresentation**

* Restatements as order op
* ***Duty to disclose*** if there is superior information + inaccessible information (unless a party substantially invested in obtaining the info) + request of material fact
* *Spiess v. Brandt* – P purchased a resort from D who claimed they made “good money”
  + P requested to look at D’s books and D withheld them
    - Statement implied that P didn’t have to do an investigation to solve the asymmetric information problem
  + ***To prove fraud there needs to be:*** (same as § 162)
    - False misrepresentation of a material fact which D either knew was false or was indifferent to the truth, intent to induce P to act in reliance and justifiable reliance by P
  + More specific the statement is and more expertise the offeror has, the more justifiable it is to rely on the offer (+ trust and susceptibility)
    - Inexperience/age of buyers means more susceptable
  + Superior knowledge = duty to disclose to level the playing field VS. active concealment of the books requested, ***once requested, duty to disclose***
  + Consider the capacity of the weaker party to engage in its own investigation
    - If they can do their own investigation pretty easily, maybe undercuts the duty to disclose even if they have superior information
      * BUT if a party misrepresents a fact, you’re telling them that they don’t need to make an investigation
  + If the seller puts in a lot to obtain the information, they should get the benefit of what they’ve put it (societal gains), but if it’s easy to provide, should
  + Dissent – not definite that accounting losses are operative losses, can still make good money
    - Offer was made before misrepresentation, small increase in price after
    - In an arms length deal, each party is responsible to do their own investigation (reliance is not justifiable)
* *Danann Realty Corp. v. Harris* – P induced to lease a building on false representation expenses with an adequately specific merger clause
  + Importance of sophistication of the parties – businessmen need to be able to rely on contracts (*P had access to the info*)
  + General boilerplate language of a merger clause wouldn’t be any good
    - Exact representation about specific terms and *sophisticated parties*
      * Parties probably bargained over the clause
    - If it were just general, sellers could get away with anything
      * Probably didn’t bargain over it
  + There HAD been a false representation of the operating expenses, but the merger clause said it wasn’t relied on
    - Contract allocated the risk of fraud
  + Dissent – allows people to lie verbally by including a general merger clause
* *Psenicska v. 20th Century Fox* – Ps signed a contract explicitly waiving reliance on D’s oral representations
  + P tries to say fraud because not “documentary-style” film (but it was)
  + ***Expressly waiving reliance on prior representation***
* *Proview v. Apple* – Apple lawyers disguised identity to purchase P’s rights to their name
  + Purposely disguised their identity which made it seem like it was material
  + False answers to specific questions = fraudulent
    - ***Specifically asking pointed questions presents a duty to disclose***
* RST § 159 – ***A misrepresentation*** is an assertion that is not in accord with the facts
  + Concealment/non-disclosure can also be a misrepresentation
  + True statements that fail to include qualifying matter to prevent false implication
    - “Half-truths” may be just as misleading as false assertions
  + The assertion must relate to a fact at the time it was made (past or present)
  + A state of mind can be a fact – misrepresent what you intend to do
* RST § 160 – An action intended or known to be likely to prevent another from learning a fact (***concealment***) is equivalent to an assertion that the fact does not exist
  + An affirmative act preventing someone from learning something they would have is always a misrepresentation with the same effect
  + Often applied to two situations:
    - Actively hide something from the other party
    - Offeror omits a portion of the written offer frustrating an investigation
  + Doesn’t have to make it impossible for a party to learn it – just likely to prevent it
* RST § 161 – ***Non-disclosure of a fact*** known to a party is equivalent to an assertion that the fact does not exist in the following cases only
  1. Knows the disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or fraudulent or material
  2. Knows the disclosure of a fact would correct a mistake of the other party as to a basic assumption on which the party is making the contract AND non-disclosure would be a failure to act in good faith
     + Reasonably expect other party to take *normal steps* to inform himself
       - Inexperienced/ignorant parties or ones with bad judgment do not require others to compensate for their deficiencies
  3. Knows the disclosure of a fact would correct a mistake of the other party as to the contents or effects of a writing that embodies an agreement
  4. The other person is entitled to know because of a trusting relationship
  + Not enough to make reasonable efforts to disclose, ACTUAL disclosure required
  + Only have to disclose facts you know (or have reason to know) will influence
    - Unintentional failure to disclose = innocent misrepresentation
    - Don’t need to disclose facts that an ordinary person would deem unimp
  + If you **subsequently acquire knowledge** that bears significance on an earlier assertion, must disclose in three cases: (If not, same as if knew the whole time)
    - If the assertion truthfully made is no longer true
    - Original assertion was a misrepresentation, but wasn’t fraudulent
      * Didn’t know it wasn’t true or didn’t intend for it to be relied on
    - Original assertion was a misrepresentation, but wasn’t material at the time because you didn’t know of extenuating circumstances making it material
  + To make a contract voidable the nondisclosure must be fraudulent or material
    - Intentionally withheld to induce action = fraudulent
* RST § 162 - A ***misrepresentation is fraudulent*** if the maker intends his assertion to induce a party to manifest his assent AND the maker

1. Knows or believes that the assertion is not in accord with the facts, or
   1. Believes the assertion is false even if it isn’t
2. Does not have the confidence he states/implies in the truth of the assertion, or
   1. Not sure if it’s true or not, but states it’s true instead of an opinion
3. Knows he does not have the basis that he states or implies for the assertion
   1. Assertion on a personal belief/experience if not the case & untrue

A ***misrepresentation is material*** if it would likely induce a reasonable person to manifest his assent or of the maker knows that it would be likely to induce the recipient to do so

* + Fraudulent misrepresentation = consciously false + an intention to mislead
    - Substantially certain the other parson will be misled
    - There are two interpretations, but *intends* to represent the false one
    - Allowing someone to continue to rely on a prior misrepresentation
  + Scienter = maker knows the untrue character of his assertion (a, b, or c)
  + Materiality of a misrepresentation is determined from the viewpoint of the maker
    - Justification of reliance is determined from the viewpoint of the recipient
  + Materiality = likely to induce a reasonable person to manifest assent OR maker knows it is likely to induce *this particular recipient* to manifest assent
    - Special consideration of recipients in light of the circumstances
* RST § 163 – A contract is ***void if misrepresentation*** as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the terms of the proposed contract, his conduct is NOT effective as a manifestation of assent
  + If a party doesn’t know the terms of a contract he cannot manifest assent
    - Has to relate to the *nature* of the contract, not just a nonessential term
  + If a party has reasonable opportunity to know the terms – doesn’t apply
    - Not reading a contract is no excuse
* RST § 164 – A contract is ***voidable if misrepresentation*** induced assent by either a fraudulent or a material misrepresentation upon which the recipient is justified in relying
  + If assent is induced by a third-party’s material or fraudulent misrepresentation, the contract is voidable unless the other party to the contract relies on it in good faith without reason to know of the misrepresentation
  + Fraud or material misrepresentation + misrepresentation induced the recipient to make the contract + justified in relying on misrepresentation = VOIDABLE
  + A non-fraudulent misrepresentation of a seemingly unimportant fact would not give the maker reason to suppose it would induce assent

**Unconscionability and Standard Forms**

* *Williams v. Walker-Thomas Furniture Co.* –
  + ***For a contract to be unconscionable there needs to be:***
    - Procedural unconscionability – asymmetric information and sophistication of the parties, inequality of bargaining power, visibility of the clauses
      * Absence of a meaningful choice
      * Manner of entering into the contract – understand terms?

AND

* + - Substantive unconscionability – terms that are unreasonably favorable to the stronger party
  + Is the party exploiting a conditional monopoly or just adjusting to changed circumstances? (something going on past normal market activity)
* *Henningsen v. Bloomfield Motors, Inc.* – Industry standard pre-printed contract to buy a car with a limited warranty, crashes due to faulty part, P has severe injuries
  + Worry about an oligopoly where the consumer has no bargaining power
    - ***Should protect consumers with no bargaining power forced to agree to bad terms in a non-functioning market***
  + Two views of standard boilerplate contracts:
    - Collusion, not a functioning market, exploiting buyers
    - Efficiency of cost of goods (reduce transaction costs)
      * Efficient terms to which the parties would’ve bargained for
  + Warranties solve an asymmetric information problem
    - Signify quality and sellers are in a better position to predict defects
  + Problems with opinion:
    - Assumes a small number of players with a standard term = collusion
      * Could just reflects an efficient bargain (perfect competition)
    - Bad term = collusion, but again could be perfect competition
      * Collusive if the price isn’t right and the sellers are exploiting their higher access to information
* RST § 208 – If a contract or term is ***unconscionable*** at the time the contract is made, a court may refuse to enforce the contract or part of it to avoid any unconscionable result
  + Determination is made in light of the contract’s setting, purpose, and effect
  + Inadequacy of consideration is not enough, but gross disparity in the values exchanged implies a term may be unconscionable
    - Also helps show effects in the bargaining process
    - Normally there are other factors than just overall imbalance
  + Inequality of bargaining power + terms unreasonably favorable to one party = may confirm indications that the transaction involved deception or that the weaker party had no meaningful choice/alternative/did not assent
    - Stronger party believes there’s a low probability weaker one will perform
    - Stronger party knows weaker will be unable to receive substantial benefits
    - Stronger party knows weaker can’t reasonable protect his interests

The Terms of the Contract

**Parol Evidence Rule**

* *Mitchill v. Lath* – P contracted with D to buy D’s farm, allege D orally agreed to remove an ice house from the land in conjunction with the contract
  + Andrews three part test: **Looking at the agreement**
    - Collateral agreement? (i.e. if it’s a separate agreement)
      * Yes – no PE
      * No – run through rest of the test
    - Contradiction?
      * Yes – no PE
      * No – go to part 3
    - Fully integrated?
      * Apply a test that given what’s in the agreement would it have **naturally been included** if they intended to have an agreement?
        + If Yes – no PE
  + Lehman – disagrees with the fully integrated prong
    - Assume extrinsic evidence and use that to decide if it’s fully integrated
      * If yes – no PE
    - Partially integrated? Decide if it’s partially integrated w/r/t term
* *Masterson v. Sine* – P sells land to D, with a buy-back clause. P goes bankrupt, trustee wants to buy-back the land, D alleges that it was implied it could only be bought back by P because it was to stay in the family
  + It was a form contract – maybe no room to add in this clause?
  + Natural inclusion
  + Dissent – more into four-corers rule
    - Default rule – have to opt out of it
* RST § 209 – An ***integrated agreement*** is writing(s) that constitutes a final expression of one or more terms of an agreement (preliminary question determined by the court to decide on interpretation or application of parol evidence rule)
  + If a writing appears to be a complete agreement in view of its completeness and specificity, it is taken to be an integrated agreement *unless* it is established by other evidence that the writing did not constitute a final expression
  + An integrated agreement supersedes contrary prior statements, if it’s completely integrated it super cedes consistent additional terms
  + Take into account the circumstances surrounding the agreement – usages of trade, course of dealings between parties, and performance can all supplement/explain an integrated agreement
* RST § 210 – A ***completely integrated agreement*** is an agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement. A ***partially integrated agreement*** is an integrated agreement other than a complete one.
  + Consistent evidence is allowed unless both parties agree that the writing is a complete and exclusive statement of the terms
  + A writing may seem complete, but that’s not enough - context is important
* RST § 211 – If a party manifests assent to a writing (***standardized agreement***) believing that like writings are regularly used to embody terms of agreements o the same type, he adopts the writing as an integrated agreement.
  + Writing is interpreted to treat alike all those similarly situated without regard to their knowledge or understanding of the standard terms of the writing
    - Courts try to effectuate the reasonable expectation of the average person
  + **Exception** if the other party has reason to believe the party manifesting assent would not do so if he *knew the writing contained a particular term*
    - Then that term is not in the agreement
  + We don’t expect customers to understand terms- eliminate bargaining over details
    - Trust in the good faith of seller, but know buyer assented w/o reading
  + Several types of standardized forms are regulated, AND
    - They may be superseded by separately negotiated or added terms,
    - They are normally construed against the draftsman,
    - The draftsman has an *overriding* obligation of good faith, and
    - The court can refuse to enforce unconscionable contracts or terms
* RST § 212 – The ***interpretation*** of an integrated agreement is directed to the meaning of the terms of the writing(s) in light of the circumstances
  + Interpretation is determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn
    - Otherwise determined as a question of law
  + Context is important, but the words of the integrate agreement are more important
* RST § 213 – ***Parol Evidence Rule***

