**Contracts Outline**

**Recurring themes:**

* **Intent of parties at time of creation of contract is important**
* **Enforcing those contracts that are value-maximizing. Avoid excessive costs!**
* **Which party was in best position to avoid loss? (Josh principle)**
* **What would parties have negotiated to had they had the opportunity? (If situation arises where there would have been a bargain but one did not occur because transaction costs of bargaining were too high, and the terms would reasonably be the same had they been made ante or post) (Andy principle)**

WHICH PROMISES GET ENFORCED? 1

A. Consideration (pp. 23-29, 41-43, 127-30, 133-36) 1

B. Bargains & Adequacy (pp. 139-47) 3

C. Reliance & Promissory Estoppel (pp. 147-48, 162-184) 3

D. Past Actions as Consideration pp. 191-198 5

CONTRACT FORMATION 6

E. Counteroffer & Battle of the Forms 14

F. Assent in an Electronic Age 15

G. Precontractual Liability 16

H. Indefiniteness 17

Policing the Bargain 20

I. Overreaching & Duress 20

J. Fraud & Misrepresentation 23

K. Unconscionability and Standard Forms 26

TERMS OF THE CONTRACT 28

L. Parol Evidence Rule 28

M. Interpretation 32

N. The UCC: Custom and Trade Usage 33

PERFORMANCE OF THE CONTRACT 34

O. Substantial Performance 34

EXCUSES FOR NONPERFORMANCE 36

P. Mistake 36

Q. Impracticability/Frustration 38

REMEDIES FOR BREACH 40

R. Specific Performance 40

S. Expectation Damages 41

T. Limitations On Damages 43

WHICH PROMISES GET ENFORCED?

# Consideration (pp. 23-29, 41-43, 127-30, 133-36)

* 1. **Contract law**:
     1. Determines when a promise is legally binding
     2. Determines what contracts mean -- & provide series of terms in absence of express statement
     3. Regulates behavior (what people can contract about)
     4. Tells us what to do when one breaks a contract
  2. § 1: **Contract Defined**
     + 1. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
  3. § 2: **Promise; Promisor; Promisee; Beneficiary**
     + 1. (1) A promise is a manifestation of intention 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;
       2. (2) The person manifesting the intention is the promisor;
       3. (3) The person to whom the manifestation is addressed is the promisee;
       4. (4) Where performance will benefit a person other than the promisee, that person is a beneficiary.
  4. § 4: **How A Promise May Be Made**
     + 1. A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.
  5. ***Hamer v. Sidway***
     1. NY Court of Appeals/1891
     2. *Facts*: Uncle promises nephew $5000 to refrain from offensive behavior until 21st birthday, nephew sues executor after uncle’s death, executor says there’s no consideration for the promise
     3. *Find*s in favor of plaintiff: Nephew suffered detriment (gave up legal right)
     4. *Rule*: **Consideration** is necessary for a contract, and is either **benefit** to promisor (uncle) **or detriment** to promisee (nephew).
  6. ***Kirksey v. Kirksey***
     1. Supreme Court of Alabama/1845
     2. *Facts*: Widowed woman is invited by brother-in-law to come to brother-in-law’s property to provide a place to raise children & live
     3. *Rule*: **Bargain** of exchange is necessary for consideration
        1. “A performance or return promise is **bargained for** if it is sought by the promiser in exchange for his promise and is given by the promisee in exchange for that promise.” §71 Restatement
     4. Dissent: Consideration in giving up the land & moving a great distance
  7. **Takeaway** from this section
     1. *Facts* are important
     2. Consideration is not a static doctrine
     3. Develop skepticism about judge’s decisions
     4. Critique court’s reasoning
  8. **Gifts are not enforceable** (*Kirksey*, R2d § 71)
     1. Why?
        1. Only an intention to give, or a promise to give.
        2. Without consideration
        3. Must be executed to be valid
  9. § 71: **Requirement of Exchange; Types of Exchange**
     + 1. (1) To constitute consideration, a performance or a return promise must be bargained for.
       2. (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
       3. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation
       4. (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.
* **Comment c**: Don’t inquire into adequacy; gift not ordinarily consideration
* **Comment d**: return promise can be consideration
* **Comment e**: third party can provide consideration

# Bargains & Adequacy (pp. 139-47)

* 1. ***Batsakis v. Demotsis*** 
     1. Court of Civil Appeals of Texas/1949
     2. *Facts*: War-torn Greece, P lends 500,000 in currency of Greece (=$25) in exchange for letter saying received $2000 and will repay w/8% interest, D says she only received $25 and should not have to repay $2000
     3. *Court decides*: D received exactly what she contracted for: there was a real bargain
     4. *Rule*: In absence of fraud or duress, only presence of bargained-for consideration matters; **courts cannot judge adequacy of consideration**
  2. ***Wolford v. Powers***
     1. Supreme Court of Indiana/1882
     2. *Facts*: Charles Lehman promises to provide for son of plaintiff if son named after him; plaintiff names son as Lehman desires; decides to execute promissory note of $10,000 instead
     3. *Court decides*: Only promiser can really know value of what he desires; no objective way to measure value, and court shouldn’t be speculating on value
     4. *Rule*: Courts shouldn’t try to assess a value of a bargain; they should **accept the adequacy of consideration** as it is
  3. ***Nominality doctrine***(Comment d to Restatement § 79)
     1. **Contract can be unenforceable when consideration is clearly a pretense for a gift**
     2. Example: exchange of $20 today for $2000 tomorrow
     3. Source:
        1. Comment d to Restatement § 79: disparity in value sometimes indicates the exchange was not bargained for but was a mere formality or pretense
  4. § 17: **Requirement of a Bargain**
     + 1. (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
       2. (2) Whether or not there is a bargain a contract may be formed under special *Rule*s applicable to formal contracts or under the *Rule*s stated in §§ 82-94.
  5. §79: **Adequacy of Consideration; Mutuality of Obligation**
     + 1. If the requirement of consideration is met, there is no additional requirement of
          - a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
          - equivalence in the values exchanged; or
          - "mutuality of obligation."

**Comment b**: detriment = legal detriment. Does not have to be economic detriment or actual loss.

**Comment c**: gross inadequacy may be indicator of fraud. § 79 does not justify fraud. **Comment e:** Inadequacy “such as shocks the conscience” is often said to be a “badge of fraud.”

**Comment d**: Nominality doctrine. See above.

# Reliance & Promissory Estoppel (pp. 147-48, 162-184)

* 1. ***Feinberg v. Pfeiffer Co.***
     1. St. Louis Court of Appeals/1959
     2. *Facts*: Feinberg worked for company for most of life, Board of Directors met and wrote memo says she was a good employee and deserved $200/month when she retired and a raise; Feinberg retires at **age 63**, company tries to go back on promise, Feinberg **gets cancer**
     3. *Court decides*: no consideration; Feinberg did not rely on promise; promise did not induce retirement; almost a gift for her service; however injustice can only be avoided by enforcing the promise
     4. *Rule*: **Where a promisor reasonably expects action or forbearance, a promisee undertakes action or forbearance, and injustice can be avoided only by fulfillment of promise, it is OK to enforce even if there is no consideration.**
        1. Use this standard for injustice: is the party who relied on the promise unable now to undertake the action
  2. **Injustice** (note: Gillette does not really like enforcement to avoid injustice)
     1. Does not necessarily require immorality on part of promiser (defendant in Feinberg did nothing wrong)
     2. Preempting bargain on part of promisee? (firm preempted bargain for Feinberg -- reaches very same terms it would have reached had it been structured as a contract)
     3. “table-pounding” injustice
  3. ***Hayes v. Plantations Steel Co.***
     1. RI Supreme Court/1982
     2. *Facts*: Hayes received implied pension promise 1-week before retirement, had given notice of retirement 6 months prior; worked for company 25 years out of total working life of 51 years
     3. *Court decides*: implied promise (“we’ll take care of you”) did not induce Hayes’ retirement; Hayes did not rely on promise; no injustice if promise is not enforced
     4. *Rule*: **Only actions induced by promises will be enforced under promissory estoppel. Promise didn’t shape his thinking.**
  4. § 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 enforcement of the promise. The remedy granted for breach may be limited as justice requires.
       2. A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
          - **Comment b**: promise needs to be one that the promiser could expect to induce reliance. Factors to consider

Reasonableness of the promisee’s reliance

Character in relation to remedy sought

Formality of promise

Extent to which evidentiary/cautionary/deterrent/channeling functions of form are met by the commercial setting or otherwise

Other policies/prevention of unjust enrichment

* 1. Note: Casebook implies promissory estoppel is a type of consideration but Gillette makes clear promissory estoppel is an **alternative to consideration**
  2. **Are all contracts enforceable under promissory estoppel (**doesn’t everyone rely on promises?)
     1. Do not want all promises to be enforced: would not be **value-maximizing** since promisors will be less likely to make promises in the first place
        1. Conversely, without promissory estoppel, it would not be value-maximizing since promisees will be less likely to rely on promises
     2. Court attempts to distinguish when reliance justifies legal enforcement; these can be societal norms, intervening events
     3. **Up to courts to determine when a promise should be enforced**
     4. Look to *Facts* (i.e. differences between *Hayes* and *Feinberg*)
        1. Essential employee vs. non essential employee
        2. Timing of promise
        3. Gender roles/stereotypes (i.e. Feinberg was a woman -- societal norms, harder for her to work?)
        4. Add’l factor of terminal illness

**\*Charitable Subscriptions\***

* 1. ***Salsbury v. Northwestern Bell Telephone Co.***
     1. Iowa Supreme Court/1974
     2. *Facts*: Soliciting subscriptions to start college, NW Bell made a subscription but wrote a letter promising $15,000 over 3-year period, promise recorded on standard pledge card; promisor reneges
     3. *Court decides*: no consideration; no detrimental reliance; charitable subscriptions serve the public good
     4. *Rule*: **A charitable subscription is binding under Restatement § 90 without proof that the promise induced action or forbearance & it is in the public interest.**
     5. “In the public interest” = value-maximizing (good idea to create college; charitable institutions can’t charge amount that will reflect cost & need contributions to survive)
        1. Policy concern
  2. ***Congregation Kadimah Toras-Moshe v. DeLeo***
     1. MA Supreme Court/1989
     2. *Facts*: Donor, while ill, orally promised to make $25,000 donation to congregation; Congregation planned to use this to transform storage room into library named after donor & put this into their budget; oral promise never put into writing; donor died in 1985, didn’t have will
     3. *Court decides*: Would be against public policy to enforce -- reject Section 90 of Restatement; putting money into budget does not indicate reliance
        1. Why against public policy:
           + Incentive effects: some may fear pledging contributions because if there were a change in circumstances, they would still be required to pay; this would discourage people to pledge contributions at all
           + Possibly woman on her deathbed was being coerced -- negative motivating factors
     4. *Rule*: **An oral charitable subscription is not binding under § 90 if it against public policy to enforce. Worried about fraud/duress.**

# Past Actions as Consideration pp. 191-198

1. **Past consideration**: Give something for something you already did -- not bargained for, because event already occurred
2. ***Mills v. Wyman***
3. Mass Supreme Court/1825
4. *Facts*: 25-year-old son became ill and was taken in by strangers; father wrote a note after he died promising to pay medical expenses that occurred
5. *Court decides*: this case is about a promisor who makes a promise to a promisee for a benefit conferred on a 3rd party (in this case his son); only benefit received by promisor is “emotional comfort” of knowing his song was cared for -- his reason for promising what he promised was a “transient feeling of gratitude”; written promise, 4 days following son’s death
6. *Rule*: **Non-enforceable rescue case**:
   * + 1. **Promisor makes a promise to a promisee for a benefit conferred on a 3rd party**
       2. **Benefit to promiser is nonexistent or minimal (i.e. emotional)**
       3. **Solely a moral obligation & no material benefit (maybe if young son)**
7. ***Webb v. McGowin***
8. Court of Appeals of Alabama/1935
9. *Facts*: McGowin redirects a 75-lb block from falling on Webb, sustains serious bodily harm, was crippled for life; McGowin promised to pay Webb $15 every two years; paid for a long time before he died, then executor tried to stop payments
10. *Court decides*: Promiser made a promise upon the promisee after promisee conferred a benefit upon promisor; benefit received very material; oral promise; 28 days after McGowin’s accident
11. *Rule*:**Enforceable rescue case**:
12. **Situation where there would have been a bargain but one did not occur because transaction costs of bargaining were too high, and the terms would reasonably be the same had they been made ante or post**
    1. **Moral obligation & material benefit**
    2. **Caring for, improving or rescuing property of person is material benefit**

**\*\* Desnee v. Wideman (screenplay re: essay)**

1. § 86: **Promise for a Benefit Received**
2. (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
3. (2) A promise is not binding under Subsection (1)
4. (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
5. (b) to the extent that its value is disproportionate to the benefit.
6. **Takeaway**:
7. Consider *Facts* (differences between Webb and Mills)
8. Time since promise made
9. Circumstances
10. Type of promise
11. Actual performance (McGowin performs until he dies)
12. Apply Andy principle:
13. Would same bargain have occurred ex ante if parties had the chance to actually bargain?
    * + - 1. Mills: maybe not
          2. McGowin: probably yes
14. Restatement § 86
15. Enforceable: Is enforcement necessary to prevent injustice?
16. Not enforceable: (a) Did promisee confer the benefit as a gift? (b) Is value disproportionate to the benefit?

