* **FIRST DETERMINE THE TENSION IN THE PROBLEM!**

Fall 2011

Florencia Marotta-Wurgler – Contracts – Attack Outline

* **DETERMINE HEADINGS FOR RESPONSE AND ENTER THEM**
* **WRITE YOUR RESPONSE AND APPLY THE FACTS**

**RELAX!!**

1. Contract Formation
   1. Explicit offer and acceptance
   2. Unilateral/Bilateral/Option K’s
   3. Written notes
   4. Conduct of the parties indicating a K
2. Contract Interpretation
   1. Ambiguity/Vagueness
   2. Parol Evidence Rule
   3. Statute of Frauds
   4. Gap Fillers
   5. Battle of the Forms
   6. Illusory Promise
   7. Requirements K
3. Contract Enforcement
   1. Consideration
   2. K-Modification
   3. Promissory Estoppel
4. Breach – Is someone acting strategically?
   1. Good-Faith
   2. Warranties
   3. Breach
      1. Anticipatory Repudiation
      2. Adequate Assurances
      3. Material Breach
5. Defenses
   1. Always remember comparisons of defenses with their normal contractual counterparts
   2. Misrepresentation 🡪 Akin to common law Warranty – is someone puffing up their skill?
   3. Duress 🡪 Contract Modification
   4. Undue Influence
   5. Unconscionability 🡪 exception to adequacy of consideration
   6. Mutual Mistake
   7. Unilateral Mistake
   8. Impossibility/Impracticability
   9. Frustration of Purpose
6. Damages
   1. Expectation
   2. Reliance
   3. Restitution
   4. Limitations
   5. Liquidated
   6. Specific Performance
7. Analysis – **Offer, Acceptance, and Mutual Manifestation of Assent**
   1. **Explicit offer and acceptance – SEE OFFER**
      1. Offer is a manifestation of willingness to enter a bargain justifying another person to understand that assent creates a K (§24). Acceptance is anything reasonable given the circumstances (§30); §2-206(a)(1) offer invites acceptance in any reasonable manner
         1. Offer must have certainty (§33) 🡪 enough info for remedy?
            1. An offer under the UCC does not fail for certainty (§2-206)
         2. NOT an offer if offeree knows/should know that it is not intended to create a K (§26 – advertisement)
      2. Offer can be revoked any time before acceptance (§36) unless an option K
   2. **Unilateral/Bilateral/Option**
      1. When ambiguous, either promise or performance is allowed as chosen by offeree (RST §32) – remember to consider each case
         1. In writing, and exchange of consideration? 🡪 Option (§87) (Induce reliance?)
            1. Firm offer (signed & written) under UCC no consideration required (§2-205)
         2. Invites performance and NOT promise? 🡪 Unilateral (§45) (*Carbolic*)
            1. Is notice necessary? 🡪 (§54) (Only in extreme circumstances)
         3. Invites performance OR promise? 🡪 Bilateral (§62) – Performance acts as a promise to perform
         4. NOTE: Implications for whether offeror can rescind (Revoking offers §36). K formed on completion for option/unilateral. K formed immediately for bilateral.
         5. §2-204 K may be made in any manner sufficient to show agreement
   3. **Written Notes – SEE ACCEPTANCE**
      1. Mailbox Rule (§60) – Acceptance is binding on dispatch, option–operative on receipt
         1. Was it *actually* dispatched? 🡪 reasonableness standard from sender’s viewpoint
      2. Is the written note actually an acceptance? (What did offer request? §30)
         1. Look at the content and determine if it “reads” like an acceptance
      3. Does acceptance add terms? *Ardente*/Mirror Image Rule – changes are a counter-offer (§59), unless expressly requests for addition (§61) 🡪 §2-207 Battle of forms
      4. Written Memorial Contemplated – §27, *Empro* – Use the facts to determine if a writing or negotiation is a manifestation of assent or just preliminary negotiation
   4. **Conduct of the parties – Mutual manifestation of assent**
      1. Would a reasonable person think that there was a K?
      2. RST §18 – Manifestation of mutual assent is required, though (§22(2)) it can be made even if offer/acceptance can’t be identified
         1. Acting or failing to act can be a manifestation of assent (§19)
         2. Certainty – K needs certainty (§33), but performance can eliminate uncertainty (§34), or reliance can make a case for K enforcement
      3. UCC §2-204 – K can be formed by conduct which recognizes a K
      4. *Embry* – Whether something is an offer has a **subjective component**
         1. Was there intent to make a K?
            1. Look to the facts

Consider communication – Outward expression (*Lucy v. Zehmer*)

Consider acts in reliance – Promissory estoppel?

Acts in reliance as a signal that a K exists

Misunderstanding favors ignorant party, or no K if mutual (§20)

* + - 1. Is there a reasonable basis for calculating damages?
         1. Look to the facts – **Gap filling**

If the parties intended to make a K and there is a means to determine damages in the event of a breach (§33), there is a K even if an essential term is missing. The court may supply the missing term with something reasonable under the circumstances (RST §204, UCC §2-204(3))

Cure by concession – accepting the highest price by default each month, all previous months inclusive (*Sun Printing*)

1. **Interpretation**
   1. Are there terms in the fact pattern that are misinterpreted by one of the parties?
      1. Look to **ambiguity/vagueness**
   2. Is there more information that can be introduced to explain things?
      1. Analysis – **Parol Evidence Rule**
         1. Integration – Complete, partial or not integrated?
            1. Extrinsic evidence is considered (§209(3), §214), Judge determines (§209(2))
         2. Interpretation – parol evidence to explain a term (§214(c))
            1. Judge determines if writing is reasonably susceptible to the meaning implied by parol evidence (*PG&E*) 🡪 if yes, jury determines meaning
         3. Consistency
            1. Inconsistent prior agreements are discharged (§213(1))
            2. Evidence cannot be introduced to contradict an integrated term (§215)
            3. Are consistent prior agreements admissible?

