

Contracts:

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- a. Overview:
 - i. Enforceable v. Non-enforceable promises
 - 1. Detriments/benefits
 - 2. Consideration/gifts
 - 3. Economic/moral/autonomy rationale
 - a. Ability to engage in commitment
- b. Consideration v. gift promises
 - i. Channeling/signaling
 - ii. Mutuality of consideration
 - 1. Consideration as a proxy for distinguishing socially beneficial, value-maximizing promises
 - 2. Consideration = easy to identify
- c. *Hamer v. Sidway*
 - i. Facts: Uncle promises nephew \$5k to refrain from drinking, etc.
 - ii. Consideration imposes limitations in categorizing which contracts are “desirably” enforceable
 - 1. Consideration as mutual inducement of promises
 - 2. Consideration = “bargained for”; in exchange for a promise
 - iii. Contract law = enforce value-maximizing exchanges (product of negotiation)
 - 1. If not enforced, promises will not manifest
 - 2. Enforcement as incentive to promise
 - iv. Holding: uncle’s promise and nephew’s performance constituted a bargained-for exchange, so contract is enforceable
 - 1. Although, court uses outdated logic of benefit/detriment
 - a. Focused on the nephew’s determinant of foregoing lawful activities
 - 2. Nephew forewent activities “in consideration of” uncle’s promise

- a. The bargain (as in this case) must involve an exchange that occurred *before* any promise or performance occurs
- d. *Kirksey v. Kirksey*
 - i. Facts: D’s sister-in-law relocated to D’s property; D then forced P to leave (substantial determinant suffered by P)
 - 1. D promises to give gift to P
 - 2. D sought benefit from P’s presence (“placeholder” for land)
 - 3. Was P’s act of traveling sufficient consideration?
 - ii. Holding: D’s promise to P was gratuitous (gift, rather than bargain)
 - 1. rationale: benefit/determinant analysis is over-inclusive, must turn to consideration (Is there a bargain?)
- e. R2 §1
- f. R2 §2
- g. R2 §4
- h. R2 §71

III. Bargains and Adequacy

a. *Batsakis v. Demotsis*

- i. Facts: P lent D 500,000 drachmas (\$25 USD)
 - 1. Both parties drafted letter claiming that \$2,000 USD was received
 - a. Evidence that both parties feared that contract would not be enforced
- ii. Holding: Ct. enforced obligation to repay \$2,000
 - 1. Inadequate consideration DOES NOT void contract
 - a. Court will typically not inquire into adequacy of consideration
 - 2. No evidence of fraud (both parties knew the exchange rate)
- iii. Adequacy of consideration:
 - 1. disparity between amount borrowed and amount owed
 - 2. Problem with courts considering adequacy – consider Batsakis’ risks in lending the money in wartime and his expected rate of return; bargain seems more fair
 - 3. Difficulty in forcing courts to make value judgments on each side of a bargain
 - a. Court would make bargains FOR the parties
 - b. This would deter promising, if terms could be negated/changed by courts
 - i. So, by refusing to inquire into adequacy of consideration, court induces transactions and contracts (incentive effect)
 - 4. Does not apply to unconscionability (“exploitation”)
 - a. Unconscionability could result from disparity between parties’ bargaining power; parties’ ability NOT to enter into the bargain

b. *Wolford v. Powers*

- i. Facts: D issued written promissory note, in exchange for P naming their child after him; estate attempts to avoid payment on note
- ii. Inadequate consideration?
 - 1. Impossibility of determining that value of naming rights to the promisor
- iii. Holding: No fraud + consideration = enforceable promise
- c. Nominal consideration (sham bargain; peppercorn example)
 - i. Where disparity in values indicate that a bargain has not occurred
 - ii. Difficulty in determining which bargains are nominal/sham

- iii. Examine intention (manifested by parties)
 - 1. If parties intended to make an enforceable promise, then the bargain should be enforced
 - 2. Use intentions to determine whether promise was bargained for
- d. Consideration v. conditions
 - i. Egregious conditions, mistakes in conditions – can still be bargains
- e. R2 §17
- f. R2 §79

IV. Reliance and Promissory Estoppel

- a. Promissory estoppel
 - i. Reliance by promisee
 - ii. Reliance must be EXPECTED by promisor
 - 1. No inducement requirement, just expectation
 - 2. Also, only enforce contract if injustice is avoidable ONLY by contract's enforcement (see R2)
 - a. Injustice: Consequences of non-enforcement (ex post analysis)
 - iii. Examine formality of contract
- b. *Feinberg v. Pfeiffer*
 - i. Facts: Feinberg was promised a pension, retired
 - ii. Holding: promise to pay pension induced P to retire; pension must be paid
 - 1. So, if no consideration, turn to promissory estoppel/reliance
 - 2. Based on expectation that reliance would induce action
 - 3. Also, *consideration cannot be based on past performance*
 - a. Exception: if promise is given in exchange for a previously conferred benefit (material benefit rule)
 - iii. Evidence of reliance
 - 1. Dates of continued employment before retirement (1.5 years)
 - 2. As opposed to *Hayes*, where employment terminated one week after promise
 - 3. When intention to retire was announced (1 year prior to new terms of pension)
 - a. So, no reliance?
 - b. But, Feinberg likely forfeited her ability to hold employment by retiring, given her age
- c. *Hayes v. Plantations Steel*
 - i. Facts: similar to the above
 - ii. Holding: No consideration, no reasonable reliance (so P cannot invoke promissory estoppel)
 - 1. Rationale: Hayes had already decided to retire, pension promise was gratuitous
- d. *Congregation Kadimah v. DeLeo*
 - i. Facts: DeLeo orally promises Congregation \$ if they build a library in his name; administrator of his estate refuses to pay the \$
 - ii. Holding: No consideration, unenforceable contract
 - 1. Would have required a return promise from the Congregation to build a library in DeLeo's name
 - 2. Or, evidence that Congregation was foregoing other fundraising based on DeLeo's contribution (reliance)
 - 3. To enforce such a promise would be "against public policy"

- a. But, formality could enhance the sincerity of the promise
- e. Charitable subscriptions –
 - 1. No requirement of consideration or reliance
 - 2. Rationale:
 - a. pledges stimulate investment by a charity
 - b. Charity is reliant on others' charity to provide goods and services to the public
 - 3. Is legal enforcement superfluous? Given extra-legal incentives
 - a. But, in 90(2), easier to enforce

f. R2 §90

g. So, enforcement conditions:

- i. Consideration
- ii. Reliance
- iii. Charity
 - 1. Doctrines should result in enforcement of contracts that “we want to be enforced”

V. Past Actions as Consideration

a. Past consideration:

- i. *Mills v. Wyman*
 - 1. Moral obligation arises from obligation to compensate Webb for “services rendered”
- ii. *Webb v. McGowin*
- iii. Material benefit rule:
 - 1. promise is enforceable if given in exchange for a previously conferred benefit
- iv. test requires an expectation that an act will be compensated (rather than undertaken as a Good Samaritan)
- v. Rationale: if ex post promise resembles what ex ante agreement would have looked like, had transaction costs allowed an ex ante agreement to be negotiated, then there is little harm in enforcing the contract
 - 1. In the absence of a bargain, could a hypothetical bargain be established?
- vi. Factors to consider:
 - 1. intent of person conferring the benefit (expectation of compensation?)
 - 2. seriousness of promise
 - a. evidence?
 - i. payments made
 - ii. written v. oral
 - 3. Opportunity to bargain ex ante
 - 4. Does ex post bargain (promise) resemble what an ex ante bargain would have entailed? Assuming no transaction costs
 - 5. Incentives?
 - 6. Is enforcement of the contract just?

b. Differences between *Mills* and *Webb*

- i. Benefit conferred on 3rd party v. benefit conferred on promisor
- ii. Oral v. written
- iii. Some payments made v. none initiated (indicative of seriousness?)

c. R2 §86

- i. Necessary to prevent injustice – to what extent?

VI. Contract Formation

VII. Offer

- a. Contract = offer + acceptance
 - i. Offer: manifestation of intention to enter into a bargain, inviting assent
 - 1. Acceptance concludes the creation of the contract
 - 2. How to determine whether an offer has been made?
 - a. Objective determination (words and actions); manifestation of assent
- b. Should courts presume that an offer was made when ambiguous language was used?
 - i. Should the party more capable of taking precautions be obligated to do so?
 - ii. Or is the burden of clarifying intent on the party with the lesser risk of liability?
- c. *Lucy v. Zehmer*
 - i. Facts: D sold P land, D alleged that contract was a **joke** (written on a napkin while drunk)
 - ii. Holding: contract enforceable (*manifestation* of intent (actions); not “undisclosed,” subjective intention (thoughts)); both parties manifested their assent to create a valid contract
 - 1. Promise: a manifestation of intention to act or forbear, as perceived by a reasonable person
 - a. An objective determination of intention also takes into account context (such as fair value of the land)
 - 2. D as party with the **greater ease of indicating his idiosyncratic intent** (joke)
 - a. So, D holds the comparative advantage in his ability to reduce the risk of misunderstanding
 - b. This doctrine is consistent with autonomy theory
 - i. D (Zehmer) can indicate that he is joking
 - ii. P not forced to bear an unanticipated loss (by not having contract fulfilled)
 - iii. P sought “specific performance” of contract, rather than damages
 - 1. Remedy frequently sought in land contracts
- d. *Courteen Seed Co. v. Abraham*
 - i. Facts: D sent P price quotations for seeds; P replied “we accept,” attempted to enforce the contract
 - ii. Holding: No contract (price quotation was not an offer)
 - iii. Rationale:
 - 1. An advertisement is a mere proposal
 - a. No language of offer, or invitation to make an offer
 - b. Prevents offeror from being bound by initial solicitation
 - i. Stock limitations, unforeseen circumstances, etc.
 - 2. Similar to preliminary negotiations (binding parties to their preliminary negotiations would have a chilling effect on such negotiations; as it would on advertising)
 - 3. The offer was when P said, “I accept”; acceptance would have been when Courteen performed the contract
- e. *Fairmount Glass Works v. Crunden Martin Woodenware*

