

## COURSE: CONTRACTS

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GRADE: A-

## CONTRACT FORMATION

- **§ 2: Promise; Promisor; Promisee; Beneficiary**
  - (1) A promise is a manifestation of intent to act or refrain from acting in a **specified way**, so made as to justify a promisee in understanding that a commitment has been made.
- **§ 33: Certainty**
  - (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
    - **However, contracts need not specify all their essential terms at formation in order to be enforceable. It is enough for agreements to provide means for making those terms sufficiently definite by the time performance is due. 262.**
      - Even price may be left open. *See* UCC § 2-305.
  - (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
  - (3) The fact that one or more of the terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.
  - **A court may cure uncertainty by referencing course of performance, course of dealing, and usage of trade (See UCC § 1-303) or by resort to a term implied by law, such as good faith or reasonable efforts (as in *Wood v. Lucy, Lady Duff-Gordon*, 86).**
    - Good faith and reasonable efforts are regarded as sufficiently definite if their content can be determined by reference to some external standard. 259.
- **UCC § 2-204: Formation in General**
  - (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
  - (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
  - (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.
    - Indefiniteness may be cured by referencing course of performance, course of dealing, and usage of trade. UCC § 1-303.
    - An open price term is governed by UCC § 2-305.
- **UCC § 2-206: Offer and Acceptance in Formation of Contract**
  - (1) Unless otherwise unambiguously indicated by the language or circumstances
    - (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
    - (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer
  - (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

## MUTUAL ASSENT

- **§ 20: Effect of Misunderstanding**
  - (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
    - (a) neither party knows or has reason to know the meaning attached by the other; or
    - (b) each party knows or each party has reason to know the meaning attached by the other.
  - (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
    - (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or

- (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.
- Outward manifestations govern; subjective intentions do not matter. *Lucy v. Zehmer*, 126.
  - Exceptions:
    - No objective person could reasonably have concluded that the promisor intended to be bound. *Leonard v. Pepsico*, 130 (Pepsico Harrier jet case).
    - The promisee has special knowledge that the promisor does not intend to be bound.
    - When no binding promise was intended, as with doctors making optimistic statements to patients. 139.
      - Policy reasons tie in, in that we do not want to prevent doctors from making these statements to their patients, as they pertain to valuable and desirable information.
- “A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing. An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term.” *Specht v. Netscape Communications Corp.*, 131, 134.
  - “Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestations of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.” 135.
  - A **reasonably prudent offeree** who has actual notice that terms might exist (for example via clickwrap or receipt of a paper contract) has constructive notice of the terms.
- 137: Assent and express limitations on the intent to be bound
  - (a) absent an expressed intent that no contract shall exist, mutual assent between the parties, even though oral or informal, to exchange acts or promises is sufficient to create a binding contract;
  - (b) to avoid the obligation of a binding contract, at least one of the parties must express an intention not to be bound until a writing is executed.
    - To determine whether a party has sufficiently expressed an intention not to be bound in the absence of a formal document, courts look to:
      - (1) whether there has been an express reservation of the right not to be bound in the absence of a writing;
      - (2) whether there has been partial performance of the contract;
      - (3) whether all of the terms of the alleged contract have been agreed upon;
      - and (4) whether the agreement at issue is the type of contract that is usually committed to writing.
  - Parties may contract to negotiate and specify a course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. The parties do not intend to be bound if the negotiations fail to reach ultimate agreement, but breach occurs if one party fails to conform to the course of conduct agreed upon.

**OFFER:** “An act whereby one person confers upon another the power to create contractual relations between them... It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him... It is on this ground that we must exclude invitations to deal or acts of mere preliminary negotiation, and acts *evidently* done in jest or without intent to create legal relations. All these are acts that do not lead others reasonably to believe that they are empowered ‘to close the contract.’” 141 (Corbin).

- § 24: An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.
- Generally an offer is freely revocable. Exceptions:
  - (i) a promise to hold the offer open which is supported by consideration [§ 87],
  - (ii) a “**firm offer**” under Article 2 of the UCC or NY Gen Oblig (above),
    - **UCC § 2-205; N.Y. Gen. Oblig. § 5-1109:** A signed (or reasonably authenticated under the circumstances—for example a handwritten memo on writer’s letterhead without signature) writing by the offeror assuring that an offer will remain open for a period of time is not revocable for want of consideration. If no period of time is indicated, the offer remains open for a reasonable time. For sales of goods, the offer cannot remain open for a time that exceeds three months.
  - (iii) an offer seeking performance rather than a return promise (an offer to enter into a **unilateral contract**) which generates the beginning of the sought performance by the offeree [§ 45], and
  - (iv) **reliance** by the offeree. 181.
    - *Drennan v. Star Paving Co.*, 188: if offer results in justifiable reliance, the offer is irrevocable.
    - **§ 87(2): An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.**
- **ADVERTISEMENTS:**
  - Generally considered an invitation by the seller to the buyer to make an offer to purchase

- If considered an offer, the problem of unexpected demand runs the risk of imposing unlimited liability on the seller
  - *Lefkowitz v. Great Minneapolis Surplus Store*, 148: an advertisement will be considered an offer if “the facts show that some performance was promised in positive terms in return for something requested.” 149.
    - **Advertisement stated:** “Saturday 9am ... 1 Black Lapin Stole ... Beautiful, worth \$139.50 ... \$1.00 ... First Come First Served.”
    - “[W]here the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract.” 149.
      - Must be *definite*. In this case, the stole was “worth \$139.50,” whereas in the other *Lefkowitz* case, the “3 Brand New Fur Coats Worth to \$100.00,” the word “to” made the value of the coats “speculative and uncertain” and therefore not an offer.
    - “[W]hile an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer.” 149.
      - Seems to suggest that if Great Minneapolis Surplus Store had displayed a sign, or had otherwise stated before Lefkowitz tried to purchase the stole, that the “house rule” applied, the offer would have been modified.
        - Seemingly arbitrarily, whoever speaks first determines whether the contract is enforceable or not.
  - § 46: Revocation of General Offer: Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree’s power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available.
- **Auctions:** Generally, it is the bidder who makes the offer, and the auctioneer can then accept or reject the highest bid. 150 (UCC § 2-328 – sale of goods)
  - If an auction is without reserve, the auctioneer is bound to not withdraw after a bid has been made.
  - A bidder may rescind his offer at any time prior to acceptance of the bid.
    - Acceptance generally via announcement by the fall of the hammer or other customary manner.
- **§ 39: COUNTER-OFFERS**
  - (1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.
  - (2) An offeree’s power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

**ACCEPTANCE:** “A voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract ... The offeror has, in the beginning, full power to determine the acts that are to constitute acceptance” 156 (Corbin).

