INTRODUCTION TO INTERPRETATION

Restatement (Second) § 201 – Whose Meaning Prevails
(1) Where the parties have attached the same meaning to a promise or agreement, both parties are bound to that meaning.

(2) Where the parties have attached different meanings to a promise or agreement, party A’s meaning is attached if party B knew of party A’s interpretation or had reason to know of this interpretation AND party A did not know or did not have reason to know of party B’s interpretation (see also § 20(2)).

(3) Where both parties attached different meanings and neither has reason to know of the other’s meaning, then there is no assent (see also § 20(1)).

Whose Meaning Prevails – Common Law
- a person’s intentions corresponds to the “reasonable meaning of his words and acts”
- mental assent of the parties not requisite for the formation of a contract – outward expressions manifest intent and not secret thoughts
  - see Lucy v. Zehmer (outward drunken behavior established assent despite his secret belief it was a joke)
  - see also Embry v. McKittrick (Embry reasonably interpreted his boss’s statement to constitute an extension of his employment and court upheld as a valid contract)

Raffles v. Wichelhaus (Peerless)
- Facts – Defendant ordered cotton to be delivered by a ship called the Peerless. The cotton arrived by another ship than he intended, also called the Peerless
- Argument for voiding the contract
  - based on parole evidence, the ambiguity in the contract rendered it none binding
- Argument for not voiding the contract
  - based on parole evidence, intention of defendant to want a certain ship is irrelevant unless states at the time of the contract
  - does not affect the deal because delivery method was immaterial to the core contract

Principles of Modern Interpretation
- view interprets “reason to know” to mean that it is “more reasonable”
- slightly different take on §§ 201 and 20 would come about
  (1) If the parties attach different meanings and neither party knows of the other’s meaning, then the more reasonable meaning prevails (§ 201(2)(b)).
  (2) If the same case presents itself but the two meanings are equally reasonable then neither wins (§20(1)).
  (3) If the parties attach the same meanings, then that meaning prevails even if unreasonable (§201(1)).
  (4) If the parties attach different meanings BUT one party (A) knows that the other party (B) attached another meaning then the other meaning (B) prevails even if it less reasonable (§ 201(2)).
this view is a “fault system” where the party most at fault for the misunderstanding loses – not about meeting of the minds

Restatement (Second) § 204 – **Supplying an Omitted Essential Term (Implied Terms)**

- When the parties to a bargain have entered into a sufficiently defined contract but have not agreed with respect to an essential term then court supplies a reasonable term for the circumstances
- **Three Cases of Implied Term Contracts**
  - terms that parties had in mind but did not express
  - terms parties would have expressed if the issue had been raised
  - terms parties would have expressed if they had foreseen the difficulty

**Omitted Essential Term** – Case Law

- court provides “reasonable” duration for a contract (see Haines v. New York)
  - Facts – City had a contract to supply sewage for the entire city but city expanded at a faster rate than when contract entered into. City wanted sewage plant to increase capacity to meet new needs beyond what it was willing to handle
  - A contract without a fixed duration is neither terminable-at-will nor in perpetuity
- purpose/goal underlying the contract can provide meaning to terms to apply to unexpressed circumstances
  - view that words standing alone are meaningless without context
  - **Spaulding v. Morse** (father promised to pay son money until he went to college but son joined military instead – court found father only intended to pay if he needed the support)
    - “If the instrument as a whole produces a conviction that a particular result was fixedly desired although not expressed by formal words, that defect may be supplied by implication and intention”
  - **Lawson v. Martin Timber Co.** (contract provision allowing an extra year to cut down timber if high water occurred interpreted to only extend duration if high water actually prevented removal)

**Textualism versus Purposivism**

- neither is necessarily correct and the same judge will often apply both
- Issues with Textualism
  - impossible and impractical for parties to dictate all conditions for every possible scenario in writing
- Issues with Purposivism
  - typically not stated clearly in the contract so attributed to the contract by court, not the parties
ROLE OF PAST USAGE AND BEHAVIOR IN INTERPRETATION

Restatement (Second) § 221 – Usage Supplementing an Agreement
- Condition for employing usage – each party knows or has reason to know of the usage AND neither party has reason to know that the other party intended an inconsistent usage
  - employ usage for contracts of similar type
- similar to modern interpretation of §201(2)(b)

U.C.C. § 1–201. General Definitions
(3) “Agreement” as distinguished from “contract” means the bargain of the parties as found in their language or inferred from other circumstances as provided in §1-303

Hierarchy of Interpretation (U.C.C. §1–303(e))
- Express Terms ➔ Course of Performance ➔ Course of Dealing ➔ Trade Usage
- this preference order reflects the closest approximation to the intentions of the party and minimizes court interference into private contracts

U.C.C. § 1–303(a). Course of Performance (see also Restatement (Second) § 221)
- A course of performance is sequence of conduct to a particular transaction between parties if:
  1. the agreement involves repeated occasions for performance by a party; and
  2. the other party, with an opportunity to reject and knowledge of the performance, accepts the performance without objection

Restatement (Second) § 223 – Course of Dealing (see also U.C.C. § 1–303(b))
(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which fairly establishes a common basis of understanding for interpreting their agreement
(2) Unless otherwise agreed, course of dealing is to be used to give meaning to an agreement

Course of Dealing – Case Law
- Foxco Industries v. Fabric World
  - Key Facts – The dispute in this case was over the term “first quality” goods. Defendant accepted a first order that included some flaws. However, for the second order, it claimed that “first quality” meant without a single flaw.
  - Uncontroverted evidence that industry custom allowed for some mistakes in “first quality.”
  - Statute assumed that parties to such a contract are presumed to have intended the trade usage
  - contrary view – parole evidence rule renders contract void because subjective intent of a party cannot provide meaning unless it informs the other party of its intention at the time of contract
Restatement (Second) § 222 – Usage of Trade (see also U.C.C. § 1–303(c))

(1) An interpretation is a trade usage if it is observed with such regularity as to justify an expectation that it will be observed with respect to a particular agreement.

(2) Existence and scope of trade usage to be determined as question of fact. If a usage is embodied in a written code then interpretation is to be determined by the court as a matter of law.

(3) Unless otherwise agreed, trade usage is to be used to give meaning to an agreement:
   - this clause justified trade usage coming behind course of dealing/performance
   - prior behavior can indicate that parties prefer some other interpretation than general trade usage

Trade Usage – Case Law

- Frigaliment Importing Co. v. BNS Intern. Sales Corp. (contract dispute over word “chicken”)
  - Subjective differences in parties interpretation sorted by trade usage and reasonableness
  - For trade usage to apply to parties either new to the trade or not members of the trade, it must be shown that so general known or so long in continuance that individual knowledge may be inferred
  - Defendant argues that by referencing Grade A chicken in the contract, it adopted the USDA regulations and definitions
  - if defendant’s action fit under at least one reasonable definition then the burden is on the plaintiff to show that a narrower or alternative definition was intended

- Hurst v. W.J. Lake (court employed usage of “minimum 50% protein” of horse meat scraps industry)
  - courts finds it safe to believe that when a tradesmen employs a term then attach trade usage

- EXCEPTION for parties new to the trade
  - see Flower City Planning v. Gumina (court rejected customary local practice of painting subcontracting jobs meaning a contract for the entire project)
  - court deemed unrealistic to hold parties strictly to a “reason to know” standard of trade usage
  - no contract existed because two reasonable but different meanings of essential terms
  - similar to Raffles v. Wichelhaus (neither party at fault so contract void)
OFFER AND ACCEPTANCE

OFFER

Restatement (Second) § 22 – Mode of Assent: Offer and Acceptance
➢ the way parties ordinarily manifest mutual assent through offer and acceptance

Restatement (Second) § 24 – Offer Defined
➢ An offer is the manifestation of willingness to enter into a bargain such that another person is justified in understanding that his assent is invited and will conclude it
   o definition is offeree focused in that it depends on a justified understanding of another party
   o there is a notion of reliance embedded in this dependence

Preliminary Negotiations – Common Law (Advertisement Binding)
➢ test of a binding obligation is whether “the facts show that some performance was promised in positive terms in return for something requested” (Williston)
   o other examples of offer based on Williston’s view
      ▪ note on the back of an envelope promising a prize “just for opening” it
      ▪ ad stating that anyone with a 1954 car can exchange for a 1955 at no price
      ▪ sign at a golf course stating that a hole-in-one wins an automobile
      ▪ advertisements for rewards
➢ Lefkowitz v. Great Minneapolis Surplus Store (an advertisement for coats on a “first come, first served” basis without qualification = valid offer)
   o Rule – an offer is typically present where the terms are concrete, definite, and not open to negotiation (follows § 24 notion of offeree reliance)
   o contrary argument claims that unilateral offers void due lack consideration
➢ Donovan v. RRL Corp. (state vehicle code stated that advertisements to sell a car = an offer)
   o specific statute trumps black-letter rule

Restatement (Second) § 26 – Preliminary Negotiations
➢ A manifestation of willingness is not an offer if the person to whom it is address knows or has reason to know that the person making it does not intend to conclude a bargain without further manifestation of assent

Preliminary Negotiations – Common Law (Advertisement NOT Binding)
➢ generally accepted black-letter rule for advertisement = simply identifying goods and specifying a price is only an invitation to negotiation
➢ Lonergan v. Scolnick
   o Key Facts – Defendant placed a form letter in the paper advertising land for sale. Plaintiff sent defendant a letter letting him know that he was proceeding with details to purchase land but defendant had already sold it to another party.
   o Holding – No contract
      ▪ offer conditioned on prompt acceptance
intentions clear from correspondence that negotiations “purely preliminary”
• “decide fast” language suggests that further expression of assent necessary
- Regent Lighting Corp. v. CMT Corp. (explicitly reserving right not to accept = invitation to offer)
- Ford Motor Credit Co. v. Russell (unreasonable to believe advertisement constituted an offer at 11% financing because (1) not everyone qualifies for financing and (2) Ford does not have an unlimited number of Escorts to sell)
  o test for a binding obligation is “whether the facts show that some performance was promised on positive terms in return for something requested”
- Fisher v. Bell (displaying an item with a price in a shop is merely an invitation to deal, not an offer)

**ACCEPTANCE**

**Rules for Transactions at a Distance**
- in general, acceptance is effective upon dispatch even if never reached by the offeror (R2d § 63(a))
  o EXCEPTION – for option contracts which are only operative upon receipt (R2d § 63(b))
  o revocation is only accepted upon receipt
- if terms of acceptance (time, place, manner) specified, then offeree must comply with them in order to create a contract (R2d § 60)
- acceptance by telephone or other two-way methods of communication are to be treated the same as face-to-face in person acceptances (R2d § 64)
- a medium of acceptance is reasonable if it the same as used by offeror or similar to customary method used in similar transactions (R2d § 65)
- receipt is established when it comes into the person’s possession or deposited in a place authorized for receipt (R2d § 68)
- see also U.C.C. § 2–206 on medium of offer and acceptance (any reasonable means accepted)

**Silence as Acceptance**
- silence is acceptance in 3 instances where (R2d § 69) –
  1) the offeree silently takes benefits with reasonable opportunity to reject, or
  2) one party relies on other party’s manifestation of intention that silence may operate as acceptance
  3) previous dealings establishes notification is required for rejection of an offer

**Taking Benefits**
- Louisville Tin & Stove Co. v. Lay (court ruled assuming control over the disposition of unwanted goods constitutes an acceptance and became liable for the price of the goods)
  - qualified by the officious intermeddler rule rejecting liability for unsolicited goods
- Austin v. Burge (court held that defendant liable to the company – continuing to pick up a newspaper after you have cancelled your subscription is an acceptance of the offer)
  - also qualified by the officious intermeddler rule (in this case clear no pretense of gratuity)

**Previous Dealings**
court reject silence as consent for planting crops – in previous dealings, there had always been an explicit agreement, therefore silence does not equal acceptance (see Vogt v. Madden)
if there is a standing offer in place and the exchange has occurred before without explicit agreements, then silence is an acceptance (see Hobbs v. Massasoit Whip Co.)

