**Contracts Outline**

**Formation Doctrines**

* **Traditional**
  + **Offer**
  + **Acceptance**
  + **Consideration**
* **Reliance**
  + **Promissory Estoppel**
  + **Pre-Acceptance Reliance**
  + **Non-K Formation Doctrines**
    - **Restitution**
    - **Promissory Restitution**

**Defeater Doctrines**

* **Statute of Frauds**
* **Duress/Undue Influence**
* **Fraud**
* **Misrepresentation**
* **Non-Disclosure**
* **Unconscionability**
* **Public Policy**
* **Mistake**
* **Bilateral**
* **Unilateral**
* **Changed Circumstances**
* **Impossibility/Impracticability**
* **Frustration of Purpose**

**Term Settling Doctrines**

* **\*Duty to Read\***
* **Battle of the Forms**
* **Parol Evidence**
* **Implied Terms**
  + **Implied in Fact**
  + **Implied in Law**
    - **Good Faith/Fair Dealing**
    - **Warranties**
* **Modifications**
* **Breach and Conditions on a K**

**Damages**

* **Expectation Damages**
* **Non-Recoverable Damages**
* **Reliance Damages**
* **Specific Performance**
* **Liquidation Damage**

Brewer-isms

Internal Consistency

Rhetorical Strength

Dialectical Strength

Inference to the best Legal Explanation

Logical Shortcut

Enthymemes

Rulify

Rule Playing Options

Romantic

Classical

|  |
| --- |
| **Glossary** |
| O = **o**ffer  A = **a**cceptance  C = **c**onsideration  K = contract (*I.e.*, **an enforceable promise**)  D = defeater doctrine  P = There is a **p**romise  E = There is a promise which the promisor should reasonably **e**xpect to induce action or forbearance on the part of the promisee or third person.  B = There is a promise which does induce such action or for**b**earance on the part of the promisee or a third person.  I = **I**njustice can be avoided only by enforcement of the promise. |

Master Equation:

K = K

F = Formation Doctrine #1

R = Formation Doctrine #2

D = Defeater Doctrines

**(F + ~D) or R 🡨🡪 K**

**Exam Algorithm:**

1. Are O, A, and C true?
   1. Yes? There is a prima facie contractual obligation (“PFCO”).
      1. If PFCO, are all sufficient conditions for any defeater doctrines true?
         1. Yes? Are the sufficient conditions of any reliance-based rules (R2d §§ 90, 87(2), 45, 139) true?
            1. Yes? There is a **K**, go to **(2)**.
            2. No? The K has been “defeated”, there is no K.
         2. No? There is a **K**. ***But***, check whether the sufficient conditions for any reliance-based rule are also true anyway, then go to **(2)**.
   2. No? Are the sufficient conditions of any reliance-based rules (as above) true?
      1. Yes? There is a **K**, go to **(2)**.
      2. No? There is no K.
2. If at any point there is a K, assess whether there has been a failure to perform by one of the parties. If so, the other party *may* be entitled to damages (damages are due when **there is a non-excused non-performance of a K**)

Classical v. Romantic and Rule Playing Options

**Three** overlapping, overarching (**BIG**) issues in K law

1. "Autonomy" vs. "Heteronomy" – whose judgment of preference, policy, or principle is to be given effect (parties, trial court, appellate court, legislature, administrative agency?)
2. Unequal capacities (Sophistication. Bargaining Power, Etc.)
3. Allocation of risk

The rationales below are how courts approach the **three** big issues in K law.

~**Classical Rationales**~

* "Laissez faire"
* Anti-paternalistic
* Parties as autonomous self-insurers and self-protectors
* "Man as an island"
* Judicial Role: judge as neutral referee
* Obligation ≈ only b/c of "objectively" provable deliberate clear bargained for promises
* Principal C *rationale* for enforcing a promise: bargained for exchange
* Principal C *rule* for determining whether putative K is actual K: "Consideration" (*See* R2d. § 71: Consideration as a bargained for exchange)

**~Classical Rule Playing~**

* Interpret Romantic rule narrowly
* Interpret Romantic rule Classically
* Interpret Classical rule broadly
* Adopt a Classical rule
* Reject a Romantic rule

~**Romantic Rationales**~

* Communitarian
* Paternalistic
* Parties as "heteronymous" guardians with (enforced) FD toward one another
* Every man "his brother's keeper"
* Judicial Role: judge as roving fairness and "field-leveling" commissioner
* Obligation b/c of benefit conferred ("quasi-contract") or reliance foreseeably induced – even reliance on bargained for exchanges (thus "K" special case of tort – "contort" idea, K as civil liability for promissory behavior)
* Principal R *rationale* for determining whether a putative K is actual K: do "justice" *in the individual case*
* Principal R *rule* for determining whether putative K is actual K: "PE" (*See* R2d § 90)

**~Romantic Rule Playing~**

* Interpret Classical rule narrowly
* Interpret Classical rule Romantically
* Interpret Romantic rule broadly
* Adopt Romantic rule
* Reject Classical rule

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Gives narrow interpretation of Romantic rule** | **Gives Classical interpretation of Romantic rule** | **Gives broad interpretation to Classical rule** | **Adopts Classical rule (when rule didn’t seem to exist in juris.)** | **Rejects adoption of Romantic rule** |
| **Classical judge** | *James Baird* on promissory estoppel  *Mills* on promissory restitution    *Wright* dissent (probably better phrased, gave literal interpretation to promissory estoppel statute, especially to "injustice" prong)  *Malaker* , interpretation of "promise" prong of p.e. to mean, "there is a clear and definite promise" (see *Pop's Cones*, *Problems*, 132.4) | *Maryland National Bank on Restatement (First) of Contracts § 90*  *Howard*  *Berryman* |  |  | *Monge* dissent |
|  | **Gives narrow interpretation of Classical rule** | **Gives Romantic interp. of Classical rule** | **Gives broad interpretation to Romantic rule** | **Adopts Romantic rule (when rule didn’t seem to exist in juris.)** | **Rejects adoption of a Classical rule** |
| **Romantic judge** | *Monge majority employment at will rule* | Cardozo, Allegheny College, rules for consideration vs. gratuitous promise  Cook v. Coldwell Banker , rules for "acceptance" of offer for a unilateral contract – see below, discussion of Cook court's "Romanticization" of rules for unilateral contract | Wright majority and concurrence (replacing "injustice can be avoided only by enforcing the promise" with "there is an injustice")  Cloutier?  Webb on promissory restitution  Drennan? amalgam of § 45 and § 90 (also may count as adopting a new Romantic rule)  Pop's Cones  Hoffman (discussed in Pop's Cones and Note 2 after) | Monge majority  Shoemaker  Drennan?, (also may count as giving broad interpretation to existing Romantic rule rules, "§ 90 exists in this state")  Alyeska |  |

Bilateral v. Unilateral Ks

Bilateral K: promise in exchange for a promise.

* **Offer:** The initial promise.
* **Acceptance:** The return promise.
* **Consideration:** Each promise is consideration for the other promise.

Unilateral K: promise in exchange for performance.

* **Offer:** The initial promise.
* **Acceptance:** Completion of performance.
  + Offer is therefore **revocable** prior to completion of performance.
    - Classical: accepts this. *Petterson v. Pattberg*
    - Romantic: provides option for partial performance. R2d § 45
* **Consideration:** For promisor: Gets performance; For promisee: gets the promise

Unclear whether K is bilateral or unilateral?

* R2d § 32: If there is doubt whether an offer is unilateral or bilateral, then the offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

*Monge* Trilogy

*Monge* Majority (Romantic): ***If***

1. An employment K is at will;
2. The K is terminated; and
3. The termination is motivated by (a) bad faith; (b); malice; or (c) retaliation,

***Then*** the employment K has been breached.

*Monge* Dissent (Classical): ***If***

1. An employment K is at will,

***Then*** the K is terminable at any time by either party for good cause, bad cause, no cause or for any or no reason at all. (Original rule)

* If an employment K is for an indefinite period of time, then K is presumed to be at will.