- **Exchange of money does not necessarily equal acceptance.** *ProCD, Inc. v. Zeidenberg*, 227 (“Transactions in which the exchange of money precedes the communication of detailed terms are common. [The court then considers examples such as the purchase of insurance, airline tickets, and electronics.]” 228).
  - “*ProCD* and *Carnival Cruise Lines* exemplify the many commercial transactions in which people pay for products with terms to follow... Gateway shipped with the same sort of accept-or-return offer *ProCD* made to users of its software.” *Hill v. Gateway 2000, Inc.*, 230, 231 (Gateway case).
  - “The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed-in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general ‘send me the product,’ but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers ‘yes,’ for **merchants and consumers alike.**” *Hill v. Gateway 2000, Inc.*, 230, 232.
- “[An offeror], as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. [An offeree] may accept by performing the acts the [offeror] proposes to treat as acceptance.” *ProCD*, 227, 229.
  - “[A]cceptance of an offer differs from acceptance of goods after delivery []; but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.” *ProCD, Inc. v. Zeidenberg*, 227, 230.
- *International Filter Co. v. Conroe Gin, Ice & Light Co.*, 157:
  - A proposal may act as an invitation to make an offer, rather than an offer itself
    - “This proposal [] becomes a contract when accepted by the purchaser and approved by a executive officer of the International Filter Co., at its office in Chicago.”

- Conroe Gin, by “accepting” the proposal made an offer with terms provided by International Filter, namely that International Filter could effect acceptance via approval by one of its executive officers
      - Presumably, Conroe Gin could have changed the method of acceptance, as the offeror is master of its offer
        - For example, could have indicated “Offer is accepted when Conroe Gin’s president receives notice from International Filter’s executive officer.”
- **§ 54: Acceptance by Performance [Unilateral Contract]; Necessity of Notification to Offeror**
  - (1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification. *See Ever-Tite Roofing Corp. v. Green*, 164 (offer “binding upon written acceptance or commencement of performance” binding once performance began despite no notice to offeror).
    - “Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.” § 50.
  - (2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless
    - (a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or
    - (b) the offeror learns of the performance within a reasonable time, or
    - (c) the offer indicates that notification of acceptance is not required.
- **§ 56: Acceptance by Promise [Bilateral Contract]; Necessity of Notification to Offeror**
  - Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably. *See White v. Corlies & Tift*, 162 (acceptance of offer seeking return promise requires steps to see that the promise is “in some reasonable time communicated” to the offeror).
- **§ 32: Invitation of Promise or Performance:** In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as **the offeree chooses**.
- **§ 69: Acceptance by Silence or Exercise of Dominion**
  - (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
    - (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
    - (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
    - (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
  - (2) An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.
- **UCC § 2-606: What Constitutes Acceptance of Goods**
  - (1) Acceptance of goods occurs when the buyer
    - (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
    - (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
    - (c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
  - (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

## **CONSIDERATION: Restatement § § 71, 79, 81**

- **Law is only concerned with outward manifestations. Internal motivations are irrelevant.**
- **§ 71: Requirement of Exchange; Types of Exchange**
  - (1) To constitute consideration, a performance or a return promise must be bargained for.
  - (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
    - Past services cannot constitute consideration because they are not induced by the promise. *Feinberg v. Pfeiffer Co.*, 48.
      - **N.Y. Gen. Oblig. § 5-1105:** A signed writing shall not be denied effect because otherwise valid consideration is past.
  - (3) The performance may consist of

- (a) an act other than a promise, or
  - (b) a forbearance, or
    - Forbearance need not be actually detrimental to constitute consideration. *Hamer v. Sidway*, 35 (forbearance from alcohol and tobacco use, arguably beneficial, still satisfies consideration).
  - (c) the creation, modification, or destruction of a legal relation.
  - The consideration must be **legal**: a promise to do an illegal act makes the contract itself illegal; forbearance must be that which the promisor has a legal right to do (a 17-year-old's promise to not smoke before turning 18 does not constitute consideration).
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.
- **§ 79: Adequacy of Consideration; Mutuality of Obligation**
  - **If the requirement of consideration is met**, there is no additional requirement of
    - (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
    - (b) equivalence in the values exchanged; or
    - (c) "mutuality of obligation."
- **§ 81: Consideration as Motive or Inducing Cause**
  - (1) The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.
  - (2) The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.
- **Illusory promises**
  - Termination clause giving a party the power to terminate at any time at will, without more will usually be unenforceable.
- **GOOD FAITH: Implied to give effect to:**
  - Satisfaction clauses. *Mattei v. Hopper*, 76 (contract dependent on satisfaction with leases).
  - Requirements contracts. *Structural Polymer Group, Ltd. v. Zoltek Corp.*, 81.
  - Exclusive dealings. *Duff-Gordon*, 86 ("reasonable efforts" as opposed to good faith).
  - **UCC § 2-306: Output, Requirements and Exclusive Dealings**
    - (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in **good faith**, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
    - (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use **best efforts** to supply the goods and by the buyer to use **best efforts** to promote their sale.

**STATUTE OF FRAUDS: requires that a contract be in writing to be enforceable, not to exist in the first place. 274.**

- **§ 110: Classes of Contracts Covered**
  - *Inter alia*: suretyship (a contract to answer for the duty of another), marriage, sale of an interest in land, performance > 1 year away
- **UCC § 2-201: Formal Requirements; Statute of Frauds**
  - To be enforceable, a signed writing is required for sales of goods for the price of \$500 or more.
  - Exceptions include if party admits that a contract for sale was made in his pleading, testimony, or court, if the goods are specially manufactured, etc.
- **§ 143: Unenforceable Contract as Evidence:** The Statute of Frauds does not make an unenforceable contract inadmissible in evidence for any purpose other than its enforcement in violation of the statute.
  - A contract not satisfying a statute of frauds may still be used for any purpose other than to enforce the contract, such as in a cause of action for restitution or as a defense to a charge of trespass. 276.
- **Functions, 278:**
  - **Evidentiary:** by setting down the contract's main terms in a document, parties do not have to rely upon the fading memories of the original negotiators when they seek to perform or to evaluate the performance of others. Also cuts down on perjury.
  - **Cautionary:** writings take more time to prepare than oral promises, which allows the parties to an agreement to think further about their transaction and possibly change or abandon it. The formality ensures parties are serious.
  - **Channeling:** signals to the court that the parties intend to be bound and really want their promises to be enforced.
- **EXCEPTIONS:**
  - **Estoppel exception (§ 139):** Applies whether the promise relied upon was to formalize the contract (*Beaver v. Brumlow*, 315; promise to formalize contract to sell mobile home land) or to convey the land itself (*Monarco v. Lo Greco*, 323; promise to keep joint tenancy so land would be conveyed to Christie).



- **Judicial admissions: UCC § 2-201(3)(b):** if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, then it is enforceable up to the quantity of goods admitted. 333.
- Courts are reluctant to read statutes of frauds very broadly. 275.
- Difference between unenforceable and void contracts. 275.

