**Contracts**

**Introduction**

**Surrogacy Contracts: Freedom of Contract and Public Policy**

See Restatement (2nd) of Contracts §1. Contract Defined.

§178. When a term is unenforceable on Grounds of Public Policy.

§179. Bases of Public Policies Against Enforcement.

In the case of Baby “M,” the question is raised of when a person’s manifestation of consent to contract should prevail and when, if ever, countervailing “policy” considerations of the parties should be overridden in exceptional cases—what kinds of contracts are not legally enforceable and why? Should surrogacy contracts be enforceable?

**In the Matter of Baby “M”** (Superior Court of New Jersey) (1987) [22]

Facts: The Sterns waited until after Mrs. Stern’s residency to have a child—but by the time they decided to start having children, Mrs. Stern was diagnosed with multiple sclerosis—a disease exacerbated during pregnancy. The Sterns and the Whiteheads signed a surrogate parenting agreement in which Mrs. Whitehead was paid $10,000 and all medical expenses for performing her agreement. After the birth of the child, Mrs. Whitehead refused to return the baby to the Sterns. Background information: market changes (birth control, abortion) decreased the number of unwanted pregnancies and thus adoption of babies was harder. Demand was also higher because people were waiting longer to have children because women had careers. Legal backdrop: there was no legislation that dealt with surrogacy in New Jersey.

Issue: Is the surrogate-parenting agreement a valid and enforceable contract pursuant to the laws of New Jersey?

Holding: Yes. There is no law governing surrogacy contracts in New Jersey and the laws of adoption do not apply to surrogacy contracts—so the payment aspect is not an issue. The sole legal concept that controls is that of the best interests of the child. Once conception has occurred the parties’ rights are fixed. Mrs. Whitehead breached her contract by 1) failing to surrender to Mr. Stern the child and 2) failing to renounce her parental rights. Specific performance is in the best interest of the child—the Sterns wanted and planned for this child, and the baby’s best interests will be served by being placed in her father’s sole custody. Trial court did not even consider it a contracts case—merely looked at the best interests of the child.

**In the Matter of Baby “M”** (Supreme Court of New Jersey) (1988) [33]

Issue: Is the surrogate contract, described above, valid?

Holding: No, the contract conflicts with the law and public policy of the state and so is invalid. The trial court concluded that the various statutes governing this matter, including those concerning adoption, termination of parental rights, and payment of money in connection with adoptions, do not apply to surrogacy contracts. Additionally, the Sterns claim they are not paying for adoption but paying for services. This court disagrees—part of the deal is giving up the child. Additionally, the surrogacy contract conflicts with 1) laws prohibiting the use of money in connection with adoptions—prevents baby-selling (if legislation is inconsistent with contract—easy case); 2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted—best interests of the child is not enough to terminate parental rights; and 3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

Also conflicts with public policy considerations—our policy has long been that to the extent possible, children should remain with and be brought up by both of their natural parents. Additionally, allowing for surrogacy contracts would permit the purchase of a woman’s procreative capacity, the highest bidders will presumably become the adoptive parents regardless of suitability, and consent is too early irrevocable. Ultimately there are some things that money cannot buy in America—namely, children—and this is not in the child’s best interests. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment. Weighing of public policy interests.

**Johnson v. Calvert (**Supreme Court of California) (1993) [48]

Facts: The Calverts desired to have a child, but the wife was unable. The Calverts thus signed a contract with Anna, providing that an embryo created by the Sperm of Mark and the egg of Crispina would be implanted in Anna, and the child would be taken into Mark and Crispina’s home. Mark and Crispina agreed to pay Anna $10,00 in a series of installments, and to pay for a $200,000 life insurance policy on Anna’s life. Relations deteriorated and Anna sent a letter demanding the balance of the payments due her or else she would refuse to give up the child. When there was no payment, Anna filed an action to be declared the mother of the child. The Calverts had also filed a lawsuit seeking a declaration that they were the legal parents.

Procedural History: Trial court ruled that Mark and Crispina were the child’s parents. The Court of Appeal affirmed.

Issue: When a zygote of a husband and wife is implanted in the uterus of another woman, who carries the fetus to term and gives birth to the child, is the surrogate the child’s natural mother under California Law?

Holding: No, the husband and wife are the child’s natural parents. The best interests of child align with the couple who intended to have the child**.** The Uniform Parentage Act was introduced to eliminate the legal distinction between legitimate and illegitimate children—the parent and child relationship became a legal relationship encompassing two kinds of parents, natural and adoptive. With regard to payment—gestational surrogacy differs in crucial respects from adoption and so is not subject to adoption statutes. The payments to Anna under the contract were meant **to compensate her for her services** in gestating the fetus and undergoing labor, rather than for giving up parental rights to the child. Thus, does not implicate the public policies underlying the statutes governing termination of parental rights. Additionally, unlikely that surrogacy contracts will exploit or dehumanize women, since there is no proof that surrogacy contracts do this to any greater degree than economic necessity poor women by inducing them to accept lower-paid or otherwise undesirable employment**.** Act cannot be construed to disprove of in vitro fertilization, since it was drafted long before this technique of impregnation was invented. Giving courts final say would be inconsistent with the role of government—courts can’t decide where a child would be better off. Test in California—whoever had the intention of having the child.

Consideration: the receipt by the promisor of something of value from the promisee.

**Damages**

Three purposes are central to damage awards:

1. Expectation interest
   1. Court attempts to put the promisee in the position in which the promisee would have been had the promise been performed
   2. One limitiation on expectation damages is if the consequences of the breach aren’t foreseeable—aren’t going to award damages.
   3. Gross expectancy: overall money.
   4. Net expectancy: the net amount you expected to gain—subtracts costs.
   5. Avoidability principle is also a limitation on expectation damages.
2. The restitution interest
   1. Promisee conferred a benefit to the promisor in the course of the transaction—goal of court is to put the pomisor back in the position in which the promisor would have been had the promise not been made. Restitution interest prevents unjust enrichment.
3. The reliance interest
   1. Promisee changed its position to its detriment in reliance on the promise. Court attempts to put the promisee back in the position in which the promisee would have been in had the promise not been made.
   2. Reliance has two elements: 1) reliance by the promise; and 2) resultant gain to the promisor.
   3. Although the recovery that is precluded by the limitation of foreseeability is usually based on the expectation interest and takes the form of lost profits, the limitation may also preclude recovery based on the reliance interest.

Restatement (Second) of Contracts, Section 347: Measure of damages in general.

Restatement (Second) of Contracts, Section 344: Purposes of Remedies.

Restatement (Second) of Contracts, Section 345: Judicial Remedies available

Notes: the UCC only applies to goods (not real estate or services).

**Expectation Damages**

Expectation—how do you get the benefit of the bargain? Expectation damages depend on the fair market value—if it was a bad deal, you are going to get a bad deal in the end.

**Hawkins v. McGee,** [Supreme Court of New Hampshire] [1929] (61)

Facts: Case against a surgeon for breach of an alleged warranty of the success of an operation. Operation in question consisted of the removal of a considerable amount of scar tissue from the palm of the plaintiff’s hand. Plaintiff claims that the doctor’s promise that the hand would be a hundred per cent perfect, constituted a contract. No malpractice here.

Procedural History: Jury included compensation for pain and suffering in final verdict for plaintiff. The court found the damages awarded by the jury were excessive and made an order that the verdict be set aside unless the plaintiff elected to remit all in excess of $500. Plaintiff refused, verdict was set aside, and the plaintiff appealed. Thus, the trial court limited the plaintiff’s damages.

Issue: Was a promise made that can be considered a guarantee? Were the instructions given to the jury regarding the award of damages erroneous?

Holding: Yes, expectation is the proper measure of recovery for a plaintiff who has been guaranteed by his surgeon that a skin graft will restore his badly scarred hand to a hundred percent perfect. Appellate court considers the repeated solicitations important. Although doctor argues that he subjectively did not mean to make a promise, this is not the test the appellate court adopts—instead, must consider what a reasonable person would have thought, and here a reasonable person would think the doctor’s statements constituted a guarantee.

Yes, the measure of damages applied by the trial court was erroneous. The measure of damages is the difference between the value of the machine if it had corresponded with the warranty and its actual value—the difference in this case is the value to Hawkins of a perfect hand and the value of his hand in its present condition. With regards to pain and suffering, don’t consider this since that would have been part of the operation anyway—only compare what you got with what you thought you would get.

The law does compel performance—specific performance—in certain situations, but these are isolated and relatively few in number. Compensating the injured party for his loss through an award in money damages is much more common. The injured party may recover from the party in breach a dollar sum sufficient to put him in as good a position as he would have occupied had the contract been performed in full—expectation damage rule. The entitlements and obligations of the parties, however, are cut off and determined at the date set by the contract. The expectation damage rule operates to deprive the loser of any benefit from indulging in non-cooperative conduct, and gives the winner his due—thus, neither has an incentive to renege in a contract, making cooperative relations feasible. Injured party in the contract is entitled to a damage recovery equal to a) the value he has lost by reason of the other party’s default, plus b) the expenditures he has made (if any) in carrying out his own obligations under the contract.

See:

UCC Section 2-712. “Cover”’; Buyer’s Procurement of Substitute Goods.

UCC Section 2-706. Seller’s Resale Including Contract for Resale.

§2-708. Seller’s Damages for Non-Acceptance or Repudiation.

In cases where the simple act of substitution is not possible or feasible (i.e. specialized equipment), the damage claim will have to be measured by looking at the claimant’s individual expectations with respect to the value of the promised performance. Specific performance only granted if the contract involves unique property—typically real estate. The cost avoided by the injured party as a result of being excused from performance by the other party’s breach is necessarily subtracted from the injured party’s damage recovery.

Limitations on Expectation Damages:

Avoidability and Mitigation**:** An injured promisee cannot recover damages for losses that, with reasonable effort, he could have avoided after the promisor’s breach became known. The injured party is under legal obligation to take reasonable steps to avoid waste and minimize the cost of breach—applies both to reliance and lost-profit features of injured party’s claim. Injured party is expected, after becoming aware of promisor’s breach, to suspend or terminate his own performance, and to minimize his lost-profit by making reasonable efforts to substitute other arrangements. Injured party has no right to pile up damages.

**The Lost-Volume Seller Exception:** What if there is a disappointed seller who is able to resell the goods after the initial buyer repudiates, but could have expanded its inventory at will and was prepared to sell to as many buyers as might care to buy🡪in this case, the profit is not recouped or replaced by a new buyer. In this case UCC 2-708(2) establishes an exception for so called lost volume sellers. If the standard damage measure is inadequate to put the seller in as good a position as performance would have done because the buyer’s breach entails the loss of a profitable sale, then the seller’s damages shall instead be the profit (including reasonable overhead) which the seller would have made from full performance by the buyer. Alternatively, it could be that what the seller cannot recoup is the time and money expanded in making the repudiated sale. On this view, what the seller is entitled to recover are the incidental damages equal to the added cost of selling the same merchandise twice. The lost profit should approximate the seller’s actual and imputed retailing costs.

In a customary damage claim for breach of contract, the promisee seeks compensation both for the injured party’s expenditures in reliance and for his lost profit. Damages based on reliance interest are meant to restore the victim to the position he would have occupied if the event or transaction had never occurred.

Essential reliance: things done to fulfill the contract.

Incidental reliance: costs not essential to fulfilling the contract—money you’ve spent or actions you’ve taken, in reliance to the contract—will greatly increase damages.

**Sullivan v. O’Connor,** [Supreme Judicial Court of Massachusetts] [1973] (70)

Facts: Court is asked to review a jury verdict awarding contract damages to the plaintiff, a self-styled professional entertainer, in connection with an unsuccessful effort by the defendant, a plastic surgeon, to reduce the length of the plaintiff’s nose. The procedure was expected to require two operations, but when he second was completed the result was so disappointing that a third operation had to be undergone in an effort to undo the effects of the first two. The third operation, however, made matters worse. The entertainer charged the doctor with two counts: 1) a suit for damages on the grounds of medical malpractice, and 2) a suit for damages on a breach of contract for failure to enhance the plaintiff’s beauty. Plaintiff seeks damages measured by difference between what she got and what she was promised (expectation damages). Defendant makes a public policy argument—doctors will be frightened into practicing defensive medicine, and so we should not use contract law in this area.

Issue: Was there an error in the trial court’s instructions regarding damages?

Holding: No, there is sufficient evidence of an exchange of promises between the doctor and his patient to justify an award of damages for breach of contract. The court does, however, reject both restitution and expectation as the proper measure of the plaintiff’s claim. Restitution would entitle her to recover no more than the $622 she paid to the doctor and hospital—wouldn’t incentivize people to follow through with promises. Expectation would entitle her to the difference in value between a beautiful nose and the nose she started with—plus the lose caused by her worsened appearance plus pain and suffering associated with the third surgery—plainly to difficult to calculate. Too hard to calculate what a beautiful nose is worth. Reliance, thus, is the best measure of the plaintiff’s loses—plaintiff is entitled to recover her detriments—put her back in the position she occupied before parties made a contract. Reliance measures the difference between the plaintiff’s old nose and her new nose—should include doctors fees, hospital fees, pain and suffering, physical and mental suffering, etc. Could also have included pain and suffering from first two surgeries, since suffering associated with first and second surgery wasted—part of reliance. Court uses reliance because determines that it is easier to measure than expectation, since cost of a perfect nose is too difficult to determine. This opinion is not a repudiation of Hawkins—although normal measure of damages is expectation, if reliance is easier to compute court may use it instead. Note: one argument for expectation damages is that it gives appropriate incentives—people will follow through with promises.

**Remoteness or Foreseeability**

Consequential damages: losses you incurred after the fact that are not directly related to the contract. Policy reason to not allow recovery for consequential damages: if it’s a foreseeable risk the promisor can try to mitigate risk and promisee can cover for unforeseeable risks. If consequential damages are contemplated by both parties, then injured party can recover them.

Restatement (Second) of Contracts, Section 351 (minority view—most don’t require implicit agreement): Unforeseeability and related limitations on damages.

**Hadley v. Baxendale** (England court of exchequer) (1854) [91]

Facts: Plaintiff’s mill was stopped by a breakage of the crankshaft in the mill. Plaintiffs sent the shaft to Pickford & Co., a carrier, to have the shaft carried to Greenwich. The plaintiffs’ servant told the clerk that the mill was stopped, and the shaft must be sent immediately. The delivery of the shaft was delayed by neglect and the plaintiffs did not receive the new shaft for several days, and the working of the mill was thereby delayed resulting in lost profits. The plaintiffs claim that the defendants promised to deliver the shaft by the next day and failed to do so—breach of contract. They claimed damages for lost business and for wages paid to their idle employees—essentially damages that resulted in them not being able to operate the mill during the delay.

Procedural History: The jury awarded damages to the plaintiffs for lost profits, and the defendants appealed.

Issue: 1) Did the defendants make a special promise guaranteeing next day delivery and did they breach that special contract?; 2) Are the defendants liable for damages resulting from the breach of the contract, but not directly related to the contract itself?

Holding: 1) First count would have required a specific promise—was dropped because of lack of evidence.

2) No, if a contract is broken, the damages received should be such as may fairly and reasonably be considered as arising naturally from such a breach of contract or as may reasonably be supposed to have been in the contemplation of both parties. If special circumstances under which the contract was made were communicated by the plaintiffs to the defendants, the damages resulting from the beach of such a contract would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances. In this case, there are a great number of reasons why a broken shaft could be sent for repair—and the carriers could not have foreseen that it would delay the entire operation of the mill. Since the plaintiffs did not communicate the special circumstances, and the loss of profits cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both parties when they made this contract, the loss of profits ought not to be considered in the estimation of damages.

Hadley test for whether something is reasonably foreseeable:

1. arises naturally from this kind of circumstance—is in the usual course of things; or
   1. no reason to believe factory would shut down—maybe there was another shaft
2. was this promise reasonable contemplated by both parties at the time of the contract?
   1. No special circumstances ever communicated.

Hector Martinez v. Southern Pacific Trans. co. (Fifth Circuit, 1979) [102]

Facts: Martinez’s agent delivered a Dragline to the Penn Central Railroad. The shipment was delayed and Martinez had to make reasonable repairs because the dragline was damaged in transit. Martinez alleges delay damages in the amount $117,600—the claimed sum represents the dragline’s fair rental value during this period. Martinez’s delay claim involves two different items: 1) cost of repair, 2) storage charges from railroad, and 3) lost use during the delay in transit, and lost use resulting from repair of the damaged goods. Not claiming lost profits but loss of use—different from Hadley.

Procedural history: First 2 claims settled. Martinez appeals the trial court’s dismissal of his claim. The district court held that damages resulting from delay were special and Martinez failed to allege that the carrier had any notice of the possibility.

Issue: Is the carrier liable for delay damages?

Holding: Yes. Damage is foreseeable by the carrier if it is the proximate and usual consequence of the carrier’s action—first part of Hadley test. It was not obvious that the shaft in *Hadley* was an indispensable element of the mill. In the instant case, however, it was obvious that the dragline is a machine which of itself has a use value. Capital goods such as machinery have a use value, which may equal the rental value of the equipment or may be an interest value. The general rule does not require the plaintiff to show that the actual harm suffered was the most foreseeable of possible harms—only needs to demonstrate that it was not so remote as to make it unforeseeable. Finally, lost rental value is frequently an appropriate measure of damages from a delay in shipment of machinery—market value test. Loss of use is a foreseeable damage (whereas lost profits, the cost of idle labor, the cost of idle equipment that had been rented, are not). Damages just have to be foreseeable, don’t have to be the most foreseeable. Court does not allow damages for the time taken in repairs as they consider this settled as part of the repair damages.

Fried: economic approach—the reason we enforce contracts is due to the efficiency of having trade—philosophical reason for enforcing promises.

**Morrow v. First National Bank** (Supreme Court of Arkansas) (1977) [107]

Facts: For a number of years, the two plaintiffs, Morrow and Goslee, collected coins—a substantial portion of which was kept at Morrow’s home. On September 4, someone broke into the house and stole the coins, valued at $32,155. On June 25, the plaintiffs reserved three large boxes at the bank and the bank promised to notify Morrow as soon as the boxes were available. The burglary occurred on September 4 and Morrow later learned that the boxes had become available on August 30.

Issue: Is the bank liable for breach of contract, and loss of the coins, for failure to notify the plaintiffs of the boxes availability?

Holding: No, plaintiff must prove more than the defendant’s mere knowledge that the breach of contract will entail special damages to the plaintiff—second prong of the Hadley test. Plaintiff must show that the bank explicitly guaranteed boxes. It must also appear that the defendant at least tacitly agreed to assume responsibility. In this case, there is no proof to support he finding that the bank, in return for box rentals of $75, agreed in effect to issue a burglary insurance policy to the plaintiffs in the amount of at least $32,155—no consideration in this case and so no implicit agreement. The tactic agreement was rejected by the draftsmen of the Uniform Commerical Code—we do not attach great importance to this fact. Court here asks if there was implicit consent to assume the risk and if there wasn’t, they aren’t going to hold the bank responsible. This is the minority view—most places don’t require implicit consent.

Certainty of Harm—Reliance Damages

Restatement Second of Contract

§346. Availability of Damages.

§349. Damages Based on Reliance Interest.

§352. Uncertainty as a Limitation on Damages.

§90. Promise Reasonably Inducing Action or Forbearance.

**Chicago Coliseum Club v. Dempsey** (Illinois Court of Appeals) (1932) [110]

Facts: Chicago Coliseum Club (CCC) is an Illinois corporation which conducts boxing matches and exhibitions for prizes or purses. The defendant, William Harrison Dempsey, was well known in the pugilistic world and at the time of the making and execution of the contract in question, held the title of world’s Champion Heavy Weight Boxer. The plaintiff was to promote a public boxing exhibition in Chicago. The CCC had engaged the services of Harr Wills, another boxer, to engage in a boxing match with the defendant Dempsey for the championship of the world. Defendant, among other things, agreed not to engage in any boxing match after the date of the agreement and prior to the date on which the contest was to be held. Weisberg promoted the matches and was to make arrangements for the match to occur—and was to be reimbursed of his expenditures by the CCC. Dempsey, however, began to prepare to fight Tunney, in violation of his contract. The CCC filed a bill in the superior court of Marion county, Indiana, asking to have Dempsey restrained and enjoined from engaging in the contest with Tunney—the court found that the contract was valid and entered a decree that Dempsey be restrained and enjoined from training or preparing or participating in any contracts in violation of his current agreement with the CCC. Dempsey ultimately refused to recognize his contract with the CCC and fight Willis.

Issue: The question of damages can be divided into four segments: 1) loss of profits; 2) expenses incurred by the plaintiff prior to the signing of the agreement between the plaintiff and Dempsey; 3) expenses incurred in attempting to restrain the defendant from engaging in other contests; and 4) expenses incurred after the singing of the agreement and before the breach. Can the plaintiff recover for all of these alleged damages?

Holding: No. 1) Loss of profit—the profits form a boxing match of this character is dependent upon so many different circumstances that they are not susceptible to definite legal determinations—not proof sufficient to satisfy the requirements and the damages are purely speculative—too much uncertainty in terms of profits. 2) expenses incurred prior to the signing of the agreement—general rule is that an action for a breach of contract a party can recover only on damages which naturally flow from and are the result of the act complained of. This is not an element of damage that can be recovered for breach of the contract in question. 3) expenses incurred in attempting to restrain the defendant—there was nothing in the agreement regarding attorney’s fees and there was nothing in the contract in regard to the services of the plaintiff—plaintiff proceeded with this character of litigation at its own risk (that of specific performance); and 4) expenses incurred between the signing and breach—expenses incurred by Weisberg in and about the furtherance of the match. Expenses incurred in furtherance of the general scheme are recoverable—but the defendant should not be required to answer in damages for salaries paid regular officials of the corporation—only special expenses are recoverable and those that were incurred in furtherance of the general plan. American rule = you have to rely on the promise.

**Anglia Television Ltd. v. Reed** (Court of Appeal, Civil Division) (1971) [123]

Facts: Anglia Television was to make a film and made many arrangements in advance. They involved themselves in much expense—all of which was done before they got a leading man. Anglia hired Mr. Reed to play the leading man—but Mr. Reed’s agent had already booked him in America for some other play and therefore Mr. Reed repudiated his contract. Anglia Television tried hard to find a substitute but could not do so and so they abandoned the film. Anglia Televisoin then sued Mr. Reed for damages—they can’t say what their profit would have been on the contract if Mr. Reed performed and so instead claim for the wasted expenditure.

Issue: Can Anglia Television recover for expenditure incurred before the contract was concluded with Mr. Reed?

Holding: Yes. Plaintiff can either claim for his loss of profits (expectation interest) or his wasted expenditure (reliance). If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. When Mr. Reed entered into the contract, he must have known perfectly well that much expenditure had already been incurred on director’s fees and the like. English rule = allow damages from before the contract was signed.

Kelly: Thinks both Dempsey and Anglia are wrong because they use reliance. Kelly argues that one can avoid the difficulties of lost profits by assuming they would have ended up at zero—an avoid having to speculate and can have a fairer measure. Reliance, meanwhile, become indeterminate when you take into account opportunity costs.

**Mistletoe Express Service v. Locke** (Court of Appeals of Texas) (1988) [126]

Allowing reliance instead of expectation in the case of a losing contract.