➢ Detrimental Reliance
  o Rule – When the subject of a contract will become unmarketable by delay, a delay in notifying the other party of his decision will amount to an acceptance (§ 69(1)(b))
    ▪ see Cole-McIntyre-Norfleet Co. v. Holloway (agent took an order that needed final authorization by principal; principal’s delay in rejecting the offer exceeded reasonable time)
    ▪ see also Kukuska v. Home Mutual Hail-Tornado Insurance Co. (court awarded damages to farmer who applied for hail insurance but application got rejected months later mid-hail season after he paid his first premium)

TERMINATION OF POWER OF ACCEPTANCE

4 Ways to Terminate Power of Acceptance
  ➢ Rejection or Counter-offer by offeree
    o see Restatement (Second) §§ 38–39
    o Note: a reply to an offer which purports to accept it but conditional on offeror’s assent to additional terms is not an acceptance but a counter-offer (R2d § 59)
  ➢ Lapse of Time
  ➢ Revocation by Offeror
  ➢ Death or Incapacity of Offeror or Offeree (R2d § 48)
    o termination occurs whether the other party knows of the death or not

Restatement (Second) § 38 – Rejection
(1) An offeree’s power of acceptance is terminated by his rejection of the offer, unless offeror manifest a contrary intention
(2) Manifestation of intention not to accept is a reject unless offeree manifests an intention to take it under further advisement

Mirror-Image Rule (Additional Terms in Acceptance)
  ➢ classical contract law’s version of termination of power to accept after counter-offer
    o if a purported acceptance varied from an offer in any respect, then no contract was formed
  ➢ modern contract law allows for certain exceptions to this rigid approach
    o U.C.C. § 2–207. Additional Terms in Acceptance
      ▪ still counts as an acceptance unless expressly made conditional on assent of new terms or the new terms materially alter the agreement
    o Restatement (Second) § 59
      ▪ comments seem to suggest that can qualify a contract if acceptance is not dependent upon the other parties assent to the additional or different terms
      ▪ mere inquiry into the possibility of getting better terms is not a counter-offer
  ➢ exception to Restatement (Second) § 39

Page | 7
Restatement (Second) § 41 – *Lapse of Time*

(1) An offeree’s power of acceptance is terminated at the time specified in the offer or at the end of a reasonable time, if no duration specified

(2) What is a reasonable amount of time depends on the *circumstances at the time* of offer and attempted acceptance

(3) Unless otherwise indicated, an offer sent by mail is seasonably accepted if acceptance mailed the same day the offer received

**REVOCATION**

Restatement (Second) § 87 – *Option Contract*

(1) An offer is binding as an option contract if it –
   a. is in writing and signed by the offeror, recites a purported consideration, and proposes a fair exchange (form)
   b. is made irrevocable by statute

(2) In order for an offeree’s actions to satisfy reliance on a unilateral contract, the act in question must be of a substantial character and a foreseeable component of acceptance
   o certain circumstances may require an offeree to undergo substantial expense, undertake substantial commitments, or forego alternatives to put himself in a position to accept an offer

**Unilateral Contracts**

- **Classical Rule**
  - revocable at any time *before the completion* of the designated act
  - rooted in the belief that only a bargain-for promise was enforceable
    - logic: unless the offeror had made a bargained-for promise to hold the offer open, then he was not bound to not withdraw the offer midway through performance
  - *follows* consideration school of contract enforceability

- **Modern Rule**
  - the beginning of the actual performance of an act transforms the act into an option contract (§ 45)
    - an option is a continuing offer, and if supported by a consideration, cannot be withdrawn before the time limit
    - option contracts are irrevocable
  - offeree not bound by unilateral contracts until they begin performance (§ 62)
    - acceptance by part performance or tender operates as a promise to render complete performance
  - *follows* the reliance school of contract enforceability

- **Damages**
  - typically expectation damages for violations under § 45
  - reliance damages for violations under § 87(2)
\textbf{Revocation – Common Law}

\begin{itemize}
\item \textbf{Brackenberry v. Hodgkins} (hypothetical from class)
\begin{itemize}
\item Facts – Mom says, “You can have my place if you take care of me for the rest of my life.”
\item Daughter does take care of mom
\item under classical rule, mom can revoke until the moment of death
\item under modern rule (§ 45), mom cannot revoke but daughter may cease performance at any time
\begin{itemize}
\item however, § 62 creates some protection for offeror in that once offeree begins performance it constitutes a promise to complete it
\end{itemize}
\end{itemize}

\item \textbf{Ragosta v. Wilder}
\begin{itemize}
\item Rule – Preparing to perform an act pursuant to an offer for a unilateral contract and \textit{beginning to} perform the act are not the same. The offeror is not bound by actions in preparation to perform an act
\item Key Facts – In preparation for purchasing property, the plaintiffs incurred expenses financing the necessary money for the purchase. The defendant withdrew the offer before they actually started paying but after they had taken out the loans to pay. Court rules no contract
\item failed to satisfy the conditions of § 87(2) for substantial and foreseeable act
\end{itemize}

\item \textbf{Drennan v. Star Paving}
\begin{itemize}
\item Key Issue – Can a contractor enforce a subcontractor’s bid as binding?
\item Holding – While the bid is not a unilateral contract, it still may be enforced under promissory estoppel if the general contractor’s reliance on the bid was reasonable. Reliance creates an option contract.
\begin{itemize}
\item Subcontractor’s bid reasonably expected to induce a main contractor to bid on a larger government contractor at a particular price
\end{itemize}
\item If defendant’s bid had explicitly stated or clearly implied that it was revocable, then reliance would have been unreasonable
\item satisfies the conditions of 87(2) because reliance foreseeable in this way; must get government contract before accepting the subcontractor’s bid
\end{itemize}

\item \textbf{Pavel Enterprises v. A.S. Johnson Co.}
\begin{itemize}
\item decision highlights the dangers of holding in Drennan –
\item unfair asymmetry of binding subcontractor but not general contractor
\item detrimental effects on the contract bidding process
\begin{itemize}
\item leads to inaccurate or inflated bids
\item to avoid bid shopping, subcontractors wait to the last minute to submit bid
\item reduces competition as a result
\end{itemize}
\item recovery by general contractor may not qualify for reliance damages if contractor engages in bid shopping and doesn’t accept the subcontractor’s bid soon after receiving the general contract (see Preload Technology Inc. V. AB&J Construction)
\end{itemize}
\end{itemize}
IMPLIED-IN-LAW VERSUS IMPLIED-IN-FACT CONTRACTS

IMPLIED-IN-LAW (QUASI CONTRACTS)

Implied-in-Law obligations exist when
1. the defendant has received a benefit, and
2. the retention of the benefit would be inequitable

Foundational justifications
- relief based upon restitution grounds of justice and equity in preventing unjust enrichment
- contracts do not rest upon the assent of contracting parties
- not a contract at all – merely a type of conduct that gives rise to liability for restitution

Relief for Work Performed or Services Rendered
- General Rule – liability is imposed when a person requested the services or knowingly and voluntarily accepted their benefits
  - Nursing Care Services, Inc. v. Dobos
    - presumption that such services are given and received in expectation of being paid for
    - Facts – Old woman required to pay for two weeks of in-hospital and at-home care even though she never explicitly agreed to it.
    - Court justified based on grounds that it would be unconscionable for plaintiff not to recover for services rendered and the aid issued was emergency aid necessary for her life
  - Day v. Caton
    - Facts – Plaintiff seeking relief for half the value of a shared wall that he built. There was no express contract with the defendant.
    - Holding – To establish contract, must demonstrate expectation to be paid and inference for promise to pay by other party
    - voluntarily accepting valuable services with reasonable opportunity to reject allows inference
- EXCEPTION for Gifts
  - no liability where the benefit was gratuitously given without expectation of payment
  - see Sparks v. Gustafson (managing a center for a friend is the type of extensive business service that ordinarily not expected to be offered out of mere gratuity for a friend)
- officious intermeddler doctrine – if service rendered without request or consent, then cannot recover no matter how beneficial the service may have been
  - exception: cases of emergency aid, see Seeva v. True (an incapacitated person may be held liable for necessities furnished to him in good faith while in that condition)
- distinct from actions for quantum meruit – a contract is implied in quantum meruit claims
**IMPLIED-IN-FACT**

*Conditions for implied-in-fact relief*
- Unjust enrichment is not a necessary condition for implied-in-fact contracts *(see Bastian v. Gafford)*
  - **Rule** – It is sufficient that the act be requested and received under circumstances which imply an agreement.
  - court found that it was irrelevant whether or not the respondent actually used the architectural plans drawn up by the petitioner or derive any benefit from them

*Terminable at-will employment contracts*
- an “at-will” employee is one who is hired without specific contractual terms
- historically, English common placed one year terms on at-will contracts
- Wagenseller v. Scottsdale Memorial Hospital
  - **Rule** – An employee may be fired for good cause or no cause, but not for bad cause
  - **Facts** – Plaintiff was fired for refusing to “group up” on retreat with her coworkers.
  - **Standard** – must show violation of one of the following 3 exceptions to have a cause of action
    - **public policy** (balances employer’s interest in efficiently running business with employee’s interest in earning a livelihood and society’s interest)
      - most clear that contrary to public policy when act violates a legislative statute
    - **implied-in-fact promise demonstrates a specific duration**
      - workplace manual could provide such circumstances outside a contract
    - **covenant of “good faith and fair dealing”**
  - mutualty of obligation is not a reason to invalidate a contract that is terminable at-will by only one party *(see Pine River State Bank v. Mettille)*
    - e.g. employee can quit at any time but employer bound to keep them
    - justification – If consideration is met, then no additional requirement for equivalence or symmetry in an exchange

*Employee Handbooks*
- courts are mixed on how they view the effects on employment contracts made by changing the company handbook
- some courts say if the employee continues working there after the change, then that constitutes consideration for accepting those changes to their contract *(see Asmus v. Pacific Bell)*
  - the modification is viewed as a unilateral promise and continuing to work is the performance requests to make it binding
- other courts have said continued employment is not sufficient *(see Demasse v. ITT Corp.)*
  - contracts once established cannot be modified unilaterally even if formed through implied consent
  - unless employees are told explicitly that continued employment is acceptance of new terms, then no consideration because not bargain-for
  - employer may not treat promises in original manual as illusory and change them whenever
- note: a handbook can always include a disclaimer preventing it from changing any contractual liabilities


**Difference between Implied-in-Law and Implied-in-Fact**

- **Validity of Contract**
  - in fact = a real contract with implicit rather than explicit assent
  - in law = not a contract at all, just a mechanism to grant restitution relief

- **Characterization of the Relationship**
  - in fact = parties themselves do it
  - in law = courts characterize

- **Damages**
  - in fact = quantum meruit *(see Ramsey v. Ellis)*
    - measures value by what services were provided
  - in law = restitution damages *(see Hill v. Waxberg)*
    - measures value by benefit conferred upon the other party that was inequitably retained
INDEFINITENESS AND PRELIMINARY NEGOTIATIONS

INDEFINITENESS

Classical Contract Theory
- “meeting of the minds” view of assent
- binary division between offer/acceptance and preliminary negotiations
  - behavior either had immediate legal effect (offer) or no legal impact (preliminary)
  - rejected duty to negotiate in good faith because an agreement to agree is unenforceable
- no contract formed unless the terms were sufficiently definite
  - indefiniteness depends on the distinction above
  - whether the parties believe that had either (1) concluded the bargaining process, or (2) still in preliminary negotiations

Restatement (Second) § 33 – Certainty
1. Even with a manifestation of intent, a contract cannot be formed unless terms are reasonably certain
2. Terms are reasonably certain if they provide a basis for determining if a breach has occurred and a remedy is appropriate (see also U.C.C. § 2–204(3))
3. One or more terms left open or uncertain may show that manifestation does not intend to be understood as an offer or acceptance

Restatement (Second) § 34 – Effect of Performance or Reliance on Certainty
1. Terms can still be reasonably certain even though it leaves room clarification in the course of performance (see also U.C.C. § 2–204(2))
2. Partial performance may remove uncertainty and establish an enforceable contract
3. Reliance may make a contractual remedy appropriate even though uncertainty remains

Note: These UCC provisions are viewed as gap-fillers. These are the default rules to be used in the absence of the parties’ actual agreement.

U.C.C. 2–305. Open Price Term
1. Parties can conclude a contract even though the price is not settled. In such a case, the price is a reasonable price at the time for delivery if –
   a. nothing is said as to price, or
   b. the price is left to be agreed by the parties but they fail to agree, or
   c. the price is to be fixed by some agreed market or third party
2. A price to be fixed in the future by either party must be fixed in good faith
3. When a price is left to be fixed under (1)(b) fails due to the fault of one party, then the other party may either treat the contract as cancelled or fix a reasonable price himself
4. However, where the parties intend not to be bound unless a price is fixed, no contract exists and the parties must be returned everything exchanged or put the other party in the position previous to the exchange if no agreement reached.
U.C.C. 2–308. Absence of Specified Place for Delivery
- unless otherwise agreed –
- the place for delivery is the seller’s place of business or resident (if none)
- except if the contract is for identified goods known to be in some other place

U.C.C. 2–310. Open Time for Payment or Running of Credit

Role of the Courts
- see Rego v. Decker; see also Arok Construction v. Indian Construction
- the court must balance opposing considerations when inserting terms into a contract
  - on the one hand, in the interests of fairness, courts should fill gaps where the reasonable expectations of the parties are clear
    - too burdensome on parties to specify all terms
    - economically inefficient to produce a more complete contract
  - other the other hand, courts should not impose any performance to which the parties did not agree
- damages
  - ought to be a greater degree of certainty for specific performance than for damages

Examples of Insufficient Essential Terms
- A publishing contract that lack details about length and content of proposed compilation and who would decide its content prevented the court from being able to ascertain what the parties had agreed to do (see Academy Chicago Publishers v. Cheever)
  - even if parties manifest an intent to make a contract, a court cannot enforce unless terms are sufficiently definite
  - contrary to view that court should not intervene in contracts

Examples of Sufficient Essential Terms
- A contract for renting a vacant commercial building still enforceable despite no provisions relating to maintenance, insurance, repairs, etc. (see Berg Agency v. Sleepworld-Willingboro)
  - as long as basic essential terms are present and the result is just and fair then court upholds
  - opposes the very conservative view in Cheever
- Subcontractor submitting a bid of price only is binding despite missing other terms because price was the essential (see Saliba-Kringlen Corp. v. Allen Engineering Co.)
  - upholds the decision in Drennan
  - exception – contract only remains enforceable as long as the additional terms are reasonable as judged by custom and circumstances of the relationship (see Crook v. Mortenson-Neal)
PRELIMINARY NEGOTIATIONS

Preliminary Negotiations – Common Law

➢ Rule - a mere agreement to agree, in which a material term is left for future negotiations is unenforceable
  
  o see Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher (case in which the contract was for renewal of lease with the annual rental rate to be agreed upon in the future; could have been enforceable if contract laid out some method for determining rent)
  
  o minority view – a renewal clause intends the renegotiated rate to be at a reasonable rent based on market conditions so it should be read into the contract terms (see Moolenaar v. Co-Build Companies, Inc, where court justified this view on the basis that the landlord benefits on the tenant’s reliance on a reasonable renegotiation)

➢ letter of intent is not to bind the parties to the ultimate objective but to provide an “initial framework from which the parties might later negotiate”
  
  o however, intent letter may bind to negotiate in good faith

➢ Good Faith Negotiations (see Channel Home Centers v. Grossman)
  
  o Rule – A letter of intent may bind negotiations to be conducted in good faith as long as both parties manifest intent and the terms sufficiently definite
    ▪ letter of intent constitutes consideration when of substantial value of both parties
  
  o Key Facts – Owners pulled out of negotiations on a technicality after having signed a letter of intent to negotiate in good faith. Letter of intent induced the tenant to proceed with leasing by having owner withdraw the rental from the market
    ▪ Consideration present because both parties took steps towards this
  
  o negotiations are no longer in good faith if one party unreasonably insists on a condition outside the scope of the preliminary agreement as laid out in the letter of intent
    ▪ Reliance damages may be appropriate where promises made in negotiation can be reasonably foreseen to induce certain actions by the other party (see Hoffman v. Red Owl Stores)
    ▪ Defendants raised the price throughout negotiations after plaintiffs had already incurred great costs in putting themselves in position to reach agreement
    ▪ damages for promissory estoppel are different from breach (see Neiss v. Ehlers)
PAROL EVIDENCE RULE AND WRITTEN INTERPRETATION

Parol evidence rules govern whether a separate, previous agreement from the written contract concerning the subject matter of the contract ought to be admissible for interpreting the primary contract.