## STANDARD FORM CONTRACTS

- Common law starting point: a party is bound to terms of a contract he signs, whether he read the contract or not. 514.
- **§ 211: Standardized Agreements**
  - (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
  - (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
    - “Courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the **average member of the public who accepts it.**”
  - (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.
    - Terms that are “beyond the range of reasonable expectation” are excluded. Comment f.
    - Doctrine of reasonable expectations: reasonable expectations of the buyer should be honored even though the policy terms do not support them. 513.
  - Comment c: “standard terms may be superseded by **separately negotiated or added terms** (§ 203), they are **construed against the draftsman** (§ 206), and they are **subject to** the overriding obligation of **good faith** (§ 205) and to the power of the court to refuse to enforce an unconscionable contract or term (§ 208). Moreover, various contracts and terms are **against public policy** and unenforceable.”
- **ADHESION CONTRACTS:** a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.
  - **“A contract of adhesion is fully enforceable according to its terms, unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise.”** *Graham v. Scissor-Tail, Inc.*, 508, 509 (finding contract between band and promoter fell within reasonable expectations of Graham, but because it designated an arbitrator who is presumptively biased, it was unconscionable).
    - (1) A contract or provision that does not fall within the reasonable expectations of the adhering party will not be enforced against him.
    - (2) A contract or provision that is unduly oppressive or unconscionable will be denied enforcement.
  - **Contractual waiver of class arbitration (and presumably class action) right is enforceable.** *American Express v. Italian Colors, Supp.*
    - Enforceable if the party has the right to pursue its rights in the contracted forum, regardless if it can do so cost effectively. 42.

## INVALIDATING A CONTRACT

- **DURESS: impermissible pressure exerted by one party over another either during precontractual bargaining or during the attempted renegotiation of an existing deal.**
  - **Any unlawful threats which do in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done constitutes duress. The age, sex, capacity, relation of parties and all attendant circumstances must be considered.** *Rubenstein v. Rubenstein*, 369 (wife’s threats against husband including gang violence and arsenic poisoning).
  - Relief for duress requires at least some resistance.
    - “[D]efendant yielded to the threat without protest, excusing the plaintiff, and making a new arrangement. Not insisting on his rights but relinquishing them, fairly he should be held to the new arrangement.” *Watkins & Son v. Carrig*, 365, 367 (excavation running into solid rock).
  - **Modifications:** A modification under duress will be voided. “To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith.” *Alaska Packers Ass’n v. Domenico*, 359, 361.
  - **Economic Duress/Business Compulsion:** “a mere threat by one party to breach the contract by not delivering the required items [] does not in itself constitute economic duress. It must also appear that the threatened party **could not obtain the goods from another source** of supply and that the **ordinary remedy of an action for breach of contract would not be adequate.**” *Austin Instrument, Inc. v. Loral Corp.*, 375, 376 (finding economic duress when Navy contractor agreed to subcontractor’s terms when it could not attain needed parts from another source in time to meet obligations under the Navy contract).

- **UNDUE INFLUENCE: similar to duress but involves the play against someone’s emotions and psychological vulnerabilities.**
  - Examples: parent/child, doctor/patient, religious advisor/member.
- **CONCEALMENT AND MISREPRESENTATION:**
  - The law tends to recognize rights to a “deliberate search for socially useful information,” [**productive information**] as opposed to “information [that] has been casually acquired” [**redistributive information**]. 388.
  - **Bare nondisclosure** traditionally attached no liability. *Swinton v. Whitinsville Sav. Bank*, 388 (termite case).
  - **Half-truths, however, are actionable:** “if he does speak with reference to a given point of information, voluntarily or at the other’s request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge. Fragmentary information may be as misleading as active misrepresentation, and half-truths may be as actionable as whole lies.” *Kannavos v. Annino*, 391, 392 (residence advertised as investment property with express assertion “being rented to the public for multi-family purposes” against zoning violation).
  - “[W]here there is reliance on fraudulent representations or upon statements and action treated as fraudulent, our cases have not barred plaintiffs from recovery merely because they ‘did not use due diligence when they could readily have ascertained from records’ what the true facts were.” *Kannavos v. Annino*, 391, 393.
    - Some degree of diligence is required of a party who relies on another’s statement. 396.
- **FRAUD AND MISREPRESENTATION:**
  - Waiver of such claims appears to be enforceable per the Borat release.
  - “[W]here the parties are dealing on a contractual basis at arm’s length with no inequities or inherently unfair practices employed, the Courts will in general ‘leave the parties where they find themselves.’ “ *Vokes v. Arthur Murray, Inc.*, 400, 402.
  - As a rule, a party to a contract may avoid the contract even if the other party obtained its assent by an **innocent misrepresentation**.
  - Complainant must show **justifiable reliance**. 396.
  - The traditional rule is that the misrepresentation must be one of fact, and not of opinion. 396.
  - **Puffing** is not actionable. *Speakers of Sport v. ProServ*, 398 (promise to get \$2-4 million in endorsements for Ivan Rodriguez).
    - **Exceptions:**
      - Fiduciary relationship between the parties.
      - Artifice or trick employed by the representor.
      - Parties do not deal at “arm’s length.”
      - Representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented.
      - “A statement of a party having **superior knowledge** may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms.” *Vokes v. Arthur Murray, Inc.*, 400, 402 (dance emporium inducing widow of 51 years to purchase over \$31,000 in dance lessons).
  - **Promissory fraud: the promisor, at the time of making certain representations, lacked any intention to perform them. 397.**
    - Promisee may recover punitive as well as compensatory damages. 396.

**UNCONSCIONABILITY: concerned with prevention of oppression and unfair surprise *not* disturbance of allocation of risks because of superior bargaining power. 523.**

- **Epstein’s view:** “Either there must be proof of some defect in the process of contract formation (be it duress, fraud or undue influence); or there must be, but only within narrow limits, some incompetence of the party against whom the agreement is to be enforced.” 525.
- **Courts generally will not apply the doctrine of unconscionability for sophisticated parties. 536.**
- **Procedural and substantive (need both)**
  - **Procedural unconscionability:** fault or unfairness in the bargaining process. 524.
    - “Where the element of unconscionability is present at the time a contract is made, the contract should not be enforced... In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made.” *Williams v. Walker-Thomas Furniture Co.*, 525, 527, 528 (cross-collateralization of household items could be found unconscionable on remand).
  - **Substantive unconscionability:** fault or unfairness in the bargaining outcome—unfairness of terms. 524.
    - **Price unconscionability:** essentially a case-specific inquiry that usually cannot be reduced to a simple mathematical formula. Other considerations include the resources of the purchaser and the meaningfulness of choice in face of inequality of bargaining power. *Jones v. Star Credit Corp.*, 532, 533 (sale of \$300 refrigerator for over \$1,000).