Facts: Phyllis Locke, doing business as Paris Freight Company, entered into a contract with Mistletoe which provided that Locke would perform a pickup and delivery service for Mistletoe at various locations in Texas. In order to perform her contract, it was necessary for Locke to make certain investments and expenditures. If part of what you spend is a capital

Issue: Is a victim of a contract breach limited to expectation interest?

Holding: No. As an alternative to expectation damages, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed. Mistletoe did not prove Locke’s losses and so they can’t be deducted from her reliance damages. To recover these expenditures they must have been reasonably made in performance of the contract or in necessary preparation. Congruent with Restatement (2nd) of Contracts §349.

**The Phantom Reliance Interest in Contract Damages [S-22]**

In 1936 Fuller and Perdue revolutionized the way scholars thought about contract damages by indentifying three basic interests contract law might seek to protect: the restitution interest, the reliance interest, and the expectation interest. Fuller and Perdue defined the theoretical ideal of the reliance interest: the position the plaintiff would have occupied if the contract had not been formed. The reliance interest breaks down into three different subdivisions:

1. The Pure Reliance Interest: position the plaintiff would have occupied if the defendant had not entered the contract, including lost opportunities.
2. Reliance Limited by Expectation: measured by the pure reliance interest, unless the pure reliance interest would exceed the expectation interest, in which case recovery would be limited to the expectation interest;
3. The Expenditure Measure: denying any compensation for either profit or lost opportunities. Just out of pocket expenses.

In reality, however, the expenditure measure produces a curious rule: Courts should award the smallest recovery they can rationalize, choosing either the plaintiff’s expenditures or the expectation interest—either of these rules force one party to bear and undue portion of the risk. Limitation on reliance produces the following result: when the contract would be profitable, courts should award expectation interest (because profit serves as a surrogate for the opportunities the plaintiff relinquished to enter the contract). But when the contracts would generate a loss, the court should award the expectation interest (to prevent parties from becoming better off after a breach than they would have been if the contracts had been performed). The reliance interest compromises this mission.

Expectation interest can duplicate existing outcomes with one clarification: Courts should presume, subject to refutation by either party, that a contract would have produced zero profit for the plaintiff. The court can then add profits or subtracts losses to reach the expectation interest.

**Avoidable Damages and the Mitigation Principle**

Restatement (Second) of Contractions, §350. Avoidability as a Limitation on Damages.

**Rockingham County v. Luten Bridge Co.** (Circuit Court of Appeals) (1929) [129]

The victim of a breach has a duty to avoid actions that increase the other party’s damages.

Facts: On January 7, 1924, the plaintiff, Luten, entered into a contract with the County Board to build a bridge which was to be part of a newly constructed County road. There was massive public opposition to the project and in February, after one of the County commissioners had resigned (but then quickly attempted to rescind his resignation), the Board reversed itself and notified the plaintiff, which by then spent $1,900 on labor and materials, that the contract was now regarded as unauthorized and invalid. Despite notification from the board regarding a recission of the contract, the bridge company continued to build the bridge. By November, the plaintiff instituted an action against Rockingham county for the work done--$18,000.

Procedural History: Trial judge instructed a verdict for plaintiff for the full amount of its claim. Defendant appealed.

Issue: Is the county liable for damages incurred after cancellation of the contract?

Holding: February notice should have been taken by the plaintiff as a repudiation of the contract. At that point the plaintiff should have halted its own performance rather than piling up damages by proceeding with the erection of a useless bridge. In the present action, therefore, the plaintiff was entitled to recover $1,900—its outlays up to the date of the notice—plus anticipated profit. It could not claim reimbursement for expenditures made after it had become aware that the County had breached. Duty to mitigate = duty to not increase damages post-breach.

Shirley Parker v. Twentieth Century-Fox (Supreme Court of Cali.) (1970) [140]

Wrongfully discharged employee must make reasonable effort to earn from other employment—but only required to seek and take employment that is not different or inferior in kind.

Facts: Under the contract between the plaintiff and defendant, the plaintiff was to play the female lead in defendant’s contemplated production of a motion picture entitled “Bloomer Girl.” The contract provided the plaintiff compensation of $750,000. Before filming began, the defendant decided not to produce the picture. The defendant notified the plaintiff of this decision in a letter and offered her employment as the leading actress in another film tentatively entitled “Big Country, Big Man.” The compensation offered was identical. Unlike “Bloomer Girl,” however, which was to have been a musical production, “Big Country” was a dramatic western type movie; “Bloomer Girl” was to have filmed in California; “Big Country” was to be produced in Australia. Finally, the plaintiff approved the original contract specified that plaintiff approved the director already chosen for “Bloomer Girl” and the contract for “Big Country” eliminated this provision. Plaintiff did not accept the contract and sued for money under the contract and for damages resulting from the defendant’s breach.

Issue: In turning down the role in “Big Country,” did the plaintiff unreasonably refuse to mitigate damages?

Holding: No. General rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings form other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has derived; the employee’s rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. Role in “Big Country” different because: “Bloomer Girl” was to be a musical review calling upon plaintiff’s talents as a dancer as well as an actress, and was to be produced in L.A., whereas “Big Country was a straight dramatic role in a western type taking place in Australia. Inferior because: “Big Country” contracted eliminated the director and screenplay approvals accorded the plaintiff under the original “Bloomer Girl” contract.

Dissent: Distortion of the term “different kind” of employment—it has never been the law that the mere existence of differences between two jobs in the same field is sufficient—this is not a difference in kind. Need to determine whether the differences are substantial enough to constitute differences in kind or whether they render the employment inferior—necessitates a weighing of the evidence that is forbidden in summary judgment. Cannot accept the majority’s proposition that an offer that eliminates any contract right, regardless of its significance, is an offer of employment of an inferior kind—severely undermines the principle of mitigation.

**Expectation: Cost of Completion v. Diminution in Value**

Restatement (Second) of Contracts, §348. Alternatives to Loss in Value of Performance.

**Groves v. John Wunder Co.** (Supreme Court of Minnesota) (1939) [912]

Facts: Groves, a corporation, owned 24 acres of real estate that it used for the excavation of sand and gravel. In 1927, Groves leased the land, together with related equipment, to John Wunder Co., also engaged in sand and gravel excavation, for a 7-year term. Wunder paid Groves a lump-sum rent of $105,000 and agreed that when the lease expired it would restore the land to Groves “at a uniform grade, substantially the same as the grade now existing at the roadway….” Seven years later, however, having turned the property into a choppy mess, Wunder refused to carry out its grading obligation and chose instead to deliberately breach the contract. Wunder conceded that it broke its contract, but urged that the proper measure of damages was the difference between the current market value of the property if the grading work had been done as promised, only $12,000, and its value as a choppy mess. Groves argued that the damages should be measured by the actual cost of grading which would have been more than $60,000. Wunder sought the application of a diminished value rule, while Groves sought “cost of replacement.”

Procedural History: In trial court, plaintiff got a judgment for a little over $15,000 and appealed.

Issue: Is the plaintiff entitled to the reasonable cost to him of doing the work called for by the contract which the defendant left undone, a total of $60,000?

Holding: Yes. 1) Defendant’s breach of contract was willful—and the decision below rewards bad faith and deliberate breach of contract. 2) In reckoning damages for breach of a building or construction contract, the law aims to give the disappointed promisee what he is promised—compensation for the work or structure which he was promised and of which he has been deprived by the contract’s breach. The owner’s right to improve his property is not trammeled by it small value. 3) Economic waste doctrine—the waste avoided is only that which would come from wrecking a physical structure, completed, or nearly so under the contract. Absent such waste, the cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance. The diminished value rule would properly apply where the cost of remedying a defect in a completed structure was excessive relative to the loss in value attributable to the defect—this would be economic waste—but it could have no application to a contract to construct an improvement. Implication: Groves, as lessor, had really paid in advance for the grading work when it agreed to accept a rent of $105,000. Groves is wrong in that it cuts against Restatement §348—“the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

**Peevyhouse v. Garland Coal Mining** (Supreme Court of Oklahoma) (1963) [917]

Facts: Plaintiffs owned a farm containing coal deposits, and in November leased the premises to the defendant for a period of five years for coal mining purposes. In addition to the usual covenants found in the coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period.

Procedural History: Court instructed jury to consider both the diminution in value of the plaintiffs’ farm as well as the cost of repair work in determination of the amount of damages. Jury awarded plaintiffs $5,000—only a fraction of cost-performance but more than the total value of the farm even after remedial work was done. Plaintiffs appeal.

Issue: Is the true measure of damages in this case what it will cost plaintiffs to obtain performance of the work that was not done because of the defendant’s default—cost of replacement?

Holding: No. The primary purpose of the lease contract between plaintiffs and defendant was neither building nor construction, it was merely to accomplish the economical recovery and marketing of coal from the premises. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved. “Relative economic benefit” is a proper consideration here—where the contract provision breached was merely incidental to the main purpose in view, and where the economic benefit which would result by the lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of non-performance. Cost of repair = $39,000 and the difference in the value of the land with the repairs is only $300. Problem with this correct application of Restatement 348 is that it is not awarding the plaintiff what he bargained for—depriving him of the benefit of his bargain because that benefit is not economical based on cost-benefit analysis. Instead of bargained for outcome, only gets diminution in value of his land.

Dissent: Where the contractor’s breach of contract is willful and in bad faith, he is not entitled to any benefit of the equitable doctrine of substantial performance. The defendant could have performed the contract. It has accepted and reaped the benefits of its contract and now urges the plaintiffs’ benefits under the contract be denied.

**Restitution—Damage Interest And Cause of Action**

1. Restitution for Breach of Contract

Restatement (Second) of Contracts, §371. Measure of Restitution Interest.

§373. Restitution when other party is in breach.

**Bush v. Canfield** (Supreme Court of Errors) (1818) [226]

Facts: Norton & Bush entered into a contract in which the plaintiff ordered 2000 barrels of superfine wheat flour at $7 dollars per barrel from the defendant. The plaintiff agreed to pay 5000 dollars in advance, with 300 more to be advanced in four months, and the rest ($6000) to be paid after the delivery of the flour. Pursuant to the contract, Norton & Bush paid over the sum of 5000 but the defendant breached the contract. The price of superfine flour at the time of breach was $5.50 per barrel. Defendant argues that plaintiff would have lost $3000.

Procedural History: The trial court found a verdict for the plaintiffs and awarded them restitution plus interest.

Issue: Should a breach of contract be measured of as restitution or expectation, given that measuring based on expectation would benefit the defendant?

Holding: Restitution. The fact that the price had fallen shouldn’t affect the damages—actual damages suffered by the party cannot be the rule of estimating damages for a breach of contract. The defendant has violated his contract, and it is not for him to say that if he had fulfilled it, the plaintiffs would have sustained a great loss, and that this ought to be deducted from the money advanced. Nothing can be more just than that the defendant should refund the $5000. What would he get if seller breaches and hasn’t paid anything—nominal damages. If there had, however, been full performance by the nonbreacher—can’t get restitution—only expectation. Regardless, partial performance can NEVER exceed the contract price as a whole.

Dissent: The ruling rescues the plaintiff from their loss, and deprives the defendant of his gain. In effect, it arbitrarily subjects the defendant to a warranty, that the flour shall not sink in price, and renders him the victim of the plaintiffs’ unfortunate speculation—should have given expectation damages.

1. Restitution to the Party in Breach

Restatement (Second) of Contracts. §374. Restitution in favor of party in breach.

**Britton v. Turner** (Superior Court of Judicature of n.h.) (1834) [232]

Facts: Case brought for the work and labor performed by the plaintiff in service of the defendant. Declaration contained a count on quantum meruit (restitution based on the value of what has been done for the owner—likely more than what was actually spent), for the labor, claiming it to be worth one hundred dollars. Defense is that the plaintiff agreed to work for one year, and that he was to be paid $120, but that the plaintiff left the defendant’s service without his consent—breaching the contract.

Procedural History: Trial court told the jury that the plaintiff was entitled to recover, under quantum meruit, as much as the labor he performed was reasonably worth—and so the jury awarded the plaintiff $95.

Issue: Can the plaintiff, who has breached his contract, recover a reasonable sum for the service he has actually performed?

Holding: Yes. Distinguishing from cases in which party has contracted to do something in a specified manner—if it is not done according to the contract, the party for whom it is built may refuse to receive it. In a contract for labor, in contrast, everyday the party is continually receiving the benefit of the contract—upon breach can’t refuse to receive what has been done. If on a breach, the nature of the contract be that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is not liable. But where the party receives value, he is liable to pay the reasonable worth of what he has received. By binding the employer to pay the value of the service he actually receives, leave no temptation to the employer to drive the laborer from his service by ill treatment, in order to escape from payment. Unjust enrichment if the employer does not have to pay anything.

**Vines v. Orchard Hills, Inc.** (Supreme Ct. of Conn.) (1980) [236]

Facts: Plaintiffs, the Vines, contracted to buy a condo from the defendant for $78,800. Before that date, they paid the defendant $7880 as a down payment toward the purchase. Plaintiffs breached the contract because husband got a job in a different city. Defendant maintains that the liquidated damages clause in the contract should be enforced, and that the evidence of the value of the property at the time of the trial should have been excluded. By the time of the trial, a fair market value of the condo was $160,000. Buyer claims the seller would be unjustly enriched because the value of the condo had risen and he made more money because of the breach.

Procedural History: Trial court rendered judgment for the plaintiffs for $7880 plus interest. Trial court argued that seller gained what it characterized as a windfall of approximately $80,000 and the purchasers were thus entitled to recover their money.

Issue: Can the purchasers of real property, after their own default, recover moneys paid as a down payment at the time of execution of a valid contract of sale?

Holding: Yes. Although earlier cases refused to permit a party to bring an action based on his own breach—the anomalous result of denying any remedy to the plaintiff in breach is to punish more severely the person who has partially performed, often in good faith, than the person who has entirely disregarded his contractual obligations from the outset. A purchaser whose breach is not willful has a restitutionary claim to recover moneys paid that unjustly enrich the seller—thus, unjust enrichment turn on whether they willfully breached. To prove unjust enrichment in the ordinary case, the purchaser, because he is the party in breach, must prove that the damages suffered by his seller are less than the moneys received from the purchaser. If the breaching party satisfies his burden of proof that the innocent party has sustained a net gain, he may claim for unjust enrichment. The court has refused to enforce an otherwise valid liquidated damages clause upon a finding that no damages whatsoever ensued from the particular breach of contract that actually occurred. Presumption of validity attaches to a clause liquidating the seller’s damage sat 10% of the contract price in the event of the purchaser’s unexcused nonperformance—but this is rebuttable. Only fault with trial court conclusion is that they should have used the house’s value at the time of breach, not at the time of trial. See Restatement §374.

1. Restitution and “Quasi-Contract”

**Cotnam v. Wisdom** (supreme court of arkansas) (1907) [241]

Facts: Services rendered by the plaintiffs as surgeons to the defendant’s intestate. Mr. Harrison, appellant’s intestate, was thrown from a street car, receiving serious injuries which rendered him unconscious. Appellees, surgeons, were notified of the accident and performed a difficult operation in an effort to save his life, but they were unsuccessful and he died.

Procedural history: Judgment for plaintiff. Defendant appeals.

Issue: Can a contract be made or implied, when no words spoken?

Holding: Yes. Appellant is right in saying that the recovery must be sustained by a contract by implication of law, but is not right in saying that is a new rule of law. Implied contracts—also quasi-contracts—entail that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of an accident or disease may be held liable for necessaries furnished to him in good faith while in that unfortunate and helpless condition. Contract implied by law rests upon no evidence. Contract in fact—evidence of an actual contract is generally to be found either in some writing made by the parties or in verbal communications which passed between them, or in their acts and circumstances by the jury—based on the facts is it fair to infer that there was a meeting of the minds. In the absence of express agreement, the surgeon, who brings to such a service due skill and care earns the reasonable and customary price, whether the outcome be beneficial to the patient or the reverse—look at cost incurred by surgeons and what they would normally get.

Note: some courts, but not all, add an additional element of recovery under quasi-contract: that services be performed under circumstances that put the recipient of the benefit on notice that the party performing the services expected to be paid.

**Martin v. Little Brown & Co.** (Superior Court of Pennsylvania) (1981) [244]

Facts: The appellant, Martin, notified Bantam Books that their book had been plagiarized and offered to provide a copy of the book, in which the appellant had highlighted the plagiarized passages. Appellee invited appellant to send his copy of the book and this was done. Upon learning that appellee was pursuing a claim of copyright infringement, he demanded compensation for his services. Appellee denied that it contracted with the appellant an so Martin filed suit to recover 1/3 of the recovery effected by the appellee.

Procedural History: Trial court held that a contract had not been made and that there could be no recovery on quantum meruit where appellant had volunteered information.

Issue: Was there an implied contract between Martin and Bantam Books?

Holding: No. Appellants initial letter did not expressly or by implication suggest a desire to negotiate, nor did it suggest that he intended to be paid, and appellee’s response did not contain an offer to pay appellant. An implied contract is an agreement which legitimately can be inferred from the intention of the parties as evidenced by the circumstances—only implied when they are rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefitted. However, when the circumstances evidence that the one’s work effort has been voluntarily given to another, an intention to pay therefore cannot be inferred. Similarly, there is no factual premise to support a finding that appellant is entitled to recover in quasi-contract—quasi-contracts are obligations created by law for reasons of justice. To sustain a claim of unjust enrichment, it must be shown by the facts pleaded that a person wrongly secured or passively received a benefit that it would be unconscionable to retain. As a general rule, volunteers have no right to restitution and appellant was a volunteer. Facts establish that he was purely a volunteer and cannot be compensated for unjust enrichment. Court’s decision indicates that when we want people to help—i.e. doctors—we will imply contract in law—policy reason for allowing contract in law in certain situations.

**Liquidated Damages**

Penalties: unenforceable clauses in agreements

Liquidated damages: enforceable. Allows contracting party to recover compensation for loss actually suffered through default.

Restatement (Second) of Contracts. §355. Punitive Damages.

§356. Liquidated Damages and Penalties.

U.C.C. Section 2-718(1). Liquidation or Limitation of Damages; Deposits

§2-719. Contractual modification or Limitation of Remedy.

**Kemble v. Farren** (Court of Common Pleas) (1829) [161]

Facts: Plaintiff agreed to pay the defendant £3 every night in exchange for the defendant acting as a principal comedian at the plaintiff’s theater for four seasons. The agreement contained a clause, that if either of the parties should neglect or refuse to fulfill the agreement, or any party thereof, such party should pay to the other the sum of £1000. The sum was declared by both parties to be liquidated damages and not a penalty sum. Defendant refused to act during the second season (after working for a bit over a year) and plaintiff brought suit to recover damages.

Procedural History: Jury assessed the damages at £750. Plaintiff appeals for full £1000 instead of expectation.

Issue: Is the clause in the agreement a penalty?

Holding: Yes. If the clause had been limited to breaches which were of uncertain nature and amount, it would have been a liquidated damages clause——might save a lot of difficulty and even impossibility of ascertaining damages. Parties have made the clause relate to any damages of any kind--£1000 could be for any kind of breach. Too broad a liquidated damages clause—the same penalty is applied if the plaintiff had failed to pay Farren for one day’s performance which is absurd. Problem with this liquidated damages provision is that it is a fixed sum for all breaches, whatever the circumstances.

**Wassenaar v. Towne Hotel** (Supreme Court of Wisconsin) (1983) [163]

Facts: Employee-plaintiff, Wasenaar, was hired as general manager of the employer-defendant, Towne Hotel. The employment contract provides for a three-year term of employment and stipulates damages in case the employer terminates the employee’s employment before the expiration of the contract—agreed to fulfill entire financial obligation set forth for full 3 years. Employer terminated Wassenaar’s employment 21 months prior to the contract’s expiration date. Affirmative defense of employer was that Wassenaar failed to mitigate damages—employee argued that mitigation irrelevant because the contract contained a valid stipulated damages clause. Stipulated damages include a penalty or liquidated damages.

Issue: 1) Is the clause a valid and enforceable liquidated damages provision? 2) Does a liquidated damages clause in an employment contract serve to eliminate the employee’s duty to mitigate damages?

Holding: 1) Yes, it was a valid provision for liquidated damages based on reasonableness. Several factors help determine whether a particular clause is reasonable: 1) Did the parties intend to provide for damages or for a penalty?—generally disregarded. 2) Is the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract?—uncertainty—if expectation damages is easy to determine than just us this; 3) Are the stipulated damages a reasonable forecast of the harm caused by the breach –a significant deviation between the stipulated amount and the ascertainable amount will appear unreasonable? A significant deviation between the stipulated amount and the ascertainable amount will appear unreasonable—courts look at the stipulated damages clause from the perspective of both the time of contracting(ex-ante) and the time of the breach (ex-post). Here, it is reasonable to assume that the parties might have anticipated elements of consequential damages (i.e. lost career development opportunities and emotional stress) and drafted the stipulated damages clause to include salary lost while out of work, expenses of finding a new job, lower salary on the new job, and consequential damages. Thus, the stipulated damages clause is reasonable when consequential damages are taken into account. 2) Yes, where the stipulated damages clause is a valid provision for liquidated damages the doctrine of mitigation of damages is not applicable to determine the damages awarded the nonbreaching party. Employee had no duty to mitigate damages because the parties had stipulated their damages as part of their bargain—although evidence of the employee’s earnings after the employer’s breach may be relevant in meeting the employer’s burden of proving the stipulated damages clause is unreasonable.

Advantages to liquidated damages: 1) less uncertainty—know exactly what your exposure is; 2) avoid transaction costs of having to fight over damages in court; 3) promote economic efficiency—enables deals to be made. As a seller, a generous liquidated damages provision means you don’t have to worry about breach; 4) allows parties to correct inadequacies of nominal damage—expectation only covers foreseeable consequential damages. Further, there can be aspects of harm having to do with human distress that aren’t in expectation damages—expectation damages can therefore undercompensate when damages are too uncertain; 5) promotes judicial economy; and 6) promotes freedom of contract to the parties.

**Lake River Corp. v. Carborundum** (U.S. court of Appeals 7th Cir.) (1985) [171]

Facts: Suit between Lake River Corporation and Carborundum Company. Carborundum manufactured this element used to make steel and Lake River was going to take this material, bag it, and deliver it. In order to fulfill contract, Lake River had to buy a $90,000 bagging machine—so Carborundum promised to buy a certain amount to make the deal worth it. Carborundum breaches and so Lake River sues and seeks enforcement of the minimum guarantee clause within their contract.

Issue: Should the court refuse to enforce a penalty clause where the signator is a substantial corporation, well able to avoid improvident commitments?

Holding: Yes, paying them full amount under the contract for services they are not going to perform is a penalty because it does not take into account their costs. Penalty clauses may discourage efficient as well as inefficient breaches of contract. On this view, since compensatory damages should be sufficient to deter inefficient breaches (that is, breaches that cost the victim more than the gain to the contract breaker), penalty damages could have no effect other than to deter efficient breaches. Nonetheless, to be valid a liquidation of damages must be a reasonable estimate at the time of contracting of the likely damages of breach, and the need for estimation at the time must be shown by reference to the likely difficulty of measuring the actual damages from a breach of contract after the breach occurs. If the damages are easy to determine—a penalty.

**Specific Performance And Injunctive Relief**

Sales of Contracts: The Uniform Commercial Code

§2-716. Buyer’s Right to Specific Performance or Replevin.

Restatement (Second) of Contracts §360. Factors Affecting Adequacy of Damages.