INTEGRATION

Restatement (Second) § 209 – Integrated Agreements
- (3) where the parties reduce an agreement to a writing reasonably appearing to be complete, then it is taken as an integrated agreement (Williston) UNLESS it is established by other evidence that the contract does not constitute a final expression (Corbin)

Restatement (Second) § 210 – Completely and Partially Integrated Agreements
1. A completely integrated agreement is a complete and exclusive statement of the terms of the agreement
2. A partially integrated agreement is any agreement other than complete ones
3. Court determines whether an agreement is complete or partial before questions of interpretation or application of the parol evidence rule.

Total versus Partial Integration
- not a rule of evidence, but a substantive rule of contract law
- Mitchell v. Lath
  - Facts – Mitchell purchases a farm from Lath. In looking at the land, the parties reached an oral agreement to remove an icehouse from the property that Mitchell found objectionable.
  - Three conditions must exist for oral agreement to vary written contract
    - 1) oral agreement must be a collateral one in form
    - 2) it must not contradict either express or implied terms in the written contract (R2d § 213(1))
    - 3) it must be one that parties would not ordinarily expect to be embodied in the writing (Williston’s approach to integration)
      - conclusive presumption that the parties intended to integrate into the written contract any prior agreement relating to the nature or substance of the contract
  - Court rules that Mitchell failed the third condition. It would seem natural to find the icehouse agreement within the written contract therefore the separate agreement has no bearings on the written contract. Therefore, final contract seems complete
  - Dissent – The promise to remove the icehouse induced Mitchell into purchasing the land and thus has consideration. Contract should nullify what the parties intended to nullify and preserve the deal. (Corbin’s approach to integration)

Primary Concern with Each View
- Williston (total) is afraid of parties committing fraud by perjuring themselves about previous oral agreements.
  - Judge should focus on form (“Four Corners Rule”)
  - Complete integration forces parties to place essential provisions in the written contract
- Corbin (partial) is worried about protecting the intentions of the party and the actual deal.
courts look at all the surrounding circumstances in determining whether an oral term is one that naturally would have been included in the writing (see Hatley v. Stafford)
- such circumstances include relative bargaining strength of parties, business experience of parties, and apparent completeness of the written agreement
- goes beyond the four corners of the document to look at assent of parties

CONSISTENCY

Restatement (Second) § 213 – Effect of Integrated Agreement on Prior Agreements
1. A binding integrated agreement discharges prior agreements to extent that it is inconsistent with them
   - integration nullifies inconsistent prior agreements (see also Mitchell v. Lath, condition #2)
2. A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope
   - seems to suggest that consistency is only relevant for partial integration
3. An integrated agreement that is not binding does not discharge prior agreement. However it may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated

Consistency – Case Law
- evidence from oral agreements allowed if consistent and additional to original terms
  - see Hunt Foods v. Doliner
  - Facts – Hunt pays $1000 to leave an option to purchase stock at a certain price. Oral agreement between parties that option would only be exercised if defendant solicited an outside offer without the time frame. Court rejects defendant argument
  - Standard – a term is inconsistent only if it contradicts or negates a term in writing
    - very narrow reading of the consistency
- Alaska Northern v. Alyeska
  - rejects narrow reading present in Hunt Foods
  - Opposing Standard – inconsistency defined as “the absence of reasonable harmony in terms of the language and respective obligations of the parties”

MERGER CLAUSES

Definition – A clause in a contract stating that it is an integrated agreement.

Restatement (Second) § 216. Consistent Additional Terms
1. Evidence of a consistent additional term admissible unless agreement completely integrated
2. Agreement is not completely integrated if it omits a consistent additional term which is (a) agreed to for separate consideration, or (b) such term might naturally be omitted from the writing
Merger Clauses – Case Law

- **Majority Rule** – Clause doesn’t necessarily make an agreement integrated but provides evidence indicating the intentions of the party to finalize the agreement (see ARB v. E-Systems)
  - not conclusive to determine complete integration
  - factors that show clause follows parties intent include
    - length of the contract
    - exhaustive detail
    - prolonged period of negotiation

- **Minority Rule** – Because clauses are usually inconspicuous boilerplate provisions, it would be unconscionable to permit them to exclude extrinsic evidence (see Seibel v. Layne & Bowler)
  - supports with U.C.C. § 2–316

- **Fraud EXCEPTION**
  - Rule – extrinsic evidence is admissible if it shows an “invalidating cause” such as lack of consideration, duress, mistake, illegality, or fraud (Restatement 2d § 214(d))
  - a promise is fraudulent if it is made with the intent not to perform it
  - damages awarded under either (1) tort action of deceit or (2) contract theory based on the value of the promise
  - general mergers clauses do not bar rescission for promissory fraud (see Sabo v. Delman)
  - however, where the merger clauses relates closely with the parol evidence specifically sought to be introduced shows that complete integration intended (see Danann Realty v. Harris)
    - supported by U.C.C. 2–316(2)(b) which says merger clause sufficient if buyer has examined the goods as fully as he desired and any defects claims ought to have been revealed by him

CONDITION-TO-LEGAL EFFECTIVENESS

Restatement (Second) § 217 – Integrated Agreement Subject to Oral Requirement of a Condition

- **Definition** – agreement that the contract will have no legal effect unless the certain enumerated circumstances are present
- **Rule** – agreements are not integrated with respect to the oral condition
  - poses problem for Williston but not Corbin
- however, if the parties characterize the condition to the performance of a written agreement then the agreement is inadmissible
  - in other words, if condition is an obligation of performance under contract, instead of preceding the contract, then it is subject to parol evidence rule

ORAL MODIFICATION CLAUSES

U.C.C. § 2–209. Modification, Rescission and Waiver

(2) Agreements that exclude modification except by signed writing can only be modified by a form supplied by the merchant and signed by the other party

(4) An attempt to modify might not satisfy (2) but it can operate as a waiver

(5) Waivers may be rescinded with reasonable notification to the other party unless the retraction would be unjust due to a material change in position based on reliance on the waiver
N.O.M. clauses have nothing to do with parol evidence rule because rule does not apply to agreements made after the contract

- common law view
  - rejects these clauses based on restitution/unjust enrichment not to honor modification
  - believes that can be broken by an oral agreement because the later agreement is just a contract that removes the n.o.m. clause
  - clause also doesn’t cover modifications outside the scope of the original agreement
- UCC § 2–209 goes against the common law
  - can be considered a waiver and waivers don’t need consideration (UCC § 2-209 (4))
  - if n.o.m. clause, then modification must be in writing (UCC § 2-209(2))

INTERPRETATION

Restatement (Second) § 212 – Interpretation of Integrated Agreement
1. Interpretation based on the meaning of the terms of the writing in the light of the circumstances
2. If a question depends on the credibility of extrinsic evidence or a choice between reasonable inferences, interpretation determined by fact-finder; otherwise it is determined as a matter of law

UCC § 2–202. Final Written Expression: Parol or Extrinsic Evidence
- evidence of prior or contemporaneous agreements cannot provide contradictory evidence to a final written contract
- however, course of performance, course of dealing, or usage of trade may explain or supplement terms even in a contradictory fashion

Two General Schools of Interpretation
- Textualism (“Four Corners”)
  - extrinsic evidence should be inadmissible where the text of the contract is plain and unambiguous (see Steuart v. McChesney)
    - court held that text of a contract was accurate that specified an option price determined by tax values despite the tax values being unreasonable
  - best approach for parties because yields the most protectable interpretation by the courts
- Purposivism
  - test of admissibility of extrinsic evidence is whether the offered evidence is relevant to prove a meaning to which the language is reasonably susceptible (see Pacific Gas & Electric)
    - must first determine the meaning of a contract before determining if evidence being offered for a prohibited purpose (add, detract, or vary terms)
    - mirrored by R2d § 212
  - plain meaning does not exists because words are no absolute but viewed in context
  - if a reasonable alternative is present, evidence for it should be put before the jury (See Mellon Bank v. Aetna)
ROLE OF PAST USAGE AND BEHAVIOR IN WRITTEN CONTRACT

Refer to U.C.C. § 2–202

Nanakuli Paving v. Shell Oil

- **Facts** – Contract between parties for the exclusive purchase of asphalt. Contract stated that the price to Nanakuli would be Shell’s posted price at the time of delivery. However, Nanakuli argued that it was entitled to “price protection” under both trade usage and course of performance

- **Holding** – Trade usage and course of performance can alter the express terms of an agreement
  - reasonable for jury to view two past occasions of price protecting as indicating an understanding of the terms rather than a waiver of those terms
  - underlying purpose of U.C.C. is promoting flexibility in business and allowing interpretation to look beyond the text of a deal to reach the true intentions of the parties
  - *runs contrary to* U.C.C. § 1–303(e) but *in accordance with* U.C.C. § 2–202

- even a “complete” contract can be explained or supplemented by parol evidence of trade usage
- trade usage totally destroys the absolute view of plain-meaning

There is a difference between plain-meaning rule and parol evidence rule

- **Parol evidence rule** – only precludes evidences of agreements not embodied in contract, not the circumstances under which the contract is made
- **Plain-meaning rule** – may preclude evidence of circumstances if contract is unambiguous on its face

FORM CONTRACTS – INTERPRETATION AND UNCONSCIONABILITY

Restatement (Second) § 211 – Standardized Agreements

1. When a party signs or manifests assent to a writing and has reason to believe that like writings regularly embody the terms of similar agreements, then the writing is an integrated agreement

2. Such writing is interpreted as treating alike all those similarly situated *without regard to their knowledge or understanding of the standards terms of writing*

3. Where the other party has *reason to believe* that the party manifesting such assent would not do so *if he knew the writing contained a particular term*, the term is NOT part of the agreement

Llewellyn on Common Law Tradition of Appeals

- **Benefits of Standardized Terms**
  - using form saves the time and resources required to specialized every contract to individual
  - repeated use of standardized terms avoids legal risks and renders terms more predictable

- **Nature of Assent**
  - should not think about “assent” to boilerplate clauses
  - instead she view as assent to a few dickered terms and the broad transaction
  - more importantly, view as blanket assent to any not unreasonable or indecent terms
effectively views a contract as two separate things – the dickered deal and the collateral supplementary boiler-plate clauses

Sardo v. Fidelity

Rule – “In order to reform a contract, it must appear that the minds of the parties have met and that a mutual mistake has been made writing out the contract so that they appear to enter into a contract to which they did not intend to be bound

Facts – Sardo was a jeweler. He went to an insurance company with the explicit purpose to insure his jewels however the subsequent policy he was given by the insurance company did not cover the theft of his jewels.

Holding – No evidence of mutual mistake. The terms were clearly defined in the policy and if Sardo had read them closely he would have seen that jewels were not covered.

Weaver v. American Oil

Rule – Where one party takes advantage of another’s necessities and distress to obtain unfair terms, relief will be granted to the disadvantaged party

Facts – Weaver signed a form contract with leasing agent without bargaining or negotiating the terms. Weaver had lesser bargaining power and no reason to understand the technical meaning of the terms in the form. One clause removed all liability for negligence occurring on premises.