1. A binding integrated agreement discharges prior agreements if INCONSISTENT
2. A binding completely integrated agreement discharges prior agreements if they are within its scope
3. An integrated agreement that is not binding or is voidable and avoided does *not* discharge a prior agreement. It may be effective to render inoperative a term which would’ve been part of the agreement if it had not been integrated
   * Rule of substantive law that defines the subject matter of interpretation
     + Renders inoperative prior written & oral agreements
   * Supersedes prior inconsistent terms
     + Have to interpret the integrated agreement & inconsistent term
   * Consistent terms are superseded (if completely integrated), but there may be separate agreements not affected
     + *First figure out if the prior agreement is within the scope of integrated one*

* RST § 214 – Agreements ***prior to or contemporaneous with*** the adoption of a writing are admissible in evidence to establish

1. That the writing is NOT an integrated agreement
2. That the integrated agreement, if any is completely or partially integrated
3. The meaning of the writing (integrated or not)
4. Illegality, fraud, duress, mistake, lack of consideration, or any invalidating clause
5. Grounds for granting/denying rescission, reformation, specific performance or other remedy
   * Conditions at the time of adoption of the writing are necessary to find invalidating clauses or remedies

* RST § 215 – Evidence of prior/contemporaneous agreements or negotiations are NOT admissible in evidence to ***contradict a term*** of a binding agreement (exceptions in §214)
  + If an agreement is integrated prior agreements are irrelevant to the rights of the parties except in question of interpretation, invalidating clauses, or remedies
    - *No matter how clear, it still can’t override a later superseding agreement*
  + An earlier agreement can help the interpretation of a later one as long as it’s not contradictory (§213)
  + If the credibility/inference of evidences could differ – question of fact as to which one to use
    - Asserted meanings must be consistent with the language and context
* RST § 216 – Evidence of ***consistent additional terms*** is admissible to supplement an integrated agreement *unless* the court finds that the agreement was completely integrated
  + An agreement is NOT completely integrated if it omits a consistent additional term which is
    - Agreed to for separate consideration, or
    - Such a term that might naturally be omitted from the writing
  + Deciding if consistent or inconsistent requires interpretation of the writing in light of the circumstances + the additional term
    - Explicitly state terms + those implied as part of the bargain
    - Doesn’t include gap-fillers, unless parties contracted around them
  + A separate contract (**collateral agreement**) NOT covered by the integrated agreement is not superseded
  + If a consistent additional term was **naturally omitted** from an integrated agreement, allow in parol evidence
  + A merger clause may exclude consistent additional terms that would’ve naturally been omitted without the clause
    - Still have to ask if the writing was assented to as an integrated agreement, the scope of the writing if completely integrated, an the interpretation

**Interpretation**

* *In Re Soper’s Estate* – Soper married to Adeline, fakes death, moves, remarries to Gertrude, actually dies and the insurance company has to give the money to his “wife”
  + Ambiguous in the context
    - ***Can use extrinsic evidence to create ambiguity***
  + Plain meaning sacrifices rationalism
    - Look to extrinsic evidence to decide if ambiguous
      * Want to figure out parties’ INTENT
* *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* –
  + Language doesn’t have plain meaning
    - Can’t discover intent of the parties by words
      * ***Reasonably susceptible to an interpretation = allow EE***
  + ASSUMING something is not ambiguous could impose an interpretation of the contract that the parties never intended
    - Might allow you to turn a contradiction into not one by explanation
      * Could allow in evidence to show that what initially looks like a contradiction is not actually one
  + Ex-post job is to figure out intent, NEED context & EE to do so
  + Can’t ever signal plain meaning unless you insert a governing clause in the contract that it’s under NY law (*parties generally like plain meaning*)
* *Trident Center v. CT General Life Insurance Co.* –
* *WWW Associates v. Giancontieri* – Reciprocal cancelation clause in the contract that P said was just supposed to be there for their benefit, D cancels within provision
  + NEW YORK
    - Get at the intent of the parties by interpreting the terms of the contract through their plain meaning by looking at the ***whole contract***
      * Four corners
    - Look at the intent of the parties by what was expressed in the contract, NOT by looking at any extrinsic evidence/what’s meant in the community
    - Interpret meanings by looking at the ***purpose***of the contract
      * Can’t use EE to CREATE an ambiguity (*contradiction?*)
    - ***Plain meaning unless ambiguous***
    - Rule for plain language and people who want words to mean more should identify that in the contract (*Josh Principle*)
      * Create incentives for parties to be clear about their intent ex-ante
        + Use plain language meaning & spell it out if diff meaning
* *Fragilament v. BNS* – Chicken mean young chicken or old chicken? D sells chicken to German company who is new in the chicken trading business
  + Assume everyone was acting in good faith & meant different things
    - Either both parties’ interpretations matter or neither do
  + Don’t look to the subjective meaning – care about ***objective meaning to outsiders***
    - Deviate from subjective meanings iff both parties mean different things
      * Competing definitions (if they agreed, doesn’t matter what an objective observer would’ve thought)
  + ***PLAINTIFFS are bringing the suit so they have to provide the affirmative evidence that their meaning is the persuasive one***
    - Toss-up of interpretations = burdens matter
  + If you don’t want a contract use RST § 20 – neither party knows the meaning attached by the other
    - BUT, if already performed can’t exactly do this
      * No contract = no remedy, but if positions changed, restitution?
  + *Novice should be charged with trade usage and indicate if he does not have the information about the trade (JOSH PRINCIPLE)*
* RST § 20 – ***Misunderstanding:*** NO CONTRACT if the parties attach different meanings to their manifestations **AND** neither party knows (or has reason to) the meaning attached by the other; OR each party knows (or has reason to) the meaning attached by the other
  + Meanings of one of the parties wins out if
    - The party doesn’t know of the different meaning attached by the other and the other party knows the meaning attached by the first party; OR
      * Don’t take any potential negligence by party 2 into account
    - The party has no reason to know of any different meaning and the other party has reason to know of the meaning attached by the first
      * Assume party 2 is negligent and party 1 was innocent
  + Meaning can depend on the parties prior experiences & context of the contract
  + As long as there is a core common meaning sufficient to determine the performances with reasonable certainty or give a reasonably certain basis for legal remedy, meaning attached to the contract is fine

**The UCC/Custom and Trade Usage**

* *Columbia Nitrogen Corp. v. Royster Co.* – Prior trade between the parties, but R as buyer, C as seller, here it’s the other way around, C is supposed to buy a minimum amount of phosphate from R, but price plunges “precipitously” and R buys significantly less
  + Parties had rejected proposals for damages allocating this risk
  + Court looks to trade usage & course of dealings
    - UCC 2-202 CAN introduce trade usage to ***explain or supplement***
      * Don’t need ambiguity to allow trade usage
        + *Even an express term can be explained by course of dealings/trade usage*
      * Seems to permit trade usage to ADD terms to which the contract was silent on
  + UCC is standard majoritarian default rule – community knows it will be used
    - Reduce costs
    - Should opt-out of trade usage if you don’t want to use it
  + NARROW VIEW about what constitutes a contradiction
  + ***Enforce custom if the deviations from purchases even out over time***
  + *Argue that this is too much deviation and no increase from minimum amount*
    - ***Strange event takes it out of the custom shouldn’t allow UCC to apply***
      * Deviate if the net effect is minimal, but should allow parties to enforce contracts as they are when prices drop excessively
        + **Ahistorical event – hasn’t happened before, no trade usage to explain this situation**
* *Southern Concrete Services v.* *Mableton Contractors, Inc*. – D agrees to buy an “approximate” amount from P, but buys much less, courts enforce contract
  + Different evolutionary theory about the trade usage
    - ***Don’t want to litigate/enforce in all circumstances***, but shouldn’t read a past history of deviation to be mutual assent trade usage
      * ***Evolved from strategic behavior – cost/benefit analysis of litigation***
    - Sellers don’t always sue breaching sellers – not a consensual agreement ex-ante (broader concept of what a contradiction is)
  + Trade usage here is inconsistent with the writing – not allowed
* UCC § 2-202 – Terms in a final expression of the parties’ agreement may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement, but may be ***explained or supplemented*** by course of dealing or trade usage/course of performance; AND evidence of consistent additional terms UNLESS the court finds the writing to be completely integrated
  + ***CERTAIN INCLUSION*** – exclude terms that would’ve been certainly included
  + Expressly exclude trade usage = won’t be held
    - Integration clause isn’t enough, need to *carefully negate* trade usage
  + If there is a very specific clause covering the same ground as the custom/trade usage, displace it?
    - Inferences about negotiations about the quantities so parties MEAN IT
      * Shouldn’t’ allow trade usage (*opposite of what Columbia actually says*)

Performance of the Contract

**Substantial Performance** – figure out who is acting strategically ex-post

* ***Can withhold performance only when the defect materially impairs the essence of what was contracted for***
* *Jacob & Youngs v. Kent* – D promised P the pipes would be a specific brand, but installed some of the specified brand and some not, P promised to pay for the house
  + Court find the two promises independent from each other
    - Completing the home w/these pipes is not a *condition* of P’s promise
  + Willful violation might not have entitled D to say he substantially performed
    - Independent performance becomes a depended one
  + Can’t substitute what they think are just as good products
  + Here would have to tear down the house and re-do – two houses for the price of one with a very small return (*Cost-Benefit analysis*)
  + **Default rule** – most parties who contract for houses would accept a substantial performance rule & very few require perfect tender (***for utility, not art***)
    - Reveal your contrary intentions if they exist
  + With complex commodities, some deviation is allowed
  + Assume parties “hold in contemplation the reasonable and probable”
    - Reasonable people
  + Get back the outstanding value minus what was expected and what was received
* *O.W. Grun* – Home as both utility and ***aesthetic***, require perfect tender for the latter
* *Levinson* – Could have strategic behavior if require perfect tender
  + Refusing to acknowledge the construction has occurred to the party’s satisfaction
  + If the task has aesthetic goal, use ***subjective determinations of performance***
  + If the task is of operative fitness, utility, structural, use ***objective determinations***
    - Otherwise people can take advantage (like here)
* Perfect Tender – Buyer of goods can reject goods and not pay for any defect, no matter how minor (UCC §2-601)
* ***Both Perfect Tender & Specific Performance create perverse incentives***
  + Use the default rule because it reduces transaction costs
    - Can bargain out of the default (*explain why it’s so important*)
* RST § 241 – Consider the following circumstances to decide ***whether a failure to render or offer performance is material***:
  + 1. The extent to which the injured party will be deprived of the expected benefit
       1. If part performance/promise, consider the *entire* exchange
    2. The extent to which the injured party can be adequately compensated
    3. The extend to which the party failing to perform will suffer forfeiture
    4. The likelihood the party failing to perform or to offer to perform will cure his failure taking into account all circumstances including “assurances”
       1. If he can fix the nonperformance – less likely to be material
          1. Security, reasonable assurance of performance, shift in market
    5. The extent to which the behavior of the party failing to perform or to offer to perform is in “good faith”
  + Only helps determine materiality – could still be a breach if not material
    - If breach, injured party has a claim for damages
      * Question the adequacy of the claim that this will compensate
    - If no breach, question the adequacy of any claim he may be entitled to
      * Specific performance
* TWO ways to value a party’s loss:
  + If defect is easily remedies, breaching party compensates for amount necessary to repair the defect or complete the work
  + If the defect involves significant repairs, including destruction & redoing the work already done, breacher must compensate by paying the reduction in fair market value that is caused by the breach