Would the term necessarily, certainly, naturally or ordinarily have been excluded in the writing? (RST §216(2))

Is it outside the scope of the integrated agreement? (RST §213(2))

* 1. Is the agreement subject to the statute of frauds?
     1. Agreement must be in writing and be signed by person against whom enforcement is sought 🡪 see **Statute of Frauds** below
  2. Were there multiple stages to the agreement? – **Battle of the forms/(§§ 57/61)**
  3. Can disputed problems with the K be rectified through **Gap Fillers**?
  4. Is there mutuality/exclusivity, or is someone increasing an obligation of the other party? Consider a **requirements K**

1. **Enforcement**
   1. **Consideration** – Contract is unenforceable without mutual inducement (RST §71)
      1. RST §71 cmt b – Focus on outward expression of intent
      2. Conditioned gifts (given either way) and past consideration are NOT Consideration
   2. **Contract Modification** – What are the current terms of the K?
      1. Pre-existing Duty Rule – no K-mod without consideration (*Alaska Packers*)
      2. RST §89 – Promise modifying K is binding if modification is fair, equitable and was not anticipated by the parties when K was formed, allowed as justice requires
      3. UCC §2-209 – Doesn’t need consideration as long as it’s in good faith
   3. Analysis of **Promissory Estoppel** – RST §90 – Always consider PE when a K fails
      1. Was there a promise? – (Gratuitous promise, Construction bid, Alternative to breach)
      2. Was reliance induced?
         1. Consider counter-factual of the promise
         2. Was the reliance reasonable and reasonably foreseeable?
      3. Does justice require damages? (§90 cmt b – was reliance reasonable and is the other party unjustly enriched)
2. **Performance and Breach**
   1. **Duty of Good-Faith** – All K’s have an implied duty of good faith (§1-203/§205)
      1. % leases – Legitimate business reason for change?
         1. Determine joint-net-gain – add profit to each party in 2 situations and see if it increased.
   2. **Warranties** – Has a party represented the quality of something? Is someone unsatisfied with the quality of a good? 🡪 Only applies to goods from merchants (See misrepresentation)
      1. Determine if there was express (§2-313)/implied warranty (§2-314)
   3. **Breach**
      1. Anticipatory Repudiation – Non-breaching can await performance, resort to remedy and suspend performance/cover/mitigate (§2-610/§253)
         1. Repudiation can be retracted before performance is due or non-breaching has materially altered his position (§2-611/§256)
      2. Adequate Assurance of Performance – When reasonable, in writing demand for assurance, suspend performance until assurance is received within 30d(§2-609/§251)
      3. Material Breach – Breach substantial enough for non-breaching party to suspend performance (See §241 factors) – Non-breaching party lose value of K? (§2-612(3))
3. Analysis of K-**Defenses**
   1. Capacity – RST §12 – person who manifests intent is bound unless (a) under guardianship, (b) an infant, (c) mentally ill, or (d) intoxicated
   2. Misrepresentation – Akin to common law warranty
      1. Was it material? 🡪 Know it was false/overstated? (§162)
      2. Did it induce assent? 🡪 Substantial reason K was made? (§167)
   3. Duress – Akin to K-modification – Manifestation of assent is induced by improper threat leaving the victim with no reasonable alternative (§175)
   4. Undue Influence – Unfair persuasion of a dominated party (§177)
   5. Unconscionability – No meaningful choice, both procedural (creation of K) and substantive (shocks the conscience) unconscionable
   6. Mutual Mistake – Mistake voids K if it is to a basic assumption behind the K (§152) UNLESS risk allocation has been made by K, court, or knowledge of risk (§154)
   7. Unilateral Mistake – K is voidable when one party makes a mistake about a basic assumption (§153), doesn’t bear the risk (§154), and other party has reason to know
   8. Impossibility/Impracticability – When performance is made impracticable without party’s fault and undercuts a basic K-assumption, duty is discharged (§261)
   9. Frustration of Purpose – Something occurs after K is made (versus mistake before) that undermines a basic assumption of the K (§265)
4. **Damages**
   1. REMEMBER! – Calculate damages for each scenario created during the response
   2. Hit all three damage interests
5. **CONTRACT FORMATION**
   1. **Mutual Assent**
      1. Common Law
         1. RST §17 – A bargain requires manifestation of mutual assent and consideration – “meeting of the minds” (cmt c)
            1. What is a manifestation of assent?

Make a promise or begin performance (§18)

May be written, spoken, or by action (§19(1)), only if the party knows/should know the other party will interpret as a manifestation (§19(2))

*Embry v. Hargadine* – standard is partially subjective

* + - * 1. Misunderstanding

RST §20 – (1) NO K if parties attach different meanings and neither/both knows; (2) K using ignorant party’s terms if the other party knows ignorant party’s meaning

* + - * 1. Only look to outward expression of intent (*Lucy v. Zehmer*)
      1. **Written Memorial Contemplated** – Manifestation of assent is sufficient even if a written K is contemplated later, but must consider circumstances (RST §27)
         1. Consider (*Texaco v. Pennzoil*, §27 cmt c)

Parties consider this a preliminary negotiation? (*Empro v. Ball Mfg*)

Does party reserve being bound?

Partial performance accepted?

Terms agreed upon (can you determine damages)?

Is written K expected?

* + 1. **UCC §2-204** – (1) K is made with any manner sufficient to show agreement and (3) does not fail for indefiniteness because one or more terms are left open as long as (1)
    2. Assent in E-Commerce
       1. Key is whether party received adequate notice of the terms of the agreement
          1. Clickwrap usually adequate, Browsewrap usually not (*Specht v. Netscape*)

Browsewrap can be accepted through repeated action (*Register v. Verio*)

* + - * 1. Shrinkwrap – must indicate terms are inside the box, buyer may accept or return the goods (*ProCD v. Zeidenberg*, §2-204)
  1. **Offer**
     1. Offer or an Advertisement? (Common Law)
        1. RST §24 – Offer is a manifestation of willingness to enter a bargain which justifies another person to understand that assent concludes the bargain
           1. RST §33 – Certainty – (1) offer fails for certainty (2) if terms cannot provide a basis for determining if there is a breach and info for giving a remedy
           2. RST §26 – Manifestation is not an offer if offeree knows/should know that it is not intended to conclude the bargain (advertisement)
        2. OFFER – YES 🡪 *Lefkowitz* – selling coats first come first served – known price/amount/means of assent
        3. OFFER – NO 🡪 *Nebraska Seed*/*Leonard v. Pepsico* (Certainty/reasonableness)
     2. Offer under UCC
        1. UCC §2-206 – (1) An offer is construed as inviting reasonable acceptance; (2) an order to buy goods is an offer.
           1. Missing terms will not fail for indefiniteness (§2-204(3)) – delivery (§2-308), time (§2-309) and price (§2-305) may be filled in
     3. **Revoking Offers/Option K**
        1. Common law – MUST HAVE CONSIDERATION
           1. RST §36 – Methods of Termination of the Power of Acceptance

Power of acceptance may be terminated by

Rejection or counteroffer by offeree §38

Lapse of time §41

Revocation by the offeror §42 (direct)/§43 (indirect)