Holding – This fine print clause was unknown and unconscionable

burden on drafter to show that provisions were knowingly and willingly accepted by other party

distinguished from Sardo in that Weaver had no reason to be able to understand the implications of the contract whereas if Sardo read it closely he would have seen the “mistake”

Darnier Motor Sales v. Universal Underwriters

Rule – Parol evidence rule does not apply to cases of standardized contracts where the bargain was “illusory” in the sense that it was not actually read and bargained for

see R2d § 211 – boiler plate provisions that are contrary to the deal are not given effect

Facts – Insurance policy was handed to Darnier as a book which he did not read. Instead, he relied on the statements of the insurance salesman on what the coverage was

rationale = form must not be viewed over substance, especially when the form is not bargained-for

Gordinier v. Aetna [Test for Boiler Plate Provisions]

extends Darnier to reject even unambiguous boiler plate provisions when –

the terms cannot be reasonably understood by an intelligent consumer

the insured did not receive full and adequate notice of the term and the term is unusual or unexpected

some activity reasonably attributable to the insurer makes the insured believe that there is coverage
MISTAKE

MUTUAL MISTAKE

Restatement (Second) § 152 – When Mistake of Both Parties Makes a Contract Voidable

(1) Adversely affected party may void contract if (a) a mistake is made as to a basic assumption that has a material effect and (b) that party does not bear the risk of the mistake

(2) Material effect is taking into account any relief by way of reformation, restitution, or otherwise

Arguments for Limited Use of Mistake Doctrine

- Fairness – Both sides are equally innocent so should err on the side of the contract
- Consequentialist – We want to incentivize parties to be more careful in drafting and entering agreements and assume responsibility for their contracts
- Efficiency – Best allocation of risks is determined by the market and contracts
- Role of the Courts – Courts should focus on the agreement and not go deeper into intent

Arguments for Broad Use of Mistake Doctrine

- Fairness – It is unfair to both parties to be forced to do something neither wants
- Consequentialist – Enforcing a bad contract unjustly enriches one party for a mistake made by both
- Efficiency – It is too expensive to draft a contract including everything so want to allow contracts to be void if the effect is undesirable for both parties

Mutual Mistake – Common Law

- Sherwood v. Walker
  - Facts – At the time of contract, both parties believed a cow to be sold was barren. After agreeing to sell the cow, the original owner realized the cow was not barren and thus worth more. Owner rescinded contract.
  - Holding – No contract because barren cow substantially different than a breeding one
    - If the thing actually delivered or received is different in substance from the thing bargained for, then no contract
    - however, if it is only difference in some quality then contract holds
      - quality is only collateral to the agreement and not critical to the substance
  - Dissent – Buyer shouldn’t be punished for taking risk of cow not being barren and it paying off
- Wood v. Boynton
  - Facts – Wood sold a stone to Boynton for $1 and the stone turned out to be a diamond worth $700. Wood wanted the stone back due to mutual mistake.
  - Holding – The contract was valid because Wood should bear risk
    - if a person selling an item does so without further investigation to its value, then they cannot repudiate the sale because found out they were mistaken about the value without evidence of fraud
- Key Difference Between Sherwood and Boynton
  - Sherwood was not aware of his limited knowledge of the cow’s barren status
  - Wood knew that she was acting with limited knowledge and treated it as sufficient
UNILATERAL MISTAKE (MECHANICAL ERRORS)

Definition – physical or intellectual blunders that result from transient errors in the mechanics of an actor’s internal machinery

- a factual mistake is not caused by the neglect of a legal duty and consists of an unconscious ignorance of a fact material to the contract

Restatement (Second) § 153 – *When Mistake of One Party Makes a Contract Voidable*

- A party’s mistake as to a basic assumption of the contract causing a material effect voids the contract if the party does not bear the risk of mistake AND
  - enforcing the contract would be unconscionable, or
  - the other party either had reason to know of the mistake or caused the mistake (see also § 161(b))
    - a duty to inquire may be imposed on the person receiving the offer when there are factors that reasonable raise a presumption of error (offer “too good to be true”)
    - see Speckel v. Perkins (an internally inconsistent letter suggested that they would not be willing to offer the maximum but then accidently offers the max at the end)

Restatement (Second) § 154 – *When a Party Bears the Risk of Mistake*

(a) the risk is allocated to him by the agreement of the parties, or
(b) he is aware at the time the contract is made that he has only limited knowledge but treats his knowledge as sufficient (conscious ignorance), or
(c) the risk is allocated to him by the court because such allocation is reasonable under the circumstances

Interpretation

- Classical View = Caveat Emptor (buyer beware)
  - see U.C.C. § 2–313. Express Warranties (reversal of buyer beware principle)
  - however, any affirmation, description, or promise the sellers makes to the buyer relating to the goods becomes a basis of the bargain and a warranty the goods will conform to that bargain

- Rescission based on mistake is available if –
  - (1) the defendant made a mistake regarding a basic assumption
  - (2) the mistake has a material effect on the agreed exchange

- see R2d § 154(b) – raises the question “Aren’t we always operating with limited knowledge if a mistake was made?”

Griffith v. Brymer

- Facts – Room rented for the king’s coronation. However, at the time the contract was formed, the coronation was already cancelled but neither party aware of this
- Holding – No contract due to a “misapposition of the state of facts which went to the whole root of the matter”; performance of the contract was never possible

EXCEPTION – in the world of high-priced art, the value of something is determined by market perception at the time and changing perceptions is not evidence of a mistake in an earlier contract (see Firestone & Parson, Inc. v. Union League)
standard – mistake must result in an imbalance so severe to be unfair to require performance; not only less desirable for defendant but more advantageous for the other party
(3) the defendant does not bear the risk of the mistake
(4) enforcing the effect of the mistake would be unconscionable
  o tend to involve both (1) oppression or surprise due to unequal bargaining power and (2) overly one-sided terms
  ➢ a significant error in the price term of a contract satisfies (1) and (2)
  o see Donovan v. RRL Corp (case where newspaper made an uncharacteristic mistake in advertising the wrong price for a car)
  o no consumer can reasonably expect 100% accuracy in the price of every advertisement
  ➢ rescission unavailable where mistake results from failure to act in good faith or in accordance with the reasonable standards of “fair dealing”
  ➢ rescission only granted if the other party can be put back to its status quo without prejudice except for the loss of the bargain

REFORMATION

Restatement (Second) § 155 – When Mistake of Both Parties Justifies Reformation
➢ where writing fails to express the agreement, the court may reform the writing at the request of the parties

Law and Application
➢ true mistake isn’t the clerical error but the mistaken belief of the parties about the correctness of the written instrument
➢ the party penalized by the error is entitled to reformation if (see Travelers Insur. v. Bailey) –
  o (1) it has been established beyond a reasonable doubt a specific contractual agreement, and
  o (2) a mistake in transcription in a material term, and
  o (3) no prejudicial change of position by the other party occurred while ignorant of the mistake (no prejudicial reliance)
➢ however, reformation not available where the parties purposely contract based on uncertain or contingent events (see Chimart Associates v. Paul)
  o high burden of evidence for first condition listed in Travelers
  o court weary of the danger of fraud
NONDISCLOSURE

Restatement (Second) § 161 – When Non-disclosure is equivalent to an assertion
(a) where party knows it is necessary to prevent a previous assertion from being misrepresented
(b) where party knows it would correct a mistake of a basic assumption
(c) where party knows it would correct a mistake about the contents/effects of a writing
(d) where the other person is entitled to know the fact because of a relation of trust and confidence

Nondisclosure – Common Law

- Hill v. Jones
  - Issue – Must the seller of a home disclose facts pertaining to past termite infestation?
  - Facts – Hill asked Jones specifically if a ripple in the floor was termite damage and was told it was water damage. Inspectors report said no evidence of infestation but failed to note the evidence of physical damage and previous treatment.
  - Holding – Seller must disclose
    - Rule – Where seller knows some material facts affecting the value of the property which are not readily observable and not known to the buyer, a duty to disclose exists
  - Definition – a matter is material if it is one to which a reasonable person would attach importance in determining his choice in the transaction

- buyer does not have the same obligation to disclose as a seller (see United States v. Dial)
  - society wants to encourage people to find out the true value of things and allow them to profit from their knowledge
  - where the means of intelligence are equally accessible to both parties – no duty to disclose
CONSIDERATION

SIMPLE DONATIVE PROMISES

Definitions
- **contract** – a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes a duty
- **promise** – manifestation of intention to act or refrain from acting in a specified way *so as to justify* a promisee in understanding that a commitment has been made
  - promisor makes the promise; promisee is the one to whom the promise is made

Restatement (Second) § 17 – Requirement of a Bargain
- formation of a contract requires a bargain in which there is a **manifestation of mutual assent to the exchange and a consideration**

Restatement (Second) § 71 – Requirement of Exchange
1. to constitute consideration, a performance or return promise must be bargained for
2. a performance 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. performance may consist of (a) an act other than a promise, (b) a forbearance, or (c) a creation, modification, or destruction of a legal relation

Restatement (Second) § 79 – Adequacy of Consideration
- If consideration is met, there is no additional requirement of –
  - gain/benefit to the promisor or loss/detriment to the promisee
  - equivalence of values exchanged
  - mutuality of obligation

Gifts
- a promise to make a gift is unenforceable (*see Dougherty v. Salt*)
  - not a bargained for exchange therefore lacks consideration (see R2d § 71(2))
- however, gifts are enforceable where promises for gifts are not (no Indian giving)
- **Purpose of Donative Promises** (Why not just wait for performance then give the gift?)
  - promisor believes if she doesn’t commit herself to the give at a certain point then will back out
  - promisor derives satisfaction from happiness between time of promise and time of delivery
  - promisor maximizes utility of gift by allowing promisee to account for it in its future plans

Arguments for should NOT be enforceable
- Fairness
  - breach of promise does not damage a promisee who did not bargain for it
Consequentialist/Moral
- A world in which every small promise was enforceable would disincentive promise making
- People need to retain their ability to change their mind
- While breaking promises wrong, it is also wrong to insist on performance of a promise that someone made to you out of love or friendship

Role of the Courts
- It would overload the court with promises and create irreconcilable evidentiary problems of proof

Arguments for should be enforceable
- Fairness
  - Unfair that a promisor gets punished for not making a legally binding promise even if it wanted to
- Consequentialist/Moral
  - It would cut down on empty promises
  - Deontological objective of ensuring that people keep their promises because that it what is right
- Role of the Courts
  - Court should not interfere with deals
  - No way for court to known if promisor did not receive something in return that she considered to be bargained for such as recognition or gratitude

Conditional Donative Promise vs Conditional Bargain Promise
- Must envision how a reasonable person would understand the condition as to ascertain if the promise is donative or bargain
- E.g. mow my lawn for $20 is bargain but chose out a car for a graduation gift is donative
  - Mowing the lawn is viewed as the price of the promise
  - Choosing out the car is a necessary means of getting the gift, but not a price

FORM PROMISES

Nominal Consideration
- Nominal consideration – transaction with the form of a bargain but the party does not believe it to be the price of the exchange
  - About two-thirds of states have explicitly rejected sealed instruments as binding
- Classical View
  - Form of a bargain sufficient for consideration
  - Assumes that both sides understand the convention of the form and adopt it intentionally
- Modern View
  - Restatement Second reversed this position and adopted bargain in fact supersedes bargain in form
- Schnell v. Nell (1861, SC of Indiana)
  - Facts: Schnell’s wife left a will that left $200 each to three people. Theresa had no property or possession at her death though so the three wanted her husband to pay out of his property.
  - Issue: Whether the instrument sued on does express consideration sufficient to her husband
  - Holding: No consideration exists
Reasoning: Three possible grounds of consideration – promise to pay him one cent; love of the husband for the wife; and that her desires were expressed in the inoperative will

- precedent precludes first and moral consideration of last two are insufficient
- qualifies it as merely a gift

 Exceptions to Nominal Consideration

- option contracts and guaranties

Four Justifications for Requiring Consideration

- evidentiary: desire to protect the court and individuals from insufficient proof of a deal
- cautionary: desire to warn parties that a legally binding deal is about to be in place
- channeling: desire for courts to be able to effectively distinguish between binding and non-binding contracts
- deterrent: desire to avoid certain types of agreements being made and enforced

Arguments for accepting nominal consideration (form over substance)

- it would simplify consideration doctrine
- nominal consideration would be an effective replacement for consideration
- not the role of the courts to determine adequacy of consideration (R2d § 79)
  - court tends not to delve into adequacy except in the blatant cases exchanging a penny for some other value

RELIANCE

Restatement (Second) § 90 – Promise Reasonably Inducing Action or Forbearance

1. A promise that should be reasonably expected to induce action on the part of the promisee AND does induce such action is binding if injustice can be avoided only by enforcement
   - “promissory estoppel”
   - does not prevent the defendant from claiming lack of consideration but reliance, in a form, becomes a replacement for consideration

2. A charitable subscription is binding under (1) without proof of actual inducement

Element of Reliance

- Classical doctrine viewed bargain as the only acceptable consideration (see Kirksey v. Kirksey)
  - Facts: The brother-in-law of the widow Kirksey suggested that she move off her land sixty miles to come live with him. However, after she got there he kicked her off after two years.
  - Holding/Reasoning: For the defendant; Promise on the part of the defendant was mere gratuity and not enforceable

- estoppel in pais or equitable estoppel – doctrine that states that if A has made a statement of fact to B and B foreseeably relied on the statement then A is prevented from denying the truth of the statement
see Hetchler (wife adopted to collect life insurance money but company refused because payments only covered period up to a month before husband’s death; however court ruled against company because husband relied on statement that payment was to date in not renewing policy)

Feinberg v. Pfeiffer Co. (Missouri Court of Appeals, 1959)

Facts: Feinberg had worked in an administrative role at the company for over 35 years. In 1947, the Board of Directors adopted a resolution essentially granting her a $50 raise and $200 pension upon retirement. Feinberg was told of this resolution and a year and a half later retired from work under the belief that she would receive the pension.

Issue: Whether Feinberg has a right to recover from defendant based upon a legally binding contractual obligation?