Excuses for Nonperformance

**Mistake**

* *Sherwood v. Walker* – Sale of a cow (barren or not?)
  + Assent induced b/c contract was made on a foundation of mutual mistake that ***goes to the substance of the contract, not the quality over what was bargained for***, party can refuse to perform
  + OR was the risk implicitly allocated to P
    - Both parties make assumptions about a thing and one turns out to be correct, it’s not voidable for the one who made the bad assumption
      * Not a mutual mistake = shouldn’t void
  + Duty to disclose if one party has superior information about the characteristics = cheaper to bear the risk rather than inferior investing in trying to find the characteristics
    - Josh principle – lends to D’s argument
* *Simkin v. Blank* – Madoff account divorce
  + Risk allocated implicitly to P b/c he thought the account would grow – decided
    - BUT mistake is about the existence of how much the marital estate was worth is potentially material
      * Mutual mistake about worth, doesn’t mean there’s speculation or he was bearing the risk that it wasn’t a real account
* RST § 151 – ***A mistake*** is a belief that is not in accord with the facts
  + Need not be articulated and could just be an assumption w/r/t a fact
    - Making a contract is not a mistake
  + Must relate to facts *as they exist at the time of the making of the contract*
    - Predictions or judgment about future events **is not** a mistake
    - An erroneous belief about the contents/effects of a writing **is** a mistake
  + *An erroneous belief w/r/t the law at the time contract was made may be a mistake*
* RST § 152 – Where ***a mistake of both parties*** at the time the contract was made ***as to a basic assumption*** on which the contract was made has ***a material effect*** on the agreed exchange, the contract is ***voidable*** by the adversely affected party UNLESS he bears the risk of mistake
  + Take into account any possible relief by reformation, restitution, etc. to see if materially effects the exchange
  + Sharing a mistaken assumption does not, by itself, make the contract voidable
    - ONLY appropriate if it has SUCH a material effect on the exchange of performances that it upsets the basis of the contract
      * Assumption about the state of the world is WRONG
      * Resulting imbalance is so sever that he cannot be fairly required to carry it out – *not only less desirable to him, but more advantageous to the other party*
        + Overall impact on both parties
  + Market conditions/financial situation of the parties are NOT basic assumptions because shifts in these don’t effect discharge of the contract
  + *Parol Evidence doesn’t preclude EE to establish a mistake*
  + With regards to releases of claims (in personal injury)
    - Mistaken as to the nature or extent of the injuries
    - Turns on a determination of the basic assumptions of the parties at the time of the release including:
      * Fair amount that would be required to compensate the claimant for his known injuries
      * Probability that the other party would be held liable on that claim
      * Amount received by the claimant in settlement of the claim
      * Relationship between known injuries and newly discovered ones
  + **Only applies when both parties are mistaken as to the same assumption!**
    - If mistaken to different assumptions, apply §153
* RST § 153 – ***One party*** is mistaken as to a basic assumption that has a material effect on the agreed exchange, voidable if he doesn’t bear the risk of mistake AND

1. The effect of the mistake is such that the enforcement of the contract would be **unconscionable**, OR
   1. NECESSARY because if one party can just avoid, it’ll more clearly disappoint the expectation of the other party than if he’s also mistaken
   2. Mistaken party has the burden of establishing unconsionability
      1. Show position he would’ve been in if the facts were what he believed and the poor position he’s in now
   3. If it’s relied on by the other party, it might still be enforceable
2. The other party knew or had reason to know of the mistake or he caused the mistake
   * *Generally don’t allow this unless the other party actually knew or had reason to know of the mistake at the time the contract was made* (or he caused it)
     + More willing of the enforcement would be unconscionable
   * Must at least meet the same requirements as §152
     + Construction bids with clerical errors, misreading of specifications, or a misunderstanding that doesn’t prevent a mutual assent

* RST § 154 – ***A party bears the risk of mistake*** when:

1. The risk is allocated to him by the agreement of the parties, or
   1. Parties provide for the risk in the contract
      1. Can agree to perform in spite of a mistake
      2. Decide this under interpretation & unconsconability
2. He is aware that he only has limited knowledge w/r/t the facts, but treats his limited knowledge as sufficient, or
3. The risk is allocated to him by the court b/c it’s reasonable under the circumstances
   1. Reasonable to do so because of (a) or (b)
   * Usually a contracting party takes the risk of most changes even if they upset basic assumptions unless some extreme hardship will justify relief because of impracticability of performance or frustration of purpose

**Impracticability/Frustration** – *general judicial reservation to alter the status quo*

* Impracticability deals with a contingency not expressly dealt with in the contract that then materializes
  + Incomplete contract
  + Probability is so low they didn’t think it was worth negotiating
  + Maybe one party realized, but thought it would fall on the other
* Court asks (impracticability):
  + Was performance impossible?
    - Implied condition that something is going to exist when performing?
    - Is it subject to any condition either express or implied?
  + No implied condition that it depends on, but it’s impossible = breach
* **Contingency** depends on the level of generality/specificity to choose
* **Foreseeability** depends on the generality of contingency & you have to figure out what is foreseeable and to whom it was foreseeable
  + If outliers can foresee it, it’s foreseeable
  + Always possible to take precautions & diversify the risks
* Try to figure out if the parties would’ve entered into the contract that looks anything like the contract now that the contingency has materialized
  + Value maximizing?
    - If bargained, enter into?
* Maybe we don’t want excuses – induce parties to negotiate and allocate risks
* *Taylor v. Caldwell* – hall contracted to be used for a concern burns down, promoter sues for lost money
  + Conditioned on existence of a thing & it ceases to exits = performance is excused
  + *Courts decide where they want to place loss & adjust the rule to fit that result*
    - Whatever person is in a better position to beear the loss
* *Transatlantic v. US* – P making a delivery when the Suez is closed and they have to use the longer route around the Cape of Good Hope
  + Performance excused if:
    - Something unexpected occurs (contingency)
      * ***Describe the contingency in a broad or narrow way to see if it’s foreseeable or not***
    - Contingency wasn’t allocated by contract *or custom*
      * Here it wasn’t out of line with custom to go other route
    - Occurrence makes performance commercially impracticable
      * ***Extra cost doesn’t equal commercial impracticability***
  + Should consider if buyer or seller is in a better position to know P or L in assessing if B < PxL
    - If the possibility is SO remote, neither party is in a better position to avoid it and we might not even want them to (leave losses where they lie)
* UCC §2-615: Commercially impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made (**goods**)
  + - Not if seller assumed a greater obligation (allocated risk)
* *Eastern Air Lines v. Golf Coast*
  + ***Contingency was foreseeable*** 
    - All depends on how broad or narrow you define contingency
  + Plus the parties are not losing money, just making less than they thought
    - ***Performance of a losing contract is not impracticable***
      * LOSS SPREADING – D in a better position to diversify its risks in contracts (different risks might affect diff contacts differently)
* *Alcoa v. Essex* – Prices in a long-term contract caused excessive increases in cost of material, p wants reformation of the contract
  + ***Excessive amount of money lost due to something that wasn’t foreseeable or allocated is commercial impracticability***
* RST § 261 – If ***a party’s performance of a contract is made impracticable*** without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, he doesn’t have to perform
  + Traditionally applied:
    - Supervening death/incapacity of a person necessary for performance
    - Supervening destruction of a specific thing necessary for performance
    - Supervening prohibition or prevention by law
  + Continuation of existing market conditions don’t usually apply
  + If party assumes the obligation – can still be held liable
    - If there is a provision in the contract *expressly shifting* the risk, consider:
      * The extent to which the agreement was standardized
      * The degree to which the other party supplied the terms
      * The frequency with which language allocating it is used in that particular trade or group
      * More significant if it’s allocated to a middleman than a producer with a limited source of supply, few outlets & no other opportunity
      * If a commercial practice & one party might be expected to insure himself against a risk = assume it
  + Should be an “objective” standard of being unable to perform
    - If he can’t perform, he’s assumed the risk of his own inability
* Frustration:
  + What was the foundation of the contract? What were they contracting for?
  + Was performance of the contract prevented?
  + Was the event that prevented the performance so remote/unanticipated that they couldn’t have thought of it when they contracted?
    - Each party takes the risks of normal circumstances that would adversely affect it, but sometimes a risk arises that is so remote they couldn’t anticipate it when bargaining
  + SPECULATION and then it turns out wrong… oh well
* *Krell v. Henry* – D rented P’s apt to watch the coronation, but doesn’t pay when king gets sick and it doesn’t go forward.
  + ***Purpose contemplated by the parties is frustrated by an unforeseen event***
  + EE can show assumption to be the foundation of the contract even if it’s not explicitly mentioned in performance of the contract
* *Lloyd v. Murphy* – D rents property to sell cars from P, gov restricts sale of cards, D tries to get out of the contract
  + ***Frustration requires an unforeseeable change that destroys underlying value of the contract***
    - Foreseeable because the public knew the effects of the law and it was still possible to make money
* *Edwards v. Leopoldi* – purpose of both parties has to be frustrated, not just one
* *Power Engineering v. Krug* – embargo kept D from reselling purchases
  + Doesn’t frustrate the purpose of THIS contract = not frustration
    - P doesn’t know of D’s plans, can’t be the foundation of the contract
* RST § 265 – If ***a party’s principal purpose is substantially frustrated*** without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, he doesn’t have to perform
  + A change in circumstances makes one party’s performance virtually worthless to the contract, but he *technically* could still perform the contract
  + The purpose must have been a principal purpose of that party in contracting
    - So completely the basis of the contract that without it, the transaction would make little sense
  + Substantial = so severe that it’s not fairly regarded as within the rules that the party assumed under the contract
  + Non-occurrence of the event must’ve been a basic assumption
  + Only applies if the frustration isn’t the fault of the party who seeks to use the rule

Remedies for Breach

**Specific Performance**

* Generally, expectation damages are preferred b/c specific performance can lead to additional transaction costs/waste, induce poor performance, etc.
* Non-breacher CAN enter into a cover contract = prefer expectation damages
  + CAN’T (unique goods, idiosyncratic) = case for specific performance
* Practical problem – it’s hard ex-post to know if a breaching party has performed if the promise was for services
  + Difficult to gauge the performance, generally do not allow w/r/t personal services
* *Sedmak v. Charlie’s Chevrolet* – P ordered a limited edition car from D, D breached the contract, specific performance was ordered
  + ***Specific performance when goods are unique and/or substitute goods cannot be obtained without considerable expense, trouble or loss***
    - Promisee is in an inferior position to find a substitute transaction
* *Klein v. Pepsico, Inc.* – Search for a used jet, P contracted with D who breached, 3 other comparable ones in the market
  + Specific performance is only appropriate when the goods are unique
    - ***Price increase is not enough for SP***
* UCC § 2-716 – Specific performance if goods are unique, etc.
  + Decree may include such terms & conditions as to payment of the price, damages, or other relief
  + Has a right to the goods if he is unable to effect cover for such goods or circumstances indicate that effort will be unavailing
* RST § 357 – ***Specific performance*** of a contract duty will be granted in the court’s discretion against a party who has committed or is threatening to commit a breach
  + An injunction will be granted if the duty is one of forbearance, OR the duty is to act and the court can’t order specific performance so there’s an injunction against an *inconsistent act*
* RST § 359 – Specific performance/an injunction ***will NOT be ordered*** ***if damages would be adequate*** to protect the expectation interest of the injured party
  + Adequate damages for part of the breach doesn’t preclude Specific performance on the contract as a whole
  + SP is not refused just because there is a remedy other than damages, but its taken into consideration with the court’s discretion
    - Want a remedy that will adequately protect the interest of the injured party
      * *Usually* expectation interest
        + Remedy may be either damages or SP/injunciton