*Howard* Majority (Classical): ***If***

1. An employment K is at will;
2. The K is terminated;
3. The termination is motivated by (a) bad faith; (b) malice; or (c) retaliation; and
4. The termination was so motivated because the employee performed (x) an act that public policy would encourage; or (y) refused to do that which public policy would condemn,

***Then*** the employment K has been breached.

*Cloutier* Majority (Romantic): ***If***

1. An employment K is at will;
2. The K is terminated;
3. The termination is motivated by (a) bad faith; (b) malice; or (c) retaliation; and
4. The termination was so motivated because the employee performed (x) an act that public policy would encourage; or (y) refused to do that which public policy would condemn,

***Then*** the employment K has been breached.

* Public policies may be non-statutory.

*Cloutier* Dissent (Classical): ***If***

1. An employment K is at will;
2. The K is terminated;
3. The termination is motivated by (a) bad faith; (b) malice; or (c) retaliation; and
4. The termination was so motivated terminated because the employee performed (x) an act that *a strong and clear* public policy encourages; or (y) refused to do that which *a strong and clear* public policy condemns

***Then*** the employment K has been breached.

* “Strong and clear public policy” essentially means a statutory public policy

**Formation Doctrine #1: Offer, Acceptance, Consideration**

**If (a) offer; (b) acceptance; and (c) consideration, then enforceable K UNLESS . . . defeater doctrine**

Offer and Acceptance

**Objective inquiry: whether there was an O or A is an objective inquiry.**

* **Test:** What would a reasonable person in the position of the parties have thought it meant? *Ray v. Eurice* (Classical)

**R2d § 50** (Acceptance of and Offer):

1. (**Definition**) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer [itself].
2. **Acceptance by performance** (I am looking at you Unilateral Ks) requires that at least part of what the offer request performed or tendered and includes acceptance by a performance which operates as a return promise.
3. **Acceptance by a promise** (Now you Bilateral Ks) requires that the offeree complete every act essential to theming of the promise.

**R2d § 33** (Certainty):

1. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
2. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
3. The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

~**Bilateral**~

*Lonergan* (Classical): If a person (a) to whom a promise or manifestation has been made; (b) knows or has reason to know the promisor does not intend it as an expression of his fixed purpose until he has given a further expression of assent, then the promisor has not made an offer.

*Izadi* (Romantic): An allegedly binding offer must be viewed as a whole, with due emphasis placed upon each of what may be inconsistent or conflicting provisions.

* **As applied:** Ignored fine print–contrary to the requirement that the court consider *all* provisions of the K–and held that a reasonable person would have thought as Izadi did.
  + Court uses reasonableness to allow for ignoring fine print when considering “whole” K.
    - Romantic court being paternalistic: not holding consumer responsible for not reading the print.

~**Unilateral**~

*Petterson v. Pattberg* Majority(Classical): ***If***

1. The K is unilateral; and
2. The requested performance has not yet been completed,

***Then*** the offeror may revoke the offer.

* Performance constitutes acceptance of a unilateral K.
* Rule applies even offeror knows the offeree is going accept.
* Rule applies even if offeree has tendered partial performance.
* *Petterson* Dissent (neither classical nor romantic): Disagrees with majority on what performance required: argues offeror’s requested performance was not the physical handing over of cash, but instead exactly what the offeree did: show up with the cash.
  + Otherwise, the promise was illusory. The offeror retained the option to revoke the offer so long as he did not physically accept cash from the offeree.

**R2d § 45** (Romantic):

1. ***If*** (a) an offer invites an offeree to accept by rendering a performance; and (b) that offer does not invite a promissory acceptance, ***then*** [***if*** the offeree tenders or begins the invited performance or tenders a beginning of it, ***then*** an option K is created].
2. The offeror’s duty of performance under any option K so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

So, under R2d § 45, at which point has a offeree tendered or begun to tender the invited performance? Grey area . . .

Consideration

*Hamer* (Classical): ***If***

1. Action or forbearance (forbearance to exercise a *legal* right);
2. At the request of another,

***Then*** there is consideration.

*Pennsy* (Holmesian consideration) (Classical/Romantic): ***If***

1. The promise induces the detriment; and
2. The detriment induces the promise,

***Then*** there is consideration.

*Dougherty* (Romantic): Consideration requires the parties to regard themselves as making a deal.

*Plowman* (Classical/Romantic): If

1. There is a benefit to the promisor; or
2. A detriment to the promisee,

***Then*** there is consideration.

* Moral consideration is not consideration.
* Past consideration is not consideration.
* **Application Note**: giving up one’s time is not a detriment. *See Plowman*.

*Baehr* (Romantic): There is consideration only if contractual promise was product of a bargain.

* A bargain is a negotiation resulting in the voluntary assumption of an obligation by one party upon the condition of an act or forbearance by the other. (*Baehr*)
* Performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise (**R2d § 71**)
* “[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.” – Hand, .J (*James Baird*)

Cts are generally unconcerned with the “sufficiency” of the consideration (*See* *Berryman*).

**Formation Doctrine #2 (R): Promissory Estoppel (PE) and other Reliance Doctrines**

**If the sufficient conditions of any reliance-based rule is met, then there is a K.**

**R2d § 90**:

(1): ***If***

1. There is a promise;
2. Which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person;
3. That promise induces such action or forbearance; and
4. Injustice can be avoided only by enforcement of the promise,

***Then*** the promise is enforceable.

* + The remedy granted for breach may be limited as justice requires.

(2): A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance (take out #3).

PE in Family Context

*Wright* Majority (Romantic – interprets Romantic rule broadly): Purports to apply § 90, yet applies the final prong as whether an injustice *would result*, not whether such injustice could be avoided onlyby enforcing the promise. (Thus broadens a romantic rule, R2d § 9)

* **“Leading example”** where there is a difference between rule stated and the rule an authoritative court has applied.

*Wright* concurrence (somewhat Romantic): Faithfully applies (d), arguing it would be almost impossible to determine the identity of the child’s biological father, bring a successful paternity action, and get support from that person.

*Wright* dissent (Classical): Argues Newman failed to show detriment.

PE and Charitable Subscriptions

**~Romantic Approach~**

First, make the K bilateral.

Second, declare acceptance of the initial, partial donation to have implied a promise in return for the donator’s donative promise.

The mutual promises serve as consideration and so there is O, A, and C. Thus, there is a K.

* **Example** (*Allegheny College* [Cardozo–Romantic]):
  + Cardozo first says K was bilateral.
    - This is dead wrong because the donation said “[t]he proceeds of this obligation shall be added to the Endowment of said Institution, **or** expended in accordance with the instructions on the reverse side of this pledge.” (emphasis added)).
  + He then says Allegheny College’s acceptance of the initial, partial donation implied a promise in return for Ms. Johnston’s donative promise (namely, “to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation.”
    - These exchanged promises were consideration.
  + Ms. Johnston’s promise is therefore enforceable because there was an O, an A, and C.
* Dissent (Kellogg–Classical): There was no O because the donation was a gift. If there was an O, however, the K was unilateral and predicated upon naming the fund the “Mary Yates Johnston Memorial Fund.” But Allegheny College never so named the fund, and therefore did not perform. K was therefore revocable at any time (and Yates revoked).

**~Classical Approach~**

*Maryland Nat’l Bank* (Classical): charitable subscriptions are unenforceable unless there is consideration or promissory estoppel applies.

PE in Commercial Contexts

*Katz v. Danny Dare* (Romantic – interprets Romantic rule broadly): Modifies § 90 in the commercial context. If there is

1. A promise;
2. A detrimental reliance on such promise; and
3. Injustice can be avoided only by enforcement of the promise,

***Then*** there is a K.

* As Applied:
  + 1. Court says detrimental because loss of employment even though Katz would’ve been fired anyways.
    - Court cared merely about *change of position* independent of an expenditure of funds.
      * “Detrimental reliance” is thus action/forbearance by the promisee.
  + 2. Voluntariness of retirement shows reliance even though “threat of firing effectively removed *any* legitimate choice [by] Katz” (emphasis added).
  + 3. Injustice because Katz cannot engage in a full-time job providing the earnings he gave up in reliance on the pension even though this implies Katz has an indefinite and unlimited earnings potential.
* Unclear why the court didn’t get a K by applying F here.

*Shoemaker* (Romantic – interprets Romantic rule broadly): Cts may consider “the reasonableness of the promisee’s reliance” when determining whether injustice may be avoided only by enforcing the promise. *See* **R2d § 90** cmt. b.

