NYU School of Law Outline: Contracts, Eric Posner

Will Frank (Class of 2011)

Fall Semester, 2008

Contents

1 Remedies for Breach of Contract **2**
1.1 Expectation Damages . . . 2
1.2 Reliance Damages . . . 5
1.3 Why These Damage Measurements? . . . 7
1.4 Limitations . . . 8
1.4.1 Duty to Mitigate . . . 8
1.4.2 Foreseeability . . . 9
1.4.3 Other . . . 10
1.5 Restitution Damages . . . 12
1.6 Liquidated Damages . . . 14
1.7 Specific Performance . . . 15

2 Grounds for Enforcing a Contract **17**
2.1 Consideration . . . 18
2.2 Unjust Enrichment . . . 21
2.3 Promissory Estoppel . . . 22

3 Offer and Acceptance **25**
3.1 Mutual Assent . . . 25
3.2 Offer . . . 26
3.3 Acceptance . . . 30
3.4 Precontractual Obligations . . . 32
3.5 Illusory Contract . . . 34

4 Interpretation **36**
4.1 Interpretation . . . 37
4.2 The Parol Evidence Rule . . . 40

5 Policing the Bargain **43**
5.1 Competency 43
5.1.1 The Infant Rule 43
5.1.2 Mental Competency 44
5.1.3 Other 45
5.2 Duress 46
5.3 Mistake And Misrepresentation 49
5.4 Impossibility/Impracticability 52
5.5 Frustration 55
5.6 Unconscionability 56

1 Remedies for Breach of Contract

When a contract is formed, if one side breaches, that side is liable in court for. . . something. What, precisely, depends.

1.1 Expectation Damages

Expectation damages are damages intended to put π in "as good a position as he would have been if the contract had not been breached." Granted, sometimes we need to use a monetary approximation.

- *Hawkins v. McGee*: Δ doctor guarantees "a 100% perfect or 100% good hand" and delivers a hand even worse than what he started with.
  - The trial judge instructs the jury that if they find for π they should calculate the injury or loss as well as the pain and suffering damages. Effectively, this would put him back to the way things were before the contract was formed.
  - The appellate court, however, remands, saying the proper measurement of damage is the jury's calculation of **the difference between the value of the hand as it is and the value of the hand as Δ promised it would be**.
- *Groves v. John Wunder Co.*: Δ company contracted to remove the gravel from a parcel of land and leave the land graded (level and suitable for building upon). It did not do so, leaving the land pitted. The cost of grading the land now is $60,000.
  - The breach is clear, the only issue is the damages. Though the cost of grading is as above, the actual change in the value of the land is only $12,000. (The land is worth that much less now than it would be graded.)
  - There are two ways to calculate expectation measurement: **Cost of performance** (where π gets the cost of what it would take to set right the wrong) or **diminution in value** (where π gets the change in its valuation of the topic under discussion).

  - The majority here ordered cost of performance, arguing that there was a punitive element; this ensures that Δs will keep their promises.
  - The minority suggested that the diminution of value would be the more accurate measure.
  - If Groves had not wanted the grading, it probably would have charged JWC more. It gave JWC a discount to do the grading. And normally, the graded land would have been worth more than the $12,000 increase (this was the Depression). But, if Groves knew that the Depression would hit and the land become cheap, would it have wanted the grading done? Probably not. It probably would have jacked the lease price up; no reason to give JWC a $60,000 discount for a gain of $12,000 in land value.

- *Peevyhouse v. Garland Coal*: Similar fact pattern, but the Court used diminution-in-value here. For one thing, the difference was even greater than *Groves*: almost 100 times.

- The "ugly fountain" case out of the Restatement of Contracts:
  - A contracts with B to build a fountain in B's yard for $5,000, but abandons the work after $2,800 is paid and the foundation is laid.
  - The cost to complete the job is $4,000.
  - The fountain is so ugly that completing it would lower the value of he property; therefore the diminution-in-value is 0, because its being incomplete is a benefit.
  - B can get $1,800: the cost of completion ($4000) less the money unpaid to A ($2,200). This puts B in the position that it doesn't have to pay out anything extra to finish the construction.
  - Why can B get the cost of performance here? Because there is specific non-economic benefit to the fountain. Clearly it's not an economic gain. Given that the function of expectation damages is to put the victim in "as good as a position as he would have been," there is a reason to grant cost of performance for non-economic values.

- From the Second Restatement: "diminution in the market price. . . or the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probably loss in value." Not *economic* value, either.

- It tends to be the case that for homes, fountains, and other personal possessions, cost of performance is the standard; for business transactions where there is no non-economic value, diminution is the standard. Nowadays it is commonly held that *Groves* was decided wrongly.

- *Acme Mills & Elevator Co. v. Johnson*: π made a deal with wheat farmer Δ, to buy all of his wheat upon delivery at $1.03/bushel. However,

Δ makes a second deal with another miller; further, when the threshing ends, wheat is worth less than \$1/bushel.

- The π claims that Δ breached the contract and asks for damages. Δ responds, first, that π was rumored to be unable to pay; second, that the damages would be nothing because π would have *lost* about 6.5 cents/bushel.
- According to the court, the breach occurred on the day that Δ began harvesting.
- The Court applies diminution-of-value, due to the strictly commercial nature. However, the diminution itself is zero. Had the contract been performed, π would have lost money on each bushel. Therefore, there are no damages.
- The Court also affirms that there are **no punitive damages in contract law** unless there is also a tort claim.
- In general, contractors would not want the option for punitive damages. Sellers, thinking there was a possibility of their efficiently breaching, would probably ask for more up front.

- *Missouri Furnace Co. v. Cochran*: π contracts with Δ to get coke at \$1.20/ton but only gets a fraction of what the contract was for. π makes a new contract with a third party to get the balance at \$4.00/ton, and sues to recover the difference in prices, \$2.80/ton.
  - π made the second contract because it still needed the coke, and besides, it had a legal duty to mitigate. See below.
  - The Court rejects that price difference calculation, pointing out that π entered into another forward contract, buying everything up front. Had it entered a spot market deal, buying at the market price specifically and as it happened, it could have been fully compensated.
  - Since π knew it was going to sue and get back the spot market damages, it should have stuck with that.

- *Neri v. Retail Marine Corp.*: π contracted to buy a boat from Δ, putting down a deposit of \$4,250. However, he had to have surgery and break the contract. He asked for his deposit back, Δ refused, so π sued. Δ counterclaimed for \$4,250 in damages.
  - Even though π breached the contract, he is the one suing. He admits he breached and there should be damages, but says they should be considered 0 because the boat was sold to another party at the same price.
  - The trial court looks at the UCC, §2-718(2): "Where the seller justifiably withholds delivery of goods because of the buyer's breach" the seller only gets to keep 20% or \$500, whichever is less. In this case, \$500. So it awards π \$3,750.

- The appellate court, though, points to subsection (3): "The buyer's right to restitution is subject to offset" to the extent that the seller has lost profits.
- In this case, had π bought his boat, then Δ would have sold two boats, one to π and one to the next buyer. This is the "lost volume" case, which only applies in the case of dealers or those with infinite goods. It doesn't apply to private sellers. The appellate court looks to UCC §2-708(1).
- So the court awards damages to Δ in the amount of the profit on the sale, plus the incidental damages for maintaining the boat while it was languishing. This is less than the deposit, so the balance of the deposit is ordered returned to π.
- The upshot is: **The seller is entitled to the lost profits, plus expenses.**

- *Illinois Central R.R. Co. v. Crail*: π contracted to sell coal to Δ (who was the original π), but the shipment was 5,500 pounds short.
  - Δ bought coal at wholesale prices to cover, but wanted to get a damage remedy equal to the difference between the retail price and the price in the contract.
  - The Court rejected this argument, saying that "the wholesale market price is to be preferred... when, in circumstances like the present, it is the more accurate measure."
  - There can only be recovery for actual loss.

1.2 Reliance Damages

Reliance damages are damages suffered by the party because he relied on the contract to happen. If A to sell a device to B, and the device costs $2 to make, the reliance damages if B breaches (by not accepting, for example) are $2. They are intended to put π in "as good a position as he was in before the contract was signed."

- *Chicago Coliseum Club v. Dempsey*: π contracted to host a fight between Δ and another, paying Δ $10 upfront and more later. Δ breaches flagrantly.
  - π sues for four types of damages:
    1. Loss of profits from the event not happening.
    2. Expenses incurred before the contract was signed, including the contract with the other fighter.
    3. Expenses incurred getting and enforcing restraining orders against Δ.

4. Expenses incurred after the contract was signed but before it was breached.

  - π admits lost profits can't be calculated and therefore can't be recovered, so #1 is denied.
  - The Court says that since the expenses incurred before the contract was signed were incurred without assurances that the contract *would be* signed, they can't be recovered. If we want to rewind time to the moment before the contract under dispute was signed, then these expenses were still paid out; #2 is denied.
  - #3 is a civil procedure matter about the risks and expenses of litigation; skip it.
  - There are multiple parts of #4: one was expenses to a certain employee, to be paid out of the proceeds, so they are denied. However, the others are valid: the upfront money to Δ, the cost of buying plans for a possible location of the fight, and any special expenses incurred after the contract was signed, such as for plane flights or additional temporary workers (normal salaried workers are excluded, of course, since they would have been paid contract or no contract).
  - In the end only those parts of #4 are recoverable.

- *Anglia Television Ltd. v. Reed*: Here, the expenses incurred before the contract was signed **are** recoverable after the breach. This is because before the contract was signed, there was time to find another actor if Δ turned down the contract; once it was signed and then breached, there was not such time and the entire enterprise was scrapped. All of the expenses of the production were incurred in reliance that *somebody* would sign the contract. Therefore, once Δ did he was liable for all.

- *Security Stove & Manufacturing Company v. American Ry. Express Co.*: All damages suffered **"in contemplation of Δ's performing its contract"** are recoverable.

- *L. Albert & Son v. Armstrong Rubber Co.*: π contracted to sell four rubber refining machines to Δ for $1,000, and Δ paid $3,000 to be ready to receive them. However, π didn't deliver two of them until two years late, after the price of rubber had plummeted to the point that the revenue Δ would have gotten from the machines was only $2,000. (Numbers simplified.) Δ sues for reliance damages; appeal follows.

  - Δ sued for reliance damages because they totaled $3,000; the expectation damages would only have been $1,000, the difference between the cost of the machines and the money to be made, without reference to the reliance damages.
  - The Court says Δ can't do that; if the reliance damages are higher than the expectation damages, **go with expectation**. A seller is not acting as a buyer's insurer, or promising profitability.

- See also Restatement of Contracts, §349: an injured party is entitled to reliance damages "less any loss that the party in breach can prove... the injured party would have suffered had the contract been performed."

1.3 Why These Damage Measurements?

We could set up a number of different schemes for assigning damages. Why do we prefer compensatory damages (expectation or reliance)?

- There are four types of damages:
  1. Expectation
  2. Reliance
  3. Punitive
  4. Nominal
- Expectation and Reliance are considered both the same, compensatory (in two different ways, but the same compared to the others). Punitive are a windfall. Nominal are a technicality.
- We prefer compensatory damages to punitive or nominal, largely because we want to respect the **efficient breach**.
- Take a seller S, who has a product that costs 2 to create (C), and two buyers, B_1 and B_2. B_1 values the product at 10 (B_1V), and B_2 values at either 8 or 16 (B_2V).
- If the seller sells to B_1, he gets $B_1V - C$. If he sells to B_2, he gets $B_2V - C - D$.
- There are different measurements for D for different damage theories:
  1. Nominal damages: $D = 1$
  2. Punitive damages: $D = 100$
  3. Compensatory damages: $D = 4$ (the amount by which B_1 would be bettered, $10 - 6$)
- If $B_2V = 8$, then performing gives a payoff of 4 for S no matter what theory, and breaching gives a payoff of 5 under nominal, -94 under punitive, and 2 under expectation. Therefore, the efficient choice is to perform.
- If $B_2V = 16$, then performing still gives a payoff of 4 for S no matter what theory, and breaching gives a payoff of 13 under nominal, -86 under punitive, and 10 under expectation. Therefore, the efficient choice is to breach.

- We want to provide for allowing the efficient breach. Expectation damages force the breacher (here, S) to internalize the loss the buyer incurs as a result of the breach. He still has to pay what the buyer would gain. Therefore, if an option comes around that would be still better for him, he will breach, and everybody will be better off.
- There is an argument that none of this matters, since punitive damages will allow the seller to try to renegotiate, telling B_1 that he will pay him 5, therefore bettering him beyond the expectation damages figure, for permission to breach; if B_1 refuses, S will perform and there will be less in totality.
- See below for "liquidated damages." clauses.
- Note that it's more likely for the seller's costs to go up, instead of another buyer coming in; but the theory is the same.

1.4 Limitations

It's not so simple as getting everything left undone when the party you've contracted with breaches. This is primarily to minimize losses, by keeping the victim of the breach from engaging in independently bad behavior, and assisting with communication between victim and breacher. We don't want to turn a small loss into a big one.