**Expectation & Reliance Damages**

* Expectation damages don’t change the outcome, lower cost & goods get to a party who values them the highest
  + If the buyer is in a better position to enter into a replacement contract = do it
  + Reduces economic waste, induces potential breachers to internalize costs, and will motivate parties to breach when it’s value maximizing and not to breach when it would result in a net loss
* *Freund v. Washington Square Press* – P claims royalties when publisher D decides not to publish his book
  + Expectation damages must be calculated to some degree of certainty & must be foreseeable to the breaching party
  + Take into account the non-breaching party’s:
    - ***Expectation interest*** – same position had there been performance
    - ***Restitution interests*** – return anything of value that was given to the breacher in consideration of the promise
    - ***Reliance interest*** – anything the party does in reliance on the fact that the contract was made (*must be foreseeable & ascertainable*)
* *American Standard, Inc. v. Schectman* – D contracts with P to regrade the land in exchange for tools, etc.
  + ***Diminution of value test* REJECTED** – difference of the value of the land as improved and the value of the land unimproved
  + ***Cost of Completion as damages*** – assumes the purpose of the contract was to have the performance fulfilled NOT to resell (*maybe the court got it wrong*)
    - Core part of the contract price – allocated the risk to D because they were given something in return for doing this
      * Appears to be incorrect valuation, but maybe contract was lower because D already got the equipment
* *Peevyhouse v. Garland* – Stipulation at the end of the lease to Ds that they have to clean up the land and Ds didn’t do it
  + ***Diminution of value test*** = expectation is to have their land returned to them at a particular value (market value)
    - Only a small part of the contract – *incidental* to the contract
    - $300 vs. $29,000
  + *Court got it wrong* – P cared about living on the land, more plausible they cared about the view than the value
    - Idiosyncratic harm suffered by P, but it’s something that they bargained for the clause – primary purpose of the contract
      * **Should’ve more strongly signaled that they cared about this**
* Diminution of value makes sense for selling – compensates expectation
* Personal use requires performance/compensation for the value of performance – compensates expectation
* Lost-Volume Sellers – Sellers who can get inventory on a whim are entitled to their lost profits when the buyer breaches because they lose a profitable sale, and any subsequent buyers are not substitutes, they’re sales the seller would’ve made anyway
  + Assume (burden of proof on seller):
    - Supply is greater than demand so you can service all comers
      * **Sufficient supply**
    - Other transactions are going to be profitable (**next sale will be profitable**)
      * Add-in incidental costs to get other people to buy
    - That buyer wouldn’t resell to one of the subsequent buyers
      * One of the resales is actually a subsequent sale (the breach is the only thing that allows the sale to that buyer)
        + BUT assume buyer isn’t a professional seller so would be reselling in a different market
      * **Had the buyer performed it wouldn’t have resold the good in the seller’s market, denying the subsequent sale**
* *R.E. Davis Chemical Corp. v. Diasonics, Inc* – Contracted to purchase medical equipment, paid a down payment and breached
  + ***Lost profit sellers recover lost profits if they show:***
    - Capacity to make the subsequent sale, AND
    - It would have been profitable to make both sales
  + UCC §2-708 = limited number of buyers it can sell to
* *Rodriguez v. Learjet* – ***Additional contract was probable absent the breach***
* RST § 347 – Injured party has a right to ***damages based on his expectation*** measured by: The loss in the value to him of the other party’s performance caused by its failure or deficiency + any other cost (incidental or consequential loss) – any cost he avoided by not having to perform
  + Want to give the party the benefit of his bargain by putting him in as good a position as he would’ve been in had the contract been performed
  + Some situations, like a delay that causes the party to miss an invaluable opportunity cannot be adequately compensated
  + The value of performance/part performance is determined by the value to the injured party NOT their values to some hypothetical reasonable person or an objective market value (depending on circumstances
  + Incidental loss = costs incurred in a reasonable effort to avoid loss
  + Consequential loss = injury to person/property because of defective performance
  + If the party avoids future loss by making substitute arrangements – subtract it
    - If there’s an especially favorable substitute transaction so the party sustains a smaller loss than might’ve been expected, damages are reduced
      * *Only recover for loss that wouldn’t have occurred but for breach*
* Reliance Damages –promisee in the same position had the promise not been made
* RST § 349 – ***Damages based on reliance interest*** including expenditures made in preparation for performance or in performance – any loss the breaching party can prove that the injured party would’ve suffered had the contract been performed
  + Ignore the element of profit and recover reliance expenditures
    - Can’t prove profit w/reasonable certainty or if it was a losing contract
    - Cannot exceed the full contract price (then it’d be clear he would’ve operated at a loss which would mean no need for damages)
  + If the promise is enforceable b/c it induced action/forbearance, the remedy is limited as justice requires
    - Extent of the promisee’s reliance rather than the terms of the promise
    - The court can conclude it’s better to limit the damages to reliance

**Limitations on Damages**

* *Hadley v. Baxendale* – P asks D to deliver a party to be repaired, D delays, and P loses a lot of money because can’t restart its operations
  + ***Only liable for foreseeable damages, unless the breaching party is made aware of special circumstances***
    - Idiosyncratic parties have to reveal circumstances to price in the risk
      * Often opted out of – ***default is only get foreseeable damages***
  + Breaching party only has foreseeable damages in mind when contract is priced
    - Can’t add idiosyncratic damages to the contract price
  + NOT a majoritarian default rule – forces information from parties who are going to suffer damages to say that they’re idiosyncratic
  + Made sense with 1-on-1 relationships, but maybe not in the modern world
* *Rockingham County v. Luten Bridge* – P contracted to construct a bridge for D, D notifies P of its breach, P completes the bridge & wants all damages
  + ***Express notice of breach = duty to mitigate damages***
    - Once you receive notice, stop doing anything w/r/t the contract
      * Only get damages up to the time you receive notice + reliance
* *Parker v. Twentieth Century Fox* – P contracts to be in D’s movie, D decides not to film the movie, offers P a role in another movie (not comparable parts, comparable $)
  + ***Different/inferior employment cannot be used to mitigate damages***
  + *Dissent* – difference must be substantial to make the job inferiror
* RST § 350 – ***Damages are not recoverable*** for loss the injured party could’ve ***avoided*** without undue risk, burden, or humiliation
  + Exception – not precluded from recovery if he made *reasonable*, but unsuccessful efforts to avoid loss
  + Once a party knows the other one will not perform, he’s expected to stop his own performance to avoid further expenditure
    - AND take any appropriate affirmative steps to avoid further loss
      * If he doesn’t, the amount of loss he could’ve avoided by doing so is subtracted from the damages
  + If a party breaches, but assures the other party it will perform later, the non-breaching party doesn’t have to arrange a substitute transaction
* RST § 351 – ***Damages are not recoverable*** for loss that the party in breach ***did not have reason to foresee as a probable result of the breach*** when the contract was made
  + Foreseeable as a probable result from breach if it follows from the breach:
    - In the ordinary course of events or as a result of special circumstances that the breaching party had reason to know about
  + A contracting party is generally expected to take account of the foreseeable risks
    - Not liable for loss that he did not have reason to see would result
  + Foreseeable loss = “general damages”

**CONTRACTS ATTACK OUTLINE FALL 2012**

PRINCIPLES 1

THEORIES/DEFINITIONS 1

**Formation**

OFFER 2

ACCEPTANCE 3

REVOCATION/REJECTION 5

CONSIDERATION 5

PROMISSORY ESTOPPEL 6

PAST ACTIONS 6

PRECONTRACTUAL LIABILITY 7

**Types**

REQUIREMENTS & EXCLUSIVE DEALINGS 7

**Terms**

COUNTER-OFFER/BATTLE OF THE FORMS 8

PAROL EVIDENCE 9

INTERPRETATION 10

CUSTOM TRADE USAGE 11

**Voiding**

INDEFINITENESS 12

DURESS 13

FRAUD/MISREPRESENTATION 14

UNCONSCIONABILITY 15

MISTAKE 16

IMPRACTICABILITY/FRUSTRATION 17

**BREACH vs. SUBSTANTIAL PERFORMANCE** 18

**Damages**

SPECIFIC PERFORMANCE 19

EXPECTATION/RELIANCE DAMAGES 19

LIMITATIONS 20

**PRINCIPLES**

* **Josh Principle**: Place losses on parties that are in the best position to avoid them
  + ***Cheapest cost avoider***
* **Andrew Principle**: Enforce promises that arise out of situations that look like those in which a bargain *would have* occurred
  + Transaction costs are too high
  + Terms are reasonable
* **Dolly Principle**: Don’t enforce indefinite contracts
  + Induce parties to be more specific with their terms
  + Otherwise, always can argue that it’s too indefinite to be considered a contract

**THEORIES/DEFINITIONS**

Three Theories of Contract Law:

* Autonomy – promisors have a moral obligation to keep their promises and promises have a corresponding moral right to the promisor’s promise
  + Generates individuals’ right to form, revise and pursue their own conception of the good – *contract law helps justify this right*
  + Individual autonomy and trust in the other party
  + Ex-post perspective on enforcement – adjudication is a mechanism of resolving a dispute between litigants
  + Three critiques:
    - Moral obligation is unproved
    - Courts do not enforce all promises
    - Discomfort with state enforcing moral rights/obligations
* Economic – Promises are enforced to establish rules that will encourage socially desirable promise-making behavior by future parties
  + Focus on net social desirability of enforcement
  + Adjudication is a mechanism for creating rules that will provide incentives to parties in the future [*ex-ante perspective*]
  + Assumes that market participants are voluntary autonomous actors
* Pluralist – Multiple goals: efficiency, individual autonomy, and fairness
  + Efficiency & autonomy should give way when one party is less capable of protecting itself and needs the court to do so

General Definitions:

* **RST § 1** – ***A Contract*** ***is a promise or set of promises*** for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty
* **RST § 2** – ***A promise*** ***is a manifestation of intention*** (external manifestation) ***to act or refrain from acting in a specified way,*** so made as to *justify* the promisee in understanding a commitment has been made
  + Conditional promises are enforceable
  + Opinions are not promises unless it’s the opinion of a paid expert
* **RST § 4** – ***A promise may be made with words*** either oral or written, or may be ***inferred*** wholly or partly ***by conduct***

**Formation - OFFER**

* **RST § 24** – ***An Offer*** is the manifestation of willingness to enter into a bargain made to justify another person in understanding that acceptance is invited and will conclude it
  + In the normal exchange of promises/offer of a promise for an act, the offer is a promise and is only revocable until accepted
* Factors that Suggest there is an Offer:
  + Detailed about material terms (price, quantity, conditions)
  + Not usually put into writing
  + Gives the power of acceptance
    - Offeror can specify his preferred mode of acceptance (**RST §30**)
  + Clear, definite advertisement that invites a particular action (*Lefkowitz*)
  + Outward, objective intent suggests it was an offer (*Lucy*)
    - Josh Principle
    - If one party is deceived into thinking the other manifested assent, the “joker” is held to the promise (**RST § 18**)
* Factors that Suggest not an Offer:
  + Ambiguous (Dolly Principle)
    - Material terms are too indefinite (*Varney*)
    - **RST § 33**: Manifestation of an intention that is understood as an offer cannot be accepted to form a contract unless the terms of the contract are reasonably certain
      * Basis for the determination of breach and appropriate remedy?
  + Agreement to agree
  + Price quote – invitation to make an offer (*Dyno*)
  + Advertisement
  + A reasonable person wouldn’t consider it to be an offer (*Pepsico*)
  + Cheap Talk
* CASES:
  + *Lucy v. Zehmer*: Drunk at party, D agrees to sell P is farm, then says was joking
  + *Leonard v. Pepsico*: Ad fro Harrier jet w/7 million Pepsi points is not an offer
  + *Dyno Construction v. McWane*: Price quotation or purchase order is the offer?
    - ***Unless there’s a clear indicator that the parties are deviating from the norm, apply the default rule***
  + *Lefkowtiz v. Great Minneapolis Surplus*: Newspaper ad for three items, first come first serve, P turned away when he tries to buy