PE as a Meta-defeater Doctrine

**R2d § 139**: This section acts as a meta-defeater doctrine (defeats Statute of Frauds) but in essence is § 90 with 5 factors to illuminate the “injustice” element:

1. The availability and adequacy of other remedies, particularly cancellation and restitution;
2. The definite and substantial character of the action or forbearance in relation to the remedy sought;
3. The extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
4. The reasonableness of the action or forbearance;
5. The extent to which the action or forbearance was foreseeable by the promisor.

Other Reliance-Based Enforcement Rules

~**Pre-Acceptance Reliance**~

*James Baird v. Gimble Bros* (L. Hand; EXTREMELY Classical): Pre-acceptance reliance is insufficient to render a promise enforceable if no consideration via bargained-for-exchange.

Rule: ***If***

1. There is an offer; and
2. Consideration has not yet been received (whether via a promise or a performance);

***Then*** promissory estoppel cannot be invoked to enforce the offer as a K.

* Paradigmatically Classical: “does not . . . promote justice to seek strained interpretations in aid of those who do not protect themselves.” (**narrows in the commercial context**)
* The offer may therefore be revoked even if offeree relied on it!
* Looks like ct is treating the contractors winning of the bid as a kind of **condition** under **R2d § 224**. Until that condition is met, there was no acceptance.

*Drennan v. Star Paving Co.* (Romantic): ***If***

1. There is reasonable reliance by an offeree; and
2. That reliance results in a foreseeable prejudicial change in the offeree’s position

***Then*** a subsidiary promise not to revoke an offer for a bilateral K is implied,

***Unless*** offeror expressly stated or clearly implied that it was revocable at any time prior to A.

* Rationale: Allocation of risk: bidder is cheapest cost-avoider.
* Essentially creates an option K using reliance as partial performance
* Brewer: Traynor blends **§ 45** (option K created by partial performance) w/ **§90** (reliance), extending **§45** to bilateral Ks. **§87(2)** come from this opinion.
* **R2d 87(2)**: ***If***
  + (1) An offer is made; and
  + (2) The offer should reasonably be expected to
    - (a) induce action/forbearance
      * (i) Of a substantial character
      * (ii) On the part of the offeree
      * (iii) Before acceptance; and
  + (3) The offer actually induces such action or forbearance
* ***Then*** the offer is a binding option K to the extent necessary to avoid injustice.

**~Pre-Promissory Reliance~**

*Berryman v. Kmoch* (Classical): ***If***

1. An option K is not supported by consideration

***Then*** it is a mere offer to sell, which may be withdrawn at any time prior to acceptance.

* *Marker* Rule (Used to reject option K here): ***If*** 
  + (1) The promisor reasonably expected the promisee to rely on the promise;
  + (2) The promisee reasonably relied on the promise; and
  + (3) A failure to enforce the promise would result in perpetration of fraud or result in other injustice,
* ***Then*** “promissory estoppel [is] to be invoked as a substitute for consideration.”
  + Classical in that it adds fraud and changes justice req (this narrows)
  + It was unreasonable to rely on an option K w/o C (Time and money spent in reliance here are not sufficient to invoke PE).

*Pop’s Cones v. Resort Int’l* (REALLY Romantic): NJ PE rule – ***If***

1. There is a clear and definite promise by the promisor; (**this gets dumped by ct**)
2. The promise was made with the expectation that the promisee will rely thereon;
3. The promisee reasonably relies on the promise, and
4. Detriment of a definite and substantial nature was incurred by relying on promise,

***Then***, The promise will be enforced.

* ***Ct dumps “clear and definite promise” and adopts § 90 for PRE-PROMISE reliance, then rules that case can go forward to trial*** (MSJ).

~**Restitution**~

Arises where one party seeks compensation for benefits she conferred on another and the other party never expressly promised to pay for those benefits:

**Restatement of Restitution § 21**: A person who officiously confers a benefit upon another is not entitled to restitution therefor. However, . . . **Restatement (Third) of Restitution § 1**: “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”

*Pelo* (General Rule): ***If***

1. One renders services of value to another with his knowledge and consent,

***Then*** there is a presumption that the one rendering the services expects to be compensated and the one to whom the services are rendered intends to pay for the same and the law implies a promise to pay.

* Ct thus allows enforcement of promises that have no C and that were perhaps resisted.

*Pelo* (Romantic – Adopted Romantic Rule??): ***If*** a person

1. Has supplied things or services to another;
2. Acted without the other’s knowledge or consent;
3. She acted unofficiously [sic] with intent to charge therefor;
4. The things or services were necessary to prevent the other from suffering serious bodily harm or pain;
5. The person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent; and
6. It was impossible for the other to give consent or, because of extreme youth or mental impairment, the other’s consent would have been immaterial,

***Then*** she is entitled to restitution therefor from the other.

* Cmt B: ***If*** the above is met (except 2) but the other:
  + (1) *Actually* refuses or expresses an unwillingness to accept the service or thing; and
  + Is not sufficiently mentally competent to understand the necessity of receiving them,
* ***Then*** the one supplying them can still recover.
* **Restatement (Second) of Restitution § 116**.

*Commerce Partnership*:A K implied in **fact** is a K inferred from the parties’ conduct, not solely from their words.

*Watts v. Watts* (Romantic – applies marriage rule to cohabitation?): **CIIF** If there are (1) joint accounts, (2) joint purchases, etc. cts have held there are inferences of equal sharing and thus the possibility of CIIF. (MtD)

* Cts should not frustrate a party’s reasonable expectations.

*Commerce Partnership*:A K implied in **law** (*i.e.*, quasi K or unjust enrichment), is an obligation created by law without regard to the parties’ expression of assent by their words or conduct.

Quasi K: ***If***

1. π has conferred a benefit on ∆;
2. ∆ has knowledge of the benefit;
3. ∆ has accepted or retained the benefit conferred; and
4. The circumstances are such that it would be inequitable for ∆ to retain the benefit without paying fair value for it.

Then K implied in law and restitution will be required.

* For subcontractors, there are two additional elements:
  + (1) Sub has exhausted all remedies against prime contractor; and
  + (2) The owner received the benefit conferred w/o paying consideration to *anyone*.

*Watts v. Watts* (Romantic): **CIIL** for Cohabitants ***If***

1. There was a benefit conferred on the ∆ by the π;
2. Appreciation or knowledge by the ∆ of the benefit; and
3. Acceptance or retention of the benefit by the ∆ under circumstances making it inequitable for the ∆ to retain the benefit.

Then K implied in law and restitution will be required.

~**Promissory Restitution**~

Arises where the recipient of services makes an express promise to pay for them, but only after the benefits were received:

* Unenforceable under classical theory because past consideration is not consideration.
* Might be enforceable under promissory estoppel.

**R2d § 86**:

1. A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
2. A promise is not binding under Subsection (1):
   1. If the promise conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched;
   2. To the extent that its value is disproportionate to the benefit.

* Interesting, (b) looks like the ct is looking at sufficiency of consideration

*Mills v. Wyman* (Classical – Narrows old rule): ***If***

1. There was a subsequent promise to compensate for some benefit received;
2. There is a moral obligation (usually gleaned from a benefit received);
3. There was a prior valid contractual obligation; and
4. That prior valid contractual obligation became **inoperative by positive law**,

***Then*** that promise is enforceable (**2-4 creates consideration out of past consideration**).

* Rule playing: narrows old rule (If moral obligation, then consideration) via dis-analogy.

*Webb v. McGowin* (Romantic): ***If***

1. There was a subsequent promise to compensate for some benefit received;
2. The benefit received was **material** (thus moral obligation is incurred); and
   1. Preserving another’s property or saving their life confers a material benefit
3. There was a prior valid contractual obligation,

***Then*** that promise is enforceable (**2-4 creates consideration out of past consideration**).

* Romantic: broadens Mills rule.

**Defeater Doctrines**

Statute of Frauds

Some Ks, despite valid formation (A+O+C), require the K to be memorialized in writing.