1.4.1 Duty to Mitigate

The first limiting factor is the duty on the part of the non-breaching party to mitigate the damages. It can't continue to rack them up.

- *Rockingham County v. Luten Bridge Co.*: π contracted the building of a bridge to Δ.
  - There were various political issues, and Δ didn't do the proper thing there; but more importantly, Δ didn't stop work when it should have, and it kept working, finishing the bridge.
  - Δ has claimed the full contract price of the bridge as damages, but since they kept working (therefore raising their expenses) all they're entitled to is their profit margin as expectation damages, plus the amount they had expended when the contract was repudiated.
  - Once you're told of a breach, **you're obligated to stop**.
- *Parker v. Twentieth Century Fox Film Corp.*: π (better known as Shirley MacLaine) contracted to make a movie with Δ. They cancelled the movie, offering her the lead in another film.
  - There's no question of breach, but Δ claims that π had, and failed, a duty to mitigate by accepting the other work.

- The mitigating work, however, has to not be "substantially different or inferior."
- There's no claim of making reasonable efforts; the only issue is whether the second movie mitigated.
- In this case, the Court finds that a Western is substantially different than a musical.
- Incidentally–it's not enough to raise the salary, either. Employees fired in breach of contract are given generous interpretations of mitigation clauses. Courts don't like forcing employees to take a different offer, even if balanced with more money.

1.4.2 Foreseeability

The second major limiter is that only damages which were foreseeable by the parties are recoverable.

- *Hadley v. Baxendale*: π suffered a break of their mill crankshaft, and used Δ to ship a replacement, which was delayed.
  - π sued for lost profits for the days when the crankshaft should have been there and not.
  - The Court, however, ruled that Δ had no way of knowing that the delay would cause lost profits, because it wasn't told by π's employee.
  - Damages, says the appellate court, should be limited to the ones "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract."
- *Globe Refining Co. v. Landa Cotton Oil Co.*: π contracted to buy oil from Δ, who artificially inflated the damages by claiming the cost of sending sending railroad cars, the track fees, the wear of the cars, the loss of reputation, and the like.
  - The Court applies the *Hadley* rule, saying those extra damages were not foreseeable.
  - The judge goes on to say that the knowledge of the extra terms "must be brought home to the party sought to be charged," which is even stricter than the *Hadley* rule.
  - This is the "tacit agreement" test; something needs to be made expressly *clear*.
- *Lamkins v. Int'l Harvester Co.*: Lacking a tacit agreement that a breaching party will be held responsible for extra damages (in this case, the lost soybean crop from a delayed light), those extra damages cannot be recovered.

- *Victoria Laundry (Windsor) Ltd. v. Newman Indus., Ltd.*: In this case, Δ engineering company would know why the laundry needed the boiler, as well as knowing that there's no way π could have, or even want, a (huge) spare.
- UCC §2-708(1): Seller's damages are limited to contract and market price difference, plus expenses.
- UCC §2-708(2): Except in certain conditions.
- UCC §§2-711-715: The *Hadley* rule is in effect; buyer's damages are limited to what "the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."
- Note that the *Hadley* rule is active; **the "tacit agreement" rule is too limiting**.

1.4.3 Other

There are other, minor limiting factors.

- *Valentine v. General American Credit*: π sued for emotional damages ancillary to her firing from a job in breach of contract.
  - Obviously she can get the balance of pay due her.
  - However, the Court does not want to compensate her for the "emotional tranquility that came with job security," which she lost when she was fired.
  - This attacks the principle of the expectation damages rule; people are not being fully compensated.
  - Why don't the Courts like to allow emotional distress damages? For one, it's likely that everyone would try to claim them. On the flip side, that would mean that prices would go up (or salaries down) to compensate.
  - Generally, contracts with a clear emotional-stability component (marriage, children, house building) tend to be viewed as worthy of emotional damages.
- *MindGames, Inc. v. Western Publishing Co.*: π licensed its board game to Δ for a royalty with various conditions about promotion and a pretty complicated renewal clause.
  - The contract continued beyond the first renewal date; as such, MindGames claimed $900,000 for the contract's renewal, plus $40,000,000 in lost profits and $300,000 for the contract for the balance of 1994.
  - The renewal fee and balance were tossed out because apparently the Court ruled the contract as having be renegotiated in 1993.

- As to the lost profits, at the time Arkansas law had a "new business" rule on the books, stating that "he who is prevented from embarking on a new business can recover no profits because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced."
- Western claimed that since MindGames was only three months old, there's no data for how it would have done.
- However, the Court overturns the new business rule. It is "at once vague and arbitrary." There are examples in the opinion where new business could have been predicted (such as an orchard); why couldn't that have happened here?
- The purpose of the new business rule is to prevent damages for a speculative loss, because they, *being* speculative, will be incalculable. Contract law doesn't allow for speculative damages.
- The Court talks about the difference between a rule (such as the new business rule) and a standard (such as "no speculative damages").
- There's no way, the Court continues, that Western would have agreed to a contract including speculative loss conditions.
- The Court throws out the new business rule, replacing it with the general speculative-loss doctrine. It therefore cuts out the logic but keeps the result.
- In this case, the rule is unclear: what is a "business"? What is "new"? What are "profits"? And given that the courts are sophisticated enough to analyze lost-earnings claims, the new business rule is unnecessary. So goodbye!

• Rules Versus Standards:

  - A rule is easily enforceable, but can be simultaneously both over- and under-inclusive.
  - Take the 55mph speed limit. If it's a straightaway, and there are no cars, and it's a clear day, what's wrong with 70mph? And if it's raining, dark, and the car looks rickety, even 55mph can be dangerous.
  - Therefore, rules have "error costs."
  - The standard, though, is completely subjective, and can be prone to abuse; plus, they are more uncertain. A standard makes it harder to predict the actions of the decision maker.
  - Therefore, standards have "decision costs."
  - Usually there's a combination, such as a negligence standard of a duty to care, applied atop a rule.
  - Expectation and other damages tend to be rule-like; speculative loss is standard-like.

- *Freund v. Washington Square Press, Inc.*: Author sues publisher; trial court sets up three categories of damages:

  1. Delay in academic promotion (speculative, no recovery granted by trial court)
  2. Loss of royalties earned (same)
  3. Cost of publishing the book on the author's own (struck down by the appellate court, because the value was not the physical items but the royalties; therefore they were speculative, see above)

- The author was trying to enforce a construction contract where none existed.

1.5 Restitution Damages

Sometimes, πs can't get expectation damages or reliance damages. However, if the π has conferred a benefit on Δ, he might get restitution damages under a *quantum meruit* or "unjust enrichment" theory: he gets whatever would make what he gave the other party properly compensated for. Difference in market share of land before and after, cost of work, or some other measure.

- *Boone v. Coe*: π contracts with Δ to move to Texas, work on and live on the farm down there, receive a portion of crops as well as supplies for a barn and a house or the materials to build one.
  - Δ thoroughly breaches the contract.
  - The Court rules that the contract is unenforceable because it is in violation of the Statute of Frauds.
  - The Court also finds that there was no benefit to Δ: but it says that "Had he received a benefit, the law would imply an obligation to pay therefor."

- **If you benefit from someone's actions, even if the contract is unenforceable, you may suffer damages to balance the benefit you gained.**

- *United States v. Algernon Blair, Inc.*: Contract between Δ and Coastal (now π). π was a subcontractor to Δ's general contract. Δ refused to pay for crane rental in accordance with the contract, so π stopped work.
  - The amount due to π was less than the cost of completion would be; therefore, there expectation damages would be 0.
  - Reliance damages can't be higher than expectation damages, so they would be 0 too.
  - However, π had done more work than Δ had paid for. They had therefore conferred a benefit on Δ without receiving payment, and won that amount as restitution damages under *quantum meruit*.

- *Oliver v. Campbell*: Lawyer π negotiates to represent client Δ for $850; however, the trial dragged out to the point that the value of π's work was calculated at $5,000. However, π discharged his contract (effectively, if not formally), so he could only sue on the contract. Had he left sooner he might have been able to get restitution, though.

- We want contracts to be honored and honorable. Courts don't like ruling that a properly-made contract was wrong.

- *Britton v. Turner*: π breached a one-year employment contract after 9.5 months and left, but sued for *quantum meruit* and won. The default rule is that **an employee who works for a long time, and accrues valuable benefits on the employer, is entitled to a pro rata benefit.** If the employer doesn't want that, he should put it into the contract.

- There are four cases for restitution damages, with associated UCC sections:

  1. Valid contract: promisor breaches, promisee seeks restitution.
     - Example: Buyer's partial prepayment, but instead of seeking expectation damages (perhaps because they're speculative?) he just wants his money back.
  2. Valid contract, promisor breaches after promisee has partially performed, but it's a losing contract.
     - *Algernon Blair* is an example.
     - Because it's a losing contract, expectation damages are 0.
     - Note: This requires *partial* performance, because no performance would mean no benefit to the promisor, and full performance would only allow suits "on the contract."
     - See UCC §2-373.
  3. Valid contract, promisor breaches after partial performance has benefited promisee; promisor sues for restitution damages.
     - *Britton v. Turner* is an example.
     - Note that here, the *promisor*, the breacher, is the one suing.
     - The default rule applies; unless the contract expressly forbids it, the promisor can get restitution damages.
     - See UCC §2-374.
  4. Invalid contract.
     - *Boone v. Coe* is an example.
     - There are various reasons for a contract to be invalid.
     - If you relied on a promise without a contract, and you conferred a benefit, you may be entitled to restitution.
     - See UCC §§2-375-76.

- Also, look at UCC §2-371.
- When calculating restitution, courts can use either cost-of-performance or diminution-in-value calculations.
- If the restitution damages *can't* be calculated, there may be an alternative. But there are problems...

1.6 Liquidated Damages

Liquidated damages, damages written into the contract to handle what happens if a party breaches, are only enforceable if they're **reasonable relative to the injury resulting from the breach**, and only if **the injury is difficult to measure** using another scheme. If those conditions aren't met, the damages clause will be considered an unenforceable penalty.

- *Pacheco v. Scoblionko*: π had arranged to send his kid to Δ's summer camp.
  - Withdrawing before Feb. 1, he would have gotten back all but $25.
  - Between Feb. 1 and May 1, he'd get everything except $500.
  - After May 1, no refund.
  - The Court, however, ruled that setup an unenforceable penalty, because there was no damages anticipated or actually suffered as a result of the cancellation.
  - So the clause was invalidated.
- *Muldoon v. Lynch*: π was contracted to improve Δ's husband's cemetary plot.
  - π promised to finish by a certain date, and didn't finish for two years more.
  - According to the contract, there was a "forfeiture" of $10/day for each day beyond promised completion.
  - π argued that this was a penalty, not a realistic measurement of damages.
  - The Court draws a distinction between compensation for a hard-to-determine loss (which this was not), and a spur or penalty (which this was).
- *Yockey v. Horn*: Δ breaks a no-litigation clause in a settlement. Here, the liquidated damages of $50,000 were considered OK, because it's hard to determine the effect of the litigation on things like reputation, and the money was clearly reasonable in both parties' minds.
- *Samson Sales, Inc. v. Honeywell, Inc.*: Δ, owning an alarm system, claimed a $50 upper limit on their damages when it failed.

  - The appellate court and highest court ruled that provision an unenforceable penalty, because...
  - It was easy to determine the damages in that case.
  - The contract's damages were disproportionate to the actual or anticipated damages.
  - The contract, as written, was completely inconsistent with the intent of the parties: "it is beyond comprehension that the parties intended" to limit Honeywell's liability like that.

- Why are penalties bad?
- They're excessive, if they're not being used to approximate the immeasurable.
- But the law and economics folks say that since courts don't object to price agreements, why do they object to liquidated damages (as long as they were agreed to fairly)?

1.7 Specific Performance

Sometimes, money doesn't cut it. Sometimes, π just wants what the contract says he gets. And sometimes, courts give it to him.

- *Van Wagner Advertising Corp. v. S & M Enterprises*: π leased sign space near the Midtown Tunnel for ten years, then the owner sold the building to Δ, who invoked a cancellation clause.
  - There was a difference in interpretation: Δ claimed that as the new owner it could terminate the contract; π claimed that only the old owner could do that.
  - Theoretically, there is no difference between specific performance and expectation damages. Expectation damages give π the value less the price, and specific performance gives the value with the price already paid for.
  - However, as here, if there is a remedy at law through expectation damages, courts are very reluctant to grant the equity remedy of specific performance.
  - π argues that there is no remedy at law, since the demised space "is unique."
  - However, "the word 'uniqueness' is not, however, a magical door to specific performance." Since π did put a price on the space–the one it negotiated for in the contract–we can determine how much the space would be worth, looking at that contract and like ones.
  - Since there is a remedy at law, there is no specific performance.