**Formation – ACCEPTANCE**

* **RST §50** – ***Acceptance*** of an offer is a manifestation of assent by the offeree to the terms made of the offer in a manner invited or required by the offer
  + **MAILBOX RULE – Acceptance is valid when it’s sent**
* **RST §52** – An offer ***can only be accepted*** by the person whom it invites to furnish consideration
* Forms of Acceptance: (If not specified by the offeror - any matter or reasonable medium **RST §30**)
  + **Promise**:
    - **RST §55** – May create a contract where offeror’s performance is completed when offeree’s promise is made (i.e. offers that include money)
      * Acceptance may be inferred by taking offered benefits
    - Offeree must exercise reasonable diligence to ***notify the offeror*** of acceptance (**RST §56**)
  + **Performance**: Allowed ***only if*** the offer invites such acceptance (**RST §53**)
    - **RST §45** – If acceptance is allowed by performance ONLY, an **option contract** is created when the offeree begins performance
      * **RST §25** – An option contract is a promise that meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer
        + Offeror only has to perform once the offeree completes performance, but is bound unless offeree doesn’t complete (offeree doesn’t have to)
        + *Preparing for performance is NOT acceptance*
    - **RST §54** – No notice is required to make acceptance effective unless offeror requests it
      * If offeree has reason to know the offeror won’t learn of performance it has to try
    - **RST §51** – If an offeree learns of an offer after ***part performance***, he may accept by completing the requested performance
      * If the offeree performs COMPLETELY before knowledge of the offer, the offer did not induce the performance and is not binding
  + **Promise or Performance**:
    - **RST §62** – Beginning performance is an acceptance by performance
      * *Offeree is bound to complete performance*
  + **Silence** – **RST §69**:
    - ONLY allowed when the offeree takes the benefit of offered services, knowing they were offered with the *expectation of compensation* (and had an opportunity to reject them)
      * If services are being rendered with an expectation of being compensated and the offeree could prevent the mistake, he accepts the offeror’s offer of services and must pay/perform according to the terms
    - The offeror gave the offeree reason to know remaining silent accepts the offer and the offeree intends to accept the offer by remaining silent
    - Because of prior dealings, the offeree knows he should notify the offeror if he doesn’t intend to accept the offer
    - OR under the exercise of dominion if the offeree does something contrary to the offerors property it is holding, the offeree is bound in accordance with the offered terms unless they are manifestly unreasonable
    - Generally look to the value-maximizing of the situation
      * *Works if the cost of acceptance is so high relative to the cost of rejection and you value a good more than the price*
        + Can still accept contracts we don’t want, but active acceptance can make us reject contracts we like
* Factors that Suggest Acceptance:
  + Manifestation of mutual assent – Each party made a promise or began performance (**RST §18**)
    - Must be visibly manifested = Written or spoken words, acts or failure to act (**RST §19**)
      * NOT assent unless the party intends to act or knows or has reason to know that the other party may infer he assents from his actions
    - If both parties manifest an intention that the bargain wasn’t serious = no assent
  + Accepted within a reasonable amount of time
    - Acceptance before notification of revocation = binding contract (*Ever-Tite*)
  + Relationship-specific investment/unrecoverable costs = beginning performance (*Ever-Tite*)
  + Website link with terms/conditions that is easily accessible/have to click ok (*Facebook*)
  + Didn’t read, but had a reasonable opportunity to accept or reject terms (*Hill*)
    - Terms generated in a robust market are consumer friendly (reduce transaction costs)
    - Reasonable person would’ve assented to the terms so ok to include
* Factors that Suggest No Acceptance:
  + Preparing for Performance
  + Parties require the contract to be memorialized in writing (*Ciaramella*) (**Contract as a cliff**)
    - Clear delineation of terms (doesn’t do more for negotiations)
    - In the case of misunderstanding & good for clarification
  + Link to terms and conditions is not available when actually purchasing goods (*Jerez*)
* ***Four-Part Test for Contested Agreements:*** *(Ciaramella)*
  + Express reservation to be bound without a signed contract?
  + Partial performance?
  + Were all *material terms* (not choice of law) agreed upon?
  + Is the agreement the type of contract usually committed to writing?
* CASES:
  + *Ever-Tite Roofing Corp v. Green*: D contracted with P to re-roof home, P could accept by performance or promise, began performance and found someone else already working
  + *Ciaramella v. Reader’s Digest*: Drafted settlement agreement, P orally agreed, but there was express indication that it would not be effective until executed
  + *Corinthian Pharmaceutical v. Lederle*: Non-conforming goods are not acceptance of a purchase order provided the seller makes clear the shipment is only a courtesy
  + *Pavel Enterprises v. AS Johnson Co*.: P (contractor) used D’s (sub) bid in their bid for a job, job initially awarded to TP so D did not correct a mistake in its sub-bid, P then tries to hold D to bid
  + *Hill v*. Gateway 2000, Inc: P order a computer from D which arrived with extra terms in the box
  + *Jerez v. JD Closeouts*: Terms and conditions on a website aren’t readily available or clear
  + *Fteja v. Facebook*: Terms and conditions are in a clear link when you click accept

**Formation - REVOCATION/REJECTION**

* **RST §42** – Revocation by the offeror terminates the offerees power of acceptance when it’s RECEIVED
  + Can revoke as long as it’s not accepted before revocation
* **RST § 39** – Rejection by the offeree terminates his power of acceptance unless the offeror manifests a contrary intention (to allow offeree to further consider)
  + Manifesting an intention NOT to accept an offer = rejection unless the offeree manifests an intention to think about it further
* **RST §40** – Rejection/Counteroffer doesn’t terminate the power of acceptance until it’s RECEIVED by the offeror (Offeror will rely on whatever response gets to him first)
* **RST §36** – Power of acceptance may be terminated by:
  + Rejection or proposal of a counteroffer
  + Time-lapse (no longer a reasonable period of time
  + Revocation by the offeror before acceptance (must be received by offeree)
  + Death or incapacity of either party
  + If they don’t comply with any condition of acceptance under the terms of the offer

**Formation - CONSIDERATION**

* **RST §71** – ***Consideration*** if performance or a return promise is bargained for
  + ***Bargained for***  = sought by the promisor in exchange for his promise and is given by the promisee for the promisor’s promise
    - *Value-Maximizing Exchange*
  + ***Performance*** = actor other than a promise, a forbearance, or the creation, modification, or destruction of a legal relation
* **RST §17** – Formation of a contract requires a bargain in which there is a manifestation of mutual assent
* **RST §79** – Courts should honor the value parties place on their performances
  + Don’t investigated the adequacy or mutuality of consideration (especially if values are uncertain)
* Factors Suggesting Consideration:
  + Forbearance by the promisee of a legal right (*Hamer*)
  + Objectively may seem inadequate, but the parties bargained for it (*Batsakis*)
  + Pleasure derived from the exchange has no market value (*Wolford*)
  + Parties signaled that they wanted the promise to be enforced (*Wolford*)
* Factors Suggesting No Consideration:
  + Gift where any action required is just a condition of the gift (*Kirksey*)
  + Legal duty
  + Duress
  + Consideration is considered **nominal** [stating the existence of consideration = consideration]
    - Need a threshold of adequacy *especially if there’s monetary (market) value*
* CASES:
  + *Hamer v. Sidway*: Uncle promised to pay nephew if he didn’t drink or gamble until he was 21
  + *Kirksey v. Kirksey*: D invites sister-in-law to live on his property, he later kicks her out (gift)
  + *Wolford v. Powers*: D promised to give P’s son $10K if they named him after D
  + *Batsakis v. Demotisis*: War-torn Greece, D borrowed the equivalent of $25 in exchange for a note saying she borrowed $2000 and would pay it back with interest

**Formation - PROMISSORY ESTOPPEL**

* **RST §90** – ***Promissory Estoppel*** exists when:
  + Promisor should reasonably expect promise to induce an action or forbearance by the promisee
  + The promise induces such action or forbearance, AND
  + **Injustice** can only be avoided by the enforcement of the promise (*Table-banging test*)
* Factors Suggesting Promissory Estoppel:
  + Value-maximizing transaction
  + Formality of the discussions (*Feinberg*)
  + Preempted any bargain with the structure of what the bargain would’ve looked like
    - P could’ve bargained for the exchange (*implied bargain*)
* Factors Suggesting No Promissory Estoppel:
  + P made his decision before D made “promise” (*Hayes*)
  + Hopeful/wishful thinking about D giving P something
  + Looks more like a gift
* ***Charitable Subscriptions*** are binding w/o proof of inducement of an action or forbearance (**RST §90**)
  + Formal, specific, written (*Salisbury*) vs. Oral, death bed, appears to be a gift (*Kadimah*)
* CASES:
  + *Feinberg v. Pfeiffer Co.*: P worked for D, board offers her pension, she late retires relying on it
  + *Hayes v. Plantations Steel Co.*: P decides to retire, D offers to “take care of him”
  + *Salisbury v.* *Northwestern Bell*: D gave P a letter donating $15,000 (should be pledge card)
  + *Congregation Kadiman v. DeLeo*: Guy on death bed says he will give money to the congregation, they say they put $ in budget, but not enough reliance

**Formation – PAST ACTIONS**

* **RST § 86** – ***A promise made in recognition of a benefit previously received*** by the promisor from the promisee is binding to the extent necessary to prevent injustice
  + NOT binding if the promisee conferred the benefit as a gift (gray areas) or the value of the promise is disproportionate to the benefit
* Factors suggesting enforce:
  + Transaction costs too high for a bargain to take place, but would-have bargained (Andrew P)
  + Expectation of payment
    - Promise as a mistake + recipient subsequently promises to pay = bound
  + Certainty and reasonability of terms (**formality**)
  + Incentive effects for future parties
  + Promisor is personally benefited (Webb)
  + Promisor spent time thinking about the promise (*Webb*)
  + Part-performance (indicates D intended to be bound) (*Webb)*
  + Definite/substantial character of the benefit received
* Factors suggesting don’t enforce:
  + Benefit was not actually conferred to the promisor (*Mills*)
    - And/or there is arguably no benefit (son died)
  + Promise was made immediately as a kind of knee-jerk reaction (*Mills*)
* CASES:
  + *Webb v. McGowin*: P saves D from death, D promises to pay & makes payments until dies
  + *Mills v. Wyman*: P takes care D’s adult sun who dies, D promises to repay in a letter

**Formation - PRECONTRACTUAL LIABILITY**

* **RST §87**: Offer is binding as an option contract IF
  + It’s in writing/signed by the offeror, produces purported consideration AND proposes and exchange on fair terms within a reasonable time
* Factors Towards PL:
  + Offeror reasonably knows I was going to rely, forgo things that were substantial in nature (*Hoffman, Dixon*)
  + Reasonably expect the offer will induce action or forbearance and it does (**RST §87**)
* Factors Against PL:
  + Reliance is not substantial or foreseeable by the offeror
* CASES:
  + *Hoffman v. Red Owl Stores, Inc.*: P and D discuss for 3 yrs P running one of D’s stores, P jumps through a lot of hoops that D lays out in order to get the store
  + *Dixon v. Wells Fargo*: P and D reached an agreement to enter into loan modification, D told P to stop making payments and 2 years later began foreclosure proceedings
    - ***Resume negotiations and/or reliance damages***