Death or incapacity

Nonoccurrence of any condition of acceptance under the terms of the offer

* + - * 1. §43 – offeror takes action inconsistent with intent to enter K and offeree knows about it (*Dickson v. Dodds*)
        2. Revocation can come any time before acceptance (*Petterson v. Pattberg*)
        3. EXCEPTION! Option K

RST §87 – (1) Offer is binding if it is in writing and has consideration, **OR** offeror knows it will induce reliance and does induce reliance an option K is created

RST §45 – (1) when an offer invites acceptance by performance (**and not promise**), option K is formed when performance begins and (2) offeror’s duty is conditional upon completion of offeree’s performance

* + - 1. UCC – DOES NOT NEED CONSIDERATION
         1. UCC §2-205 – Firm offer in signed writing that it will be held open cannot be revoked for lack of consideration for time stated (or 3mo if not stated)
  1. **Acceptance**
     1. Common Law
        1. RST §30 – (1) Offer may invite acceptance by words, performance, or give offeree a selection, (2) any manner and by any medium reasonable
        2. **Mailbox Rule** – RST §60 – (a) acceptance is operative as soon as it is out of offeree’s possession, however (b) an option K is not operative til received by offeror
        3. **Mirror-Image Rule/Counter-offer**
           1. *Ardente v. Horan* – letter accepting house K with extra stipulations
           2. Mirror Image Rule – Acceptance must be the mirror image of an offer. An acceptance which adds terms is a repudiation and a counter-offer (RST §59) unless it indicates these are merely requests for change/addition which do not invalidate the agreement (RST §61)
        4. Unilateral/Bilateral K – Acceptance by Performance
           1. Notice – RST §54 – (1) If acceptance by performance is invited, no notice is necessary unless requested, (2) if there is no way offeror will know, offeror can rescind unless (a) offeree notifies, (b) offeror learns in reasonable time, or (c) offer indicates notice isn’t required

*Carlill v. Carbolic Smoke Ball* – buying began performance, notice when sick

* + - * 1. Choice of method for promising performance – RST §62 – (1) When there is a choice, beginning of performance or promise to perform acts as an acceptance, and (2) tendering operates as a promise to complete performance (offeror and offeree cannot back out)

**NOTE** – Partial performance must be unambiguous and specific to the K

*White v. Corlies and Tifft* – contractor buys supplies for job, offeror rescinds before he begins or alters the supplies. No K (option or unilateral)

* + - 1. **Acceptance by Silence**
         1. RST §69 – (1) Acceptance by silence is OK when (a) offeree takes services with opportunity to reject and knowledge that compensation is expected, (b) Where offeror indicates silence is OK and offeree intends to accept by silence, or (c) Where by previous dealings, offeree should notify intent not to accept. (2) If offeree does anything inconsistent with offeror’s ownership of property is bound to terms of K.
         2. *Hobbs v. Massoit Whip* – Eel skin case – Previous dealings
    1. **UCC**
       1. §2-204(1) – K may be made in any manner sufficient to show agreement including conduct by both parties
       2. §2-206(1)(a) – offer is construed as inviting acceptance in any manner and by any medium reasonable under the circumstances
  1. **Interpreting Assent**
     1. Analysis – Interpretation of Contract
        1. Are there terms in the fact pattern that are misinterpreted by one of the parties?
           1. Look to **ambiguity/vagueness**
        2. Is there more information that can be introduced to explain things?
           1. Analysis – **Parol Evidence Rule**

Integration – Complete, partial or not integrated?

Extrinsic evidence is considered (§209(3), §214), Judge determines (§209(2))

Interpretation – parol evidence to explain a term (§214(c))

Judge determines if writing is reasonably susceptible to the meaning implied by parol evidence (*PG&E*) 🡪 if yes, jury determines meaning

Consistency

Inconsistent prior agreements are discharged (§213(1))

Evidence cannot be introduced to contradict an integrated term (§215)

Are consistent prior agreements admissible?

Would the term necessarily, certainly, naturally or ordinarily have been excluded in the writing? (RST §216(2))

Is it outside the scope of the integrated agreement? (RST §213(2))

* + - 1. Is the agreement subject to the statute of frauds?
         1. Agreement must be in writing and be signed by person against whom enforcement is sought 🡪 see **Statute of Frauds** below
      2. Were there multiple stages to the agreement? – **Battle of the forms/(§§ 57/61)**
      3. Can disputed problems with the K be rectified through **Gap Fillers**?
      4. Is there mutuality/exclusivity, or is someone increasing an obligation of the other party? Consider a **requirements K**
    1. **Ambiguity** – Term that could be either of several discrete things (*Peerless*)
       1. RST §201 – (1) If both parties mean the same thing, that is the meaning attached to the ambiguous term, (2) if they mean different things, meaning attaches to the ignorant party if the other (a) knew, or (b) should have known the ignorant party’s meaning. (3) If there is disagreement and no info asymmetry, no K.
       2. *Oswald v. Allen* – Coins 🡪 no K
    2. **Vagueness** – Term that is unclear as to the meaning (What is a dress? What is a chicken?)
       1. RST §202 – (1) Words are interpreted in light of all circumstances and principal purpose of the parties is given great weight. (2) K is interpreted as a whole and (3) words are given their (a) prevailing meaning or (b) technical meaning within their field. (4) Repeated acceptance of performance is given weight.
       2. §203(b)/§2-208(2) 🡪 Express terms > Course of performance (this deal) > Course of dealing (previous deals) > Trade usage
          1. §203(d) – negotiated terms > standard terms
          2. §206 – interpret terms against the drafter because drafter will draft such that his interests are protected
    3. **Parol Evidence Rule**
       1. Common Law
          1. RST §213 – (1) Binding, integrated agreements discharge all prior agreements **inconsistent with** the integrated agreement. (2) A binding, completely integrated agreement discharges all prior agreements **within the scope** of the integrated agreement.
          2. RST §209 – (1) integrated agreement is a writing constituting a final expression of one or more terms, (2) whether the agreement is integrated is determined by the judge before interpreting it or applying §213. (3) If writing looks complete and specific, it is considered integrated unless other evidence says otherwise.
          3. New Evidence to Determine if Integrated (§214)

RST §214 – new evidence can be used to establish (a) if a writing is integrated, (b) if it is completely or partially integrated, (c) the meaning of the K, (d) illegality, fraud, duress, mistake, (e) ground for specific performance or other remedy

* + - * 1. New Terms after Integrated (§215/216)

Extraneous evidence cannot be introduced to contradict an integrated term (§215), consistent additional terms can be added to a K that is not completely integrated (§216(1))

A separate term agreed upon with its own consideration is naturally omitted from the writing and is evidence of a lack of complete integration (§216(2))