- *Curtis Bros. Co. v. Catts*: Tomatoes are fungible; normally the victim can buy matching ones elsewhere and sue for the difference between contract and market prices. But because π here missed his opportunity (all the tomatoes were claimed), he does not have a remedy at law. Therefore he is entitled to specific performance.
- **If you can cover and get expectation damages, you aren't entitled to specific performance.**
- The Restatement and the UCC say the same.
- Why do we want to allow specific performance, if it interferes with the efficient breach theory above?
  1. It protects the victim.
  2. It can help in the calculation of expectation damages.
  3. The buyer could make a secondary deal, the same as the seller was breaching to get. The seller could pay the buyer a premium to breach, and everybody is better off.
- *Fitzpatrick v. Michael*: π was a nurse for the aging Δ; there was a contract for \$8/wk, room, board, and a bunch of posthumous concessions in return for nursing services. After Δ's relatives "poisoned his mind," he broke the contract.
  - The Court finds that since the contract has to do with land and was unwritten, the Statute of Frauds bars a remedy at law.
  - But as this was an employment contract, the damages weren't speculative.
  - The Court is reluctant to force specific performance, because that would be forcing Δ to hire someone he didn't want to. If nothing else, every few days one side or the other would be complaining in court.
  - π then asks for a negative injunction, barring Δ from hiring another nurse.
  - The Court doesn't want to do that, either, citing a rule that they won't issue negative injunctions when they wouldn't issue positive ones.
- *Lumley v. Wagner*: Earlier case, where the Court did issue a negative injunction enforcing a covenant not to compete (CNC) and keeping Δ from working anywhere other than π's opera company.
- *Pingley v. Brunson*: Court rules that negative injunctions only matter where there's an element of uniqueness on a performer's part. Here, π restaurant could hire another musician to replace Δ and then sue for the price difference.

- Long-term CNCs tend to be enforceable–the maximum is three years depending on the nature of the work.
- Longer-term clauses tend to interfere with the efficient breach.

2 Grounds for Enforcing a Contract

Everything begins with bargaining, or bargaining failure.

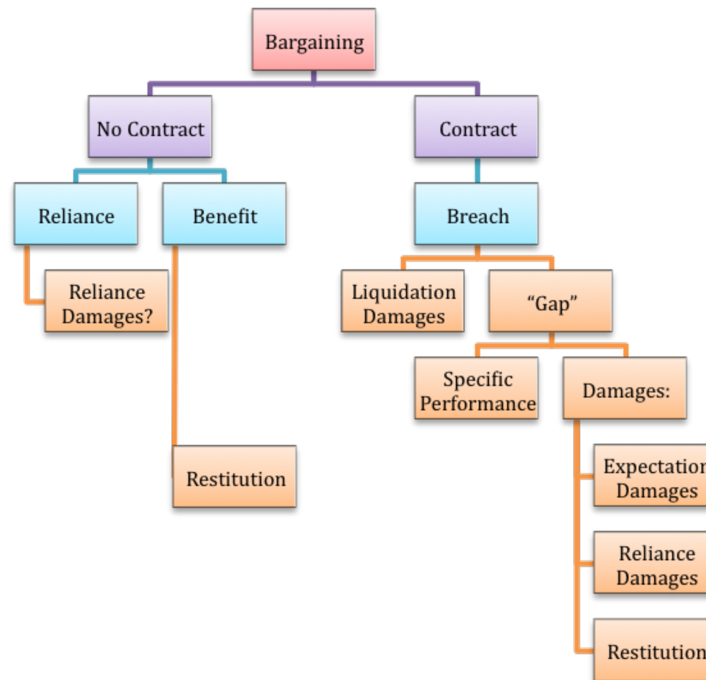

Figure 1: Bargaining

- There may or may not be a contract–and a lot of time is spent debating this in court.
- If there is no contract, there can still be reliance (see promissory estoppel) and maybe reliance damages; or there can be a benefit conferred on the breacher, and therefore restitution damages.
- If there is a contract, and then a breach (because otherwise we don't care), some contracts will have liquidation damages.
- Otherwise, there's a sort of "gap"–this is not a legal term, but analytic: "what would the parties have agreed to if they had anticipated a breach?"

- There can be specific performance, for real estate contracts, CNC issues, or where the good is unique.
- There can also be damages: expectation, reliance, or restitution.
- But: **How do we know if there is a contract?**

2.1 Consideration

Something given in return for a promise.

- *Congregation Kadimah Toras-Moshe v. DeLeo*: Dying Δ promises to give money to π's rabbi, but never puts the promise in writing.
  - π claims that the promise constituted a contract.
  - Δ claims that there was no consideration.
  - The Court sides with Δ. However, there still could have been reliance. Which there wasn't, because π hadn't started building yet.
- *Hamer v. Sidway*: π, Δ's nephew (through nominal assignees), swore off smoking, gambling, drinking, or swearing until he was 21 in return for $5,000 in accordance with a letter from Δ.
  - At 21, π wrote to Δ, who responded "I have the money, and will put it into a trust for you."
  - After Δ's death, his estate claimed there was no consideration, because his stopping those actions was good for the nephew.
  - The Court rules that though the actions were unhealthy, they were legal, and therefore ceasing them was consideration.
  - However, **you can't promise to refrain from doing something illegal.**
- *Fischer v. Union Trust Co.*: π sues for the promise to pay off two mortgages on land given her by her father Δ (whose assets went into the trust). However, the Court says that the $1 given to Δ was not consideration, because there was no bargaining, and the whole thing was treated as a joke.
- According to the Second Restatement §71, "a performance or a return promise must be bargained for... sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."
- *Duncan v. Black*: The sequence of events:
  1. Δ sold land and a cotton allotment to π.
  2. Δ did not transfer the cotton allotment the next year.
  3. π started a lawsuit against Δ

4. To avoid the suit, Δ gave π a promissory note.
5. Δ did not pay the note.
6. π sued for the note.

   - The Court decides that the promise not to sue was not consideration, because Congress had passed a law preventing π from suing in the first place. Therefore, π didn't incur a detriment or confer a benefit by refraining from the suit.
   - Since cotton allotments can't be bought or sold, π had no right to sue for it.
   - So the seller failed to breach in 2, the lawsuit in 3 was invalid, and the promise in 4 was likewise invalid. Therefore there was no lawsuit in 6.
   - π might have sued for restitution, giving money for something he didn't get. If the Court can sort the price of the cotton allotment from the price of the land, π might get the price of the allotment back.

- According to the Second Restatement, §74, "Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration." However, there is an exception if the claim is doubtful because of uncertainty, or if the forbearing party believes that it is valid.
- This is less restrictive than in *Duncan*, where the Court vacated the invalid promise to forbear even though π believed it was valid.
- This has questionable reconciliation with the greater consideration doctrine. Here, a potential π gives up something worth even less than a dollar–an invalid legal claim which he believes is valid–and the courts accept it.
- What's the difference between this and *DeLeo*? It's a strict business transaction, as opposed to the personal/social/familial situations.
- **Courts don't like to enforce gratuitous promises.** Why?
  - It's a matter of form versus substance.
  - Courts need a rule to distinguish enforceable from unenforceable promises.
  - A formal rule has no psychoanalysis or determinations; simply if there is bargaining, there is a quid pro quo; therefore there is an enforceable promise.
  - Courts don't want to take that to extremes ("a peppercorn as consideration"), and so they don't favor this example.
  - Sometimes, though, there is a bargaining, but we're not sure about it. See the gift examples.

- Consider the following scenario:
  - A sells property to B.
  - B goes to a bank for a mortgage.
  - The bank says "there is ambiguity in this deed" and won't give a mortgage.
  - B goes to A and says "there is ambiguity!"
  - A says "I don't think so," and B asks for a quick-claim deed (a supplemental deed saying "I give up all rights").
  - A says "sure, but give me $100 for my trouble."
  - **That's enforceable.**
- There is a difference between substantive (it really *is*) and formal (it is presented to be).
  1. Substantive quid pro quo and formal quid pro quo: Consideration doctrine is satisfied, contract is enforceable. Easy case.
  2. No substantive quid pro quo, no formal quid pro quo: Consideration doctrine not satisfied, clearly a gift, no enforceable contract.
  3. No substantive quid pro quo, formal quid pro quo: *Fischer v. Union Trust Co.* case. Court found no enforceable contract.
  4. Substantive quid pro quo, no formal quid pro quo: Option contract. Tricky.
- The mixed-case boxes are unclear.
- Judges are concerned with the intent of the parties, as opposed to gifts.
- Judges don't like gifts because there's no QPQ–and therefore there is no way to rely on promises. QPQ keeps contracts enforceable.
- Holmes, in "The Common Law," wrote he would have gone the other way in *Fischer*: if the family went through the ritual of giving the dollar, he would have considered it enforcement.
- Holmes: The father considered the dollar to legally bind him. They went through the ritual specifically to signal to future judges that they intended it to be binding.
- It's easy to structure a gift as an exchange and vice versa, so the form could be a signal to the courts.
- But parties might not want their promises to be taken seriously; they haven't thought enough about the enforcement issue, for example.
- Form in the law can help clear up the matter of intent: it's a signal at transaction time. (Legal seals serve the same purpose.)

2.2 Unjust Enrichment

Sometimes, you can't recover even after an unjust enrichment. Especially if the consideration given is given before the promise.

- *Mills v. Wyman*: Δ's son comes back from sea and is taken care of until death by π. After death Δ tells π that he will pay π's expenses, but he doesn't.
  - The problem here is temporal: Δ's promise came after π cared for the son.
  - The consideration doctrine and Δ's motivation factor into this: Δ didn't make the promise in order to obtain π's services, but out of gratitude later.
  - The care to the son, though a detriment, is "past consideration": ***not*** **actual consideration.**
- Some past considerations are valid, but most of even those are invalidated for other reasons.
- Take an example:
  - π lends Δ money, and Δ defaults. π does not sue within the statute of limitations.
  - Later, Δ promises to pay π back and does not, so π sues.
  - This past consideration would be upheld; there is an underlying moral truth that there is still obligation.
- *Webb v. McGowin*: π sustains great injury saving Δ's life, and Δ promises to care and maintain π and pay him every two weeks for his life.
  - π claims a contract, with the life-saving as consideration; plus, π was injured in the process.
  - The problem is, the promise was made after the life-saving. The detriment was not motivated by the promise.
  - So why did this come out differently than *Mills v. Wyman*?
  - The Court decided that getting your life saved has a clear material benefit; whereas in *Mills* the benefit was much less substantial.
  - Further, the Court examines whether, if time stopped before the consideration was granted, it's clear there would be a bargain here, but *Mills* was less obvious.
  - Plus, Δ paid for about eight years, so the Court concludes that he intended to keep the promise.
- *Harrington v. Taylor*: Similar circumstances, but a life-saving was not ruled consideration.

- There was also a clear amount in *Webb*, which could have made the difference.
- In some circumstances, there could be a *quantum meruit* claim, but there's a limit to those based on gratuitousness or offensiveness, which might bar such damages.
- In some cases, the law has declared life-saving (such as by doctors) to be a *quantum meruit* circumstance, to encourage life-saving. Just because it's impossible for the parties to bargain doesn't mean doctors aren't using their training.
- As a general rule, **you cannot make a promise out of consideration based in the past... with exceptions.**

2.3 Promissory Estoppel

If there is reliance on a promise, but the promise hasn't become a full contract, the courts might enforce the promise anyway, under a promissory estoppel theory.

- *Seavey v. Drake*: Δ, as a man's executor, wants to evict π, the deceased's son. π claims that he was invited to live on the land, that he paid taxes and built a house, and that the father agreed to give it to him.
  - The Court decides that π can't sue for contract breach.
  - The contract would have to be in writing, under the statute of frauds.
  - There is no consideration, and therefore no contract under which he can sue.
  - π gave up a promissory note, but the Court rules that not part of a trade, since there was no inducement.
  - But π wins anyway.
  - The Court rules that because π relied on the promise, and there was no justice at law, there could be justice at equity.
  - The part performance–π staying on the land for so long–suggests the father intended the promise.
  - But there wasn't consideration. How does part performance get around that?
  - Formal theory says consideration lets parties show the seriousness of the promise, but formal theory isn't universally accepted. In substance, this is a gift, and π, relying on the promise, made those improvements.
  - The Court notes that had the father been alive he would have gotten a benefit from the promise, in the form of the improvements.

- π could have just claimed *quantum meruit*, but he would have gotten the money, not the land.

- *Kirksey v. Kirksey*: π, a widow, was told by Δ, her brother-in-law, "come live here and I will give you land."
  - The Court rules that this was a conditional gift not a bargain. (One judge says the moving was consideration, but in dissent.)
  - The Court further says this was unlike *Seavey*: there was no part performance. Reliance, but that was insufficient.
  - Other differences from *Seavey*: This is a law court, not an equity matter. Here the damges are for money. In addition, there can be no calculation of damages, because there's no quid pro quo.