Only get equitable relief of specific performance when legal remedy is inadequate. With respect to land contracts—land is always unique so get specific performance. Don’t always want to grant specific performance because courts want to encourage efficient breaches—certain breaches are desirable so that goods end up in the hands of the person who values them most.

1. **Contracts for Goods**

**Cumbest v. Harris** (Supreme Court of Mississippi) (1978) [183]

Facts: Cumbest and Harris contracted for the sale and purchase of certain hi-fi equipment via a bill of sale (Harris giving a loan). An option was also signed on the same date allowing Cumbest to repurchase the audio equipment by or before the following month. Transaction was intended to be a loan, in substance and the audio equipment was to serve as collateral. Complaint states that on the final day of payment, the plaintiff made every effort humanely possible to pay the required amount of money to the defendant—the defendant purposely avoided meeting with him at various places. Plaintiff deposited the required amount with the defendant’s landlord and subsequently initiated a lawsuit seeking equitable relief. The complaint alleges that the audio equipment is unique—valued over $10,000, many of the integral parts of the system could no longer be replaced, other parts were personally designed and built by Cumbest himself, it took Cumbest 15 years to piece the set together, and even items that are still available are of the type hat require special order purchases that take months or even years to complete.

Procedural History: Appeal from an order from the lower court dismissing appellant Cumbest’s bill of complaint.

Issue: Is the personal property which was the subject of the controversy, of such peculiar, sentimental or unique value as to come within the exception to the general rule that a chancery court will not ordinarily decree specific performance of a contract involving personal property?

Holding: Yes, the property has both unique value and falls into the category of property which is not readily obtainable due to scarcity. The general rule is that, ordinarily, specific performance will not be decreed if the subject matter of the contract sought to be enforced is personalty (a person’s movable property). Exceptions: 1) where there is no adequate remedy at law; 2) where the specific articles or property are of peculiar, sentimental or unique value; and 3) where due to scarcity the chattel is not readily obtainable. These exceptions are partly founded on the principle of the inadequacy of a remedy at law—damages may sometimes not be readily ascertainable.

**Scholl v. Hartzell** (Court of Common Please of Penn.) (1981) [186]

Facts: Plaintiff entered into an agreement of sale for a Chevrolet Corvette for $4,000 with the defendant—and gave the defendant $100 as a deposit. A receipt was given to the plaintiff noting said deposit and indicating that the balance of $3,900 would be due and payable upon pick up of the vehicle. Defendant, however, called the plaintiff and told him he would not be selling his car to him and returned the plaintiff’s deposit. Plaintiff filed an action in replevin (legal remedy for a person to recover goods unlawfully withheld) or a judgment in the amount of $4,655, which he alleges represents the difference between the sale price and the value of the property replevied.

Issue: Can the plaintiff get replevin to enforce the contract that hasn’t been performed yet and only has a security deposit?

Holding: No. Plaintiff has failed to establish his exclusive right to the automotive parts in question—it was an unexecuted contract and further performance was required by both parties—deposit does not give you exclusive right to possession. We do not believe that plaintiff, through said tendering of the deposit, acquired a right to immediate and exclusive possession of the goods in question. Plaintiff by his replevin action is attempting to force defendant to specifically perform the contract in issue—specific performance is an equitable remedy and only available when plaintiff has no adequate remedy at law. Plaintiff contends that §2-716 permits a buyer to avail himself of the legal remedy of replevin in cases in which cover (finding another car) is reasonably unavailable or the goods are unique. Court fails to find the car fits the unique goods contemplated by §2-716 and further believes that the plaintiff can easily recover by going out and buying another Corvette. Thus, no specific performance.

**Sedmak v. Charlie’s Chevrolet** (Missouri Court of Appeals) (1981) [188]

Facts: Plaintiffs, the Sedmaks, entered into a contract with defendant, Charlie’s Chevrolet, Inc., to purchase a Corvette or approximately $15,000. Charlie’s breached the contract—Sedmaks were told they would have to bid on the car. Sedmaks had originally given Charlie’s a check for $500 as a deposit, and given a receipt in return. According to the Sedmaks, Charlies’ told them they would definitely be the owners of the car—defendant even made changes to the car order as requested by the Sedmaks. After breach, Sedmaks filed for specific performance.

Issue: Are the Sedmaks entitled to specific performance?

Holding: Yes. When the relevant equitable principles have been met and the contract is fair and plain, specific performance goes as a matter of right. Trial court ordered specific performance because it concluded that the Sedmaks have no adequate remedy at law for the reason that they cannot go upon the open market and purchase an automobile of this kind with the same mileage, condition, ownership and appearance as the automobile involved in this case, except if at all, with considerable expense, trouble, loss, great delay and inconvenience. Under the Code, the court may decree specific performance as a buyer’s remedy for breach of contract to sell goods where the goods are unique or in other proper circumstances. Pace car is not unique in the traditional sense—it is not an heirloom and not one of a kind. However, there was limited production of the car and it was difficult to obtain—making it a “proper circumstance” worthy of ordering specific performance. Judgment affirmed. Decided under UCC §2-716.

Shwartz: For a lot of goods, no reason to think the transaction costs are going to be any higher than costs of collecting money damages. If you grant specific performance, however, they will haggle and negotiate—so should use it instaed.

**2. Contracts of Services**

**Lumley v. Wagner (Chancery Division) (1852) [197]**

Personal services contract enforced by enjoining performance elsewhere rather than by requiring specific performance.

Facts: Bill filed by Lumley, lessee of Her Majesty’s Theatre, against Johanna Wagner, Albert Wagner, her father, and Frederick Gye, the lessee of Covent Garden. Defendants came to and concluded an agreement to sing for the Plaintiff during three months at his theatre, and during that time not to sign for anybody else. Subsequently, J. and A. Wagner made anther engagement with the defendant Gye, by which it was agreed that the Defendant Wagner should, for a larger sum than that stipulated by the agreement with the Plaintiff, sing at the Royal Italian Opera and abandon the agreement with the Plaintiff. The bill by the plaintiff prayed that the Defendants be restrained from singing and performing or singing at the Royal Italian Opera, or at any theater.

Issue: Can the court compel Ms. Wagner not to sing at the Royal Italian Opera?

Holding: Yes. The contract dictates that defendant should sing at Her Majesty’s Theater for a certain number of nights, and that she should not sing elsewhere during that period. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement. Court grants negative injunction.

**Ford v. Jermon** (District Court of Philadelphia, 1865) [203]

Facts: Plaintiff hopes to obtain specific performance of the written agreement by which the respondent bound herself to act, during a stipulated period, for the complainant, and that the respondent should be enjoined from playing or appearing at any theatre not under the management of the complainant, until the season for which she had agreed to serve him should have expired.

Issue: Can the court compel the plaintiff either be direct or indirectly compelled to perform?

Holding: No. One reason the courts will not force an unwilling performer before the public is the harshness of compelling obedience by imprisonment—because the mode of compulsion is the indirect one of obliging the actor to remain idle until necessity forces him to comply. This court disapproves of Lumley—clearly the reason the company is doing this is to be coercive—if specific performance is not appropriate negative injunction isn’t either.

**Duff v. Russell** (Superior Court of New York City, 1891) [205]

Facts: This action is brought by the plaintiff, a theatrical and operatic manager, to restrain the defendant from appearing as a singer or actress upon the stage of the Casino, in the city of New York, during the period of her contract with the plaintiff.

Issue: Does the plaintiff have a right to injuctive relief?

Holding: Yes. Although there is no negative stipulation in the contract, it was not possible for her to perform elsewhere in New York without violation of her contract with the plaintiff, and a negative clause was unnecessary to secure to the plaintiff exclusively the services of the defendant.

**Dallas Cowboys v. Harris** (Court of Civil appeals, Texas 1961) [213]

Facts: The Dallas Cowboys seek injunction to restrain Harris from playing professional football, or engaging in any activities related to professional football for anyone except the Club. Appellant alleges that Harris was bound by the terms of the written contract to play football for the Club and no one lese, but that in violation of his contract he was playing football for the Dallas Texans.

Procedural History: Jury returned verdict in favor of Harris, and Club appealed.

Issue: Does the plaintiff have a right to injunctive relief?

Holding: Yes. It is well established that injunctive relief will be granted to restrain violation by an employee of negative covenants in a personal service contract if the employee is a person of exceptional and unique knowledge, skill and ability in performing the service called for in the contract. Definition of the word unique introduced in evidence it too narrow and limited—instead, wherever the same service could not easily be obtained from others, its performance will be negatively enforced by enjoining its breach. Not necessary that he is unique, just that it is really hard or impossible to obtain—Club should recover since Harris has talents that would be difficult to cover. Similar to Semtak. For any kind of equitable relief, one ought to ask if monetary damages are going to be adequate (i.e. would it be hard to cover), if they are, no specific performance.

**Consideration**

Fuller, The functions performed by legal formalities

The evidentiary function: evidence of the existence and purport of the contract.

The cautionary function: acts as a check against inconsiderate action.

The Channeling function: serves as a seal—furnishes a simple and external test of enforceability.

See Restatement (Second) of Contracts. §71. Requirement of Exchange; Types of Exchanges.

(d) Not infrequently the consideration bargained for is an act with the added requirement that a certain result shall be produced. Don’t ask if promise suffered detriment or if promisor got something, ask about a bargain for consideration—look at motive of promisor and ask why he was making this promise. If gift is only motive, then no consideration.

**Hamer v. Sidway (1891) [596]**

Facts: Uncle William promised to give young Willie, his nephew, the sum of $5,000 if the boy, then 15, would refrain from smoking, drinking and gambling until he turned 21. Willie did refrain and on reaching his majority wrote to his Uncle requesting the promised sum. In a letter of reply, Uncle William stated that he would carry out his promise by placing $5,000 in a bank account for Willie’s benefit and would keep the fund “on interest” until he thought his nephew capable of using it wisely. When the Uncle died, the defendant, the executor of Uncle’s estate, refused to pay Willie the $5,000 on the grounds that the Uncle had received no consideration for his original promise to Willie, and so no contract existed.

Issue: Whether by virtue of a contract defendant’s testator William E. Story became indebted to his nephew William E. Story, on his 21st birthday in the sum of five thousand dollars?

Holding: Yes, consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first—forbearance from what he otherwise might have done. It is held that the promise is binding and made upon good consideration. Surrendering one’s freedom of action is sufficient consideration for a promise. Benefit to promisor is Willie’s good behavior. Motive of promisor is to extract return performance. This is an example of a unilateral contract—not an exchange of one promise for another, it is an exchange of a performance for a promise—nephew is performing, by abstaining, in exchange for uncle’s money. In a unilateral contract, promisor can revoke at any time.

**Kirksey v. Kirksey** (Supreme Court of Alabama) (1845) [603]

Facts: The plaintiff was the wife of the defendant’s brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land and would have attempted to secure the land she lived on. The defendant wrote a letter to the plaintiff, Antillico, and advised her to obtain preference on the land she owned, sell it, and quit the country. Defendant promised to let her have a place to raise her family, as he had more open land than he could tend. Within a month or two after receiving the letter, the plaintiff abandoned her possession, and removed with her family to the residence of the defendant. After two years he asked her to leave.

Issue: Was there consideration?

Holding: No. A gratuitous promise is not enforceable even if a party has reasonably relied on that promise and has suffered loss and inconvenience. Lack of consideration and judgment reversed. If he wanted her to move there and do something for him—there is consideration. But since, according to the court, he was just doing it to be nice—it is considered a gift and is not enforceable.

**Johnson v. Otterbein University** (Supreme Court of Ohio) (1885) [594]

Facts: Otterbein University is an educational institution. In February, 1869, Johnson signed and delivered to an instrument in which he promised to pay to the trustees of Otterbein University one hundred dollars, with interest as a donation. In 1876, the trustees bough suit regarding the nonpayment of the note. The answer alleged that the note was without consideration.

Issue: Is the promise to pay $100 enforceable?

Holding: No. An executory contract to give is without consideration, and that a promise to pay money as a gift may be revoked at any time before payment. Is the promise of the University to apply the proceeds to the payment of its indebtedness an act of advantage to Johnson, or of detriment to the institution? No. In the absence of special circumstances we fail to see how a duty to apply the fund to a particular corporate purpose can better serve as a consideration than a duty to apply it to corporate purposes not specified. The acceptance of the writing containing the direction to apply the fund does not in the legal sense give rise to a case of mutual promises. Need to have either benefit to promisor or detriment to promisee. University attempted to argue that they were legally bound in what they could use the money for—but there are always a fiduciary duty for donations to be used wisely—just a conditional promise.

**Congregation Kadimah Toras-Moshe v. DeLeo** (Supreme Judicial Court, 1989)

Facts: An orthodox Jewish synagogue commenced action in the Superior Court to compel the administrator of an estate to fulfill the oral promise of the decedent to give the Congregation $25,000. Decedent made this promise during four of five visits by the Congregation’s spiritual leader to the decedant’s deathbed. Congregation had plans to use the $25,000 to build a library.

Issue: Is the decedent’s oral promise an enforceable contract?

Holding: No. There was no legal benefit to the promisor nor detriment to the promisee, and thus no consideration. Furthermore, hope or expectation, even though well founded, is not equivalent to either legal detriment or reliance—budgeted for library but did nothing else substantial. Finally, there is no injustice in declining to enforce the decedent’s promise, and so section 90(2) does not apply. Court seems to emphasize the importance of a written contract in donative promises—causes you to pause before making a promise and is evidentiary (reduces uncertainty about what happened). Reasons to enforce an oral contract for a charitable gift: promissory estoppel (reliance) and public policy enforcement without consideration (we like this kind of charitable giving, so going to enforce—waiving normal rules because public policy reasons so much support enforcing the contract).

**Exception to General Rule Requiring Consideration**

Promissory estoppel: Gratuitous promise which the promisor knows is gratuitous and which the promisee knows is gratuitous—but which induces the promisee to take some action of a definite and substantial nature. No misrepresentation. See Section 90.

Equitable estoppel: you provide false information that you know to be false, and the other party relies on it, you aren’t allowed to disaffirm in court.

**1. Promises From Benefit Received**

Restatement (Second) of Contracts. §81. Consideration as Motive or Inducing Cause.

Bargained for: the promisor must manifest an intention to induce the performance or return promise and to be induced by it—promisor’s desire.

Doctrine of past consideration—before the fortune telling he declares “if what you predict comes true I’ll give you money and in exchange I want you to read my palm.” See Moore v. Elmer.

Moral Consideration

**Mills v. Wyman** (Supreme Judicial Court of Massachusetts) (1825) [614]

Facts: Plaintiff, as an act of kindness, gave shelter, food and some sort of medical attention to the defendant’s son, who, having returned from a “voyage at sea,” was found by the plaintiff wandering the lonely streets of Hartford ill and destitute. The son, age 25, died after a couple of weeks and the plaintiff then wrote to the defendant telling him what happened and requesting reimbursement. Although he had no legal obligation to pay his son’s bills, the son being an adult, the defendant promised to reimburse the plaintiff but later refused.

Issue: Was the defendant’s promise to pay a binding contract?

Holding: No, there was no legal consideration for the promise. The defendant hadn’t asked the plaintiff to care for his son—acted the part of a good Samaritan and simply volunteered. Accordingly, there is no present consideration. Past consideration can sometimes be sufficient, for example, when a debtor promises to pay a debt previously contracted—but here there was no pre-existing obligation because the son was of full age and lived independently of his father’s family. The defendant’s promise must be regarded as gratuitous, a promise to make a gift. There is an overriding need to protect the security of those honest and fair-minded men, who may have inconsiderately made promises without consideration.

**Webb v. McGowin** (Court of appeals of Alabama) (1935) [623]

Facts: Webb, a workman employed by a lumber mill, had been on the point of dropping a huge pine block from the upper floor of the mill to the ground below when he perceived that the falling block would be likely to crush McGowin, who had suddenly appeared from nowhere and now stood directly beneath him. To prevent this, Webb elected to go over the side along with the block, in that way diverting the block from hitting McGowin but sustaining crippling injuries for himself. Afterwards, in consideration of the plaintiff’s act of self-sacrifice, McGowin promised to pay Webb $15 every two weeks for the rest of his life. McGowin made those payments on a regular basis until he died, after which his executors refused to continue the payments, claiming that McGowin’s promise to Webb had been without consideration.

Issue: Is there a legal basis for enforcing the promise made by McGowin to Webb?

Holding: Yes. McGowin had no strictly legal obligation to Webb at the time he made his promise—having behaved as a volunteer, Webb evidently had no claim against McGowin for restitution. But, material benefit plus moral obligation added up to a valid consideration, and hence McGowin’s promise was enforceable even though made after the event. Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor’s subsequent agreement to pay for the service, because of the material benefit received. In cases where a material benefit is received, the subsequent promise to pay is an affirmance of the services rendered carried consideration.

**Webb v. McGowin** (Supreme Court of Alabama) (1936) [626]

Holding: Moral obligation a valid argument when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promisee by reason of the service rendered.

Restatement (Second) of Contracts. §86. Promise for benefit received.

Contract Modification and Preexisting Duty Rule

**Alaska Packers’ Assn. v. Domenico** (Ninth Circuit) (1902) [632]

Facts: Defendant, owner of a salmon cannery, had a contract with the plaintiffs, a group of sailors, to operate its fishing boats in certain remote northern waters. The sailors signed “articles” under which each was to be paid $50 for the season (the season, apparently, being short) plus 2 cents a fish. Appellants had about $150,000 invested in the salmon cannery. Once the sailors arrived in the remote location, when it was plainly too late for the defendant to hire replacement personnel, the sailors refused to work unless the defendant agreed to sign new articles doubling their pay to $100. The defendant eventually agreed, but when they got back to San Francisco, refused to pay more than $50.

Issue: Was the subsequently rendered contract valid and enforceable?

Holding: No. The plaintiffs’ conduct was willful, arbitrary and without valid cause. The defendants promise to come through with an extra $50 was given without consideration—consent to such a demand under such circumstances is given without consideration. It cannot justly be held that there was a voluntary wavier on the part of the appellant of the breach of the original contract. Doctrine of duress. Alaska rule—requiring consideration i.e. can’t bargain for more when doing the same original service—seems to broad—sweeps in cases where it is perfectly reasonable for a person to ask for modification.

**Brian Construction v. Brighenti** (Supreme Ct. Conn.) (1978) [640]

Facts: Contractor, plaintiff, hired subcontractor, defendant, to perform construction and “everything requisite and necessary to finish the entire work.” Once the defendant started working, he discovered considerable debris below the surface—neither party had been aware of the additional rubble, and thus its removal was not specifically called for by the plans and specifications included in the contract. The defendant ceased working and eventually entered into an oral agreement with the defendant for work not included in the subcontract. Later, the defendant left the job and the plaintiff completed his contract, suffering considerable damages.

Issue: Did the oral agreement constitute a valid contract?

Holding: Yes. When a party agrees to perform an obligation for another to whom that obligation is already owed, although for a lesser remuneration, the second agreement does not constitute a valid contract—imposes an additional burden not previously assumed. An unforeseen burdensome condition was discovered during the performance of the original contract. The promise of additional compensation in return for the promise that the additional work required would be under taken was held to constitute a separate, valid agreement. It was binding as a new contract—court thus gets around need to have modification in writing in this manner. Different from Alaska—there is a significant and material change in the circumstances.

Contracts without consideration:

Restatement (Second) of Contracts. § 89. Modification of Executory Contract.

§90. Promise Reasonably Inducing Action or Forbearance.

§87. Option Contract.

§86. Promise for Benefit Received.

See Also:

§79. Adequacy of Consideration; Mutuality of Obligation.

§71. Requirement of Exchange; Types of Exchange.

Sales Contracts: The UCC. §2-209. Modification, Rescission, and Waiver—states that if parties want to modify a bargain midway through the deal—no need for consideration.

2. Promissory Estoppel

**Feinberg v. Pfeiffer Co.** (St. Louis Court of Appeals) (1959) [703]

Facts: Mrs. Feinberg served as Pfeiffer’s chief bookkeeper and assistant treasurer for 37 years. The Board of Directors, in recognition of her faithful service, devotion, and skill, voted to increase her salary to $400 a month. In addition, on her retirement—whenever she might choose to retire—the company would pay her $200 a month for the rest of her life. This retirement plan was adopted to afford Mrs. Feinberg security for the future and in the hope that her active services will continue with the company for many years to come. Mrs. Feinbrg continued to work for Pfeiffer for another year and half, and then formally retired. Mr. Lippman, the head of the company, died a few years later, and was succeeded by his son-in-law, Mr. Harris. Advised by his lawyer and accountant that Mrs. Feinberg’s pension was a gift, and not a contractual obligation supported by consideration, Harris cut the payments down to $100 a month.

Issue: Has the plaintiff a right to recover from defendant based upon a legally binding contractual obligation to pay her $200 per month for life?

Holding: Yes. There had been no consideration for the company’s promise to pay Mrs. Feinberg $200 a month for life. Mrs. Feinberg made no promise to continue her employment and indeed, the Board resolution made it clear that the pension would be paid even if she retired at once. However, choosing to retire early in reliance on Pfeiffer’s promise to pay her is sufficient to establish a legal right to the pension under the doctrine of promissory estoppel and Section 90. It is common knowledge that it is virtually impossible for a woman of her age to find satisfactory employment—Mrs. Feinberg would have continued working until she had dropped had it not been for the company’s promise—foreseeable that she would rely and be hurt.

Promissory Estoppel as an Alternative to Breach of Contract

**Hoffman v. Red Owl Stores, Inc.** (Supreme court of Wisconsin) (1965) [724]

Facts: Plaintiff contracted a representative of the Red Owl chain with a view to getting a Red Owl supermarket franchise. In the course of discussions plaintiff stated that all the capital he had available for investment was $18,000, to which the Red Owl people replied that that sum would be quite sufficient to set up in business as a Red Owl store. Subsequently, at the urging of Red Owl, plaintiff a) sold his bakery building at a loss of $2,000, b) bought a small grocery store in order to gain experience as a grocer, c) shortly afterwards sold the grocery store for an amount roughly equal to his cost, d) put $1,000 down on land in the neighboring town where the new Red Owl would be constructed, and e) incurred $265 in personal moving and rental expenses. All this preparatory activity took place over a period of about three years, during which Red Owl steadily maintained its promise that a franchise would be offered once all conditions had been met. In 1962 Red Owl indicated that the plaintiff’s investment requirement had been raised to $34,000 and that a proposed equity investment by plaintiff’s father-in-law would have to be made in the form of a gift, a condition Hoffman couldn’t meet or wouldn’t. At that point, Hoffman abandoned his efforts to meet Red Owl’s demands and sued Red Owl for breach.

Issue: Should the court recognize this as a cause of action grounded in promissory estoppel?

Holding: Yes. The promissory representations made by Red Owl in the course of their negotiations induced the plaintiff to take the steps described above, and the consequence, when such representations failed, was to leave the plaintiff with fairly heavy reliance losses. The lower Court did not and presumably could not find a conventional breach of contract on Red Owl’s part. Instead, it identified an actionable course of conduct for which Restatement Section 90 and the doctrine of promissory estoppel were held to provide independent grounds of relief. Section 90 operates to impose fair-dealing requirements on parties engaged in pre-contractual negotiations, with no enforceable promise having been made by either. Court looking for a way to give a remedy but cannot use traditional means—fraud or breach of contract because don’t have elements of either, so stretch promissory estoppel in order to provide remedy. Using promissory estoppel difficult because there was no definite promise—but court determines that what was said was close enough to a promise to induce him to act—and up to courts discretion to provide remedy to avoid injustice.