CONTRACT FORMATION

1. Offer pp. 201-205, 13-22, 205-15

Main Q: What’s an offer and what’s an invitation to offer?

1. § 24: **Offer Defined**
   * 1. 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.
        1. Comment a: can propose exchange in goods, services, promises, etc.
        2. Comment b: contingent gift = no contract. Need to determine if paying for something (i.e. $100 to go to college) or contingent gift.
2. § 18: **Manifestation of Mutual Assent**
   * 1. Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.
        1. Comment c: Law takes joker at his word if other party is deceived.
3. § 19: **Conduct as Manifestation of Assent**
   * 1. The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
     2. The conduct of a party is not effective as a manifestation of assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
     3. The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.
        1. Comment c: unintended appearance of assent not enough….must have a conscious will to engage in that conduct.
4. § 20: **Effect of Misunderstanding**
   * 1. (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
        1. (a) neither party knows or has reason to know the meaning attached by the other; or
        2. (b) each party knows or each party has reason to know the meaning attached by the other.
     2. (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
        1. (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
        2. (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.
5. § 22: **Mode of Assent; Offer and Acceptance**
   * 1. (1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties. (*No contract is formed if neither party is at fault or if both parties are equally at fault*)
     2. (2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.
        1. Ex. Peerless: 2 ships named Peerless. Neither party knew of the other ship. No K.
6. ***Lucy v. Zehmer***
   * 1. S. Ct. of Appeals/Virginia
     2. *Facts*: Lucy and Zehmer talked about Zehmer selling his farm at a party. Signed paper agreeing on sale. Zehmer claimed it was a joke. Question is whether parties mutually assented.
     3. *Court decides*: Indications of seriousness: reasonable price, appearance, written, 40 minutes discussion, changed “I” to “we”, wife signed, wait 4 days to say it’s a joke, Lucy took seriously. Indications of joke: on back of napkin, drinking, bar, Zehmer previously rejected offers to sell. Focus on understanding of promisee, not intent of promiser. Not actual intent, but manifestation of intent.
     4. *Rule*: **Outward manifestation of intent to form a contract is sufficient if it convinces promisee that promisor is serious.** 
        1. Can be: writing, negotiation for long period of time
        2. Would a reasonable person view the promisor’s manifestation of intent as offer to enter into binding contract?
        3. No unilateral renege/retraction
7. ***Leonard v. PepsiCo***: Offer of Harrier jet for 7,000,000 “Pepsi points.” **Not binding offer when no reasonable person would believe it was a serious offer to enter a contract.**
8. ***Dyno v*. *McWane***
   * 1. 6th Cir./1999
     2. *Facts*: Dyno (contractor) prepared bid, McWane provided quote as subcontractor.
        1. 11/8: McWane faxes price quotation w/”estimate” at top
        2. 11/13: Prices and notes
        3. 11/22: FedEx package sent, Dyno says order materials
        4. 11/24: Dyno receives package
        5. 12/1: Couldn’t find package, faxes new papers over, missing

Dyno claims offer made on 11/13. Mcwane says offer made 11/22. When contract was formed depends on McWane’s liability for broken pipes

* + 1. *Court decides*: Reasonable person would see notes and “please call” and assume invitation for negotiation. Looking at papers at price quotations aka price negotiation. Invitation to deal. Elements that make it an invitation rather than offer: specificity re: terms of payment, delivery time, place of delivery. Intent to offer must be shown.
    2. *Rule*: **A price quotation that lacks elements which makes it clear that it is not intended to be an offer (see above) is considered an invitation to make an offer rather than the offer itself and thus does not form a K.** 
       1. More detailed = the more it looks like a binding offer and less like negotiations
       2. Did parties intend offer/acceptance?
       3. Presumption of offer vs. presumption of invitation to offer -- encourage promisors to make serious offers

1. ***Lefkowitz v. Great Minneapolis Surplus Store***
   * 1. Minn./1957
     2. *Facts*: 2 advertisements -- First: for 3 fur coats “worth to $100” Second: 2 scarves for $89.50. Both are first come, first served. No demand > supply problem, and no further negotiation invited. Second ad has nothing open for interpretation. Store refused to sell, saying they were for women only.
     3. *Court decides*: Offer because invites performance (being first in line on Saturday). Decides it was a binding offer that Lefkowitz accepted.
     4. *Rule*: **Advertisement is binding offer when not open for negotiation and invites performance by offeree. Clear, definite & explicit.**
        1. **Note: Ads generally treated as invitations to deal.**
        2. Consider possibility of commercial misconduct (Lefkowitz buying for $1 and selling to someone else for $20)
2. Acceptancepp. 215-245

**Mechanics of Accepting an Offer**

1. § 50: **Acceptance of Offer Defined; Acceptance By Performance; Acceptance By Promise**
   * 1. (1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
     2. (2) 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.
     3. (3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.
        + Comment a: Offeree must comply w/terms set by offeror re: acceptance
        + Comment b: performance can acceptance; preparation for performance is not
        + Comment c: return promise can be acceptance; most modes ok
2. § 52: **Who May Accept An Offer**
   * 1. An offer can be accepted only by a person whom it invites to furnish the consideration.
3. § 30: **Form of Acceptance Invited**
   * 1. (1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.
     2. (2) **Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.**
        + Comment a: “offeror is master of his offer” -- entitled to insist on whatever kind of acceptance he wants.
        + Comment b: offeror can leave certain aspects of offer to be filled in upon acceptance (i.e. quantity). Must not fail for indefiniteness.
4. § 63: **Time When Acceptance Takes Effect** **(Mailbox Rule)**
   * 1. Unless the offer provides otherwise,
        + (a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; but
        + (b) an acceptance under an option contract is not operative until received by the offeror.
          - Comment a: Mailbox rule.
          - Comment b: Can’t revoke acceptance after mailing. Practically, probably can b/c offeror won’t know.
          - Comment e: Acceptance final when it “leaves offeree’s possession”
5. § 66: **Acceptance Must Be Properly Dispatched**

An acceptance sent by mail or otherwise from a distance is not operative when dispatched, unless it is properly addressed and such other precautions taken as are ordinarily observed to insure safe transmission of similar messages.

* + - * Comment c: “other precautions” = postal regulations usually controlling (offeree may have to take add’l precautions if something interrupts postal service, like war.)

1. **UCC § 2-206**:
   * 1. (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. (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.
        + Comment 1: Offeror must make unacceptable forms of acceptance “quite clear”
        + Comment 3: performance as acceptance must be followed w/notice “within a reasonable time by notice to the offeror”

**Acceptance by Performance (unilateral contract)**

1. § 54: **Acceptance By Performance; Necessity of Notification to Offeror**
   * 1. (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.
     2. (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.

* Comment b: only applies to acceptance by performance (i.e. do not have to notify offerer of mailing acceptance)
* Comment c: notification only necessary when offeror has no means to determine whether performance took place.

1. § 51: **Effect of Part Performance Without Knowledge of Offer**
   * 1. Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.
        + Ex. Police officer arrests man wanted (reward offered). Finds out about reward. Can deliver man into custody and accept award.
        + Comment b: Offeree who knows he’s not the intended offeree cannot take advantage of offeror’s mistake or lack of knowledge.
2. ***Ever-tite v. Green***
   * 1. Louisiana/1955
     2. *Facts*: Ever-tite (offeree & Pl.) drafted contract for re-roofing the Green’s residence which was contingent upon credit check of Greens. Required written acceptance (Greens were offeror & def.). Ever-Tite’s sale rep signed, who wasn’t authorized to accept on behalf. Loaded truck w/supplies, drove over to def’s house, found other workers doing re-roofing. Greens revoked based on Ever-Tite’s non-acceptance.
     3. *Court decides*: Court thinks that acceptance was commencing performance, loading truck with materials. Looks to balancing of interests -- what Ever-Tite did vs. what Greens could have done?
        + **“Josh Principle” -- between two parties, Greens were in better position to avoid this cost, Ever-Tite had no reason to call Greens since they thought there was a contract**
        + Legal principle: acceptance by virtue of beginning performance
     4. *Rule*: **Once performance is started, parties is obligated to complete the contract.**
        + Try to determine unrecoverable costs.
3. § 53: **Acceptance By Performance**; **Manifestation of Intention Not To Accept**
   * 1. (1) An offer can be accepted by the rendering of a performance **only if** the offer invites such an acceptance.
     2. (2) Except as stated in § 69, the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance.
     3. (3) Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.

* Comment a: Acceptance by performance doesn’t have to be explicitly invited, but Q is, is acceptance by performance reasonable under the circumstances?
* Comment b: re: (2), offeree not bound if performs, then decides not to accept but runs the risk of having his behavior bind him by manifestation of assent (§40). Reasonable diligence to notify offeror of intention not to accept is fine.
* Comment c: Acceptance is only acceptance if someone knows about offer. (e.g. someone gets interrogated by police, voluntarily gives up name of criminal, not entitled to reward for info)

1. § 62: **Effect of Performance By Offeree Where Offer Invites Either Performance or Promise**
   * + (1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.
     + (2) Such an acceptance operates as a promise to render complete performance.

* Comment b: Part performance renders offer irrevocable.

**Acceptance by Promise (bilateral contract)**

1. ***Ciaramella v. Reader’s Digest***
   * 1. 2nd Cir./1997
     2. *Facts*: P sued D in district court for employment discrimination (chronic depression) & ERISA claim/severance benefits. Pre-discovery, parties entered into settlement agreement, P did not sign. D claimed it was binding via oral promise.
     3. *Court decides*: Why would writing be important? (can look back on if later disputed; verify agreement to a third party; challenges with oral negotiations vs. oral contract). Parties free to bind themselves orally, but only if they intended to be bound. 4-part test to whether an oral promise is enforceable. Here, oral agreement is not enforceable b/c Ciaramella’s “We have a deal” was not acceptance.
     4. *Rule*: **Consider when trying to determining if oral contracts are binding over written contracts**:
        + **Is there an express reservation of the right not to be bound in absence of a signed agreement? (i.e. merger clause)**
        + **Partial performance of the contract?**
        + **Are all terms of the contract agreed upon?**
        + **Is this agreement the type of contract usually put in writing?**
          - Leval test: Did parties intend to be bound? What are: (1) the intentions of the parties at the time of contract and (2) manifestations to one another by which the understanding was reached
          - Note: Settlement offers need not always be in writing to be enforced (judge handling settlement conference -- assent manifested). *Reich v. Best Built Homes, Inc.*
2. § 56: **Acceptance By Promise; 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.

* Acceptance by mail can be effective on dispatch even if it is not received by offeror.

**When Offeree Can No Longer Accept**

1. § 36: **Methods of Termination of the Power of Acceptance**
   * 1. (1) An offeree's power of acceptance may be terminated by
        + rejection or counter-offer by the offeree
        + lapse of time
        + revocation by the offeror or
        + death or incapacity of the offeror or offeree.
     2. (2) In addition, an offeree's power of acceptance is terminated by the nonoccurrence of any condition of acceptance under the terms of the offer.