- **UCC § 2-302: Unconscionable Contract or Clause**
  - (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable **at the time it was made** the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
  - (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
  - **The issue of unconscionability is NOT to be submitted to a jury.**

## PUBLIC POLICY

- **Contracts that call for unlawful conduct are “illegal contracts.”**
  - “A contract which is legal on its face and does not call for unlawful conduct in its performance is not voidable simply because it resulted from an antitrust conspiracy.” *X.L.O. Concrete Corp. v. Rivergate Corp.*, 580, 581 (the “Club” fixing prices).
  - “A sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer’s unlawful intent.” A merchant may safely exhibit an “understood indifference.” 582.
- **Public policy defenses that appeal to specific statutes or regulations were twice as successful as those that appealed to general notions of public policy. 575.**
- Whether a contract violates public policy is a question of law.
- Courts will derive policy from legislation related to the subject of the agreement. *Bovard v. American Horse Enterprises, Inc.*, 577 (finding public policy against the manufacture of drug paraphernalia implicit in statute making possession, use, and transfer of marijuana unlawful).
- **In pari delicto:** in circumstances of equal fault, the position of the defendant is the more compelling. 579.
  - Plaintiff may be able to recover in restitution.
- **RESTRAINT OF COMPETITION**
  - *Hopper v. All Pet Animal Clinic*, 589: veterinary non-compete agreement.
    - “Covenants not to compete are construed against the party seeking to enforce them... The initial burden is on the employer to prove the covenant is reasonable and has a fair relation to, and is necessary for, the business interests for which protection is sought.” 590.
    - A restraint is reasonable only if it
      - (1) is no greater than is required for the protection of the employer,
      - (2) does not impose undue hardship on the employee, and
      - (3) is not injurious to the public. 591.
      - The reasonableness of individual limitations contained in a specific covenant not to compete must be assessed based upon the facts of that proceeding. 591.
  - **“Blue pencil” rule:** courts cross out words to the extent that a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken.
  - **Rule of reasonableness [§ 184]:** the covenant will be enforced only to the extent reasonably necessary to protect the employer’s interest.
- **EXULPATORY CLAUSES**
  - In most states, a clause exculpating one party from liability for its own negligence is ineffective.
  - Courts will rely on “rules of construction” to limit exculpatory clauses. For example, a court may read a clause that exculpates a landlord from injury in hallways and common areas as not including the lawn.
    - Problems with this approach are that drafters can adjust, they maintain the legality of the clauses, and they in fact intentionally misconstrue the meaning of the clauses.
  - “Contracts by which one seeks to relieve himself from the consequences of his own negligence are generally enforced unless (1) it would be against the settled public policy of the State to do so, or (2) there is something in the social relationship of the parties militating against upholding the agreement.” *O’Callaghan v. Waller & Beckwith Realty Co.*, 503, 504 (upholding exculpatory clause of landlord in Illinois).
    - Social relationships that qualify include common carriers, shippers of freight, telegraph companies, etc.
- **UNCLEAN HANDS**
  - **Equitable doctrine:** equitable relief may be denied to parties with “unclean hands.”
  - Courts have discretion and much more flexibility in applying the doctrine of unclean hands than they do the doctrine of public policy.
  - “The misconduct must bear a certain kind of relationship to the subject matter of the suit before a court will consider it.” 580.

## MISTAKE AND IMPRACTICABILITY

- **When properly invoked, the doctrines of mistake, mutual mistake, and impracticability all act as excuses which relieve a party from owing damages**
  - If the contract is **divisible**, the party will be excused only to the part rendered impossible by the mistake or event
  - Courts will allow restitution if performance is excused
    - Work done must be “so far identified with [the contract]” to allow recovery. *Young v. City of Chicopee*, 918, 919:
      - Allowed recovery for labor and materials actually wrought into the bridge prior to its burning
      - Refused recovery for lumber placed on the bridge that also burned, despite the fact that the contract required one-half of the material required for the repairs to be “upon the job” prior to repair (essentially facilitating the method of plaintiff’s loss once the bridge and all of the lumber burned).
  - In *ALCOA*, the court refashioned the pricing term of the contract after finding mistake concerning the capacity of the WPI “to work as they expected it to work” (as a pricing mechanism).

## MISTAKE

- Fact existing at the time of contract
- **REQUIREMENTS:**
  - Mistake as to a basic assumption
  - Material adverse effect
  - Risk not allocated
  - Unconscionability or “the other party had reason to know of the mistake or his fault caused the mistake.”
- **MUTUAL MISTAKE REQUIREMENTS:**
  - Mistake as to a basic assumption
  - Material adverse effect
  - Risk not allocated

## FORCE MAJEURE

- Will be ignored by courts if they are written too broadly.
- Courts will interpret “or any additional events” similarly to those previously listed (*Ejusdem generis*).
- **“Hell or high water” clause:** expressly assume liability despite any unforeseen difficulty

## IMPRACTICABILITY

- **REQUIREMENTS:**
  - Event whose non-occurrence was a basic assumption
  - Event makes performance impracticable or substantially frustrates a party’s principal purpose
  - Party is without fault
  - Language and circumstances do not indicate that performance is not discharged
- **UCC § 2-613-15**
- **Requirements. *Transatlantic Financing Corp. v. United States*, 871, 872 (court implies that closure of Suez canal was a risk allocated to Transatlantic by the contract, denies impracticability):**
  - **(1) an unexpected contingency must have occurred;**
    - Foreseeability, however, still does not necessarily prove its allocation; parties may have recognized the risk, but considered it too insignificant to make it a subject of their bargaining. 878.
    - Cannot be the complaining party’s fault.
  - **(2) the risk of the unexpected occurrence must not have been allocated either by agreement or by custom;**
    - Risk allocation analysis: which party can better:
      - Take precautions against the contingency—which party is in a better position to control the risk or magnitude of the harm?
      - Insure against the contingency—which party can better estimate the cost of the harm?
      - Bear residual risk—which party has more diversified assets?
      - The superior risk-bearer should not be excused; the inferior risk-bearer can be.
  - **(3) occurrence of the contingency must have rendered performance commercially impracticable.**
    - “The issue of impracticability should no doubt be ‘an objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor’s capability of performing as agreed.’ Dealers should not be excused because of less than normal capabilities. But **if both parties are aware of a dealer’s limited capabilities**, no objective determination would be complete without taking into account this fact.” 875n13.
    - Performance is not excused by a cost that is merely onerous: “It must be positively unjust to hold the parties bound.” *The Eugenia*, 877.

- “A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.” *Mineral Park Land Co. v. Howard*, 863, 864 (finding removal of gravel below water level would be prohibitively expensive).
- “Excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.” *Taylor v. Caldwell*, 866, 867 (Music Hall burning down excuses parties from performance).
  - If a duty, by no fault or neglect of the parties, becomes impracticable due to some contingency, and the party owing such duty cannot be said to have assumed the risk of such contingency, that party will be excused from performance by the doctrine of impracticability.
  - Law implies that the non-occurrence of such contingency was a condition on which the contract was made.

## CONTRACT MODIFICATIONS

- *See also* **DURESS, FRAUD/MISREPRESENTATION, and MISTAKE**
- **§ 89: Modification of Executory Contract:** A promise modifying a duty under a contract not fully performed on either side is binding
  - (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
  - (b) to the extent provided by statute; or
  - (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.
- **UCC § 2-209: Modification, Rescission and Waiver**
  - (1) An agreement modifying a contract within this Article needs no consideration to be binding.
  - (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded...
  - (3) The requirements of the statute of frauds section of this Article (§ 2-201) must be satisfied if the contract as modified is within its provisions.
  - (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
  - (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.
  - Comment 2: **modifications** made thereunder **must meet the test of good faith** imposed by this Act.... and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.
- **N.Y. Gen. Oblig. § 5-1103:** A signed writing modifying or discharging an obligation is not invalid because of the absence of consideration.
- **Pre-existing duty rule:** “Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration...” § 73.
  - A modification without consideration is unenforceable. *Alaska Packers’ Ass’n v. Domenico*, 359 (duress).
    - Traditional rationale is that it prevents overreaching and blackmail.
  - **Modifying around the rule:**
    - Rescission and new agreement: “A rescission followed shortly afterwards by a new agreement in regard to the same subject-matter would create the legal obligations provided in the subsequent agreement.” *Schwartzreich v. Bauman-Basch, Inc.*, 363, 364 (parties tore their signatures off the previous agreement).
    - New consideration
- **NO-ORAL-MODIFICATION CLAUSES**
  - Parol evidence rule applies to prior and contemporaneous agreements only. Subsequent agreements are admissible as evidence.
  - The common law rule is that no-oral-modification clauses are generally not effective. 419.
    - Any prior agreement, including the no-oral-modification itself, can be modified by a later agreement.
  - Some legislatures have enacted statutes to give effect to no-oral-modification clauses; for example N.Y. Gen. Oblig. § 15-301(1) (requiring signed writing to change written agreement with no-oral-modification). 420.
    - Courts construe the statute narrowly to avoid its consequences.
    - A party can often overcome the no-oral-modification clause by showing reliance on the oral modification.