Was there a promise?

**Blatt v. University of Southern California** (Court of Appeal) (1970 [753]

Facts: Plaintiff, a graduate of USC school of law, brings suit against the Order of the Coif, the local chapter that has the authority and responsibility to elect members from graduating students. Election to the Order of the Coif elevates the esteem, standing and position of the law student elected in the eyes of the public at large. After plaintiff became a student, the individual defendants represented to him that if he were in the top 10 percent of his graduating class, he would be eligible for election to the membership of the Order—ended up ranking fourth scholastically. Later, committee elected 7 or 8 members to the Order who ranked below him in scholastic achievement—learned that membership was restricted to students who had worked on the Law Review under a policy adopted after said representations were made to plaintiff. After the adoption of the policy, the plaintiff was advised that the policy did not apply to him—relied on this advice and information and thus did not apply for or accept Law Review assignments.

Issue: Is there an issue of promissory estoppel?

Holding: No. There was no consideration, so must fall under promissory estoppel if relief is to be found. Not applicable here because in other cases in which it has been applied, the promisee suffered actual detriment in foregoing an act, in refusing other employment or in expanding definite and substantial effort or money in reliance on a promise. There was no promise, since assurance was only that he would be considered, and no real reliance to the detriment of the promisee, so no promissory estoppel.

**Spooner v. Reserve Life Insurance** (Supreme Court of Wash.) (1955) [756]

Facts: Action to recover bonuses allegedly due insurance agents. In the bulletin, the Vice President stated: “This renewal bonus is a voluntary contribution on the part of the Company. It is agreed by you and by us that it may be withheld increased, decreased or discontinued, individually or collectively, with or without notice.” Respondents met the conditions of the bulletin by remaining with appellant and selling insurance, maintaining high ratio of sales.

Issue: Was the bulletin a promise to pay a bonus under certain conditions?

Holding: No. A supposed promise may be illusory because it is so indefinite that it cannot be enforced or by reason of provisions contained in the promise which in effect make its performance optional or entirely discretionary on the part of the promisor. It cannot be said that there has been a breach of a binding contract to pay a bonus, because the promise was illusory. Can’t support a bargained for exchange because haven’t really promised anything.

**Ypsilanti v. General Motors** (Court of Appeals of Michigan) (1993) [768]

Holding: Reverse circuit court decision because:

1. the mere fact that a corporation solicits a tax abatement and persuades a municipality with assurances of jobs cannot be evidence of a promise—mere hyperbole.
2. Representations of job creation and retention are a statutory prerequisite.
3. The fact that a manufacturer uses hyperbole and puffery in seeking an advantage or concession does not necessarily create a promise. Not really binding themselves—context where everyone knows what is really happening.
4. Reliance awards not reasonable—the resolution contained no suggestion that approval was conditioned on a commitment to operate the plant for any particular period.

Was there reasonable reliance?

**Alden v. Vernon Presley** (Supreme Court of tennessee) (1982) [773]

Facts: Action against the estate of Elvis Presley to enforce a gratuitous promise to pay off the mortgage on plaintiff’s home made by decedent. As a result of these promises, plaintiff filed for divorce. The mortgage indebtedness at the time of the execution of the settlement agreement was $39,587 and it is this amount which is the subject of the present suit. Presley died and estate would not assume liability for the mortgage.

Issue: Are the elements of promissory estoppel satisfied by this case?

Holding: No. The limits of promissory estoppel are: 1) the detriment suffered in reliance must be substantial in an economic sense; 2) the substantial loss to the promisee in acting in reliance must have been foreseeable by the promisor; 3) the promisee must have acted reasonably in justifiable reliance on the promise as made. Estate denied liability subsequent to the execution of the property settlement agreement—the property settlement agreement was not binding upon the plaintiff or her husband until approved by the court and the estate’s denial of liability for decedent’s gratuitous promise BEFORE submission of the agreement to the court removed the element of detrimental reliance from the factual scenario of this case. Unreasonable for her to rely on offer that has been retracted.

Injustice of non-enforcement

**Cohen v. Cowles Media Co.** (Supreme Court of Minnesota) (1990) [777]

Facts: In the closing days of the state gubernatorial campaign, Dan Cohen separately approached two reporters, one from the Star Tribune and one from the Pioneer Press. Cohen told them that if they could promise confidentiality, that he would be treated as an anonymous source, then he would furnish them with documents regarding one of the candidates. They agreed, but neither informed him that their promises were subject to approval and revocation by their editors. Decision to identify Cohen in the stories was the subject of vigorous debate. The same day as the two newspapers articles were published, Cohen was fired by his employer.

Issue: Does a newspaper’s breach of its reporter’s promise of anonymity to a news force constitute a legally enforceable contract?

Holding: No, the promise is not enforceable either as a breach of contract claim or under promissory estoppel. Breach of contract does not lie, because there was no bargain here—no contract created. So if there is to be a legally binding promise, must have been made through promissory estoppel. According to the doctrine—a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding of injustice can be avoided only by enforcing the promise. In this case, the reporters’ unambiguous promise to treat Cohen as an anonymous source—and the reporters expected this promise to induce him to give them the documents—which he did to his detriment (he was fired). However, of critical significance in this case is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society—seems best to leave the parties here to trust in each other. Enforcement of the promise of confidentiality under promissory estoppel theory would violate defendant’s First Amendment rights.

**Cohen v. Cowels Media Co.** (Supreme Court) (1991) [781]

Holding: Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. The Minnesota Supreme Court’s incorrect conclusion that the First Amendment barred Cohen’s claim may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established under Minnesota law—reversed and remanded for further proceedings.

3. Offers and Promissory Estoppel

See Restatement (Second) §87. Option Contract.

UCC §2-205. Firm Offers—an offer where you are promising to keep it open for a certain period of time—applies to goods.

**James Baird Co. v. Gimbel Bros., Inc.** (Second Circuit) (1933) [709]

Facts: Defendant, a New York merchant, requested the amount of linoleum necessary to complete a construction job, and was accidentally given about ½ the proper yardage. Relying on this estimated amount, the defendant offered to supply all the linoleum for a certain lump sum. Plaintiff, a contractor, got the offer on the same day the defendant learned of the mistake—at which point it telegraphed all of the contractors withdrawing its offer. Plaintiff formally accepted the offer a few days later. Defendant refuses to recognize the existence of a contract.

Issue: Was a contract made between the merchant and the contractor?

Holding: No. The subcontractor’s offer could be revoked even after the general contractor had submitted its own bid (the winning bid) using the subcontractor’s price quotation. The subcontractor’s offer looked for an acceptance from the offeree in the form of a return promise, not merely reliance through the submission of a bid. General rule for offers is that there is no contract and no consideration until it is accepted. The doctrine of promissory estoppel was aimed at cases involving reliance on donative promises, but it had no application to offers that sought consideration via exchange. Not an option contract—worried about expanding promissory estoppel to offers—worried about scope.

**Drennan v. Star Paving Co.** (Supreme Court of California) (1958) [712]

Facts: Lancaster School District invited contractors to submit bids on the construction job. Drennan, a general contractor prepared bid for last-minute submission. Among his callers is Star Paving Co., which offers to do the paving work for $7,131. Star’s figure turns out to be the lowest bid for paving received, and Drennan therefore includes it in his own bid to the School District. Drennan proves to be low-bidder and is awarded the contract. Drennan drops in the next morning to say hello to the folks at Star only to be greeted with the news that their paving bid was a great mistake—too low by half—and that they have now decided to withdraw it. Drennan contracted with another company to do the work for $10,900 and then sued Star for difference.

Issue: Did the plaintiff’s reliance make defendant’s offer irrevocable?

Holding: Yes. The Star’s offer to do the paving work for $7,131 included a subsidiary promise not to revoke until the plaintiff should have at least an opportunity to accept that offer after the general contract had been awarded to him. Consideration in a conventional sense was lacking—Drennan paid nothing to Star in exchange its ordinary right of revocation. Where, however, the offeror’s aim is to induce the offeree to rely on the offer and to make commitments of its own on such reliance, Restatement Section 90 waives the requirement of consideration and turns the offer into a binding promise. Court finds an implied contract to keep the offer open—California default rule.

**Was There Agreement?**

1. Mutual Assent

Contract doctrine suggests that there must be mutuality—if one is bound, both are bound—at least true with bilateral contracts. Option = situation where one is bound but other isn’t.

The Objective Theory of Assent

**Embry v. Hargadine, McKittrick** (St. Louis Court of Appeals) (1907) [264]

Facts: Appellant was an employee of the respondent company under a written contract to expire December 15, 1903 at a salary of $2,000 per annum. His business was to select samples for the traveling salesmen. Appellant contends that on December 23, 1903 he was re-engaged by the respondent, through the president, for another year at the same compensation. Respondent contends that in a phone call, he told the president that as there were only a few days left for him to seek employment with other firms, if respondent wished to retain his services longer he must have a contract for another year or he would quit respondent’s service then and there. The president told him, “Go ahead you’re all right; get your men out and don’t let that worry you.”

Issue: Did what was said constitute a contract of reemployment on the previous terms, irrespective of the intention or purpose of McKittrick?

Holding: Yes. To constitute a contract there must be a meeting of the minds of the parties and both must agree to the same thing. Inner intention cannot either make a contract of what transpired or prevent one from arising. The formation of a contract is thus not determined by the secret intention of the parties, but by their expressed intention. Reasonable man standard: if his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject. While the president may not have intended to reemploy Embry, this does not matter. It only matters whether or not the language used was of such that Embry, as a reasonable man, might consider he was reemployed for the ensuing year. What matters is objective assent. Measure McKittrick’s manifestation of assent by what objective person would understand and Embry by what he subjectively understood. The existence of a binding contract is not dependent upon the subjective intent of the parties. See also Lucy v. Zehmer—creation of legal obligation requires mutual assents—which depens on the objective manifestations of conduct.

Restatement (Second) of Contracts. §17. Requirement of a Bargain.

§18. Manifestation of Mutual Assent.

§19. Conduct as Manifestation of Assent.

§24. Offer defined.

Notes: Advertisements are not generally viewed as offers—are not binding in themselves to sell it to you at all or under the terms advertised. Ambiguity in information sent out to a buyer—not specific enough for someone to accept.

**What is an Offer?**

See Restatement (Second) of Contracts. §26. Preliminary Negotiations.

UCC §2-204. Formation in General.

UCC §2-206. Offer and acceptance in formation of contract.

UCC §2-305. Open price term.

UCC §2-308. Absence of specified place for delivery.

UCC §2-309. Absence of specific time provisions; notice of termination.

UCC explicitly says that if you leave out a lot of terms, doesn’t mean no deal—just means that they have a default provision they are going to impose.

Solicitation

**Nebraska Seed Co. v. Harsh** (Supreme Court of Nebraska) (1915) [279]

Facts: Plaintiff, a corporation, engaged in buying and selling seed in Nebraska brought this action against the defendant, a farmer. Petitioner purchased 1800 bushels of millet seed at the agreed price of $2.25 per hundred of weight from defendant. Plaintiff claims that this is proven by a letter sent by the plaintiff, offering thereabouts of 1800 of millet seed for $2.25. Plaintiff accepted this offer via telegraph and mail after receiving the offer, but defendant refused to deliver.

Issue: Did letter of defendant constitute an offer to sell to the plaintiff?

Holding: No. The language in the letter is general and is not an offer by which he may be bound, if accepted, by the persons addressed. If a proposal is nothing more than an invitation to the person to whom it is made to make a counter-offer, it is not such an offer as can be turned into an agreement by acceptance. The letter was not intended as a final proposition, but as a request for bids—it did not fix a time for delivery, did not fix a definite amount—the fact that one or more terms are left open indicates that it is an offer not an option. Seems as though seller sent out this letter to lots of people—key indication that it was a solicitation not an option.

Advertisement

**Leonard v. Pepsico** (United States District Court, New York) (1999) [282]

Issue: Did Pepsi’s commercial constitute an offer?

Holding: No, for two reasons. 1) Defendant’s advertisement was not an offer. The general rule is that an advertisement does not constitute an offer. Such advertisements are understood to be mere requests to consider and examine and negotiate. Exception to this rule is when the advertisement is a clear, definite, and explicit, and leaves nothing open for negotiation. The fact that a proposal is very detailed normally suggests that it is an offer, while omission of many terms suggests that it is not. 2) An Objective Reasonable Person would not have considered the commercial an offer.Commercial is clearly a joke and a reasonable viewer would understand the advertisement as mere puffery.

1. **Written Memorial Contemplated**

Preliminary negotiations

**Empro Manufacturing Co. Ball-Co Man., Inc.** (Seventh cir. 1989) [293]

Facts: Common pattern in commercial life—two firms reach concord on the general terms of their transaction. They sign a document, captioned “agreement in principle” or “letter of intent,” memorializing these terms but anticipating further negotiations and decisions. The party that perceives itself the loser then claims that the preliminary document has legal force, independent of the definitive contract. In this case, Empro sent Ball-Co a “letter of intent” to purchase the assets of Ball-Co. The letter stated the general terms and conditions. Also stated that Embro’s purchase shall be “subject to the satisfaction of certain conditions precedent to closing…and approval by the shareholders and board of directors of Empro.” Letter of intent signed by both parties. Later, Empro learned that Ball-Co was negotiating with someone else, and it filed suit contending that the letter of intent obliges Ball-Co to sell only to it.

Issue: Does the letter of intent have a binding affect on the parties?

Holding: No. Intent of the parties must be determined solely from the language used when no ambiguity in its terms exists. Because letters of intent are written without the care that will be lavished on the definite agreement, it may be a bit much to put dispositive weight on “subject to” in every case. However, neither the text nor the structure of the letter suggests that it was to be a one-sided commitment, an option in Embro’s favor binding only Ball-Co. Objective manifestations—the requirement of board approval and the escape hatches indicate that it is not an option contract and so cannot bind only one party.

Restatement (Second) of Contracts. §27. Existence of Contract Where Written Memorial is Contemplated.

**Texaco v. Pennzoil** (Court of Appeals of Texas 1987) [297]

Facts: Texaco contends that under controlling principles of New York law, there is insufficient evidence to show that the Getty entities intended to bind themselves to an agreement with Pennzoil. Pennzoil contends that the evidence showed that the parties intended to be bound to the terms in the Memorandum of Agreement.

Issue: Did the parties intend to be bound by the Memorandum of Agreement?

Holding: Yes. If parties do intend to contract orally, the mere intention to commit the agreement to writing does not prevent contract formation before execution of that writing. However, if either party communicates the intent not to be bound before the final formal document is executed, then no oral expression of agreement to specific terms will constitute a binding contract. Whether the parties intended to be bound only by a formal, signed writing: 1) whether a party expressly reserved the right to be bound only when a written agreement is signed; 2) whether there was any partial performance by one party that the party disclaiming the contract accepted; 3) whether all essential terms of the alleged contract had been agreed upon; and 4) whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected (don’t have to find all of these factors necessarily). The record as a whole demonstrates that there parties intended to bind themselves to an agreement.

1. **Revoking an offer**

**Dickinson v. Dodds (In the Court of Appeal 1876) [302]**

Facts: Defendant Dodds signed and delivered to the Plaintiff, Dickinson a memo agreeing to sell Mr. Dickinson his house for £800. The bill alleged that Dodd understood and intended that the Plaintiff should have until Friday 9 am within which to determine whether he would purchase. On Thursday afternoon, the Plaintiff was informed that Dodds had agreed to sell his property to another man. Afterwards, plaintiff went to Dodds house and left a formal acceptance of the offer in writing. Dodds declined to receive it, saying “you are too late.” Dickinson sued.

Issue: Did the offer constitute a binding contract?

Holding: No, letter was nothing but an offer. It is settled law that this promise was not binding, and that at any moment before a complete acceptance by Dickinson of the offer Dodds was as free as Dickinson himself. Before there was any attempt to acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties, which is essential. Restatement §42. Because Dickinson knew Dodds had sold to someone else—no meeting of the minds—Restatement §36(c). See also Restatement §43—indirect communication of revocation—if you take action that indicates revocation of contract and other party knows about it—treated as revocation. Dodds thought that Dickson had given him an option, but not an option because no purported consideration (see Restatement §87)—need some benefit ((exclusivity, small fee, additional interest, etc.) in exchange for keeping the offer on the table. Under the UCC, however, it is possible to make an option w/o consideration—UCC does not care about cautionary function of consideration between merchants because they are business players.

Restatement (Second) Contracts. §17. Requirement of a Bargain.

§18. Manifestation of Mutual Assent

§22. Mode of assent: Offer and Acceptance

§24. Offer Defined

§25. Option contracts.

§36. Methods of Termination of the Power of Acceptance.

§37. Termination of Power of Acceptance under Option Contract.

1. **Acceptance**

Acceptance: The Mirror Image Rule

The mirror image rule: when a purported acceptance is really a counteroffer, it is a rejection of the original offer. Any qualification of or departure from those terms invalidates the offer.

**Ardente v. Horan** (Supreme Court ofRhode Island 1976) [310]

Facts: Certain residential property was offered for sale by defendants. The plaintiff made a bid of $250,000 for the property—defendants’ attorney advised plaintiff that the bid was acceptable to defendants. Defendants’ lawyer prepared a purchase and sale agreement and forwarded it to the plaintiff for signature. Plaintiff execute the agreement and attached a letter requesting that the following items remain with the real estate: a) dining room set and tapestry covering in dining room, b) fireplace fixtures throughout; c) the sun parlor furniture. The letter also stated “I would appreciate your confirming that these items are part of the transaction, as they would be difficult to replace.” The defendants refused to agree to see the enumerated items and did not sign.

Issue: Was there an acceptance of the offer, creating a binding contract?

Holding: No. The terms of the accompanying letter apparently condition the acceptance upon the inclusion of various items. An acceptance must be definite, unequivocal, and may not impose additional conditions on the offer nor may it add limitations. However, an acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition—qualified acceptance. The condition on the plaintiff’s acceptance of defendant’s offer operated as a rejection and this counter-offer voids original offer—was a conditional agreement.

Restatement (Second) of Contracts. §61. Acceptance Which Requests Change of Terms.

UCC §2-207. Additional terms in Acceptance or Confirmation.—if you use language of acceptance, even if you state additional terms, treated as an acceptance.

Acceptance by Correspondence—the Mailbox Rule

Mailbox rule: an acceptance is effective upon dispatch. Reason for throwing the hardship of a delayed or lost letter upon the offeror is due to the fact that the offeree is already relying on the deal being on; the offeror is only holding things open. The offeror is, however, free to insist upon acceptance being effective only upon receipt. When an offer is in the form of an option, acceptance is only operative upon receipt of the offer.

Restatement (Second) of Contracts. §63. Time When Acceptance Takes Effect

§64. Acceptance by Telephone or Teletype.

§65. Reasonableness of Medium of Acceptance.

Acceptance by Performance or “Unilateral Contracts”

Restatement (Second) of Contracts §30 permits offerors to specify that acceptance may take the form of performing or refraining from performing a specified act. See also §32. Invitation of promise or performance. Unilateral offer until the other party completes performance.

**Carlill v. Carbolic Smoke Ball Co.** (In the Court of Appeal 1893) [317]

Facts: The defendants were the proprietors and vendors of a medical preparation called “The Carbolic Smoke Ball.” In newspapers they placed an advertisement that stated: “£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts with increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks. £1000 is deposited with the Alliance Bank, shewing our sincerity in the matter.” Plaintiff, was attacked by influenza after using the ball as instructed and sued.

Issue: Was the advertisement meant to be a binding promise?

Holding: Yes. The deposit is called in aid by the advertiser as proof of his sincerity to pay the reward. Rewards are offers to anybody who performs the conditions named in the advertisement and anybody who does perform the condition accepts the offer. Notification of the acceptance need not precede the performance. This offer is continuing offer, and is never revoked.

Restatement (Second) of Contracts. §54. Acceptance by Performance; Necessity of Notification to Offeror.

**White v. Corlies & Tifft** (Court of Appeals of New York 1871) [332]

Facts: The plaintiff was a builder. The defendants furnished the plaintiff with specifications for fitting up a suit of offices and requested him to make an estimate of the cost of doing the work. Plaintiff left his estimate with the defendants and on the same day, the defendants made a change to their specifications and sent a copy to the plaintiff for his assent, which he assented to by signing. On the day following, the defendants wrote to the plaintiff agreeing to the fitting and asking him to begin at once. No reply to the note was ever made by the plaintiff, and on the next day it was countermanded by a second note from the defendants. Immediately on receipt of the note, the plaintiff commenced a performance by the purchase of lumber.

Issue: Did the note, without the builder’s assent, constitute a binding contract?

Holding: No. The note to “begin at once” did not make the agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound. Where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. He is not bound if that manifestation is not put in a proper way to be in the usual course of events. The plaintiff did no act that indicated an acceptance of the offer to the defendants. This is a bilateral contract—no notice of acceptance because he could have been buying lumber for any number of projects. For bilateral contracts notice is necessary for acceptance and performance itself has to be reasonable in the circumstances (put in the proper way to be in the usual course of events, in reasonable time communicated to offeror). For bilateral contracts, if offeror doesn’t have an opportunity to know about acceptance—there is no contract. For unilateral contracts, notification must be made within a reasonable time—but it doesn’t have to be a precedent to acceptance.

**Petterson v. Pattberg** (Court of Appeals of New York 1928) [336]

Facts: Plaintiff owed the defendant the sum of $5,450, the debt being secured by a mortgage on certain real estate belonging to the plaintiff. The defendant-mortgagee, offered to reduce the principal of the debt by $780 if the plaintiff prepaid the entire amount due by May 31. Late in May the plaintiff appeared at the defendant’s door, knocked loudly, and in response Pattberg said “Too late. I have sold your mortgage to another investor.” Pattberg refused to accept the cash. Claiming breach, Petterson sued Pattberg for the $780 discount.

Issue: Did Pattberg withdraw his offer before Petterson accepted?

Holding: Yes, Pattberg withdrew his offer when he informed Petterson that he had sold the mortgage to someone else. Since that communication took place before Petterson could actually make “tender” of his money, the offer must be regarded as revoked. Such withdrawal or revocation sufficed to terminate the offer, “If the offeror can say ‘I revoke’ before the offeree accepts, however brief the interval of time…there is no escape from the conclusion that the offer is terminated.” The seller’s assent, not the buyer’s tender, would be the final and indispensable step in a concluded bargain. Deal becomes a unilateral contract, which is revocable at any time—if the performance requires the cooperation of both parties, such as the payment of money, a person who reserves the right to refuse to receive the performance has not made an option. See Restatement (Second) of Contracts. §45.

Sales Contracts: The UCC. §2-205. Firm Offers.

Restatement (Second) of Contracts. §45. Option contract created by part performance or tender.

§62. Effect of performance by offeree where offer invites either performance or promise.

Acceptance by Silence

**Hobbs v. Massasoit Whip Co.** (Supreme Judicial Court of Mass. 1893) [342]

Facts: Action by Hobbs against Massasoit Whip Company to recover skins shipped to the defendant and retained by him several months without notifying plaintiff whether he had accepted them. The plaintiff was not a stranger to the defendant—he had sent the eelskins in the same way four or five times before, and they had been accepted and paid for.