* Comment b: condition can be implied or express.

1. § 40: **Time** **When Rejection or Counter-Offer Terminates the Power of Acceptance**

* When offeree rejects or counter-offers by mail, has power of acceptance until received by the offeror,
* but later acceptance after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.

**Other Methods Of Acceptance**

1. § 55: **Acceptance of Non-Promissory Offers**

Acceptance by promise may create a contract in which the offeror's performance is completed when the offeree's promise is made.

* Offeror performs in some way. Offeree promises something in relation to that performance. Contract. Ex. A applies to B, an insurance company. Gives first month’s premium. B’s notification that application has gone through is acceptance.

1. § 69: **Acceptance By Silence**
   * 1. (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
        + 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.
        + 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.
        + 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. (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.
        + - Comment a: This is exceptional!
          - Comment a: Either offeree silently takes offered benefits. Or, prior dealings between parties such that silence is acceptable.
          - Comment b: Can’t use someone’s services knowing that you’ll be required to pay, then not pay. (Ex.: violin lessons not charged upfront)
          - Comment e: Re: property, offeree is usually required to hold property if they don’t want it, or return it. Exercise of dominion w/o intent to accept does not accept.

**Revocation of Offer or Acceptance**

1. ***Pavel Enterprises v. A.S. Johnson Co***
2. Maryland/1996
3. *Facts*: July 27: Info (written scope of work) given by Johnson to PEI
   * + 1. Aug. 5th NIH invited bids, Johnson verbally submitted quote to PEI
       2. Mid-August, NIH notified PEI that its bid would be accepted (after low bidder was disqualified)
       3. Aug. 26th, meeting between president of PEI and Johnson’s chief estimator
       4. After meeting: PEI sent fax to many subcontractors asking for further info, telling sub contractors to review their bids
       5. Aug 30th, PEI told NIH that Johnson was to be subcontractor
       6. Sept. 1st, PEI accepted Johnson’s sub-bid, Johnson called and withdrew orally
       7. Sept. 2nd Johnson withdrew sub-bid by letter
       8. Sept. 28th NIH awarded contract to PEI
4. *Court decides*: Johnson tried to revoke their offer. Rule is offeror can revoke an offer before received acceptance. Different principles re: reliance on subcontractors
   * + 1. *Drennan*: bids are irrevocable -- generals rely on sub’s bids. (Problems with this? general contractors will bid shop, locks in the subcontractor, but does not lock in general, giving general option to act strategically) (default rule)
       2. Hand: sub is bound when accepted by general and used in contract… partial performance, sub is bound as soon as this happens
5. *Rule*: **Promissory Estoppel (detrimental reliance) may make offer irrevocable if reliance is substantial and reasonable, foreseeable.**
   * + 1. Note: not in this case because after general’s bid rejected, sub had to reason to inform PEI of their error.
6. § 42: **Revocation** By Communication From Offeror Received by Offeree

* An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.
* Comment a: most offers revocable.
* Comment c: Cannot revoke after acceptance

1. § 25: **Option Contracts**
   * 1. An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.
        1. Comment c: traditional common-law way to make an offer irrevocable is to give consideration or affix a seal. (Ex. Insurance: rights to file claim when certain conditions are met; employee stock: can buy company’s stock at any time at fixed price)
2. § 45: **Option Contract Created By Part Performance or Tender**
   * 1. (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
     2. (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
        1. Comment f: beginning preparations, though they may seem essential, do not constitute acceptance. May constitute justifiable reliance under promissory estoppel.
3. § 87: **Option Contract** 
   * 1. (1) An offer is binding as an option contract if it
        1. (a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
        2. (b) is made irrevocable by statute.
     2. (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.
        1. Comment b: offers made in consideration of $1 are often irrevocable. But gross disproportion between parties is not consideration. But may invoke short-term irrevocability.
4. **UCC § 2-205**:
   * 1. An offer by a merchant to buy or sell goods 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 or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
        1. Comment 1: no consideration needed -- just express statement of irrevocability & signatures
        2. Comment 2: “confirming” the offer is not revocable can be just about anything
        3. Comment 3: Current “firm” offers, not long term options. 3-months time limit.
        4. Comment 4: inadvertent signing is protected.

# Counteroffer & Battle of the Forms

1. **Old Common Law View**
   * 1. Mirror Image Rule:
        1. Offer must be accepted exactly as-is. Changing terms of acceptance is a counteroffer. Generally not followed in its strictest form, but courts still hold that a counteroffer rejects an initial offer, and such rejections extinguish the initial offer.
        2. Expressed in Restatement 38: Parties can agree to hold an offer open despite disagreeing on certain terms. One way to keep offer in place b/c disagreement over terms would result in counteroffer/rejection.
     2. Last Shot Doctrine
        1. Parties bound to last offer (or counteroffer) given by one party before commencement of performance. (Wouldn’t this encourage people to change terms, then begin performance to their benefit?)
2. **UCC § 2-207**:
   * 1. 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.] 🡨 Exception to (1)
     2. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
        1. (a) the offer expressly limits acceptance to the terms of the offer;
        2. (b) they materially alter it; or
        3. (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
           1. **Only says add’l terms, not different**
     3. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.
        1. Comment 1: Two situations for 2-207: i) written confirmation of oral modification to original writing and ii) acceptance adds minor modifications or forms have conflicting clauses.
        2. Comment 2: All add’l matters fall under subsection (2)
        3. Comment 4: test for add’l vs. different: do terms materially alter the original bargain? Materially alter: unreasonable surprise or hardship ex. warranty, reserve of power to cancel, limiting time to bring complaint.
        4. Comment 6: no answer -- assume accept. Conflicting terms -- assume object. Contract continues w/o conflicting terms.
3. ***Ionics v. Elmwood*** (Battle of the forms) -- Applying UCC 2-207
   * 1. 1st Cir./1997
     2. *Facts*: Ionics purchased thermostats from Elmwood; each time, it sent a purchase order containing language about remedies. Ionics replied with an Acknowledgement form containing an indemnification clause. Neither party disputes that there was a contract, but they dispute Elmwood’s liability. Ionics order and Elmwood’s Acknowledgment contained terms that are diametrically opposed to each other. Which terms rule?
     3. *Court decides*: Under common law? Counteroffer (Elmwood) is “last shot.” Under UCC 2-207(1)? No. Ionics expressly states assent is conditional on their terms. UCC 2-207(3) rules. Under UCC 2-207(2), additional terms = widget vs. blue widget are allowed in; different terms = red widget vs. blue widget not allowed in. No written contract re: liability since conflicting terms cancel each other out. Ionics gets its terms, not because there was agreement but because they were the legal default terms (state provisions).
     4. *Rule*: **If parties exchanging forms seem to be accepting an offer, different or additional terms do not indicate no contract. If two terms in two forms are contradictory, each party is assumed to object to the other party’s conflicting clause. “Knockout rule”**
4. § 39: **Counter-Offers**
5. 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.
6. 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.

# Assent in an Electronic Age

1. ***Hills v. Gateway***
2. 7th Cir./1997
3. *Facts*: Hills order Gateway computer via telephone, terms of purchase included with computer in the box that is shipped. Terms include an arbitration clause.
4. *Court Decides*: Case is really about when the contract was formed. Hills say contract formed when order was placed over the phone, terms in box are add’l. Judge’s position: not battle of the forms b/c only one “form.” So UCC 2-207 doesn’t apply. Thinks Gateway gave invitation to offer, purchaser become offeror, purchaser controls terms of contract. Gateway argues contract formed when goods arrived, after 30-day examination period. Hills waited too long. Practical considerations: vendors would have to tell consumers all terms over the phone.
5. *Rule*: **Burden on consumer to look for terms, burden on company to provide terms that can be reasonably noticed. Contract formed if parties assent -- assume that parties assent as long as company provides a reasonable communication of terms.**

Internet cases: Terms and Conditions

1. ***Jerez v. JD Closeouts***
   * 1. NY state court/2012
     2. *Facts:* Forum selection clause on website of defendant. Plaintiff bought goods, dissatisfied, wants to litigate. Is it part of contract?
     3. *Court Decides:* Mere existence of license terms on submerged screen not sufficient to place consumers on inquiry or constructive notice of those terms. “Static” terms -- consumer doesn’t have to do anything, they’re just on the website, submerged in a random section.
     4. *Rule:* **Consumer has to be given reasonable opportunity to read and be aware of terms and conditions for there to be manifestation of assent. Have to provide purchaser with notice of terms.**
2. ***Fteja v. Facebook***
   * 1. S.D.N.Y./2012
     2. *Facts*: Fteja’s facebook page removed from site. Alleges discrimination and sues -- forum selection clause in terms and conditions. When you sign up to get Facebook, have to click through and “accept” T&C. Users click to assent.
     3. *Court Decides*: Clickwrap licenses: users presented w/terms, click to assent. Browsewrap: T&C available on website via hyperlink, user has no interaction w/terms. Here: users click to assent, but terms are available through hyperlink. Fteja too internet-savvy to argue he didn’t understand how to click “terms of use” to discover rights. Assent legit.
     4. *Rule*: See above.
3. Views of current phenomenon of users assenting to terms they never read.
   * 1. **Andy principle**: Terms provided by seller reflected **a hypothetical bargain between seller and consumer**. If we don’t have an actual bargain, but pretty good understanding of what the actual bargain would have been and the transaction reflects that, then maybe it is ok to enforce the agreement
     2. **Market Theory**: In mass contracts, reading the terms is fictional, so **vendor is providing the same terms to the whole market** -- as long as those terms reflect what consumers at large would have agreed to
     3. **Consumers take advantage of ignorant consumers** (probably less likely b/c of competition -- competitors can point to bad terms of each others’ agreements -- reputation matters)

# Precontractual Liability

1. ***Hoffman v. Red Owl Stores, Inc.***
   * 1. Wisconsin/1965
     2. *Facts*: Hoffman runs a bakery, wants to open franchise of Red Owl Stores. Red Owl tells Hoffman to sell bakery, discussions continue for years -- Hoffman jumps through many hoops at Red Owl’s request, and keep increasing price of opening franchise. Hoffman never gets Red Owl stores.
     3. *Court decides*: No contractual offer b/c just negotiations? Lots of things remained open during these negotiations. Action or forbearance as a result of these negotiations must be substantial.
     4. *Rule*: **Re: option contracts, offeree can use promissory estoppel to bind offeror to honor commitment only if offeree can show that despite not giving consideration for promise of irrevocability, she was justified in relying on it.**
        1. Note: courts generally are wary of imposing liability for promises made in the period of negotiation
2. ***Dixon v. Wells Fargo***
   * 1. D. Mass/2011
     2. *Facts*: Dixons orally agreed w/Wells Fargo to take steps necessary to enter into loan modification program. Steps were to default & give WF certain financial info. Received notice that WF proceeding w/foreclosure. P wants WF to perform on promise to negotiate re: loan modification.
     3. *Court decides*: Dixons only seek specific performance, not loan modification, but just agreement to negotiate. WF “strung along” Dixons --this type of inquiry should be a “balancing act” weighing intent of parties and ability to step away unscathed if unable to reach a deal. Can Dixons do this? Prob. not
     4. *Rule*: **See Hoffman. An important consideration is what the parties are asking for. Takeway: Fact bound situations, when promissory estoppel is appropriate**
        1. When we see one person jumping through a bunch of hoops for another person, we tend to think reliance.
3. § **87**: **Option Contract**
   * 1. (1) An offer is binding as an option contract if it

(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) is made irrevocable by statute.