- *Ricketts v. Scothorn*: Δ promised \$2000 to π to give her independence; π quit her job.
  - The Court notes that Δ didn't *want* π to quit (that would make this a standard consideration case), but wanted to give her flexibility, and therefore there was no contract.
  - However, the Court rules that Δ knew that π might quit, and this became reliance on his promise and was therefore enforceable.
  - This is a bit of an outlier, though.

- **Equitable estoppel**: If you deliberately mislead someone to get him to do something, you're estopped from claiming he doesn't (for example) have consideration.

- *Prescott v. Jones*: Δ insurance agency says it will renew "unless notified to the contrary," but cancels the policy when it doesn't hear back. The property is destroyed, but the case falls apart because Δ didn't make any false representation; tit was only "of a present intention or purpose on their part."

- emphAllegheny College v. National Chautauqua County Bank: Δ (through the deceased woman) made a promise to donate money to π.
  - π could have asked the judge to uphold promissory estoppel.
  - But if it did, it could have only gotten reliance damages, and the damages would be "the status quo before the promise was made." That would have gotten it \$20 in pamphlets, not the money Δ promised.
  - So the judge decides it's not a matter of promissory estoppel, it's a contract: π gets the money, and Δ gets her name on the scholarship.

- *First Nat'l Bank of Logansport v. Logan Mfg. Co.*: π (through its employee) promises a loan to Δ.

- Δ sued for the loan. But there was no mutual promise or consideration.
- So Δ sued for promissory estoppel.
- The promise, in this case, was the large loan the bank knew they'd need to get the company running.
- There was a reasonable expectation of reliance, due to the bank manager encouraging them to move.
- On the bank's side, it's not a definite or substantial set of facts/money.
- And both parties knew that the promise was conditional on other factors. So there isn't the same degree of reliance.
- Breach of contract is a better remedy than promissory estoppel, but sometimes breach can't be made out. So, to satisfy the injustice, promissory estoppel is a stopgap.

- Wachovia contract with Citibank: W won't go looking around for or soliciting buyers, and in return, Citi will give the shareholders money/shares in Citi.
  - Citi wants this because they don't want the fact they're sniffing around W. to drive up W.'s value; besides, they can lock in their price.
  - W. probably wants to speed up the process of selling itself.
  - Is this enforceable?
  - What is Citi agreeing to?
  - The letter of intent, of course. But besides that, this is an option contract.
  - Citi filed a lawsuit this weekend, first for specific performance, and then for money.
  - Specific performance was preferable, because there's no adequate legal remedy.
  - Can you calculate W.'s sale price based on how much another company–Wells Fargo–offered? Probably not. WF offered more because it thought it could get more out of W.
  - The judge, to punish the breacher, enjoined W. from discussing until a few days later.
- Normally, **promissory estoppel can only recover reliance damages**, except for charitable gifts, where the courts will enforce the promises if they're in writing and formally done.
- So. There are **three rules for examining a set of facts**:
  1. Consideration theory.

2. Unjust enrichment/promise theory.
3. Promissory estoppel theory.

- Always examine all three theories.
- 2 is a special case, because sometimes there isn't a real promise.
- 1 is preferred, because it gives expectation damages or specific performance, not just reliance (as in 3).
- If possible, argue 1. If vague or not in writing, argue 3.
- 3 is really a torts idea–breaching hurts someone. 1 is a contract concept.
- Policy goals: Know whether there's a *"serious contract"* by examining the form, avoid enforcing gifts and tricky intra-family behavior because they're not good to enforce, and enforce commercial behavior (and maybe charitable gifts) because that's good to enforce.

3 Offer and Acceptance

How do we know whether a contract has been made?

3.1 Mutual Assent

The most traditional form of contract: If there is a meeting of the minds, then there was a contract. If not, there was not.

- *Raffles v. Wichelhaus*: π agreed to sell Δ bales of cotton from Bombay, to arrive on the *Peerless* ("ex *Peerless*").
  - The cotton did come on a ship called the *Peerless*, but it was the one leaving in December, not October. So Δ refused to pay for the cotton when it arrived in December.
  - π argued that Δ was being offered exactly what he asked for.
  - Δ argued that there was no contract, because there was no meeting of the minds.
  - Δ also could have argued that he complied, because he was ready to buy from the October *Peerless*.
  - The Court rules that the two sides were thinking of two completely different *Peerless*es, and therefore there was no meeting of the minds, and therefore no contract.
  - This is more like the warehouse case (an agreement to buy goods in warehouse A is satisfied by the delivery of the same goods from warehouse B) than the vineyard case (wine from one vineyard is not equivalent to wine from another of the same name). But that would have led to the contract being enforced.

- How close do the two mental states have to be in the wine or warehouse cases?
  - If they had known there were more than one vineyard/warehouse/*Peerless*, this would have become like the circumstance outlined in the Second Restatement §20(1)(b).
  - This is a "subjective theory": the mental states of the parties don't have to be the same, but they do have to be the same as regards the relevant contract portion.
- This is also a new remedy type: rescission. Normally, one party has breached, and the other wants the contract enforced or a monetary offset. Now, one party is arguing that the contract is not valid (equivalent to arguing for void).
- *Embry v. Hargadine-McKittrick*: π sues for breach of contract after Δ employer said "don't let that worry you" regarding the contract renewal.
  - Δ argues that π was an at-will employee.
  - As a subjective test, if there was no meeting of the minds, which there wasn't, so be it.
  - As an objective test, though, if Δ said something that would mean something specific to a reasonable person, then it qualifies as a meeting.
  - If a reasonable person would take what Δ said as assent, it was assent.
- *Kabil Developments Corp. v. Mignot*: Subjective intent can be testified to under the objective standard, to give the jury more information; this can help them determine the reasonable person standard.
- *N.Y. Trust Co. v. Island Oil & Transport Corp.*: Even though an objective standard would allow a sham contract to stand, the judge (though an objective standard proponent) said he wouldn't enforce sham contracts.

3.2 Offer

At the simple level, all contracts need an offer and an acceptance. In the real world, of course, those are rarely at issue. But they're important doctrinal concepts. So: how do we know when there was an offer?

- *Moulton v. Kershaw*: Δ wrote to π saying "we are authorized to offer salt." When π sent a telegram saying "ship me some," Δ withdrew the offer.
  - The Court has to decide whether Δ's letter was an offer, and therefore the telegram an acceptance.

- The telegram would be considered an acceptance because it showed an agreement. So if the letter was an offer, there was clearly a contract.
- However, the Court ruled that the language in the letter was too ambiguous. It didn't discuss quantity, and was just an advertisement.
- What if, the Court says, π had requested a ridiculous amount of salt? Imagine the jury trying to determine what he offer meant and what a "reasonable" quantity of salt was; impossible. Therefore, this was only an invitation to begin bargaining.
- Because there was no offer, there's no need to examine for reasonability standards.
- The difference between an offer and an advertisement is that you can accept the former but not the latter.
- If Δ had agreed to the telegram, the telegram would have been an offer with Δ's response the acceptance.

- *Keller v. Ybarru*: Similar facts, but there was an upper limit on the amount due to the time and space constraints, so that was distinguished.
- *Petterson v. Pattberg*: Creditor Δ writes to debtor π that he will accept cash, and forgive $780 of the debt, if π keeps up his quarterlies and pays the balance by May 31. However, when π shows up to do just that Δ won't accept because he's sold the mortgage.
  - Was there a valid offer? Yes; the reasonable person standard says so. A reasonable person would think there was an offer.
  - However, this was a unilateral contract, so Δ's revocation by saying he's sold the mortgage and won't accept constitutes revocation of the offer.
- In a normal **bilateral contract** there is a seller and a buyer, and there are promises going in both directions. At time 1, both parties make the promises; at time 2 (or times 2 and 3), both parties fulfill.
- In a **unilateral contract** (or option contract), there is only one promise, with performance going the other direction; performance is acceptance.
  - It's impossible to partially perform a unilateral contract. Take the classic "A will give B $100 to cross the Brooklyn Bridge" case. Under *Petterson*:
  - If B hasn't started, A can revoke.
  - Ditto if B has started but only barely, and ditto if B is almost done.
  - It's only a breach once B has gotten across the bridge.

  - However, the Second Restatement §45 has a different rule: "On option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it." Once B starts performing, A is bound. But B has the option to finish or not.
  - This shifts the power from the offeror to the offeree. Problem is, B can now exploit A–delaying unnecesarily when A needs him to finish. A can't hire someone else and break B's contract.
  - Had the Restatement been in effect in *Petterson*, though, there would have been no difference. There's no way to partly perform paying money, so Δ could still have revoked where he did.

- *Carlill v. Carbolic Smoke Ball Co.*: Δ company advertised that any user of their smoke ball who contracts a cold is entitled to £100. π tries to collent, but Δ claims it wasn't a contract, just a "mere puff."
  - The Court finds that the offer was made to the general public, in a reward-type contract.
  - The Court also finds that Δ waived its right to be informed that π was performing.
  - Finally, the Court finds this was not exaggerated "puffery" nor a gift.

- *Cobaugh v. Klick-Lewis, Inc.*: Δ has left up a sign saying "a hole in one wins this car!" past when it meant the offer to be valid, and π aces the hole.
  - Δ claims that they had just left the sign up.
  - But the Court finds that the "manifested intent," what a reasonable person would interpret the sign as, is what matters; and it's clearly a unilateral contract, giving mutual assent.
  - What if the sign was readable but clearly old and outdated? That would have been a different argument.
  - And if the offer hadn't been seen until after the ace, it would have gone back to consideration matters; the performance has to be motivated by consideration.
  - The Court rules that the "manifested intent," the way a reasonable person would interpret the sign, is what matters. So π wins.

- The offeror is the "master of the offer." Which means the offeror sets the terms: he can decide the terms of acceptance and fulfillment, determine whether it's unilateral or bilateral, and what the terms are.

- *Allied Steel & Conveyors, Inc. v. Ford Motor Co.*: Seems more complicated than it is. Event sequence:

1. Δ offered to purchase machinery from π An acceptance clause is in the contract which says that "acceptance should be executed on acknowledgement copy and returned" to Δ. There's also a provision indemnifying Δ for negligence.
2. π starts work on the machinery
3. An employee of π is injured as a result of Δ's employees' negligence.
4. Δ receives the acknowledgement copy.

- π claims that there was no acceptance at 3, because the acceptance was defined to be 4.
- The Court, though, notes that π had started work at 2, clearly suggesting they were performing under the contract.
- The Court goes on to suggest that the wording of the acceptance clause was not exclusive, so there were other ways to accept... including starting work. Had Δ tried to revoke the contract, π probably would have sued for estoppel.
- We also know that Δ knew about the acceptance, since they were there helping.
- π, by starting work, knew that Δ wanted to protect itself.

- *Davis v. Jacoby*: π sues the executor of Δ's estate for specific performance of what they claim is a contract made in the letters.
  - If this was a unilateral contract, then π have a problem: unilateral contracts can only be performed through acceptance, and if an offeror dies, the offer is revoked.
  - Why does the Court side with π?
  - An offer to enter into a bilateral contract is an exchange of promises.
  - π claim this was an exchange of a promise to go to California in return for a promise to leave everything to π, accepted by the lost (but stipulated) letter.
  - If this was a bilateral contract, Δ could have sued if π had reneged. That doesn't seem to track with the facts.
  - But the Court decides Δ was trying to extract a return promise, because the husband could have died before the wife, and he wanted assurance she would be taken care of.
  - The Court also describes how they are by law supposed to err on the side of bilateral contracts.
- The advantage of unilateral contracts to the offeror is the right to revoke.
- Second Restatement §36: Power of acceptance may be terminated by rejection, counter-offer, time lapse, revocation, or death/incapacity of either party, or "nonoccurrence of any condition of acceptance."

3.3 Acceptance

"Offer" gets us into trouble, because what is intended by the offer and what is interpreted aren't the same thing, and being unclear can get you locked into a contract. So we need to modify "mutual assent."

- *Livingstone v. Evans*: Land sale. Sequence of events:

    1. Δ writes to π offering to sell his land for $1,800.
    2. π responds "Send lowest cash price. Will give $1,600."
    3. Δ responded, "Cannot reduce price" and sold to a third party.
    4. π writes, "I accept."

    - 1 is an offer.
    - 2 is a rejection and a counter-offer.
    - What about 3? It's clearly a rejection of the counter-offer. But the Court rules it's also a counter-offer itself.
    - Therefore, the acceptance in 4 is valid.
    - Question: How long is a contract offer held open? "For a reasonable time."

- Mirror Image Rule: once the status of offer, counter-offer, rejection, &c. is sorted, all is settled.
- This was replaced by UCC §2-204, which isn't as high as a standard.
- *Richardson v. Union Carbide Indus. Gases, Inc.*: Both sides had huge liability-indemnity provisions: "Seller shall indemnify buyer" versus "buyer shall indemnify seller."