Issue: Does the defendant’s silence constitute acceptance of the plaintiff’s offer?

Holding: Yes. There was a standing offer for the skins, and even if the offer was not such that the contract was made as soon as the skins were sent—the general principle is that conduct which imports acceptance or assent is acceptance or assent in the view of the law. Under normal circumstances, no acceptance by silence—Hobbs is an extreme example.

Restatement (Second) of Contracts. §69. Acceptance by silence or exercise of dominion.

Rule: Under Restatement §36(2) an offeree may terminate an offer by revocation UNLESS 1) the offerree begins the invited performance (Restatement §45) or 2) the offeree has reasonably relied on the offer (Restatement §87(2)).

**5. E-Commerce**

**Specht v. Netscape Communications** (US SDNY 2001) [344]

Facts: Visitors wishing to obtain SmartDownload from Netscape’s web site arrive at a page pertaining to the download of the software. On this page, they click on a download button, initiating download. The sole reference on this page to the License Agreement appears in text that is visible only if a visitor scrolls down through the page to the next screen. Visitors are notrequired affirmatively to indicate their assent to the License Agreement, or even to view the license agreement, before proceeding with a download of the software.

Issue: Does an offer of a license agreement, made independently of freely offered software and not expressly accepted by a user of that software, nevertheless bind the user to an arbitration clause contained in the license?

Holding: No, there was no manifestation of assent when plaintiffs downloaded the software. Shrink-wrap—you must physically unwrap the packaging, and this unwrapping is treated as assent. A click-wrap license presents a user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked. The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable. There is also browse-wrap, in which notice of a license agreement appears on the plaintiff’s website—clicking on the notice links the user to a separate web page containing the full text of the license agreement. However, the user is not required to click on an icon expressing assent to the license, or even view its terms, before proceeding to use the information on the site. The browse-wrap does not provide sufficient notification—not enough here to put reasonable man on notice to discover license. There is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there.

**Register.com, Inc. v. Verio, Inc.** (Second CIrcuit, 2004) [353]

Facts: This plaintiff Register serves registrars for the insurance of domain names on the world wide web. Register.com also sells a variety of website design services. Applicants to register a domain name submit to the registrar contact information, including at minimum, the applicant’s name, postal address, telephone number, and email. The defendant Verio is engaged in the business of selling a variety of web site design, development and operation services. To facilitate its pursuit of customers, Verio acquired the domain name information from Register and would then send them marketing solicitations by email, telemarketing and direct mail. Register wrote to Verio demanding that it cease using the information for email marketing as well as direct mail and telephone marketing. Verio ceased using the information for email marketing, but refused to stop marketing by direct mail and telephone.

Issue: Did Verio become contractually bound to the conditions imposed by Register’s restrictive legend despite the fact that the legend did not appear until after Verio had submitted the query and received the data?

Holding: Yes. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would have been considerable force to its contention that it obtained the data without being conscious that Register intended to impose conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. In *Specht*, the users in whose favor we decided visitedthe website one time to download its software—there was no way to determine that any downloader had seen the terms of the offer. Verio admitted that it was fully aware of the terms on which Register offered the access. It is standard contract doctrine that when a benefit is offered subject to stated conditions and the offeree makes a decision to take the benefit with knowledge of the terms of that offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.

**Identifying and Interpreting the Terms of the Bargain**

Interpreting the meaning of the words the parties used.

Gap-filing when a situation arises that is not explicitly handled by the terms of the parties’ agreement.

Identifying which term is adopted by the parties when, though it is clear the parties intended to enter into contractual relations, the terms of the offer differ from the terms of the acceptance.

**1. Interpreting the meaning of the terms**

Ambiguous terms—have more than one meaning—find which meaning, if any, was intended by the parties.

Vagueness—whether a term was meant to apply beyond its clear core meaning.

Objective Theory of Assent, Judge Learned Hand: A contract has nothing to do with the personal, or individual, intent of the parties. Must be in the words used in the contract or other words—not in unexpressed intent.

Ambiguous Terms

**Raffles v. Wichelhaus** (Court of Exchequer, 1864) [370]

Facts: Plaintiff agreed to sell to the defendant, and the defendant agreed to buy, 125 bales of Surat cotton at a stated price. The cotton thus sold was to arrive on the ship Peerless sailing from Bombay, but when the Peerless, or at least a Peerless, reached port at Liverpool the defendant refused to accept and pay for the merchandise. As it turned out, there were two ships named Peerless sailing from Bombay, and while the plaintiff clearly had in mind the Peerless that sailed from Bombay in December, the defendant as clearly meant to designate the Peerless that sailed from Bombay in October. The contract contained nothing that clarified the matter because neither party had any idea that there were two ships Peerless in the world

Issue: Did the contract intend for the delivery of the October Peerless?

Holding: No. There was no agreement on the same thing. Since the defendant intended to buy one lot of merchandise, while the plaintiff intended to sell another, there was no contract or agreement which the Court could enforce. Raffles stands for the proposition that when parties are subjectively attaching different meanings to a critical term, and there is no meaning attached to this essential term, ambiguity can lead to failure of the agreement entirely. Restatement 201.

Restatement (Second) Section 201(1). Whose Meaning Prevails.

§202. Rules In Aid of Interpretation.

UCC §1-205. Course of Dealing and Usage of Trade.

UCC §2-208. Course of Performance or Practical construction.—the parties themselves know best what they have meant by their words of agreement and their action under the agreement is the best indicator of what that meaning is.

Vague Terms

Vague terms lead to disputes over whether and to what extent words used were meant to apply beyond their agreed core meaning.

**Weinberg v. Edelstein** (Supreme Court of new York, 1952) [385]

Facts: The plaintiff and defendant operate retail stores in the same building. The plaintiff’s lease, entered into in June 1949, entitles him to sell “ladies dresses, coats and suits and ladies sports clothes.” The landlord also agreed with the plaintiff not “to rent any other store in the same building for the retail sale of ladies dresses, coats and suits.” Defendants lease was assigned to him on June 1950, and he was authorized to sell, among other items, blouses and skirts. Defendant displays and sells matched skirts and blouses—and plaintiff claims they are in reality two-piece dresses—the sale of which is forbidden the defendant.

Issue: Does the restrictive covenant’s provision regarding dresses cover the sale of blouse-skirt combinations?

Holding: No. Look to the practices and customs of the trade—namely, the ladies’ garment industry. In that industry, there has been a long-established division between houses that manufacture dresses and sportswear houses that manufacture skirts and blouses. Furthermore, there are separate unions—a skirt union, a blouse union, and a dress union. Additionally, two-piece dresses consist of a completely uniform top and bottom, sold at a single-unit price, and are typically worn together as a unit. Meanwhile, sportswear houses manufacture unrelated skirts and blouses and charge a separate price for each item—can be worn without relation to each other. Above evidence indicates an almost universal trend in the women’s garment industry to separate skirt-blouse combinations from dresses. In this case, both parties are assumed to be in the same community of discourse and therefore either knew or had reason to know of the special meaning attached to the word dress.

NOTES: There is a tendency in the courts, supported by the UCC and the Restatement, to find an understanding by reasonable reference to custom or to the parties previous conduct. In *Frigaliment* (chicken)*,* by contrast, there had been no prior course of dealing between the plaintiff and defendant, and evidently trade usage was to various to be relied upon. See UCC §2-208. Course of Performance or Practical Construction.

Generally: Words of Contract > course of negotiations > course of performance > course of dealings > usage of trade.

Course of performance: how they have acted under the agreement.

Course of dealings: how the two parties had acted previously.

**2. Filling the Gaps**

Situation where there is some kind of gap in the contractual provisions.

Sun Printing & Pub. v. Remington Paper & Power (Court of App. NY 1923) [395]

Facts: Sun Printing (plaintiff) agreed to buy 1,000 tons of paper per month for 16 months from Remington (defendant). The price was fixed for the first 4 months, then adjustable based on terms they would agree upon in re-negotiations, but capped at the contract price for newsprint charged by the Canadian Export Paper Company. Before the designated renegotiation time, Remington decided to stop delivering. Sun Printing then demanded that Remington supply them with paper at the price ceiling, and renewed that demand monthly for the rest of the year.

Issue: Was the defendant within its rights to release itself from the contract due to lack of specificity of the length of the pricing period?

Holding: Yes. Seller and buyer left two subjects to be settled in the middle of December and at unstated intervals thereafter—one was the price to be paid and the other was the length of time that such price was to govern. Agreement as to one was insufficient without agreement as to other. Without a specification of term, leaves defendant exposed to risk—if price goes down on Canadian standard, they can take the lower price every month. If it goes up, however, Sun Printing can keep old price (since can claim that term hasn’t ended). Overall, refusal to fill the gap. Under the Restatement §34, key to whether or not a contract is sufficient is if the controversy involves an essential term—an essential term is one the court needs to recognize a breach and can provide a remedy.

Restatement of Contracts. §34. Certainty and Choice of Terms; Effect of Performance or Reliance

§204. Supplying an omitted essential term.

**3. Illusory Promises**

Illusory promise: leaves complete discretion to perform or not in the hands of the promisor.

Requirements Contracts

New York Central Iron Works v. U.S. Radiator (Court of App. NY 1903) [403]

Facts: Contract was an open as to the quantity of goods that the defendant was to deliver. The defendant became bound to furnish the plaintiff “with their entire radiator needs for the year of 1899” on the terms and prices specified. Defendant complains that it filled the orders until 48,000 feet of radiation had been delivered, which was as much as the plaintiff had ever required before, but that the plaintiff continued to send in order that would bring the aggregate for the year up to 100,000 feet and these orders in excess of the amount delivered the defendant refused to fill. The defendant construed the contract as calling only for the usual amount of goods.

Issue: Was there a limitation clause implied in the contract?

Holding: No. The parties left the contract open and indefinite as to the quantity of goods that the plaintiff might order form time to time. The court does not mean to assert that the plaintiff had a right under the contract to order goods to any amount. Both parties in such a contract are bound to carry it out in a reasonable way. The obligation of good faith and fair dealing towards each other is implied in every contract of this character. If the defendant could prove that the plaintiff was not acting reasonably or in good faith, but using the contract for a purpose not within the contemplation of the parties—i.e. speculative as distinguished from regular and ordinary business purposes—the contract would not be binding. But since no defense of this kind was either pleaded or proved in this case, the judgment of the trial court is affirmed.

UCC. §2-306(1). Output, Requirements and Exclusive Dealings.

Essential test is whether a party is acting in good faith—a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but a normal expansion undertaken in good faith would be within the scope of this section.

Requirements contract: a contract in which one party agrees to supply as much of a good or service as is required by the other party, and in exchange the other party expressly or implicitly promises it will obtain its goods or services exclusively from that first party.

Exclusive Dealing Contracts

**Wood v. Lucy, Lady Duff-Gordon**  (Court of App. NY 1917) [407]

Facts: Parties entered into a contract under which the plaintiff was given the exclusive right to license the use of the defendant’s name in connection with the manufacture of dresses, hats, fabrics and the like. Defendant’s opinion on women’s fashions were then much in vogue, and it was expected that manufacturers and designers would pay handsome fees for her endorsements. The parties agreed to split equally all revenues. At some point, despite the grant of exclusive marketing rights to plaintiff, defendant began placing endorsements on her own and plaintiff sued. The defense was that the contract lacked mutuality—namely, the contract did not actually obligate the plaintiff to take any positive action whatever—promise, if any, was illusory.

Issue: Is the promise by the plaintiff illusory?

Holding: No, a promise on plaintiff’s part to use “reasonable efforts” to generate license revenues as properly to be implied. A promise may be lacking, and yet the whole writing may be instinct with an obligation, imperfectly expressed. Entails the further conclusion that “reasonable efforts” represents an enforceable standard of conduct. Holding in this case adopted by UCC 2-306(2)—reflects the perception that parties to an exclusive dealing arrangement often wisely prefer to deal with future uncertainties through a process of flexible rather than fixed obligation. Yes, there’s a gap in contract because it does not entail any obligations on promisor, but can read in reasonable efforts requirement. COMMENT: Exclusive agent is required to use reasonable effort and due diligence in the expansion of the market or the promotion of the product. How do you decide whether there’s enough in the contract to bind the parties?—Restatement §204. Supplying an Omitted Essential Term—bargain is sufficiently defined? UCC §2-204—even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for remedy. Under UCC, there is a lot we can do to fill in gaps—see §2-308, 2-309, 2-310.

**4. Adhesion Contracts**

Contracts of adhesion—often written by one of the parties and unread by the other.

**Carnival Cruise Lines v. Shute** (Supreme Court 1991) [419]

Facts: The Shuts purchased passage for a 7-day cruise on petitioner’s ship. The face of each ticket contained this admonition: “subject to conditions of contract on last pages.” The terms and conditions contained a forum-selection clause that mandated all litigation issues that should arise would be tried in and before a court located in the State of Florida. Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship.

Issue: Should the forum selection clause be enforced?

Holding: Yes. Forum selection clause permissible for several reasons:

1. No notice issue—plaintiff knew about forum selection clause—but only read clause after they had already bought the ticket—court does not deal with this issue because this particular plaintiff had actual notice.
2. a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit—typically carries passengers from many locales and would be subject to litigation in several different fora.
3. A clause establishing ex ante the forum for dispute resolution dispels confusion about where cases should be litigated, sparing litigants time and expense of pretrial motions.
4. Forum clause benefits passengers in that they have reduced fares due to the savings that the cruise line enjoys by limiting the for a in which it may be sued.

No indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims—petitioner has its principal place of business in Florida and many cruises depart from and return to Florida.

**Compagno v. Commodore Cruise Line** (US Dis. Crt. of Louisiana 1999) [426]

Holding: When *Shute* was decided in 1991, 46 U.S.C. §186 provided in pertinent part: “It shall be unlawful for the owner of any vessel transporting passengers between ports to insert in any contract any provision or limitation (2) purporting [in the event of bodily injury] to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury. All such provisions shall be declared against public policy and shall be null and void.” In 1992, the House of Representatives added “any” immediately before the prase “court of competent jurisdiction.” Senator Breeux later remarked that the 1992 House addition “was intended by the House to overturn the Supreme Court decision in *Shute*.” However “any” was deleted from 46 U.S.C. §183c in 1993 . Accordingly, the Court is guided by the *Shute* decision.

**Caspi v. Microsoft Network** (Superior Court of New Jersey 1999) [427]

Facts: Plaintiffs asserted various theories including breach of contract, common law fraud, and consumer fraud in the way Microsoft had “rolled over” MSN membership into more expensive plans. Shortly thereafter defendants moved to dismiss the amended complaint for lack of jurisdiction and improper venue by reason of the forum selection clause that defendants contended was in every MSN membership agreement and bound all the named plaintiffs. Plaintiffs contend that they did not receive adequate notice of the forum selection clause and therefore the clause never became part of the membership contract that bound them.

Issue: Did the plaintiffs have adequate notice of the forum selection clause?

Holding: Yes. The holding *Shute* did not dispose of the notice question because the plaintiffs there had essentially conceded that they had notice of the forum selection provision by stating that they did not contest that the forum selection clause was reasonably communicated to them. The plaintiffs in *Shute* could have perused all the fine print provisions of their travel contract if they wished before accepting the terms by purchasing their cruise ticket. The plaintiffs in this case were free to scroll through various computer screens that presented the terms of their contracts before clicking their agreement. We discern nothing about the style or mode of presentation, or the placement of the provision, that can be taken as a basis for concluding that the forum selection clause was proffered unfairly, or with a design to conceal its provisions.

Restatement (Second) of Contracts. §211. Standardized Agreements.

Comment: Standardized contracts allow for simplified operations and reduced costs to the advantage of all concerned. Customers do not in fact ordinarily understand or even read the standard terms. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as law may impose. Apart from regulations by the government, standard terms imposed by one party are enforced. But standard terms are construed against the draftsman (§206), and they are subject to the overriding obligation of good faith (§205), and to the power of the court to refuse to enforce an unconscionable contract or term (something the other party slipped in, but nobody would ever agree to)(§208). Moreover, various contracts and terms are against public policy and unenforceable.

1. **Which Terms were Agreed to?**

Battle of the Forms

**Step-Saver Data Systems, Inc. v. Wyse Tech.** (Third Circuit, 1991) [431]

Facts: Step-Saver developed a multi-user system that required terminals. Step-Saver selected a program by TSL as the operating system for the multi-system, which was manufactured by Wyse. Almost immediately upon installation of the system, Step-Saver began to receive complaints from its customers. At least twelve of Step-Saver’s customers filed suit against Step-Saver because of the problems with the multi-user system. In this suit, Step-Saver alleged breach of warranties by both TSL and Wyse. Printed on the package of each copy of the program was a copy of the box-top license—Wyse claims that the box-top was a counter-offer to agreement and that Step-Saver accepted by performing.

Issue: Is Step-Saver bound by the box-top license, which gave only limited warranty?

Holding: No. The box-top license was equivalent to a written acceptance that contained additional terms, of which the warranty disclaimer was obviously one. Such additional terms must be regarded as proposals under 2-207(2), and as the warranty disclaimer would “substantially [materially]” alter the distribution of risk between the parties,” it could not become part of the agreement. Opening the packages, said the Court, did not constitute assent to the warranty disclaimer by Step-Saver. Court concludes that based on Step-Saver’s course of conduct, actions demonstrate that they did not agree to new terms. The only way that terms could be accepted is if consent was conditional on acceptance. No conditional acceptance—if there was then even though it was materially altering it still would have become part of the agreement—Wyse did not demonstrate that they would have refused to contract with agreement to additional terms—in order to construe something as conditional acceptance must demonstrate this conditional acceptance—have to look to the course of conduct.

UCC. §2-207. Additional Terms in Acceptance or Confirmation.

2-207 applies to buyers who are ordinary consumers just as well as to merchant buyers—indeed, in the case of a consumer, under the first sentence of 2-207(2) “additional terms” are to be construed as “proposals” and excluded (unless accepted) without regard to whether they are material—not an agreement unless expressly assented to.

Terms that Follow Later

**ProCD v. Zeidenberg** (7th Cir. 1996) [447]

Facts: The defendant bought the plaintiff’s software product at a retail store, and thereafter attempted to exploit the product commercially.

Issue: Is the buyer bound by the terms of a license enclosed in the box containing the product?

Holding: Yes, the buyer is bound by the license, which specifically prohibits commercial use of the software. 2-207 does not apply because only one form, the license, was involved in the transaction. That being so, the prohibition against commercial use was binding on the buyer and would not be treated as a mere proposal. Court points out that all sorts of consumer goods are bought and paid for before the detailed terms of the agreement are made known to the buyer—but all would agree that those terms are contractually binding and cannot be treated by the buyer as mere proposals. Step-Saver and ProCD taken together seem to suggest that there is a difference between merchant-buyers and consumer-buyers. ProCD dealt with a rolling contract—in which the goods in question are received and paid for before the “contract” has been furnished to the buyer—by keeping it beyond the date to send it back, agree to the terms. Contract only is completed when you assent at the end by not sending the product back. See also Hill v. Gateway—same holding as Pro-CD, involves delivery of a computer and a non-merchant—expanding ProCD beyond merely merchants and software.

**Klocek v. Gateway** (District of Kansas, 2000) [457]

Facts: Klocek brings claim arising form purchases of Gateway computer. Gateway asserts that plaintiff must arbitrate his claims under Gateway’s Standard Terms and Conditions Agreement.

Issue: Is the plaintiff bound by the arbitration agreement?

Holding: No. Court rejects holdings in Hill and ProCD—by its terms §2-207 applies to an acceptance or written confirmation. It states nothing that requires another form before the provision comes into affect. Under §2-207, the standard terms would only constitute a counter-offer only if Gateway expressly made its acceptance conditional on plaintiff’s assent to the additional or different terms. The court finds that the act of keeping the computer past five days was not sufficient to demonstrate that the plaintiff expressly agreed to the Standard Terms. Anything he did not know when buying the computer was not part of the agreement—terms that he saw after were proposed additions—Klocek does not see this as a rolling contract but as an addition to original contract. Klocek made an offer to Gateway, which was accepted by Gateway when they sent the computer—inclusion of additional agreement constitutes an additional term.

1. **Express & Implied Warranties**

The scope of performance is often defined by a warranty. When parties are silent, contract law supplies some warranties by default. Two provided by the UCC are the implied warranty of merchantability and the implied warranty of fitness for the particular purpose.

Implied Warranties

Step-Saver Data Systems, Inc. v. Wyse Technology (ED of Penn. 1990) [814]

Facts: Step-Saver alleges error in the Court’s refusal to charge the jury on the implied warranty of merchantability.

Holding: Step-Saver fails to differentiate between warranty of merchantability and the warranty of fitness for a particular purpose. Merchantability = fitness for the ordinary purposes for which such goods are used. Acceptance in the trade, in addition to being an express requirement for merchantability under the UCC, has long been a reliable barometer for determining whether a particular product is merchantable. Step-Saver didn’t put forward any evidence as to whether they are acceptable in trade—indeed, this plaintiff had put the terminals through significant testing; furthermore, this machine is widely used in the industry. Fitness = fitness for a particular purpose—narrower, more specific, and more precise. In order to prove fitness, must show that at the time of sale Wyse had reason to know of the particular purpose for which the Wyse-60 terminals were being purchased by Step-Saver and that Step-Saver relied on Wyse’s skill and judgment to select or furnish suitable terminals.

See UCC §2-314. Implied Warranty: Merchantability; Usage of Trade.

§2-315. Implied Warranty: Fitness For Particular Purpose.

§2-312. Warranty of Title and Against Infringement; Buyer’s Obligation Against Infringement.

§2-714. Buyer’s Damages for Breach in Regard to Accepted Goods.

Express Warranties

Express warranties entail a promise to make good for losses within their scope, whether or not such losses were foreseeable, uncertain, or avoidable.

UCC §2-313. Express Warranties by Affirmation, Promise, Description, Sample.

Royal Business Machines, Inc. v. Lorraine Corp. (7th Cir. 1980) [818]

Facts: $1 million awarded to Booher and Lorraine Corp. in compensatory and punitive damages against Royal.

Issue: Is there evidence to support that Royal made either express or implied warranties?

Holding: No. Paraphrasing UCC §2-313, an express warranty is made up of the following elements: a) an affirmation of fact or promise, b) that relates to the goods, and c) becomes part of the basis of the bargain between the parties. The decisive test for whether a given representation is a warranty or merely an expression of the seller’s opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion. General statements (i.e. “of good quality”) are regarded as the seller’s opinion—puffing his wares—does not create an express warranty. No express warranty created by Royal’s affirmation that RBC was of high quality—this was merely the seller’s opinion. Furthermore, must find that the affirmations of fact or promises became part of the basis of the bargain—need reliance. Finally, breach only if the machines were defective upon delivery—not later on.

Express Disclaimers of Warranty

Schneider v. Miller (Court of Appeals of Ohio, 1991) [831]

Facts: Appellant bought a used 1966 Chevrolet Impala from the appellee—took a test drive of car and surveyed car before driving it. Appellant signed a bill of sale acknowledging that the car was sold “as is,” and signed a separate document indicating that the car was sold “as is” with no warranty.” Later found out that it was entirely rusted through and sued.

Issue: Is there any kind of warranty?

Holding: Sold “as is,” so no general warranty. Regarding implied warranties, UCC §2-316 provides that terms like “as is” in commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. Contracted around implied warranties. Also, under 2-315 3(b)—they also had the opportunity to examine and they did not.