* + 1. (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**.
       1. Comment c: “circumstances may be such that the **offeree must undergo substantial expense, or undertake substantial commitments, or forego alternatives**, in order to put himself in a position to accept by either promise or performance.” Reliance must be foreseeable. Various factors influence the remedy:
          1. formality of offer
          2. commercial or social context
          3. extent to which the offeree’s reliance was understood to be at his own risk
          4. relative competence and the bargaining position of the parties
          5. degree of fault on the part of the offeror
          6. ease and certainty of proof of particular items of damage
          7. likelihood that unprovable damages have been suffered

1. §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 enforcement of the promise. The remedy granted for breach may be limited as justice requires.
       2. A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
          - **Comment b**: promise needs to be one that the promiser could expect to induce reliance. Factors to consider

Reasonableness of the promisee’s reliance

Character in relation to remedy sought

Formality of promise

Extent to which evidentiary/cautionary/deterrent/channeling functions of form are met by the commercial setting or otherwise

Other policies/prevention of unjust enrichment

# Indefiniteness

1. ***Varney v. Ditmars***
   * 1. Ct. Appeals NY/1916
     2. *Facts*: P applied for employment w/D, hired for $35/week. D says, I’ll give you $40/week & fair share of profits at end of year if P continues working & finishes certain projects. P stays home election day, falls ill, D fires him and refuses to discuss.
     3. *Court Decides*: Focuses on “fair share.” What does this mean? Can’t measure “fair value”, no market substitute. Remedy for breach would rely on quantum meruit, or lost profits, but how could you determine what these lost profits were?
     4. *Rule*: **Contracts must have some degree of certainty. Full intention of parties must be ascertained to a reasonable degree of certainty .** “Fair share” of service can’t be ascertained. Might be able to prove by pointing to past customs and some percentage.
2. ***D.R. Curtis Co v. Mathews***
   * 1. Ct. Appeals Idaho/1982
     2. *Facts*: Curtis contacted Mathews, they orally agreed that Mathews would sell 30,000 bushels of wheat for $3.58/bushel. Express price agreed upon but actual price depends on analysis of protein basis and scale at time of delivery. Both signed written agreement. No reference to protein basis. Sept -- Curtis informed Mathews of new price. Nov -- Curtis goes to Mathews’ farm to test wheat, found Mathews sold to different firm.
     3. *Court Decides***:** Parties to a contract for a sale of goods may make a binding contract even if price is not specified, as long as they intended to enter into binding contract -- UCC 2-305(3). Here, element of price was purposely left open to be established later. Contract not ambiguous or void for indefiniteness -- parties intended to establish later, and are still bound to perform -- UCC 2-305(1)(b).
     4. *Rule*: **Contracts not void for indefiniteness b/c price for goods was left open-- goods, governed by UCC, can find market substitute if price is left ambiguous.**
        1. **Andy principle: can determine what parties would have bargained for had they been able to.**
3. ***Joseph Martin Jr. Deli v. Schumacher***
   * 1. N.Y./1981
     2. *Facts*: Renewal rent left indefinite. Landlord raises rent from $650 to $900.
     3. *Court Decides*: This was a mere agreement to agree, w/material term left open for negotiations, and is unenforceable.
     4. *Rule*: Have to determine how indefinite contracts are made, in good faith or bad faith -- figure out intent of the parties & what to do w/contract:
        1. Is there a good reason why the parties might enter into the contract?
        2. Might wonder whether one party was engaged in attempting to exploit another -- the more we think this, the more we might reject the contract
        3. Institutional competence, do we think within the terms of the contract it lies w/in the power of the court to create a remedy?
4. **UCC § 2-204:**
   * 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.
        1. “The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.”
5. **§ 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.
     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 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.
        1. Comment a: actions might show that parties meant to conclude a binding agreement. Indefinite agreements can be given precision by trade meanings
        2. Comment b: Fundamental policy -- contracts made by parties, not courts
        3. Comment c: the more terms the parties leaves open, the less likely they meant to form a binding contract
        4. Comment d: Valid contracts can be made when time of performance is left uncertain
        5. Comment e: Indefinite price ok, except if one party explicitly did not want to be bound unless price set
        6. Comment f: Promises can be indefinite in other aspects than time and price -- but again, the more uncertainty, the stronger the inference that parties did not intend to be bound.
6. **UCC § 2-305:**
   * 1. Parties if they so intend can conclude a contract for sale **even though the price is not settled**. In such a case the price is a reasonable price at the time for delivery if
        1. (a) nothing is said as to price; or
        2. (b) the price is left to be agreed by the parties and they fail to agree; or
        3. (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
     2. A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
     3. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
     4. Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.
        1. Comment 1: applies to contracts w/price term left open but nevertheless the parties intended to be bound. Defeats not enforcing “agreements to agree” and on the grounds of indefiniteness.
        2. Comment 2: Whether both parties intend is usually a question for jury
        3. Comment 3: Need good faith in fixing the price! “observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant”
        4. Comment 4: price can depend on particular expert
        5. Comment 5: wrongful interference w/price machinery may be treated as either (1) cancellation or (2) failure to take cooperative action, thus giving other party leeway in fixing reasonable price
        6. Comment 6: everything conditioned by requirement of good faith
7. ***Eastern Air Lines v. Gulf Oil Corp.***
   * 1. S.D. Florida/1975
     2. *Facts*: Indefinite term is not price, but how much oil Eastern can choose to buy. Eastern’s obligation under the contract is to only purchase its requirements in certain cities from Gulf. Gulf’s requirements are to make effort to supply Eastern with what it wants. Indefinite: how much fuel will be bought. Advantageous to both: Eastern b/c guaranteed fuel at each of cities specified…Gulf because they get a long-term output to sell jet fuel, and can relate crude oil price increases directly to price of jet fuel. Eastern “fuel freights” -- structures their system so they’re relying heavily on Gulf, Gulf unprofitable b/c of high price of fuel combined w/regulation of prices.
     3. *Court Decides*: This contract historically found invalid b/c indefinite, now, generally binding w/r/t goods, going to allow requirements contracts under UCC 2-306(1). Gulf could refuse if Eastern’s demands were not made in good faith. Good faith = honesty in fact, observance of reasonable commercial standards of fair dealing in the trade.
     4. *Rule*: Requirements contracts ok as long as parties ask for and supply quantities of goods in good faith.
8. **§ 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.
        1. Comment 1: Applies to dealers/distributers as well as manufacturing concerns
        2. Comment 2: Requirements contracts not too indefinite, b/c parties should deal in good faith. Goal: reasonable elasticity, flexibility. Shut down by requirements buyer for lack of orders is probably ok, but shut down to curtail losses is not. Normal expansion ok, sudden expansion probably not. TEST = if parties are acting in good faith.
        3. Comment 3: Can’t deviate unreasonably from estimate included in contract. Minimum/maximums are clear limits.
9. ***Wood v. Lucy, Lady Duff Gordon***
   * 1. Ct. Appeals/NY, 1917
     2. *Facts*: Defendant a “creator of fashions” -- markets her endorsements and her own designs. Employed plaintiff to have exclusive right sell her endorsements & sell her designs/license others to sell. Defendant would receive one half of all profits and revenues derived from any contracts plaintiff makes. Sues b/c defendant placed endorsements on products w/o plaintiff knowing (Sears)
     3. *Court Decides*: No explicit promise w/in the contract -- but implied promise to make reasonable efforts to sell. Practical reality: either she is entirely at his mercy, or he has to exercise reasonable effort.
     4. *Rule*: **Obligation to exercise reasonable effort in exclusive dealings contracts is fairly implied. (Default rule)**
        1. Value to society is most important, not to Wood or Lucy
        2. Leave to parties to make the deal but define “reasonable efforts” to maximize social benefits
        3. Parties surrender ability to act in their own interests and instead must act in society’s best interests

Policing the Bargain

# Overreaching & Duress

* **Questions to consider for this unit:**
* -Can courts detect outcome & motivations well enough to police bargains?
* -Did the court get it right?
* -“Bad bargains” -- should the law rescue individuals? Should contract law should do so, rather than some other kind of law? (leaves contract intact but allows party some safety net)
  1. ***Alaska Packers’ Ass’n v. Domenico***
     1. 9th Cir./1902
     2. *Facts*: Mar. 26, 1900: contract between P & D for plaintiffs to work aboard ship from San Fran to Alaska and back to work as fisherman & sailors. Before trip back to San Fran, stopped working and demanded pay increase (claimed nets defective). Valid?
     3. *Court Decides*: Court says parties are not bound by modification to $100. Why? No consideration -- no extra benefit from original contract, company got exact same bargain but had to pay more. But, how to tell? Reasons might be taking advantage, or they might be benign, if nets were actually defective. Still, doesn’t matter.
     4. *Rule*: **If you have a preexisting duty, no modification without consideration is enforceable**.
  2. **§ 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, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
     3. The requirements of the statute of frauds section of this Article (Section 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.
        1. Comment 1: Seeks to protect all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.
        2. Comment 2: Modifications must meet good faith test.
        3. Comment 3: subsections (2) and (3) meant to protect against false allegations of oral modifications. Doesn’t include unilateral termination or cancellation.
        4. Comment 4: Subsection (4) is intended to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties’ actual later conduct.
  3. **§ 73: Performance of Legal Duty** 
     1. Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain. (Enforces pre-existing duty rule but allows for deviations)
        1. Comment a: raises suspicions that transaction was gratuitous or mistaken or unconscionable.
        2. Comment b: performance of a legal duty is no consideration for a promise in any such case if the duty is owed to the promisor (i.e. torts) -- i.e. can’t benefit from something you had to do anyway.
        3. Comment c: lack of social utility in bargains that are modified w/o consideration provides what modern justification there is for a rule that performance of a contractual duty is not consideration for a new promise
        4. Comment d: performance of contractual duty can be consideration if the duty is not owed to the promisor.
  4. **§ 89: Modification of Executory Contract**
     1. A promise modifying a duty under a contract not fully performed on either side is binding
        1. (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
        2. (b) to the extent provided by statute; or
        3. (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.
           1. Comment a: Relates primarily to adjustments in on-going transactions
           2. Comment d: Paragraph (c) states the application of § 90 to modification of an executory contract
  5. ***Wolf v. Marlton Corp.***
     1. Sup. Ct. NJ/1959
     2. *Facts:* Married couple rents out property -- get into a deal w/someone who wants to back out. Couple doesn’t let them back out, def. threatens to sell it to undesirable person, “ruin the business.”
     3. *Court Decides:* Is this a threat? Can fit this into Restatement § 176(2)(a) --Harm recipient and offer no significant benefit to Wolfs. But, think about broader social implications -- do we need to ask the court to look a little deeper (integration--can be considered a benefit).
     4. *Rule:* **Implication + colorful language can be a threat, even if it is not implicit. Key test -- Harm recipient and offer no significant benefit.**
  6. **§ 174: When Duress By Physical Compulsion Prevents Formation of a Contract**
     1. If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.
        1. Comment a: Rare situations when actual physical force is used
        2. Comment b: Void v. voidable: void by law or option to void
  7. **§ 175: When Duress By Threat Makes a Contract Voidable** 
     1. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
     2. If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.
        1. Comment a: Look to § 176 to determine if threat is improper
        2. Comment b: if victim has other option but fails to take it, no improper threat. OLD RULE: threat must arouse fear so as to preclude party from exercising free will.
        3. Comment c: Improper threat must induce the making of the contract = if the duress substantially contributes to his decision to manifest his assent. **Test: Did the threat actually induce assent on the part of the person claiming to be the victim of duress?**
           1. Consider each case individually (age, background, relationship of parties)
           2. Circumstantial evidence may be useful in determining whether a threat did in fact induce assent
        4. Comment d: Duress by threat renders a contract voidable
        5. Comment e: Still voidable by victim if threat comes from a 3rd party UNLESS other party did not know of threat, and changed his position materially in reliance on transaction.
  8. **§ 176:** **When A Threat is Improper**
     1. A threat is improper if
        1. (a)what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
        2. (b) what is threatened is a criminal prosecution,
        3. (c) what is threatened is the use of civil process and the threat is made in bad faith, or
        4. (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
     2. A threat is improper if the resulting exchange is not on fair terms, and
        1. (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
        2. (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
        3. (c) what is threatened is otherwise a use of power for illegitimate ends.
           1. Comment a: This section recognizes a broad variety of threats as improper, including economic harms.
           2. Comment b: When threat = crime or tort, improper.
           3. Comment c: threat of criminal prosecution = improper.
           4. Comment d: threat of civil process = improper.
           5. Comment e: threat to breach a contract is not in itself improper. But, is improper when it breaches duty of good faith and fair dealing imposed by contract
           6. Comment f: (a) Look for maliciousness or vindictiveness. (b) party making the threat has by unfair dealing achieved an advantage over the recipient that makes his threat unusually effective.
  9. ***Austin Instrument Inc. v. Loral Corp.***
     1. Ct. Appeals NY/1971
     2. *Facts:* Subcontractor raised prices on general contractor, threatened to cease deliveries if general contractor didn’t consent. General finishes contract, sues.
     3. *Court Decides:* Loral choice to assent to modification was taken away.
     4. *Rule:* **A contract is voidable on the ground of 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**

Gillette’s list of possible duress situations:

* + - Offer for a non value-minimizing exchange (enter this contract or I’ll kill you) -- not an offer that we think tends to advance value-maximizing exchanges
    - Situational monopoly combined w/exploitative price (i.e. rescue price to person in need of rescue)
    - Dire need -- don’t want to pay but in need of something (may be value-maximizing but may not be exchange you prefer to enter into)
    - Problem with underlying market itself -- exchange that occurs at the market price but don’t quite trust the market, i.e. laborers are taken advantage of but all employers do this so it is “market price” -- should contract law take into account any underlying taint in the market?