- Defendant contends that it is a promise to make a gift and no contract existed because plaintiff gave no consideration
- Past services are not a valid consideration (“many years of long and faithful service”)

 Plaintiff’s Arguments for Consideration

- Continuation of employment by plaintiff from date of resolution to retirement (court rejects)
- Her retirement and abandonment of gainful employment in reliance on the promise

Holding/Reasoning: Judgment was affirmed for the plaintiff. The act of the plaintiff constituted reliance and thus promissory estoppel prevents defendant from denying the resolution

contrast with Hayes v. Plantations Steel Co. where court rejected reliance because Hayes had told the company of his intention to retire seven months prior to being promised pension

Restatement (Second) §86—Promise for Benefit Received

(1) A promise made in recognition of benefit previously received by promisor from promisee is binding to the extent necessary to prevent injustice

(2) Such a promise is not binding if (a) promisee conferred the benefit as a gift, (b) for other reasons the promisor has not been unjustly enriched, or (c) its value is disproportionate to the benefit conferred previously

- condition (b) seems to suggest that if previous benefit was part of another contract then cannot make a promise for such a benefit (i.e. employment contract for which promisee was paid for services to promisor)
BARGAIN PRINCIPLE

Refer to Restatement (Second) §§ 17, 71, 72, 79

- Section 71 (Requirement of Exchange)
  - (1) To constitute consideration, a performance or return promise must be bargained for
    - it is enough that one party manifests an intention to induce the other’s response and to be
      induced by it and that the other responds in accordance with the inducement

- Section 72 – any performance which is bargained for is consideration

- Section 79 – if the requirement of consideration is met, there is no additional requirement that the
  bargain be fair and equivalent

ADEQUACY OF CONSIDERATION

Courts refuse to look at the adequacy of consideration

- consideration has nothing to do with whether or not the promisor is benefitted (see Hamer v. Sidway)
  - Facts: Plaintiff’s uncle promised him $5,000 if he did not drink, smoke, etc. before reaching the
    age of 21. Plaintiff did not participate in any of these activities. His uncle died sometime after and
    his executor refused to pay the $5,000 plus interest.
  - Holding: Contract valid
  - “It is enough that something is promised, done, forborne, or suffered by the party to whom the
    promise is made as consideration for the promise made to him.”
  - “Consideration means not so much that one party is profiting as that the other abandons some
    legal right in the present...as an inducement for the promise of the first.”
  - legal detriment is all that is required (see Davies v. Martel Lab)
    - consistent with R2d § 79 (a) and § 71 (3)(c)

No mutuality requirement (see Hancock Bank v. Shell)

- courts traditionally have declined relief to a party from the terms of a contract merely because the
  bargain was bad or uneven
- consistent with R2d § 79 (b)-(c)
- EXCEPTION – Illusory Promises

DURESS

Restatement (Second) § 175 – When Duress by Threat Makes a Contract Voidable

1. if manifestation of assent is induced by an improper threat that leaves no reasonable alternative
2. if assent is induced by one who is not a party to the transaction if the other party knows of the duress

Restatement (Second) § 176 – When a Threat is Improper

1. what is threatened is a crime, tort, criminal prosecution, use of civil process, or breach of good faith
2. exchange is on unfair terms AND threat would harm recipient and not benefit party making the threat
   - (2)(c) is a catch-all provision for all duress cases (“what is threatened is otherwise a use of power
    for illegitimate ends”)
Unidroit Principles of International Commercial Contracts

- Article 3.9 – threat is unjustified if act threatened is a wrong itself or it is wrongful to use it as means to obtain contract

**Duress – Common Law**

- uneven bargain is not sufficient to establish duress
  - see Batsakis v. Demotsis (affirmed a contract that effectively exchanged $25 for $2,000 between a party that was in a dire position and need of money in Greece during WWII)
  - essentially a ruling that the normal remedy for breach is expectation damages, the agreed upon exchange (as opposed to restitution damages which are the value of what the wronged party gave up)

- hard bargaining positions, if lawful, and financial circumstances if not caused by the party against whom the contract is sought to be voided will not be deemed duress (see Chouinard v. Chouinard)
  - “one crucial element is missing: a wrongful act by the defendants to create and take advantage of an untenable situation”
  - Distressed Traveler
    - traditionally, contract could not be voided because Frug in the desert did not induce his duress
    - Eisenberg thinks such a contract violates fairness and efficiency implicit in bargain principle
      - fairness – moral duty to help others and not take advantage
      - efficiency – creates a monopoly situation
  - refer to R2d § 175(1)

- EXCEPTION – hard bargaining position not acceptable for “adventitious rescue” in admiralty
  - see Post v. Jones (rejected a contract whose prices were set during an auction at the time of salvage)
  - “nor will they permit the performance of a public duty to be turned into a traffic of profit”
  - Policy Justifications
    - if savior can extract exceedingly high prices then either (1) people will be discouraged from engaging in activities that might require rescue or (2) people will spend a greater amount on precautions that would exceed cost of rescue

**UNCONSCIONABILITY**

Restatement (Second) § 208 – Unconscionable Contract or Term

- if a contract or term is unconscionable, the court may either –
  - void the entire contract,
  - enforce the remainder of the contract with the unconscionable term, or
  - limit the application of the term to avoid unconscionable results

- see also U.C.C. § 2–302
General

Terminology Used in Interpretation

- Procedural
  - grossly unequal bargaining power, hidden/fine print terms, ignorance, education, duress
- Substantive
  - terms so one-sided as to oppress or unfairly surprise an innocent party, imbalance in obligations and right imposed, significant cost-price disparity
- Requirement for unconscionable ruling
  - usually courts believe that must be a violation of BOTH in some fashion
  - some courts view excessive substantive unconscionable contracts sufficient (see Maxwell)
  - if procedural claims only existed cases would be more appropriate under fraud, misrepresentation, or duress

Standards of Measurement

- §172–§176 (“duress”)
- §2-302 (“unconscionability”)
- UNIDROIT Art. 3.10 (“excessive advantage”)
- Uniform Consumer Credit Code §5.108(4) (“gross disparity”)

Williams v. Walker-Thomas Furniture Co. (1965)

- Facts: Furniture contract consolidates debt with new items purchased so can never pay off anything. When Williams defaults, they repossess everything even though only defaulted on one item
- Holding: Contract was unconscionable
  - considers that plaintiff was poor with little bargaining power with little knowledge of the terms
  - unconscionable – an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party

Pittsley v. Houser (hybrid transactions)

- application of Uniform Commercial Code (UCC) in hybrid cases that don’t just involve goods (such as this case which involves goods and installation, a service)
- predominant factor test – determine what the chief purpose of the exchange is; service that requires goods (commission for piece of art) or goods that require service (home appliance installation)
  - regarded as the more prudent view
- alternate view is that you apply UCC to the goods portion of the exchange and not to the other portion

Maxwell v. Fidelity Financial Services, Inc. (1995, Supreme Court of Arizona)

- Rule – Substantive violations alone are sufficient under the U.C.C.
- Key Facts: Contract rejected novation terms as unconscionable due to grossly excessive price.
- Common Law Test for Unconscionability
  - whether, in the light of the general commercial background and needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing AT THE TIME of the making of the contract
    - objective is to prevent oppression and unfair surprise
- NOT disturbing the distribution of risks because of bargaining positions
- distinct from “reasonable expectations

**Arguments in favor of doctrine of unconscionability**
- Morality as well as the argument that certain people (poor, uneducated, those in trouble) have unequal bargaining power – no meaningful choice, and hence contract not truly consensual
- Prevent those with bargaining power from abusing that advantage (protect rights weak, etc.)
- Courts should protect the weak, and further courts are able to draw line to limit unconscionability (and duress) and still protect right to contract

**Arguments against a doctrine of unconscionability**
- Intent of parties / freedom of contract should be determinative. Further, shouldn’t treat the poor differently because of unequal bargaining power, etc – same right to contract as others
- Slippery slope to point where all contracts based on unequal bargaining power are unenforceable; threat of unconscionability makes businesses less likely to contract with poor
- Why should the court judge the value of consideration after the fact?

**MUTUALITY/ILLUSORY PROMISES**

Restatement (Second) § 77 – Illusory and Alternative Promises
- promise not consideration if by its terms the promisor reserves a choice of alternative performance unless either –
  (a) each alternative performance would have had consideration if it alone had been bargained for
  (b) at least one performance would have had consideration AND there is a substantial possibility that events will eliminate the other alternatives before the promisor exercises his choice

Overview
- principle of mutuality – idea that both parties must be bound or neither is bound
- only applies to bilateral contracts (exchange of a promise for a promise)
  - no application to unilateral contracts (an exchange of an act for a promise)
- does not apply to bargains in which both parties have made real promises but one party not legally bound by his promise (e.g. a party induced into a contract by fraud is not bound by it but can still compel performance by the other party if he wants)

Illusory Promises – Common Law
- unilateral/conditional promises are not necessarily illusory
  - see Scott v. Moragues Lumber Co. (upheld a contract that stated IF one party bought a boat, THEN he would lease it to the other party)
  - a contract can be valid if conditioned upon the happening of a future event entirely under the control of one party
his promise narrowed a legal right so it was real – Scott gives up right to buy and boat and not
lease it to the lumber company
\( \text{refer to R2d §71(3)(b)-(c)} \)

- **no mutuality where there is an obligation to sell but no obligation to buy**
  - **Rule** – Mutuality required to enforce bilateral promises
  - **see Wickham & Burton Coal v. Farmer’s Lumber** (court rejected that plaintiff’s promise to
    provide defendant with as much coal as needed at a certain price was enforceable)
  - lack of mutuality rendered it an illusory promise – effectively the seller is just quoting a price to
    the buyer without any obligation
  - **see U.C.C. § 2-306** which allows agreements with a reasonable quantity exchanged given the
    estimate and carries an assumption that party parties will do their best to exchange said quantity
    - requirement contract = buyer will buy from seller exclusively
    - output contract = seller agrees to provide good exclusively to buyer

- **no mutuality where a party is free to terminate a contract at any time without notice**
  - **see Miami Coca-Cola v. Orange Crush** (court rejects license agreement that allowed Orange
    Crush to withdraw a perpetual license to exclusive right to manufacture at any time)
  - illusory promise because Orange Crush didn’t really promise to do anything – it faced no legal
detriment
  - **contrasts with Linder v. Mid-Continent Petroleum** where court upheld a similar contract because
    it required a 10 day notice before termination

**Wood v. Lucy**
- **Rule** – Implied within a promise that the party will use *reasonable efforts* to fulfill the purpose of the
  contract
- **Facts** – Lucy hired Wood to endorse her products in exchange for half of the sales. Lucy insists that
  agreement lacking mutuality because Wood not bound to do anything.
- **Holding** – Court upheld the contract because it believed that Wood was bound to use reasonable
  efforts to bring profits and revenues into existence. Such an obligation was implicit in the promise to
  pay the defendant one-half of the profits
  - good faith component of the deal provides the consideration (embodied in UCC §2–306 on
    exclusive dealings)
  - **contrasts with the literal view adopted by the courts in Wickham**

**Two Competing Views of Illusory Promises**
- a court can either dismiss a promise as illusory on face (Something-Nothing Distinction), or
- it may turn an illusory promise into a real promise by applying reasonable implications of the
  interaction

DAMAGES FOR TERMINABLE AT WILL CONTRACT – WHY IS THIS HERE?
Grouse v. Group Health Plan, Inc. (1981, SC of Minnesota)

- **Facts:** Grouse was offered a job by Elliott (chief pharmacist at Group Health). He then quit his job at Richter Drug. However, Elliott hired another person after that because he was unable to supply references for Grouse.
- **Issue:** Whether section 90 (reliance) applies
- **Holding:** Reverse and remand. Promissory estoppel entitles Grouse to recover
- **Reasoning:** Under the facts, Grouse had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of the respondent. Damages should be equal to what he lost in quitting his old job and forgoing other opportunities, not how much he would have made in the new job.
- *contrary decision reached* in White v. Roche Biomedical Labs

### LEGAL DUTY RULE

**Restatement (Second) § 73 – Performance of Legal Duty**

- a promise in which one party only promises to perform an act that he is already obliged to perform is not consideration or bargain UNLESS the legal duty is doubtful or subject of honest dispute
- a similar performance is consideration IF it differs in a way that is more than just a pretense of bargain
- **NOTE:** legal duty rule makes a *promise* unenforceable but not a completed transaction

**Justifications for the Rule**

- limit vulnerability of promisors to threats (hold-up job; see Lingenfelder)
- potential for unequal protection under the law (monetary tips or rewards to police officers)
  - see Denney v. Reppert where the only officer allowed to retain award was the one *out of his jurisdiction*
- no additional consideration because already obligated to provide what is being offered

**Legal Duty – Common Law**

- **Examples of Unenforceable Agreements**
  - polygraph operator cannot claim a reward for turning over information leading to an arrest if his job required him to turn over all relevant information (*see* Slattery v. Wells Fargo)
  - contract stemming out of an attempt to extort additional commission out of job by threatening not to complete it (*see* Lingenfelder v. Wainwright Brewery)
- **Examples of Enforceable Agreements**
  - renegotiating a salary for a job in light of receiving another higher offer is enforceable due to doctrine of mutual rescission (*see* Schwartzreich v. Bauman-Baschu; *see also* modification)
  - Foakes v. Beer
    - ambiguous as to whether or not legal duty rule should apply
    - **Holding** – A promise to forgive part of a debt in exchange for immediate payment is not enforceable because there is no consideration
Contracts

- **Dissent** – Contract should be enforceable because payment up front is substantially different from delayed payment. Immediate payment is preferred and much more beneficial to creditors and thus a benefit is conferred upon them by it

**EXECUTORY ACCORD, MODIFICATION, AND WAIVER**

**Executory Accord**

The remedy available depends on whether an agreement was a substituted contract or an accord

- breach of substituted contract = collect under new agreement
- breach of accord = collect under either new agreement or old agreement

**Restatement (Second) § 279 – Substituted Contract**

(1) **Definition** – a contract that is itself accepted by the obligee in satisfaction of obligor’s existing duty
  - obligor = debtor
  - obligee = creditor

(2) discharges the original duty and breach of substituted contract does not give a right to enforce original contract

**Restatement (Second) § 281 – Accord and Satisfaction**

(1) **Definition** – an accord is a contract under which an obligee accepts performance in satisfaction of existing duty

(2) Until performance of accord, original duty is suspended UNLESS there is a breach of the accord by the obligor that then discharges the obligee’s duty to accept accord performance as satisfactory. Then obligee may enforce either original or new duty

(3) Breach of accord by obligee does not discharge original duty but obligor may maintain a suit for specific performance of the accord