    - The old-fashioned form of contracts had no forms, but lots of conversations. Not anymore; sophisticated parties use forms and boilerplates, leading to a "battle of the forms." The UCC has little tolerance for this.
    - So the Court looks at UCC §2-207, having decided that the sale-of-goods part of this contract is the controlling part.
    - If the mirror image rule were applied, then the seller's form was an offer, the buyer's form a counter-offer, and the delivery and installation constituted an acceptance, therefore making the buyer's terms applicable. The "last shot" rule.
    - But the UCC rejects the mirror image rule: a "definite and seasonable expression," even with different or additional terms, can be considered and acceptance.
    - The boilerplate in the buyer's forms says that extra terms invalidate the acceptance. §2-204 does the same with the seller's form, basically.

- The Court decides to follow §2-204(3), and "knocks out" the provisions on both sides. Since (1) says there's no acceptance of either form, the "knock-out" rule clears the field and fills it in with UCC terms. Conclusion? No indemnity.
- Note that the UCC redefined the mirror image rule into "if the non-agreed terms are trivial, they're in, else they're out." So parties put in language to make the contract conditional in line with §2-207(1). Hence, (3).
- The Revised UCC redefines this to make the knock-out rule explicit.

- *ProCD v. Zeidenberg*: Δ, buying π's software with a consumer license, uses it commercially.
  - Δ claims that he didn't see the restriction until he opened the box, and therefore he couldn't renegotiate; therefore, the terms in the box are after the acceptance, and therefore invalid. He says the offer is the terms on the box, and the acceptance is the purchase.
  - π claims that since the box says "additional terms inside," and there's a return option, the acceptance comes from using the software having read the interior terms.
  - The Court sides with π, saying that shrinkwrap licenses are not inherently unenforceable. If you accept knowing there are hidden terms, they're not really hidden.

- *Hill v. Gateway*: This was a similar case, with a computer ordered over the phone; but the Court (same judge as *ProCD*, actually) again says that the terms being spelled out, even if not read, and keeping the computer beyond the 30-day refund, constitutes acceptance. However, he does back away a little; saying "surprise, you owe us $10,000!" probably wouldn't be upheld.

- *Klocey v. Gateway*, though, throws out the above, claiming that as the buyer is the offeror, and the master of the offer, *his* terms, not the seller's, are what matter.

- *Hobbs v. Massasoit Whip Co.*: Occasionally, silence can be acceptance. But only occasionally.

- *Martin v. Little, Brown, & Co*: π offers to give information about plagiarism to Δ, and Δ said "Sure, send it along." Then π demanded payment.
  - There was no express contract. Was there an implied contract?
  - Δ never suggested it would give money. The $200 offered as an honorarium could just be a gift.
  - There are no restitution damages.
  - There are also no expectation damages, because there was never a price agreement.
  - So, no, no implied contract.

3.4 Precontractual Obligations

Sometimes, there are obligations and circumstances that take effect even before the contract is formed that have to be examined.

- If a seller offers to sell land and keep the offer open for 10 days, but then revokes before a buyer accepts, is there a contract?
- The seller offered to keep the offer open, which might be a promise.
- But there is no consideration for the promise, according to *Dickinson v. Dodds*.
- However, that was superseded by the Second Restatement §87, and the UCC §2-205. UCC language: "An offer... in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated."
- Why would the seller offer the time factor, then?
  - Maybe buyers would pay more for the option.
  - Or buyers would be more willing to take time and examine the offer.
- So here is a conflict between the consideration doctrine and common business practice. So the Restatement and UCC serve as a compromise.
- The Restatement says that an option contract offer is binding if it's in writing, recites a purported consideration for the making of the offer, and has fair terms and a reasonable time.
- Note that "purported consideration" could be $1 and unpaid; it just has to be *purported*.
- The UCC doesn't even require the recitation of consideration; the UCC is less likely to need the formalities because it's among merchants.
- The Courts don't want to kill a valid business transaction.
- *James Baird Co. v. Gimbel Bros.*: Sequence of events:
  1. Δ sends a letter to π offering to sell linoleum.
  2. π uses that offer to make a bid on a construction contract.
  3. Δ revokes the offer.
  4. π accepts.
  - The Court rules that 2 not an acceptance, because π did not tell Δ.
  - π tries to claim that this is a firm offer and making the bid counts as an acceptance.

  - The Court then looks at the wording again, seeing that the offer is for "reasonable prompt acceptance after the general contract has been awarded."
  - So it's not really a firm offer.
  - Courts are reluctant to assume an option contract unless it's crystal clear. "We will hold this offer open" lines are outright required.
  - Could π have tried for promissory estoppel, on the principle that it relied on Δ's bid?
  - The Court says no: "An offer for an exchange is not meant to become a promise until a consideration has been received."
  - "We offer to sell you linoleum... if you win the bid" is not the same as "we will sell."

- *Drennan v. Star Paving Co.*: Similar to above. Sequence:

  1. Subcontractor Δ makes a bid to contractor π.
  2. π uses that offer to make a general contracting bid.
  3. π gets the job.
  4. Δ revokes the offer.
  5. π accepts.

  - The Court rules that there was a contract, because "reliance made defendant's offer irrevocable."
  - The difference here is the language of the offer; there's no extra language about prompt acceptance &c.
  - There's also an element of burden-shifting: in *James Baird Co.* an offer is not firm unless listed as such, while here an offer is firm unless stated as not.
  - Under the traditional offer-and-acceptance doctrine, π would lose the case completely. Why does he win?
  - First, there's a policy concern: general contracts need to be able to rely on subcontractors.
  - Second, the First Restatement about option contracts comes into play: π is halfway across the bridge. Not part-performing, but committing to the client and relying on Δ.
  - The Court finds that the offers are firm.
  - The Second Restatement codifies this into §87(2). Since Δ knows π will rely on its bid to make the general, it's binding.

- *Goodman v. Dicker*: Entrepreneurs π wanted a franchise; there were discussions to that effect, but there was no offer or acceptance, so there was no contract.

- Relying on the promise that eventually there would be a franchise, π spent cash setting up some details.
- There may be a remedy under promissory estoppel, for reliance on Δ's promise, but it's weak.
- "I promise to give you X" is pretty strong, but "I offer to do the paving work at this price" or "I will give you a franchise" are weaker.

- *Hoffman v. Red Owl Stores, Inc.*: Similar. No offer, but assurances; those do not rise to the level of full estoppel, but there is some.

3.5 Illusory Contract

Another way of saying "no consideration."

- *Davis v. General Foods Corp.*: π has a recipe idea, and writes to Δ.
    - Δ writes back, saying "we decide what, if anything, you get."
    - Δ then uses the recipe.
    - The *quantum meruit* claim is shot down because π voluntarily gave the recipe to Δ. There was no negotiation, no mistakes, no misunderstandings. It's a gift, and we know what the courts think about gifts.
    - Was there anything π could have done? "I have a recipe; what's it worth?" wouldn't have gotten very far, and including an IP term ("use of this recipe constitutes...") would be a mess.
    - The Court finds that there's no breach of a contract, because Δ's promise ("we promise to use your recipe, or not, and pay you, or not") is too general, therefore "illusory" and therefore unenforceable.
- Doctrinally, illusory/vague promises are unenforceable for lack of consideration (no constraints = no consideration and no promise) and for no mutual assent (no offer, terms indefinite).
- As to the problems on page 356-57:
    1. A is not illusory, as the seller is constrained because the promise is not indefinite.
    2. B is not either, as long as 10 days is "reasonable" in the industry.
    3. C is probably illusory.
- *Obering v. Swain-Roach Lumber Co.*: Contract says that if Δ wins the land owned by π's deceased, it will sell the land to π for a certain amount of money and the rights to remove the timber.
    - π do not accept the deed, and Δ sues. (They reverse positions on appeal.)

- π argue they are not liable, because the description of the land is too indefinite. That's thrown out.
- π also argue there is no mutuality in the contract, because Δ had no obligation due to the condition.
- The Court says that might have been true prior to the auction, but now, its enforceable.
- After the auction, the agreement says "now you must resell." After buying, Δ is not unconstrained.
- It's a lot like a unilateral contract; before buying, Δ hasn't accepted. π could have said never mind.
- π made an offer: "we'll pay if you buy, and then sell us, the land and keep the timber." Buying the land was acceptance.

- *Paul v. Rosen* is much the same, except the condition was not met when the contract was repudiated. Hence, it's not a contract, just revoking an unaccepted offer.
- Second Restatement §77 describes the rules for determining whether a promise is illusory.
- *Wood v. Lucy, Lady Duff-Gordon*: Δ gives π the exclusive right to market her designs and put her endorsement on products, in return for half the profits. Then she breaches, making a huge deal with Sears-Roebuck.
  - Did Δ break her promise? Unquestionably. She claims there was no contract, because "the plaintiff does not bind himself to anything." Therefore there was no consideration, there was an illusory promise, lack of mutuality, take your pick.
  - The Court rules that there is an implied obligation to "use reasonable efforts to place the indorsements [sic] and market her designs." That means he is constrained–he has to act in good faith/use best efforts.
  - How could he be expected to do this? Meh. Details.
  - But the contractual half-profits factor means π has a stake in the success, so the more he makes for Δ the more he makes for himself.
  - It isn't about making sure the promises are crystal clear, but the implied promises and obligations (and therefore consideration).
- Three cases:

Case:	"If I do X,"	"Then I will do Y."
Davis	Use your recipe	Pay you. Maybe.
Obering	Buy the land at auction	Resell the land to you.
Wood	Market your designs	Give you half the profits.

- The *Wood* concept is clearly embodied in the UCC. In all contracts, there is a duty of good faith; especially when it comes to exclusive dealing in goods, there is an obligation to use best efforts to supply and promote sale.
- *Omni Group, Inc. v. Seattle-First Nat'l Bank*: π: "If the feasibility study is satisfactory, I will buy the land."
  - π said that because they want to make sure the land is useable. Δ knows it's standard operating procedure, and they can't sell without.
  - Then Δ breachers, and argues that due to the feasibility report requirement, the promise was illusory.
  - π was constrained to accept the offer, though, if the report was satisfactory. If π had said "well, the report says the land is great, but we can get something better so we're going to say it's unsatisfactory," and Δ could prove that, they'd show bad faith. So π wins.
- *Feld v. Henry S. Levy & Sons, Inc.*: The bread crumbs case. π promises to buy all of the bread crumbs Δ bakery produces.
  - So this one is Δ: "If I produce bread crumbs, I will sell them."
  - Then Δ breaches, by no longer producing bread crumbs.
  - The contract clearly isn't void, based on the *Wood* precedent.
  - So Δ could argue that it did fulfill the contract: it's simply producing no bread crumbs.
  - But the Court says that "good faith required continued production until cancellation, even if there be no profit."
  - The Court's concern was how to decide when bad faith existed.
- *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., Inc.*: Cardozo decision shows off the problems with how difficult good or bad faith determinations are. Here, what bothers him is that the parties didn't determine which price to use and how often to reevaluate and the like. So it's unenforceable. The dissent, though, argues that they can fill the gap with some reasonable term.

4 Interpretation

How do we comply with a contract that leaves a lot to the parties' discretion? Often, contracts aren't as clear as courts would like. How can they interpret them and fill in the gaps?

4.1 Interpretation

There are generally two major methods for interpreting: the "New York" formalistic view, and the "California" contextual view.

- *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*: Δ wanted to sell itself (like Wachovia, above), and π and Δ signed a letter of intent. When Δ started negotiating with another party, π sued for breach of contract.
  - The Court found that the "letter of intent" is an intent to form a contract, not a contract itself; they don't have a contract.
  - **Courts don't like "magic words" tests.** Though here it's clear that the letter of intent is not a contract, people sometimes screw up. The Courts don't like to hold people to their words.
  - π argues that they have an option contract out, and Δ is not allowed to negotiate with others.
  - But the Court finds that "neither the text not the structure of the letter suggests that it was to be a one-sided commitment."
  - Plus, Δ had asked for clarifications, so it clearly didn't consider *itself* bound.
  - Plus, under the standard of *Interway v. Alagna*, if the parties sign a letter of intent "subject to" a later agreement, it's not currently binding.
- Courts want to figure out *when* the parties to a contract are truly bound. This is the mutual assent problem. So they set up rules so the parties know when they should consider them bound.
- Problem is, the rules are normalistic and vague. The Restatement §§24, 33 go into more detail about the offer-acceptance doctrine.
  - However, the rules have been relaxed. The mirror-image rule, for example, has been almost destroyed, by a hundred and fifty years of businesses with offices full of lawyers.
  - So the doctrines have been changing; the mirror image rule just doesn't work in the real world.
- Comparing *Red Owl* and *Empro*: *Empro* says that businesspeople and normal people will go through phases: negotiation, contract, performance. Even a written document may not be a contract. But *Red Owl* suggests that the written documents *can* be enough to rely on, so liability can start in the pre-contract phase. (There are some differences in the standards depending on the nature of the parties; businesses, individuals, entrepreneurs.)
- That's why parties ask for waivers.