# Fraud & Misrepresentation

1. ***Spiess v. Brandt***
   * 1. S. Ct. Minnesota/1950
     2. *Facts:* Def. sell pl. wilderness resort & worked out pay schedule. Pl. couldn’t pay one installment, so def. served notice of cancellation. Pl. sued for fraud re: profits of resort.
     3. *Court Decides:* Pl. had a right to rely on representations re: whether def. were making good money. This was false -- and made it so pl. were operating under assumptions about state of affairs that didn’t actually exist.
     4. *Rule:* **Fraud: (i) False representation about a (ii) Material fact (iii) Knowing to be false or indifferent to truth (iv) Intent to induce (v) Reasonable or justifiable reliance.**
        1. Look for: more experienced taking advantage of less experienced.
2. **§ 159: Misrepresentation Defined**
   * 1. A misrepresentation is an assertion that is not in accord with the facts
        1. Comment a: Words, conduct can both be assertions
        2. Comment b: Failing to qualify a statement can be false assertion
        3. Comment c: prediction about future is not false assertion
3. **§ 160: When Action Is Equivalent To An Assertion (Concealment)**
   * 1. Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.
        1. Comment a: Concealment = affirmative act likely to keep another from learning of a fact which he would otherwise have learned
        2. Comment b: Commonly applied to 2 situations:
           1. Comment a: Party actively hides something from another (painting over defects)
           2. Comment b: Party prevents another from making an investigation (sends someone in search of info where he know it won’t be found)
4. **§ 161: When Non-Disclosure Is Equivalent To An Assertion** 
   * 1. A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
        1. (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
        2. (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
        3. (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
        4. (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.
           1. Comment a: act of preventing another from learning of a fact that is significant = misrepresentation
           2. Comment b: failure to disclose might be unintentional (i.e. someone forgets) -- that’s ok. Also, only needs to disclose stuff he knows about.
           3. Comment c: someone needs to correct an earlier situation when:

1. Previously-true assertion is no longer true

2. Previously non-fraudulent misrepresentation (???)

3. previously-non material misrepresentation becomes material (learns of other party’s characteristics that may make them likely to rely)

* + - * 1. Comment d: If one party knows the other was mistaken on a basic assumption, other party is expected to disclose the fact that would correct the mistake. Except: buyer of property, for example, is not normally expected to disclose circumstances that may make property more valuable than seller knows.
        2. Comment e: One party cannot hold another to a writing if he knew the other was mistaken as to its contents or legal effect. Does not include failure of party to read carefully.
        3. Comment f: Relation of trust and confidence -- may indicate right to expect disclosure.

1. **§ 162: When A Misrepresentation is Fraudulent or Material** 
   * 1. (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
        1. (a) knows or believes that the assertion is not in accord with the Facts, or
        2. (b) does not have the confidence that he states or implies in the truth of the assertion, or
        3. (c) knows that he does not have the basis that he states or implies for the assertion.
     2. (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.
        1. Comment a: Must be consciously false and intended to mislead another.
        2. Comment b: Courts require that the make know of the untrue nature of his assertions, can be met 3 ways:
           1. 1. Maker knows fact to be false. NOT essential -- can also believe the assertion to be false.
           2. 2. Maker lacks confidence in truth but passes it off as a fact rather than an opinion
           3. 3. Maker says or implies the assertion is made under some particular basis, such as personal knowledge or personal investigation (which he has not made)
        3. Comment c: non-fraudulent misrepresentation must be material in order to provide relief. Materiality is determined from the viewpoint of the maker, while justification of reliance is determined from viewpoint of recipient. Requirement for materiality can be met in 2 ways:
           1. 1. Likely to induce a reasonable person to manifest his assent?
           2. 2. Maker knows that for some special reason it is likely to induce that particular recipient to manifest his assent.
2. **§ 163: When A Misrepresentation Prevents Formation Of A Contract**
   * 1. If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation.
        1. Comment a: Misrepresentation must be related to nature of contract, not some random other fact (i.e. seller deceives buyer of identity -- doesn’t affect contract re: goods)
        2. Comment b: If recipient had reasonable opportunity to know character or essential terms, manifestation of assent.
3. **§ 164: When a Misrepresentation Makes A Contract Voidable** 
   * 1. (1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
     2. (2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.
        1. Comment a: **VOIDABLE: 1. Misrepresentation must have been either fraudulent or material. 2. Misrepresentation must have induced the recipient to make the contract. 3. Recipient must have been justified in relying on the misrepresentation.**
        2. Comment b: Non-fraudulent misrepresentation must be material to make a contract voidable.
        3. Comment c: In general, recipient doesn’t need to show that he has actually been harmed by relying on misrepresentation to void a contract.
        4. Comment d: Misrepresentation has no legal effect unless reliance is justified.
4. ***Danann Realty Corp. v. Harris***
   * 1. Ct. Appeals N.Y./1959
     2. *Facts*: Plaintiff claims he was induced to enter a contract of sale of a lease because of oral representations as to operating costs/profits of building. Contract itself contains a clause denying plaintiff’s right to rely on such representations. Buyer acknowledges to take property as is and negates any other representations made
     3. *Court Decides*: Generally don’t rely on merger clauses, but here the plaintiff announced and stipulated that it is not relying on any representations as to the very matter the complaint addresses -- specific enough merger clause. Goes to whether D knew P was relying on oral representation: Def couldn’t have known plaintiff was relying on oral representations
     4. *Rule*: **Enforce specific merger clauses. Contracts not voidable on fraud when def. had no reason to believe P would rely on misrepresentations.**
        1. *Dissent*: Enforcing merger clauses goes against public policy. Cases shouldn’t hinge on clever wordings of contracts.
5. ***Borat Case***
   * 1. Judge applies Danann to uphold waiver of liability but:
        1. Asymmetry between parties
        2. Clause is not the same
        3. Only way to verify information is to ask the movie company itself

**Takeaway: Look to facts! & Look at merger clauses skeptically.**

1. ***Proview v. Apple***
   * 1. *Facts*: Apple created company w/iPad initials, tried to buy trademarks, buys name for 35,000 pounds

# Unconscionability and Standard Forms

1. ***Williams v. Walker-Thomas I***
2. D.C. Ct. Appeals/1964
3. *Facts:* Contract for various household goods entered into in her home (in home sale). Who owns the property? Company owns the goods -- at some point she’ll own if she makes all the payments -- rent to own transaction. However, company keeps a balance on every item until paid in full. Company repossess all items b/c defaults on one.
4. *Court Decides:* Refraining from reading contracts is not a excuse / one who signs a contract has a duty to read & understand it (or have someone help them to understand it). This is probably immoral but there’s no mistake or fraud -- just her mistake. Congress should enact legislation to allow judgment in her favor.
5. *Rule:* **Failing to read/unilateral mistake is not a basis for voiding contract, even if morally abject.**

1. ***Williams v. Walker-Thomas II***
2. D.C. Dist./1965
3. *Facts:* Same as above.
4. *Court Decides:* Legal basis for unconscionability = absence of meaningful choice (procedural unconscionability) or terms that are unreasonably favorable to other party (substantive unconscionability). Absence of meaningful choice = Gross inequality of bargaining power/manner of entering into the contract (Did each party to the contract have a reasonable opportunity to understand the terms of the contract?). Terms unreasonably favorable to other party = low bargaining power? ability to understand the terms? Seller knows buyer can’t afford?
5. *Rule:* **Unconscionability:** 
   * + 1. **Absence of meaningful choice on the part of one of the parties AND** 
          1. **Gross inequality of bargaining power**
          2. **Reasonable opportunity to understand terms of contract? (Education. Hidden in fine print. Deceptive sales practices.)**
       2. **Terms that are unreasonably favorable to the other party. Consider circumstances.** 
          1. **Terms are to be considered in the light of the general commercial background & the commercial needs of the particular trade or case**
          2. **Corbin: Are terms so extreme as to appear unconscionable according to the mores and business practices of the time and place? (court agrees more w/Corbin)**

**\*\* Dissent: wary of incentive effects -- paternalistic behavior of salespeople over customers. \*Autonomy**

1. **§ 208 -- Unconscionable Contract or Term**
2. If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
   * + 1. Comment a: factors to consider are numerous -- setting, purpose and effect.
       2. Comment b: Old rule: unconscionable if contract was one that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”
       3. Comment c: Gross disparity of consideration may be an important factor in evaluating -- may also point to defects in bargaining process
       4. Comment d: Gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion
       5. Comment e: Examples of unconscionable terms: unreasonably large liquidated damages, limitations on debtor’s right to redeem collateral
       6. Comment f: decision is made in light of all material facts.
       7. Comment g: appropriate remedy is usually to deny effect to unconscionable term.
3. **UCC § 2-302 Unconscionable contract or Clause.**
4. If the court as a matter of law finds the [contract](http://www.law.cornell.edu/ucc/2/2-106.html#contract_2-106) 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.
5. When it is claimed or appears to the court that the [contract](http://www.law.cornell.edu/ucc/2/2-106.html#contract_2-106) 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.
   * + 1. Comment 1: Intended to allow the court to pass directly on unconscionability of a contract or a term -- principle is one of the prevention of oppression and unfair surprise and not the disturbance of allocation of risks because of superior bargaining power.
       2. Comment 2: **Court may refuse to enforce contract as a whole if it is permeated by unconscionability or it may strike any single term or group of terms, or may limit unconscionable terms.**
       3. Comment 3: For judge’s consideration, not jury’s
6. ***Henningsen v. Bloomfield Motors, Inc***
7. S. Ct. NJ/1960
8. *Facts:* Couple purchases car w/warranty limited to replacing parts that break and disallows all other warranties. Steering fails, wife is badly injured. Standard form contract -- fill in blanks of price, model, etc. Used industry-wide.
9. *Court Decides:* Court thinks terms evolve from enterprises w/strong bargaining power -- not from parties bargaining but from “gross inequality of bargaining power.” But consider efficiency -- can’t negotiate individually & standard forms offer lower price for good b/c lower transaction price. Court thinks it’s collusion among the industry -- Oligopoly -- only a few sellers in the market, collusion among small number of sellers rather than something that evolved from a hypothetical or real bargain.
10. *Rule:* **Unconscionable to disclaim liability for personal injuries in opaque and hidden a manner, or even at all, b/c of car companies’ greater duty rising from their place as the supplier of a dangerous but common good.**

TERMS OF THE CONTRACT

# Parol Evidence Rule

1. ***Mitchill v. Lath***
2. Ct. Appeals **N.Y./**1928
3. *Facts:* Pl. and defendants signed contract for the sale of a farm. Pl. did not like an icehouse on the property. Def. orally promised and agreed to remove the icehouse. Def now refuses to remove icehouse. Oral agreement enforceable?
4. *Court Decides:* Ultimate objective in interpreting contract is to determine what is the final contract as intended by the parties. Courts determine this using the parol evidence rule. If parol evidence applies, can’t introduce extrinsic evidence (in this case oral agreement to remove icehouse) Why have this? -Reduces possibility of fraud (someone lying about an agreement that never occurred) -Signals parties to take their transactions seriously & be careful to write down everything -Benefit to parties but also to courts.
5. *Rule:* **Andrew 3-part test:** 
   * + 1. **Is the agreement completely independent or related to existing agreement?** 
          1. **Yes: permit extrinsic evidence**
          2. **No: go to (2)**
       2. **Do the extra terms contradict existing terms?**
          1. **Yes: don’t permit extrinsic evidence**
          2. **No: go to (3)**
          3. **Is the agreement fully integrated (include everything the parties intended)?**