Three step analysis:

**Step #1**: Is this contract within the statute of frauds? (**R2d § 110**)

* (1) Exec-admin provision: Promise to decedent’s creditors to personally pay debts if the estate is insufficient.
* (2) Suretyship provision: Promise to answer for the duty of another.
* (3) Marriage Provision: Ks where marriage is the consideration.
* (4) Land Contract Provision: Ks for the sale of an interest in land.
* (5) Sale of Goods over $500 (Req’d by **UCC 2-201**)
* (6) One-year Provision: K that is not to be performed w/in one year of its making
  + This is read *very* narrowly to include only those activities that COULD NOT POSSIBLY (a touch too strong) be performed within a year (9 year construction of power plant could have been performed in 1). **It is only w/in terms of SoF if by the express terms of K it cannot be performed in less than on year** (Romantic idea, Brewer doesn’t fully endorse).
  + Applies to Non-commercial transactions via **R2d § 130**:
    - (1): If any promise in a K **cannot be fully performed within a year from the time the K is made**, all promises in the K are within the SoF until one party to the K completes her performance.
    - (2): If one party to a K **has completed her performance**, the one-year provision of the **SoF does not prevent enforcement of the promises** of other parties.

**Step #2**: If w/in SoF, Is it satisfied by and adequate writing? (**R2d § 131**)

* Signed by or on behalf of party to be charged
* Reasonably identifies the subject matter of K
* Sufficient to indicate that a K has been made btwn parties, or offered by the signer
* States w/ reasonable certainty the essential terms of the unperformed promises in K

**Step #3**: If there is no adequate writing, is there an exception to SoF that applies?

* **R2d § 132**: The memorandum can consist of several writings ***if***
  + (1) One of the writings is signed; and
  + (2) The writings clearly indicate that they relate to same transaction (*Crabtree*)
* **R2d § 139**: A promise can be enforced under PE despite SoF (see factors *supra*) (*McIntosh*)

Policy of SoF:

1. Evidence: The Statute still serves an evidentiary function thereby lessening the danger of perjured testimony (the original rationale);
2. Caution: The requirement of a writing has a cautionary effect which causes reflection by the parties on the importance of the agreement; and
3. Channeling: The writing is an easy way to distinguish enforceable contracts from those which are not, thus channeling certain transactions into written form.

*Crabtree v Elizabeth Arden Corp* (Romantic): ***If***

1. A writing is signed w/ the intention to authenticate the info contained therein; and
2. The info contained therein does evidence a K,

***Then*** the writing satisfies SoF.

(Use of Several Writings to satisfy SoF) ***If***

1. The writings is signed by the party to be charged (PtbC); and
2. Writings unsigned by PtbC clearly refer to the same subject matter or transaction,

***Then*** the signed and unsigned writings may be read together to satisfy the SOF. (*See* **R2d § 132**)

* Classical: Some cts require reference in signed writing to the unsigned one
* Romantic: For others, if (1) they refer to the same subject matter, and (2) oral testimony is admitted to show the connection, then the connection is established (as here)

(Permissibly of Parole Evidence under SoF) ***If***

1. No term of the K is supplied by parol evidence**;**
2. The unsigned writing refers on its face to same transaction the signed writing does;and
3. Signed writing (that establishes a contractual relationship btwn parties) is signed by PtbC,

***Then*** parol evidence is admissible to show connection between the signed and unsigned writings.

* Parole evidence can only 1) link documents and 2) interpret terms of the writing to give them the meaning that was understood when the contract was prepared and agreed upon.

*McIntosh v. Murphy* (Romantic): Ct adopts **R2d § 139**, reliance defeats SoF (one-year provision).

*Alaska Democratic Party v. Rice* (Romantic): Ct adopts **R2d § 139**, reliance defeats SoF.

Duress/Undue Influence

~**Duress**~

*Totem Marine v. Aleyska Pipleline Co* (Romantic): *Grimshaw* Rule (Purported) ***If***

1. B involuntarily accepts terms of party A;
2. The circumstances give B no reasonable alternative to accepting those terms; and
3. The circumstances are the result of coercive acts of A (***Causation***),

***Then*** the K is voidable by B.

* “*Coercive*”: If the duress resulted from ∆’s wrongful or oppressive conduct (tortious, criminal, and immoral acts–KCP7557.6); and not by π’s necessities, then (3) is satisfied.
* “*No Alternative*”: Brewer says this is too strong. “Your money or your life” presents an alternative. Looks like ct reads as “π would have no adequate remedy if threat were carried out.” Factors to consider: ability to delay, exigency of the situation.

Williston Rule of Economic Duress (rejected by Ct): ***If***

1. One was victim of a wrongful or unlawful act or threat; and
2. Such act or threat deprived A of unfettered will,

***Then*** there was economic duress (and the K is voidable by A)

**R*1st* § 492(b)**: ***If***

1. There is a wrongful threat of one person by words or other conduct;
2. That induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment; and
3. The threat was intended or should reasonably have been expected to operate as an inducement,

***Then*** the K was entered into under duress and is therefore voidable.

Rule (Applied I): ***If***

1. A, by wrongful acts or threats, intentionally causes B to involuntarily enter into a transaction; and
2. B has no reasonable alternative but to accept A's terms or face serious financial hardship,

***Then*** the contract is voidable by B.

Rule (Applied II): ***If***

1. A deliberately withholds payment of an acknowledged debt to Party B;
2. A knows that B has no choice but to accept an inadequate sum in settlement of debt; and
3. Through necessity B involuntarily accepts an inadequate settlement offer,

***Then*** release signed by B for the inadequate settlement offer is voidable by B (economic duress).

**Brewer**: When should we deprive one of superior bargaining power? (Inequality in barg power)

How many straws are allowed to be on the camels back when the transaction begins?

**See also** *Kelsey-Hayes* under Modification.

~**Undue Influence**~

*Odorizzi v. Bloomfield School Dist* (Romantic): ***If***

1. There is undue susceptibility in a servient person; and
2. There is excessive pressure on the servient person by a dominant person,

***Then*** there is undue influence over servient person by the dominating person.

*Odorizzi* Factors (Excessive Pressure):

1. Discussion of the transaction at an unusual or inappropriate time,
2. Consummation of 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. Statements that there is no time to consult financial advisors or attorney.

* “If a number of theses elements are simultaneously present, the persuasion may be characterized as excessive”

**R2d § 175**: If you need more (yeah, right), check here for Duress and Undue influence.

Fraud: Misrepresentation and Non-Disclosure

~**Misrepresentation**~

Park 100 Investors v. Kartes (Romantic) (595) ***If***

1. There is a material misrepresentation of past or existing fact by PtbC;
2. That was false;
3. That was made with knowledge or reckless ignorance of the falsity;
4. That was relied on by the complaining party; and
5. That proximately caused the complaining parties injury (***not included as applied***)

***Then*** there was fraud.

* Fraud trumps duty to read (*infra*)

**R2d § 166**: When a misrepresentation as to a writing justifies reformation (probably don’t need)

~**Non-Disclosure**~

*Hill v. Jones* (Romantic): FL Rule (Applied) ***If***

1. The seller knows of facts materially affecting the value of the property;
2. These facts are not readily observable; and
3. These facts are not known to the buyer,

***Then*** the seller has a duty to disclose these facts.

* Sub-rule for “materiality”: **If**
  + (1) A matter is one to which a reasonable person would attach importance in determining her choice of action,
* ***Then*** that matter is material.

CA Rule (More Classical - Rejected): ***If***

1. The seller knows of facts materially affecting the value or desirability of property;
2. The facts are known or are accessible only to the seller; and
3. The seller also knows that such facts are not known to or within the reach of the diligent attention and observation of the buyer,

***Then*** a seller is under a duty to disclose them to a buyer.

**R.2d § 161**: Non-disclosure of a known fact is equivalent to an assertion that the fact does not exist only where the person:

* Knows disclosure is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material;
* Knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the K and if non-disclosure amounts to failure to act in good faith and in accordance with reasonable standards of fair dealing;
* Knows disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part; OR
* The other person is entitled to know the fact because of a relation of trust and confidence between them.

Where any of these are true, there was a DUTY TO DISCLOSE!

*Laidlaw v. Organ* (Note Case) (Very Classical): Caveat emptor, no duty to disclose. “Even if the seller had been entitled to disclosure, he waived it by not insisting on an answer to his question [about events that could increase the value of tobacco].” But the buyer was not req’d to disclose his knowledge about the end of the war, the only advantage he had was knowledge that he gained by rising earlier in the morning, his superior diligence. It would be difficult to require disclosure where the information was equally accessible to both parties.