- *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*: Chicken confusion!
    - π claims that "chicken" in its contract for buying chickens from Δ refers only to "young" chickens, broilers/fryers; Δ claims that the word means those as well as "fowl," stewing chickens.
    - The contract simply says "chicken."
    - π's arguments:
        1. There are two sizes of chickens discussed: 1.5-2 lb. and 2.5-3 lb. Since the smaller size is only young chickens, therefore the word "chicken" must refer to young chickens only. **Rejected**. The judge says that "a contract for 'apples' of two different sizes could be filled with different kinds of apples even though only one species came in both sizes."
        2. The use of the English word "chicken" in the communications, instead of the German "Huhn," suggests the German-speaking π wanted to clearly mean the young chickens that they thought the English word meant. **Rejected** The judge that there's no evidence to support this conclusion and there's testimony that the implication was that "chicken" and "Huhn" were equal in meaning.
        3. There is obviously a trade meaning for "chicken": "young chicken." **Rejected**. All the testimony to back that up collapses when the businessmen say they would always clarify what they meant.
    - Δ's arguments:
        1. Government regulations (Department of Agriculture) say "chicken" means all of the above. **Challenged**. "Why do we care what the government says?"
        2. π knew there was no way Δ could have made money selling young chickens at the price it was offered. So they knew stewing chickens were intended. **Favored but not definitive**. There's no rule saying a party can't enter into a bad contract; π could have just thought it was getting a great deal.
        3. π ordered more after receiving the first batch. **Persuasive**.
    - The Court decides that π has not met its burden of proof that "chicken" meant young chickens, and finds for Δ.
    - This is a different result than *Raffles*, where no meeting of the minds means no contract.
- Interpreting a contract is tricky. Courts can look at the words, trade usage, overriding concerns or purposes, what the parties would have agree do, or just use the default rules.
- Many contracts leave out prices; the default rule says market prices.

- Pre-contractual negotiation "extrinsic evidence" is analogous to the legislative history of a statute. Do we look at it? Sometimes.
- *W.W.W. Associates, Inc. v. Giancontieri*: Seller Δ backs out of a sale of real estate. (New York rule.)
  - There is third-party litigation on the land that may affect the value of the land, and a clause that says that "either party" may back out.
  - However, π claims that the back-out clause was *intended* only to apply to it, since the point of the clause was to protect π from litigation, which Δ didn't need an out from.
  - π offers to bring in testimony to prove that the clause was drafted sloppily, and argues that the Court should look at the "real" contract, not just the writing.
  - The Court (a New York court) disagrees, saying it must give "due weight to what was in their contract." If a contract is clear and complete as written, they don't have to look at intent.
  - Since there are many reciprocal and non-reciprocal clauses, these were clearly sophisticated parties who weren't going to be sloppy like that.
  - Plus, the Court doesn't want to set a precedent that words don't matter.
- *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*: In doing work for π, Δ would "indemnify... against all loss, damage, expense" &c. Then π harms its own equipment. (California rule.)
  - π sues Δ and wins in the lower court, because the lower court finds that the indemnity provision is comprehensive.
  - However, this Court finds that the provision was intended to indemnify against damage to third parties, not the first party.
  - The Court rules that words do not have intrinsic meaning; they must be examined with the context "in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges)."
  - The Court outlines steps: look at the extrinsic evidence regarding the circumstances of making the contract, and then, if considering that makes the language of the contract unclear, allow the extrinsic evidence to prove meaning.
- In favor of the California rule: Judges have their own linguistic background, so applying the extrinsic evidence would allow them to find actual ambiguity.
- Against the California rule: This would make writings less reliable.

- The parties know that this debate exists, so they often define their terms in advance.
- The New York rule seems to be favored, judging by the definition clauses and the choice-of-law clauses favoring New York.
- New York rule is also referred to as a "four corners" rule: looks at what's within the four corners of the document.

4.2 The Parol Evidence Rule

Evidence of certain oral arguments connected to a written contract may be entered into evidence and examined *under certain conditions*.

- The **three conditions for parol evidence** to be acceptable:
  1. The agreement must be collateral. That is, it must be a separate agreement: "I agree to sell the house, and orally, also to sell my pet Chihuahua."
  2. The parol evidence must not contradict express or implied provisions of the written contract. This is in tension with the implicit idea that these, "and no more," are the terms.
  3. The parol evidence must be one that parties would not ordinarily be expected to embody in the writing. This overlaps 2; if something isn't "naturally" in the writing, it might be an implication that there are no more terms.
- *Mitchill v. Lath*: Δ agrees to sell land to π. There are various conditions, and π sues for one not in the contract: a promise to remove an icehouse.
  - Under the parol evidence rule, it's arguable that since the icehouse was on another piece of land, it wouldn't be natural to put it into the contract.
  - However, the Court finds that the icehouse promise violates condition 3, and maybe 2. There are all sorts of conditions in the contract to sell the land; if the icehouse promise was significant, it should have been included.
- *Hatley v. Stafford*: π leased land from Δ, and Δ took back his land; π sued under trespass, since a landlord can't normally come onto his tenant's property.
  - There was a provision that Δ could take back the land at a cost not greater than $70/acre.
  - However, π argues that provision was subject to an oral agreement that it would only last for 30-60 days. Δ counters that is inadmissible parol evidence.

- Under *Mitchell*, it looks like Δ wins.
- However, the Court says that the parol evidence rule states that the time-limiting agreement must not be inconsistent, and "to be 'inconsistent'...the oral term must contradict an *express provision* in the writing." Since there's no mention of time in the writing, the time limit doesn't contracdict anything express.
- The Court also finds that the time limit wouldn't have naturally been put into the writing.
- So the Court finds for π.

- A writing is a memorial of some provisions, maybe or maybe not all provisions, of the contract.
- A useful rule to look to: **did the parties intend to put all of their promises in the writing, or did they intend to leave some out?**
- The Second Restatement (§§213-26) is a complete mess, discussing integration, partial integration, complete integration...
- The UCC is better. §2-202: "if there are terms in the writing, they may not be contradicted. However, they may be explained or supplemented by:" (b) is "consistent additional terms, *unless* the writing is a complete integration."
- There is a tension in the cases, same as the plain meaning rule.
- Plain meaning matters have the New York four-corners rule versus the California context rule; parol evidence has the formulaic "does it look complete?" test versus the less formalistic "what is the intent?" test.
- *Long Island Trust Co. v. International Inst. for Packaging Educ., Ltd.*: Loan with promissory note. Dispute: Δ claim that their guarantee of the second loan from π bank was on the oral condition that the five other guarantors of loan 1 guarantee the new one too.
  - Loan 2 is never paid by the debtors, and π goes after Δ, who say the second guarantee is not valid.
  - π claims that this condition, not being in writing, is barred by the parol evidence rule.
  - The Court finds that the writing of the guarantee is not unconditional.
  - This sounds like *Mitchill*, but it comes out the other way.
  - The Court describes the "conditional delivery" rule: the promise is conditional on something else; the parol evidence is not adding or modifying a term, but defining whether or not the contract is enforceable.

  - Parol evidence may be brought in to define conditions, not terms. (This would not have helped in *Mitchill* since the π was looking for performance, not voiding.)

- *Lipsit v. Leonard*: Another set of exceptions to the parol evidence rule: tort claims.

  - π's claim of breach of contract against employer Δ is dismissed for vagueness, and the parol evidence of oral promises connected to the contract are barred under the parol evidence rule.
  - However, the parol evidence *is* admissible regarding the tort action of fraud, because they represent inducement of the contract!
  - The problem is, all you can get for that are out-of-pocket costs (reliance damages, basically). Besides, it's harder to prove; you have to show a mental state or intent, and the standard of proof is "clear and convincing." And changing one's mind is not fraud.
  - So *Mitchill* wouldn't have worked here, either.

- Fraud has eroded from "a representation about the state of the world" and now encompasses "promissory fraud," promising to do something you never intended; this differs from contracts because it's a matter of *intent*, hard to prove.

- *LaFazia v. Howe*: A fraud claim is blocked by the existence of the merger/integration clause, which states "this is the complete and entire agreement." That means there's no question of extra promises to induce or anything. Courts, though, don't always enforce this.

- *Hoffman v. Chapman*: The parol evidence rule does not bar evidence that a contract was made by mutual mistake.

- The parol evidence rule and statute of frauds are sort of inversions. Also, the parol evidence rule can bar earlier *written* promises, not just oral.

- But the intent of both the statute and the rule are the same: fear of fraud or confusion, for example.

- It is generally understood that a writing represents what the parties really want to do, and prior debates and oral discussion aren't relevant. So the parol evidence rule bars them. But sometimes, there isn't enough time, or one person might not understand the rules and think the prior promises are still enforced.

- So the parol evidence rule is not as strictly applied as it could be; often courts will look at the writing to determine whether it's supposed to be complete (merger or integration clauses or else the overall level of detail), and if not, they *will* look at the prior discussion or debate.

- Concern about fraud leads to an emphasis on the writing, but concern about the limitations of the parties (time or experience) leads to this give-and-take. Plus, it varies between jurisdictions.
- Sometimes, there is no writing at all. But courts might still enforce (unless the statute of frauds bars, of course). This fits into our theme: "when do promises become a contract?" We have a lot of ways of making that decision: consideration, offer/acceptance, parol evidence...

5 Policing the Bargain

When do bargaining defects render a contract unenforceable?

5.1 Competency

Sometimes, one party or another is not competent to make a contract, or have it enforced.

5.1.1 The Infant Rule

Minors (those under the age of majority, generally 18 nowadays) don't have the same binding rules on them when it comes to contracts.

- *Halbman v. Lemke*: Minor child π offers to buy a car for $1,000 up front and $25 a week for ten weeks, at which point he'll get the title.
  - However, the connecting rod breaks during the intervening time. π tries to get his money back, Δ refuses (and endorses over the title), the car ends up destroyed.
  - Δ claims he's still owed the balance. π asks for the money back, under the **"infancy doctrine": a minor can void a contract at his option, or affirm it at his majority.**
  - "Voidable" is not "void." "Void" means no contract, legally. (Prostitution and illegal contracts, or ones with fatal defects.) "Voidable" means one party has the power to declare the contract void at any time.
  - However, a minor who voids a contract is required to return as much of the consideration as remains in his possession. Which, in this case, was nothing–the car was destroyed.
- Why the infant doctrine?
  - It's too easy to fleece a kid. "The protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."

- But there's a "necessities" exception; the doctrine makes adults reluctant to deal with kids, but we want the minors to have the necessities, so we don't want the adults to be reluctant.
- Note, also, that according to *Webster Street Partnership v. Sheridan*, shelter is not a necessity if the minors have homes to go to. This has policy decisions of minors living with their parents, or at least getting their parents as guarantors.
- It's actually unlikely that minors would be fleeced for necessities, anyway. But courts might enforce, or else insist on restitution, or others.
- Note also: If the minor doesn't have consideration anymore, he doesn't have to repay it. Same concern.

- If a contract is voided, what happens to costs paid and the like? The Courts have to sort that out, using their "equitable powers."
- The Restatement says that minors have "only voidable contractual duties until the beginning of the day before that person's eighteenth birthday."

5.1.2 Mental Competency

Can crazy people make contracts?

- The traditional rule: "a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind." Since a contract requires a meeting of the minds, a crazy person can't contract.
- The old idea was that mental incompetence was purely cognitive–they don't know what they're doing. But more and more, the Courts began to accept the idea that there was motivation incompetence–they don't know *why* they're doing it.
- *Faber v. Sweet Style*: Contracts made by a manic-depressive on his manic swing were voided. Even though the man knew what he was doing and wasn't literally suffering delusions, he was *motivationally* delusional.
- Second Restatement §15: a person gets "only voidable contractual duties" (not instantly void; change from the old rule) if he:
  - Is unable to understand (cognitive)
  - Is unable to act reasonably (motivational) *and* the other party has reason to know of his condition.
- The infancy rule is more protecting than the mental illness rule. The minor can *always* recover, but the mentally ill only if the other party has reason to know. If the contract is "fair," it might be enforceable anyway.

- Is it just that a mature child, more capable than an incompetent, is also more protected?
- We do want incompetents to make some contracts, though–and it's harder to fake being a minor.
- *Ortelere v. Teachers' Retirement Board*: 60-year-old teacher has a "nervous breakdown" and is diagnosed with "involutional melancholia" (the 1960s "clinical depression"), given electroshock therapy and tranqs to no avail, and dies. But before she died, she changed her pension from $375 with reserves to $450 without.
  - π claims that Δ should not have let her make the change, as the shrink says she was at no time competent from her breakdown forward.
  - The Court has to grapple with "how do we know she was incompetent?"
  - For one, she loved her family, and knew she was dying; why go to the higher immediate payout?
  - But, says the dissent, the pension had become the family's only income. She may have decided she needed the upfront money more.

5.1.3 Other

Sometimes, it doesn't rise to the level of mental incompetency, but there are other reasons for ruling whether a contract is fundamentally enforceable.