**ANDREWS test: 4-corners test. Look at agreement on face. Is everything “naturally” included?**

**LEHMAN (dissent) test: Look at agreement itself and extrinsic evidence, determine if parties intended to include it.**

**If yes: no extrinsic evidence**

**If no: permit extrinsic evidence**

* + **\*Parol evidence does not apply to anything after the writing of the agreement (prior to or contemporaneous)**
  + **\*progression of the law is towards a more liberal approach in consideration of parol evidence -- So even if you're in a NY jurisdiction, mention the restatement/Lehman approach and not assume you're necessarily "stuck" with the four corners doctrine**

1. ***Masterson v. Sine***
2. S. Ct. **Cal.**/1968
3. *Facts:* Mastersons owned a ranch, conveyed it to husband’s sister and brother in law. Reserved the option to repurchase it within 10 years for same price plus depreciation of any improvements. Husband went bankrupt; trustee & wife sought to establish their right to enforce the option (b/c otherwise it would go to creditors?). Defs try to claim the contract left out a word -- non-assignable.
4. *Court Decides:* Traynor says that if there’s a contradiction, no extrinsic evidence b/c writing instrument more reliable than oral agreement. When else does the parol evidence rule operate to exclude extrinsic evidence? When contract is fully integrated.
   * 1. *Rule:* **TRAYNOR’S test:**
        1. **Is agreement fully-integrated?**
           1. **Determine from face of written instrument**
           2. **Look at collateral agreements**
           3. **Look at circumstances at the time of the writing (place yourself in the shoes of the contracting parties)**
        2. **If contract language is fairly susceptible of either one of the two interpretations contended for in light of what’s found in (1), then admit extrinsic evidence (go to a jury)**

\*Policy considerations

1. Written word > human memory (but this is not a worry because you can exclude collateral agreements that directly contradict written ones)
2. Fear of fraud -- economic underdog asserts terms that benefit him (but here you would look to true intent of parties -- can’t exclude all oral agreements)
3. **UCC § 2-202 --Parol or extrinsic evidence**
4. 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
   * + 1. (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
       2. (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 .
          1. Comment 1: Definitely rejects:

assumption that a writing is final

legal meaning instead of commercial meaning

requirement that language be ambiguous

* + - * 1. Comment 2: Writings are to be read on the assumption that parties took trade usages for granted when drafting agreement. (unless carefully negated)
        2. Comment 3: Can admit additional terms unless court finds that the writing was intended by both parties as a complete and exclusive statement of all terms. Additional terms would have been certainly included in the document = don’t go to a jury.

**Proof excluded when terms of collateral agreement “certainly” would have been in included in the original document**

1. **§ 209 -- Integrated Agreements**
2. (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
3. (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
4. (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.
   * + 1. Comment a: Fully-integrated agreement supersedes everything, even consistent additional terms. But all agreements (even fully-integrated) should be read in light of circumstances and may be explained or supplemented by operative usages of trade, course of dealing between parties, and by course of performance of agreement.
       2. Comment b: fully-integrated agreement can take any form. Merger clauses not always final
       3. Comment c: Use all evidence to determine if agreement is integrated.
5. **§ 210 -- Completely and Partially Integrated Agreements**
6. (1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
7. (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
8. (3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
   * + 1. Comment a: writing assented to by both parties as a complete and exclusive statement of all terms = no add’l evidence. Don’t give to jury.
       2. Comment b: Integration can be proven through other evidence. NO full integration using 4-corners rule.
       3. Comment c: Can tell incompleteness from face of doc.
9. **§ 211 -- Standardized Agreements**
10. (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.
11. (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.
12. (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.
    * + 1. Comment a: Benefits of standardized agreements: (1) essential to mass production (2) no individual transaction costs (3) salespeople can focus on meaningful choice instead of minor variations in contract
        2. Comment b: not reading and understanding is still assenting b/c not reading is expected
        3. Comment c: Unfair terms? Gov’t regulation, power of court not to enforce unfair terms, requirement of good faith.
        4. Comment d: promisee may be bound to non-contractual document (insurance policy, steamship tickets, etc) if he has reason to know those often contain contractual terms
        5. Comment e: courts applying a standardized agreement seek to discover the reasonable expectations of the average member of public who accepts it
        6. Comment f: not bound to unknown terms which are beyond the range of reasonable expectation (bizarre or oppressive? hidden, illegible?)
13. **§ 212 -- Interpretation Of Integrated Agreement**
14. The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.
15. A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.
    * + 1. Comment a: intention of party = manifested by party only
        2. Comment b: meaning can never be plain except in context. (1) is not limited to instances of ambiguity.
        3. Comment c: (1) permits references to negotiations of parties.
        4. Comment d: judges often interpret terms instead of juries
        5. Comment e: Judge decides interpretation if evidence is so clear such that no reasonable person could decide in any way but one. But jury decides if possible inferences are conflicting
16. **§ 213 -- Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)**
17. A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
18. A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
19. An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.
    * + 1. Comment a: partially oral and written agreement = at most a partially integrated agreement
        2. Comment b: Fully or partially integrated agreement supersedes inconsistent terms of prior agreements
        3. Comment c: Completely integrated agreement = even consistent additional terms are excluded
        4. Comment d: Integrated agreement does not supersede prior agreements if it is not binding (by, for example, lack of consideration).
20. **§ 214 -- Extrinsic Evidence**
21. Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
    * + 1. (a) that the writing is or is not an integrated agreement;
        2. (b) that the integrated agreement, if any, is completely or partially integrated;
        3. (c) the meaning of the writing, whether or not integrated;
        4. (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
        5. (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.
           1. Comment a: Integration determined prior to interpretation.
           2. Comment b: Expressions and general tenor of speech used in negotiations are admissible to show conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties
           3. Comment c: Fraud, mistake, duress, etc. don’t need to appear on the face of the document. Not affected by merger clause
22. **§ 215 -- Contradiction of Integrated Terms**
23. Except as stated in the preceding Section, 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.
    * + 1. Comment a: evidence can still be relevant to interpretation
24. **§ 216 -- Consistent Additional Terms**
25. (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
26. (2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
    * + 1. (a)  agreed to for separate consideration, or
        2. (b)  such a term as in the circumstances might naturally be omitted from the writing.
           1. Comment b: decision of consistency requires interpretation of the writing in the light of all circumstances.
           2. Comment c: Excludes additional consistent term even term & consideration are part of the contract
           3. Comment d: **consistent additional term omitted “naturally,” included. Likely to arise w/in standardized forms.**
           4. Comment e: Merger clause does not change whether agreement was fully integrated or not.

# Interpretation

1. ***In Re Soper’s Estate***
2. Supr. Ct. Minnesota/1935
3. *Facts*: Man marries a woman, deserts her, marries again but does not divorce first wife, dies. Leaves his estate to his “wife” -- who is his wife?
4. *Court Decides*: Court says to interpret contracts in a manner that the way the parties intended when they contracted -- in this case, the meaning of the word “wife. Dismiss “plain meaning” which is “simply the meaning of the people who did not write the document.”
5. *Rule*: **Interpret terms as intended by the parties. Often requires oral proof. Look to circumstances under which the contract was made, or resort to extraneous aids to construction.**
   * + 1. **Dissent: wife means legal wife. Plain meaning ok when there is a legal definition of a word.**
6. ***WWW Associates v. Giancontieri***
7. **NYS**/1990
8. *Facts*: Plaintiff contracted with Defendants to buy land. “Reciprocal cancellation provision” permitting either party to cancel the agreement if litigation against the sellers is not concluded before June 1, 1987. On June 2, 1987, while the litigation was still pending, Defendants cancelled the contract pursuant to the cancellation clause, and Plaintiff initiated this action for specific performance.
9. *Court Decides*: Kaye: allow in extrinsic evidence when term is ambiguous but parties cannot create an ambiguity. Are purchasers trying to introduce evidence that is inconsistent with written terms?
10. *Rule*: **Adhere to plain meaning rule, preclude extrinsic evidence in favor of plain meaning (but this means looking at contract as a whole, looking at what parties intended but excluding negotiations). Stricter than Soper’s estate.** 
    * + 1. **NY generally more restrictive**
11. ***Pacific Gas & Electric Co v. GW Thomas Drayage & Rigging Co.***
12. Supr. Ct. **Cal**/1968
13. *Facts*: P & D enter contract for D to remove and replace the upper metal cover of P’s steam turbine. Agreement: D agreed to perform work at its own risk and expense and to indemnify plaintiff against all loss, damage, expense and liability resulting from injury to property arising out of work. Rotor of the turbine damaged -- $25,144.51 in repairs. P included in insurance coverage?
14. *Court Decides*: Traynor’s view of language: language does not have plain meaning -- no “constant referents.” Merely using words that have a plain meaning does not mean that was the intent of the parties
15. *Rule*: **How to interpret contracts?**
    * + 1. **Look at context: aka extrinsic evidence, “all credible evidence offered to prove the intention of the parties”**
        2. **Judge determines ambiguity and if there is, then admits extrinsic evidence & finder of facts gets to resolve ambiguity** 
           1. **Implies you can create an ambiguity “..exclusion of evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended”**

**\*Policy considerations: Incentive effects of NY system: parties take greater care when contracting -- i.e. clarify or qualify words to signal to the court what they mean.**

* + **Ex ante vs. ex post effects**
    - **Ex post: judge’s job to figure out intentions of parties ex post, need to know all evidence that went into this contract**
    - **Ex ante: Get at intent by creating incentives for parties to be clear ex ante**

1. ***Fragilament v. BNS***
2. SDNY/1960
3. *Facts*: Dispute over term “chicken” -- only high grade “broiler” chicken or any kind of chicken?
4. *Court Decides*: No fraud or bad faith: both parties just understand different things about the meaning of the term. “Making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs - not on the parties’ having meant the same thing but on their having said the same thing.” Subjective meaning of individuals does not matter, all that matters is the objective meaning of observer who saw bargaining process & reads contract. Look to evidence of both interpretations.
5. *Rule*: **Plaintiff has the burden of proof to provide enough evidence to convince that a term is not ambiguous.**
6. ***Trident Center v. Connecticut General Life Insurance Co.***
7. 9th Cir/1988
8. *Facts*: Plaintiff and defendant entered into loan with a 15-year term. Trident must pay annually w/interest for years 1-12, then can prepay subject to sliding prepayment fee. In case of default, defendant has the option of accelerating the note and adding a 10% prepayment fee. Interest rates dropped and Trident wanted to get out of contract.
9. *Court Decides*: No ambiguity but bound b/c CA rule. Criticizes CA rule on interpretation.
10. *Rule*: **Really a takeaway: looking at all evidence even when there is no ambiguity does not promote efficiency. Words do have meaning -- our statutes, decrees, common law system all depend on interpreting these meanings -- can’t parties contract as they wish and say what binds them?**
    * + 1. **Jab at Traynor**

# The UCC: Custom and Trade Usage

1. ***Columbia Nitrogen v. Royster***
2. 4th Cir/1971
3. *Facts*: Columbia was to buy 31,000 tons of phosphate for each year for 3 years, prices set by contracts. After contract was signed, prices for phosphate dropped. Columbia buys less than minimum (1/10 of stated minimum)
4. *Court Decides*: Court looks at trade usage, course of dealing (as specified in the UCC 2-202 -- governs sale of goods). Rationale for usage UCC based on assumptions: parties aware of trade usage & desire to apply it to their transactions.
5. *Rule*: **Can introduce trade usage to explain or supplement writing. Code suggests that even an express term can be explained or supplemented by trade usage evidence. Can also add terms notwithstanding parol evidence rule.**
   * + 1. **Don’t employ 2-202:**
       - **Contradiction w/writing**
       - **When inconsistent with express terms of contract**
       - **When parties include specific term to opt out of trade usage**
6. ***Southern Concrete Services v. Mableton Contractors***
7. D.C. Georgia/1975
8. *Facts*: Pl. seller, def. buyer. Parties entered into a contract for the sale of concrete for use in building foundation of a power plant; D was to buy 70,000 cubic yards of concrete, only ordered about 12,000, as that was what was needed for the construction work. Clause: “No conditions which are not incorporated in this contract will be recognized”
9. *Court Decides*: Differences between this case and Columbia:
   * + 1. No prior dealings between parties that can be pointed to
     + 2. No provisions re: repricing
     + 3. Contract does not suggest that the buyer would only be liable for concrete actually delivered
     + 4. Contract sets out specific quantity, price, and time specifications

Court doesn’t believe that 2-202 was meant to invite a challenge on the essential terms of a clear and explicit contract. UCC can’t be an industry-wide waiver of legal contract rights -- contracts would lose all value.