## INTERPRETATION:

- **MAXIMS:**
  - **Ejusdem generis:** of the same kind
  - **Expressio unius est exclusio alterius:** the expression of one is the exclusion of another
  - **Noscitur a sociis:** it is known from its associates

- **Contra proferentem:** against its author
- **§ 201: Whose Meaning Prevails**
  - (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
  - (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
    - (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
    - (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
      - Illustrated in *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 440 (what is chicken?).
  - (3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.
- **§ 202: Rules in Aid of Interpretation**
  - (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
  - (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
  - (3) Unless a different intention is manifested,
    - (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
    - (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.
  - (4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
  - (5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.
- **§ 203: Standards of Preference in Interpretation:** In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:
  - (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or no effect;
  - (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;
  - (c) specific terms and exact terms are given greater weight than general language;
  - (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.
- **§ 204: Supplying an Omitted Essential Term:** When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.
  - When a contract's mechanism for determining a term fails, a court, upon finding that the parties intended to be bound even in the event of such failure, may supply a reasonable term. *Oglebay Norton Co. v. Armco, Inc.*, 266, 268 (contract created in 1957, modified four times through 1983, the last modification extending the contract through 2010; court found the parties intended to be bound even in the event of pricing mechanism failure).
- **UCC § 1-303: Course of Performance, Course of Dealing, and Usage of Trade**
  - (e) express terms > course of performance > course of dealing > usage of trade.
  - "Usage of trade is only binding on members of the trade involved **or persons who know or should know about it.** Persons who should be aware of the trade usage doubtless include those who regularly deal with members of the relevant trade, and also members of a second trade that commonly deals with members of a relevant trade (for example, farmers should know something about seed selling." *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 448, 451 (usage of paving trade binding on Shell)).
  - Where it is difficult to determine whether a particular act constitutes course of performance or a waiver, the preference is in favor of waiver.

## BATTLE OF THE FORMS

- **UCC § 2-207: Additional Terms in Acceptance or Confirmation**
  - (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.



- (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
  - Evidence of **consistent additional terms** admissible.
  - If the term or agreement asserted by a party would naturally be included within a provision of the written contract, that term is excluded by the parol evidence rule. *Gianni v. R. Russell & Co.*, 407 (excluding alleged exclusive right to sell soft drinks in exchange for agreeing not to sell tobacco when lease contained tobacco prohibition but no soft drink exclusivity).
- (3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to the determination of a question of interpretation or to application of the parol evidence rule.
  - **Comment b:** “a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.”
  - **New York:** four corners rule
  - **California:** The court must consider the parol evidence to determine if it is precluded by the parol evidence rule. “[Parol evidence] should be excluded only when the fact finder is likely to be misled.” *Masterson v. Sine*, 411, 413 (extrinsic evidence that option meant to remain in family permissible).
- **§ 214: Evidence of Prior or Contemporaneous Agreements and Negotiations:** Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
  - (a) that the writing is or is not an integrated agreement;
  - (b) that the integrated agreement, if any, is completely or partially integrated;
  - (c) the meaning of the writing, whether or not integrated;
  - (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
    - Rectification: *Bollinger v. Central Pennsylvania Quarry Stripping & Construction Co.*, 416: agreement to deposit waste under topsoil mistakenly not reduced to writing but demonstrated by course of performance. Evidence not barred by parol evidence rule.
    - Mistake: facts that are present at the time of contract formation.
    - Waiver of such claims appears to be enforceable per the Borat release.
  - (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.
- **§ 215: Contradiction of Integrated Terms:** Except as stated in § 214, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.
- **§ 216 Consistent Additional Terms**
  - (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
  - (2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
    - (a) agreed to for separate consideration, or
    - (b) such a term as in the circumstances might naturally be omitted from the writing.
- **EVIDENCE OF THE PARTIES’ INTENT:**
  - (1) Judge determines whether the language in the written agreement, with respect to the dispute in question, admits of only one plausible meaning. 420.
    - **NEW YORK: “four corners” rule: belief that the best evidence of intent is the writing**
      - **Exception:** conditions precedent to the agreement. *Hicks v. Bush*, 747.
      - “Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.” *W.W. Associates, Inc. v. Giancontieri*, 428, 429.
      - “A contract is unambiguous if the language it uses has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion. Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.” *Greenfield v. Philles Records, Inc.*, 425, 427 (involving Ronnettes’ musical recordings).
    - **CALIFORNIA: all extrinsic evidence of the parties’ intent must be considered**
      - It is not feasible to determine the meaning the parties gave to the words from the instrument alone; the meaning of a writing can only be found by interpretation in light of all the circumstances. Therefore, extrinsic evidence of the parties’ intent must always be considered. *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 421.
      - “The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.” 422.

- A party must always be given an opportunity to present extrinsic evidence to the court regarding the parties' intent. *Trident Center v. Connecticut General Life Ins. Co.*, 430.
  - (2) If the language is ambiguous, extrinsic evidence as to its meaning will be admitted to inform the court's determination of the meaning of the contract language. 420.
    - **Where both parties' subjective intent coincides with an objective meaning of the term, the plaintiff has the burden of showing his intent was used rather than defendant's.** *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 440, 444.
- **UCC § 2-202: Final Written Expression: Parol or Extrinsic Evidence:** Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
  - (a) by course of performance, course of dealing, or usage of trade (§ 1-303); and
    - This evidence is **admissible even if** the term or document appears **unambiguous**. *Hurst v. W.J. Lake & Co.*, 446 (term—horse meat “minimum 50% protein” means > 49.5%); *Columbia Nitrogen v. Royster*, 456 (document—contract with detailed provisions and merger clause still allows usage of trade).
  - (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
    - If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.
  - **Commercial meaning of terms is prioritized over legal meaning.**
    - “When one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear by proving either that he had actual knowledge of the usage or that the usage is so generally known in the community that his actual individual knowledge of it may be inferred.”