* + - * 1. Policy – Freedom of K vs. Freedom of Parties. Parties are free to contract that a writing is completely integrated, or that certain terms are intentionally excluded.
      1. UCC – Strong presumption against deeming writings integrated
         1. §2-202 – Terms intended as a final expression may not be contradicted but may be explained or supplemented (a) by course of dealing or trade usage (§1-205) or by course of performance (§2-208) and (b) by evidence consistent with additional terms unless writing is completely integrated.
    1. **Statute of Frauds**
       1. Agreement **must** be **in writing** and **must** be signed by the person against whom enforcement is sought!
       2. Common Law
          1. RST §110 – Agreements subject to SOF

K of an executor of a will

K to pay someone else’s debt

Marriage K

K for sale of land

K that won’t be performed within a year

* + - * 1. Exceptions

RST §139 – Damages in reasonable reliance of oral K are not in SOF

§139(2) – consider other remedies, character of action taken in reliance, reasonableness of the action, extent it could be foreseen by non-relying party

Partial performance can be removed through restitution damages

* + - 1. UCC
         1. UCC §2-201

K for sale of goods over $500 (§2-201)

K for securities (§8-319)

K for sale of personal property beyond $5k in value (§1-206)

* + - * 1. Exceptions: §2-201(3)

(a) if goods are specially manufactured and can’t be resold

(b) if breaching party admits there was a K

If goods have been paid for and payment was accepted, or if goods have been received and accepted (§2-606)

* + 1. **Gap filling**
       1. If the parties intended to make a K and there is a means to determine damages in the event of a breach (§33), there is a K even if an essential term is missing. The court may supply the missing term with something reasonable under the circumstances (RST §204, UCC §2-204(3))
          1. Missing terms will not fail for indefiniteness (§2-204(3)) – delivery (§2-308), time (§2-309) and price (§2-305) may be filled in
       2. Agreement to agree – *Sun Printing v. Remington Paper* – price/time terms were not in K, negotiated every expiration period
          1. Π could present evidence of market stability to determine price/time term
          2. Cure by concession – Π agrees to pay the max price from all previous months, current month inclusive.
          3. Policy – freedom to contract, don’t want to give courts significant latitude to interpret/apply terms to K
    2. **Illusory promises** – when promisor is not actually committed to performing anything
       1. Mutuality – requires exclusivity (buyer must buy from seller), and there must be a valid business need (a reason to have to buy) 🡪 both parties must have obligations
       2. Mutuality can be implied (court assumed Π would perform otherwise he wouldn’t make $) based on good-faith dealing (*Wood v. Lady Duff*; §1-203, §205)
    3. **Requirements K**
       1. UCC §2-306 – (1) terms based on output or requirements are those based on good-faith dealings, no quantity unreasonably disproportionate to any estimate or prior output/requirement may be tendered/demanded. (2) requires mutuality

Outputs contract – buyer will buy all that seller has

Requirements – seller will sell all that buyer needs

|  |  |  |
| --- | --- | --- |
|  | Requirements K | Output K |
| Good Faith Increase | Protect *sellers*, buyers can’t ask for disproportionately more – [text] | Protects *buyers*, can refuse to buy disproportionate increase in tendered output – [text] |
| Good Faith Decrease | Protects *buyers*, who can ask for disproportionately less – [comment 2] | Protects *sellers*, can tender disproportionately less if in good faith – [comment 2] |

* + - 1. *NY Central Iron Works v. United Radiator* – suspicious increase in orders when price of iron increased; Π provides no data on bad-faith 🡪 K-valid
      2. *Eastern Air Lines inv. v.Gulf Oil Corp* – selling jet fuel, price goes up, Δ wants to change K-price; K-valid based on good-faith prior dealings
    1. **Standard Form K**
       1. RST §211 – (1) When a party enters into a written agreement that uses standard terms, the party adopts the writing as an integrated agreement (2) treating all parties to the same agreement the same way regardless of their understanding.
          1. (3) EXCEPT where the other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term 🡪 that term is KO
       2. *Carnival Cruise v. Shute* – clause must be reasonable and you must have notice
    2. **Battle of the Forms** – Mirror Image/Last Shot Rule, UCC §§ 2-204, 2-207
       1. UCC §2-207 – (1) written confirmation is an acceptance even if it adds or modifies terms, UNLESS acceptance is expressly conditioned upon assent to the additional or different terms.
          1. (2) Additional terms are proposals for addition which are incorporated into the K UNLESS (a) offer limits acceptance to terms of the offer, (b) the terms materially alter the K, or (c) notification of objection is given.
          2. (3) Conduct demonstrating existence of a K establishes a K with terms on which both parties agree, together with gap fillers from UCC
          3. Cmt 4 – Materially altering – negate standard warranty, requiring high % delivery when industry standard is low, clause giving seller power to cancel on any failure of buyer, etc.
          4. Cmt 5 – Not materially altering – Clause fixing reasonable times for complaints, clause providing interest on overdue invoices within industry standard, etc.
       2. Analysis – Merchants (§2-207)
          1. Is acceptance predicated on new terms?

Yes 🡪 no K without new terms

No

Are the terms additional or different?

Different – Either KO disagreeing terms, “fall away” new different term, or treat as additional

Additional – §2-207(2) – term is in K unless (a) Offer limits acceptance, (b) materially alter agreement, or (c) offeror objects

*Union Carbide v. Oscar Mayer* – “indemnity clause” Materially altered agreement

* + - 1. Analysis – Merchant – Consumer (§2-204)
         1. Seller’s form is acceptance + additional terms

If buyer accepts – seller’s terms control

If buyer does not accept – UCC gap fillers (*Klocek*)

* + - * 1. Did buyer accept counter-offer by not returning product?