UCC §2-316. Exclusion or Modification of Warranties.

**See Morris v. Mack’s Used Cars: you can’t use as is to contract around unfair or deceptive acts or practices (anything that is protected by the Consumer Protection Act).**

**WRITTEN & PAROLE EVIDENCE RULE**

1. **THE PAROLE EVIDENCE RULE**

**Thompson v. Libbey (**Supreme Court of Minnesota) (1885) [461]

Facts: Plaintiff is the owner of a quantity of logs marked HCA. Plaintiff and defendant made an agreement of sale and purchase of the logs—the written agreement stated that plaintiff would sell the logs for 10 dollars a thousand feet. Defendant now pleads a warranty of the quality of the logs alleged to have been made at the time of the sale, but not within the agreement.

Issue: Can the verbal warranty be enforced?

Holding: No. Parole evidence is inadmissible to contradict or vary the terms of a valid written instrument. Founded on the injustice that would result if matters in writing, made with consideration and deliberation, and intended to embody entire agreement of the parties, were liable to be controlled by the uncertain testimony of slippery memory. If it imports on its face to be a complete expression of the whole agreement, it is to be presumed that the parties introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parole evidence is directed. A completely integrated agreement contains all terms—can’t supplement it. Thus, in determining whether to admit parole evidence, have to decide whether or not it was an integrated agreement—even in a completely integrated agreement, the judge can hear testimony about ambiguous or vague matters. Test: did the parties intend this to be what their deal was? Did they intend zero outside evidence? If so, integrated.

**Brown v. Oliver (**Supreme Court of Kansas) (1927)[463]

Facts: Action was one of replevin (legal remedy for a person to recover goods unlawfully withheld from his or her possession) to obtain possession of hotel furniture. Plaintiff purchased from defendant land on which stood a hotel operated by a tenant, and there was ample oral evidence that the sale included the hotel furniture owned by defendant. The instrument, however, made no mention of personal property.

Issue: Was it the intention of the parties to limit the writing to that single subject of negotiation?

Holding: No. The personal property was not mentioned because that had been talked over before. Where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form, three propositions may be laid down: 1) whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties; 2) intent must be sought in the conduct and language of the parties and the surrounding circumstances; 3) Whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. Principle that writing is sole criterion is untenable. In the present circumstances, the instrument did not by itself conclusively establish whether the parties intended it should exclude every subject of sale except real estate. No evidence of parties intent about negotiating on that term, therefore have to look at parole evidence.

Restatment of Contracts §209. Integrated Agreements.

§210. Completely and Partially Integrated Agreements.

§213. Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule).

§214. Evidence of Prior or Contemporaneous Agreements and Negotiations.

§216. Consistetn Additional Terms.

UCC §2-202. Final Written Expression: Parole or Extrinsic Evidence.

**Pacific Gas And Electric Co. v. G.W. Thomas Drayage & Rigging Co. (**Supreme Court of California) (1968)[468]

Facts: In 1960 defendant entered into a contract with plaintiff to furnish the labor and equipment necessary to remove and replace the upper metal cover of plaintiff’s steam turbine. Defendant agreed to perform the work “at its own risk and expense and to indemnify plaintiff against all loss. During the work the cover fell and injured the exposed rotor of the turbine. Plaintiff brought this action to recover $25,144.51, the amount it subsequently spent on repairs.

Issue: Should the court confine itself to the written contract?

Holding: No. The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. Test of admissibility of extrinsic evidence is not whether it appears to the court to be plain and unambiguous on its face, but whether the evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. The terms of a contract must be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. If the language in the contract is vague or ambiguous, the judge can take into account conduct or prior negotiations.

**Trident Center v. Connecticut General Life Insurance Co.** (Ninth Circuit) (1988) [471]

Facts: The parties to this transaction are, by any standard, highly sophisticated business people. Plaintiff is a partnership consisting of an insurance company and two of Los Angeles largest and most prestigious firms: defendant is another insurance company. They negotiated a commercial loan amounting to more than $56 million. Lawyers (Trident) sought and obtained financing for the project from defendant. Everything was copacetic for a few years until interest rates began to drop. The 12 ¼ percent rate that had seemed reasonable in 1983 compared unfavorably with 1987 market rates and Trident started looking for ways of refinancing the loan to take advantage of the lower rates. Trident brought suit in state court seeking a declaration that it was entitled to prepay the loan now; subject only to 10 percent prepayment fee.

Issue: Can parties introduce extrinsic evidence that the contract means something other than what it clearly states?

Holding: Yes, unfortunately. The promissory note provides that Trident “shall not have the right to prepay the principal amount hereof in whole or in part before January 1996.” It is difficult to imagine language that more clearly or unambiguously expresses the idea that Trident may not unilaterally prepay the loan during it’s first four years. Trident, however, argues that there is an ambiguity because another clause of the note provides that in the event of a prepayment resulting from default, the prepayment fee will be 10%--says this gives it the option of prepaying the loan if only it is willing to incur the prepayment fee. Traditional contract rule states that extrinsic evidence is inadmissible to interpret vary or add to the terms of an unambiguous integrated written instrument. Trident points out, however, that California does not follow the traditional rule. Under Pacific Gas, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parole evidence. Mnoonkin says this is the wrong application of Pacific Gas—if no problems of ambiguity or vagueness; if it is clear what the parties meant, then can’t use parole evidence.

1. **REFORMING MISTAKES**

**The Travelers Insurance Co. v. Bailey**  (Supreme Court of Vermont) (1964)

Facts: The defendant, when nineteen, bought a life insurance policy from the plaintiff. Policy was supposed to grant an annuity at age sixty-five for five hundred dollars a year for the balance of his life, ten years certain. Instead policy gave an annuity obligation to pay five hundred dollars a month for life, one hundred months certain. Plaintiff insurance company has come to ask for reformation of the annuity provisions of a life insurance policy on the basis of mistake—claims that if you run the numbers nobody could have thought this was the deal.

Issue: Can the defendant obtain reformation of the contract?

Holding: Yes. The duty of establishing beyond a reasonable doubt the true agreement to which the contract in question is to be reformed is on the party seeking reformation. Where there has been established beyond a reasonable doubt a specific contractual agreement between parties, and a subsequent erroneous rendition of the terms of the agreement in a material particular, the party penalized by the error is entitled to reformation, if there has been no prejudicial change of position by the other party while ignorant of the mistake. I cannot be said that the defendant acted in reliance on the terms of the policy—defendant has not demonstrated that he was prejudiced by the existence of the error and therefore reformation granted. High standard for party seeking reformation.

See Restatement §155. When Mistake of Both Parties As to Written Expression Justifies Reformation.

1. **THE STATUTE OF FRAUDS**

Underenforcement: the failure of the legal system to enforce a legitimate exercise of assent.

Overenforcement: the erroneous enforcement of an alleged exercise of assent that in fact never occurred.

Statute of Frauds requires that some contracts be formalized—inevitably led to a rise in instances of underenforcement. This in turn has led to the development of judicially created exceptions to such statutes. See Restatement §110. Classes of Contracts Covered. Function of these rules: evidentiary function, cautionary function (people take more seriously what they are writing), and channeling (ceremonies let people know they’ve achieved something).

Statute covers: Greater than a year, land contracts, sales in excess of a certain amount

**Boone v. Coe** (Court of Appeals of Kentucky) (1913) [483]

Facts: Defendant was the owner of large and valuable farmland in Texas. Plaintiffs were farmers in Kentucky. In 1909, defendant made a verbal contract with plaintiffs whereby he rented to them his farm in Texas for a period of 12 months, to commence from the date of plaintiffs’ arrival at defendants’ farm. In exchange for them leaving Kentucky, and taking charge of his farm, the defendant would have a dwelling completed on said farm and ready for occupancy upon their arrival. They travelled for a period of 55 days and when they got to Texas defendant broke his contract. Plaintiffs now claim a total of $1,387 in damages for time lost and moving expenses.

Issue: May plaintiffs recover for expenses incurred and time lost on the faith of a contract that is unenforceable under the statute of frauds?

Holding: No. The contract is unenforceable under the statute of frauds. A parole lease of land for one year, to commence at a future date, is within the statute. There are, however, well recognized exceptions to the general rule that damages cannot be recovered for violation of a contract within the statute of frauds: 1) where services have been rendered during the life of another, on the promise that the person rendering the service should receive at the death of the person served a legacy, a reasonable compensation may be recovered for the services rendered; 2) vendee of land under a parole contract is entitled to recover any portion of the purchase money he may have paid, and is also entitled to compensation for improvements; and 3) under a contract for personal services within the statute, an action may be maintained if the defendant has actually received some benefits from the acts of part performance. Unlike these exceptions, no benefit given to the defendant—plaintiffs merely sustained a loss. Restatement §90 would be used now to enforce contract.

See Restatement Second §125. Contract for Transfer, Buy, or Pay for an Interest in Land.

§129. Action in Reliance; Specific Performance.

§130. Contract not to be Performed within a Year.

**Riley v. Capital Airlines Inc.** (Southern District of Alabama) (1960) [489]

Facts: Action for a breach of a five-year oral contract in which Riley Enterprises, plaintiff, agreed to supply Capital Airlines, defendant, with water methanol according to its demands and specifications.

Issue: Was there a five-year contract?

Holding: No. The statute of frauds of Alabama states an agreement is void, which does not conform with the statute of frauds, when it is “not to be performed within one year from the making thereof.” Exceptions: 1) An exception is made, however, if the “goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business.” Although it is true that the plaintiff manufactured the product exclusively for he defendant and according to its specifications, there was no product or item manufactured in its entirety for delivery five years form the date of making the contract—if they had not paid after every shipment would have been able to recover. 2) Plaintiff contends that the doctrine of part performance removes the contract form the effects of the statute of frauds—however there is confusion over part performance and entire performance. Here, plaintiff completed performance—since each delivery was made at separate moments. Thus, court finds that plaintiff is not entitled to damages for breach of contract because the statute of frauds bars enforcement of the executor portion thereof. The plaintiff should, however, be compensated for loss in equipment which was purchased in good faith.

See UCC §2-201. Formal Requirements; Statute of Frauds.

Restatement of Contracts: §139. Enforcement by Virtue of Action in Reliance.

§143. Unenforceable Contract as Evidence.

Satisfying the Requirement of a Writing: Signing

**Schwedes v. Romain** (Supreme Court of Montana) (1978) [494]

Facts: Respondents owned twenty acres of land. The Schwedes were searching for a place to retire and received a letter from the respondents regarding the sale of their land. Schwedes communicated an acceptance of the respondents’ offer by telephone call. Thereafter, respondents’ attorney told the Schwedes not to pay the purchase price on September 20, 1976—when they made an attempt to do so—but to do it at a later closing date. Subsequently, respondents sold the real property in question to a third party. No document in writing was signed by either the Schwedes respecting the transaction, but respondents would have executed the necessary documents for the property transaction and authorized their delivery to the Schwedes if the purchase price had been deliver to them prior to the sale to the third party.

Issue: Is the contract enforceable?

Holding: No. A contract for the sale of real estate is invalid unless it, or some not or memorandum thereof is in writing subscribed by the parties to be charged. Here there is no writing, memorandum or note binding the Schwedes to buy this property. Hence, the oral promise of Schwedes was not legally binding, and imposed no legal duty. **Since the Court will not bind the Schwedes, they will also not bind the seller even though he signed a document.** Second, the contract is no subject to partial performance, which would take it outside of the statue of frauds. Appellants have failed to distinguish between acts undertaken in contemplation of eventual performance, and acts that truly constitute part performance of a contract. Partial performance must be unequivocally referable to that contract—it is not actions taken in anticipation. Such acts as obtaining financing and making studies of real property have been held insufficient part performance to preclude the defense of the statue of frauds. Courts will apply the doctrine of promissory estoppel to suspend the statue of frauds only in those situations when the statue would otherwise operate to perpetuate a fraud.

**Leonard v. Pepsico** (SDNY) (1999)

Holding: Under the New York Statute of Frauds, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties. Crabtree held that a combination of signed and unsigned writings would satisfy the statute of Frauds “provided that they clearly refer to the same subject matter or transaction.” This rule contains two strict threshold requirements: 1) the signed writing relied upon must by itself establish “a contractual relationship between the parties,’” and 2) the unsigned writing must on its face refer to the same transaction as set forth in the one that was signed. None of the material relied upon by the plaintiff meets either threshold.

Restatement. §131. General Requisites of a Memorandum.

§133. Memorandum not Made as such. A memorandum may consist of an entry in a diary or in the minutes of a meeting, of a communication to or from an agent of the party, of a public record, or of an informal letter to a third person.

**In re REALNETWORKS** (Northern District of Illinois) (2000)

Facts: Plaintiffs, on behalf of a class of Illinois plaintiffs and individually, brought suit against Defendant RealNetworks alleging trespass to property and privacy, claiming that RealNetworks’ software products secretly allowed RealNetworks to access and intercept users’ electronic communications and stored information without their knowledge or consent. Before a user can install either of the software packages, they must accept the terms of RealNetworks’ License Agreement, which include a clause stating that “Any and all unresolved disputes arising under this License Agreement shall be submitted to arbitration in the State of Washington.”

Issue: Does the electronic agreement constitute a writing for the purposes of the Federal Arbitration Act?

Holding: Yes. Court does not now find that all electronic communications may be considered written. Rather, the Court examines the contract at issue in this action and finds that its easily printable and storable nature is sufficient to render it written. The process or printing the License Agreement is no more difficult or esoteric than many other basic computer functions, and the melodrama and over exaggeration with which Intervenor describes the alleged impossibility of printing the License Agreement is disingenuous.

UCC §2-201—requires a writing that is signed by the party against whom enforcement is sought or by his authorized agent or broker.

**Cloud Corp. v. Hasbro, Inc.** (Seventh Circuit) (2002)

Facts: Wonder World Aquarium is a toy that Hasbro sold for a brief period in the mid 90s. Hasbro contracted out the manufacture and sale of this product—Southern Clay was to sell and ship a patented synthetic clay to Cloud Corporation, which was to mix the clay with a preservative, pack the mixture in packets, and ship them to affiliates of Hasbro in East Asia. Cloud had manufactured a great many packets of powder in advance of receiving formal purchase orders for them from Hasbro. Hasbro refused to accept delivery of these packets or to pay for them. One of the terms of Hasbro’s contract with Cloud Corp. was that the supplier could not deviate from a purchase order without Hasbro’s written consent.

Issue: Is there an enforceable contract despite the lack of a signature?

Holding: Yes. The quantity term in a contract for the sale of goods for more than $500 must be memorialized in a writing signed by the party sought to be held to that term, UCC §2-201(1), and so therefore, must a modification of that term, UCC §2-209(3). However, the emails plus the notation brought up in evidence satisfy the statutory requirement. The UCC does not require the contract itself be in writing, only that there be adequate documentary evidence of the existence and essential terms, which there was here—Hasbro agreed to buy the additional packets produced by Cloud Corp. The Electronic Signatures in Global and National Commerce Act provides that in all transaction in or affecting interstate or foreign commerce, a contract shall not be denied legal effect merely because it is in electronic form. We conclude that the sender’s name on an email satisfies the signature requirement of the statue of frauds. Under the statute of frauds, however, Hasbro did give its written consent to the modification.

E-Sign Act. §101. General Rule of Validity.

Uniform Electronic Transactions Act. §9. Attribution and Effect of Electronic Record and Electronic Signature.

Uniform Computer Information Transactions Act. §213. Determining Attribution.

**PERFORMANCE AND BREACH**

**1.Duty of good Faith in Performance**

Lucy—the first time we see duty of good faith.

Restatement (Second) §205. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

UCC §1-201(19). “ ‘Good faith’ means honesty in fact in the conduct or transaction concerned.

UCC §1-203(1)(b). “ ‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in trade.”

UCC §1-102(3). “The affect of the provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care may not be disclaimed by agreement.”

**Goldberg 168-05 Corp. v. Levy** (Supreme Court of New York) (1938)

Facts: Plaintiff agreed to rent certain premises to the defendant Levy for a term expiring September 30, 1938. The tenant was to pay rent in addition to ten percent of gross receipts of the business conducted by the tenant on the leased premises. In the event that the gross sales of the tenant for any calendar year did not equal $101,000, the Tenant was to have the right to cancel the lease. Defendant operated a retail men’s clothing business, and plaintiffs claim that defendants negligently and willfully permitted the said business to become mismanaged and by negligently or willfully diverting the proper channels of trade from said business to another store operated by said defendants, caused a reduction of the gross income of the sales of the demised premises below the amount of $101,00 per year.

Issue: Can the plaintiff recover despite the fact that the contract never explicitly obligates the tenant to refrain from conduct calculated to depress the annual gross receipts of the business?

Holding: Yes. Rental agreement was a promise to make reasonable efforts to bring profits into existence. The defendants conduct—diverting business for the sole purpose of bringing gross receipts below the specified figure and thereby laying the basis for a cancellation of the lease—is in direct violation of the covenant of good faith and fair dealing which exists in every contract—defendant willfully diverted sales to get out of contract.

Mutual Life Insurance Co. of New York v. Tailored Woman (Court of Appeals of New York) (1955)

Facts: Plaintiff leased to the defendant the basement, first, second, and third floors in the building known as No. 742 Fifth Avenue for a term of ten years. The lease provides that the premises were to be used by the defendant for the sale of women’s apparel, accessories, and jewelry. Lease required a fixed minimum rental as well as 4 percent of the gross receipts. On June 1, 1945 plaintiff leased to the defendant additional space on the fifth floor of the building for a term of one year and four months. The lease provided the fixed rental but did not require the defendant to pay a percentage on sales affected on the fifth floor. The defendant discontinued its fur department on the main premises and transferred it o the fifth floor premises.

Issue: Does the defendants actions violate the implied covenant of good faith?

Holding: No. Defendant made changes to the building that resulted in an integrated department store served by elevators reached through the main store from the Fifth Avenue entrances—previously the fifth floor had been inaccessible via the elevators. Recovery is forbidden for fur sales made on the fifth floor, although they get a percentage from the lower floor referrals to the fifth floor. Plaintiff did not contemplate when it leased the fifth floor for a flat rental that the fifth floor would be integrated with the lower floors into one store, but such lack of foresight does not create rights or obligations. The effect of the two leases read together was that the defendant had the right to sell all kinds of women’s apparel in any part of the four floors, so long as no other use was made of the premises. Except as to the fur sales to customers sent upstairs, there was no additional sales “on, in or from” the premises covered by the percentage lease. Defendant as we see it was merely exercising its rights. Present case does not constitute an unconscionable diversion of business form percentage-lease premises to others.

**Stop & Shop, Inc. v. Ganem** (Supreme Judicial Court of Mass.) (1964)

Facts: Defendants in this bill for declaratory relief are lessors under a percentage lease. The lease was for thirteen years and included a minimum rental of $22,000 a year and the further rent of 1 ¼ percent of all gross sales. When the lease was made the plaintiff was engaged in the supermarket business. The plaintiff intended to cease operating a supermarket on the premises after January 1, 1963, but to continue to pay the minimum rent.

Issue: Does the lease compel the defendants to continue to operate the supermarket?

Holding: No. An omission to specify an agreement in a written lease is evidence that there was no such understanding. Even if there is more than nominal minimum rent, other circumstances such as that the fixed rent is significantly below the fair rental value of the property might, however, justify the conclusion that the parties intended that the lessors have the benefit of the percentage rent throughout the term. An apparently substantial minimum rent in an apparently complete written lease, in the absence of a showing of disparity between the fixed rent and the fair rental value, gives ground for the inference that fixed rent and the lessee’s self-interest in producing sales were the only assurance of rent that the lessor required. The burden of showing a disparity between the fixed rent and the fair rental value would be on the lessors.

**2. CONDITIONS**

Sometimes a performance is due only if something happens or does not happen. This type of occurrence is called a condition. Unless the condition is satisfied, nonperformance is not a breach. In its proper sense the word “condition” means some operative fact subsequent to acceptance and prior to discharge. Classic example: fire insurance—a new house, obligation to pay for damages to house depends on something happening—no duty to pay anything unless the house burns down. Condition precedent v. condition subsequent. Express conditions v. implied conditions—given the context & given the deal, a party’s duty to perform is hinged on condition. Condition subsequent—filling claim within 30 days—defendant has the burden of proof in conditions subsequent.

**Inman v. Clyde Hall Drilling Co.** (Supreme Court of Alaska) (1962)

Facts: Inman worked for the Clyde Hall Drilling Company as a derrickman under a written contract of employment. His employment terminated and he commenced this action against the company claiming that they fired him without justification, and this breached his contract. The Company moved for summary judgment on the ground that Inman’s failure to give written notice of his claim, as required by the contract, was a bar to his action. A fulfillment of the thirty-day notice requirement is expressly made a condition precedent to any recovery.

Issue: Is the provision in a contract, making written notice of a claim a condition precedent to recovery, contrary to public policy?

Holding: No. If we find those positions are such that one party has unscrupulously taken advantage of the economic necessities of the other, then in the interest of justice—as a matter of public policy—we would refuse toe enforce the transaction. The facts in this case do not persuade us that the contractual provision in question was unfair or unreasonable—was probably designed to preclude stale claims—nothing to suggest that it was designed from an unfair motive to bilk employees out of wages or other compensation justly due them. Further, there was nothing to suggest that Inman did not have the knowledge, capacity or opportunity to read the agreement. Finally, the commencement of an action and service of the complaint was not an effective substitute for the kind of notice explicitly called for by the agreement. Since notice was a condition precedent to recovery—Company was not required to plead lack of notice as an affirmative defense, but instead, that Inman was required to plead performance of the condition or that performance had been waived or excused. Strict application of condition.

**Howard v. Federal Crop Insurance Corp.** (Fourth Circuit) (1976) [845]

Facts: Plaintiffs, tobacco farmers, asserted that their crops, which were insured by the defendant, had been damaged by heavy rains, resulting in a loss of $35,000. Notice and proof of loss was promptly filed, but before an insurance adjuster could come and inspect the damage the plaintiffs plowed the tobacco fields under and prepared their land for another crop. Pointing to a provision f the insurance policy, which stated that “The tobacco stalks on any acreage with respect to which a loss is claimed shall not be destroyed until the Corporation makes an inspection,” the defendant refused to pay and moved for summary judgment.

Issue: Is compliance by the insureds with this provision of the policy a condition precedent to the recovery?

Holding: No. Rather, that duty arose upon the filing of notice and proof of loss. While the defendant would afterwards be free to defend its refusal by proving that the plaintiffs’ action had made it impossible to determine the extent of the loss, the plaintiffs might then respond by showing that the loss could have been evaluated without on-the-spot inspection, or that the plowing-under was necessary to prevent the spread of bugs. The larger aim of the insurance contract was to establish a right on the part of the insured to compensation for crop losses. That right being established by the filing of the claim, the parties would then be left to determine the extent of such losses by inspection and other appropriate means. Treating the inspection requirement as a condition precedent would have meant that the policy coverage was wholly forfeited even though there had in fact been rain damage; treating it as a condition subsequent properly placed the amount of the plaintiffs’ damages in issue. Condition subsequent if promise that they won’t plow over their crops—if the plaintiffs want to, they can counterclaim for damages for breach of that promise/condition subsequent.