## CONDITIONS

- **§ 224: Condition Defined:** A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.
- **If language is unclear, a court will prefer an interpretation that imposes a duty rather than a condition. 734.**
  - A condition that is not entirely unambiguous can be read by a court as a duty so as to avoid the harshness of forfeiture, as occurred in *Peacock Construction Co. v. Modern Air Conditioning, Inc.*, 735 (“within 30 days after the completion of the work included in this subcontract, written acceptance by the Architect and full payment therefor by the Owner” read as “within 30 days after full payment therefor by the Owner”).
  - **Forfeiture:** the denial of compensation that results if the non-occurrence of a condition causes the obligee to **lose his right to the agreed exchange after he has relied substantially** on the expectation of that exchange, as by preparation or performance.
- **Construction contracts:** “small contractors will not ordinarily assume the risk of the owner's failure to pay the general contractor... There is nothing to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor.” *Peacock Construction v. Modern Air Conditioning*, 735, 736.
  - In **California, Nevada, and New York**, courts invalidated “pay if paid” clauses as against public policy. In other states, legislatures made such clauses unenforceable. However, in most jurisdictions they are enforced. 737.
- Where a condition is within one party's control, that party need not “incur extraordinary expense simply to establish reasonableness or good faith.” *Informed Physician Services v. Blue Cross*, 728 (involving financing condition).
- **SATISFACTION AS A CONDITION**
  - “If the person giving the order stipulates that the portrait when finished must be satisfactory to him or else he will not accept or pay for it, and this is agreed to, he may insist upon his right as given him by the contract.” *Gibson v. Cranage*, 738, 739 (potentially influenced by **seller's** insistence that buyer could reject portrait if not perfectly satisfied).
  - “The **law requires** such a claim of dissatisfaction to be made in **good faith**, rather than in an effort to escape a bad bargain.” *Neumiller Farms, Inc. v. Cornett*, 740 (involving chip manufacturer claiming potatoes wouldn't chip properly after significant decrease in price of potatoes).
  - In **New York**, even third-party satisfaction **requires reasonable** rather than honest **satisfaction**. 741.
- **PREVENTION:** “a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition.” *Kooleraire Service & Installation Corp. v. Board of Education*, 743 (New York City Board of Education instructed comptroller to withhold certification of contract).
  - **Exception:** if the contract authorizes the prevention. 743.
- **WAIVER, ESTOPPEL, AND ELECTION**
  - **WAIVER:** **prior** to the occurrence of a condition, the promisor may waive the condition.



will generally be held to be severable... But if the consideration to be paid is single and entire the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.” *Gill v. Johnstown Lumber Co.*, 767 (finding delivery of logs divisible).

- Where the purpose of a contract is the final step, the preceding steps are not divisible. *Pennsylvania Exchange Bank v. United States*, 768.
- A schedule of payments does not necessarily equal divisibility. *See Kirkland v. Archbold*, 776 (construction contract with payments to be made every ten days; contract found not severable, “The total consideration was to be paid for the total work specified in the contract. The fact that a schedule of payments was set up based on the progress of the work does not change the character of the agreement.” Contractor to recover under quasi-contract for restitution; cannot recover under contract).
- **RESTITUTION: § 36: Restitution to a Party in Default**
  - (1) A performing party whose material breach prevents a recovery on the contract has a claim in restitution against the recipient of performance, as necessary to prevent unjust enrichment.
    - The party in breach may still recover in restitution. *See Britton v. Turner*, 769 (employee in year-long contract voluntarily leaves employ after nine months, allowed recovery for quantum meruit).
  - (3) A claim under this section may be displaced by a valid agreement of the parties establishing their rights and remedies in the event of default.
  - (4) If the claimant’s default involves fraud or other inequitable conduct, restitution may on that account be denied.
    - “He is entitled to recover for his services and materials, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished.
  - “These decisions are based on the theory of unjust enrichment. The action is not founded on the broken contract but on a **quasi-contract to pay for the benefits received**, which cannot be returned, **diminished by the damages sustained** because of the contractor’s breach of his contract.” *Kirkland v. Archbold*, 776, 777 (allowing recovery for contractor in default on quasi-contract quantum meruit basis).
  - Generally, a party cannot, after it breaches, seek restitution for a down payment on real estate.
    - In New York, a seller may absolutely keep a down payment of up to 10%. The Court of Appeals has not expressed a view as to payments in excess of 10%. *Maxton Builders, Inc. v. Lo Galbo*, 778.

## PERFORMANCE

- **GOOD FAITH: immutable (cannot contract around it).**
  - “Has ‘X’ acted in good faith with respect to the performance or enforcement of some right or duty under the terms of the Agreement?” 558.
  - The duty of good faith does not extend to formation (there is no duty to **negotiate** in good faith absent an agreement to do so). However, negotiating fraudulently or in bad faith may trigger other doctrines such as promissory estoppel.
  - “You [cannot] take deliberate advantage of an oversight by your contract partner concerning his rights under the contract.” *Market Street Associates v. Frey*, 564, 566 (plaintiff seeking to take advantage of defendant’s oversight of paragraph in agreement).
    - If plaintiff believed defendant knew or would surely find out about the paragraph, it was not dishonest or opportunistic to fail to flag the paragraph. If, however, he assumed defendant would overlook it, and sought to take advantage of the oversight, he violated the duty of good faith.
  - **§ 205: Duty of Good Faith and Fair Dealing:** Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
  - **UCC § 1-304: Obligation of Good Faith:** Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement.
    - “Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.” UCC § 1-201(b)(20).
  - “Neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion.” *Dalton v. Educational Testing Service*, 550, 551 (SAT case).
  - “No obligation can be implied that would be inconsistent with other terms of the contractual relationship.” 551.
  - The duty of good faith in a licensing contract requires the licensee “to make a good faith effort to see that substantial sales [are made].” *Bloor v. Falstaff Brewing Corp.*, 567, 571 (beer contract with best efforts clause).

## REMEDIES

- **Coase Theorem:** “when transaction costs are absent and legal entitlements well-defined, parties will bargain to an allocatively efficient outcome under any remedy” (which remedy court chooses doesn’t matter). 639.
  - **Transaction costs are ALWAYS present, so the remedy DOES affect the allocation of goods. 639.**