**U.C.C. § 3–311. Accord and Satisfaction by Use of Instrument**

- TOO COMPLICATED – REVIEW LATER

**Accords**

- traditional legal rule states that executory accord is unenforceable
  - this however goes against the bargain principle
- modern rule has been hedged with many exceptions and distinctions
  - if substituted contract then enforceable
  - old contract rights suspended during period of supposed performance of the second contract
  - if accord has separate consideration, then it is binding (see *Sugarhouse Finance v. Anderson*):
    - follows from *promissory estoppel* that if a promise reasonably expected to induce an action does induce such an action, then it becomes binding
    - in this case, Anderson took out a loan under the belief that fulfilling the new obligation would satisfy his original duty
Distinguishing Accord from Substituted Contract
- test is vague but court looks at the parties’ intent
- likely to find accord is a substituted contract if duty under original contract was disputed, not liquidated, had not matured, and involved a performance other than money
  - see Sugarhouse Finance Co v. Anderson which determined new terms were an accord because the original obligation was for a definite and undisputed amount of money

Modification

 Modifications to Existing Contract
- conditions required to enforced modifications to a contract voluntarily agreed to by both parties (see R2d § 89(a))
  1) the promise modifying the original contract was made before the contract was fully performed on either side
  2) the underlying circumstances which prompted the modification were unanticipated by the parties
  3) the modification is fair and equitable (not under duress)
- Angel v. Murray
  - Rule - modification of a contract is itself a contract and requires consideration
  - because it requires consideration it cannot be unilaterally rescinded
  - a substantial modification to increase price of services provide is material element

Waiver

Modification v. Waiver
- Waiver – give up condition that isn’t material element of a contract (can be rescinded before reliance)
- Modification – alter a material element of the contract (cannot be rescinded)

Rules for Acceptable Waiver
- Restatement (Second) § 84 (see also UCC § 1–306 for method of waiver and § 2–209(5) for conditions of waiver)
  1) a promise to perform a contract even though a certain condition was not fulfilled is binding as long as that condition wasn’t a material part of the contract
  2) waiver can be retracted as long as adequate notice is given and the other party hasn’t relied on the waiver
- waiver unlike modification does not require consideration
  - no mention of consideration in R2d § 84
  - modifications of sales contracts generally do not require consideration (see U.C.C. § 2–209(1))
  - contracts that fail as modifications may still be viewed as waivers (UCC §2–209(4))
  - designed to avoid problem of not being able to fix a contract when a party encounters unanticipated difficulties
  - voluntary modifications acceptable as long as not influenced by duress or coercion
Contracts

- modern trend away from the legal duty rule
  - waiver also doesn’t require detrimental reliance
    - see U.C.C. § 2–209(5) which says that waivers can be retracted unless the other party relies on the waiver
    - this suggests that reliance not allowed initially for waiver to be enforced (see BMC Industries v. Barth)
- Clark v. West
  - Rule – “If the words and acts of a party reasonably justify the conclusion that it intended to abandon a condition, then a waiver is effectively established”
  - Holding – The court argued that the defendant’s failure to notify Clark of his violation of the drinking provision given knowledge of his drinking constituted a waiver of this condition. Clark relied on the fact that nobody told him he violated conditions and continued to write with an expectation of receiving $6 per page instead of $2 per page.

PAST CONSIDERATION

NOTE: “past consideration” is a term of art and past is not a description of consideration

Restatement (Second) § 82
(1) A promise to pay back a debt obligation is binding if the indebtedness is still enforceable
  - if promise is made after debt is no longer enforceable due to statute of limitations, then the debt is re-established and you are obligated to pay it
(2) These acts count as promises under (1)
  - voluntary acknowledgement to the obligee admitting present of past debt
  - voluntary transfer of money or other payment made as a payment of past debt
  - statement to the obligee that statute of limitations will not be pleaded as defense

Past Consideration – Common Law
- Traditionally enforced promises to pay the following –
  - debt barred by a statute of limitations
  - debt incurred when the adult was under legal age (defense of infancy)
  - debt that has been discharged in bankruptcy (see R2d § 83)
- Moral Obligation versus Legal Obligation
  - moral: one justification for enforcing these promises is that morally you should pay for benefits conferred upon you regardless of any legal enforceability
  - legal: another view is that second promise operates as a waiver of legal immunity
    - see also R2d § 86 which makes a promise made in recognition of benefit received binding to the extent it is necessary to prevent injustice
- Mills v. Wyman
  - cases occurred in 1825 and operates under traditional view of “past consideration”
  - Facts – A man took care of another man’s son incurring great expense. The father promised to repay the man of taking care of his son but then failed to do so.
Contracts

- **Holding** – Moral obligation is NOT sufficient consideration to support an express promise unless at some previous time consideration has existed
  - consistent with the traditional enforceability of promises based in the face of infancy, statute of limitations, and bankruptcy – in his some legal concept intervened to remove an obligation that was previously present

- Bull/Boy Distinction: decision in this case conflicts with *Boothe v. Fitzpatrick* where the court held that a promise to repay someone for taking care of his bull was binding
  - R2d §86 tries to distinguish these cases using “benefit conferred”

- **Webb v. McGowin**
  - Facts: Webb worked in a mill and in the process of preventing injury to McGowin caused severe injury to himself. McGowin then promised Webb that he would repay for what he did
  - **Rule** – A moral obligation is a sufficient consideration to support a subsequent promise where the promisor has received a material benefit (i.e. life saved) although no original duty existed
    - the promise is viewed as compensation for services rendered as if a previous request for the service was made
    - extends not only to benefits received but also for the injuries sustained to the property and person of the promisee in rendering the service
    - **EXCEPTION** certain humanitarian acts voluntarily performed do not entitle to a legal remedy
EFFECT OF UNEXPECTED CIRCUMSTANCES

Difference between Mutual Mistake and Unexpected Circumstances
- with mutual mistake, parties tend to attempt to rescind or justify nonperformance before much is done under the contract
- with unexpected circumstances, the disputed issue typically arises after performance has begun

IMPOSSIBILITY

Restatement (Second) § 263 – Discharge by Impossibility
- if the existence of a specific thing is necessary for performance, then its destruction or non-existence renders performance impracticable and thus voids the contract

Impossibility – Common Law
- Taylor v. Caldwell
  - Rule – In contracts where the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance excuses the performance
  - Facts – Contract in question for the use of a music hall for a series of concerts. However, the hall was destroyed by fire the day before the concerts were to begin.
  - Holding – contract excused; “tacit assumption” of continued existence of hall
- Ocean Tramp Tankers Corp. v. V/O Sovfracht
  - opposes Taylor and rejects the conclusion that tacit assumption of existence voids contract
  - if unexpected circumstances had been foreseen, parties would not have voided the contract but instead they have differed on what would happen
- Albre Marble & Tile Co. v. John Bowen (damages)
  - Rule – Expenses incurred in preparation of a performance that then was subsequently rendered impossible partially at the fault of defendant may be recovered
  - Holding – General contractor liable for the expenses explicitly stated in the contract can be recovered but not all expenses.
- Selland Pontiac-GMC v. King
  - Facts – Selland ordered buses from King who got bodies from Superior; Superior went out of business and thus King failed to supply to Selland
  - Holding – King is excused from contract because Selland knew that Superior was exclusive supplier so its continued existence was an implied condition
  - contrary to Barbarossa – typically failure of source of supply treated as a foreseeable contingency and risk allocated to seller; not implied condition if exclusive supplier not named in contract
**IMPRACTICABILITY**

Restatement (Second) § 261 – Discharge by Supervening Impracticability

- discharge of a contractual duty permitted when 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

U.C.C. § 2–615. Excuse by Failure of Presupposed Conditions

(a) Delay or non-delivery not a breach if a contingency makes performance impracticable

(b) Where causes affect only a part of the capacity to perform, seller must allocate production and deliveries among his customers but may include regular customers not then under contract as well

(c) Seller must notify buyer seasonably of delay or non-delivery and provide an estimated quota

*Impracticability – Common Law*

- Mineral Park Land Co. v. Howard
  - Rule – In the legal context, impossible means not practicable and *impracticable means it can only be done at an excessive and unreasonable cost*
  - Facts – A contract where a party agreed to take all the gravel and earth it needed for a bridge project from plaintiff’s land. However, defendant took gravel and earth from other persons when there was some still left because no more could be taken by ordinary means from first source.
  - Holding – Defendant excused. In determining what was available, court viewed the conditions in a practical and reasonable way

- United States v. Wegematic
  - Facts – Contract with defendant to design a new, revolutionary computer. Due to engineering difficulties, defendant claims it was impracticable to deliver the computer system as it would be too costly.
  - Holding – Defendant cannot discharged contract
    - inability to create technology due to increasing development costs not a “nonoccurrence of which was a basic assumption on which the contract was made” (*see UCC § 2–615*)
    - the risk should be assumed by the promisor in such cases
    - RW implications of excusing non-delivery = manufacturers free to express what are only aspirations and gambles on mere probabilities of fulfillment without any risk of liability
  - *contrary to* rule in *Mineral Park* because disproportionate costs in developing fails “basic assumption” part of the test

- Transatlantic Financing Corp. v. United States
  - Facts – Plaintiff forced to ship goods around Africa after unrest in Egypt closed the Suez Canal.
  - Holding – Contract not rendered impracticable (fails step 3)
    - Plaintiff knew or should have known about the Suez Canal and thus assumed risk of not being able to use customary route
    - risk became part of the dickered terms and should have adjusted for it in the price
    - price difference too small to be impracticable
  - *Three-part test for determining impracticability*
    1) an unexpected contingency must occur
2) risk of contingency must not have been allocated by either the agreement or custom
3) contingency must render performance commercially impracticable
   o balancing competing factors
     ▪ community’s interest in enforcing a contract, and
     ▪ commercial senselessness of requiring performance
   o see also American Trading v. Shell (court agrees and says notice of possible diversion at Suez Canal prevents contract from being impracticable)
   ➢ Transatlantic addresses the requirement in § 261 that performance be made impracticable without plaintiff being at fault – foreseeability and failure to act establishes plaintiff fault

**FRUSTRATION OF PURPOSE**

Common Law

➢ idea that the purpose of the contract is incorporated into the contract
   o **buyer’s side impracticability**
   o purpose conflates price/value of contract (e.g. a hotel room graduation weekend costs more than a hotel room in mid-February)
   o **qualification** – if both parties do not know purpose or have reason to know purpose, application of this doctrine should be limited to avoid fraud
   ➢ Krell v. Henry
     o Facts – Parties contracted for a room to watch the king’s coronation but it was canceled after the formation of the contract
     o Holding – Contract could be terminated; contract wasn’t just for the use of the rooms but for the use of the rooms for a particular purpose
     o Necessary Conditions for Discharging Contract
       ▪ Occurrence of event was foundation of the contract, and
       ▪ Performance of the contract was prevented, and
       ▪ Event which prevented performance not reasonably contemplated at the time of contract
     o **contrasts with Griffith v. Brymer** which was a mutual mistake case because the coronation had been canceled without the knowledge of either party before the contract was formed
GOOD FAITH PERFORMANCE

Restatement (Second) § 205 – Duty of Good Faith and Fair Dealing
- Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement
- “examples of “bad faith” from comment d
  - evasion of the spirit of the bargain
  - lack of diligence and slacking off
  - willful rendering of imperfect performance
  - abuse of a power to specify terms
  - interference with or failure to cooperate in the other party’s performance

Purposes of “Good Faith”
- a term excluding forms of bad faith (Farnsworth)
- basis for proscribing violations basic standards of decency (Summers)
- means of limiting the exercise of discretion in contracts (Burton)

U.C.C. on Good Faith
- every contract or duty imposes an obligation of good faith (§ 1–304)
- “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing (§ 1–201)
- buyers and sellers must

Good Faith versus Unconscionability
- unconscionability: issue assessed at the time of contract formation; applies to contract terms not performance
- good faith: applies to contract performance under enforceable terms

Frug’s Spectrum of Good Faith Requirements
- Egoism: take advantage of everything at the other’s expense
- Rational Capitalist: take advantage of every opportunity for profit within contract
- Chivalry: cognizance of effects on other parties; try to help others when cost not too high
- Solidarity: both in a contract together thus decisions should maximize benefit to both
- Saint: focus primarily on the interests of others, not self

Common Law
- if discretion is exercised outside the reasonable expectations of the party, then there is a breach of good faith (see Best v. US Nat’l Bank)
  - Holding – raising the nonsufficient funds fees, while not unconscionable, were a breach of good faith because consumers expect the fees to reflect cost of processing and overhead and not generate excessive profits
  - bank employees intentionally did not notify depositors of the increased fees
“best effort” clauses do not require a party to render performance in such a way as to imperil the very existence of the business or cause bankruptcy (see Bloor v. Falstaff Brewing Corp).

- buyers and sellers must use best effort to promote/supply goods (U.C.C. § 2–306)
- performance can be halted if “its losses from continuance would be more than trivial”
- yielding less profits than expected does not trigger exemption

Once a contract has been formed, a relationship between parties is formed such that opportunistic behavior not contemplated by the parties at the time of drafting is a breach of good faith.

- see Best v. US Nat’l Bank (bank employees intentionally did not notify of increased fees)
- see also Market Street Associates v. Frey (court doesn’t allow one party to trick another by taking advantage of other party’s ignorance of legal rights within the contract)
  - court unsure in this case of tricking the corporation or just carelessness on the corporation’s end not to read the contract terms
- distinction between candor in contract performance and contract formation
  - formation is a transaction at arm’s length between weary parties – want to allow some advantage to knowledge
  - performance ought to follow Frug’s category of “solidarity” as the interests of the parties merge

Terminable At-Will Employment

- firing someone for bad cause is a breach of the good faith and fair dealing covenant (Wagenseller)
SUBSTANTIAL PERFORMANCE

KEY QUESTION – How close to “perfect” performance is good enough?
➢ Is the difference between the performance rendered and “perfect” performance important or trivial?