If buyer accepts – seller’s terms control (*ProCD, Hill*)

If buyer does not accept – No K

* + - 1. NOTE: RST §57 (Counter-offer) and RST §61 (reply not predicated on additional terms is still valid acceptance) together act like §2-207
         1. Historically a reply with additional terms followed by performance, last-shot terms are applied

1. **ENFORCEABILITY**
   1. Analysis – Contract enforceability
      1. **Consideration** – Contract is unenforceable without mutual inducement (RST §71)
         1. RST §71 cmt b – Focus on outward expression of intent
         2. Conditioned gifts (given either way) and past consideration are NOT Consideration
      2. **Contract Modification** – What are the current terms of the K?
         1. Pre-existing Duty Rule – no K-mod without consideration (*Alaska Packers*)
         2. RST §89 – Promise modifying K is binding if modification is fair, equitable and was not anticipated by the parties when K was formed, allowed as justice requires
         3. UCC §2-209 – Doesn’t need consideration as long as it’s in good faith
      3. Analysis of **Promissory Estoppel** – RST §90 – Always consider PE when a K fails
         1. Was there a promise? – (Gratuitous promise, Construction bid, Alternative to breach)
         2. Was reliance induced?
            1. Consider counter-factual of the promise
            2. Was the reliance reasonable and reasonably foreseeable?
         3. Does justice require damages? (§90 cmt b – was reliance reasonable and is the other party unjustly enriched)
   2. **Consideration**
      1. ***THIS HAS NOTHING TO DO WITH BENEFIT/DETRIMENT***
      2. RST §71 – Consideration (1) must be bargained for, and (2)there must be mutual inducement. Focus is on outward expression of intent (cmt b)
      3. RST §79 – Benefit/detriment are indicators that something is bargained for, but we are unconcerned about the adequacy of consideration.
      4. RST §81 – Even if what is bargained for does not induce the promise, it does not prevent it from being consideration
      5. Moral Obligation – Depends on the situation
         1. *Mills v. Wyman* – promise to pay son’s debt not valid moral obligation because son is an adult
         2. *Webb v. McGowin* – Where promisee cares for, improves and preserves the property of the promisor, though done without request, is sufficient consideration for the promisor’s subsequent agreement to pay for the service/benefit received
      6. NOT Consideration
         1. Conditioned Gift – Money given in exchange for something that would have been done either way. (*Johnson v. Otterbein* – promise to give $100 to pay school’s debt)
         2. Past Consideration – Past events can’t be consideration because they weren’t mutually induced. (*Moore v. Elmer* – promise to buy clairvoyant a house for prediction that was already made and paid for)
   3. **Contract Modification and Pre-Existing Duty Rule**
      1. Common Law
         1. Pre-existing Duty Rule – no K modification without consideration
            1. *Stilk v. Myrick* – guys desert ship, no extra $ for other sailors since death of sailors was in K
            2. *Alaska Packers* – no extra $ to sailors who refuse to work
            3. Posner – a peppercorn for your life is not real consideration – good-faith standard should be used.
         2. RST §89 – Promise modifying a K not fully performed is binding if (a) the modification is fair, equitable and was not anticipated by the parties when they made the K, (b) it is provided by statute, or (c) as justice requires in view of a material change of position in reliance on the promise
            1. *Brian Construction and Development* – awarded cost of cover from Δ after Δ repudiated a legit K-modificaiton.
      2. UCC
         1. UCC §2-209 – (1) Agreement for modification doesn’t need consideration (Cmt 2) as long as it is in good faith. (Cmt 2) Bad faith modifications are barred. (2) Signed agreement excluding modifications cannot be changed except by signed writing, and (3) SOF must be satisfied.
   4. **Promissory Estoppel**
      1. Analysis – RST §90
         1. Was there a promise?
         2. Was reliance induced?
            1. Consider counter-factual of the promise
            2. Was the reliance reasonable and reasonably foreseeable?
         3. Does justice require damages? (§90 cmt b – was reliance reasonable and is the other party unjustly enriched)
      2. RST §90 – A promise which the promisor should reasonably expect to induce action or forbearance and which does induce such action of forbearance is binding if injustice can be avoided only by enforcement of the promise. Remedy granted for breach as justice requires.
         1. Reliance is the typical damage interest, expectation is available also
      3. Gratuitous Promise
         1. *Rickets v. Scothorn* – Grandfather promises to pay granddaughter to not work – no consideration since she kept working for some time, relied on promise later
         2. *Greiner v. Greiner* – mother promises kid land, he moves in reliance
         3. *Feinberg v. Pfeiffer* – Promised retirement package
      4. Construction
         1. *James Baird v. Gimbel Bros* – mistake in subcontractor bid, no PE
         2. *Drennan v. Star Paving* – Contractor relied on subcontractor bid, court found PE 🡪 subcontractor wanted Π to rely on the bid.
      5. Alternative to Breach of Contract – FMW likes this as a constructed option §87(2)
         1. *Goodman v. Dicker* – Court awards reliance for part performance on promise to give franchise to sell radios
         2. *Hoffman v. Red Owl* – Reliance on promise, no K for lack of certainty
2. **PERFORMANCE AND BREACH**
   1. **Implied Duty of Good-Faith Performance**
      1. Every K includes an implied covenant of good faith (§1-203/§205)
         1. §205 cmt a – Faithfulness to an agreed common purpose
         2. No rejections for better offers or change of mind
         3. Good faith rejection of non-conforming items is allowed
            1. CAN YOU DETERMINE WHAT A CONFORMING ITEM IS?
      2. UCC §2-103 – Immutable Rule – This is not a default rule 🡪 can’t contract out
      3. % Leases
         1. Analysis
            1. Determine Gross Sales – Price x (#Sold)
            2. Determine Lessor’s Gain – % x Gross
            3. Determine Lessee’s Profit – (Price – (% x Price)) – x (#Sold)
            4. Joint Net Gain – Lessee + Lessor’s profits
            5. If joint net gain increases 🡪 good faith
         2. Consider context – *Tailored Woman* – Moved furs upstairs, Majority assumed they sold more furs. Dissent looks to K-terms and interprets bad faith
         3. *Goldberg v. Levy* – Open store close, mismanage this one – Court doesn’t allow
         4. What was contracted? – *Stop and Shop* – Minimum rent plus %, but minimum was close to market 🡪 good faith to discontinue store there and pay minimum
         5. **ASK** – Is there a legit business reason to do what Δ did?
   2. **Warranties -** ONLY APPLY TO GOODS FOR SALE BY MERCHANTS
      1. Efficiency
         1. Buyers – don’t have to rely on their own expertise or research
         2. Sellers – signal that their products are good
      2. Implied Warranties
         1. Merchantability – §2-314 – (2) To be merchantable, goods must (a) pass without objection in the trade, (b) be of fair and average quality (if fungible), (c) be fit for the ordinary purpose that it is used for, (d) be within normal variations, (e) be adequately contained/packaged according to K, (f) conform to the promise of fact on the container
            1. Cmt 3 – used goods have implied warranty appropriate to such used goods
         2. Fitness for Purpose – §2-315 – (a) Buyer does not need to expressly state the purpose, but (b) seller must have reason to know the purpose and (c) buyer must have relied on the seller’s skill/judgment
      3. Disclaiming Implied Warranty
         1. §2-316(2)/(3) – Disclaimer must be bold and conspicuous, must use specific language 🡪 “as is” or “merchantability” or “with faults”
            1. (3)(b) – when buyer has inspected the goods as fully as he desired, there is no implied warranty with regard to defects he should have found
         2. Limitation of remedy – §2-719 – (1) remedy may be (b) exclusively limited to (a) repair or replacement of an item; (2) failure of the remedy’s purpose results in default, and (3) remedy cannot be unconscionable
      4. Express Warranties
         1. §2-313(1) – (a) any affirmation of fact, (b) description, or (c) sample by the seller about the goods that becomes part of the basis for the bargain
            1. *Royal Business Machines*