1. *Rule*: **Assume specifications as to quantity and price are intended to be observed by the parties, and neither party has a unilateral right to make a major departure from agreements in the contract. Parties opt in unless they specifically opt out.**

PERFORMANCE OF THE CONTRACT

# Substantial Performance

1. **General principle: Promisor who has substantially performed is entitled to recover although he has failed in some particular to comply with his agreement. Non-material breach.**
2. **General relief: cost to place the promisee in the position he would have been in had the performance been in full compliance w/the contract. (Correcting shortfall in performance)**
3. ***Jacob & Youngs v. Kent***
4. Ct. Appeals NY/1921
5. *Facts*: Contractor made promise as to type of pipe -- specific brand (Reading). Homeowner promised to pay for completion of house. Did contractor perform promise? No, did not use exclusively Reading pipe. P wants to introduce evidence that showed pipes by other manufacturers were the same in quality, appearance, market value & cost.
6. *Court Decides*: Promise for certain kind of pipes was a promise independent of promise to build a house. If contractor has to tear down house to re-install Reading pipes, then he is essentially building 2 house for price of 1. Waste of time, labor for something that is not essential (quality is same between pipes used and pipes desired). P gets paid full performance minus value of what you did not perform. When difference is minimal, damages are minimal.
7. *Rule*: **Creates default rule -- look at what’s reasonable based on the purpose of the contract and the presumable intention of the contract. Would reasonable people accept substantial performance in lieu of full performance?** 
   * + 1. **Parties can opt out of this default rule.**
8. ***OW Grun Roofing & Construction Co. v. Cope***
9. Ct. Civil Appeals TX/1975
10. *Facts*: Plaintiff Cope hired defendant to install a new roof in her home. Def installed roof, but there were yellow streaks due to difference in color of some of the shingles -- def tried to remedy, but new shingles did not match original, and roof was not uniform color and still “streaky.” Roof is still good quality. Contracts says shingles should be “russet glow” (brownish) color.
11. *Court Decides*: Promisor who has substantially performed is entitled to recover although he has failed in some particular to comply with his agreement
12. *Rule*: **Factors for substantial performance:**
    * + 1. **Contractor must have intended to comply with contract**
        2. **Contractor shall have substantially done so in the sense that the defects are not pervasive, do not constitute deviation from general plan and are not so essential that the object of the parties in making the contract is defeated**

**Substantial performance only permits omissions or deviations that are:**

1. **Inadvertent and unintentional**
2. **Not due to bad faith**
3. **Do not impair the structure as a whole**
4. **Are remediable without doing material damage to other parts of the building in tearing down and reconstructing**

**\*\* Decoration is matter of personal preference -- would substantial performance frustrate personal choice?**

1. ***Haymore v. Levinson***
2. S. Ct. Utah/1958
3. *Facts*: Plaintiff Haymore was building a house near completion, defendants contracted to purchase house for $36,000 based on certain terms. $3,000 of the purchase price was to be placed in escrow to be held until “satisfactory completion of the work” which referred to a list of items attached to contract. Haymore completed work but Levinsons not satisfied, made new list of -- Haymore completed second list and again Levinsons were not satisfied, Haymore refused to do more work.
4. *Court Decides*: Two types of “satisfaction” clauses: 1. Subjective: do something of a nature that pleasing someone’s personal taste must be reasonably considered an element of predominant importance in the performance 2. Objective: involves satisfaction as to such things as operative fitness, mechanical utility or structural completion. Can’t have arbitrary privilege of deciding work not satisfactory. Building contracts generally fall into objective class of contracts -- here, work was objectively satisfactory.
5. *Rule*: **Objective standard in most building cases (even though there may be a subjective standard for cases in which personal choice or fancy is likely to be an important factor, a man’s home is his castle, etc).**
6. **§ 241 -- Circumstances Significant in Determining Whether A Failure Is Material**
7. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
   * + 1. (a)  the extent to which the injured party will be deprived of the benefit which he reasonably expected;
       2. (b)  the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
       3. (c)  the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
       4. (d)  the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
       5. (e)  the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
          1. Comment a: Consider circumstances, not rules, which are to be considered in determining whether failure is material
          2. Comment b: NO simple rule for loss of benefit to injured party -- have to consider all circumstances (construction: defects affecting structural soundness are particularly significant)
          3. Comment c: Difficulty in proving exactly how much was lost will affect adequacy of compensation.
          4. Comment d: Failure as material breach? Less material: occurs late. More material: occurs early
          5. Comment e: Likelihood that failure will be cured is significant in determining materiality
          6. Comment f: Good faith can’t save failure to perform
8. **UCC 2-601 (Perfect Tender Rule)**
9. Subject to the provisions of this Article on breach in installment contracts and unless otherwise agreed under the sections on contractual limitations of remedy, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
   * + 1. (a) reject the whole; or
       2. (b) accept the whole; or
       3. (c) accept any commercial unit or units and reject the rest.

EXCUSES FOR NONPERFORMANCE

# Mistake

1. **Mistake = when one or both parties are mistaken about a material fact that exists at the time of their agreement**
2. **Excuse = when an unanticipated future event not contemplated by the agreement renders the agreement impossible, impracticable or pointless.**
3. ***Sherwood v. Walker***
4. Supr. Ct. MI/1887
5. *Facts*: Parties to contract for sale of cow. Both parties believed, according to majority, that the cow was barren. Cow was not barren, sold for under value. D sues to have P pay full value or void contract.
6. *Court Decides*: Not every mutual mistake is grounds for voiding -- only some. Difference: if the parties’ mutual mistake materially affects the substance of the contract, then voidable. What does it mean to be a mistake that materially affects the substance of the contract? Can’t void a contract just because mere quality of the good differs from what was expected. Contract was about belief in state of the world that neither party believed was erroneous -- if both parties knew cow was not barren, neither party would have entered into contract to sell cow for $80.
7. *Rule*: **For a contract to be void based on mutual mistake, mistake must go to substance of the whole contract, not just an error which does not affect the substance of the whole consideration.** **Test: Would the parties have made the contract anyway knowing the mistake?**
   * + 1. **Dissent:** neither party knew; each guessed, and the party with less information turned out to be right and to be in luck; there the speculation was not knowledge that required disclosure – just an assumption of risk and that risk paying off
8. ***Simkin v. Blank***
9. Ct. Appeals N.Y./2012
10. *Facts*: Couple divorcing makes an agreement to divide assets. One of the investment accounts was a Madoff account and therefore frozen -- no value. Void based on mistake?
11. *Court Decides*: No explicit agreement as to 50/50 nature of the agreement. Not mistaken at time of agreement b/c it did have a value of $6 million at the time it was signed -- husband could have withdraw his share then.
12. *Rule*: **“Courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.” (in this case the 50/50 divide)**
13. **§ 151 -- Mistake Defined**
14. A mistake is a belief that is not in accord with the facts.
    * + 1. Comment a: mistake = erroneous belief. Prediction about future is not a mistake.
        2. Comment b: Can be mistaken about law
15. **§ 152 -- When Mistake of Both Parties Makes a Contract Voidable**
16. Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
17. In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.
    * + 1. Comment a: **Voidable if 3 conditions are met:**
           1. 1. Mistake must relate to “basic assumption” on which contract was made
           2. 2. party seeking avoidance must show that the mistake has a material effect on the agreed exchange of performances
           3. 3. Mistake must not be one as to which the party seeking relief bears the risk
        2. Comment c: Mistake had material effect? Did resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out?
        3. Comment e: Did one party allocate the risk?
        4. Comment f: Even if one party signed a release, can still attack it. Can say release is unconscionable, or both parties were mistaken. Will likely turn on the basic assumptions of the parties at time of execution
        5. Comment h: mistake as to different assumptions -- don’t need to be identical, but if different use § 153

1. **§ 153 -- When Mistake of One Party Makes a Contract Voidable**
2. Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
   * + 1. (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
       2. (b) the other party had reason to know of the mistake or his fault caused the mistake.
          1. Comment a: Jury should weigh evidence particularly carefully when someone is using mistake to avoid liability
          2. Comment b: Mistake must be basic assumption of contract
          3. Comment c: mistaken party must also show that if enforced, the contract would be unenforceable
          4. Comment e: If other party had reason to know if mistake, mistaken can avoid contract w/o showing unconscionability
3. **§ 154 -- When a Party Bears the Risk Of A Mistake**
4. A party bears the risk of a mistake when
   * + 1. (a) the risk is allocated to him by agreement of the parties, or
       2. (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
       3. (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.
          1. Comment b: party can escape if risk was allocated to other party
          2. Comment c: Conscious ignorance = no mistake
          3. Comment d: Court can allocate risk if reasonable (will consider purposes of parties and will have recourse to its own general knowledge of human behavior)

# Impracticability/Frustration

1. ***Taylor v. Caldwell***
2. Engl./1863
3. *Facts*: P and D contract for use of a music hall for four specific days, for plaintiff to perform a concert. 100 pounds per day. Before first concert, music hall burned down. No fault on either party.
4. *Court Decides*: Is there an implied condition in the contract that the subject matter in the contract is going to exist as the time when performance is required? If no implied condition, no inquiry into negligence, reasons for impossibility. Liable for performance even if events supervene that make it impossible or extremely burdensome.
5. *Rule*: **W/contract subject to an express or implied condition, and if the impossibility is based on something unforeseen that wasn’t your fault, and negates that implied or express condition central to the contract, then you might not have to perform.**
   * + 1. **incentive effect: to make the plaintiff disclose the private information of expected profit so that the defendant can insure against those losses in the event of a fire, which it is the best position to avoid**
6. ***Transatlantic Financing Corp v. US***
7. D.C. Cir/1966
8. *Facts*: Plaintiff trying to recover extra expenditure from taking alternate route when Suez Canal was shut down. Performed under conditions not required by contract.
9. *Court Decides*: Is the Suez Canal route an implied or express term in the contract? If unexpected, then contracted party who is adversely affected party has chance to be excused.

But: Risk allocated to Transatlantic -- no express term of necessity to go through the Suez Canal.