- i. Facts: appellee requested quote re: glassware; quote given, with direction, “for immediate acceptance”; entered order and Glassware co. refused to fill the order
- ii. Holding: valid contract was formed (offer was made when Co. provided quote upon appellant’s request)
- iii. Rationale:
 - 1. D accepted the K
 - 2. Details re: sizes of glasses could be established before delivery
 - 3. As opposed to *Courteen Seed*, Fairmount made an offer; in *Courteen*, the advertising (price quotation) was an invitation to bargain

f. R2 §18

g. R2 §19

h. R2 §24

VIII. Acceptance

a. *Ever-Tite Roofing v. Green*:

- i. Facts: P agreed to re-roof D’s house; when P arrived, others were roofing
- ii. Holding: valid contract, D’s breached by employing others
- iii. Rationale:
 - 1. Homeowner made an offer, acceptance was stipulated as by promise or performance
 - 2. An offer may be revoked before any performance has commenced
 - a. An offer may be revoked until it is ACCEPTED
 - i. Notification of revocation must precede acceptance
 - 3. Rationale behind rule:
 - a. Protects Co.’s investment (foregoing profit-making activities due to job)
 - b. Green’s attempt to revoke the offer came too late, since P had already commenced work
 - c. Was work commenced?
 - i. D argues that P had not commenced performance by loading its trucks
 - ii. Had merely “prepared for performance”
 - iii. Court is not convinced
 - 4. The offeree made the contract
 - a. Based on the time needed to conduct a credit report
 - b. Contract signed by P’s sales rep.
 - i. Contract not binding until signed by contractor
 - 1. Why the delay in making the contract binding?
 - a. Credit report
 - b. Cancellation of job based on unforeseen circumstances
 - c. Contractor does not want to be bound by any conditions negotiated by the sales rep.
 - 5. D had no knowledge that the contract had been accepted (no requirement that P notify of its acceptance, since K invited performance);
 - a. subject to reasonableness test

b. *Ciaramella v. Reader’s Digest*

- i. Facts: settlement agreement enforced, P argued that he did not assent (refused to sign settlement agreement)
- ii. Holding: parties did not intend to be bound by the agreement
- iii. Rationale:
 - 1. *Ciaramella test*
 - a. Typically in writing?
 - b. Material terms left open?
 - c. Partial performance?
 - d. Express reservation to be bound by the written instrument?
 - 2. Merger clause
 - a. Merging all prior negotiations into the written document
 - i. Prevents being bound by anything NOT included in the written agreement
 - ii. Evidence that parties did not intend to be bound by oral agreement
 - iii. Allows for “cheap talk”; preliminary negotiations
- c. Acceptance by performance
 - i. Commencement of performance creates an option contract
 - ii. Option contract: option to complete terms of the contract (one-sided; only the offeror is bound)
 - 1. Involves opportunity costs; the extent of the investment is decided by the offeree
- d. Preliminary negotiations
 - i. *Ciarmella test*
 - ii. (Judge) Leval test to determine whether a preliminary agreement is binding
 - 1. *Teacher’s Ins. & Annuity Assoc. v. Tribune Co.*
 - 2. Two-types:
 - a. “fully-binding preliminary agreement”
 - i. “preliminary only in form” – only to be formalized in written doc.
 - ii. Rationale: Resources have been invested
 - 1. A party may demand performance of the transaction
 - b. “binding preliminary committment”
 - i. Agree on certain terms, others open for further negotiation
- e. Acceptance:
 - i. Mailbox rule:
 - 1. Acceptance is valid upon dispatch (and offer may no longer be revoked)
 - a. Rationale: a contrary rule (acceptance valid upon receipt) would disadvantage the offeree by causing a possible misconception of acceptance (if revocation occurred between dispatch and receipt)
 - b. Also, market conditions may change
 - ii. Silence as acceptance
 - 1. Offeror can’t cause silence to operate as acceptance
 - a. Exceptions:
 - i. offeree silently takes benefits
 - ii. “contracted negative option”

2. Allowing silence limits autonomy by imposing an obligation (CD clubs)
 - a. Also, imposes offeror's conditions (such as price)
3. Would result in situations where contract is accepted merely to avoid transaction costs associated with rejection
 - a. Assuming no transaction costs, no need for a legal rule (Coase theorem)

f. Revocation:

i. *PEI v. Johnson*

1. Facts: Contractor solicits bids, subcontractor submits bid with an error; sub did not "revoke" acceptance until after contractor granted it the contract
2. Issue: When did Johnson's acceptance occur, since revocation cannot occur after acceptance?
3. Holding: Johnson revoked the offer prior to PEI's acceptance; no promissory estoppel; no K
4. Rationale/Notes:
 - a. P's detrimental reliance on D's sub-bid (and acceptance)?
 - b. Johnson's bid: accepted by PEI by partial performance (by using in its bid)?
 - c. Johnson argues: bid is an offer conditional on PEI being awarded the bid
 - i. The condition was satisfied when PEI was awarded the contract (disqualification of initial bid winner caused Johnson to fail to notify PEI of the error in their bid, since they thought PEI had not received the contract)
 - d. R2 inserts section to establish reliance in subcontracting

ii. *Baird* (Hand):

1. No exchange of promises (bilateral contract), until the general is awarded the bid
 - a. So, sub can revoke at any point prior to acceptance
 - b. General responsible for any mistakes in sub's bid
2. Consistent with holding in *Johnson*

iii. *Drennan* (Traynor):

1. Sub is estopped from revoking its bid, due to general's reliance (so, Johnson's offer is binding immediately)
 - a. This rule protects the general but allows it to "bid-shop"

iv. Alternative interpretations:

1. sub agreed, conditional on general's receiving the contract
 - a. accepted by general on condition of receiving the contract
 - i. in this case, sub can revoke until general receives the bid
2. promissory estoppel/reliance
 - a. sub bound for a reasonable time
 - i. behavioral consequences?
 1. degree of care by each in reviewing bids for accuracy

v. rationale?

1. best party to avoid the potential loss?
2. or party who causes the loss?
 - a. argument for both parties being the best able to avoid mistake

- b. also, both “caused” the loss
 - vi. reliance analysis:
 - 1. ct. in *PEI* found evidence that general did NOT rely on sub’s bid
 - vii. bargaining process of negotiating costs of precautions, no need for legal rules
 - 1. but, transaction costs of reaching agreement prevent agreement from being reached
 - 2. with a legal rule, costless negotiation
- g. R2 §25
- h. R2 §30
- i. R2 §40
- j. R2 §42
- k. R2 §45
- l. R2 §50-56
- m. R2 §62
 - i. Commencement of performance entails a promise to complete performance
 - 1. But, only if offer can be accepted by either promise OR performance
 - 2. Not an option contract
 - a. Binds both parties to irrevocable contract
- n. R2 §69

IX. Counteroffer and Battle of the Forms

- a. *Ionics v. Elmwood*
 - i. Facts:
 - 1. thermostats and water dispensers
 - 2. discrepancy between terms on purchase/order forms: “battle of the forms”
 - ii. Holding:
 - iii. Rationale:
 - 1. Was there a contract?
 - 2. If so, what were the terms?
 - a. conduct of Ionics (paid for and used the thermostats)
 - b. but, Elmwood’s terms would be “last shot” under common law doctrine
 - c. UCC 2-207
 - i. no “assent to additional terms” in acceptance (acknowledgement form)
 - ii. no acceptance conditional on such assent
 - 1. additional or different terms (Elmwood form); “proposals” only
 - d. terms of acknowledgment:
 - i. not an acceptance
 - 1. unless, acceptance is expressly conditioned on assent to additional or different terms
 - 2. or, unless conduct recognizes the existence of a contract
 - a. binding terms are only those which have been agreed upon
 - 3. contract formed by conduct, rather than the terms of forms
 - a. so, how to decide warranty/remedy?