Warranties – “Have been extensively tested,” “Would not cause fires,” “Service calls needed every 7k to 9k copies”

Not Warranties – “Copiers are of high quality,” “low frequency of repairs,” “Would increase profits”

* + - 1. §2-313(2) – Affirmation merely of the value or statement of the seller’s opinion or commendation of the goods does not create a warranty
      2. Becomes part of the basis for the bargain – Interpretation
         1. *Royal Business Machines* – if 1st shipment was bad, no warranty for second
         2. *CBS v. Ziff* – buyer paid for the assertion that the promise was correct
    1. Damages for Breach of Warranty
       1. §2-714(2) – Difference at the time/place of acceptance between the value of goods accepted and the value as warranted, unless circumstances show proximate damages of a different amount
    2. POLICY
       1. Warranties are valuable – squaring information asymmetries, risk allocation
       2. Freedom of K – parties should be free to give/disclaim warranties
       3. Default warranties save transaction costs
       4. Contraints on the seller’s ability to disclaim warranties/limit remedies are justified to the extent that consumers are imperfectly rational
  1. **Breach**
     1. **Anticipatory Repudiation** – When either party repudiates, the non-breaching party may (a) await performance by repudiator, (b) resort to remedy for breach, and (c) suspend performance and cover/mitigate damages (§2-610/§253)
        1. (1) Repudiating party can retract before next performance is due or until non-breaching has cancelled or materially changed his position (§2-611/§256)
        2. **Adequate assurance of performance** (§2-609/§251)
           1. (1) When reasonable grounds ((2) commercial standards between merchants) for insecurity arise WRT performance of one party, the other may in writing demand assurances and suspend performance until assurances are received (4) in reasonable time less than 30d

Assurances must be in writing and can’t be used to modify K, communication to workers is inadequate (*Scott v. Crown*)

* + - 1. Non breaching party can suspend performance and sue on K even before breach is possible (*Hochester v. De La Tour*) as long as repudiation is definite and unequivocal (*Harrell v. Sea Colony* – asked about getting out of K)
    1. **Material Breach** – A breach that justifies other party to suspend performance
       1. Analysis
          1. Did the non-breaching party lose the value of the K? (§2-612(3))

RST §241 – factors

Will injured party be deprived of expected benefit?

Can injured party be compensated for the benefit deprived?

Is breaching party suffering forfeiture? Substantial performance?

Can breaching party make good on the K?

Did the failure to perform comport with good faith/fair dealing?

1. **DEFENSES**
   1. **Capacity**
      1. Incompetence
         1. RST §12 – (2) Person who manifests intent is bound unless (a) under guardianship, (b) an infant, (c) mentally ill, (d) intoxicated
         2. Infancy – RST §14 – Only voidable duties until day before person’s 18th b-day
         3. Insanity – RST §15 – No K if unable to understand nature/consequences of transaction or unable to act in a reasonable manner WRT the transaction and the other party has reason to know of the condition
         4. Intoxication – RST §16 – No K if the other person has reason to know that because of intoxication the other person is unable to understand the nature/consequences of the transaction or is unable to act in a reasonable manner in relation to the transaction
   2. **Misrepresentation**
      1. Note similarity between misrepresentation and warranty
      2. Analysis
         1. Did the promisor know the statement was false, overstate confidence, or know the claim was baseless?
            1. Material (RST §162)
         2. Did the misrepresentation become a substantial part of why the other person agreed?
            1. Induced assent (RST §167)
      3. Misrepresentation – When consent is induced by fraud or fraudulent misrepresentation, K is voidable because the terms have not been bargained for
         1. Must be **material** and must **induce** party’s manifestation of assent
         2. *Halper v. Rosenthal* – no K when Π represents to Δ that realestate has no termites
      4. RST §162 – Misrepresentation is **material** when the maker intends the assertion to induce a party to manifest assent and the maker (a) knows it is false or (b) overstates his confidence, or (c) knows he doesn’t have basis for his claims
      5. RST §167 – Misrepresentation induces assent if it substantially contributed to his decision to manifest assent
   3. **Duress**
      1. Note similarity between duress and contract modification
      2. Analysis
         1. *Austin v. Loral* – When there is duress
            1. One party threatens to breach
            2. Threatened party cannot cover
            3. Ordinary remedy for breach is inadequate
         2. *US v. Progressive Enterprises* – Party claiming duress must voice problem
         3. Consider
            1. What form does the duress take?
            2. Result of duress is a rolling back of the K
         4. If a manifestation of assent is induced by improper threat leaving the victim with no reasonable alternative (RST §175) 🡪 No K because of duress
         5. A threat is improper if it is a crime/tort, criminal prosecution, civil process in bad faith, a threat that is made in bad faith (RST §176)
         6. Ask: Does the threat leave the party under duress with no reasonable alternative?
            1. Remember there is a duty not to harm, but there is no duty to rescue
      3. Policy – What are the incentives?
         1. K are supposed to be mutually beneficial to both parties
         2. Ask how far the threat must go?
         3. People could always claim they are under duress, so the threshold must be high
            1. Otherwise every time someone complains, people would back out of Ks
   4. **Undue Influence**
      1. *Odorizzi v. Bloomfield*
         1. Elements of undue influence
            1. Discussion of the transaction at an unusual or inappropriate time
            2. Consummation of the transaction in an unusual place
            3. Insistent demand that the business be finished at once
            4. Use of multiple persuaders by the dominant side against a single servient
            5. Absence of 3rd party advisers to the servient party
            6. Statements that there is no time to consult financial advisers or attorneys
      2. RST §177 – When undue influence voids a K
         1. Unfair persuasion of a party under the domination of the other party
         2. If manifestation of assent is induced by undue influence, K is voidable
         3. If influenced by 3rd party, voidable unless other party is acting in good faith and relies on the K
   5. **Unconscionability**
      1. Unconscionability is an exception to the adequacy of consideration (RST §79) which states that there is no additional requirement beyond mutual inducement
      2. *Williams v. Walker Thomas Furniture* – unconscionable payment plan for products
         1. Elements
            1. No meaningful choice

Asymmetrical bargaining power

* + - * 1. Procedural – Something problematic about the creation of the K

Are the terms obfuscated in fine print such that there is no notice?