**Special Types - REQUIREMENTS & EXCLUSIVE DEALINGS CONTRACTS**

* **Requirements Contracts**:
  + **UCC §2-306(1)**: If a quantity is measured by the output of the seller or requirements of the buyer, the actual output/requirements may be any that occur in good faith
    - Can’t be unreasonably disproportionate from any estimated quantity
      * If no estimated quantity, can’t be totally different from any normal or otherwise comparable prior output or requirement
    - **Good Faith** = honesty in fact in the conduct or transaction
      * Between merchants it includes observance of reasonable commercial standards of fair dealing in the trade
  + As long as the parties are acting in good faith with their demands, the contract is enforceable (*Eastern Airlines*)
    - Established course of performance (relationship) + established usages of trade + contract = should be upheld as agreed upon
  + Benefit both parties:
    - Seller is guaranteed sales, assume they won’t have excess output
    - Buyer has an assured source of supply, no worry they’ll run out
* **Exclusive Dealings Contracts**:
  + **UCC §2-306(2):** A lawful agreement for exclusive dealing imposes (unless otherwise agreed) an obligation on the seller to use best efforts to supply the goods and on buyer to use best efforts to promote the sale
  + Implicit requirement to exert reasonable efforts
    - Reasonable efforts should be consistent with what the majority of the people in the same situation would want (*Wood*)
      * Parties operate as a single unit trying to maximize the joint interest
* CASES:
  + *Eastern Air Lines v. Gulf Oil Corp*: Requirements contract for an ongoing relationship between airline & oil co basing the price on a specific index. Oil crisis messes with prices, but parties are held to the contract
  + *Wood v. Lucy*: P has exclusive rights to endorse D’s goods, D endorses something w/o P

**Terms - COUNTER-OFFER/BATTLE OF THE FORMS**

* **RST §39** – A counter-offer is an offer made by an offeree to the offeror proposing a substituted bargain that differs from the original offer, but relates to the same matter
* Two outdated views on counteroffers/performance:
  + Mirror Image Rule – Offer only accepted if the offeree agrees to the *exact* terms
  + Last Shot Doctrine – Parties are bound to the terms of the last offer made before performance commenced (When parties begin performing before final terms are agreed to)
* **UCC §2-207** – Applies when there is a sale of goods (not just merchants)
  + **An additional rule is something that does not have a default rule (otherwise the default rule is assumed in the first contract and the second includes a *different* term)**

1. Statement of acceptance operates as an acceptance even if it has *additional* or *different* terms from the offer **unless** acceptance is expressly conditional on assent to the additional or different terms
2. *Additional* terms are considered proposals for addition to the contract. Between Merchants they become part of the contract **unless**
   1. Offer expressly limits acceptance to terms of the offer
   2. Additional terms material alter the contract
      1. If the clause negates standard warranties, requires a guaranty, complaints have to be made in a materially shorter time than customary/reasonable, seller reserves the power to cancel upon the buyer’s failure to meet any invoice when it’s due
   3. Offeror notifies (or notified) offeree of its objection to the terms
      1. Prior notification of objection if there are different terms from the first contract (notified that they’d only accept term 1)

(*If any of these are satisfied, the first party’s terms govern*)

*Different terms* can be treated in three different ways:

1. Treat them like additional terms
   1. If they meet any of the three conditions under 2, they fall out
2. They fall out no matter what because (2) doesn’t apply
3. Contradictory terms knock each other out & UCC gap fills
4. If the parties act as if there is a contract, then there is a contract
   1. Terms that both parties agree on are in the contract
   2. Supplemental terms that are allowed under (2) are part of the contract
   3. UCC gap-fills any terms that are knocked out

* Order of Operations for UCC:
  + Did the offeree make his acceptance contingent on his terms:
    - Yes = No contract under (1), go to (3)
      * Contract contains only the terms on which the parties agree – other terms are filled by the UCC
    - No = Contract under (1), go to (2)
      * If parties are merchants, additional terms are accepted UNLESS
        + The offer expressly limits acceptance to its terms
        + Additional terms materially alter the contract
        + Notification offeror rejects the terms
      * If parties are NOT merchants, additional terms rejected unless explicitly accepted
      * Different terms can be treated in three different ways:
        + Just like additional terms (comment 3)
        + Conflicting terms knock out and UCC gap-fills
        + Different terms are rejected and the offeror’s terms hold

**Terms - PAROL EVIDENCE**

* Attempting to get in evidence of prior or contemporaneous agreements
* **RST §209**: An ***integrated agreement*** is writing(s) that constitutes a final expression of one or more terms of an agreement [**determined by the court first to decide on interpretation/PE**]
  + **RST §210**: completely integrated = an exclusive statement of the terms of the agreement
    - Consistent evidence is allowed unless it’s completely integrated
* **RST §211**: A party who manifests assent to a ***standardized agreement*** believing that like writings are regularly used to embody terms of agreements of the same time adopts it as an *integrated agreement*
  + *Reasonable expectation of the average person*
  + **Exception** if the other party has reason to believe the party manifesting assent would not do so if he knew the writing contained a particular term (*that term falls out of the agreement*)
* **RST §213** = Parol Evidence Rule
  + Binding integrated agreement discharges prior INCONSISTENT agreements
  + Binding completely integrated agreement discharges prior agreements w/in the scope
* **RST §214**: Agreements prior to or contemporaneous with the adoption of a writing are admissible
  + To establish that the writing is NOT an integrated agreement
    - Or if it is, that it’s completely or partially integrated agreement
  + The **meaning** of the writing (interpretation)
  + Illegality, fraud, duress, mistake, lack of consideration, or any invalidating clause
  + Information about remedies

TEST:

* Sufficiently Related?
  + Yes = Continue
  + No = Totally separate agreement **NO PE**
    - Could argue it’s a stand-alone contract *if* there is consideration for it
    - A separate contract NOT covered by the agreement is not superseded (**RST §216**)
* Contradiction? (**RST §215**: Cannot allow in EE to CONTRADICT a term of a binding agreement)
  + Yes = NO PE
    - Everything outside the 4-walls of the contact contradicts (*Mitchill*)
    - Contradicts only if express contradiction or something in the contract excludes the possibility of doing it this way (merger clause) (*Mitchill, dissent*)
      * Consider the extrinsic evidence to determine if it’s contradictory
  + No = Continue
    - **RST §216**: Evidence of consistent additional terms is admissible to supplement an agreement as long as it’s not completely integrated
* Integrated? [***fully and/or partially w/r/t that term***]
  + Four-Corners (NY): (*Mitchill*) **the party that doesn’t want the EE argues this test**
    - Looking at the contract, is it on its face integrated so that anything else that would be in the contract would be there – no reason to consider the EE
      * Yes = no EE
      * No = allow EE
    - Preserves cheap-talk and reduces fraud, more clear
  + Naturally Omitted (CA): (*Masterson*) **the party that does want the EE argues this test**
    - Look at the EE to decide if it’s something that would’ve been *naturally omitted* from a contract like this
      * Ordinarily would not be expected to be in the writing
        + Merger clause may exclude consistent additional terms that would’ve naturally been omitted without the clause (**RST §216**)
      * Yes = no EE
      * No = allow EE
  + Certainly Included (**UCC §2-202**):
    - Look at the EE to decide if it’s something that would *certainly be included* in a contract like this
      * Yes = No EE
      * No = allow EE

CASES:

* *Mitchill v. Lath*: Oral agreement to remove an icehouse
* *Materson v. Sine*: P sells land to D with a buy-back clause, P goes bankrupt and trustee wants to buy-back the land, but D alleges it was implied that it could only be bought back by P

**Terms - INTERPRETATION**

* **RST §20**: **VOID** the contract if there was a misunderstanding – parties attach different meanings to their manifestations AND neither party knows or has reason to know of the meaning attached by the other OR each party knows or has reason to know of the meaning attached by the other
  + Meanings of one party wins out if:
    - The party doesn’t know of the different meaning attached by the other and the other party knows the meaning attached by the first party, OR
    - The party has no reason to know of any different meaning and the other party has reason to know of the meaning attached by the first
* **RST §212**: The ***interpretation*** of an integrated agreement is directed to the meaning of the terms of the writing(s) in light of the circumstances
  + Determined by trier of fact if it’s a question of credibility of the EE or choice among inferences
* Factors To Allow Extrinsic Evidence for Interpretation:
  + NY Test (*WWW Associates*): **Look at the whole contract**  (four corners)
    - Look at the ***purpose*** of the contract and decide the term is ambiguous on its face
  + CA Test (*Pacific Gas*):
    - Term is reasonably susceptible to an interpretation = allow EE
      * Allow EE to see if it’s ambiguous
  + One side will argue to allow extrinsic evidence to CREATE an ambiguity (*Soper*)
  + Objective meaning to outsiders (*Fragilament*)
    - Deviate from the subjective meanings iff both parties mean different things
    - Plaintiff bears the burden of showing their interpretation is objectively correct
* Factors Against Allowing Extrinsic Evidence for Interpretation:
  + NY Test (*WWW Associates*):
    - Term has a plain meaning within the four corners of the contract
      * Josh Principle –People who want words to mean something else should indicate it
  + CA Test (*Pacific Gas*):
    - Term is not reasonably susceptible to an interpretation
    - External evidence does not indicate there’s any reason to think it’s ambiguous
  + Should be dictionary definition only – say what you mean if different (*Soper* dissent)
  + Plaintiff didn’t show their interpretation was objectively correct (*Fragilament*)
* CASES:
  + *In re Soper’s Estate*: Married, faked death, moved, remarried, life insurance policy went to “wife” – should it be his legal 1st wife or 2nd wife everyone knew of
  + *Pacific Gas v. GW Thomas Drayage*: P working for D, agrees to accept risk for certain things, ambiguous about what
  + *WWW Associates v. Giancontieri*: Reciprocal cancellation clause that P said was just suppose to be there for their benefit, D cancels within the provision
  + *Fragilament v. BNS*: Does chicken mean high quality or any quality

**Terms - CUSTOM TRADE USAGE**

* ***Novice should be charged with trade usage and indicate if he does not have the information about the trade*** (Josh Principle, *Fragilament*)
* ALWAYS ok to bring in custom/trade usage to explain/supplement terms (**UCC §2-202(a)**)
  + Even an express term can be explained by course of dealings/trade
  + Standard majoritarian default rule – community knows it will be used
    - Reduces costs & parties should opt-out if they don’t want it
  + ***Still can’t contradict the contract***
* Factors Suggesting Include Trade Usage:
  + Deviations from purchases even out over time
    - Come back with the fact that it’s too much of a deviation, never went above amount
  + Prior dealings
  + Parties didn’t expressly opt out of trade usage
* Factors Suggesting Don’t Include Trade Usage:
  + Ahistorical event takes it out of custom – hasn’t happened before, no TU to explain situation
    - BUT always come back with *Columbia* that they allowed it
  + Looks like the custom evolved because parties don’t want to litigate/enforce all deviations, but in the end they should be allowed to enforce a contract as they see fit (*Southern Concrete*)
    - Strategic behavior – cost-benefit analysis of litigation
  + Exclude terms that would’ve been certainly included (**UCC §2-202**)
  + Expressly exclude trade usage – must *carefully negate* (*Columbia*)
    - OR very specific clause covering the same ground? [*maybe*]
  + Inferences about negotiations about the quantities show the parties MEANT IT
* Three ways to counter trade-usage
  + CONTRADICTS a specific term of the contract
  + You fall outside the trade usage (variation is too large)
  + Situation is so ahistorical/strange/crazy that it doesn’t apply
  + *Potentially* if a party is outside of the trade (not a novice)
* CASES:
  + *Columbia Nitrogen v. Royster*: Prior trade between the parties, but R as buyer, C as seller, here it’s vice-versa. C is supposed to buy a min amount of material from R, but prices plunge “precipitously” and R buys significantly less
  + *Southern Concrete v. Mableton Contractors*: D agrees to buy an “approximate amount” from P, but buys much less, courts enforce contract