- b. UCC provides “supplementary additional terms incorporated under any other provisions of Act”
 - c. So, UCC warranty provision as a gap filler
 - 3. **additional** terms:
 - a. become part of contract UNLESS:
 - i. materially altering the contract
 - ii. offeree expresses objection (can be by conduct)
 - iii. acceptance is limited to acceptance of initial terms
 - 4. **different** terms, excluded from contract:
 - a. each parties’ objection is implicit
 - b. no mention in 2-207(2), only in comment 6
 - iv. Prof. Goldberg:
 - 1. “best shot rule”
 - 2. force courts to decide which of two “different” terms is “best”
 - a. no default rules
 - b. incentive to drive each party to the middle
 - 3. must be calculated while taking into account that warranty/remedies are factored into the price of the product
- b. *Step-Saver Data v. Wyse Tech.*
 - i. Facts:
 - 1. Contract:
 - a. SS: offer on phone, acceptance upon shipment
 - b. box-top license consists of additional terms
 - ii. Holding:
 - 1. court holds that contract was already in place, TSL’s box-top license forms were not sufficient for TSL to forgo the transaction
 - 2. No need to determine when contract was formed, since determination is one of conduct
 - a. so, conduct by both parties (2-207(3))
 - iii. Rationale:
 - 1. TSL argues conditional acceptance
 - a. USS 2-207(3)
 - b. but, contradicted by their conduct:
 - c. 3 tests:
 - i. materially altering?
 - ii. certain terms (exclusive)
 - iii. unwillingness to proceed
 - 2. return provision: not enough to satisfy (ii), since other terms on box-top were disregarded
- c. *Jerez v. JD Closeouts*
 - i. Facts:
 - 1. website order, with hidden terms
 - ii. Holding:
 - iii. Rationale:
 - 1. was forum selection clause “reasonably communicated”?
 - 2. contract present to mass numbers

- a. no classic “meeting of the minds”
- d. *Fteja v. Facebook*
 - i. also cites “reasonable communication”
 - ii. both cases require mutual manifestation of assent to terms
 - 1. Do terms resemble those which rational parties would have bargained for, ex ante? if so, enforceable
 - a. forum selection clause? biased by hindsight?
 - i. saves company money, factored into costs, passed to consumer in pricing
 - 1. competition in bargaining
 - a. prices, warranties, forum selection clauses
 - b. factors to assess in determining fairness of terms:
 - i. exploitative? unreasonable? exploit another’s bargaining position? were terms communicated? any competitors?
 - c. extra-legal motivations for fairness in terms
 - i. credible reputational signals
 - 1. crucial to internet transactions
 - iii. what remedy?
 - 1. legislation (“lemon law”) for highly tailored situations
 - 2. default rules/minimum standards (list of prohibited clauses/terms)
 - 3. improve communication of terms
 - 4. creation of fed. agencies for consumer protection
 - 5. rating agencies
- e. UCC 2-207
- f. R2 §36
- g. R2 §39

X. Precontractual Liability

- a. *Hoffman v. Red Owl Stores*
 - i. Facts:
 - ii. Holding:
 - 1. no contract, but recovery of damages for several expenditures caused by reliance
 - iii. Rationale:
 - 1. no recovery for large expenditure (purchase of “experimental store”)
 - 2. Court uses promissory estoppel, not as a substitute for consideration in a contract, but to prevent injustice
 - a. recovery mechanism
 - 3. preliminary agreements were lacking in sufficient definiteness and specificity to constitute a contract
 - a. yet, court still enforces the promise
 - b. promise:
 - i. manifestation of intent to act
 - ii. with the intention to commit to another’s action/promise
 - 4. Court promoting negotiations by allowing promissory estoppel to bind parties to another’s investment (detrimental reliance)
 - a. but, discourages “cheap talk”; can also chill negotiations

- b. at what point is Hoffman's reliance unreasonably risky?
 - i. bargaining power
 - ii. specific demands for performance
 - 1. as opposed to "cheap talk"
 - iii. nature of franchise agreements ("skin in the game")

b. *Dixon v. Wells Fargo*

i. Facts:

- 1. foreclosure process, Dixons notified
 - a. told to stop payments
 - i. were P's expected to pay into ESCRO? or, pocketing the money saved by stopping mortgage payments?
- 2. P's sue D after foreclosure initiated
 - a. foreclosure initiated 1.5 years after payments stopped
- 3. D's file motion to dismiss (failure to state a claim)
 - a. argue no contract, no promissory estoppel
- 4. promisor: misconduct?
 - a. taking advantage?

ii. Holding:

- 1. special verdict for Wells Fargo
 - a. Dixons did not rely on D's representations
 - i. since D was in contact with P

iii. Rationale:

- 1. promissory estoppel:
 - a. reliance induced in preliminary agreement
 - b. this would allow promissory estoppel to swallow all of contract law
 - i. As in *Hamer v. Sidway*, all promises induce some sort of reliance
- 2. "strung along"; "upper hand"
 - a. promisor's words were designed to take advantage
 - i. absence of fair-dealing, good faith
- 3. Ask:
 - a. Was there a contract?
 - b. If not, can liability be imposed by promissory estoppel?
 - c. Is R2 90 an invitation to judicial error?
 - i. "avoid injustice"

c. R2 §87

d. R2 §90

XI. Indefiniteness

a. *Trimmer v. Van Bomel*

- i. "sumptuous life"
- ii. indefinite promise

- 1. indefiniteness may indicate that parties did not intend to be bound by contract
 - a. or, can simply reflect uncertainty (in prices, supply, etc.)

b. *Wagner Excello Foods v. Fearn Int'l*

- i. juice concentrate
- ii. open terms:

1. do parties intend to be bound by contract?
 - a. how many terms?
 - b. materiality?
 - c. other terms included?
 - d. other evidence?
 - i. partial performance of contract?
 1. such as, purchase of equipment
 2. terms, if included, may constitute a barrier to negotiation
 - a. terms may signal adverse intentions
 - b. costs of negotiating may be greater than expected loss
 3. indefiniteness as a bargaining tool
 - a. asymmetric information
 - b. in employment context, an employee can use information regarding an employer's surplus in negotiations
- c. reconciling the cases:
 - i. In *Wagner*, intent to be bound
 1. external reference point
 2. price as only open term
 - a. Court can fill the gap with a reasonable (market) price
 - i. limited to the sale of goods (UCC)
 - b. Court will reach to enforce contracts when indicia that parties intended to be bound
- d. *Varney v. Ditmars*
 - i. essential term open to negotiation (Cardozo dissent)
- e. *Eastern Airlines v. Gulf Oil Corp.*
 - i. Facts:
 1. **Requirements contract**
 - a. Eastern and Gulf → aviation fuel contract
 - b. fuel requirements by city (long-term relationship)
 2. as opposed to “at arms-length”, “one-off” transaction
 - a. “relational contract”
 - b. primary enforcement mechanism is the relationship itself
 3. contracts deliberately left vague on certain terms
 - a. so, how to enforce contract, if disputed in court?
 - ii. Holding:
 1. Valid contract, not violated by E. Airlines
 - iii. Rationale:
 1. Requirements contracts:
 - a. contrary to output contract
 - i. in requirements contract, E. Airlines purchase all jet fuel required from Gulf Oil
 - ii. In output contract, Gulf would sell all output to E. Airlines
 2. E. Airlines uses external metric (West Texas Sour price) for all purchases, regardless of market price
 - a. Gulf has new refinery, surplus fuel
 3. Energy crisis:

- a. OPEC price increase and embargo
 - b. So, USA attempts to increase domestic oil production
 - i. price “old oil” at previous rate; “new oil” much more expensive
 - 1. incentive for oil co’s to increase production of new oil
 - ii. additional incentive:
 - 1. for every barrel of new oil produced (in excess of previous capacity), one barrel of old oil can be sold at higher price (market price)
4. dispute:
- a. external price point (price of West Texas Crude) listed in Platt’s Oilgram is “old oil” price (much lower)
 - i. \$5 v. \$11
 - b. but requirements contract with E. Airlines forced Gulf to sell its oil at a much lower price (artificially low price as compared to market)
5. D argues that contract is vague, indefinite (and has been invalid the entire time)
- a. requirements are indefinite
 - i. E. Airlines can buy as much or as little oil as it wants
 - ii. So, argues that quantity term is indefinite, unenforceable
 - b. historically, courts have held that requirements contracts are invalid for want of definiteness, mutuality
 - i. but, courts have held that common law will enforce contract if requisite demand can be shown in good faith
 - c. evidence of fuel freighting?
 - i. where E. Airlines obtains large quantities of fuel at cities with Gulf contract, freights to other cities without Gulf contract (to take advantage of artificially low price)
 - 1. D argues that this constitutes a violation of the good faith requirement in requirements contracts
 - a. evidence can be commercial standards
 - b. UCC protects against unreasonable demand, based on historical experience
 - d. Gulf’s additional arguments:
 - i. conditions changed dramatically (requirements contract was entered into with certain range of price estimates)
 - ii. no custom of fuel freighting (unprecedented situation)
 - iii. UCC 2-306: cannot use requirements contract to exploit price discrepancies
 - 1. but, allows for deviations from custom (comment 2)
 - iv. if net gain is negative (such as if contract required Gulf to shut down), contract cannot be binding
 - e. Did the parties intend to be bound?
- f. *Wood v. Lucy, Lady Duff-Gordon*
- i. Facts:
 - 1. **exclusive dealings** contract
 - a. contract for Wood to market LLDG’s products for half the profits
 - 2. LLDG gets Sears contract – endorsing line of fashions