Unconscionability

* Comes from **UCC 2-203**, which states that a ct may refuse to enforce all or part of an otherwise valid K if it finds that it was unconscionable at the time it was made.
* Later instantiated (as above) to apply beyond sales of goods in **R2d § 208**.
* Procedural Unconscionability: Lack of choice or bargaining power defective; manner in which the contract was entered into.
* Substantive Unconscionability: Relates to the fairness of terms of the resulting bargain.

*William v. Walker-Thomas* (Romantic – Affirmatively policing decisions to ensure they are fair in the court’s eyes; imposes a standard, rather than rule, for unconscionability; anti-paternalistic)

Rule: ***If***

1. There is an absence of meaningful choice on the part of one of the parties; and
2. The terms of the K are unreasonably favorable to the other party,

***Then*** the K is unconscionable.

* If there is a gross inequality when considering all of the circumstances surrounding the transaction, then (1) is satisfied.
  + Relevant considerations: Did each party to the K, consider his level of education, have a reasonable opportunity to understand the terms of the K, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?
* If the terms are “so extreme as to appear unconscionable according to the mores and business practices of the time and place,” then (2) is satisfied.

*Higgins* (?) ***If*** a K is

1. Procedurally unconscionable; and
   1. Focuses on surprise and oppression due to unequal bargaining power.
2. Substantively unconscionable,
   1. Focuses on overly harsh or one-sided results.

***Then*** the K is unconscionable.

* Sliding scale: The more procedurally unconscionable K is, the less substantively unconscionable the K must be and vice versa.

Public Policy

*Derico v. Duncan* (Classical): Ks made in violation of regulatory statutes enacted for protection of the public are unenforceable unless the purpose of the statute is to raise revenue (taxes).

*Hiram Ricker* (Romantic): If the legislature did not expressly intend for Ks to be voided by a licensing statute, then the failure to follow the licensing statute does not void the K as against public policy.

*Riggs v. Palmer* (Note Case) (Romantic): Legislature would not have wanted the nephew to profit: “no man should profit by his evil deeds.”

Mistake

**What is a mistake?**

“A belief that is not in accord with the facts.” **R2d § 151**. The erroneous belief must relate to a fact in existence at the time the K is executed.

**~Mutual Mistake~**

Old Rule: (*Sherwood v. Walker*): ***If***

1. The mistake goes to the whole substance of the agreement; and
2. Is not a mere quality of the agreement,

***Then*** rescission is appropriate.

* Rule is insensitive to an “as is” clause; that is, an explicit allocation of risk.

New Rule: (**R2d § 152**, applied in *Lenawee* (Classical)): ***If***

1. Both parties make a mistake *at the time a contract is made*;
2. The mistake is as to a basic assumption on which the K was made; and
3. The mistake materially affects the parties’ agreed upon exchange of performances,
   1. **R2d § 152(2)**: In determining whether the mistake has a material effect on the agreed exchange of performances, **account is taken of any relief** by way of reformation, restitution, or otherwise.

***Then*** the K is voidable by the adversely affected party,

***Unless*** she bears the risk of the mistake under **R2d § 154**.

* **R2d § 154**: A party bears the risk of a mistake when
  + (a) The risk is allocated to him by agreement of the parties,
  + (b) He is aware, at the time the K is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
  + (c) The risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.
* When the parties themselves specifically **assign the risk**, cts should respect that decision.

**~Unilateral Mistake~**

*Wil-Fred’s Inc.* (Romantic): ***If***

1. There is a mistake by one party;
2. The mistake relates to a material feature of the K;
3. The mistake occurred notwithstanding the exercise of reasonable care by the party;
4. The mistake is of such grave consequence that enforcement of the K would be unconscionable;
5. The other party can be put back into its status quo (that is, the non-mistaken party could be put into its position prior to the promise); and
6. The evidence of the aforementioned conditions is clear and positive,

***Then*** the K is voidable by the adversely affected party (see **R2d § 153** *infra*).

* Requires “clear and positive evidence.”

Williston’s Rule for Unilateral Mistakes [CB 681 @ bottom]: ***If*** there is

1. A unilateral mistake;
2. That mistake is material; and
3. The mistake is so palpable that the party not in error will be put on notice of its existence,

***Then*** the K may be rescinded.

**R2d § 153**:

1. Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of mistake under the rule stated in **§ 154**, and
   1. Effect of the mistake is such that enforcement of K would be unconscionable, **or**
   2. The other party had reason to know of the mistake or his fault caused the mistake

Changed Circumstances: Impossible, Impracticable, Frustration of Purpose

~**Impossibility/Impracticability**~

Classical Approach: K is strict liability. Don’t like it? Protect yourself! (force majeure clause?)

* *Paradine v. Jane* (1647) (Note) (Classical): Prince Rupert and his army occupy farmer’s land. Despite the fact that the farmer could no longer use the land, he is still required to pay rent. Contract as strict liability.
  + Objective/subjective. Classical idea is **objective impossibility**.

Romantic/Modern Approach: excuse performance if an assumption on which it is based changes.

* *Taylor v. Caldwell* (1863) (Note) (Romantic): Rented music hall burns down. No breach by the lessor because the thing essential to performance (building) no longer exists.
  + Harder to apply to fungible goods
  + Prohibition by gov’t usually qualified as impossible ()
  + UCC excuses impossibility

**R2d § 261** (discharge by supervening impracticability): ***If***, after a K is made,

1. A party’s performance is made impracticable;
2. Without his fault;
3. By the occurrence of an event; and
4. The non-occurrence of which was a basic assumption on which the K was made,

***Then*** her duty to render that performance is discharged,

***Unless*** the language or the circumstances indicate the contrary.

* Examples of “basic assumptions on which the K was made”:
  + Death or incapacity of person necessary for performance. **R2d § 262**
  + Destruction, deterioration, or failure to come into existence of thing necessary for performance. **R2d** **§ 263** (See *Taylor v. Caldwell*)
  + Prevention of performing the duty by gov’t regulation or order. **R2d § 264**; **UCC 2-615(a)**

**R2d § 271**: Impracticability excuses the non-occurrence of a condition IF the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result.

~**Frustration of Purpose**~

*Krell v. Henry* (Note): Narrows strict liability with frustration of purpose. Rented room at high rate to see King; King didn’t come. Performance will be excused when the purpose of a K is frustrated by an unforeseeable supervening event and the purpose was within the contemplation of both parties when the K was executed. A K’s purpose may be inferred from surrounding circumstances.

**R2d § 265** (discharge by supervening frustration): ***If***, after a K is made,

1. A party’s principal purpose is substantially frustrated without his fault;
2. By the occurrence of an event;
3. The non-occurrence of which was a basic assumption on which the K was made,

***Then*** his remaining duties to render performance are discharged,

***Unless*** the language or circumstances indicate the contrary.

*Mel Frank v. Di-Chem* (Classical) ***If***

1. A subsequent governmental regulation prohibits a tenant from legally using the premises for its originally intended purpose,

***Then*** the tenant has no obligation to pay rent,

***Unless*** there is a serviceable use still available consistent with the use provision in the lease.

* The fact that the use is less valuable, less profitable, or unprofitable does not mean the tenant’s use has been substantially frustrated.
* Opinion gives a node to **R2d § 265**.

**Term Settling (Interpreting Ks)**

**~Same Meaning~**

**R2d § 201(1)**: ***If***

1. The parties have attached same meaning to a promise or agreement or a term thereof,

***Then*** it is interpreted in accordance with that meaning.

**~Different Meanings~**

**R2d § 201(2)**: ***If***

1. The parties have attached different meanings to a promise or agreement or a term thereof at the time the agreement was made; and
2. One party but not the other knew or had reason to know of the meaning attached by the other party,

***Then*** the K is interpreted in accordance with the other (unknowing) party’s meaning.

*Joyner v. Adams* (Romantic): ***If***

1. The parties have attached different meanings to a promise or agreement;
2. One party knows or has reason to know what the other party means;
3. The other party neither knows nor has reason to know of the first party’s meaning,

***Then*** the court will enforce the language in accordance with the innocent party’s meaning.

* Differs slightly from R2d § 201(2) because focuses on innocence of parties.

Both *Joyner* and **§ 201(2)** reject *contra proferentem*, the maxim that a contractual ambiguity ought to be resolved against the party who drafted the language in question.