In general, the function of a contractual condition is to place the risk of non-occurrence of the critical event on one party rather than the other. Restatement Section 227: in case of uncertainty, with respect to the intended effect of a condition, the “preferred” interpretation is one that will reduce the risk of “forfeiture”. §261. Interpretation of Doubtful Words as Promise or Condition—Where it is doubtful whether words create a promise or an express condition they are interpreted as creating a promise. Whether something is a condition or not—even if you make it very explicit, court may refuse to enforce if they fell it is contrary to public policy.

See §227. Standards of Preference with Regard to Conditions.

**Chirichella v. Erwin (Court of Appeals of Maryland, 1973) [849]**

Facts: Appellants, the Chirichellas, had contracted in June 1971 to sell their home in Silver Spring to appellees, the Erwins. The agreement provided that they were to settle within 15 days from the date of completion. The June settlement of the “New Home” never materialized because the Chirichellas claimed it was not completed “in a workmanlike manner.” Sometime after October 1971, Mr. Erwin asked Mr. Chirichella to settle, but the latter refused because the “New Home” was not ready, and so the Erwins sued.

Issue: Was the contested provision a condition precedent to performance?

Holding: No. A condition precedent has been defined as a fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance of a promise arises. The question of whether a stipulation in a contract constitutes a condition precedent is one of construction dependent on the intent of the parties. Although no particular form of words is necessary in order to create an express condition, such words or phrases as “if” and “provided that,” are commonly used to indicate that performance has expressly been made condition…as have the words “when,” “after,” “as soon as,” or ”subject to.” We determine that the provision merely fixes a convenient and appropriate time for settlement—it was not a condition precedent.

See Restatement. §229. Excuse of a Condition to Avoid Forfeiture.

**3. MATERIAL BREACH**

Only if the breach is material does it relieve the nonbreaching party of its duty of performance under the contract. A party to a contract may reasonably conclude that a breach has so impaired the interest in future performance that terminating the contract relationship is prudent—at this point, the materiality threshold has been crossed—the promise is no longer confident that she will receive the future performance.

See Restatement (Second) Contracts §237. Effect on Other Party’s Duties of a Failure to Render Performance—if it’s a material breach, then you can suspend your performance.

§241. Circumstances Significant in Determining Whether a Failure is Material—in determining whether a failure is material, focus on the central aspect of the contract.

**B&B Equipment Co. v. Bowen** (Missouri court of appeals, 1979) [891]

Facts: In 1968, Braymen of B&B wanted to retire and Jacques and Hughes desired to find someone to take Braymen’s place. Bowen was unemployed and available. Bowen did not, however, have sufficient funds to pay the value of Braymens’ 100 shares of stock. The corporation therefore agreed to buy the stock from the Braymens for $15,000 and in turn to sell that stock to Bowen for the same sum. After a few years, Bowen spent less time on his duties for B&B, which ultimately led to him being discharged. The corporation’s tendered to Bowen the sum of $9,656 representing the $2,500 paid by Bowen to the Braymens, together with the $7,156 dividends which Bowen received from B&B and contributed toward payment of the stock. Bowen demands issuance to him of the 100 shares.

Issue: Was there a material breach warranting rescission of the contract?

Holding: Yes. Bowen’s argument on appeal is that his breach did not go to the very substance of the contract—rests this argument on fact that rescission of a contract for breach by the other party must relate to vital provisions going to the very substance of the agreement, and cannot relate to a subordinate or incidental matter. Rather than the principal purpose of the agreement being the sale and purchase of stock, as Bowman argues, clearly purpose of the transaction was the performance of services by Bowen. So his failure to adequately perform those duties did constitute a material breach warranting rescission. Judge makes sure, as part of rescission, that Bowen is put back in the position he would have been in (rescission).

**Lane Enterprises, Inc. v. L.B. Foster** (Superior Court of Penn 1998) [894]

Facts: Litigation concerning an agreement between Foster, a manufacturer of steel bridge components and Lane, a company specializing in the coating of steel materials Lane was not to ship any coated components to Foster without prior approval from an ODOT inspector and Lane was to coat the bridge components in two separate stages. Later, ODOT sent a letter to Hammond formally rejecting the Stage I coated bridge components in their present condition. Lane agreed to assume the cost of the repairs, which would be deducted from the $18,018 still owed to Lane. After the repairs were completed, Lane requested the amount still owing on Stage I, $7,082. Foster responded that it would not pay Lane until Lane gave assurances concerning its commitment to Stage II of their agreement. Lane responded that it would not discuss Stage II until Foster remitted the monies owed. Faced with the prospect of delay damages under the Hammond Agreement, Foster hired a different company to do the coating at a cost of $42,055 more than it would have paid Lane to complete Stage II under the agreement.

Issue: Did Foster’s failure to remit the final $7,082 amount to a material breach of the agreement permitting Lane to suspend performance?

Holding: No. In determining the materiality for purposes of breaching a contract, we consider §241 of the Restatement. We note that Foster failed to pay only $7,082 out of a $133,922 purchase order—this amounts to a withholding of approximately 5% of the total contract price—hardly material. Further, Foster planned to remit the monies due once it received assurance from Lane that Lane would perform Stage II of the agreement. Thus, Foster did not breach the contract. Furthermore, Lane’s failure to give Foster assurance of performance constituted an anticipatory breach. Anticipatory breach of contract occurs whenever there has been a definite and unconditional repudiation of a contract by one party communicated to another. A statement by a party that he will not or cannot perform in accordance with the agreement creates such a breach. Due to the difficulties that Lane experienced performing Stage I of the Agreement coupled with Lane’s lukewarm expression of its ability to perform, we find that Foster had reasonable grounds to demand assurance of performance. Lane refused to give such assurances and thus we find that Lane, not Foster, materially breached the contract. Repudiation = anticipatory breach. Since Lane did not materially breach, still can have a damage claim—but can’t suspend performance.

Perfect Tender Rule

**Ramirez v. Autosport** (Supreme Court of New Jersey, 1982) [902]

Facts: On June 20, 1978 the Ramirezes and Graff, a salesman for Autosport, agreed on the sale of a new camper and the trade-in of the van owned by the Ramierezes. Autosport needed two weeks to prepare the new van, but on that date, the Ramirezes returned with their checks to Autosport to pick up the van. Inspection disclosed several defects in the van and the Ramirezes were asked to return after it had been repaired. After Graff notified them that the van was ready, the plaintiffs returned to accept delivery, but workers were still touching up the outside paint and the cushions inside were soaking wet. The defendant agreed to replace the cushions and call them when the van was ready. After many inquiries, Graff finally informed the plaintiffs that they could pick up the van on September 1. When the plaintiffs went to the showroom, nobody from Autosport came for several hours so they left. One November 20, 1978, the plaintiffs sued Autosport seeking rescission of the contract.

Issue: Can Mr. and Mrs. Ramirez, plaintiffs, reject the tender by defendant, Autosport, of a camper van with minor defects and cancel the contract for the purchase of the van?

Holding: Yes. Under the UCC, the seller has a duty to deliver goods that conform precisely to the contract. Seller is under such duty to make a perfect tender and that a buyer has a right to reject goods that do not conform to this perfect tender. Because of the seller’s right to cure, however, the buyer’s rejection does not necessarily discharge the contract. Within the time set for performance in the contract, the seller’s right to cure is unconditional. If the rejection occurs after the time set for performance, the seller has further reasonable time to cure if he believed reasonably that the goods would be acceptable with or without money allowance. After acceptance, the buyer may revoke acceptance only if the nonconformity substantially impairs the value of the goods to him. Once a buyer accepts goods, he has the burden to prove any defect. By contrast, when goods are rejected for not conforming to the contract, the burden is on the seller to prove that the nonconformity was corrected. Recognizing today’s commercial reality, the Code permits a seller to cure imperfect tenders. Should the seller fail to cure the defects, whether substantial or not, the balance shifts again in favor of the buyer, who has the right to cancel or seek damages. We find that Autosport did not provide a cure.

UCC. §2-508. Cure by Seller of improper tender or delivery; replacement.

§2-601. Buyer’s rights on improper delivery.

§2-602. Manner and effect of rightful rejection.

§2-606. What constitutes acceptance of goods.

§2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach after acceptance.

§2-608. Revocation of Acceptance in Whole or in Part.

§2-711. Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods.

**FAILURE OF BASIC ASSUMPTION**

Because everyone who breaches a contract in some sense made a mistake by entering it, to permit any mistake to justify avoidance would be effectively to eliminate contractual enforcement. Restatement §151 defines a mistake as a belief that is not in accord with the facts—permitted as defense to breach of contract.

1. **MUTUAL MISTAKE**

Mutual mistake—treated as an implied condition to a contract.

**Sherwood v. Walker** (Supreme Court of Michigan, 1887) [1053]

Facts: Defendant, an importer and breeder of Angus cattle, offered to sell a certain cow, Lucy, to the plaintiff, a local bank executive. Defendant advised plaintiff that the cow in question was barren and could be purchased for $80, which represented her value as sirloin steak. By contrast, had the cow been capable of breeding her market value would have been $1000. Before plaintiff could take delivery, however, defendant learned from his ranch foreman that the cow as in fact “with calf” and refused to hand her over.

Issue: Can defendants retain the cow?

Holding: Yes. If at the time they entered into their agreement both parties did in fact believe that the cow was barren and forever useless for breeding, then the defendant had a right to rescind and refuse delivery. Under well-settled law, a contract cannot be enforced if the “whole substance” and “very nature” of the merchandise sold is different from that which the parties bargained for, if the mistaken identification was mutual, and if the dollar consequences to the disadvantaged party were significant. If the thing actually delivered and received is different in substance form the thing bargained for and intended to be sold—then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been actuating motive to the purchaser seller, or both, the contract remains binding.

Dissent: Majority opinion overstates the parties’ original convictions: defendant though the cow would never breed, but plaintiff thought she might, neither being perfectly sure. The parties were not mistaken in a legal sense, merely ignorant and uncertain, and each took his chances.

NOTES: The factor of risk-assumption is treated by most modern authorities as an integral feature of the doctrine of mistake. Restatement §152—a contract based on mutual mistake is voidable unless the adversely affected party bears the risk of the mistake—presumably, experts dealing with non-experts cannot make mistakes as to the intrinsic value of the property.

See Restatement §154. When a Party Bears the Risk of a Mistake.

A party bears the risk of mistake when: allocated by agreement, conscious ignorance, and risk allocated by the court.

Nester v. Michigan Land & Iron Co. (Supreme Court of Michigan, 1888)[1061]

Facts: Defendant entered into a written contract with the complainant, whereby the defendant sold him all the merchantable pine fit for aw logs on certain lands owned by the defendant…for the sum of $27,000. The timber was not to be cut faster than paid for. The complainant, having made but one payment, cut and carried away to his mill all the pine upon the lands. Plaintiff seeks to compel the defendant to accept but one-half of the purchase price for the timber sold, on the ground that both parties in their estimate of the equality of the timber standing upon the land when sold were mistaken, that a large portion of it was decayed.

Issue: Should the price be reduced because the pine was unexpectedly defective?

Holding: No. Complainant was a lumberman with 25 years experience, nothing in the contract can be construed into a promise or guaranty as to the quantity and quality of the logs. Further, the parties had the matter under consideration for three months before the purchase was made, and the principal question of contention during all that time was the amount of timber, of the quality desired, likely to be yielded. Evidence demonstrates that the defendant told the complainant the company would not sell promising to the purchaser any amount, and that the complainant must purchase upon his own estimate; that complainant had such estimate made by his own men; that he knew the estimate could not be made with any degree of certainty by anyone. Parties could have investigated more but did not. Does not overrule Sherwood but does seem to severely limit it—but Restatement §152 does indicate that mistake may still be relevant.

**Wood v. Boynton** (Supreme Court of Wisconsin, 1885) [1064]

Facts: Wood sold a “pretty stone” to Boynton, a jeweler, for $1. Buyer and seller both apparently believed that the stone was worthless topaz, but of course it turned out to be a diamond worth $700. Suit by the seller to rescind the transaction and recover the stone.

Issue: Does the mistake in fact of the type of stone warrant a rescission of the contract?

Holding: No. Presumably, jewelers, antique dealers and other experts in rare objects are entitled to use their expertise to make bargain purchases from the unaware, in that way earning a reward for bringing the true value of such objects to light. Being in the business, bargain purchases that are accidental or lucky for the buyer probably merit the same treatment. If Boynton would have been within his right sin making a shrewd purchase had he known the stone was a diamond, it is hard to see how his legal position could be worse because he didn’t (mutual mistake). Wood assumed whatever risk was involved in sparing herself the cost of an independent appraisal. In the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. Restatement §151.

Lenawee County Board of Health v. Messerly (Supreme Ct. of Mich. 1982) [1067]

Facts: Pickles, appellees, purchased from appellants, William and Martha Messerly, a 600-square foot tract of land upon which is located a three-unit apartment building. After the transaction was closed, the Lenawee County Board of Health condemned the property and obtained a permanent injunction, which prohibits human habitation on the premises until the defective sewage system is brought into conformance with the Lenawee County sanitation code. Clause in the contract stated: “Purchaser has examined this property and agrees to accept same in its present condition. There are no other or additional written or oral understandings.”

Issue: Does the existence of a mutual mistake warrant rescission of the contract?

Holding: No. The fact that it may be of less value than the purchaser expected at the time of the transaction is not a sufficient basis for the granting of equitable relief. This mistake, while directly and dramatically affecting the property’s value, cannot accurately be characterized as collateral because it also affects the very essence of the consideration. The things sold and bought income-generating rental property had in fact no existence. Case-by-case analysis whereby rescission is indicted when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties. Rescission is not available, however, to relieve a party who has assumed the risk of loss in connection with the mistake. A court need not grant rescission in every case in which the mutual mistake relates to a basic assumption and materially affects the agreed performance of the parties. Equity suggests that in this case, the risk should be allocated to the purchasers. The clause in the contract noted above indicates that the parties considered the risk as related to the present condition of the property should be on the purchaser (the “as is” clause). Case reflects that as between two parties, buyer assumes risks—although under §154 court has some discretion.

Restatement (Second) of Contracts. §151. Mistake Defined.

§152. When Mistake of Both Parties Makes a Contract Voidable.

§154. When a Party Bears the Risk of a Mistake.

§157. Effect of Fault of a Party Seeking Relief.

§158. Relief Including Restitution.

1. **UNILATERAL MISTAKE**

**Tyra v. Cheney** (Supreme Crt. of Minnesota, 1915) [1076]

Facts: The defendant had a contract to add to and repair a school building. Plaintiff did some work and furnished some material in performance of the contract. Plaintiff, however, claims that when bidding for the contract he left out of the written bid the cost of a $963 part that was included in an oral transmission.

Issue: Should the bidder be held to the terms of his written offer?

Holding: No. If cognizant of the mistake in plaintiff’s bid, and that the latter was unaware of its occurrence, defendant had no right to claim that, when he told plaintiff to go ahead with the work, their minds met upon the price mistakenly stated in the bid. Court does not enforce contract because there was a unilateral mistake where the contractor knew of the mistake. Restatement §153—limited circumstances where mistake of one party makes a contract voidable.

See Laidlow v. Organ: Should the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, have been communicated to the vendor? The court is of the opinion that he was not bound to communicate it. Clear that there was no fraud, but court sends back to the jury to determine if buyer imposed on seller in any way—i.e. rushing deal along.

See Restatement §160. When Action is Equivalent to An Assertion (Concealment).

§161. When non-disclosure is equivalent to an assertion.

1. **CHANGED CIRCUMSTANCES**

Impossibility and Impracticability

**Paradine v. Jane** (1647, England) [1085]

Facts: A landlord’s action to recover rent. The tenant pleads that he should be excused from payment because, during the term of the lease, he had been evicted from the land by a royalist army under the command of Prince Rupert. Defendant claims that both he and the landlord assumed that he would be able to access the land and use it—and since he was not able to do this he should be excused from paying his rent.

Issue: Should the defendant be excused because he was evicted from his land?

Holding: No. While army had been alien enemies, yet he ought to pay his rent. Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

NOTE: *Paradine* represents theory of absolute liability—Where the party by his agreement voluntarily assumes or creates a duty or charge upon himself, he shall be bound by his contract, and the nonperformance of it will not be excused by accident or inevitable necessity.

**Taylor v. Caldwell** (In the King’s Bench, 1863) [1089]

Facts: Plaintiff rented the Surrey Gardens—a music hall and outdoor dining area—from defendant for four separate days during the summer months at a rental of £100 a day. Plaintiff planned to stage musical events and other entertainments for the local folks and with this in view spent a substantial sum on the promotion, advertising and general preparation. Before any of these entertainments could be offered, however, the Surrey Gardens caught fire and burned to the ground. The disaster was no one’s fault. Claiming that the defendant had breached by failing to make the Gardens available on the agreed dates, plaintiff sued to recover an amount equal to his promotional expenditures and related outlays, now wasted. Defendant responded by arguing that he should be excused as a matter of law, performance having obviously been impossible.

Issue: Does the fact that the Surrey Gardens burned down absolve the defendant of responsibility to perform his end of the contract?

Holding: Yes. Central question is one of intent. The contract itself said nothing about what should happen in the event of a disaster, and evidently neither party raised the issue in the course of negotiations. Even so, the parties must have known that the contract could not be fulfilled if the music hall was destroyed by fire. They undertook their mutual obligations on the assumption that the Surrey gardens would be there, physically, when the time came to use it. That circumstance was plainly essential to performance on either side. Looking at the contract as a whole, therefore, and in the absence of any express provision to the contrary, the continued existence of the music hall must be regarded as a condition “by law implied.”

See Restatement (Second) of Contracts §261. Discharge by Supervening Impracticability.

§263. Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance—most common examples of impossibility are destruction.

UCC §2-613. Casualty to Identified Goods.

CNA & American Casualty v. Arlyn Phoenix (District court of appeal of Florida, 1996) [1094]

Facts: Case involves the death of the young actor, River Phoenix, before completion of two films. CNA and American Casualty had written entertainment package insurance policies covering various aspects of the two productions. The agreement with the production company apparently included a general obligation not do anything which would deprive parties to the agreement of its benefits—insurance companies allege that Phoenix deprived the parties of his services and breached his obligation by overdosig. CNA and American Casualty claim the defense of impossibility of performance does not apply because it requires that the impossibility be fortuitous and unavoidable, and that it occur through no fault of either party.

Issue: Did the defendant breach his contract by dying?

Holding: No. Not persuaded to depart from clear and unambiguous rule that death renders a personal services contract impossible to perform. In such contracts, there is an implied condition that death shall dissolve the contract. Parties could have provided specifically for the contingency of loss due to the use of illegal drugs, as they provided for other hazardous contingencies. See Restatement (Second) §262. Death or Incapacity of Person Necessary for Performance.

Transatlantic Financing Corp. v. U.S. (U.S. Court of Appeals DC, 1966) [1096]

Facts: The plaintiff, a shipping company, had entered into a contract with the United States to carry wheat to Iran. The contract price for the shipping service was $305,00, a figure that reflected the parties’ shared assumption that the cargo ship would make the voyage—some 10,000 miles—by way of the Suez Canal, which was the customary and the shortest route. While the sip was on the high seas, Egypt was attached by Britain, France and Israel and responded by closing the Canal and blocking passage to all vessels. Following inconclusive discussion with the Department of Agriculture, plaintiff’s ship was rerouted around the Cape of Good Hope, arriving in Iran several weeks later than expected, and having added 3,000 miles to the trip. Plaintiff never sought to be excused from its contract obligations—the ship did go on to Iran—but it subsequently asked the government for an additional $43,00 to cover the expense of the longer voyage. The government refused, Plaintiff argues that performance of the original contract had become impossible because of the Canal’s closing,

Issue: Do the unexpected circumstances warrant recovery for the plaintiff?

Holding: No. Three elements are necessary to justify the plaintiff’s impossibility claim: 1) an unexpected occurrence, 2) a failure to have allocated the risk of that occurrence by agreement or by custom, and 3) commercial impracticability with respect to the performance of the plaintiff’s obligations. Both parties expected the ship to follow the usual and customary route, which was through the Canal Suez. Hence the need to travel around the Cape qualified as an unexpected occurrence (1st condition is the only one the court finds is met). As to risk allocation, the Court felt that the tensions in the Middle East, alerted both defendant and plaintiff to abnormal risks in going through the Suez. Assuming the parties were equal in that respect, the plaintiff, as an experienced shipping company, would still be better able to estimate the added cost of performing by alternative routes. In any event, the actual variation in cost was fairly modest—less than 15% of the total contract price—so that performance could not be said to have been commercially impracticable from a purely financial standpoint. Finally, there is an inconsistency in the plaintiff’s litigating position—seeks to reinforce the basic contract but also demands noncontractual relief. The claim of impossibility, however, is all-or-nothing—either the contract should be treated as wholly discharged—in which even the entire voyage would be compensated—or the contract should be viewed as binding and the plaintiff should be limited to the contract price—apparently the contract price was too good to give up. Post-contractual change in the market price of promised goods and services is generally an expected element in any forward exchange. This is a case where the event has reduced the market value of performance in a way not anticipated, as opposed to an impossibility that renders performance physically impossible. Indicates that if the transaction is one in which it is possible for you to get goods from another source, then not impossible to complete contract (unless you specify in contract that it will specifically be your goods, i.e. your cows). Impracticability—some kind of change makes it much more burdensome for you to perform the contract.

See. UCC. §2-615. Excuse by Failure of Presupposed Conditions.

**4. FRUSTRATION OF PURPOSE**

In frustration cases, nobody is saying that the transaction can’t go forward. See Restatement (Second) of Contracts. §265. Discharge by Supervening Frustration.

**Krell v. Henry** (Ct. App. 1903) [1101]

Facts: Queen Victoria having at long last gone to her reward, the coronation of her son, soon to be Edward VII, was jubilantly planned for the end of June, 1902. The coronation procession was to pass along Pall Mall on June 26 and June 27. Krell, the owner of a flat situated along the street of the coronation route, agreed to let his chambers to Henry for the two daytime periods at a fee of £75, of which £25 was paid in advance as a deposit. Edward suffered a sudden attack of appendicitis, however, and the coronation had to be postponed. Henry, in consequence, refused to pay the balance of the rent.

Issue: Did the failure of the coronation to actually occur warrant the rescission of the contract?

Holding: Yes. The case is controlled by *Taylor v. Caldwell.* Concededly, Krell’s apartment, unlike Surrey Gardens, continued to exist, and Henry could have gone and spent two days looking at the vacant streets if he wanted to. But the undeniable purpose of the agreement was to provide a view of the great procession. That goal having been frustrated by the King’s illness, the foundation of the contract was eliminated. Performance effectively became impossible; hence the contract was discharged. Restatement §265 specifically approves the result in *Krell*, treating the case as one of supervening frustration. Clear that under frustration doctrine, party whose purpose was frustrated gets out of executor performance (although court did not deal with this, deposit could be seen as unjust enrichment).

**Lloyd v. Murphy** (Supreme Crt. of Cali. 1944) [1107]

Facts: Plaintiffs leased premises to defendant for a five-year term for the sole purpose of displaying and selling new automobiles (including service and repair) and of selling gas. On January 1, 1942 the government ordered that the sale of new automobiles be discontinued. Due to this occurrence, plaintiff orally waived the restrictions in the lease as to use and subleasing and offered to reduce the rent. Nevertheless, defendant vacated the premises

Issue: Does the principal of frustration apply to this case and serve as an excuse for nonperformance of the lease?