- a. Wood sues D
- ii. Holding (Cardozo):
 - 1. Valid contract (due to implied consideration)
 - a. as opposed to “primitive” formalism
 - 2. Willing to imply terms if they constitute default rules
 - a. default rules: parties would have agreed to terms ex ante
 - i. reasonable efforts assumption (see below)
 - 3. An attempt to overcome indefiniteness
- iii. Rationale:
 - 1. Exclusive dealings contract binds LLDG
 - a. but, P argues that Wood not obligated to do anything
 - i. no consideration
 - ii. “lacks the elements of a contract”
 - b. goal of an exclusive dealings contract:
 - i. no incentive for one marketer to free-ride on efforts of another marketer
 - ii. LLDG can’t hire another marketer after having success w/ Wood
 - 2. Wood’s argument (adopted by Cardozo):
 - a. implied promise to exercise reasonable efforts to marked designs
 - i. parties meant to be bound
 - b. but, interpretation of “reasonable efforts” in contract open to legal interpretation, dispute
 - i. so, use a default rule
 - ii. default rule can reduce transaction costs
 - 1. only requires that minority of parties (idiosyncratic actors) opt-out of the default rule
 - a. again, reference to terms that parties WOULD HAVE bargained for

g. R2 §33

XII. Policing the Bargain

XIII. Overreaching and Duress

- a. Modification of an existing agreement:
- b. *Alaska Packers v. Domenico*
 - i. Facts:
 - 1. new wage demanded after employees transported to Alaska
 - 2. Wage demand granted
 - ii. Holding:
 - 1. “new” contract not valid
 - iii. Rationale:
 - 1. Employer accepted work at new wage
 - a. But, supervisor exceeded authority to bargain
 - 2. Pre-existing bargain, with consideration
 - a. no new consideration in new rate agreement
 - 3. Pre-existing duty rule
 - a. any modification must be supported by new consideration

- i. consideration cannot be the same as the promise in the original contract
 - b. What if fishermen agreed to work an extra day?
 - i. then, no preexisting duty rule
 - 4. Argument that fishermen did have consideration in modification?
 - a. no provision in original contract re: quality of nets
 - b. contract terminated when terms (re: ability to earn commission) were violated by faulty nets
 - i. so, new contract with higher wages?
 - 5. motivations for modification:
 - a. unforeseen circumstances (benign)
 - b. exploit a monopoly position (malign)
 - i. court's holding in *Alaska Packers*
 - 6. context of labor movement
 - a. courts frightened at power of organized labor
 - i. exercising monopoly power, interfering with the market
 - b. assumption that companies providing faulty nets would be economically irrational
 - i. as would workers stopping work
 - 1. unless their demands were true
 - ii. or, Alaska Packer Co. attempting to achieve optimal level of fish with faulty nets (to limit commission, cannery capacity, etc.)
 - 7. consideration as a proxy for benign modification
 - a. modification is less likely to be the consequence of a "hold-up"
 - b. difficult to measure (consideration can be found in a variety of circumstances)
- c. R2 §73
 - i. pre-existing duty rule
 - 1. no mention of consideration
 - 2. takes into account unanticipated circumstances (consideration irrelevant)
 - a. recognizes that consideration can be manipulated
 - 3. so, courts have the capacity to distinguish between benign and malign motives?
 - a. move from rule (consideration v. no consideration) to standard (good faith v. bad faith modification)
- d. R2 §89
 - i. modification must be "fair and equitable"

XIV. Duress

- a. General:
 - i. enforcement of contracts:
 - 1. voluntariness requirement
 - 2. autonomy and economic incentive rationales
 - a. ideal: perfect competition
 - b. monopoly: evidence that bargain was not value-maximizing; exploitative
 - c. changed conditions (unanticipated)
 - i. "shock" to normal market conditions

- ii. prone to duress if unanticipated (9/11; Sandy)
 - iii. statutes for price gouging
 - ii. improper v. illegal threats
 - 1. either can void a contract (see R2 176; *Wolf*)
- b. *Wolf v. Marlton Corp.*
 - i. Facts: threat to sell tract of land to an “undesirable party”
 - ii. Holding:
 - iii. Rationale:
 - 1. motives?
 - a. intent to induce assent via improper threat
- c. *Austin Instrument, Inc. v. Loral Corp.*
 - i. Facts
 - ii. Holding
 - iii. Rationale:
 - 1. economic duress
 - a. no alternative source of supply
 - b. breach of contract action does not remedy situation (reputational harm, etc.)
 - c. immediate possession is threatened
 - 2. “hold-up” scenario, as in *Alaska Packer*
 - 3. *Batsakis*?
 - a. duress argument likely not sufficient to void contract
 - i. since benign explanation is also available
- d. R2 §174 -
- e. R2 175 –
 - i. improper threats inducing manifestation of intent
 - 1. those threats included in 176
- f. R2 176

XV. Fraud and Misrepresentation

- a. Willful and Negligent Misrepresentation
 - i. Fraudulent or material misrepresentations
- b. *Speiss v. Brandt*
 - i. Facts:
 - 1. resort sale, alleged misrepresentations re: profit-generating capacity
 - ii. Holding:
 - 1. fraud?
 - a. majority – yes
 - b. dissent – no
 - iii. Rationale:
 - 1. fraud?
 - a. knowledge of falsity/should know to be false
 - i. fraudulent or material misrepresentation
 - b. material fact
 - c. intent to induce
 - d. justified reliance
 - 2. asymmetric information re: exchange

- a. incentive to investigate
 - b. seller lulls buyer into complacency by making representations
 - i. so, not an autonomous decision
 - 3. the seller is not necessarily required to convey all information
 - a. but, such disclosure is required if representations are made
 - i. representations must be complete and accurate
 - b. requirement incentives trust,
 - i. reduces transaction costs
 - 4. does not apply to future events (facts)
 - a. does not implicate opinions or speculation
 - b. rule attempts to address information asymmetry problem
 - i. no asymmetry in future predictions
 - 5. misrepresentations of past facts
 - a. resort is “making good money”
 - i. Dissent agrees with claim (not a misrepresentation)
 - 1. capital improvements made to resort
 - 2. accounting losses v. operating losses
 - 6. inducement? reliance?
 - a. dissent argues that sale was made before representations in question
 - b. P went forward with sale even though books were not provided
 - i. had books been provided, no information asymmetry problem
 - ii. request for books indicated that P was not relying on seller’s representations?
 - 7. contrast *CBS v. Ziff-Davis*
 - a. what is buyer purchasing?
 - i. good + promise
 - ii. $x + y$
 - 1. x (resort) = 90K
 - 2. x (resort) + y (promise) = 95K
 - b. does not depend on buyer’s belief that representation is true (buyer can still rely on promise)
 - 8. youth/inexperience argument
 - a. duty to avoid mistake falls to party better able to correct the mistake
 - 9. duty to disclose:**
 - a. party with superior information has affirmative obligation to convey information, even in the absence of a direct question
 - i. should party with inferior info. be expected to discover info. through reasonable means?
 - b. not applied to situations where hidden benefit (rather than detriment) generates socially-valuable transactions to both parties
 - i. incentives for investment in discovering benefits
 - 10. a fraudulent misrepresentation need not be material to render contract voidable
- c. *Danann Realty v. Harris*
- i. Facts:
 - 1. building lease; alleged misrepresentations re: operating costs
 - ii. Holding:

1. majority:
 - a. merger clause is binding (constrains ability to prove fraud)
 - b. but, merger clause can't be used as a shield
 - i. seller cannot contract for immunity from fraud
 1. specificity of clause
 2. professionals bargaining for contract (including merger clause)
 - a. clause factored into cost
 - c. facts were discoverable by all parties
 - d. buyer misrepresented that they were not relying on oral representations
- iii. Rationale:
 1. oral representations and merger clause
 - a. contracting out of liability for misrepresentations?
 - b. why would a buyer sign a contract with a merger clause?
 - i. protects preliminary negotiations (not bound to terms)
 - ii. agents' representations
 - iii. transaction costs (of litigation)
 1. cheaper price for foregoing representation liability
 - c. hold-up problem (in absence of merger clause)
 - i. also reflected in pricing
- d. *Psenicska v. 20th Century Fox*
- e. R2 §159
- f. R2 160
- g. R2 161
- h. R2 162
 - i. a representation is material if it is likely to induce reliance
- i. R2 163
- j. R2 164
 - i. misrepresentation makes a contract voidable when it is fraudulent OR material
- k. R2 167
 - i. when misrepresentation is an inducing cause
 1. when it substantially contributes to assent
 - a. so, misrepresentation made negligently (without knowledge or bad motives) can also void a contract

XVI. Unconscionability and Standard Forms

- a. *Williams v. Walker-Thomas Furniture I & II*
 - i. Facts:
 1. rent-to-own contract (Walker-Thomas retains the title)
 2. DC Ct. of Appeals holds that the contract is exploitative but IS enforceable
 3. DC Circ. Ct.
 - a. use unconscionability doctrine to void contract
 - i. absence of choice
 - ii. contract terms unreasonably favorable to one party
 - ii. Holding:
 - 1.
 - iii. Rationale:

1. procedural unconscionability
 - a. deprives one party of rational choice re: bargain
 - b. factors:
 - i. education of parties
 - ii. deceptive sales practice
 - iii. unequal bargaining position
 - iv. presentation of terms (hidden)
 2. substantive unconscionability
 - a. unreasonably favorable contract terms
 - i. where stronger party knows that weaker party cannot perform the contract
 - ii. assessment also takes into account any benefits conferred on the party with weaker bargaining power
 1. i.e., ability of buyer to purchase goods on credit
 - b. content of contract
 - i. secured transaction clause
 1. payments distributed pro rata (allocated to each item as proportion of value of each) until entire balance of all items is zero
 - c. cross-collateral clause
 - i. any competition? unequal bargaining power?
 - ii. clause allows co. to recoup at least some costs in the event of default
 1. without clause, higher costs, less credit, higher interest rates
 2. this analysis could be faulty, if cognitive error reduces a buyer's assessment of her own probability of default
 - a. cognitive error: party acting irrationally
 - i. should courts invalidate these contracts?
 - ii. at what cost?
 - iii. deterrence incentive of cross-collateral clause is not effective unless party is aware of clause
 1. in terrorem effect
 3. "payday" loans
 - a. high-risk loan: what rate of return?
 - b. impossible to tailor terms of loan to debtor
- b. *Henningsen v. Bloomfield Motors*
- i. Facts:
 1. contract for purchase of vehicle; limitation on express and implied warranties
 - ii. Holding:
 - iii. Rationale:
 1. oligopoly
 - a. but, why collude on warranty terms, rather than price?
 - b. warranties = convince buyer of quality
 - i. signaling, induces confidence
 - ii. if low quality, price accounts for lack of quality