Would a reasonable person understand the terms?

* + - * 1. Substantive – Something in the K must shock the conscience
    1. UCC §2-302 (RST §208) – Unconscionable K
       1. If the court finds a K unconscionable at the time it was made, court can refuse enforcement or not enforce the unconscionable parts
       2. Parties are given the opportunity to explain the setting
  1. **Mutual Mistake**
     1. *Sherwood v. Walker* – infertile cow that gets pregnant
     2. RST §152 – A mistake by both parties voids the K if the mistake is made as to a basic assumption on which the K was made that has a material effect on the agreed exchange of performances
     3. RST §154 – When a risk allocation is made, when contracting party is aware of his limited knowledge but treats it as sufficient, or if the risk is allocated by the court under reasonable circumstances
  2. **Unilateral Mistake/Duty to Disclose**
     1. *Tyra v. Cheney* – Knowledgeable party can’t take advantage of their extra knowledge, burden is on Π to prove that Δ is aware of Π’s mistake
     2. RST §153 – When one party makes a mistake about a basic assumption on which the K is made, K is voidable if he doesn’t bear the risk (§154) and the effect of the mistake makes K unconscionable or the other party had reason to know
     3. RST §160 – Action intended or known to prevent another from learning a fact is equivalent to asserting the fact doesn’t exist
     4. RST §161 – Non-disclosure is the same as lying when
        1. He knows that disclosure is necessary to prevent a previous assertion from being a misrepresentation
        2. Where he knows that disclosure would correct a mistake of the other party as to a basic assumption such that it is a failure to act in good-faith
        3. When the non-disclosure would clarify elements of a writing
        4. When the other person is entitled to know
  3. **Impossibility/Impracticability**
     1. *Taylor v. Caldwell* – Theater burns down, court finds implicit term excusing theater from K
     2. RST §261 – When a party’s performance is made impracticable without his fault and it undercuts a basic K-assumption, duty is discharged
     3. RST §263 – No K if something necessary fails to come about
     4. UCC §2-613 – If goods in a K suffer casualty, loss is on buyer; under a “no arrival, no sale” term, K is cancelled or if loss is partial, option is on buyer to accept, renegotiate, or repudiate
     5. UCC §2-615 – excuse by failure of presupposed conditions
        1. Delay in delivery by a seller due to impracticability is not a breach
        2. Seller must notify the buyer of the delay
        3. CMT 4 – increased cost is not enough
        4. CMT 8 – Did parties explicitly or implicitly allocate the risk?
  4. **Frustration of Purpose**
     1. Distinguish from mistake – Frustration occurs after K is created, mistake is before
     2. *Krell v. Henry* – Rent a room to watch the coronation that doesn’t happen, no K
     3. RST §265 **–** When something happens after the K is made that frustrates one party’s ability to perform through no fault of their own which undermines a basic assumption of the K 🡪 no K

1. **DAMAGES**
   1. Three damage interests – Π can choose
      1. Expectation – Promisee where she’d be if the promise was performed
      2. Reliance – Returns promisee to pre-promise position
      3. Restitution – Returns promisor to pre-promise position
   2. **Expectation Damages**
      1. Incidental Damages – Any consequential damages seller reasonably knew about that could not be prevented by cover
         1. RST§347, UCC §1-305 – Expectation damages including incidental damages
            1. UCC §2-715(b) – Incidental damages
         2. *Hawkins v. McGee* – Damages for current and perfect hand. Δ(current/starting) hand = incidental damages. **No pain and suffering**.
      2. Cost of Completion vs. Diminution of Value – Services 🡪 Common Law
         1. RST §348 – (1) Rental/Interest for delayed usage, or for unfinished work, (2) Award cost of completion unless that is disproportionate to the loss of value to Π, then award diminution of market value
            1. Consider idiosyncratic value – signaled in asking for specific performance

*Peevyhouse* – got market, but had high IV

*Jacobs and Young v. Kent* – Reading pipe/Economic waste

* + - * 1. Remember – efficient breach would make Π indifferent, consider who is behaving strategically
    1. Market Value vs. Lost Profit – Goods 🡪 UCC
       1. UCC §2-713(1) – Damages are market price at time of breach minus K-price + incidentals – cost saved
       2. Alternatively cost of good-faith cover (UCC §2-712)
       3. *Tongish v. Thomas* – discourage strategic behavior 🡪 breach when price goes up, keep K when it goes down; allows for middle men to safely hedge
       4. Policy – Preserves initial risk allocation between parties
  1. **Reliance Damages**
     1. RST §349 – Reliance damages minus losses **proven by Δ** (no moral hazard damages)
     2. Does not include lost opportunity costs generally
     3. When lost profits can’t be proven – *Anglia TV v. Reed* – Actor hit for pre-K reliance that he **knew/should have known** about
     4. Losing K – *Mistletoe Express Svc v. Locke* – Delivery service running @ loss gets costs in reliance minus provable losses
        1. Expectation damages – Π must prove what damages were
        2. Reliance damages – Δ must prove what the losses would have been
     5. Moral Hazard – Reckless behavior (over-reliance) because of complete insurance
  2. **Restitution**
     1. The injured party is entitled to restitution for **any benefit he has conferred** by way of performance or reliance (RST §373) measured as either reasonable value to the other party in terms of what it would have **cost to obtain from someone else** (unjust enrichment), or the amount the other’s property **value has increased** (value conferred) (RST §371)
     2. Losing K – *Bush v. Canfield* – B puts down $, C breaches and sues asking for market – K price. Court awards restitution to B, **breaching party can’t sue on K**
     3. *Quantum meruit* – *Britton v. Turner* – K for 1y, Π works less, awarded sum for services rendered minus cost for Δ to cover above K
     4. Quasi-K – *Cotnam v. Wisdom* – surgeons called during emergency sue for services
        1. **Elements** – No opportunity to negotiate, most people would have agreed, there was unjust enrichment/value conferred to Δ
  3. **Limitations of Damages**
     1. Remoteness or Foreseeability of Harm
        1. RST §351 (*Hadley rule*) – Damages include foreseeable losses resulting from (2a) ordinary course of events, or (2b) special circumstances breaching party had reason to know, otherwise (1) unforeseeable losses are not recoverable. (3) Court can exclude lost profits to limit disproportionate compensation.
        2. *Hadley v. Baxendale* – Miller broken shaft, no damages for down mill from late shipper. Moral hazard of retaining information from shipper. Remove info asymmetry and shipper will charge more for insurance or limit damages in K.
        3. *Morrow v. 1st National* – Coins stolen before put in safety deposit box. **No tacit agreements**, bank was not insuring against burglary for promising to call.
     2. Certainty
        1. RST §352 – No damages beyond what is established with reasonable certainty
           1. Encourages parties to use liquidated damages clause (§356)
        2. *Chi Coliseum v. Dempsey* – Lost profits too speculative
     3. Avoidability of Harm
        1. RST §350 – (1) no damages for avoidable losses without risk/burden/humiliation unless (2) reasonable effort is made to avoid the harm – “**Duty to Mitigate**”
           1. Avoid moral hazard – *Rockingham v. Luten Bridge*
           2. No need to accept inferior work – *Maclaine v. Fox Film*
        2. UCC
           1. Seller’s cover – UCC §2-706 – Seller can resell on repudiation and get Δ(resale/K) price plus incidental minus saved $. Must notify buyer