1. *Rule*: **Impossibility:**
   * + 1. **Did unexpected contingency materialize?**
       2. **Was the risk of that contingency allocated to one of the parties or another? (allocation can be implied or express)**
       3. **Did contingency render performance impracticable?**
2. **UCC 2-615 -- Excuse by Failure of Presupposed Conditions**
3. Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
   * + 1. (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been **made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made** or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
       2. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
       3. (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.
          1. Comment 4: Increased cost alone does not excuse performance unless increased cost is due to unforeseen contingency which alters essential nature of performance (not just rises or collapses of market)
          2. Comment 5: where a particular source of supply is exclusive under agreement and fails, this section applies
4. ***Eastern Airlines v. Gulf Oil Corp***
5. S.D. FL/1975
6. *Facts*: Mutually advantageous relationship re: price of fuel that was disrupted by Middle East crisis and oil prices skyrocketing. Gulf alleges requirements contract is impracticable under UCC 2-615.
7. *Court Decides*: Oil prices and gov regulation of oil prices were both foreseeable. Risk allocated to Gulf.
8. *Rule*: **Impracticability = Failure of presupposed condition**
   * + 1. **that was an underlying assumption of the contract**
       2. **which failure was unforeseeable**
       3. **and the risk of which was not specifically allocated to the complaining party.**

**\*Cannot be just economically burdensome or unattractive. Must be “unjust.” Had parties bargained specifically, would they have entered into same contract?**

1. ***Aluminum Co of America v. Essex Group Inc***
2. W.D. Penn/1980
3. *Facts*: an agreement called “Molten Metal Agreement” between ALCOA and Essex. ALCOA argues impracticability and frustration of purpose.
4. *Court Decides*: Restatement recognizes that circumstances existing at the execution of a contract may render performance impracticable or they may frustrate the purpose of one of the parties so as to excuse his performance.
5. *Rule*:
   * + 1. **Impracticability: party doesn’t have to perform “where a supervening event renders his performance impracticable”**
       2. **Frustration: party doesn’t have to perform when his principal purpose is substantially frustrated by the occurrence of a supervening event.**
6. **§ 261 -- Discharge By Supervening Impracticability**
7. Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.
   * + 1. Comment d: impracticable ≠ impossible but rather extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved…shortage of materials due to war, embargo, crop failure, shutdown of sources, etc. can fall under this definition
       2. Comment e: Subjective vs. objective. “The thing that cannot be done” vs. “I cannot do it” -- party generally assumes risk of his own liability of not being able to render performance
8. **§ 265 -- Discharge By Supervening Frustration**
9. Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
   * + 1. Comment a: substantial=so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Not enough that transaction is less profitable or that party will sustain a loss”
10. ***Krell v. Henry***
11. Eng/1903
12. *Facts*: Contract between parties to rent flat for 75 pounds for purpose of viewing coronation. Coronation cancelled, renter wants money back and to get out of contract.
13. *Court Decides*: No mistake, no impracticability (apt didn’t burn down). Court says the taking place of the coronation was the “substance of the contract” “foundation of the agreement” -- destroyed w/procession was cancelled.
14. *Rule*: **Whether or not parties could anticipate something happening that would render the contract value-less. Look to see if one party took the risk -- did parties foresee the contingency, and assume the risk of it happening?**
15. ***Lloyd v. Murphy***
16. S. Ct./CA
17. *Facts*: P & D entered contract to lease for 5 years a piece of land for purpose of showing and selling new cars. Agreed not to sublease. Fed. government ordered that sale of new cars be discontinued. D informed P that this hurt his business, P tried to negotiate by lowering rent, and waive restrictions on subleasing and purpose of land. D left premises and wanted to break contract.
18. *Court Decides*: Frustration of purpose depends on total or nearly total destruction of the purpose for which, in the contemplation of the parties, the transaction was entered into. If the event that frustrates is foreseeable, should have been provision in contract, and if there’s not, absence gives rise to inference that the risk was assumed.
19. *Rule*: **For frustration, (1) event must not be foreseeability and (2) value of performance must be destroyed. If some other use of contract remains valuable, no frustration.**

REMEDIES FOR BREACH

# Specific Performance

1. **Policy concerns w/specific performance:**
2. Autonomy: forcing people to do things
   * + 1. Especially w/ services -- indentured servitude
3. Efficiency: makes sense only when it leads to an allocation of goods to one who values the goods more than the original purchaser w/lowest transaction costs
   * + 1. SP a good idea when promisee is in an inferior position to buy replacement goods. Ex. if there is an inferior market for the specific good contracted for.
4. Damages are in reality often undercompensatory; can’t compensate for time, anger, frustration
5. ***Sedmak v. Charlie’s Chevrolet***
6. Missouri Ct. Appeals/1981
7. *Facts*: Pl. wanted to purchase special car (only a few thousand in distribution). Works w/dealer to request specific features. Deal then refuses to sell them the car.
8. *Court Decides*: Promisee in inferior position to promisor to buy replacement car -- not in good position to go out and buy the same thing.
9. *Rule*: **Where the contract is plain and simple, and the good is either unique or there are other similar circumstances that make getting the contracted-for good or service impracticable, specific performance is not only appropriate, but available to plaintiff as a matter of right.**
10. **UCC § 2-716 --**
11. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
12. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
13. (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 or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.
    * + 1. Comment 1: seeks to further a more liberal attitude about specific performance
        2. Comment 2: unique = must be determined in terms of the total situation which characterizes the contract
14. ***Klein v. PepsiCo Inc***
15. Missouri Ct. Appeals/1981
16. *Facts*: Klein wanted to buy G-II corporate jet from Pepsico. Negotiated, but sold to someone else.
17. *Court Decides*: UCC 2-716 does not allow specific performance where damages are recoverable and adequate. Increase in the cost of replacement does not merit the remedy of specific performance. Not unique = money damages would be adequate.
18. *Rule*: **Specific performance is not appropriate where money damages are available; mere rise in price is not an excuse to order specific performance – that does not make the good unique.**
19. **§ 357 -- Availability of Specific Performance and Injunction**
20. (1) Subject to the rules stated in [§§ 359](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=101603&cite=REST2DCONTRs359&originationContext=document&transitionType=DocumentItem&contextData=(sc.Category))-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty.
21. (2) Subject to the rules stated in §§ 359-[69](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=101603&cite=REST2DCONTRs369&originationContext=document&transitionType=DocumentItem&contextData=(sc.Category)), an injunction against breach of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty if
    * + 1. (a) the duty is one of forbearance, or
        2. (b) the duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.
           1. Comment b: Injunction appropriate:

1. Performance due under contract consists of forbearance

2. Court orders forbearance from inconsistent action

1. **§359 -- Effect of Adequacy of Damages**
2. (1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.
3. (2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.
4. (3) Specific performance or an injunction will not be refused merely because there is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in § 357.

# Expectation Damages

1. ***Freund v. Washington Square Press, Inc.***
2. Ct. Appeals NY/1974
3. *Facts*: P contracted with D for D to publish P’s book. Terms: P delivers manuscript to D, D gives $2000 nonrefundable advance, D has right w/in 60 days not to publish. Otherwise, must publish w/in 18 months in hardcover, then paperback. P would receive royalties. D merged w/another publisher and couldn’t publish hardcover. Did not publish in any form. P wants lost royalties, cost of publication.
4. *Court Decides*: Conceivably could get royalties, but failed to prove w/reasonable degree of certainty. Re: cost of performance, P contracted for the advance and the royalties, not the book. Only had an interest in royalties. Could bring manuscript to another publisher, and hasn’t lost anything.
5. *Rule*:
   * + 1. **Compensable reliance damages are those that are foreseeable and ascertainable in performance of the contract.**
       2. **Purpose of damages: put the injured party in the position he would have enjoyed absent breach at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee. “Secure benefit of bargain” not more or less.**
          1. **Measured in cost to defendant, not value promised by plaintiff.**
6. **§ 347 -- Measure of Damages In General**
7. Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
   * + 1. (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
       2. (b) any other loss, including incidental or consequential loss, caused by the breach, less
       3. (c) any cost or other loss that he has avoided by not having to perform.
8. **§ 349 -- Damages Based On Reliance Interest**
9. As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.
10. ***American Standard Inc v. Schectman***
11. S. Ct. NY/1981
12. *Facts*: P rents land to D, D doesn’t grade land as specified in contract.
13. *Court Decides*: Diminution in value test: landowner entitled only to difference in land improved and value of unimproved. Exception: They ultimately sell the land for $3000 less than they thought they were going to sell it for with improvement, but improvements would cost $90 000.  Here, grading the land was a part of the purpose of the contract, so we shouldn't apply the substantial performance rule.
    * 1. *Rule*: **(Wrongly decided) but there is a bad faith breach here, and there is no waste comparable to Jacobs & Youngs, you don’t have to tear down the house and replace work you’ve already done.**
    1. ***Peevyhouse v. Garland Coal & Mining Co.***
       1. S. Ct. OK/1962
       2. *Facts*: P rents land to D, D doesn’t clean up land after the fact. Cost to clean up land very high but difference in value is very low.
       3. *Court Decides*: Apply diminution in value rule. Party's expectation in American Standard was to have the land re-graded, but here the cleaning up was only incidental. How do we figure out that the clause is incidental? They think that no one would *really* bargain for it.
       4. *Rule*: **Owner is entitled to cost of performance, unless it is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.**
    2. **UCC 2-708 --**
14. (1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the **difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages** provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
15. (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.
    * + 1. (2): D resold to Buyer 2. But finite and predictable number of buyers, and losing one means lost profits from that specific deal, even if good resold to someone else.
    1. ***R.E. Davis Chemical Corp. v. Diasonics Inc***
       1. 7th Cir/1987
       2. *Facts*: P contracted to buy medical diagnostic equipment from D. Paid $300K deposit. 3rd party breached contract w/P so P breached contract w/D. D later sold equipment to someone else for same price it was to be sold to Davis. Davis wants: $300K back. Diasonics wants: offset/lost profit.
       3. *Rule*: **To take advantage of lost profits rule:** 
          1. **Must establish that it had capacity to produce both units**
          2. **Must establish it would have been profitable to produce both units and sell to 2 buyers.** 
             1. **Buyer has a counterargument where, if the buyer had performed, he would have resold the goods and the seller would not have**
    2. ***Rodriguez v. Learjet***
       1. Ct. Appeals KS/1997
       2. *Facts*: P contracted w/D to buy a jet. P paid down payment. But 3rd party he was buying jet for didn’t want it anymore. P breached contract & wanted $250K back.
       3. *Rule*: **Court uses test from Diasonics:**
          1. **Possessed capacity to make add’l sale?**
          2. **Profitable to make 2 sales?**
          3. **Probably would have made the add’l sale absent buyer’s breach**

# Limitations On Damages

1. Mitigation principle: Requires promisee to take cost-justified steps to mitigate (or avoid aggravating) the promisor’s damages for breach of the K. Sanction is reduction in damage award.
2. Foreseeability principle: Seeks to ensure that promisor, at time of K, has reason to foresee any special or unusual consequences that might enhance promisee’s losses from breach.

FORESEEABILITY

1. ***Hadley v. Baxendale***
   * 1. Eng/1854
     2. *Facts*: P’s mill stopped by a crank shaft breaking. This was how the mill operated. P’s servant went to D, told D’s clerk that mill was stopped & needed replacement quickly. D guaranteed delivery on next day if order placed by noon. Was told that it needed to be fast. Delivery delayed by neglect. P did not get shaft for days, lost profits.
     3. *Court Decides:* Up to party who has a special need (i.e. urgency) to disclose those -- otherwise, can only collect regular, not increased, damages.
     4. *Rule*: **Expectation damages have to be foreseeable at time of contracting. (Default) Can opt out if you have special needs and make those clear to the promisor. Otherwise, promisor won’t foresee increased damages and won’t be required to pay.** 
        1. **Effect of the default rule -- to allow, but also to require, the party w/special needs to disclose such needs.**
        2. **Rule that forces the revelation of information. Forces parties who will suffer damages to reveal those.**
2. MITIGATE
3. ***Rockingham County v. Luten Bridge Co***
   * 1. 4th Cir/1929
     2. *Facts*: P contracted with D to build a bridge. Controversy with Board, eventually voted not to build bridge. Informed P of their breach of K. P kept working. Sued, damages included work done after rescinding contract. D claimed P failed to mitigate the damages by continuing to work.
     3. *Court Decides:* P can’t “pile up” the damages. Possibility for abuse (P continuing knowing he will get bigger award). P had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.
     4. *Rule*: **P cannot hold a D liable for damages which need not have been incurred. P must, so far as he can w/o loss to himself, mitigate damages caused by D’s wrongful act.**
4. ***Parker v. 20th Century Fox Film Corp***
   * 1. S. Ct. CA/1970
     2. *Facts*: Actress contract w/Fox to star in song/dance movie “Bloomer Girl.” D decided not to produce film and instead offered P a leading role in another movie “Big Country Big Man.” P declined offer and instead sued for (1) compensation from contract and (2) damages resulting from D’s breach.
     3. *Court Decides:* Measure of recovery by wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or w/reasonable effort might have earned from other employment. D has burden to prove that other employment was comparable or substantially similar. These two options not substantially similar
     4. *Rule*: **Needn’t mitigate damages w/ a job or option that’s lesser or different than the one contracted for.**
5. **§ 350 -- Avoidability As A Limitation On Damages**
   * 1. (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.
     2. (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.
6. **§351 -- Unforeseeability and Related Limitations On Damages**
   * 1. (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.
     2. (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
        1. (a) in the ordinary course of events, or
        2. (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
     3. (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.