2. insurance explanation
 - a. multiple buyers = recover nominal additional fee from each buyer to pay for liability for one buyer
 - i. accounts for information asymmetry re: historical rate of defects
 1. warranty covers expected cost of a defect
3. disclaiming warranty
 - a. information asymmetry reduces over time
 - i. at some point, both parties are equally capable of avoiding loss
 - b. caveat emptor – buyer beware
4. cognitive error:
 - a. disclaiming limited warranty still serves signaling function, while relying on over-optimistic consumer
 - i. underestimating probability of defect
 1. information asymmetry exploited
 - b. so, warranty disclaimer is not value-maximizing
 - i. but this does not require collusion; lack of a competitive market
5. how would a reasonable consumer interpret a warranty disclaimer clause?
 - a. same result, since clause’s disclaimer of personal injury is not readily apparent

c. R2 §208

XVII. The Terms of the Contract

XVIII. Parol Evidence Rule

a. *Mitchill v. Lath*

- i. Facts:
 1. farm purchase; oral agreement re: removal of icehouse from across the street
- ii. Holding:
 1. Was oral promise part of the contract?
 - a. Did parties intend for the oral promise to be part of the contract ex ante?
 2. parol evidence rule
 3. Andrews majority:
 - a. broad interpretation of writing’s included terms
 - i. writing as a full integration of terms
 - b. in the absence of a merger clause, examine agreement itself to evaluate what terms in parol evidence contradict terms in written agreement
 - i. “natural omission test”
 4. Lehman dissent:
 - a. terms in writing must be expressed, or merger clause
 - b. contract must be examined in context of surrounding circumstances
 - i. subject-matter specific (conveyance of land)
 - ii. assuming there was an agreement re: the icehouse, would agreement be included in writing?
 1. to apply natural omission test
 2. document alone will not suffice to answer
 - iii. agreement re: conveyance of land naturally omits other acts to be performed on other property

1. not ruling on validity of term, only on admissibility of evidence re: prior agreement

iii. Rationale:

1. parol evidence rule
 - a. encourages cheap talk
 - b. reduces transaction costs
 - c. but, credibility problem
2. Requirements:
 - a. promise must be collateral in form
 - i. connected to written agreement
 1. closely related; independent from
 - b. term must not contradict written terms
 - c. term not expected to ordinarily be included in writing
3. Test:
 - a. 4 corners test
 - i. on its face, does writing appear to be a complete expression of terms?
 1. if so, fully-integrated
 2. merger clause as evidence
 - b. matter of degree
 - c. merger clause → can be express or implied
4. what if contract contained a merger clause?
 - a. Andrews: scope would apply to conveyance
 - b. Lehman: parol evidence still admissible
 - i. also agrees w/ above re: conveyance
 - c. “but for” agreement (includes icehouse)
 - i. how to evaluate?
 1. extrinsic evidence re: negotiations
 2. extrinsic evidence to establish integration
5. Lehman:
 - a. extrinsic evidence can always be admissible to determine integration
 - i. if fully integrated, that extrinsic evidence is not included in agreement
6. if icehouse agreement was made AFTER conveyance contract?
 - a. no consideration
 - b. good faith modification
 - i. parol evidence rule does not apply

b. *Masterson v. Sine*

- i. Facts:
 1. land conveyance with buy-back option;
 2. seller goes bankrupt, trustee attempts to exercise option (so that land could be sold and creditors paid) but seller claims that oral agreement was made that land would “stay in the family”, could not be re-assigned
 - a. argue that parol evidence of the agreement should be admissible
- ii. Holding (Traynor):

1. allow parol evidence to determine if writing is fully-integrated, re: assignability agreement
 - a. natural omission test
 - i. versus certainty test of UCC; more permissive
 - b. only exception: when parol evidence is misleading
 2. Dissent:
 - a. assignability presumed under CA law, so parol evidence contradicts written terms
- iii. Rationale:
1. parol evidence
 - a. not admissible if contradicting terms included in writing
 - i. or, where agreements are fully-integrated
 1. merger clause as evidence
 2. where fully integrated, parol evidence cannot add to or vary terms
 - b. integration:
 - i. determined from face of document
 1. Andrews rationale
 2. admissibility of parol evidence?
 - a. Andrews, Lehman, or Traynor?
 - b. terms v. meaning of terms
 - c. JP Morgan and WaMu dispute
 - i. indemnification from acts by WaMu prior to acquisition
 1. but, assumed “all liabilities” (FDIC argument)

- c. R2 §209
- d. R2 210
- e. R2 211
- f. R2 212
- g. R2 213
- h. R2 214
- i. R2 215
- j. R2 216

XIX. Interpretation

- a. *In re Soper*
 - i. Facts:
 1. dispute over the meaning of “wife” in life insurance policy
 - a. Gertrude or first wife?
 - b. ambiguity enters once extrinsic evidence is introduced
 - i. otherwise, “wife” has a plain meaning
 - ii. Holding:
 - iii. Rationale:
 1. Intention of contracting party v. objective dictionary definition
 2. ambiguous term v. plain meaning (where extrinsic evidence is inadmissible)
 - a. versus actual intention of the parties
 - b. context as crucial to assessing intentions
 3. “wife”

- a. Gertrude as wife does not contradict express contractual intent, just evidence of ambiguity
 - i. contradiction is debatable
 - b. compare to “wife and son”
 - i. son – additional term
 - 1. subject to parol evidence rule
 - a. not interpreting a term, adding a term
 - 2. unless term is arguably part of the definition of wife (interpretation)
 - a. if so, can use parol evidence/extrinsic evidence
 - c. contract read as a whole
 - i. plain meaning in context of contract
- b. *W.W.W. Assoc. v. Giancontieri*
- i. Facts:
 - 1. land sale; reciprocal cancellation provision (construction on land with a lis pendens filed against it)
 - ii. Holding (Kaye):
 - 1.
 - iii. Rationale:
 - 1. interpretation of terms
 - a. look to document to interpret terms of contract
 - i. look to other sections to resolve ambiguities
 - ii. would not permit consultation of other documents, as in *Soper* (although other document in *Soper* was found to be unconvincing)
 - b. seek to determine purpose of contract
 - c. parol evidence rule in NY – *Mitchill v. Lath*
- c. *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*
- i. Facts:
 - 1. contract to remove metal turbine, causing damage
 - 2. indemnity provision in contract
 - ii. Holding (Traynor):
 - iii. Rationale:
 - 1. interpretation
 - a. is proposed evidence relevant to prove meaning?
 - i. is anything relevant admissible?
 - b. divergent assessment of court’s ability to determine parties’ intent (from Kaye in *WWW Assoc.*)
 - c. “credible factors” can be admitted to allow jury to decide on one of two possible meanings
 - 2. extrinsic evidence
 - a. allowed to define a term (even if contradictory)
 - i. but, once the term is defined, cannot admit contradictory extrinsic evidence
 - b. compare with Traynor’s “natural omission test” in *Masterson*
 - i. as opposed to Lehman’s dissent in *Mitchill*

- c. this rule is limited to meanings to which term is “reasonably susceptible”
 - d. *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*
 - i. Facts:
 - 1. commercial loan for an office building; dispute over pre-payment of loan (due to unfavorable rise in interest rates)
 - ii. Holding (Kozinski):
 - 1. reasonable susceptibility
 - iii. Rationale:
 - 1. Kozinski:
 - a. illustrates the absurdity of Traynor’s rule
 - i. but, uses same boundary of “reasonable susceptibility”
 - 2. Incentive effects
 - a. under NY rule (Kaye; *WWW Assoc.*), “plain meaning”
 - i. reduces transaction costs in interpretation, ex post
 - ii. increases transaction costs in drafting, ex ante
 - b. under CA rule (Traynor; *Pacific Gas*), admit extrinsic evidence
 - i. vice versa re: above transaction costs
 - c. empirically, CA firms in deals with NY firms choose to use NY law
 - 3. Textual v. contextual interpretation
 - a. ex ante or ex post interpretive perspective?
 - b. resolving ambiguity
 - i. admit extrinsic evidence to resolve ambiguity
 - e. *Frigalim Importing v. B.N.S. International Sales Corp.*
 - i. Facts:
 - 1. dispute over the meaning of “chicken” in contract
 - a. frier? broiler? stew chicken?
 - 2. seller: chicken is ANY chicken
 - 3. buyer: chicken is “broiler chicken”
 - a. no fraud, bad faith alleged
 - ii. Holding (Friendly):
 - 1. party with “narrower” definition of term (P) has burden of proving that his meaning was intended
 - a. P did not carry proof, so judgment for D
 - iii. Rationale:
 - 1. subjective intention of parties? or plain meaning (objective manifestation of intent; *Lucy v. Zehmer*)?
 - a. Holmes: manifestation of intent
 - b. so, party with idiosyncratic meaning of term can more cheaply avoid mistake
 - 2. ambiguous term: “chicken”
 - a. trade usage:
 - b. court finding meaning of term that was intended by the parties
 - i. but, both parties bring evidence of own meaning (opposing experts)
 - ii. inexperience defense:

1. Friendly is receptive but this would entail definition of ALL terms in contract, if one party is inexperienced (transaction costs)
 2. inexperienced party as cheapest cost avoider
 - a. Identify self as inexperienced and clarify ambiguity due to inexperience
 - c. market price argument
 - i. D unable to profit under one interpretation
 1. evidence in support of other interpretation
 2. D's subjective intent coincided with some objective meanings (but, so did P's)
 - a. so, P, with narrower definition of chicken, had **burden of proving** that his meaning was intended
 - i. P did not carry burden, so judgment for D
- f. R2 §20 – effect of misunderstanding
 - i. requirements of misunderstanding
 - ii. no manifestation of mutual assent
 - iii. no contract
 1. applies to *Peerless* case, as opposed to “burden of proof” test of Friendly
- g. R2 22
 - i. where P has reason to know that seller intended a contrary meaning

XX. The UCC, Custom, and Trade Usage

- a. *Columbia Nitrogen Corp. v. Royster Co.*
 - i. Facts:
 1. Columbia sells nitrogen to Royster; Royster sells phosphate to Columbia
 - a. initial phosphate sale: minimum quantities, escalation of price clause to correspond with production costs
 - ii. Holding:
 1. evidence of trade usage is admissible where not explicitly disclaimed, and where authorized by UCC 2-202 (re: sale of goods)
 - iii. Rationale:
 1. UCC 2-202
 - a. trade usage admissible to “explain or supplement” writing, even where writing is intended as final
 - b. writing need not be ambiguous
 - i. so, min. quantity in Columbia contract (which was not ambiguous) does not preclude admission of trade usage
 - ii. can explain terms, or add terms
 1. but, must not add terms if writing is complete and final
 2. assumptions re: trade usage:
 - a. familiarity to all parties
 - b. trade usage's application is intended by the parties
 3. to exclude trade usage in a contract:
 - a. include express terms for every scenario where trade usage would otherwise be used to fill a gap

- i. but, terms must be bargained-for
 - 1. transaction costs
 - 2. ex ante (drafting) v. ex post (interpretation) costs
- b. argue that there is no customary trade usage in particular situation
- c. ignorance cannot exclude extrinsic evidence of trade usage, unless such ignorance is signaled to both sides

XXI. Performance of the Contract

XXII. Substantial Performance

a. *Jacob & Youngs v. Kent*

i. Facts:

- 1. buyer demanded that builder use Reading pipe, then discovered that other pipe was used
 - a. contract was not fully performed as promised

ii. Holding (Cardozo):

- 1. using other pipe IS a breach; but, most parties suffering such a breach would expect to pay the amount due (minus damages re: pipe error)
 - a. versus demanding perfect tender = minority
 - b. is this position defensible? would most parties bargain for a substantial performance rule?

iii. Rationale:

- 1. independent v. dependent promises
 - a. dependent promise = condition
 - b. how to distinguish?
 - i. context of contract; justice; economic waste
- 2. substantial performance
 - a. remedy for breach, awarding damages equal to difference in value
 - i. assuming innocence of mistake, intentions of both parties (assumed to be in good faith; reasonable)
 - b. “just as good”
 - i. allows reasonable assumption that both parties intent for value-maximizing choices in quality
 - c. strategic behavior problem (both parties)
 - i. exploitation
 - ii. increased or decreased under substantial performance or **perfect tender** default rule?
 - 1. substantial performance:
 - a. reduce strategic behavior by buyer
 - 2. perfect tender
 - a. reduce strategic behavior by builder
- iii. neither rule is favored based on strategic behavior
 - 1. but, since contractors are repeat players in industry, reputational incentives already constrain their strategic behavior
 - a. so, substantial performance rule favored

b. *O.W. Grun Roofing & Construction Co. v. Cope*

i. Facts:

- 1. “patchwork” roofing
- ii. Holding:
- iii. Rationale:
 - 1. difficulty in distinguishing between utility and aesthetics
 - 2. perfect tender rule: can lead to “chiseling”
 - a. both rules (sub. perf. and perf. tender) can lead to perverse incentives
 - 3. parties may contract out of the default (sub. perf.) rule
 - a. although clause was not effective in *Jacob & Youngs*
 - i. due to wording of specifications: “pipe OF THE quality commonly manufactured by Reading”

c. *Haymore v. Levinson*

- i. Facts:
- ii. Holding:
- iii. Rationale:

1.

d. R2 §241

XXIII. Excuses for Nonperformance

XXIV. Mistake

a. *Sherwood v. Walker*

i. Facts:

- 1. mutual mistake re: barren cow

ii. Holding:

1. Majority:

- a. both parties were laboring under a misconception, so contract is voidable
- b. mistake must be:
 - i. mutual
 - ii. re: a basic assumption of the contract (the “root of the matter”)
 - iii. material (as to the substance)
- c. mistake re: quality is not included in the above criteria

2. Dissent:

- a. mistake was to quality of cow, not substance (cow itself)
- b. mistake based on knowledge (limited), not fact
 - i. and purchaser thought that the cow could eventually breed (no certainty); had a “hunch”
- c. mistake must be based on fact; so, eliminates unpredictable future circumstances (such as with a stock price)

iii. Rationale:

1. quality v. substance

- a. was cow different than intended substance or quality?
 - i. price difference: unlikely that parties intended to assent to such an unfair bargain

2. consequences on the bargain:

- a. unallocated risk (neither party bears the risk of mistake)
- b. risk of cow’s fertility could have been allocated in the contract

- i. as between the two parties, the seller is in a better position to evaluate the risk (of fertility)
 - 1. so, parties likely would have allocated the risk to the seller
 - a. majority position:
 - i. in the face of uncertainty, ask where parties would have allocated the risk ex ante
 - ii. court does not actually take this position
3. pacta sunt servanda
 - a. promises ought to be kept
- b. *Simkin v. Blank*
 - i. Facts:
 - 1. Divorce settlement predicated on existence of Madoff account (later found to be non-existent fraud)
 - ii. Holding:
 - 1. settlement cannot be reformed on basis of mutual mistake
 - iii. Rationale:
 - 1. Divorce settlement was not explicitly intended to be 50/50 (no express intention of equitable division)
 - 2. Settlement represented parties' intentions re: speculation of the asset in question (Madoff account); similar to parties' speculation re: fertility of cow in *Sherman*
 - a. Divergent predictions re: future worth of certain assets
 - b. Risk allocation? On party who took the risk
 - i. Cannot avoid fulfilling contract when risk actually materializes
 - ii. Contra: if account had greatly increased in value after settlement, wife could not claim part of gains (valuation argument)
 - 1. Risk was bargained for in contract
- c. R2 §151-154
 - i. 151: Mistake
 - 1. Must be a mistake of fact
 - ii. 152: Mutual mistake
 - 1. Mutual mistake can void a contract (voidable by adversely-affected party)
 - 2. Under certain conditions:
 - a. Mistake is re: basic assumption of the contract
 - b. Adversely-affected party does not bear the risk of the mistake (see 154)
 - iii. 153: Unilateral mistake
 - 1. Can also void a contract, under certain circumstances:
 - a. Adversely-affected party does not bear the risk of the mistake (see 154)
 - b. if other party was aware of mistake
 - i. baseball card example (\$12, instead of \$1200)
 - iv. 154: Allocation of risk for mistake
 - 1. If not expressly allocated in contract, can infer from circumstances

2. If party has limited knowledge re: basic assumption and acts as if the limited knowledge is sufficient
3. Or, 154(c), if court determines that it is reasonable to impose assumption of risk on a party (such as in speculation situations)
 - a. Risk allocated by the court: such as when farmer discovers minerals in land
 - i. Duty to disclose?
 - ii. Cheapest cost avoider?

XXV. Impracticability/Frustration

a. Impossibility

b. *Taylor v. Caldwell*

- i. Facts:
 1. contract to play concerts at a music hall; hall burns down
- ii. Holding:
 1. contract is voided, based on doctrine of impossibility
- iii. Rationale:
 1. implied condition of continued existence (of thing essential to the contract)
 - a. criticized in future cases (*Transatlantic Financing*)
 - b. Not an implied condition, since destruction of the concert hall was not contemplated by the parties ex ante
 - i. Remote risk (not worth bargaining)
 - ii. Unforeseeable
 2. as with contract involving performance by a person, the contract is voided upon the person's death (or, a painter who is struck blind)
 - a. Same logic with contract for exchange of chattels, and the chattels are destroyed (*Rugg v. Minett*)
 3. Existence of music hall was an implied condition of the performance
 4. No alternative means of fulfilling contract (alternative performance of contract)
 - a. Alternative performance may = paying damages
 - b. Not required by *Taylor* court
 5. Court could have allocated risk to music hall owner
 - a. Better able to take fire prevention precautions, purchase insurance, etc.
 - b. So, music hall owner should be liable
 6. P suing D to recover promotional costs
 - a. Which party is in best position to decide how much to spend on promotional costs?
 - i. Party better able to avoid loss of spending on promotional expenses
 - b. So, discrepancy in deciding which party is the cheapest cost avoider
- iv. Notes:
 1. Parties may contract out of the default rule
 - a. *RNJ Interstate Corp. v. US*
 - i. Court held that RNJ (contractor) could not avoid performance, due to an express clause
 2. Risk (R) = impact of risk (I) x probability of risk (P)