#### **SPECIFIC PERFORMANCE:**

- Considerations. *Walgreen Co. v. Sara Creek Property Co.*, 636, 637 (upholding injunction prohibiting a second pharmacy in the same mall because determination of damages “would have been costly in forensic resources and inescapably inaccurate.”):
  - Benefits: substitute cost of fact determination by court with private negotiation; more accurate damages achieved by private negotiation than government determination.
  - Costs: continuing supervision by the court; may impose costs on third parties; bilateral monopoly and resulting negotiation costs
- Where an injured party would face considerable expense and trouble which cannot be estimated in advance in arranging a new performance, specific performance is proper. *Laclede Gas Co. v. Amoco Oil Co.*, 630, 634 (granting specific performance where it was unclear whether Laclede would be able to find another propane gas supplier, what the cost would be, etc.).
- **UCC § 2-716: Buyer’s Right to Specific Performance or Replevin**
  - (1) Specific performance may be decreed where the goods are unique or in **other proper circumstances**.
    - “Output and requirements contracts involving a **particular or peculiarly available** source or market present the typical commercial specific performance situation.” Comment 2.
    - “Specific performance is inappropriate where damages are recoverable and adequate.” *Klein v. PepsiCo, Inc.*, 621, 624 (denying specific performance for sale of G-II aircraft).
    - “Price increases alone are no reason to order specific performance.” 624.
    - “Equity will not ordinarily enforce, by specific performance, a contract for the sale of chattels, [but] it will do so where **special and peculiar reasons** exist which render it impossible for the injured party to obtain relief by way of damages in an action at law.” *Morris v. Sparrow*, 626, 626 (granting specific performance for a roping horse).
      - “special subjective value based on one party’s sincere affection for and attachment to it, as opposed to a sentiment assumed for the purpose of litigation out of greed, ill will or other [unworthy] sentiment.” *Houseman v. Dare*, 627 (granting specific performance of oral agreement to have possession of dog jointly owned with ex-boyfriend).
  - (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing...
- **Situations in which a court will REFUSE TO GRANT specific performance:**
  - A court will not award specific performance of a contract to provide a personal service. 629.
    - However, a court may grant a negative injunction. In *Lumley v. Wagner*, an opera singer agreed to sing exclusively for Lumley, but when she was persuaded to sing at another theater, a court granted an injunction prohibiting her from doing so. The court could not compel her to sing for Lumley, but it could compel her to abstain from singing in the other theater, which might cause her to fulfill her contract. 629.
    - Negative injunctions are especially common in the world of sports.
  - Courts should not grant specific performance where it would be impractical for the court to carry out such an order. *Northern Delaware Industrial Development Corp. v. E.W. Bliss Co.*, 635 (refusing to grant a decree ordering defendant to hire 300 more workers to maintain schedule with construction).
    - “Frequently ignored when the public interest is involved.” *Laclede Gas Co. v. Amoco Oil Co.*, 630, 632 (granting specific performance despite difficulty of court supervision where performance was provision of propane gas to a community).
  - Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due.
  - “A remedy at law to defeat the grant of specific performance must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.” *Laclede Gas Co. v. Amoco Oil Co.*, 630, 633.
- **Courts will enforce arbitral awards of specific performance even in cases in which they would not have granted it themselves. *Grayson-Robinson Stores, Inc. v. Iris Construction Corp.*, 636.**

**DAMAGES: § 344: Purposes of Remedies:** Judicial remedies under the rule stated in this Restatement serve to protect one or more of the following interests of a promisee:

- (a) his “**EXPECTATION** interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.
  - **(a) loss in value + (b) incidental and consequential loss – (c) cost and loss avoided. § 347.**
    - **Incidental losses:** costs incurred in a reasonable effort, whether successful or not, to avoid loss.



- Courts will look to whether a liquidated damages clause awards reasonable damages at all potential breach points to determine whether it imposes a penalty. *See Lake River Corp. v. Carborundum Co.*, 712 (holding that liquidated damages clause is a penalty because: (1) at whatever point breach occurs, Lake River receives more than its lost profits, (2) if breach occurs at the beginning, the damages would be dramatically more than lost profits).
  - To withstand scrutiny, a liquidated damages clause must account for all manner of contingencies so that it is reasonable across potential breaches.
- Take-or-pay clauses, which are essentially penalty clauses, are upheld on the distinction that the payment is an alternative mode of performance instead of damages for breach. 717.
- **California:** liquidated damages valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made. 717.
- **PROS:** allow parties to control risk; avoid uncertainty, delay, and expense of litigation to determine damages; allow parties to correct what they perceive as inadequate judicial remedies; considerations of judicial economy and freedom of contract.
- **CONS:** excessive damages may signal unfairness in bargaining; may deter efficient breaches; may serve as punishment where contract law is primarily concerned with compensation. 721.
- **Arbitration: a court will enforce liquidated damages approved by arbitration even if the court itself would conclude that the clause was a penalty.**

## LIMITATIONS ON DAMAGES

- **AVOIDABILITY/MITIGATION: § 350: Avoidability as a Limitation on Damages**
  - (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
    - Continued performance after learning of breach is not recoverable. *Rockingham County v. Luten Bridge*, 675 (“plaintiff should have desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge. 676).
      - Under UCC § 2-704(2), a seller of unfinished goods may recover if, in the exercise of reasonable commercial judgment to mitigate loss, he chooses to finish the goods for sale or to sell the unfinished goods for scrap or salvage value, even if his judgment turned out incorrect. 676.
    - Under the UCC, it is assumed that a buyer can cover and a seller can resell; damages equal difference in contract price and cover/resale price.
      - If an injured party fails to cover/resell, damages equal the difference in market price and contract price.
      - A seller who resells at a price higher than contract price may still recover from buyer. A buyer who covers for less than the contract price cannot recover from seller.
    - **Employment contracts:**
      - Other employment must be **comparable, or substantially similar**. Employee’s rejection of employment of a **different or inferior kind** cannot be used to mitigate damages. *Parker v. Twentieth Century-Fox Film Corp.*, 683, 684 (Bloomer Girl musical in L.A. compared with Big Country western in Australia).
      - “An offer of reemployment by an employer will not diminish the employee’s recovery if the offer is not accepted if circumstances are such as to render further association between the parties **offensive or degrading to the employee.**” *Vorhees v. Guyan Machinery Co.*, 686.
  - (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.
    - The promisor must compensate the injured party for costs associated with reasonable mitigation efforts and attempts, whether or not mitigation occurs. 675.
- **FORESEEABILITY: § 351: Unforeseeability and Related Limitations on Damages**
  - (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach **when the contract was made.**
    - “Tacit agreement” test: (generally has not found favor) what liability would the defendant have assumed consciously at contract formation, or what would the plaintiff reasonably suppose it had assumed? “Consider what the parties would have concluded had they considered the subject.” *Kenford Co. v. County of Erie*, 695, 697 (applying the test in denying recovery for appreciation in value of peripheral lands to a stadium that was never built; court determined that the parties, at contract formation, would not have contemplated that the county would be liable for such damages).
  - (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
    - **Incidental damages:** (a) in the ordinary course of events, or
      - UCC: both buyer and seller can recover.

- Courts have assumed that a buyer's inability to cover does not follow from breach in the ordinary course of events. Therefore inability to cover is only foreseeable if the seller was aware of facts making the buyer's inability to cover foreseeable. 692.
- **Consequential damages:** (b) as a result of special circumstances beyond the ordinary course of events, that the party in breach had reason to know.
  - UCC: only buyer can recover.
    - Lost profits are foreseeable. *Delchi Carrier Spa v. Rotorex Corp.*, 692 (awarding lost profits for breach of contract to provide compressors for air conditioners).
  - Contracts can "no consequential damages" clauses
  - ^Two result in litigation over which damages are incidental and which are consequential. 692.
- **Hadley v. Baxendale, 688:** "Damages should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties, **at the time they made the contract**, as the probable result of the breach of it." 689 (mill shaft delivery negligently delayed causing unforeseeable extended shutdown of mill and resultant lost profits).
  - (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.
  - **The test of foreseeability is OBJECTIVE.**
  - **Sentimental value:** generally not compensable. 700.
  - **Emotional distress: § 353: Loss Due to Emotional Disturbance:** Recovery for emotional disturbance will be excluded unless the breach also caused **bodily harm** or the contract or the breach is of such a kind that serious **emotional disturbance was a particularly likely result.**
- **CERTAINTY: § 352: Uncertainty as a Limitation on Damages:** Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.
  - "Where the proof is available, prospective profits may be recovered, when proven, as other damages. But the jury cannot be asked to guess. They are to try the case upon evidence, not upon conjecture." *Isbell v. Anderson Carriage Co.*, 706.
    - *Fera v. Village Plaza, Inc.*, 705: allowed lost profits for new book and bottle shop based essentially on the fact that the issue was extensively litigated at trial.