**~Interpreting Adhesion Contracts: Reasonable Expectations in the Insurance Context~**

*C&J Fertilizer*: ***If***

1. There is a conflict between terms of an insurance policy; and
2. A term than an insured would reasonably expect to be in the policy,

***Then*** the court is to interpret in accord with the reasonably expected term

* “The objectively reasonable expectations of applicants and intended beneficiaries regarding the term of insurance Ks will be honored even though painstaking study of the policy provisions would have negated those expectations.” KCP7 397.8
  + **R2d § 237, cmt. f**: If unknown terms are beyond the range of reasonable expectation, then customers are not bound to those terms.
  + **R2d § 237, cmt. f**: If the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term, then a party who adheres to the other party’s standard terms does not assent to that term.

Duty to Read

*Eurice* (Classical): Absent fraud, duress, or mutual mistake, one having the capacity to understand a written doc who reads and signs it or w/o reading it/having it read to her, signs it, is bounds by this signature. –**Capacity to understand + no defeater = bound by sig to terms.**

*Park 100*: “Generally, parties are obligated to know the terms of agreements they sign, and can’t avoid obligations in the agreement by not reading it. But, where misrepresentation has been employed to induce entering into an agreement, one is not bound to the terms of the agreement.” –**Misrepresentation (Fraud) trumps a duty to read, K is not binding.**

Does *Park* change *Eurice* (fraud is a defeater)?

Battle of the Forms

The UCC covers sales of goods (§ 2-106), not services. Merchant defined §2-104. Definitions: §1-201. §2-201 – requires only the signature of the party against whom enforcement is sought.

**~Mirror Image Rule (**Pre-UCC**): Common Law~**

*Poel v. Brunswick* (Classical, pre-UCC):If an A varies **any** terms of the O, then the purported A is deemed a rejection of the O and is instead regarded as a **Counteroffer**.

* **Last Shot Rule:** When terms do not match, the last shot is the counteroffer, acceptance of goods is acceptance, and the terms of the last shot prevail.
  + Tends in practice to favor sellers over buyers, because sellers normally “fire the last shot” – i.e., send the last form.

**~UCC § 2-207: Sale of Goods~**

* **2-207(1):** If (**A** or **B**) then **C** unless **D**
  + ***If***
    - [**A**] A definite and seasonable express of acceptance; OR
      * Seasonable: “if [done] at or within the time agreed or, if no time is agreed, at or within a reasonable time.” **UCC 1-205(b)**
    - [**B**] A written confirmation which is sent within a reasonable time,
  + ***Then*** [**C**] acceptance ***even if*** it states terms additional to or different from those offered or agreed upon,
  + ***Unless*** [**D**] acceptance is expressly made conditional on assent to the additional or different terms.
* **2-207(2):** Additional terms are to be construed as proposals. However, If **E** then **F** unless (**G** or **H** or **I**).
  + ***If***
    - [**E**] The parties are ***merchants***,
  + ***Then*** [**F**] such terms become part of the K,
  + ***Unless* (**[**G**] the offer expressly limits acceptance to the terms of the offer;
  + [**H**] The terms materially alter the offer; OR
  + [**I**] Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.**)**.
* **2-207(3):** Conduct by both parties that recognizes the existence of a K is sufficient to establish a K for sale although the writings of the parties do not otherwise establish a K. In such case the terms of the particular K **consist of those terms on which the writings of the parties agree**, together with any supplementary terms incorporated under any other provisions of [the UCC].
  1. **Comment 4 to UCC § 2-207:**
     1. ***If*** 
        1. The clause would “materially alter” the K; and
        2. The clause was incorporated w/o express awareness by other party,
     2. ***Then*** surprise or hardship would result.
        1. *Dale Horning* gets this wrong [backwards].
        2. A “materially alteration” is one that goes against *standard industry practice.*
  2. **Comment 5 to UCC § 2-207:** IF clause involves no element of unreasonable surprise, THEN it is to be incorporated into the contract UNLESS notice of objection is seasonably given.
     1. **See examples**
  3. **Comment 6 to UCC § 2-207:** If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their conclusion has been assented to. If clauses on affirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this actin including subsection (2).

*Dale Horning* (Romantic): ***If*** the different or additional term were incorporated without the express awareness of the non-assenting party would result in

1. Surprise; or
   1. Would the new term catch the non-assenting party unaware?
   2. Fact-intensive question:
      1. Subjective: Was the non-assenting party aware of the additional term?
      2. Objective: Given the industry customs and the relevant facts, should the non-assenting party have been aware of the additional terms?
         1. **If either one, then there is no surprise**.
2. Hardship,
   1. Would the additional term impose substantial economic hardship on the non-assenting party?
      1. Subjective/Objective: Did the assenting party know or have reason to know that the non-assenting party could incur substantial liability due to the addition term?

***Then*** the additional terms materially alter the K under **UCC 2-207(2)(b)**.

* Misreads Cmt. 4
* Posner (*Union Carbide*): Should be (MA🡪(S or H)), ***not*** ((S or H) 🡪 MA)

*Brown Machine* (Romantic??): To convert an acceptance to a counteroffer under UCC 2-207(1), the conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the K.

**R2d § 39** (Counteroffers):

1. ~Definition~
2. An offeree’s power of acceptance is terminate by his making of a counteroffer, unless the offeror has manifested a contrary intention or unless the counteroffer manifests a contrary intention of the offeree.

See **R2d § 50(2)** on acceptance by performance above.

Parol Evidence Rule (PER)

PER ***always*** allows evidence to show fraud which always invalidates a K (*Hill*; R2d 214(d)).

**~PER~**

*Thompson v. Libby* (Classical – Four-Corners Approach): ***If***

1. Contradicts; or
2. Varies the terms of a valid written instrument,

***Then*** the parol evidence is inadmissible.

**~Merger Clauses**~

A merger clause states that the writing is intended to be final and complete; all prior understandings are deemed to have been “merged” into or superseded by the final writing.

* **Two approaches:**
  + Williston’s “Four Corners” (Classical): Gives conclusive weight to merger clause.
    - Applied in *Thompson v. Libby*.
  + Corbin’s (and **R2d § 210**, cmt. b) (Romantic): “[A] writing cannot itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.”

**~So, can parol evidence be admitted to *add* a term to an agreement?~**

* If a written K imports on its face to be a complete expression of the whole agreement, then parol evidence cannot be admitted to add another term to the agreement. (*Thompson*)
  + Sufficient condition for parol evidence to be inadmissible.
  + Such a K is called “*completely integrated*.”
    - **R2d § 210(1)**: “A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.”
      * **§ 210(2)**: All other integrated agreements are “partially integrated.”
    - **§ 210(3)**: Whether an agreement is partially or completely integrated is the preliminary question the court must answer to determine if PER applies.
    - Whether a K is completed integrated is a matter of law. (*Thompson*)
  + As-applied in *Thompson*:
    - ***If*** the K
      * (1) “Imports a legal obligation, without any uncertainty as to its object or the extent of the engagement,”
    - ***Then*** the K is completely integrated.

**R2d § 215** (Contradiction of Integrated Terms): ***If***

1. There is a K; and
2. The K is either completely or partially integrated,

***Then*** evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.

**~Parol evidence to show there was a promise~**

Parol evidence of a promise by one of the parties is admissible only if the promise relates to a subject distinct from that to which the writing relates. (*Thompson*)

**~Parol Evidence: Ambiguity~**

*Hershon v. Gibraltar* (Classical; Parol Evidence when there’s ambiguity):

* If contractual terms are unambiguous, then parol evidence is inadmissible.
  + Cts must give effect to a K’s plain meaning, as understood by reasonable people in the parties’ position, regardless of what parties subjectively thought or intended.
* If parol evidence (used to show ambiguity) varies, alters, or contradicts the clear meaning of the writing, it is inadmissible.
* If there is a **facial ambiguity**, then external evidence is admissible to resolve the meaning of that term **unless** the external evidence would contradict the clear meaning of the text.