- *Odorizzi v. Bloomfield School District*: Teacher π is "arrested for criminal homosexuality," and Δ talks him into resigning; the charges are dropped, and he claims undue influence.
  - π wants his resignation annulled.
  - He can't plead fraud, as there was no misstatement; and there was no confidential relationship (employer/employee doesn't cut it) with reliance on the relationship.
  - He can't plead duress, because there was no unlawful action or threat: the legal action/suspension and firing was not illegal.
  - However, undue influence says there must be excessive pressure to persuade one who is vulnerable, and given the situation (40 hours awake, just been booked, no lawyer) and the statements ("no time to discuss with a lawyer"), that's accurate.
  - But be skeptical about undue influence. The Courts are reluctant.
- *In re Baby M*: Parents who decided not to have children acquired a surrogate mother.
  - The Court has two choices: either enforce the contract, or declare it void and set up custody arrangements.

- There was no mental incompetence, no fraud, no duress.
- And the economic and social inducement was voluntary.
- However, the Court finds that the statutes prohibiting baby-selling apply here as well. The contract is void as against public policy.
- What law was broken? She can still give up parental rights, but counseling allows the mother to understand what she wants; a contract in advance defeats this purpose. You can't ask a woman to give up a child before birth.
- The public policy advanced by the no-baby-selling statute renders this surrogacy contract unenforceable.
- Note: This is illegal in New Jersey, but not New York.
- And implantation cases are different; the genetic argument is weakened, but the third party is still the pregnant one. That said, the surrogates usually lose these.

5.2 Duress

A contract made under duress is no contract. *If* it's actual duress.

- *Batzakis v. Demotsis*: Payment of 500,000 drachmae for a signature to the effect of owing $2,000 (that much drachmae were worth about $25).
  - Δ claims that the contract was signed under duress. But the formal defense is actually one of lack of consideration.
  - However, since there *was* consideration, even grossly inadequate, the contract is upheld.
  - "Mere inadequacy of consideration will not void a contract." The Courts don't want to interfere with freedom to contract.
  - There is an argument that it was World War II; the inadequacy could be because the chance of repayment was a long shot, and the risk was factored in.
  - We don't know what was fair, but Δ *did* make the contract.
- *Embola v. Tuppela*: Δ's trustor said "if you give me $50 now, and I get my mine back, I'll give you $10,000." But once it happened Δ said there was inadequate consideration; the Court found it was an investment with a chance of paying off, balancing the books and getting around usury laws.
- *Levine v. Blumenthal*: Original contract said $175/mo for year 1 and $200/mo for year 2. However, there was a renegotiation leaving the price at the year 1 price through year 2.
  - The first contract was premises for money.
  - The second, though, was a promise to reduce the rent for... **nothing**. No contract.

- The **Legal Duty Rule** says that you can't promise to do something you already have a legal duty to do as consideration for another promise.
- There might have been nominal consideration in the form of goods, or the time of payment changing, or the location of payment changing, though.

- *Alaska Packers' Ass'n v. Domenico*: Similar to the above, two promises.
  - The first contract was catching fish in exchange for money ($50 plus two cents a salmon).
  - The second was a extra $50 in exchange for...**nothing**.
  - π *tried* to argue that since the nets were rotten, the second contract was the money in exchange for extra work in the form of dealing with rotten nets, but the Court tosses that out.
  - The Trial Court tries to suggest that without that second contract, both sides are worse off (no money, no fish); after it they're better. But the appellate court tosses that one out as well.
  - Here, this qualified as extortion/duress; π knew there were no other fishermen in the area, and Δ had laid out a lot of money up front. It was a holdout scenario.
  - Δ could have sued for breach, but π didn't have the money to cover expectation damages.

- *Schwartzreich v. Bauman-Basch, Inc.*: Formalistic solution to the second-contract argument: they declare the first contract mutually rescinded by the second one.

- *Austin Instrument, Inc. v. Loral Corp.*: True duress case.
  - Δ was a general contractor, awarding a subcontract to π; however, π threatens to stop delivery unless Δ pays more.
  - First contract: money for goods.
  - Second contract: More money (and some other contracts) for the same goods.
  - The moment the deliveries were done, Δ refused to honor the second contract. (Why then? More on that soon.)
  - Duress: "when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will."
  - Δ couldn't have gone to other subcontractors and made the deadline. Asking the client for an extension, or defaulting, would have been harmful to Δ reputation; there's no legal remedy for that.

- Could Δ have gotten an injunction? Courts are reluctant to do that unless the goods are unique, but they effectively were. Some courts have ruled the duress doctrine dead because of the injunction option.
- But in general, the circumstance is, there was no option, so Δ had to sign the second contract. So it's not enforceable.

- *Brian Constr. & Dev. Co. v. Brighenti*: Second contract to excavate more debris, for more money.
  - The difference here is that new, unforeseen conditions, make a new obligation, which has to be contracted for.
  - Was this a duress case? Probably not–there were legal remedies here, such as suing for breach.
  - In the end, this was a new obligation.
- The Second Restatement, §89, says that the second contract (as in *Brian Constr.*) is enforceable "if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made."
- *Universal Builders v. Moon Motor Lodge*: Second, oral, contract: additional work for additional payment.
  - Δ claims that the first contract had a "must be in writing" clause.
  - However, besides the unjust enrichment claim, the Court finds that since Δ's agent knew about the additional work, he was effectively waiving the written-change-order clause.
  - So it seems you can't have a no-oral-agreements clause, because agreeing to an oral agreement waives it.
- But you can't waive a contract into a gift, as per Corbin.
- *Hackley v. Headley*: π was holding out; there was bad faith in the rounding, but a valid dispute about the scales. The problem was, Δ (π below) couldn't sue for breach during the bad faith.
  - So Δ accepted the rounded money, and then claimed duress. Was it?
  - Was there a wrongful threat? The business would have collapsed if he hadn't accepted, but that wasn't π's fault.
  - The Court doesn't want to start messing about with examining finances.
  - The free will factor is pretty subjective.
  - In the end, there was no duress. There was some bad faith, and other arguments, but no duress.
- The duress doctrine is tricky, but the important rule is the lack-of-legal-remedy clause.

- *Denney v. Reppert*: You can have a preexisting duty (cop, bank employee, and so on) which precludes you from accepting a reward offered to the general public.
- *Sheets v. Teddy's Frosted Foods, Inc.*: At-will employee π argues he was a whistleblower.
  - π was an at-will employee, but at the same time, the Court has to consider whether his firing violated the "underlying purpose" of the FDCA.
  - π also claims that the firing, if upheld, constitutes a disincentive for employees to blow the whistle. Court sides with π.
  - Dissent argues that this erodes at-will employment, takes over the Legislature's job, increases the expense of contracts, and disincentivizes hiring.

5.3 Mistake And Misrepresentation

What happens if, due to either a mistake or a misrepresentation, something is either never said, or something incorrect is said? It depends on the nature of the mistake or misrepresentation as well as the relationship between the parties.

- *Laidlaw v. Organ*: Buyer Δ knew that the war had ended, and the price of tobacco had gone up–therefore he had gotten a steal.
  - There was no fraud, because there was no active misrepresentation, simply no affirmative disclosure. Δ did not say "the war is still going on," nor did he say "the war is over."
  - Δ was not required to communicate his information, given that the means of knowledge was freely accessible to both parties and no special relationship existed between buyer and seller.
- *Jackson v. Seymour*: Δ tells his sister π that her land is good only as a pasture, so she sells it to him for $275. After that Δ learned that there was valuable timber on the land.
  - There was no *intentional* misrepresentation-but there was constructive fraud.
  - Despite there being no misrepresentation, and no fraudulent mental state, there was a constructive relationship between brother and sister; this plus the "gross inadequacy of price" entitles π to equitable relief.
- There is a lot of debate about the nondisclosure examples.
  - If a house is infected with termites, which the buyer can't discover easily, the contract is void.

- A geologist who knows about mineral deposits on land, but is never *asked* as such, can buy the land and doesn't have to mention the deposits directly.

- Normally, as per *Laidlaw*, there is no duty to disclose.
- And normally, as per *Matthews v. Kincaid*, public facts one could discover normally do not have to be disclosed.
- But if the facts are those a buyer could not discover (such as a tendency of a basement to flood), and/or if there is a confidential relationship, there is a duty to disclose.
- *Sherwod v. Walker*: Both parties believed that a cow was barren, and therefore worth \$80. However, the cow wasn't, and was worth \$1,000, so Δ refused to sell.
  - π sues for the cow he bought.
  - The Court finds there was a mutual mistake about the fundamental nature of the cow, and therefore the contract was rescindable.
  - There is a difference, says the Court, between a contract to sell a barren cow, and "any cow." In effect, **the cow being sold was a different cow than the one contemplated by the parties**.
  - The dissent argues that this was a risk on π's part, because π thought the cow might be fertile.
- The rule: "Recission is not available, however, to relieve a party who has assumed the risk of loss in connection with the mistake." If it's an assumed risk (a bookstore with a bunch of books labeled a dollar), that's different then if there's not (the baseball card case with the unwitting employee).
- *Elsinore Union Elementary School Dist. v. Kastorff*: Contractor Δ accidentally submitted a bid and, in effect, charged $-\$3,000$ for the plumbing.
  - There was evidence of negligence, in that he was asked to double-check, but the appellate court rejects.
  - π asks for expectation damages, the difference between the price Δ quoted and the price π got elsewhere once Δ wouldn't perform.
  - However, the Court rescinds the contract for mistake. Why? It was a unilateral mistake.
  - But the Court says this was a "costless" mistake, and more fundamentally, one of clerical matters, not judgment.
  - Plus, he told them quick, so it's not like π *really* relied on the quoted price.
  - So. Clerical mistake, no reliance, no negligence or other minor factors. But still: **Why does this justify rescinding?**

- Enforcing it would be bad for society.
- If the contract was enforced, Δ would probably go out of business, to be replaced by someone else, who may or may not be better at catching mistakes.
- Setting up a rule of enforcement in these cases would probably lead to contractors adding a greater risk premium to the contracts because some mistakes are unavoidable.
- Plus, the number of mistakes wouldn't go down.
- In addition, the school district might also be in a better place to find the mistakes. Courts are sympathetic to "obvious" mistakes that are overlooked.

- *Tribe v. Peterson*: π claims Δ gave an express warranty that the horse would "never buck."
  - Δ claims that there was no warranty, because no one would make a "no buck" guarantee.
  - Δ is also ready to claim that there was no breach of a warranty, and it was a gentle horse; but even a gentle horse might buck.
  - But what if π had made a mistake argument?
  - Express warranty and unilateral mistake are two completely different doctrines. Express warranty is just another promise, so it's a contract, where the remedy is damages; unilateral mistake is a rescission remedy. The mistake argument probably wouldn't have held up here because it was a judgment mistake.

- *Hinson v. Jefferson*: Δ sold land to π with a restrictive covenant saying, in effect, "residential only." However, the land conditions meant π couldn't get a septic tank.
  - This was a mutual mistake; both parties believed a residential dwelling could be build there.
  - But the Court is reluctant to apply the mutual mistake doctrine, since it's real property and π still got the land contracted for.
  - The Court finds an implied warranty; given the contract with terms that make it impossible to do anything but build a residence, the implication is that the land is fit to build a residence.
  - Like constructive fraud, we pretend there's fraud even though there's no direct misrepresentation.
  - Why allow the rescission? Who bears that risk?
  - If the buyer bears the risk, house prices will go down; but if the seller bears it, there will be incentive for the sellers to investigate.

- Implied and express warranties are part of the UCC, §§2-313-14. Goods have warranties as implied, unless disclaimed, and "sold as-is" is enough.

- *Johnson v. Healy*: A house is sinking due to improper fill from a Δ, leading to a loss of value.
  - This is a breach of warranty/misrepresentation (same thing, in effect; facts vs. promises)
  - The misrepresentation is that Δ's claim "made of the best materials" implies "there is nothing wrong with the house."
  - Since there was something wrong, π gets expectation damages.
  - One possibility would limit that to diminution-in-value; if that's hard to determine, the court can use "reasonable" repair costs.

- *Cushman v. Kirby*: Δ misrepresented the water quality of the house being sold, and the husband stayed silent.
  - If there had been no misrepresentation, there probably wouldn't be a remedy, since π could have found that out themselves; but once there is misrepresentation (twice, because the husband's silence is its own misrepresentation)...
  - But if π had investigated (say, smelled the water), there wouldn't be *reliance*, and therefore there would be no remedy.
  - In this case, there is no difference–except for punitive damages–between the tort and contract damages, though normally tort damages are lower.

5.4 Impossibility/Impracticability

Sometimes, it's impossible (or very impractical) to perform a contractual promise. In those cases, you might be able to get rescission.

- *Taylor v. Caldwell*: Contract to use Δ's contract hall, but the hall burned before the first performance.
  - π want damages, the profits they would have made, and claim that Δ breached by failing to have a concert hall.
  - The Court held, not that it was OK to breach if it's impossible, but that the existence of a concert hall was a precondition.
  - In other words, Δ were really saying "if we have a concert hall, we will let you perform in it."
  - This is an implicit element the Court reads into the contract.
  - And since the risk has not been allocated in the contract, the contract is null.