Holding: No. Frustration is not a form of impossibility—performance remains possible but the expected value of the performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration. The promisor seeking to excuse himself from performance must prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed. It cannot be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles was so remote a contingency that its risk could not be foreseen by defendant, an experienced automobile dealer—gives rise to inference that risk was assumed. Furthermore, defendant could have continued to sell automobiles or subleased the property. No frustration because 1) foreseeable and 2) could have done something else with the land.

**POLICING THE BARGAIN**

**1. OBTAINING ASSENT BY IMPROPER MEANS**

Misrepresentation

**Halpert v. Rosenthal** (Supreme Court of Rhode Island, 1970) [966]

Facts: On February 21, 1967 plaintiff agreed to convey a one-family house to the defendant for the sum of $54,000. Defendant paid a deposit of $2,000. The agreement provided for delivery of the deed and payment of the balance of the purchase price by June 30, 1967. On May 17, 1967, a termite expectation was made, and it was found the house was inhabited by termites and because of this defendant notified plaintiff he was not going to purchase property.

Issue: Does the plaintiffs innocent misrepresentation of a material fact—namely, that the house did not have termites—warrant the granting of a claim for rescission?

Holding: Yes. Where one induces another to enter into a contract by means of a material misrepresentation, the latter may rescind the contract. It does not matter if the representation was innocent or fraudulent. A misrepresentation amounts to an assertion that is not in accordance with the facts, and it is material when it becomes likely to affect the conduct of a reasonable man with reference to a transaction with another person. Further, a misrepresentation, even though innocently made, may be actionable, if made and relied on as a positive statement of fact. Defendant was amply justified in believing that the home he was purchasing was free of termites—relief warranted (burden on person who makes false statement). Case demonstrates the difference between fraudulent and material misrepresentation.

NOTES: Claim of misrepresentation works as a shield—can rescind the contract. Normally can’t get reliance damages—contract is voidable. “As is” clause might trump misrepresentations—explicitly contracting out definitely would.

See Restatement (Second) of Contracts

§159. Misrepresentation Defined.

§162. When a Misrepresentation is Fraudulent or Material.

§164. When a Misrepresentation Makes a Contract Voidable.

§167. When a Misrepresentation is an Inducing Cause.

**Byers v. Federal Land Co.** (8th Cir., 1924) [972]

Facts: The defendant Federal Land Company and the plaintiff entered into a written contract whereby plaintiff would purchase from Federal Land Company 320 acres of land in Wyoming, for which he was to pay $2,800 in cash and a balance of $8,400, with interest, in 50 semiannual installments. Federal Land Company agreed to convey to plaintiff the land mentioned when the plaintiff made all of these payments. Plaintiff contends that Federal Land Company induced him to sign the contract by fraudulently representing to him that, 1) Federal Land Company was the actual owner of the land and 2) it was in possession of the land; and 3) that the land was of the value of $35 per acre (it is actually worth about $15 per acre).

Issue: Is rescission of contract warranted based on fraudulent misrepresentation by the defendant regarding 1) ownership of the land, 2) worth of land, or 2) possession of the land?

Holding: 1) No. Land was owned by another company. The plaintiff did not prove the inability of the Federal Land Company to comply with its contract to “convey or cause to be conveyed” this land. The representation as to ownership was not material misrepresentation to the plaintiff under these circumstances. Not material because could acquire legal title whenever they wanted.

2) No. An honest opinion as to the monetary value of property, stated as opinion is not fraudulent misrepresentation. A statement of the value of property for which there is a generally accepted market price, such as bonds of the government, may be a misrepresentation of fact. A statement of monetary value of property with no definite market value, such as a mine or invention, is generally made and understood as an expression of opinion only, and not as a representation of fact. Brokers intended price as mere opinion and purchaser of lands of this nature would understand that no definite value can be assigned.

3) Yes. The statement that possession would be given to the plaintiff at once, coupled with the making of the lease, whereby Carpenter assumed to take the land as lessee after the 1st of March, and to plough it, and to pay rent to plaintiff for five years, was intended to convey the impression that possession was held by the Federal Land Company. This misrepresentation was material because of the value of such possession during the long period that the contract might continue, and the substantial amount of rent to be paid.

**Vokes v. Arthur Murray Inc.** (District Court of Appeal Florida, 1968) [975]

Facts: Defendant Arthur Murray operates dancing schools throughout the nation. Plaintiff Ms. Vokes was sold fourteen “dance courses” totaling in 2,302 hours of dancing lessons for $31,090, over the course of several months. Plaintiff was persuaded to buy these dance classes by false representations from the instructor that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace.

Issue: Can the defendant rescind the contract for fraud or misrepresentation?

Holding: Yes. It is true that generally a misrepresentation, to be actionable, must be one of fact rather than of opinion. But this rule has exceptions, such as when there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact presented. Further, a statement of a party having superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms. It could reasonably be supposed that defendants had “superior knowledge” as to whether the plaintiff had dance potential—may be material if from an expert.

See Restatement (Second) of Contracts.

§168. Reliance on Assertions of Opinion.

§169. When Reliance on an Assertion of Opinion is not Justified.

Duress

An assessment of when threats of various sorts should allow someone to rescind a contract because there was too much pressure—originally limited to physical threats.

**Hackley v. Headley** (Supreme Crt. of Michigan, 1881) [984]

Facts: Headley sued Hackley & McGordon to recover compensation for cutting, hauling, and delivering in the Muskegon river a quantity of logs. Headley claims he accepted a lower price for the logs than he was owed because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered him.

Issue: Was the receipt obtained by duress?

Holding: No. Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances that deprive him of the exercise of free will. But where the party threatens nothing which he has not a legal right to perform, there is no duress. The duress here is found exclusively in the debtors refusal to meet promptly their pecuniary obligation. This would not have constituted duress if he had not happened to be in pecuniary straits. Holding for the plaintiff would import an unequal doctrine—no one would know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need. Court’s holding—it is ok to take advantage of financial circumstances so long as you did not create them—bargaining.

**Austin Instrument v. Loral Corp.** (Court of Appeals of N.Y., 1971) [988]

Facts: Loral awarded a subcontract to Austin for the to supply 23 of 40 of the precision gear parts required to make radars for the Navy. In May, 1966, Loral was awarded a second Navy contract for more radars. The Austin officer refused to accept an order for less than all 40 of the gear parts and told Loral that Austin would cease deliveries of all the parts due under the existing subcontract unless Loral consented substantial increases in the prices provided for by that agreement. Shortly thereafter, Austin stopped delivery. After contacting 10 manufacturers of precision gears and finding none who could produce the parts in time to meet its commitments to the Navy, Loral finally agreed to Austin’s demands (for all 40 gears and for the price increase). Subsequently, Loral refused to complete payments under the second contract.

Issue: Was the Loral subject to economic duress?

Holding: Yes. Austin’s threat to stop deliveries confronted Loral with the danger of liquidated damage claims or cancellation by the Navy as well as loss of standing as a defense contractor, all of which deprived Loral of its free will. Hence, the contract modification was voidable on grounds of duress. Further, money damages (i.e. going to court later) would have been inadequate and Loral could not have obtained the gear parts from other sources in time to meet its obligations to the Navy. Duress because buyer had no alternative source of supply.

**U.S. v. Progressive Enterprises** (U.S. District Crt. E.D. of Virg., 1976) [992]

Facts: Plaintiff, Crane Company submitted a written proposal to furnish a cast iron deaerator to defendant for $5,238, the price quoted as firm for acceptance within 15 days. After the expiration of the 15-day period, Progressive submitted its bid for the government contract without arranging for an extension of the 15-day period. Progressive was awarded the government contract and shortly afterwards verified the continued effectiveness of the quoted price. Crane advised Progressive that due to rapidly escalating material costs, the purchase order could only be accepted at a price of $7,350. Progressive agreed to the higher price, but later refused to pay the increased price, claiming that it was under economic duress.

Issue: Was Progressive under economic duress, making the modification invalid?

Holding: No. First, Progressive was not relying on the lower price quoted because the time-period for acceptance had expired—thus was not in a position in where it relied on the price only to find itself squeezed by repudiation of the quoted price. The evidence further shows that Progressive at no time protested the increased price, or in any way attempted to enforce the terms of the earlier, lower price contract. A buyer must at least display some protest against the higher price in order to put the seller on notice that the modification is not freely entered into.

See Restatement §175. When Duress by Threat Makes a Contract Voidable.

§176. When a Threat is Improper.

Undue Influence

Ordorizzi v. Bloomfield School Dis. (Dis. Crt. of App. Cali., 2nd Dis., 1966) [996]

Facts: Plaintiff Odorizzi was employed as an elementary school teacher by defendant Bloomfield School District. On June 10th he was arrested on criminal charges of homosexual activity and on June 11th he signed and delivered to his superiors his written resignation as a teacher. The criminal charges were eventually dropped, and September he sought to resume his employment at the school. On the district’s refusal to reinstate him, he filed suit for relief. Odorizzi’s complaint alleges that his resignation was invalid because it was obtained through duress, fraud, mistake, and undue influence—Odorizzi declares that he was under severe mental and emotional strain at the time of the arrest, and while he was in this condition and unable to think clearly, the superintendent of the district and the principal of his school came to his apartment and told him that if he did not resign immediately the district would suspend and dismiss him from his position and publicize their proceedings—but that resigning would avoid humiliation and not jeopardize his chances of securing employment elsewhere.

Issue: Is the resignation void due to 1) duress, 2) menace, 3) fraud, 4) mistake, or 5) undue influence?

Holding: 1 and 2) No. Duress consists in unlawful confinement of another’s person, or relatives, or property, which causes him to consent to a transaction through fear. Because the action or threat in duress or menace must be unlawful, and the threat to take legal action here is not unlawful—the announced intention to initiate suspension and dismissal proceedings under the Education code was not only their legal right but their positive duty as school officials—therefore there can be no menace or duress.

3) No. Actual fraud involves conscious misrepresentation or concealment or nondisclosure of a material fact that induces the innocent party to enter the contract—complaint fails to assert the elements of knowledge of falsity, intent to induce reliance, and justifiable reliance. Constructive fraud arises on a breach of duty by one in a confidential or fiduciary relationship to another that induces justifiable reliance by the latter to his prejudice—no presumption of a confidential relationship arises from the bare fact that parties to a contract are employer and employee.

4) No. Mistake—the doctrine of mistake customarily involves such errors as the nature of the transaction, the identity of the parties, the identity of things to which the contract relates, or the occurrence of collateral happenings.

5) Yes. Undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. Whether a person of subnormal capacities has been subjected to ordinary force or a person of normal capacities subjected to extraordinary force, the match is equally out of balance. Pattern of undue influence usually goes as follows: 1) discussion of the transaction at an unusual or inappropriate time, 2) consummation of the transaction in an unusual place, 3) insistent demand that the business be finished at once, 4) extreme emphasis on untoward consequences of delay, 5) the use of multiple persuaders by the dominant side against a single servient party, 6) absence of third-party advisers to the servient party, and 7) statements that there is no time to consult financial advisers or attorneys. Representatives of the school board undertook to achieve their objective by overpersuasion and imposition to secure plaintiff’s signature but not his consent to resignation through a high-pressure carrot-and-stick technique. Undue influence has to do with process—not with rationality decision itself.

See Restatement §177. When Undue Influence Makes a Contract Voidable.

Unconscionability

An uncconscionability claim is easy to make, but rarely successful because the courts use a very tough standard. Today there are two dimension to an unconscionability doctrine: 1) procedural unconscionability: took place at the making of the contract, weakness in bargaining process; and 2) substantive unconscionability: evils in the resulting contract, the terms of the extraordinarily harsh or unfair. Unconscionability is determined at the time the contract is entered into.

Williams v. Walker-Thomas Furniture Co. (D.C. Court of Appeals 1965) [1009]

Facts: Company, a retail store, sought to repossess various household items that it had sold to Williams, a welfare recipient, over a period of some five years. Each sale (including the last, a stereo set sold for $541.95) was on credit. The printed form purchase agreement contained a so-called cross-collateral or “dragnet” provisions of which the purpose was to secure the customer’s indebtedness by empowering the Company, in the event of a default, to repossess not only the particular item (say the stereo set) to which the indebtedness related, but every other article purchased from the Company on which any balance remained due at the time the latest purchase was made. In contract, company stated that all payments made by the purchaser shall be credited pro rata on all outstanding leases, bills and accounts due at the time the payment was made—ensuring that no single credit got fully paid off. Williams having defaulted on the stereo installments, the Company sought to take back all of the merchandise it had ever sold her. Williams claimed the cross-collateral provision was unconscionable and therefore unenforceable.

Issue: Is the defense of unconscionabilty available to the defendant?

Holding: Yes, it is available as a matter of common law and requires no specific statutory authorization. Unconscionability means or includes two salient factors: 1) an absence of meaningful choice on the buyer’s part (in effect), and 2) the presence of contract terms “unreasonably favorable” to the seller. Meaningfulness of choice might be negated by the manner in which the contract was entered into—did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized to the point of deceptive sales practices? Where the contract terms are found to be commercially unreasonable and so unfair, enforcement should be refused. Where the circumstances indicate that one party did not, or could not, fully comprehend the meaning of the contract, then the court is free to use its own judgment to determine whether the contract terms are fair. Thus, the threshold issue in *Walker-Thomas* is whether the Company made the cross-collateral provision clear to Ms. Williams at the time she signed the form contract—court concludes that there is a procedural unconscionability issue—capacity of buyer v. seller is at issue.

See UCC §2-302. Unconscionable Contract or Clause.

Restatement §208. Unconscionable Contract or Term.

In re Realnetworks (N.D. Ill, E.d. 2000) [1018]

Facts: Intervener argues that the License Agreement is procedurally unconscionable because it failed to provide fair notice of its contents and did not provide a reasonable opportunity to understand its terms before it was enforced.

Issue: Is the contract unconscionable?

Holding: No. Although the burying of important terms in a maze of fine print may contribute to a contract being found unconscionable, the arbitration provision in the License Agreement is not buried. Because the arbitration agreement is not buried in fine print, and because the user is given ample opportunity to understand the arbitration provision, the Court does not find that the arbitration agreement is procedurally unconscionable. Also, requirement of arbitration is a totally legitimate provision.

Discover Bank v. Superior Court (Cal. Supreme Court 2005) [1020]

Facts: Plaintiff Christopher Boehr obtained a credit card from defendant Discover Bank in April 1986. Discover Bank subsequently added the arbitration clause in July 1999, pursuant to the change of terms provision in the agreement, and added the arbitration clause by sending to its existing cardholders a notice. The arbitration clause precluded classwide arbitration. The cardholders continued use of the account was deemed to constitute acceptance of the new terms. On August 15, 2001, Boehr filed a class action alleging that Discover Bank breached its cardholder agreement by imposing a late fee on payments that were received on the payment due date, but after Discover Bank’s undisclosed 1 pm cut-off time. Discover moved to dismiss the class action pursuant to arbitration agreement’s class action waiver.

Issue: Is the contract unconscionable?

Holding: Yes. Procedural element of unconscionablity focuses on oppression or surprise due to unequal bargaining power, while substantive unconscionabiltiy focuses on overly harsh or one-sided results. The procedural element generally takes the form of a contract of adhesion, which imposed and drafted by the party of superior bargaining strength, regulates to the subscribing party only the opportunity to adhere to the contract or reject it. Some class action waivers are unconscionable under California law when: 1) a consumer is given an amendment to its cardholder agreement in the form of a bill stuffer that he would be deemed to accept if he did not close his account, an element of procedural unconscionablity is present; and 2) class action clauses that act as exculpatory contracts clauses. Because damages in consumer cases are often small, because the company will reap a handsome profit from the small amount it takes from each consumer, and because the class action is often the only effective way to halt and redress such exploitation—can be exculpatory. In disputes involving small amounts, when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money, the waiver becomes in practice the exemption of the party from responsibility for its own, fraud, or willful injury to the person or property of another—unconscionable.

Dissent: Not exculpatory because many other means by which Discover Bank could be called to account for the mischarges to the plaintiff: 1) cardholder may contact the bank and attempt to resolve the matter informally; 2) individual arbitration process; 3) small claims court; 4) Attorney General could bring claim on behalf of the public; and 5) highly regulated industry.

Gatton v. T-Mobile USA, Inc. (Cal. Crt. of Appeals, 2007) [1026]

Facts: Plaintiffs were subscribers to T-Mobile. All plaintiffs executed service agreements drafted by T-Mobile. The terms and conditions incorporated into each of the plaintiff’s agreements included a mandatory arbitration clause including a class action waiver. Plaintiffs challenge the $200 per telephone fee imposed by T-Mobile for termination of the service agreement before its expiration. Two of the plaintiffs also challenge the practice of installing a locking device in T-Mobile handsets that prevents its subscribers from switching cell phone providers without purchasing a new handset.

Issue: Is the arbitration clause unconscionable?

Holding: Yes. To be unenforceable a contract must be both procedurally and substantively unconscionable, but the elements need not be present in the same degree. Analysis employs a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionbaility is required to come to the conclusion that the term is unenforceable, and vice versa. Procedural element of contract focuses on oppression or surprise. Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise is the extent to which the supposedly agreed-upon terms of the contract are hidden in the maze of the printed form. No surprise here—the arbitration provision was not disguised or hidden, and T-Mobile made an affirmative effort to bring the provision to the attention of its customers. California Supreme Court has, however, consistently held that the procedural element of an unconscionable contract generally takes the form of a contract of adhesion. A contract of adhesion is imposed and drafted by the party of superior bargaining strength and relegates to the subscribing party on the opportunity to adhere to the contract or reject it. We reject the notion that the existence of a market choice altogether negates the oppression aspect of the procedural unconscionability—it is relevant, but it is not determinative of the entire issue. Use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives. If the challenged provision does not have a high degree of substantive unconscionabilty, it should be enforced. In the consumer context, class actions and arbitrations are often inextricably linked to the vindication of substantive rights—thus class action waiver has a high degree of substantive unconscionability. Arbitration provision therefore unconscionable.

Dissent: I cannot agree that the contract is procedurally unconscionable—a contract of adhesion is not per se unconscionable. Plaintiffs were fully appraised of the terms of the service agreement, and they did not present evidence of a lack of meaningful alternative sources or other arrangements to meet their cellular telephone needs—thus, T-Mobile’s conduct cannot be deemed oppressive.

NOTE: implication of AT&T is that it is unlikely that waivers of class actions will be held unconscionable.

**LONG TERM CONTRACTS**

Discrete contracts are characterized by their short duration, limited personal interactions and precise party measurements of easily measured objects of exchange. Thus, discreteness refers to the idea that each transaction can be viewed as an identifiable event at a particular moment in time that is entirely separate from any other transaction. Presentation refers to the idea that every future contingency can be reduced to a present expectation during a magical moment of contract conception. Intertwined contracts are of a significant duration and participants never intend or expect to see the whole future of the relation.

Classical contract theorists look largely to assent at the time of the formation to determine the meaning of the contract that may extend long into the future. Relational contract theory views a contract as existing within a complex web of relations that color and influence its meaning. Neoclassical contract theory attempts to qualify classical contract with relational considerations—for example, by taking course of dealing and performance and usage of trade into account when interpreting assent. Next case takes a more relational approach.

Aluminum Company of America v. Essex Group, Inc. (W.D. Penn. 1980) [1115]

Facts: Plaintiff, Aluminum Company of America (ALCOA), brought this action against defendant, Essex Group. In 1966 Essex made a policy decision to expand its participation in the manufacture of aluminum wire products. Under agreement, Essex was to deliver alumina to ALCOA which ALCOA smelts into molten aluminum and then Essex would pick it up. The escalation formula indicates that $.03 per pound of the original price escalates in accordance with changes in the Wholesale Price Index-Industrial Commodities (WPI) and $.03 per pound escalates in accordance with an index based on the average hourly labor rates paid to ALCOA employees a the Warrick plant. The portion of the pricing formula that is in issue in this case is the production charge that is escalated by the WPI. ALCOA asserts that the agreement was incapable of reasonably reflecting changes in the non-labor costs at ALCOA’s plant. ALCOA sought, when it made the contract, to achieve a stable net income of about 4 cents per pound of aluminum converted. OPEC actions to increase oil pries and unanticipated pollution control costs greatly increased ALCOA’s electricity costs—electric power is the principal non-labor cost factor in aluminum conversion. As a result, ALCOA’s production costs rose greatly and unforeseeably beyond the indexed increase in the contract price—stands to lose in excess of $75 million during the remaining term of the contract.

Issue: Is ALCOA entitled to relief due to impracticability?

Holding: Yes. The strict standard of severe disappointment required for impracticability to be found are clearly met in the present case—ALCOA will lose well over $60 million dollars out of pocket over the life of the contract. Unlike *Transatlantic*, where the judge found that there must be more than a 12 percent cost increase to constitute impracticability, here ALCOA’s loss is more than a thousand times greater than the carrier’s loss. AND the circumstances show a deliberate avoidance of abnormal risks. With regards to remedy, to decree rescission in this case would be to grant ALCOA a windfall to gain in the current aluminum market and at the same time deprive Essex of the assured long term aluminum supply which it obtained under the contract. In cases like the present one modification and enforcement may be the only proper remedy. The Court’s role here is limited to framing a remedy for a problem they did not foresee and provide for—perhaps will incentivize businessmen to negotiate their own resolution to problems which arise in the life of long term contracts. If parties know that in extreme cases courts will adjust—that is going to facilitate negotiations between parties and lead to less litigation. Bargaining in the shadow of a court that has the power to adjust it better than in one that is strictly adhering to traditional contract doctrine.

Northern Indiana Public Service Co. v. Carbon County Coal (7th cir. 1986) [1125]

Facts: NIPSCO, an electric utility, and Carbon County Coal Company, entered into a contract whereby Carbon County agreed to sell and NIPSCO agreed to buy approximately 1.5 million tons of coal every year for 20 years, at a price of $24 a ton subject to various provisions for escalation which by 1985 had driven the price up to $44 a ton. The price fixed was a floor. Unfortunately, the market turned and NIPSCO became able to buy electricity at prices below the costs of generating electricity from coal. So NIPSCO decided to stop accepting coal from Coal County, and brought this suit to be excused from its contract either under the contract’s force majeure clause or under the doctrines of frustration and impossibility. Force majeure clause: NIPSCO may stop taking delivery of the coal for any cause beyond its reasonable control. NIPSCO argues that the Indiana Public Service Commission’s economy purchase order prevented it from using the coal it agreed to buy—these orders were that NIPSCO was not allowed to pass on fuel costs to its ratepayers in the form of higher rates if it can buy electricity cheaper than it can generate electricity internally using Carbon County’s coal.

Issue: Is the contract voidable?

Holding: No. A force majeure clause interpreted to excuse the buyer from consequences of a risk he expressly assumed would nullify a central term of the contract—the risk that has come to pass was one that NIPSCO voluntarily assumed when it signed the contract. Rarely is it impracticable or impossible for the payer to pay; but if something has happened to make the performance for which he would be paying worthless to him, an excuse for not paying, analogous to impracticability or impossibility, may be proper—frustration. The facts of the present case do not bring it within the frustration doctrine. Since impossibility and related doctrines are devices for shifting risk in accordance with the parties’ presumed intentions, they have no place when the contract explicitly assigns a particular risk to one party or the other. A fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer, and the assignment of the risk to the buyer is even clearer when there is a price floor. Furthermore, no specific performance because it would be a continuation of a production that has become uneconomical—imposing costs on society greater than benefits.