**Voiding - INDEFINITENESS**

* ***The more important the uncertainty, the stronger the indication the parties didn’t intend to be bound***
* **UCC §2-208**: The parties themselves know best what they have meant by their agreement and their action under the agreement is the best indication of what the meaning was (industry custom)
* Factors Suggesting Indefinite:
  + No amount can be computed from what was said (no clear remedy) (*Varney*)
  + Terms of the contract are not reasonably certain (**RST §33**)
  + Agreement to agree without a market price (*Joseph Martin Deli*)
* Factors Suggesting Not Indefinite:
  + Maybe just ambiguous? (two clear meanings it could have)
  + Infer from behavior the parties meant to be bound (*Curtis*)
  + Market substitute for the indefinite term (*Curtis*)
  + *Quantum meruit*- contract was performed for a promise to pay the reasonable value of the services it will be decided depending on the market value
  + If P can prove what the terms means – he could win (*Varney, dissent*)
  + Ongoing relationship/requirements contracts (*Eastern Airlines*)
  + Exclusive Dealings Contracts (*Wood*)
  + **UCC §2-305**: Binding contract for a sale of goods even if no price is settled as long as there is an intent to be bound
* CASES:
  + *Varney v. Ditmars*: P hired by D who tells him he will give him a “fair share” of the profits
  + *DR Curtis Co v. Matthews*: P approached D about selling grain, orally agreed to an amount, but it’s customary that the amount will change depending on the protein content

**Voiding - DURESS**

* ***UCC & RST allow for “good faith” modifications to ongoing transactions***
  + **UCC §2-209**: Enforce modifications made benignly (in good faith) and don’t enforce those that were made malignly (in bad faith) [*don’t need consideration*]
  + **RST §89**: A promise modifying a duty under a contract not fully performed on either side is binding if it’s fair and equitable under circumstances not anticipated by the parties
    - BOTH parties don’t expect the new circumstances
* ***Physically compelled by duress = not effective as assent & VOID*** (**RST §174**)
* Factors Suggesting Duress:
  + Manifestation is induced by an improper threat that leaves the victim with **no reasonable alternative** = VOIDABLE (**§175**)
    - **RST § 176**: Improper threat = crime or tort (or would result in one), threat of criminal prosecution, use of civil process + bad faith or a breach of duty of good faith/fair dealing
      * **Also improper** if the resulting exchange is not on fair terms AND
        + Would harm the recipient & wouldn’t significantly benefit party making it
        + Effectiveness of the threat in inducing assent is significantly increased by prior unfair dealing (*manipulative advantage over other party*)
        + What is threatened is otherwise a use of power for illegitimate reasons
  + Lawful threat that is still improper (*Wolf*)
    - Reasonably induced the party to act
  + Pre-existing duty (*Alaska Packers*)
  + No consideration
  + Situational monopoly + exploitative price
  + **Economic Duress** – immediate possession of needful goods is threatened or withholding of goods was threatened unless some future demand is agreed to (*Loral*)
* Factors Suggesting No Duress:
  + Good faith modification under unexpected circumstances (**UCC §2-209, RST §89**)
  + Clear legal duty owed to the promisor is not consideration, but a similar performance IS consideration if it differs from what was required by the duty in a way the reflects more than a pretense of a bargain (**RST §73**)
* CASES:
  + *Alaska Packers’ Ass’n v. Domenico* – D hires fishermen (Ps) to work on their fish farm in Alaska. Ps demand more money citing net issues, ruled they had pre-existing duty
  + *Wolf v. Marlton Corp* – P is building a house for D, D wants out, P won’t allow it so D threatens to re-sell the house to someone who would be unfavorable to D (threat)
  + *Austin Instrument, Inc. v. Loral Corp.* – P provides parts to D for its contract with the gov, P wants second contract and if D says no it will stop delivering goods under the first contract

**Voiding - FRAUD/MISREPRESENTATION**

Points to think about:

* ***Duty to Disclose*** if one party has superior information + it’s inaccessible + request of material fact
  + Unless a party substantially invested in obtaining the info
* ***Void*** under **RST §163**? **Mistake must relate to the nature of the contract**
  + Misrepresentation to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the terms of the proposed contract = NO manifestation of assent
* Factors towards voiding:
  + Specifically ask pointed questions about something the other party knows (*Apple*)
  + Inexperienced party, information asymmetry that the party cannot otherwise obtain (*Spiess*)
  + Boilerplate merger clause
  + Easy for the party to provide the information (*Speiss*)
* Factors against voiding:
  + Sophisticated parties (*Dannan*)
  + Specific merger clause [parties probably bargained over the clause] (*Dannan*)
  + Specifically denying reliance on prior oral agreements (*Borat*)
  + Arms-length deal, each party is responsible to do their own investigation (reliance not justifiable)
  + Seller put in a lot of effort to obtain the information, they should get the benefit

Order of Operations: Fraud or material misrepresentation + induced +justified in relying = voidable

* Misrepresentation?
  + An assertion not in accord with the facts (**RST §159**)
  + **RST §161**: **Non-disclosure** of a fact = an assertion that the fact doesn’t exist ONLY if:
    - The party knows the disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material
    - The party knows the disclosure would correct a mistake of the other party as to a basic assumption on which the party is making the contract AND non-disclosure = bad faith
    - The party knows the disclosure would correct a mistake of the other party as to the contents or effects of a writing that embodies an agreement
    - The other person is entitled to know because of a trusting relationship
  + **RST §160**: An action intended or known to be likely to prevent another from learning a fact = an assertion the fact doesn’t exist (**concealment**)
  + **Subsequently acquired**? [**RST §161**]
    - Must disclose if:
      * The assertion truthfully made is no longer true
      * Original assertion was a misrepresentation but it wasn’t fraudulent because the party didn’t know it wasn’t true and/or didn’t intend for it to be relied on
      * Original assertion
* Fraudulent? [**RST §162**] ***consciously false + an intention to mislead***
  + If the maker intends his assertion to induce a party to manifest assent AND
    - Knows or believes that the assertion isn’t in accord with the facts (believe it’s false even if it isn’t); or
    - Doesn’t have the confidence he states/implies in the truth of the assertion (not sure if it’s true, but makes an assertion rather than state an option); or
    - Knows he doesn’t have the basis that he states or implies for the assertion (assertion on a personal belief/experience if it’s not the case/untrue)
* Material? [**RST §162**]
  + If it would be likely to induce a reasonable person to manifest assent or the maker knows it would be likely to induce the recipient to do so
* Voidable? [**RST §164**]
  + Fraudulent or material? (***material is necessary if it’s not fraudulent***)
  + Induced party to make the contract?
  + Reliance was justified?
    - View reliance from the point of view of the party who the misrepresentation was made to

CASES:

* *Spiess v. Brandt*: P purchased resort from D who claimed they made good money, P asks to look at the books & D withholds them
* *Dannan v. Harris*: P induced on false representation w/an adequately specific merger clause
* *Psenicska v. 20th C Fox*: P signed contract explicitly waiving reliance on D’s oral representations
* *Proview v. Apple*: D purposely disguised identity to purchase P’s right to their name

**Voiding - UNCONSCIONABILITY**

* ***Weaker party has no meaningful choice/alternative/did not assent***
* ***Bad term for a party doesn’t definitely mean that it’s unconscionable*** – Priced in
* Factors towards unconscionable:
  + Procedural
    - How the contract was entered into
    - No bargaining power – low sophistication of the parties
    - Asymmetric information
    - Small type
    - Pre-printed contract same for a whole industry [**collusion]** (*Henningson*)
      * Parties exploiting their higher access to information
  + Substantive
    - Terms unreasonable favor the stronger party (*Williams, Henningson*, **RST §208**)
  + Other general factors [**RST §208]**:
    - Stronger party believes there’s a low probability the weaker one will perform
    - Stronger party knows the weaker one will be unable to receive substantial benefits
    - Stronger party knows weaker can’t reasonably protect his interests
* Factors against unconscionable:
  + Sophisticated parties
  + Party is simply adjusting to changed circumstances (normal market activity)
  + Boilerplate contract is just an efficient way to do business
    - Terms that the parties would have bargained for
  + Perfect competition
* CASES:
  + *Williams v. Walker-Thomas Furniture*: P bought furniture + from D and term in contract said she didn’t own anything purchased until she had paid for everything
  + *Henningson v. Bloomfield*: Car industry standard pre-printed contract with a limited warranty
* **RST §208** – Contract or term unconscionable at the time the contract was made = court can refuse to enforce the whole contract or part of it to avoid any unconscionable result
* **UCC §2-302** – Court can void parts or wholes of an unconscionable contract

**Voiding - MISTAKE**

* ***Parties wouldn’t have entered into the contract if they knew about the “thing”***
* ***Parol Evidence doesn’t preclude EE to establish a mistake***
* ***Duty to Disclose if one party has superior information about the characteristics***
  + Cheaper to bear the risk rather than make inferior party invest in trying learn (Josh Principle)
* A mistake is a belief that is not in accord with the facts (**RST §151**)
  + Relating to the facts *as they exist at the time of the making of the contract*
    - Predictions/judgments about the future **is not** a mistake
    - Erroneous beliefs about contents/effects of a writing **is** a mistake
  + Erroneous belief about the law may be a mistake
* **RST §152: *Mistake of both parties*** as to a basic assumption on which the contract was made has a material effect on the agreed exchange = contract is voidable by the adversely affected party ULESS he bears the risk of mistake
* **RST §153**: ***Unilateral mistake*** if one party is mistaken to a basic assumption + material effect = voidable if he doesn’t bear the risk AND
  + Enforcement would be unconscionable OR the other party had reason to know of the mistake
    - Mistaken party has the burden of establishing unconscionability
* Factors Indicating a Mistake:
  + Shared erroneous belief as to the state of the world at the time of the contract
    - Thing contracted for isn’t actually what the parties thought it was
  + Mistake about the SUBSTANCE of the contract (*Sherwood*)
* Factors Indicating Not a Mistake:
  + Adversely affected party bore the risk of mistake (**RST §154**):
    - Risk was allocated to him by the agreement (parties provide for the risk in the contract)
    - Aware he only has limited knowledge w/r/t the facts, but treats it as sufficient
    - Risk is allocated to him by the court (*reasonable to do so b/c of one of the other two*)
  + Speculation about the future
  + Party(ies) making assumptions about the bargain allocates implicitly the risk (*Simkin*)
  + Mistake over the quality of what is being bargained for
  + Mistake was not made at the time of the contract was made (*Simkin*)
  + Assumption was not mentioned in the contract – importance was not implied (*Simkin*)
* CASES:
  + *Sherwood v. Walker*: Did the parties make a mistake about the barrenness of the cow?
  + *Simkin v. Blank*: Madoff account divorce – husband split assets assuming account was valid

**Voiding - IMPRACTICABILITY/FRUSTRATION**

* ***Would the parties have entered into a contract that now looks like this?*** [Still value-maximizing]
* ***Maybe we don’t want excuses – induce parties to negotiate and allocate risks***
* ***Courts decide where they want to place the loss and adjust the rule to fit that result***
  + Josh Principle – whatever party is in a better position to bear the loss

Impracticability: [**RST §261**]