- *Tompkins v. Dudley*: The burning of a schoolhouse Δ was building for π did not nullify the contract to build it. Given *Taylor*, why not?
  - This was for any building that fit the bill, not the specific music hall.
  - Δ accepts the risk of something happening before the building was completed; there was no accepting of the risk in the music hall.
  - The contract here guaranteed the building, whereas the *Taylor* contract didn't.
- Still, the basic question is the same: why does the *Tompkins* court not infer a condition but the *Taylor* court does?
- It's a question of risk allocation. The buyer values the result V higher than the cost C; but then C goes way, way up. Now what?
- In *Taylor*, π bears the risk, and if Δ did, the price would have been higher. In *Tompkins*, Δ bore the risk, if π did the price would have been lower.
- The Court interprets the general terms of the contract in *Taylor* to not apply in all conditions.
- The Court has to consider what the parties envisioned.
- The "particular-thing" case: hiring a painter to paint your portrait, then he goes blind. The choice is "rescission" or "expectation damages"; if the latter, the painter will charge more.
- What risk allocation do we want? More payment in case of impossibility, or less?
- The insurance policies are assumed not included unless they're spelled out.
- *Carroll v. Bowersock*: π contractor wants his cost of performance prior to the place burning down.
  - This is a *quantum meruit* claim. π can't sue on contract, because the contract was unfinished, but there was unjust enrichment.
  - There is no actual benefit from going from old-floor to hole-in-the-floor, but there is a sort of metaphysical benefit; had the contractor just quit then and there, a new contractor would have been able to pick up where he left off.
  - So the Court finds *quantum meruit* for everything that provides a benefit to Δ; things "wrought" into the structure, which weren't going to be removed.
  - So π can't get the cost of the forms for columns or his tools.
- *Kel Kim Corp. v. Central Markets*: π can't get liability insurance for a while; the contract says that's grounds for termination.

- Is this a contingency case–"if the insurance is purchasable, I'll buy it"?
- (Note: This was during a tort liability crisis no one could anticipate due to tort damages skyrocketing.)
- However, the Court says the "impossibility doctrine" says a contract can be excused "only if they couldn't possibly have foreseen it," and the idea of the rink not getting insurance was foreseeable. Even if the details weren't.
- π then claimed *force majeure*, the clause saying "if they can't pull this off due to labor disputes, service, laws, riots, war, or Acts of God, they don't have to."
- But the Court says those are of a fundamentally different nature, related to failure to operate day-to-day. *Force majeure* clauses are interpreted narrowly.

- *Bung. v. Recker*: A contract to sell one's beans is different than a contract to sell "any beans." If the source is neutral, the farmer can get the beans somewhere else; the benefit of the contract is price stability.
- Courts don't insist on technical *impossibility*; extreme impracticability works too.
- If it was foreseeable, then the Courts will hold the contract unconditional, because the parties should have allocated the risks.
- *American Trading & Prod. Corp. v. Shell Int'l Marine, Ltd.*: The Suez Canal closes. Unforeseeable? Not after 1956. (This was the Six-Day War, 1967.)
  - The ship had to go 'round the Cape of Good Hope, adding travel time.
  - π claims that the Suez was the specific method of performance.
  - The Court claims that the contract did not include an explicit "through the Suez" clause. There was a clause mentioning, but the Court says that was just the probable route.
  - π claims impracticability. But the Court says it's not that unreasonably difficult, since the Cape was a well-established alternative, and it wasn't that much money difference.
  - Besides, the ship knew there was trouble in the Suez before it entered the Mediterranean, and kept going.
- When the doctrines begane, the courts would discuss "implicit conditions."
- Broadly: you can enter into an absolute, or a conditional, promise.

- If the promise is conditional, if the condition occurs that creates an obligation; else it doesn't.
- Construction contracts, notwithstanding the progress payments, often have the implied "if the building conforms to the plans I will pay."
- Courts don't like forfeitures, but they will enforce specific ones. If there's no condition, then the Courts assume the promise is absolute, the contract is fulfilled, and the buyer can sue for expectation damages (which may be nominal).

5.5 Frustration

The flip side of the impossibility doctrine: If performance is not impossible, but the valuation on the buyer's side has bottomed out, the contract may be unenforceable.

- *Krell v. Henry*: π let his flat for rent, and Δ asked to rent in order to watch Edward VII's coronation. The coronation was cancelled due to illness, and Δ did not pay the balance of the rental.
  - The Court finds an implied condition here too, similar to *Taylor*.
  - The problem is, if the π's costs had simply gone up, the Δ probably would have demanded performance. Why should Δ get out if the value goes down?
  - There's a foreseeability issue: if it were foreseeable, extra costs could factor in the risks and include the costs. But if not, *ex ante*, what could be done?
  - The Court compares to the Derby cab case: the specificity of the item (any cab versus that one flat), the value derived from its purpose as opposed to the cab's transportation value.
  - The Court infers an implied condition based on circumstances.
  - What if π had incurred a detriment, say, cleaning up the flat for visitors?
  - It probably wouldn't change the reasoning.
  - What if π had installed bleachers, and Δ had paid his deposit?
  - Early on, Δ might have gotten back his deposit (though here he didn't ask for it); later, π might have gotten reliance damages.
  - What about an unjust enrichment claim? Who should bear the loss?
  - Normally *quantum meruit* reigns: if Δ pays but gets nothing he deserves his money back. But if π engages in something, like the bleachers: under the doctrine he's out of luck, but sometimes the Courts will rule the detriment to π as a benefit to Δ (like the hole in the floor).

- *Chase Precast Corp. v. John J. Paonessa Co.*: π manufacturers concrete highway barriers, and Δ contracted with the Commonwealth to improve highways and with π to get the barriers necessary.
  - Due to changes in the contract with the Commonwealth, Δ cancelled its contract with π, but did buy all the barriers already made.
  - π sues for expectation damages. However, the Court finds the frustration doctrine bars enforcement.
  - There was a provision in Δ's contract with the Commonwealth to cancel, but the contract here didn't have such.
  - It can be inferred, then, that they chose not to put it in; but the Court doesn't make that leap.
  - There are the normal issues of implied conditions ("if there's a contract, we'll buy barriers") and risk allocation (there's no risk, since these are only barriers not yet made).

5.6 Unconscionability

Sometimes, courts will simply say that a contract is so grossly unfair that it is inherently unenforceable.

- *Woollums v. Horsley*: Basically the geologist example, with Δ having information about the value of π's land that π didn't.
  - Here, the Court won't enforce, because the say they can't enforce an inequitable specific-performance claim.
  - They say this is unconscionable because of the huge price imbalance.
  - Δ might have a claim in law, since he lost in equity; but he probably won't pursue it.
- There are two forms of unconscionability:
  - **Substantive** unconscionability has to do with the substance of the contract (such as the price imbalance).
  - **Procedural** unconscionability has to do with the formation of the contract (such as that one party was uneducated, unsophisticated, aged, and diseased.
- *Waters v. Min Ltd.*: Unconscionability in the law courts: π had an annuity from an injury when she was 12; at 18, she met a guy who hooked her on drugs and convinced her to sell the annuity for a pittance.
  - This isn't like *Batsakis*; there was no risk of not receiving the amount. The annuity itself had that value, period, amen.
  - This is more like *Woollums*, but without the information-failure and social-productivity angles.

- "Mere inadequacy" won't void a contract. But the inadequacy plus the ridiculously unjust facts will.
- Plus, certain contracts are unconscionable, plain and simple. Price disparities might qualify.
- If there was no price disparity, would this be upheld? The boyfriend's fiduciary interest might void it; what about the procedural issues of lawyers only on one side?
- Other hypo: if the dealing was fair, but the numbers inadequate? "Mere inadequacy" again, but the Court also says that disparity might be enough since the disparity leads to the conclusion that "knowing advantage was taken."

- The old rule was that there was a duty to read, and you were bound by anything you signed.
- The problem is, people don't read the massive fine print, and may generally assent without specific examination.
- Without a duty, though, you can get out of any contract by not reading (or claiming not to).
- So maybe the signing is "a reasonable manifestation of intent."
- But courts don't always hew to that standard:
- *Agricultural Ins. Co. v. Constantine*: "not liable for loss" parking ticket provision was tossed out.
  - There was no signing or actual agreement.
  - There was no indication on the ticket what it meant.
  - There was no attention drawn to the provision.
  - Can you even contract out of liability? Isn't that against public policy?
  - A tort law concept: We want the garage to be careful and competent and hire employees who are the same.
  - But market forces would incentivize drivers to not patronize bad parking garages, too.
  - It's a tension of tort liability standards versus contracting out of litigation.
- *Henningsen v. Bloomfield Motors, Inc.*: Δ claims that the form contract π signed means he's only liable for defective parts within 90 days of sale.
  - Normally this would be a dead end. Car manufacturers aren't common carriers, and he did sign the contract.

- But the Court finds that the disclaimer of implied warranty of merchantability by the dealer and the elimination of all obligations besides parts replacement is void. Why?
    - Unequal bargaining power: π can't negotiate since it's "take it or leave it," he can't shop around because this is an industry rule (implying possible collusion), and warranty of merchantability is a default rule.
    - Confusion: the disclaimer is inconspicuous, counter to reasonable expectations, an unfair surprise, and takes advantage of the lack of sophistication of the ordinary consumer.
    - Cars are quasi-public.
    - It's impossible to review and understand the risks.
- The Court calls this "counter to public policy." Nowadays that would probably fall under the unconscionability doctrine.

- Why are form contracts so common, and why can't you negotiate?
- It would be expensive and time-consuming to demand so much negotiation; that cost would be passed on to consumers.
- UCC §§2-313-16 have the bits on express and implied warranty, and disclaimer thereof.
- *Richards v. Richards*: π, wife of truck driver, wants to ride along; Δ company says she has to sign a "passenger authorization" form.
    - The authorization is actually a very, very broad liability release. This is bad first because they should have told her.
    - Second, the broad nature is bad because it can disclaim unrelated liability. This goes back to the goals of contract versus tort law: Tort law is designed to impose liability on persons who take too little care (and therefore deters damage to people); that outweighs freedom to contract.
- What's so great about freedom to contract, anyway? It allows people to put their own valuation on things.
- Allowing the liability raises prices or applies prices because of the necessity, say, of insurance.
- The unconscionability doctrine keeps the liability limitation clauses from running rampant.
- The Courts generally assume people aren't sophisticated enough to take advantage of true freedom of contract.
- *Broemmer v. Abortion Services of Phoenix*: Contract of adhesion, unsophistication, therefore unconscionability.

- This doctrine is probably more important theoretically than practically, and is a central counterexample to the idea that contract law always protects freedom of contract.
- Normally, courts will respect the contract's terms. Whatever the parties put in, the courts will (usually: liquidated damages!) defer to.
- This is similar to the other policing-the-bargain doctrines; some, though, say it's a way to get policy decisions into contract cases.
- *Woollums*, *Waters*: The fraud and duress doctrines don't apply, but the Courts need *something*.
- *Williams v. Walker-Thomas*: As per Second Restatement §211, where party B has reason to believe party A wouldn't agree if he knew about the terms, there is obligation to point them out.
    - *Williams* is an aggressive advancement of unconscionability: she didn't understand, there was no bargaining, and this was an unfair commercial practice.
    - Procedural problems: Form contract, and a common-law duty to read faces a question of reasonable expectations: imagining that by defaulting on the stereo means π loses everything is hardly reasonable.
    - Why, though, is the cross-collateral clause unconscionable? It's not the language. But it's not enough to say the inequality of bargaining; this isn't a monopoly situation.
    - Why were the terms one-sided?
    - All of them favor the seller, maybe? There was no discount for the terms?
- *Brower v. Gateway 2000, Inc.*: The unconscionability comes out of that the cost of arbitration is greater than any possible damages from the suit, thanks to the ICC clauses.
- *Market Street Associates, Ltd. Partnership v. Frey*: Lease with an out condition.
    - Contract between JC Penney and Δ: property was sold to Δ and then leased back. Then JC Penney assigned the lease to π.
    - π wanted to build, tried to get a loan, and couldn't because they didn't own the property. So they asked Δ for the money to build, but Δ said "that's too small. No."
    - So π invoked the buyout clause.
    - Δ claims that π should have mentioned the buyout clause, and that there were never real negotiations, just a front.

- There are two theories: good faith and implied condition.
- Good faith: If this isn't here, you'd have to put in every bad faith condition explicitly, and this is embarrassing and takse too long.
- Implied condition: If they had anticipated this, they would have put the condition of "real" negotiation into the paragraph.
- This isn't the same as unconscionability: this is about behavior once the contract is signed, not unconscionable clauses in negotiation. Δ just forgot about the clause, and π doesn't have a duty to remind them.