U.C.C. § 2–601. Buyer’s Rights on Improper Delivery
➢ if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole, accept the whole, or accept some units and reject the rest
   o “in any respect” sounds a lot like “perfect tender” rule
   o however, subject to § 2–612(2) which echoes substantial performance and good faith requirement extends to rejection of tender

U.C.C. § 2–612. Installment Contract and Breach
(1) applies to sale of goods contracts
(2) buyer may reject any installment as non-conforming if substantially impairs the value of that installment and cannot be cured
   o revocation must come at a reasonable time after he discovers or should have discovered non-conformity (§ 2–608)
   o EXCEPTION if seller gives adequate assurance of its cure then buyer must accept installment
(3) non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract resulting in breach

Factors to Consider in Determining “Substantial” Performance (see Jacobs & Young v. Kent)
➢ the purpose to be served;
➢ the excuse for deviation from the letter of the agreement;
   o default must be in good faith
      ▪ some courts say willful breach is not protected (see Jardine Estates v. Donna Brook Corp)
      ▪ other courts allow willful breaches that are in good faith (see Vincenzi v. Cerro)
➢ cruelty of enforcing adherence (cost of “perfect” completion grossly out of proportion to the good attained)
   o substituted performance is allowed where delivery becomes impracticable due no fault of the either party (§2–614)

Policy Justifications
➢ sacrifices individual’s contractual expectations for society’s need for facilitating economic exchange

Damages for Partial Performance
➢ NOT a question of whether or not there is a breach
   o substantial performance is always a breach – question of trivial or material breach
➢ if breach is material (i.e. not substantial performance) –
Contracts

- party rendering performance only entitled to restitution damages – *quantum meruit* (should be zero in cases such as red/yellow roof right?)
- if breach is only trivial (i.e. substantial performance) –
  - party rendering performance is entitled to the value of the contract minus diminution of value (such as cost of completing the performance and other additional harms like delay)

**Common Law – Substantial Performance**
- failure to rescind does not necessarily make performance substantial *(see Kreyer v. Driscoll)*
  - In *Kreyer*, the Driscolls were not satisfied with the builder’s work on the house who faced difficulties in completing the job
  - however, valid grounds to rescind a contract typically precludes substantial performance claims
- in fields where performance depends **merely on taste or preference**, substantial performance should not apply *(see O.W. Grun Roofing v. Cope)*
  - includes things such as art, decoration, and a person’s home
  - red roof with a yellow streak should not be substantial performance because the burden on the homeowner to fix is excessive

U.C.C. § 2–508. Cure by Seller of Improper Tender or Delivery
- seller may seasonably notify buyer of his intention to cure if time of performance has yet to expire
  - in *TW Oil v. Con Ed*, they offered to cure the very next day
- seller may then have reasonable time to substitute a conforming tender if he believed the goods would have been acceptable (cure permitted beyond the contract deadline)

**Common Law – Cure**
- cure was designed to act as a safeguard “against surprise as a result of sudden technicality on the buyer’s part”
- doctrine of cure applies to sellers who knowingly or unknowingly make a nonconforming tender
  - see *T.W. Oil v. Con Ed* where they reasonably believed that 0.92% oil would be acceptable with appropriate price adjustments despite the contract being for 0.5% oil
- cure which endeavors by substitution to tender a chattel not within the agreement is invalid
  - see *Zabriskie Chevrolet v. Smith* where curing a faulty new car buying replacing the transmission was not a valid cure – fundamental difference between new and fixed car
- the performance rendered as a cure should conform to the higher “perfect tender” standard rather than just “substantial performance” *(Midwest Mobile Diagnostic v. Dynamics Corp of America)*

**EXPRESSION CONDITIONS**

**Promise versus Condition**

Classical View of Distinction
- if duty is conditional, non-performance is NOT breach
  - substantial performance not allowed
if duty is a promise, then failure to substantially perform is a breach

**Restatement (Second) § 227 – Standards of Preference with regard to Conditions**

- if it is unclear whether or not the terms are a condition or promise, then we assume it is a promise
- unless the event is under the obligee’s (person receiving performance) control or the circumstances indicate that he has assumed the risk
  - e.g. ambiguous contracts generally construed most strongly against insurers

**Typical Language of**

- condition: “provided,” “if,” “unless,” “until,” and “when”
- promise: “promise” and “agree”

**Common Law – Express Conditions**

- Distinction Defined (in Merritt Hill Vineyards v. Windy Heights Vineyard)
  - promise is “a manifestation of intention to act or refrain from acting in a specified way”
  - condition is an event not certain to occur which must occur, unless excused, before performance under a contract becomes due
- express conditions must be literally performed but implicit conditions are subject to substantial performance
- not entitled consequential damages for the condition not occurring (e.g. entitled to get your deposit back but cannot get damages for failure to perform)
  - nonfulfillment of a promise, however, is a breach of contract and carries a right to damages

**Excuse from Condition**

**Condition is excused if**

- a party prevents or hinders fulfillment of the condition
  - see Vanadium where plaintiff sabotaged the application to the Department of the Interior
  - carries with it a reasonable effort to meet condition (see Lach v. Cahill)
- a party waives the condition (R2d § 84)
- the condition cannot be performed due to impossibility (R2d § 271)
- fulfillment of the condition would cause disproportionate forfeiture (R2d § 229)
  - court sometimes applies substantial performance to conditions
  - see Aetna v. Murphy (court allowed a man to recover on his insurance claim despite delayed notice because agreement was an adhesion contract and no prejudice to insurance company)
  - see also Burne v. Franklin Life Insurance (delay in notice to insurance company did not constitute breach because accident put him in a coma)
ORDER OF PERFORMANCE

Restatement (Second) § 243 – Order of Performance
➢ if performances can be rendered simultaneously, then they are due simultaneously
➢ if the performance of one party requires completion over a period of time, then that party’s performance is due first
➢ these orders apply unless language of agreement or circumstances stipulate otherwise
   o e.g. paying school tuition up front, airplane tickets, performance of any kind to which enjoyment is subjective (such as movies, plays, etc.)

Justifications for § 243(2)
➢ other party might not do a good job if receives payment before full completion
➢ less complicated than forcing payment first then allow to sue if unsatisfactory after performance rendered
➢ if party gets paid first then walks way, it is unlikely that any benefit will be conferred to other party (e.g. half a haircut)
MATERIAL BREACH

BREACH

Law of Breach (R2d § 237)
- in a bilateral contract for exchange of promises, each party’s duty is a condition of the other party (1) not being in material breach and (2) that breach is uncurable
- traditional view of breach
  - must continue obligation of contract while suing the other party for breach or else you are in breach
  - e.g., if you have rats in your apartment, you cannot withhold rent because your obligation to pay is independent of the presence of rats
- modern view of breach under §237
  - all obligations are conditional
  - material breach is a reference to substantial performance
  - if a party has substantially performed, his breach is not material; if his breach is material, then he has not substantially performed

Factors Considered in Determining Material Breach (R2d § 241)
- extent to which injury party will be deprived of the benefit reasonably expected
- extent to which the injured party can be adequately compensated for the part of benefit deprived
- extent to which the party failing to perform will suffer forfeiture
- likelihood that the party failing to perform will cure his failure
- extent to which the failing party performed in good faith

Common Law – What is a material breach?
- K&G Construction v. Harris [breach material]
  - subcontractor knocks down wall of general contractor’s trailer
  - because of this, contractor refuses to pay subcontractor for installation work on the grounds that violated obligation to conduct performance with care
- Walker v. Harrison [breach NOT material]
  - business pays for advertising space but billboard poorly maintained with rust and stains on sign
  - business sent a telegraph to billboard company claiming that they voided the rental contract by not maintaining the sign
REPUDIATION

Who Gets Damages for Anticipatory Repudiation

- Repudiation with Non-Performance (R2d § 243)
  - party who repudiates gets damages
  - a breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach
  - see Hochster v. De La Tour where court allow anticipatory repudiation even though suit was filed before contractual performance was due

- Repudiation without Non-Performance (R2d § 253)
  - party who “failed to perform” gets damages
  - repudiation alone is total breach and discharges other party of its contractual duty (no need to cure)

- Retraction (R2d § 256; UCC § 2–611)
  - a party may retract repudiation if there is no reliance

What Are Damages For Anticipatory Repudiation

- Seller (UCC § 2–611)
  - for repudiation by the buyer, damages are the difference between the market price at the time of tender and the unpaid contract price

- Buyer (UCC § 2–611)
  - for repudiation by the seller, damages are the difference between the market price at the time buyer learned of breach and the contract price together with any incidental/consequential costs
  - time buyer “learned of breach” can be TWO things
    - time of repudiation (§ 2–610)
    - time of performance

Assurance of Performance

- Before repudiation, a party must demand adequate assurance if there is reasonable grounds for insecurity and may not suspend performance while awaiting assurance unless it is commercially reasonable (UCC § 2–609)

- failure to provide adequate assurance within a reasonable time is a repudiation (R2d § 251)

- Reasonable Grounds for Belief
  - conduct by a party indicating doubt as to willingness or ability to perform
  - events that indicate a party’s inability to perform
    - insolvent buyer (UCC § 2–702)
    - however, must be an actual change in financial position (see Pittsburgh-Des Moines Steel where the failure to get a specific loan was not sufficient grounds without more information)
 Restatement (Second) § 345 – Judicial Remedies Available
➢ awarding a sum of money due under the contract or as damages,
➢ requiring specific performance or enjoining non-performance,
➢ requiring restoration of a specific thing to prevent unjust enrichment,
➢ awarding a sum of money to prevent unjust enrichment,
➢ declaring the rights of the parties, and
➢ enforcing an arbitration award

INTRODUCTION TO CONTRACT DAMAGES

Cooter & Eisenberg, Damages for Breach of Contract
➢ in a market under perfect competition, expectation damages equal reliance damages
➢ contracts enforceable through consideration can employ reliance damages and contracts enforceable through § 90 reliance can get expectation damages
➢ Reasons to Prefer Expectation Damages
   o more difficult to establish the value of performance than the extent of reliance
     ▪ reliance requires factoring opportunity costs and other unclear factors

Efficiency Breach
➢ advocated for by Eisenberg and Posner
   o idea that parties should be able to breach if they are willing to pay the expectation damages (cost of breach < cost of performance)
   o damages mechanism should be such that aggrieved party is indifferent to breach
   o expectation damages forces breaching party to consider other parties interests
➢ opposed by Friedmann
   o transaction costs and litigation result from breach
   o undermines confidence and security in contract

Punitive Damages (R2d § 355)
➢ not recoverable for breach of contract unless conduct would independently also be considered a tort
EXPECTATION DAMAGES

Restatement (Second) § 344(a) - DEFINITION

> expectation measure – purpose of the law is to put the plaintiff in as good a position he would have been in had the contract been performed

BREACH OF CONTRACTS FOR THE PERFORMANCE OF A SERVICE

Breach by Person Under Contract to Perform a Service

> Restatement (Second) § 384(2) – Alternatives to Loss in Value of Performance
  o diminution in the market price of the property caused by the breach
    ▪ (1) provision breach is merely incidental to the main purpose of the contract
      • justification holds as long as defect product of good faith – breaches that are not merely incidental likely in bad faith and thus entitled to full cost of repair
    ▪ (2) completion damages would result in “unreasonable economic waste”
      • see Peevyhouse v. Garland where relative economic benefit insufficient for paying $29,000 for restoration work that would only increase property value by $300
      • see also Schneberger v. Apache ($1.3 million cost of reducing water pollution grossly disproportionate to $5,000 increase in value despite legislation protection the environment)
  o reasonable cost of completing performance or remedying defect as long as cost is not clearly disproportionate to the loss of value
    ▪ see Louise Caroline Nursing Home v. Dix where the damages for leaving the building incomplete were equal to the cost of completion because that cost was within contract price
  o in choosing diminution of value or cost of completion, should consider if for general commercial usage or private personal use (similar logic to red-yellow roof)

> medical promises and contracts
  o pain and suffering not part of the losses that can be fairly said to come within the terms of a contract
    ▪ see Hawkins v. McGee (pain incidental to surgery merely a legal detriment which constituted part of the consideration of the contract)
  o doctor’s statements not a guaranty but merely a reassurance (see Van Zee v. Witzke)
  o given uncertainty of medical science, doctors can seldom in good faith promise specific results (see Sullivan v. O’Connor)
  o to enforce a doctor’s promise of health, must provide clear proof of such a promise

Breach by Person Who Contracted to have a Service Performed

> Two Equivalent Formulas for Damages (R2d § 347)
  o Contract Price (Less) Cost saved by not completing work (Less) Amount already paid; or
    ▪ preferred by the SCOTUS
  o Expenditures to Date (Plus) Lost Profits (Less) Amount already paid
someone else buying the service does not absolve the breaching party from damages (see Wired Music v. Clark where Clark left over a year left on a contract at his old location but new tenant picked up a contract)

do not include overhead costs (see Vitex v. Caribtex)

BREACH OF CONTRACTS FOR THE SALE OF GOODS

Remedies for breach of a contract for the sale of goods are governed by the Uniform Commercial Code

Goods are all things movable (UCC § 2–105)

Breaches by Seller for a Contract for the Sale of Goods (Buyer’s Remedies)

two broad categories

- specific relief (in which the buyer is awarded the actual goods); and
- damages

Breach of Warranty (U.C.C. § 2–714(2))

- measure of damages for non-conformity of tender is the difference between the value of goods accepted and the value of goods as warranted at the time of acceptance
- unclear if this is interpreted as the cost of repair or the cost of replacement (court interpreted as cost of repair in Continental Sand)