* Supervening event occurs, the non-occurrence of which was a basic (shared) assumption of the contract
  + Unforeseeable contingency
    - Party arguing FOR impracticability argues that is so crazy and out of this world that these events happened it could not have been foreseen by either party
      * Must figure out WHAT was foreseeable and to WHOM it was foreseeable
        + If outliers could foresee it, a party will argue it’s foreseeable
    - Party arguing AGAINST impracticability will argue that it’s a broad thing that happened (i.e. can’t get credit) that could happen any day and should’ve assumed risk
  + Continuation of existing market conditions don’t usually apply (**RST §261**)
* The event renders performance unduly burdensome
  + Commercially impracticable [**UCC §2-615**]
    - Extra cost is not enough
    - Excessive amounts of money lost (b/c unforeseeable) is enough (*Alocoa*)
  + Objective standard of being unable to perform (**RST §261**)
  + Simply performing a losing contract is NOT impracticable (*Eastern Airlines*)
* The party seeking relief did not cause the occurrence or bear the risk
  + Not allocated by contract or custom (*Transatlantic*)
  + Should the party have taken precautions or diversified the risk? (*Eastern Airlines*)
  + If the provision expressly shifts the risk, consider the provisions, etc (**RST §261**)
  + Is the buyer or seller in a better position to know the P or L in B<PxL? (*Transatlantic*)
    - If so remote, neither party is in a better position and should leave losses where they lie

Frustration: [**RST §265**]

* Same as impracticability except that the event ***destroys the purpose of the contract***
  + FOUNDATION OF THE CONTRACT
* Technically could still perform the contract, but it would be virtually worthless (**RST §265**)
  + Not value-maximizing anymore!!
* Consider:
  + Did the party make the contract to make a profit on a further action? – **speculation?**
  + Contingency frustrates future purpose, but other party doesn’t know of it? (*Krug*)
  + Purpose isn’t mentioned in the contract, but is understood (*Krell*)
  + Is the party only limited in its benefit from the contract, but can still perform? (*Lloyd*)

CASES:

* *Taylor v. Caldwell*: Hall contracted to be used for a concert burns down - impracticable
* *Transatlantic v. US*: P has to go around Cape of Good Hope b/c Suez closed - NOT impracticable
* *Eastern Airlines v. Gulf Coast*: Oil prices get messed up in requirements contract - NOT impracticable
* *Alcoa v. Essex*: Prices in a long-term contract caused excessive increases in cost - impracticable
* *Krell v. Henry*: D rented P’s apt to watch the coronation which didn’t happen b/c king sick - frustrated
* *Lloyd v. Murphy*: D rents prop from P to sell cars, gov restricts sale, but can still sellish - NOT frustrated
* *Edwards v. Leopoldi*: **purpose of both parties must be frustrated**
* *Power Engineering v. Krug*: Embargo kept D from reselling purchase – NOT frustrated

**BREACH vs. SUBSTANTIAL PERFORMANCE**

* **Substantial Performance:** Fulfillment of obligations with only slight variances from exact terms and/or unimportant omissions or minor defects
  + Default Rule: Most parties who contract for houses would accept a substantial performance & very few would require perfect tender (for utility, not art)
    - *Reveal contrary intentions if they exist*
* **Perfect Tender:** Meets specifications of the contract exactly
  + **UCC §2-601**: buyer of goods can reject them and not pay for any defect no matter how minor
  + Can allow for strategic behavior if it’s something that could be judged subjectively
* Factors Indicating Substantial Performance:
  + **Failure to perform was an accident**
  + Independent promise from the overall promise to pay (not a *condition*) (*Jacob & Youngs*)
  + Operative fitness/structural goals = objective standard (*Haymore*)
  + Defects are not pervasive or so essential that the object of the contract can’t be obtained
  + Would have to tear down the whole house and do it again (cruel to enforce)
* Factors Indicating Breach:
  + Willful violation
  + Aesthetic goals = use the party’s subjective standard to determine performance (*Haymore*)
  + Utility and aesthetic = require perfect tender (*OW Grun*)
  + Easily remedied
  + **RST §241**: Consider the following if failure to render or offer performance is material:
    - Extent of deprivation of expected benefit
    - Extent to which the injured party can be adequately compensated
    - Likelihood of a cure
    - Good faith and fair dealing?
* TWO ways to value the party’s loss:
  + If the defect is easily remedied, breaching party compensates for *amount necessary to repair the defect or complete the work*
  + If the defect involves significant repairs, including destruction/reducing the work already done, the breaching party pays *the reduction in fair market value that is caused by the breach*
* CASES:
  + *Jacob & Youngs v. Kent*: D promised P the pipes would be a specific brand, but installed some of the specified brand and some not (same quality)
  + *OW Grun v. Cope*: D was supposed to install a uniform colored roof – ended up streaky
  + *Haymore v. Levinson*: Ds would pay for a house upon “satisfactory completion,” but kept adding things to list for P to achieve “completion”

**Damages - SPECIFIC PERFORMANCE**

* **RST §357**: Specific performance will be granted in the courts discretion
* Factors Suggesting Specific Performance:
  + Goods are unique and/or substitute goods cannot be obtained without considerable expense, trouble or loss (*Sedmak*)
  + Non-breacher can’t enter into a cover contract
  + **UCC § 2-716**: Goods are unique or other proper circumstances
    - Unable to effect cover for such goods or circumstances indicate effort will be unavailing
  + Damages will be inadequate
* Factors Suggesting No Specific Performance:
  + Price increase is not enough (*Klein*)
  + Damages would be adequate to protect the expectation interest of the injured party (**RST §359**)
    - Adequate damages for part of the breach doesn’t preclude SP on the contract as a whole
  + Would lead to additional transaction costs/waste, induce poor performance
  + Contract is for services (difficult to gauge the performance)
* CASES:
  + *Sedmak v. Charlie’s Chevrolet*: P ordered a limited edition car from D, D breached
  + *Klien v. Pepsico*: Search for used jet, P contracted with D who breached, 3 others available

**Damages - EXPECTATION & RELIANCE DAMAGES**

* Expectation Damages: Put the promisee in the same position had the contract been performed
  + **RST §347**: Loss in the value of the other party’s performance + any other cost (incidental or consequential) – any cost avoided by not having to perform
    - Incidental loss = costs incurred in a reasonable effort to avoid loss
    - Consequential loss = injury to person/property because of defective performance
  + Cost of completion:
    - Pay the amount the have the performance rendered
      * PURPOSE was to have the performance fulfilled (*American Standard*)
      * Assume the land is meant for personal use
        + OR the original cost was priced into the contract (*American Standard*)
    - Strongly signal that they care about the clause
  + Diminution of value:
    - Difference of the value of the land as improved vs. unimproved
      * PURPOSE was to have the land be at a certain value (*Peevyhouse*)
      * Assume the land was supposed to be resold [**Peevyhouse is wrong**]
    - The clause that was not performed is incidental to the contract
  + Take into account: (*Freund*)
    - Expectation interest = same position party would’ve been in had there been performance
    - Reliance interests = anything the party does in reliance on the fact the contract was made
    - Restitution interests = return anything that was given in consideration
* Reliance Damages:
  + **RST §349**: Expenditures made in performance (or in preparation) – any loss the breaching party can prove that the injured party would’ve suffered has the contract been performed
    - If you can’t prove profit with reasonable certainty or it was a losing contract
* Lost Volume Seller:
  + Requirements:
    - Supply is greater than demand so you can service all comers
    - Other transactions are going to be profitable (next sale will be profitable)
    - That buyer wouldn’t resell to one of the subsequent buyers
      * Selling in different market (b/c not professional)?
    - Maybe require that the additional contract was probable absent the breach (*Learjet*)
  + **UCC §2-708** = limited number of buyers that can be sold to
* CASES:
  + *Freund v. Washington Square Press*: P wants royalties when publisher doesn’t publish book
  + *American Standeard v. Schectman*: D contracts with P to regrade his land in exchange for tools
  + *Peevyhouse v. Garland*: Stipulation at the end of a lease requires Ds to clean up the land
  + *RE Davis Chemical Corp v. Diasonics*: Contract for medical equip, down payment + breach
  + *Rodriguez v. Learjet*: ***Additional contract was probable absent the breach***

**Damages – LIMITATIONS**

* Damages must be foreseeable:
  + Foreseeable damages unless breaching party is aware of special circumstances (Hadley)
    - Idiosyncratic parties have to reveal circumstances to price the risk
      * NOT majoritarian default – forces info out of parties
    - *Made sense with 1-1 relationships, but maybe not in the real world*
  + **RST §351**: Foreseeable as a probable result from breach if it follows from the breach in the ordinary course of events or as a result of special circumstances that the breaching party had reason to know about
* Non-breaching party must attempt to mitigate damages:
  + Express notice of breach = must stop working (Rockingham)
  + Different inferior employment cannot be used to mitigate (Parker)
  + **RST §350**: Damages are unrecoverable for losses the non-breacher could avoid without undue risk, burden, or humiliation
    - *Not precluded if he made a reasonable, but unsuccessful effort to avoid loss*
    - Stop performance + take any appropriate affirmative steps to avoid further loss

EXTRA INFO:

**A. Compensatory Damages** - The Plaintiff (non-breaching party) is put in the position he/she/it would be in if promise had been performed.

**1.  Expectation Damages**

Expectation damages are designed to give the Plaintiff (non-breaching party) the “benefit of the bargain.” This means compensating the Plaintiff so that he is placed in the position he would have been in if the breaching party had performed.

**a. General Damages**

The Plaintiff (non-breaching party) will be compensated for damages that result from a given type of breach, without regard to the Plaintiff’s particular circumstances. This generally means the Plaintiff will be compensated for the difference between the contract price and the price of obtaining a substitute performance (in some cases, this may be the difference between the contract price and the market price).

**b. Consequential Damages**

Consequential damages are available **in addition** to expectation damages when:

i. the Plaintiff has additional losses as a result of his or her particular circumstances

ii. that a reasonable person would have foreseen as a result of breach

iii. at the time the parties entered the contract.

The Plaintiff has the burden of proving consequential damages. Look for situations where, at the time the contract is formed,  the Plaintiff tells the Defendant of particular additional damages that will result from the breach.

**2. Reliance Damages** - If the Plaintiff cannot show with sufficient certainty what his expectation damages would be, he may recover **reliance** damages.

Reliance damages place the Plaintiff in the position he would have been in if the contract **had never been formed**. Usually, this means **the Plaintiff can recover the cost of his performance.**

**B. Duty to Mitigate Damages** - The non-breaching party (i.e., the Plaintiff), has a duty to mitigate damages. This means that the Plaintiff must make reasonable efforts to cut her losses by avoiding additional expenditures (usually by stopping performance), or by obtaining substitute performance. There will be no recovery for damages that a party could have avoided.

A party is allowed to recover the expenses of mitigation.

1. Manufacturing

If the Plaintiff (non-breaching party) is a manufacturer, the general rule is that she should stop work after the other party’s breach. However, if the manufacturer can sell the manufactured goods to a third party, she should mitigate damages by finishing the goods and selling them.

2. Construction

The non-breaching contractor should stop work on the project. She has no duty to find another construction job.

3. Employment

If the employer breaches, the employee is under a duty to mitigate damages by seeking similar employment at the same rank in the same locale.

4. Sale of Goods

a.  **If the buyer is in breach**, the seller may resell the goods in a commercially reasonable manner. The seller may recover the difference between the contract price and the sale price. **U.C.C. 2-706.** The seller gets no recovery if he resells for more than the contract price.

If the seller does not resell, he may recover the difference between the contract and the market price.

b. **If the seller is in breach**, the buyer has the right to purchase substitute goods at a reasonable price. The buyer can recover the difference between the contract price and the cost of substitution (“cover”).  **UCC 2-712.**

If the buyer does not purchase substitute goods, he can recover the difference between the contract price and the market price of the goods. The buyer may not recover consequential damages that could have been avoided by purchasing the substitute goods.

**F. Specific Performance** - The court orders the breaching party to perform. This remedy is only available when the subject matter of the contract is rare or unique.

1. Specific performance is available for real estate contracts.

2. Specific performance is available for unique goods such as works of art.

3. Specific performance may be available if the subject matter of the contract is sufficiently rare.

4. Specific performance is **not** available if the contract is for rare or unique services (i.e., an actor or musician). However, the court may enjoin the breaching party from performing for another for the duration of the contract.

5. Specific performance is **not** available if the seller has sold the item to another bona fide purchaser.