- a. Used to establish which parties would agree to bear the risk (where the contract allocated the risk)
 - b. Difficult to quantify
 - 3. Leads to modern doctrines of:
 - a. Impracticability
 - b. Frustration
- c. Impracticability –
 - i. Where occurrence/non-occurrence of an event makes performance impractical
 - ii. factors to be considered:
 - 1. Extreme/unreasonable difficulty/expense for one party (severity)
 - 2. Foreseeability
 - 3. Which party bears the risk?
 - a. Express allocation v. implied
 - b. How *would have* the parties allocated the risk, had they foreseen it?
 - 4. Relational transactions
 - a. Extra-legal factors also constrain parties’ activities (breach/risk allocation)
 - b. Favors limited judicial intervention (allow the loss to lie where it falls)
 - i. Rationale that parties are better at determining their intentions, allocation of risk than courts
- d. **Commercial impracticability**
- e. *Transatlantic Financing Corp. v. United States*
 - i. Facts:
 - 1. Suez Canal closure forces ship to take alternate route; sues to recover additional costs, under impracticability theory
 - ii. Holding:
 - 1. Based on results of tri-partite impracticability test, performance of contract NOT rendered legally impossible (commercially impractical); no relief granted
 - iii. Rationale:
 - 1. Foreseeability
 - 2. Allocation of risk
 - a. Transatlantic as cheapest cost avoider
 - i. Could purchase insurance, determine how to bear the risk of a foreseeable contingency
 - ii. Surrounding circumstances suggest a willingness by Transatlantic to assume risks of unexpected contingency of Canal closure
 - 3. Not commercially impractical
 - 4. Most courts embrace this strict interpretation of commercial impracticability (higher costs alone are not sufficient)
 - 5. P does not claim performance was impossible, claimed that it performed under conditions different than those bargained for in the contract
 - a. Causing P to incur more costs than anticipated
 - b. Due to materialization of an unexpected contingency
 - i. Risk of contingency (that actually materialized) was not allocated

- ii. Performance rendered impracticable
 - 6. Contingency:
 - a. Suez Canal was closed
 - i. Unforeseen? Conflict in the region? Closed for another reason?
 - b. Or, simply, the trip was more expensive than expected
 - i. This would likely be interpreted as foreseeable
- iv. Notes:
 - 1. Posner/Rosenfield suggestion: replace foreseeability with cheapest cost avoider test (involving both party better able to foresee and better able to obtain insurance)
 - 2. Pluralist analyses
 - a. Since efficiency analysis does not apply, use fairness (Hillman)
 - b. Since courts cannot create incentives for parties to minimize unforeseen losses
 - i. "Agreement model"
 - 1. Accounts for "relational realities"
 - ii. "Gap model"
 - 1. Parties share losses
 - 3. *Willamette Crushing Co. v. State by & Through DOT*
 - a. Facts: Deadline as commercially impractical
 - b. Holding: contract enforceable, since contractor knew of deadline when he submitted bid
 - 4. Bankruptcy as implied term in every contract
- f. *Eastern Airlines v. Gulf Oil Corp.* (cont.)
 - i. Facts:
 - 1. Requirements contract for oil purchases; D invokes commercial impracticability to excuse it from performing contract
 - ii. Holding:
 - 1. Commercial impracticability does not apply; remedy of specific performance ordered
 - iii. Rationale:
 - 1. If a contingency is foreseeable, parties can account for the contingency in the contract
 - a. As in Suez cases, conflict in the Middle East was foreseeable
 - b. So, resulting governmental pricing structure (two-tiered) was also foreseeable
 - 2. Again, interpretation of the contingency (conflict in the Middle East = foreseeable; two-tiered pricing system = unforeseeable) determinative of impracticability
 - 3. Argument that Gulf Oil chose to peg prices on certain index, speculating that index will provide greatest profit
 - a. Choice of price index was bargained for in contract
 - b. Argument that Gulf Oil allocated the risk to itself ex ante
 - i. So, under this argument, could not use impracticability as an excuse for non-performance ex post
 - 4. Limiting case for impracticability:

- a. Performance of contract under contingency will result in bankruptcy
 - iv. Notes:
 - a. Force majeure clause
 - i. “force majeure” – act of God
- g. *ALCOA v. Essex*
- i. Facts:
 - 1. ALCOA (aluminum) argues that supervening event rendered performance impractical
 - ii. Holding:
 - 1. ALCOA is entitled to relief on the grounds of both impracticability and frustration of purpose
 - iii. Rationale:
 - 1. Severe disappointment → impracticability (also satisfies other elements of doctrine)
 - 2. Proposed solution?
 - a. Split unanticipated loss between both parties? When risk is not allocated in the contract
 - i. removes incentive for promisee to take precautions to avoid risk (expected loss)
 - 1. since promisee knows that the loss will be divided amongst the parties
 - ii. removes incentive to research, obtain information on risks
 - 1. “traditional” rule (leave loss where it falls) encourages parties to consider risks and take reasonable precautionary measures
 - b. “Gross inequities” clauses
- h. Westinghouse uranium cases
- i. Hypo: Hurricane Sandy example/warehouse and components to be delivered
- i. Is buyer of components still obligated to pay for components?
 - ii. Is supplier of components liable for breach if components (which have been destroyed) are not delivered?
 - 1. Foreseeability?
 - a. If foreseeable, risk can be allocated (and bargained for, with price, insurance, etc.)
 - iii. Other interpretations of contingency?
 - 1. Contingency that goods in a warehouse suffered damage?
 - 2. Storm was forecast, and then occurred
 - 3. Different levels of generality (the way the contingency is described can be determinative of whether the test for commercial impracticability is satisfied)
 - a. No reason to describe contingency in general v. specific terms
- j. **Frustration** (of purpose)
- i. If a change in circumstances makes one party’s performance worthless to the other (party’s principal purpose for entering into the contract is substantially frustrated by a supervening event – *ALCOA*)
 - ii. Doctrine between impossibility and impracticability (UCC 2-615)
 - 1. P can still perform, but no longer valuable

- 2. IMPLICIT risk allocation (default)
- iii. Factors to be considered:
 - 1. Substantial frustration
 - 2. Circumstances essential to the contract/basic assumption of the contract
 - 3. Supervening event must not be the fault of the disadvantaged party (including when party could have protected itself in the contract)
- iv. Opera hypo: Difference between illness of the lead singer and the cancellation of the opera due to a citywide flu epidemic
 - 1. Foreseeability; basic assumption; no express risk allocation
- k. *Krell v. Henry*
 - i. Facts:
 - 1. P enters contract to lease room to observe King's coronation; coronation was canceled; P sues to avoid contract
 - ii. Holding:
 - iii. Rationale:
 - 1. Frustration of purpose:
 - a. Parties contracted to achieve a certain purpose, which no longer applies
 - b. Coronation procession was regarded by both parties as the central purpose of the contract (basic assumption; essential)
 - 2. Parties could have included an opt-out clause (no contract if no procession) OR express provision that contract would be valid regardless of occurrence of coronation
 - 3. What factors are significant enough to constitute frustration?
 - a. Rainy/foggy? Vision of the procession obscured?
 - i. Idiosyncratic intention (to only perform contract in sunny weather) should be expressed by idiosyncratic actor
 - 1. Otherwise, assumed that promisee bore the risk
 - 2. Since a different allocation of risk (where promisor agrees to bear the risk of bad weather) would be reflected in the price
 - ii. Foreseeable risks are allocated in the contract (and reflected in the price)
 - b. Court holds that test is satisfied:
 - i. Both parties regard the contingency (or its non-occurrence) to be the "foundation" (basic assumption) of the contract?
 - ii. Event foreseeable? Reasonably in the contemplation of the parties when they contracted?
 - iii. Allocation of risk?
- l. *Lloyd v. Murphy*
 - i. Facts:
 - 1. Lease of service station/showroom for selling cars; govt. then bans sale of new cars due to war effort (1942);
 - 2. P attempts to avoid performance of K
 - ii. Holding (Traynor):
 - 1. contract not voidable for frustration, since purpose of contract (lease) was not totally destroyed, just restricted

- iii. Rationale:
 - 1. No defense of frustration when risk is foreseeable
 - a. Wartime manufacturing restrictions were foreseeable
 - b. Did parties anticipate supervening event?
 - c. Did parties contract to allocate the risk?
- m. UCC 2-615
 - i. Commercial impracticability:
 - 1. Seller does not assume “greater responsibility” (unallocated risk)
 - 2. Non-occurrence of contingency was a basic assumption of the contract
 - a. Unforeseen
 - 3. Contingency that materializes renders performance impracticable
- n. R2 §261
 - i. Impracticability
- o. R2 §265
 - i. Frustration

XXVI. Remedies for Breach

XXVII. Specific Performance

- a. Purpose of remedies in contract law:
 - i. When a breach occurs, remedies put parties in the position that they would have been in had the contract been performed
 - 1. Expectation remedy
 - a. expectation damages as a proxy
 - b. specific performance
 - i. but, this is an extraordinary remedy, rarely granted; why?
- b. Why no general standard of specific performance (versus damages)?
 - i. efficient breach theory
 - 1. promisee can either fulfill a contract or pay compensatory damages
 - a. can recoup damages by selling goods/engaging in contract with a third party
 - b. so, no party is worse off, and one party (third party) is better off – *pareto superior*
 - i. since it induces a second transaction
 - ii. but, increases transaction costs
 - c. but, seller (promisor) can also invoke a third-party transaction and supply the buyer with substitute goods (cover)
 - i. so, no distinction between damages and specific performance unless there are no substitutes for performance on the market (uniqueness)
 - 1. b/c seller cannot “cover”
 - ii. specific performance only increases transaction costs
 - ii. breach and pay (with damages) option incentivizes buyer to work with seller to minimize loss
- c. Specific performance
 - i. usually invoked in contracts for the sale of unique goods or land
 - 1. where damages would not be certain (as where calculation of value is difficult, unavailability of substitutes)