Damages – With market price, damages are Δ(market/K) price, OR lost profit plus incidental minus resale (lost volume seller) (§2-708)

Incidental are reasonable costs incurred(§2-710)

* + - * 1. Buyer’s cover – UCC §2-712 – buyer can get Δ(cost of cover/K price) +I-S
        2. Lost Volume Seller – §2-708(2) resale and market are the same, loss is lost opportunity to sell another item (*Neri v. Retail Marine*)

RST §347 cmt f – question of lost volume is a question of fact (more buyer than boats = no lost volume)

* 1. **Damage Limitations and Liquidated Damages**
     1. Express Damage Limitations
        1. UCC §2-719 – (1a) Agreement can provide additional or limited remedies which are (1b) optional unless expressly exclusive. (2) if exclusive fails, default UCC. (3) commercial losses may be limited, but limiting injuries is unconscionable
     2. Liquidated Damages
        1. Analysis (*Kemble v. Farren*)
           1. Did both parties consent to the clause?
           2. Did parties intend damages or penalty?
           3. Is the injury capable of accurate estimation at the time of contract?

Examined *ex post*, but determined *ex ante*

Consider the actual loss compared to the possible loss *ex ante*

* + - * 1. Are the damages a reasonable forecast of the harm? (*ex post*)

Subjective value counts – *Wassenar*

* + - 1. RST §356 – Damages for breach may be liquidated in the agreement BUT only at an amount that is reasonable in the light of the anticipated or actual loss and the difficulties of proof of loss. **More than this is not enforceable as a penalty**.
      2. RST §355 – Punitive damages are not recoverable unless breach constitutes a tort
      3. UCC §2-718 – Liquidated damages at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proving loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy
      4. NOTE: May take into account speculative profits or idiosyncratic value (*Wassenaar v. Towne Hotel* – liquidated damage clause removes duty to mitigate, damages consider loss to reputation/emotional damage of losing job)
  1. **Specific Performance**
     1. IS THERE AN ADEQUATE REMEDY OTHER THAN SP?
        1. CAN SUBJECTIVE VALUE OF THE ITEM/SERVICE BE DETERMINED?
     2. IS SP EVEN AVAILABLE?
     3. SP for Sale of Land – Default is SP, burden on Δ to show why not, can opt out
        1. *Loveless v. Diehl* – Land lease w/ buyout provision
     4. SP For Sale of Goods – Default is $, burden on Π to show goods are unique
        1. *Cumbest v. Harris* – Fancy stereo system, could not be replaced
        2. NOTE: Must be unable to cover (§2-716(3))
     5. SP for Personal Services – Note, there is a distinction between personal service (i.e. you can only do that one thing at that time) and service (i.e. I can make you something but am capable of doing other stuff at the same time)
        1. No positive SP (*Mary Clark*, RST §367) as it amounts to slavery and is against public policy (RST §365)
        2. Negative injunctions are ok (*Lumley v. Wagner*) or may be implied from the terms of the K (*Duff v. Russell*) subject to enforceability (§366) and ability for the person to find adequate alternative means to make a living (§367(2))
           1. More commonly given when the services are very unique, or implication of the contract would preclude working elsewhere
           2. Otherwise need to consider whether this is something agreed to in the K
        3. Policy – Costs on court for enforcement, SP does encourage renegotiation, Damages are fully compensated, Allows employers to make employee specific investments
     6. RST §359 – (1) No specific performance if there are adequate damages, (cmt a) must consider whether there is an adequate damage remedy
        1. RST §360 – consider (a) certainty of damages, (b) difficulty of covering, (c) likelihood that damage award could not be collected
     7. UCC §2-716 – (1) SP for unique goods, (2) may include payment of price, damages or other relief, (3) Buyer has right of replevin if unable to cover
        1. Goods must be unique and difficult to get/cover (cmt 1)
        2. Buyer must have *immediate* property right for replevin (i.e. paid for)

Policy

* Efficient breach
  + Perfect expectation damages force the promisor to internalize the costs of the promisee from a resulting breach, thus maximizing the net gain to both parties
* Parol Evidence Rule
  + Freedom of K vs. Freedom of Parties. Parties are free to contract that a writing is completely integrated, or that certain terms are intentionally excluded.
* Gap Filling – freedom to contract, don’t want to give courts significant latitude to interpret/apply terms to K
* Statute of Frauds
  + Prevent misunderstanding
  + Avoid reliance on imperfect memory
  + Reduce the costs of litigation – collection and evaluation of evidence
* Warranties
  + Warranties are valuable – squaring information asymmetries, risk allocation
  + Freedom of K – parties should be free to give/disclaim warranties
  + Default warranties save transaction costs
  + Contraints on the seller’s ability to disclaim warranties/limit remedies are justified to the extent that consumers are imperfectly rational
* Duress – What are the incentives?
  + K are supposed to be mutually beneficial to both parties
  + Ask how far the threat must go?
  + People could always claim they are under duress, so the threshold must be high
    - Otherwise every time someone complains, people would back out of Ks
* Market Value Damages – Preserves initial risk allocation between parties
* Material breach doctrine
  + What would parties have wanted *ex ante*?
  + Incentives – avoid excessive care by performing party (and resulting high price)
  + Risk allocation
* Unilateral mistake/frustration of purpose
  + Incentives:
    - Who is in the better position to avoid the mistake?
    - Incentives to acquire information:
      * Deliberately vs. Casually acquired info
      * Productive vs. Distributive facts
  + Risk Allocation:
    - Did the parties allocate the risk?
    - Who was the efficient risk-bearer?
* Policy against injunctions
  + Involuntary servitude
  + Protection of employee’s livelihood
  + Foster Competition
* Policy supporting injunctions
  + Protecting employer’s relationship-specific investments
  + Allows employees to credibly commit