**~PER Exceptions (R2d § 214 and *Sherrod*)~**

**R2d § 214**: Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

1. That the writing is or is not an integrate agreement;
2. That the integrated agreement, if any, is completely or partially integrated;
3. The meaning of the writing, whether or not integrated;
4. Illegality, **fraud**, duress, mistake, lack of C, or other invalidating cause [Ds];
   1. ***Sherrod***(Classical: narrows fraud exception): Fraud exception to PER applies **only if** the fraud **does not relate directly to the subject of the K**. (in which case, the PER would exclude the evidence).
      1. Rationale: without PER, parties would be “under a cloud of uncertainty” as to whether they can rely on written Ks.
5. Ground for granting or denying rescission, specific performance, or some other remedy.

Implied Terms

**~Implied Terms, the Obligation of Good Faith, and Warranties~**

* Implied-in-fact: Parties intended the term to be included
* Implied-in-law: Law implies the term
  + **R2d § 205**: Duty of good faith and fair dealing

**~Implied-in-Fact~**

*Wood v. Lucy* (Romantic; Cardozo: “The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.”) ***If*** the whole writing is

1. “Instinct with an obligation” (Parties **MUST** have meant for obligation to be included)
2. And that obligation is imperfectly expressed,

***Then*** there is a K (implied-in-fact) even if a promise is lacking.

* Here “reasonable” or “best efforts” is implied.
* This case inspired **UCC § 2-306(2)**:
  + A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes (unless otherwise agreed) and obligation by the seller to use **best efforts** to supply the goods and by the buyer to use **best efforts** to promote their sale.

**~Good Faith and Fair Dealing (subset of implied-in-law)~**

Every K imposes upon each party a duty of good faith and fair dealing in its performance and is enforcement. **R2d § 205**

**Good faith** if and only if honest in fact and the observance of reasonable commercial standards of fair dealing. *Donahue*; **UCC § 1-201(20)**.

**Employment Context**: *Donahue v. Federal Express Corp.* (Classical):

* Implied duty of good faith and fair dealing does not apply to pure employment at-will. However…
  + ***If*** the termination
    - (1) Violated clear mandates of public policy;
    - (2) Violates employer’s announced termination procedures (e.g., if employee handbook requires “for cause” termination; OR
    - (3) Is intended to deny compensation already earned,
  + ***Then*** at-will employee has cause of action for wrongful termination (for violation of duty of good faith and fair dealing).
* **When does at-will employment become terminable only “for cause?”**
  + An employee can overcome the presumption that is an at-will employee by establishing that he gave his employer additional consideration other than the services for which he was hired.
  + ***If***
    - (1) Employee affords employer substantial benefit other than the services the employee was hired to perform; or
    - (2) Employee undergoes substantial hardship other than the services he was hired to perform,
  + ***Then*** additional consideration exists for overcoming the at-will presumption.
    - In such a case, termination must be “for cause.”

**~Warranties (subset of implied in law)~**

There are two kinds of warranties:

1. Express, and
2. Implied
   1. Merchantability
   2. Fitness for particular purpose
   3. Workmanlike construction (house)

**UCC § 2-313**: Express Warranties

1. Express warranties by the seller are created as follows:
   1. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
   2. Any description of the goods which is made part of the basis of the bargain creates express warranty that the goods shall conform to the description.
   3. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
2. It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

**UCC § 2-314**: Implied Warranties (of Merchantability)

* **§ 2-314(1)**: If seller is merchant, then warranty of merchantability is implied.
* *Bayliner*: In all Ks for a sale of goods by a merchant, a warranty is implied that the goods will be merchantable.
  + A good is merchantable only if (1) it would “pass without objection in the trade”; and (2) is fit for the ordinary purposes for which the good is used.”
    - (1) Concerns whether a “significant segment of the buying public” would object to buying the goods.
    - (2) Concerns whether the goods are “reasonably capable of performing their ordinary functions.”
  + **Therefore**,
    - ***If***
    - (1) a significant segment of the public would object to buying the good; or
    - (2) the good is not reasonably capable of performing its ordinary functions,
  + ***Then*** the good is not merchantable.

**UCC § 2-315**: Implied Warranty of Fitness for Particular Purpose

* ***If*** the seller at the time of contracting has reason to know
  + (1) any particular purpose for which the goods are required and
  + (2) the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods,
* ***Then*** there is an implied warrant that the goods shall be fit for such purpose

**UCC § 2-316**: Exclusion or Modification of Warranties [we didn’t cover this UCC provision]

* (1) covers express warranties
* (2) and (3) cover implied warranties

*Caceci v. Di Canio Construction Corp.* (Romantic) (implied – workmanlike construction):

**Rule**: “There is an implied term in the express contract between a builder-vendor and purchasers that the house to be constructed will be done in a skillful manner free from material defects.” (*i.e.*, **Homes contracted for sale prior to construction come with an implied warranty of workmanlike construction**)

* Rationale: Cheapest cost avoider. “Responsibility and liability in such cases [as this] should, as a matter of sound K principles, policy, and fairness, be placed on the party best able to prevent and bear the loss[, the builder].”

Modification of a K Based on a Pre-existing Duty

**~Seeking to modify the terms of a K~**

*Alaska Packers’* (pre-existing duty rule): ***If***

1. The new K is based solely on the agreement to render the exact services, **and none other**, that they were already under K to render,

***Then*** there is no consideration for the new K

* Promising to perform an existing obligation will not serve as C for additional return compensation from the other party.

*Schwartzreich* (p. 726)

**R2d § 73**: Performance of a Legal Duty

* ***If***
  + (1) There is a legal duty owed to a promisor; and
  + (2) That legal duty is not doubtful and not the subject of honest dispute,
* ***Then*** performance of that legal duty is not C for a new K; ***but***
* ***If***
  + (1) The new K differs from what was required by the duty in a way which reflects more than a pretense of bargain,
* ***Then*** there is C for the new K.

**R.2d § 89**: A promise modifying a duty under a K that is not fully performed by either side is binding

1. If the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
2. To the extent provided by statute; or
3. To the extent that justice requires enforcement in view of material change of position in reliance on the promise,

**~Is the K governed by the UCC? (The sale of goods)~**

**UCC § 2-209(1)**: An agreement modifying a K within this article needs no C to be binding.

**~Modification K entered into while under economic duress~**

*Kelsey-Hayes*: Modification K entered into while under duress do not supersede the original K.

***If***

1. A party’s manifestation of assent is induced by an improper threat;
2. That improper threat leaves the victim no reasonable alternative; and
3. The party “at least display[ed] some protest against the higher price in order to put the seller on notice that the modification is not freely entered into,

***Then*** there is duress and so the K is voidable.

Breach and Conditions on a K

**~Material Breach~**

Ks create duties. To not fulfill a contractual duty is to breach the K. Yet not all breaches of contractual duties are viewed equally by the law. Indeed, not all breaches are *material*.

**R2d § 241**: When determining whether failure to render or to offer performance is material, consider the:

* 1. Extent to which injured party will be deprived of benefit he reasonably expected;
  2. Extent to which injured party can be adequately compensated for part of benefit of which he’ll be deprived;
  3. Extent to which the party failing to perform or to offer to perform will suffer forfeiture;
  4. Likelihood party failing to perform or to offer to perform will cure his failure, taking account of all circumstances including any reasonable assurances; and
  5. Extent to which behavior of party failing to perform or to offer to perform comports w/ standards of good faith and fair dealing.

**~Conditions: Express, Constructive, and Satisfaction Conditions~**

**R2d § 224**: A **condition** is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a K becomes due.

* That is, before the contractual duty kicks in.

**How might A draft contractual provisions to motivate B to bring about an event (E) that is or is likely to be in B’s control?**

**Three ways:**

1. Make some performance by A, a performance that B desires, conditional on E, which seems to be within B’s control.
   1. Example 1: Insurance co. makes its payment to the insured, which the insured desires, conditional on the insured party’s providing notice of loss w/in 60 days.
   2. Example 2: A promises to pay B $100 per bushel of wheat on condition that B delivers the wheat to A’s factory no later than 12PM on February 4, 2016.
2. Make B’s performance of E a duty to A, that is, part of B’s promise to A.
   1. Example: A promises to pay B $100 per bushel of wheat, and (in exchange for: bilateral contract) B’s promise to deliver the wheat to A’s factory no later than 12PM on February 4, 2016.
3. Do both: Make some performance by A, a performance that B desires, conditional on E while bringing about E is also one of B’s duties to A.
   1. A promises to pay B $100 per bushel of wheat, conditioned on B’s delivery of the wheat to A’s factory no later than 12Pm on February 4, 2016, *and* B promises to deliver the wheat to A’s factory no later than 12Pm on February 4, 2016.