- ii. disfavored with the passage of time (goods subject to changes in value)
- iii. also, goods are only unique to a point (can probably be converted to some amount of money)
 - 1. same as rationale re: monetization of damages
- iv. can contract into specific performance (opt in)
- v. does not apply to personal services contracts
 - 1. autonomy concerns
 - 2. requiring specific performance of service requires monitoring of the service
 - a. even though services are usually “unique”
- d. *Sedmak v. Charlie’s Chevrolet*
 - i. Facts:
 - 1. P contracted to buy limited edition Corvette;
 - 2. dealership refused to perform the contract when the car’s value increased
 - ii. Holding:
 - 1. Court orders specific performance of the contract
 - iii. Rationale:
 - 1. UCC 2-716
 - a. specific performance when goods for sale are unique (so, no other adequate remedy, since Corvette is not fungible)
 - b. Court holds that goods need not be unique, just difficult to obtain (UCC: specific performance in “other proper circumstances”)
- e. *Van Wagner Adver. v. S&M Enters.*
 - i. Facts:
 - 1. lease terminated for billboard facing Midtown tunnel; Van Wagner sought specific performance
 - ii. Holding:
 - 1. No specific performance, since damages could be calculated
 - a. does not satisfy uniqueness or ‘other proper circumstances’ requirement of UCC 2-716
 - iii. Rationale:
- f. R2 357
- g. R2 359

XXVIII. Expectation Damages

- a. expectation damages:
 - i. to restore promisee to position he would have been in had the contract been performed
 - 1. how to measure expectancy?
 - a. market price? or contracted price?
 - b. reliance on contract?
 - i. reliance damages: put the party back in the position they were in had there been no contract
 - 2. justification for expectation damages:
 - a. if no expectation damages, seller has incentive to breach (such as, if reliance damages were the default rule)
 - b. but, does not prohibit breach to the same degree as punitive damages (preserves possibility for breach, in some circumstances)
- b. “lost volume” sellers – Special Problems in Measuring Expectancy

- i. resale by the seller in a breach
 - 1. damages as difference between resale price and original contract price
 - a. incurs transaction costs
 - b. but, injects goods back into the market (no economic waste)
 - 2. how to assess with multiple resales? for different prices?
 - a. which resale is compared with original contract price, for calculation of expectation damages?
 - i. strategic behavior?
 - ii. risk of declining market?
 - 3. expectation damages as loss of profit, rather than loss of entire contract price
 - a. excess of demand; no post-sale resale can be substitute for original contract (*R.E. Davis v. Diasonics*)
 - b. in this case, supply > demand
 - i. other considerations:
 - 1. advertising in a new territory
 - 2. “shelf space”/inventory
 - ii. selling more = costs more
 - iii. but, won’t sell past the point of profitability
 - c. seller bears the burden of proving that he should not be willing to make resale, due to profitability or other concerns
 - i. but then seller is required to divulge business model in public forum
 - ii. buyer – cannot shoulder burden of proving that further sales would still be profitable, due to information asymmetry
 - ii. what if both B and S are professional sellers of goods?
 - 1. either could make resale
 - iii. difficulty of measuring seller’s expectations (could proper damages be zero?)
- c. *Freund v. Washington Square Press*
 - i. Facts:
 - 1. contract for publication of book
 - 2. advance; royalties
 - 3. termination, publication deadlines
 - 4. P sues, claiming loss of royalties, loss of reputation (delay of tenure), cost of (self) publication
 - ii. Holding:
 - 1. nominal damages only (expectation damages not sufficiently certain);
 - 2. also accounts for reliance/restitution (see below)
 - iii. Rationale:
 - 1. damages:
 - a. measurable/certain
 - b. injury foreseeable
 - 2. vindicating the interests of aggrieved party in contract:
 - a. expectation interest
 - i. expectation must be proved with required certainty
 - ii. past as predictor of the future?
 - 1. court holds, not in this case

- 2. most courts, however, give more credit to the aggrieved party's assessment of his expectations
 - iii. cost of alternative publication?
 - 1. court holds: not what was contracted for
 - b. reliance interest
 - i. no preparation for publication costs expended by P, no reliance interest
 - ii. reliance must be an inherent requirement of the contract, rather than an "act of indulgence"
 - c. restitution interest
 - i. restore benefits conferred on other parties
 - 1. manuscript returned
- d. *Peevyhouse v. Garland Coal & Mining Co.*
 - i. Facts:
 - 1. farm leased for strip-mining; D's did not perform remedial work, since expense was much more than value of farm;
 - a. remedial work: \$29,000
 - b. value to be restored: \$300
 - 2. P's appeal jury's award of a fraction of the requested damages (due to "diminution in value" argument)
 - ii. Holding:
 - 1. Court agrees with D, applies diminution in value measure of damages, rather than default rule of cost of performance
 - a. only applies in unique situations, where the performance in question was not central to the purpose of the contracting parties
 - 2. Dissent:
 - a. exception requires that non-performance was in good faith (not so in this case)
 - i. ignores ex ante intentions of the parties
 - b. D's benefits should also be considered
 - c. appropriate remedy:
 - i. specific performance or cost of performance damages
 - iii. Rationale:
 - 1. expectation damages:
 - a. cost of performance rule
 - b. versus value rule
 - 2. economic waste (R2)/disproportionate expense/relative economic benefit, etc.
 - a. Cites *Jacob & Youngs* (substantial performance)
 - i. where Cardozo refuses to impose cost of performance damages (since cost of performance would amount to forfeiture)
 - 3. Contrasted with *American Standard, Inc.*
 - a. Where damages based on cost of performance were awarded regardless of "economic waste"
- e. *Peevyhouse* and *American Standard*
 - i. In each case, parties contracted for a service that other party failed to perform
 - 1. in each case, cost of performance was far greater than increase in value

2. so, what was the expectation of the landowner?
 - a. to have the service performed?
 - i. would mandate cost of performance damages
 - b. or, to have land of market value equivalent to that equal to if the service had been performed
 - i. thus necessitating value damages
 - c. in both cases, remedial work was contracted for, so was factored into the price/negotiations
- ii. In *American Standard*, failure to perform remedial work was an intentional breach (as distinguished from *Jacob & Youngs*)
 1. evidence of intent:
 - a. misfeasance v. nonfeasance
 - i. no need to undo work already performed in good faith, just requires performing the contract
 2. centrality of performance in question to the purpose of the contract
 - a. in *Peevyhouse*, argument that purpose of contract was for mutual profit from coal mining
 - i. remedial work was incidental to contract
 1. but, ignores subjective value (idiosyncratic)
 - a. residential v. investment purpose of land
 3. *American Standard*
 - a. awarded cost of performance damages but already sold the land
 - i. so, no intention to use damages to purchase performance
 1. windfall?
 2. or just allocating the risk/speculating
 - b. both cases wrongly decided?

f. R2 347

g. R2 349

XXIX. Limitations on Damages

- a. Lost volume sellers:
 - i. expectation damages- to make seller whole
 1. but what if seller is able to resell goods (so, no loss on individual sale) but could have made 1 additional sale w/o the breach?
 - a. so damages=lost profits from indiv. sale
 - b. only applies when volume is not an issue (can always make another sale); supply > demand
 - c. also assumes that it would be profitable/reasonable for seller to make another sale
 - i. burden of proof?
- b. *Hadley v. Baxter*
 - i. Facts:
 1. contract to deliver a new mill part; delay causing lost profits
 - ii. Holding:
 - iii. Rationale:
 1. default rule: party cannot recover unforeseeable damages (in most cases), unless P notifies D that he will be liable for such damages

- a. for instance, if most mill owners maintained a second replacement shaft for use when the first is under repair
 - i. (idiosyncratic actor would not have a second backup shaft and would need to notify D of this to recover damages)
 - ii. bargaining out of default rule
 - b. do not want parties to breach, so require full damages
 - i. but default rule systematically undercompensates parties who do not speak out
 - ii. rule places aggrieved party in worse position than if contract had been performed
 - 1. an alternative rule would increase costs, since possibility of damages (full compensation for any unforeseen contingency) would be factored into price
 - c. difference between “high cost customers” (who suffer large damages) and “low cost customers” (who suffer little harm if contingency occurs); charging differential prices to either
 - i. burden should be placed on high cost consumers to identify themselves as such (but often unverifiable)
 - ii. so, shipper will charge difference between high cost and low cost customers to account for both
 - 1. but this is a subsidy for high cost customers, penalty for low cost customers
2. low default rule for damages –
 - a. opt out for greater protection (information-forcing rule)
 - b. general damages v. “special” (idiosyncratically-high) damages
 - i. then, special damages are not foreseeable
 3. but, often no opportunity to bargain re: level of risk (mass commerce)
 - a. shippers opt out of default rule (disclaiming liability); does not allow for information-forcing rule of *Hadley*
 - i. exceptions:
 1. self-insure
 2. especially egregious breaches