Two Remedies for Failure to Deliver Goods

- cover – buyer recovers difference between cost of substitute goods purchased and contract price (UCC § 2–712)
  - if a buyer chooses to cover, then he can’t get difference from market price (UCC § 2–711)
    - lack of perfect information makes this dangerous – difficult to tell if a purchase was a “cover” to make up for the seller’s breach or just continuance of other business
    - for this reason, some courts interpret the comments for § 2–713 to only apply if the cover is reasonable (seller can prove that it was in fact a replacement for the one not delivered)
    - just because a buyer can then pass on its increased costs to subsequent buyers does not mean that seller does not owe “cover” damages (see KGM Harvesting v. Fresh Network where lettuce prices increased so seller breached old contract)
  - hypothetical cover – buyer recovers the difference between market price at the time of the breach and contract price (UCC § 2–713)
    - only applies where buyer has not covered
    - market price determine with reasonable leeway (see Egerer v. CSR West where court found a price available to buyer six months after seller failed to deliver as adequate)

Buyer’s Incidental Damages (UCC § 2–715(1))

- incidental damages – expenses reasonably incurred in connection with effecting cover and any other reasonable expense incident to the delay or other breach

Breaches by Buyer for a Contract for the Sale of Goods (Seller’s Remedies)

occurs in cases of wrongful rejection, revocation, repudiation, or failure to pay

seller’s remedies include (UCC § 2–703) –
Contracts

- withholding delivery of the goods
- stop delivery
- resell and recover damages
- recover damages for non-acceptance
- cancel

- **Damages for Seller Resale (UCC § 2–706)**
  - where resale made in good faith and in a commercially reasonable manner, then may recover
    contract price + incidentals – resale price – expenses saved

- **Damages for Non-acceptance or Repudiation (UCC § 2–708)**
  1. Formula for Damages = market price at time of tender + incidental damages – unpaid contract
     price – expenses saved by not having to deliver
  2. If (1) is inadequate, then formula = lost profits + incidentals + costs reasonably incurred + credit
     for payments

- **Lost Volume Seller (interpreted from § 2–708)**
  - **Rule** – even if the goods are resold to another buyer, the seller has lost the profits from a sale
    - unlike with buyer’s remedies, the seller may recover difference from market even if resells
    - standard case is where a seller has an unlimited supply of a standard-priced good
    - applies even if the seller doesn’t have the excess goods at the time of contract
    - EXCEPT with used cars because viewed as unique sales and thus not lost volume (see
      Lazenby Garages v. Wright where)
  - the measure provided in § 2–708(1) is typically inadequate for the lost volume seller
  - Argument against Lost Volume Seller
    - applying as the standard can lead to overcompensating the seller for the possibility of the sale
      of a second good even if it would not have been profitable for the seller to produce both units
      – law of increasing marginal costs and diminishing marginal returns

**LIMITATIONS TO EXPECTATION DAMAGES**

**Mitigation** (Restatement (Second) § 350)

- **Rule** – damages are not recoverable for loss that the injured party could have avoided or reasonably
  attempted to avoid without undue risk, burden or humiliation

- **For services**
  - damages limited to work done up until notice of cancellation (Rockingham County)
  - may be able to recover for “loss of reputation” if you can demonstrate concrete proof (e.g. painter
    who is asked to stop halfway through has a reputation to uphold of having quality work)

- **For goods**
  - duty to mitigate only constrains the duty to cover in good faith under § 2–712
  - where goods are unfinished, seller may mitigate by reselling goods, salvaging them, or any other
    options that is commercially reasonable (UCC § 2–704(2))
    - no duty to cover nor resell is mandated

- **For employment**
  - mitigation creates a duty to search for a new job
appropriate measure of recovery for wrongfully discharged employee = salary agreed upon less amount employee earned or with reasonable effort might have earned from other employment
  - damages include cost of looking for a new job (Mr. Eddie v. Ginsberg)

for mitigation to apply, employer must show that other employment was comparable or substantially similar
  - taking a different movie role could be substantially different and inferior (Shirley Maclaine Parker v. 20th Century-Fox)
  - taking a job far from your home is not comparable (Punkar v. King Plastic Corp.)
however if you do take an inferior job, then it mitigates damages

**Foreseeability** (Restatement (Second) § 351)
- for buyer’s consequential damages to be awarded they must be foreseeable (UCC §2-715(2))
  - (1) any loss probable arising out of the ordinary course of events of the contract; and
  - (2) the seller at the time of contracting had reason to know that could not be prevented by cover later informing seller of possible loss is not sufficient – might not be able to change anything
- even if type of loss is foreseeable, may only recover the amount of loss reasonably foreseeable (Victoria Laundry)
- standard isn’t to prove that the harm was the most foreseeable but that it wasn’t so remote as to be unforeseeable (see Martinez v. Southern Pacific Transportation where strip-mine received an essential part for its machinery a month late and sued for lost profits)
  - applies a broader approach than in Hadley v. Baxendale where loss profits from delay in fixing broken shaft not awarded as damages
- there are NO consequential damages for sellers – it would just be loss profits (UCC §2–710)

**Fairness Argument** on Both Sides
- **Defendant** would claim that it would be unfair to pay high damages for something that it could not have known would happen – discourages efficiency breach
- **Plaintiff** would claim it is unfair to bear the brunt of the loss for the other party’s breach

**Consequentialist Argument**
- both sides would contend that a ruling contrary to their liking would discourage parties from entering contracts

**Causal Limit to Foreseeable Damages**
- even if damage foreseeability, defendant’s breach must be the “chief” cause of the damages; otherwise consequential damages will be limited
- if you don’t try to cover, then you can’t recover consequentialist damages (see UCC § 2-715)

**Certainty** (Restatement (Second) § 352)
- must demonstrate with reasonable certainty that damages stem from the defendant’s breach
- damages don’t have to be calculable with mathematical accuracy (UCC § 1–106)
- Three-fold Test (Kenford Co. v. Erie City)
  - proximity
  - certainty
  - foreseeability
- “New Business Rule”
prohibits recovery of lost profits that a plaintiff claims would have been generated by a proposed new business because it is too speculative

**Emotional Distress** *(Restatement (Second) § 353)*

- Rule – recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract is such a kind that serious emotional disturbance was particularly likely
  - generally deny such damages despite foreseeability within the rule of Hadley
  - in theory, every breach of contract would cause some emotional distress
- no duty to provide a sense of job security if breach employment contract *(Valentine)*
- key test – whether the contract has elements of personality
  - e.g. loss of a marriage or child fits this personal interests element
- EXCEPTION breach of contract to provide entertainment and enjoyment allows recovery of emotional distress *(see Jarvis v. Swan Tours where damages awarded for plaintiff who suffered disappointment from the loss of their holiday trip caused by deceiving travel brochure)*

**ALTERNATIVES TO EXPECTATION DAMAGES**

**Three Other Primary Approaches**

- Liquidated Damages
- Specific Performance
- Reliance and Restitution Damages

**Liquidated Damages** *(Restatement (Second) § 356)*

- Definition – the sum a party to a contract agrees to pay if he breaks some promises and which was arrived at by a good faith effort to estimate the probable damages of breach
  - NOTE: penalty damages (a sum fixed not as a pre-estimate of probable damages but as a punishment for breach) are unlawful contracts *(R2d § 355)*
- Conditions Where Liquidated Damages are Permissible *(U.C.C. § 2–718)*
  - amount is reasonable in the light of the anticipated harm caused by a breach;
    - if damages grossly disproportionate then court usually concludes expectations unreasonable
  - difficult to prove loss for aggrieved party of breach; and
  - inconvenient or not feasible to obtain an adequate remedy
    - if it is clear that actual damages are capable of accurate estimate or easily ascertainable at the time of contract then rejected as a penalty clause *(see Hyman where fluctuations in real property values made it impossible to ascertain damages at formation)*
      - most courts prefer at time of contract because too frequently parties can calculate damage at time of breach and thus render most liquidate clauses inoperative
    - alternatively, could measure at the time of breach *(Pembroke)*
- Forfeiture of Deposit (penalty, not liquidated damage)
  - if buyer breaches, they are entitled to recover deposit minus actual damages *(Lee Oldsmobile)*
  - actual damages are capable of accurate damages so keeping down payment is a penalty
- Underliquidated Damages *(U.C.C. § 2–719)*
  - normally enforced – increasing is viewed as penalty but limited is seen as alright


- consistent with the idea of efficiency breach
  
  o typically achieved by either limiting or excluding liability for consequential damages (unless unconscionable); or
  
  o in the case of defective goods, seller’s responsibility is limited to repair or replacement of goods

**Specific Performance** (Restatement (Second) § 359)

- equitable decree (specific performance) will not be adjudged unless the ordinary common law remedy of damages is an “inadequate and incomplete remedy”
  
  o damages are viewed as the default remedy with specific performance as the exception

- Categorical Precedent
  
  o NO specific remedy for contracts for building construction (incapacity of the court to superintend performance as well as ordinary damages being adequate)
  
  o NO specific remedy typically for performance involving personal relations such as employment
    
    - not because monetary relief is adequate but because believed to be unwise to force a performance involving personal relations
  
  o YES specific remedy for the sale of real property
    
    - no fully liquid market and frequently subjective values make calculation of damages difficult
    
    - has become less categorical overtime where not a certainty to receive specific relief

- **Uniqueness and Inability to Cover** (U.C.C. § 2–716)
  
  o specific performance may be decreed where the goods are unique
    
    - physical differences alone don’t constitute unique; must look at economic interchangeability
    
    - essential trait is not uniqueness of property but uncertainty/inability of valuing the breach in any other terms
  
  o if after reasonable effort buyer cannot cover or it is reasonable that the buyer’s efforts to cover would be unsuccessful, then specific performance may be demanded
    
    - see Laclede Gas v. Amoco Oil (court granted specific performance for a contract supplying propane because it was improbable that plaintiff would find another supplier willing to enter into a similar long-term agreement)

- **Cost and Benefits of Injunctions instead of Damages**
  
  o Benefits = prices and costs more accurately determined by the market as opposed to experts before a jury (traditional damages risk inaccurate determination of value and expenditures)
    
    - burden of determining costs shifted from court to parties
  
  o Costs = continued supervision by the court and the cost of bilateral monopoly
    
    - however, simple negative injunctions typically have negligible costs of supervision (see Walgreen v. Sara Creek where court granted injunction under exclusivity clause against defendant not to lease a space)
RELIANCE DAMAGES

Restatement (Second) § 344(b)
- reliance measure – purpose of the law is to put the plaintiff in as good of a position as he would have been in had the contract not be made
  - allow recovery for the expenditures incurred in preparation and part performance
  - long term profits from gross receipts cannot be determined with sufficient certainty; therefore, reliance more suitable in such cases

Expectation damages act as a ceiling on reliance damages (R2d § 349)

Common Law
- medical promises and contracts
  - contrary to Hawkins, damages should include pain and suffering and other detriments following proximately from doctor’s failure to perform (see Sullivan v. O’Connor)
- sometimes expenses incurred before contract was made may be recoverable
  - Rule – “defendant must have contemplated – or at any rate, reasonably should have known – that if he broke his contract, all that expenditure would be wasted, whether or not it was incurred before or after the contract” (Anglia Television)
  - see Security Stove v. American Rys. Express (court awarded damages that would have incurred even had the contract not been breached for a delay in delivering a stove that plaintiff intended to exhibit at a convention)
- reliance damage are still owed even if no profits would have occurred had the contract been performed (see L. Albert & Son v. Armstrong Rubber Co.)
  - if defendant can prove that plaintiff actually would have lost money, then reliance damages are reduced by that amount

RESTITUTION DAMAGES

Restatement (Second) § 344(c)
- restitution measure – purpose of the law is to restore to a party any benefit he has conferred on the other party

Two Theories of Viewing Restitution
- substantively – recapture of a benefit conferred on defendant that would leave him unjustly enriched
- remedially – refers to remedies that are based on the amount of a defendant’s unjust enrichment

Restitution Damages for Breach of Contract
- Measures of Restitution Interest (R2d §371)
  - reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person similar to claimant, or
Contracts

- extent to which the other party’s property has been increased in value
  - injured party cannot maintain an action for restitution unless the non-performance is so material that it is held to go to the “essence” of the contract
  - see Osteen v. Johnson (The defendant failed to press and mail out copies of a second record. The essence of the contract was to publicize and make Osteen known so this constituted a substantial breach of the contract)

- Quantum Meruit
  - literally means “what one has earned”
  - functions as if contract had never been made and allows recovery for the reasonable value of the services performed – expectation damages (contract price) do not set a cap on restitution
  - allows the recovery of the value of services irrespective of whether or not completing the contract would have been profitable (see United States v. Algernon Blair)
  - exception: expectation damages become a ceiling on recovery if party has fully performed his part of the contract when the breach occurs (see Oliver v. Campbell)

Restitution in Favor of a Plaintiff in Default

- historical rule for the sale of real property – “a vendee in default cannot recover back the money he has paid on an executory contract to his vendor who is not himself in default”
  - logic is that restitution should always be refused because the buyer is guilty of a breach and should not be allowed to have advantage from his wrong
  - historically rule operated irrespective to damages

- modern rule (generally accepted over the historical rule)
  - the party who breaches is entitled to restitution for any benefit that they conferred by way of part performance or reliance in excess of the loss that they caused by their own breach
    - see Kutzin v. Pirnie (breaching party had put down a deposit in excess of damage done to other party and were entitled to restitution for the excess)
    - modern rules takes effect where breaching party has conferred a benefit upon rather than a detriment to the other party
  - logic is that the law of contracts is designed to compensate for loss and excess compensation is economically undesirable
  - see also R2d § 374(1) – doesn’t apply to contracts with liquidated damages or forfeiture clauses; these are governed by § 374(2)
  - burden to prove unjust enrichment falls on the purchaser as the party in breach
  - exception: restitution damages not allowed for willful breach
    - breach not considered willful if there is an honest dispute as to contractual obligations

- U.C.C. § 2–718(2)-(3)
  - breaching party entitled to restitution of any amount by which the sum of his payments exceeds seller’s terms for liquidated damages or the lesser between 20% of the total value and $500
  - deduct from this amount benefits already conferred by the seller