**PROMISSORY ESTOPPEL:** May be invoked to establish the existence of a contract without consideration (precludes defendant from asserting lack of consideration as a defense to performance of a promise), or to create precontractual liabilities in cases where no contract was formed.

- **Equitable doctrine**
  - Subject to equitable defenses
  - Courts have greater discretion to deny equity
- **Restatement § 90: Promise Reasonably Inducing Action or Forbearance**
  - (1) A **promise** which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires.
    - "In New York, promissory estoppel has three elements: 'a **clear and unambiguous promise**; a reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained by the party asserting the estoppel by reason of the reliance.' [The court goes on to indicate that sometimes the doctrine will only be applied in cases of unconscionable injury or when enforcement is necessary to avoid injustice.]" *Cyberchron Corp. v. Calldata Systems Development, Inc.*, 247, 249 (Grumman pressured Cyberchron to proceed with manufacturing hardware despite no final agreement as to its weight).
  - (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
- In cases of promissory estoppel, courts will generally award **RELIANCE DAMAGES**. *D&G Stout, Inc. v. Bacardi Imports, Inc.*, 106 (Bacardi knew D&G was in negotiations with National and that D&G could not remain open without Bacardi's account when Bacardi made multiple assurances that it would not leave D&G).
- **AS A REPLACEMENT FOR CONSIDERATION:**
  - *Ricketts v. Scothorn*, 92: Note from grandfather foreseeably induces granddaughter to leave gainful employment.
  - *Feinberg v. Pfeiffer Co.*, 97: Promise of pension foreseeably relied upon when retiring.
  - *D&G Stout, Inc. v. Bacardi Imports, Inc.*, 106: Promise to continue at-will relationship relied upon when rejecting buyout offer.
- **IN CASES WHERE NO CONTRACT IS FORMED:**

- Promissory estoppel may be extended to detrimental reliance on **promises that are not sufficiently definite or certain** to constitute an offer or, indeed, a promise.
- *Dixon v. Wells Fargo, N.A.*, 241: “**Agreement to negotiate.**” Wells Fargo indicated that it agreed to consider Dixons for loan modification and to proceed Dixons should stop making payments, which the Dixons promptly did, then Wells Fargo initiated foreclosure proceedings.
  - **However, the court in *Dixon* cited 24 cases from the same year rejecting indefinite and uncertain promises as satisfying the elements of promissory estoppel. 246.**
- *Cyberchron Corp. v. Calldata Systems Development, Inc.*, 247: Agreement could not be reached over two essential terms of the contract. Nonetheless, Cyberchron’s reliance on Grumman’s repeated pressure to maintain schedule with assurances that “we would work out the definitization of the purchase order later” found sufficient to create precontractual liability.

## PRECONTRACTUAL LIABILITY:

- **RESTITUTION:** Often times, services performed will have benefits to both parties. The question in these cases becomes: **which party were the precontractual services designed to benefit?** If the services were designed to benefit plaintiff, with incidental benefits to defendant, there will be no recovery, but if the services were designed to benefit defendant, with incidental benefits to plaintiff, there will be recovery. *See Songbird Jet Ltd. v. Amax, Inc.*, 235 (no recovery for services with incidental benefit to defendant when services designed to benefit plaintiff); *cf. Precision Testing Laboratories, Ltd. v. Kenyon Corp.*, 235 (recovery for services designed to benefit defendant despite incidental benefit to plaintiff).
  - “[S]ervices were entirely voluntary and were designed to and had the effect of protecting [its] own interests,... even if they incidentally benefited [defendant].” *Songbird Jet Ltd. v. Amax, Inc.*, 235.
  - “The court held for Ellis, distinguishing *Songbird* on the ground that there *Songbird*’s ‘services were designed to promote [its] own interests,’ whereas here ‘Ellis’ services were designed to benefit’ Kenyon, and the issuance of a certificate of conformity by the EPA was clearly such a benefit. The fact that Ellis himself gained knowledge from the experience ‘does not detract from the lengthy period of time he and his technicians spent working toward bringing Kenyon’s car to certification level.’” *Precision Testing Laboratories, Ltd. v. Kenyon Corp.*, 235.
- **RELIANCE: See also PROMISSORY ESTOPPEL**
  - “[A] negotiating party may not with impunity misrepresent its intention to come to terms, and liability for **misrepresentation** includes reliance losses.” 235.
    - *Markov v. ABC Transfer & Storage Co.*, 235: lessor of a warehouse fraudulently promised to renew a lease and to negotiate in good faith while it was quietly negotiating for the sale of its premises. The lessor’s motive was to be assured that, should the sale negotiations fail, the lease could be renewed. The court awarded reliance losses.
  - **Promissory estoppel:**
    - *Dixon v. Wells Fargo, N.A.*, 241: applies promissory estoppel to precontractual obligations in an “agreement to negotiate,” an indefinite and uncertain offer.
- **PRELIMINARY BINDING AGREEMENTS/PRELIMINARY BINDING COMMITMENTS**
  - **Tribune I:** a fully **binding preliminary agreement**, which is created when the parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document. Such an agreement is fully binding; it is “preliminary in form—only in the sense that the parties desire a more elaborate formalization of the agreement... [I]t binds both sides to their ultimate contractual objective in recognition that, ‘despite the anticipation of further formalities,’ a contract has been reached...” 252.
    - A contract has already been created, but the parties intend to formalize it with a writing.
  - **Tribune II:** a **binding preliminary commitment** is created when the parties agree on certain major terms, but leave other terms open for further negotiation. The parties agree to negotiate in good faith. If a final contract is not agreed upon, the parties may abandon the transaction as long as they have made a good faith effort to close the deal and have not insisted on conditions that do not conform to the preliminary writing. 252.
    - No contract has been formed. The parties bind themselves to negotiate in good faith for a specified time or a reasonable time.
    - *Channel Home Centers v. Grossman*, 252: A binding preliminary commitment will be enforceable if:
      - (1) both parties manifested an intention to be bound by the agreement;
      - (2) the terms of the agreement are sufficiently definite to be enforced; and
      - (3) there was consideration. 256.
    - “An obligation to negotiate ‘in good faith’ nixes trickery and certain forms of obduracy, ... but it does not require one side in negotiations to reveal its bargaining strategy or its reservation price, to disclose every tidbit that would be of use to the other side, or to refrain from taking advantage of its opportunities.” *PSI Energy v. Exxon Coal USA*, 258.

**HOW TO AVOID NEXT TIME:** recitals, promises/covenants/warranties/grants of discretion, representations, conditions, force majeure, hell or high water, disclaimer, liquidated damages, merger, no oral modification, anti-waiver, no-reliance, fraud waiver, choice-of-law, forum selection, signature