**Three Types of Conditions:**

1. Express Conditions (conditions expressly stated in the K) [*Oppenheimer*];
2. Constructive Conditions (conditions implied by law) [*Jacob & Youngs*];
3. Satisfaction Conditions (a type of condition) [*Morin*].

**~Constructive Conditions~**

* **Substantial Performance Satisfies Constructive Conditions**
  + *Jacob & Youngs* (Romanic: looks at purpose of the rule [also considers Reading pipe req to be constructive rather than express condition despite the Reading pipe req being written into the K)
    - ***If*** 
      * (1) The duty is not expressly conditioned; and
      * (2) The duty has been substantially performed,
    - ***Then*** substantial performance fulfills the constructive conditions
    - ***Unless*** the duty was transgressed willfully.
      * Sub-rule: If the breach is immaterial to the K, then there is substantial performance.
* **Damages: Difference in value or cost of replacement?**
  + ***If*** 
    - (1) There is substantial performance;
    - (2) There is an innocent and trivial (non-willful and immaterial) departure from the language in the K; and
    - (3) The cost of completion is “grossly and unfairly out of proportion to the good to be attained” from the replacement,
  + ***Then*** damages are the difference in value instead of the cost of replacement.

**~Express Conditions~**

* **Does Substantial Performance Satisfy Express Conditions?**
  + **Classical**:Substantial Performance ***Does Not*** Satisfy Express Conditions
    - *Oppenheimer* (Classical: limits reach of *Jacob & Youngs*):
      * **Rule**: Substantial performance is inapplicable to express conditions; such conditions must be **literally performed**.
        + **R2d § 237**, cmt. d: If the parties “have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event.”
  + **Romantic View:** Substantial Performance ***Does*** Satisfy Express Conditions
  + *JNA Realty* (Romantic: paternalistic in the sense that it prevents unwitting lessor from suffering forfeiture out of proportion to his own fault despite the express nature of the condition)
    - ***If***
      * (1) There would be a forfeiture;
      * (2) The gravity of the loss would be “out of all proportion” to the gravity of the fault; and
      * (3) There would be no prejudice to the landlord,
    - ***Then*** the tenant is entitled to equitable relief (waiver of express condition).
      * **Forfeiture**: Consequence of breach would include giving up ownership of an asset or cash flows from an asset as compensation for the other party’s loss.
      * Forfeiture, according to **R2d § 229** cmt. b: “The denial of compensation that results when the obligee loses [its] right to the agreed exchange after [it] has relied substantially, as by preparation or performance on the expectation of that exchange.”
  + **R2d § 229**: To the extent the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

**~Satisfaction Clauses~**

Satisfaction clauses are clauses in a K that stipulate, as a condition of the K, the satisfaction of a one of the parties to it.

*Morin* (Posner) (Romantic: goes beyond the rule, wants to save parties from risk of illusory promise by implying terms to the K or interpreting language objectively):

* **R2d § 228**: ***If*** it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, ***then*** if a reasonable person in the position of the obligor would be satisfied, the condition will be interpreted as having occurred.
* **Objective Approach** to Interpreting Satisfaction Clauses: ***If*** the K involves commercial quality, operative fitness, or mechanical utility that other knowledgeable persons can judge, ***then*** the reasonable person standard is employed.
* **Subjective Approach** to Interpreting Satisfaction Clauses: ***If*** the K involves personal aesthetics or fancy, ***then*** the standard of good faith applies.

**Damages**

**~Theory~**

**Three central rationales for damage rules:**

1. **Expectation Interest:** *Counterfactual status quo*: put π in as good as position as she *would have been* had the K been fully performed *by both sides*;
2. **Reliance Interest**: *Actual status quo*: put party in as good a position as was in before the K was made; and
3. **Restitution Interest**: Prevent unjust enrichment, protect party from having to confer benefit unjustly upon other party.

**Compare to the three central rationales for enforcing promises:**

1. Because the promise was the product of a bargain (expectation);
2. Because there was reliance that would be unfair not to protect (reliance); and
3. Because enforcement is required to prevent unjust enrichment (restitution).

**~Expectation Damages~**

**General Formula**

**R2d § 347** (the most general formula for measuring expectation damages):

**Expectation damages** = **loss in value** + **other loss** – **cost avoided** – **loss avoided**

1. **Loss avoided**: Difference between value to injured party of the performance he should have received (under the terms of the K) and the value to him of what, if anything, he actually did receive. (expected revenue/pay – actual revenue/pay)
2. **Other loss**: “Incidental” or “consequential” damages (Incurred cost as a result of the breach)
3. **Cost avoided**: Amount injured party might save in expenses by not having to complete performance after the breach (expected cost – actual cost)
4. **Loss avoided**: Amount the injured party might save by reallocating or reselling materials planned for use in the breached K (losses that can be mitigated)

**Special Cases**

Three cases: (1) construction Ks; (2) house sale Ks; and (3) employment Ks.

* (1) **Construction Contracts** (*American Standard*; Classical: narrows *Jacob & Youngs*):
  + ***If*** the contractor’s performance has been defective or incomplete, ***then*** the reasonable cost of replacement or completion is measure of damages ***Unless***
    - (1) There has been substantial performance of the K made in good faith;
    - (2) Correction of the defects would result in economic waste;
    - (3) The breach is incidental to the main purpose of the K; and
    - (4) The contractor must not have intentionally breached the K; in which case damages are **diminution in value**.
      * Narrows *Jacob & Youngs*; cites case but obtains different result.
* (2) **House Sale Contracts** (*Roesch v. Bray*; Classical): Daughter entered K to sell mother and father house for $65k. Dad informed daughter he couldn’t perform the K. Daughter sold house 1 yr later for $63.5k. Court used the $63.5k resale price as market value at time of sale K; awarded $1,500.
  + ***If*** a purchaser defaults on a K for the sale of real estate, ***Then*** (1) the seller may recover the difference between the K price and the market value of the property at the time of the breach; and (2) may not recover expenses incidental to ownership pending the resale of the property (for example, maintenance and utility expenses).
    - **How to calculate market value?**
      * If sale of the real estate after a breach of K is made (1) within a reasonable time; and (2) at the highest price obtainable after the breach, THEN that sale price is evidence of the market value on the date of the breach.
        + Application in *Roesch*: Housing market was moving slowly because interest rates were high, therefore reasonable to assume the resale price in 1983 was the best indicator of the market value of the home in 1982.
* (3) **Employment Contracts** (*Lukaszewski* [efficient breach]; *Roth* [inefficient breach]):
  + **Efficient Breach** (*Lukaszewski*; speech therapist)**: *If*** a party breaches a K, then the other party should receive the difference between what the party expected to receive and what the party actually received, ***Unless*** the injured party did not fulfill its duty to mitigate.
    - In certain circumstances, the injured party fulfills its duty to mitigate even when the replacement is more expensive. For example, facts of *Lukaszewski*.
    - Policy rationale: encourages efficient breach. That is, society should not punish someone for breaching a K when they find a better deal so long as the breaching party compensates the injured party for what the injured party expected to receive.
      * Application to *Lukaszewski*: ***If*** gain from new salary > damages to be paid to Ed. Bd., ***then*** employee will breach and pay.
  + **Inefficient Breach** (*Roth*; hairdresser)**: *If*** (1) an employee breaches an employment K; and (2) the employee enters a K with a different employer at a higher price, ***then*** the employee owes the injured employer the market value of her services less the original K price.
    - Discourages efficient breach because breaching employee must pay injured employer not what that employer expected to receive, but what the breaching employee actually received.

**Limitations on Recovery**

We covered 2 ways to limit recovery: (1) foreseeability; and (2) mitigation.

1. **Foreseeability of Damages**:
   1. *Hadley v. Baxendale* (Classical): ***If*** (1) two parties have entered a K; and (2) one party has breached the K, then the non-breaching party may recover those damages that “may fairly and reasonably be considered” as either (i) “arising naturally” from the breach; or (ii) “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the K,” as the probable result of the breach.
      1. However, (1) there were **special circumstances** under which the K was made; and (2) those circumstances were **communicated to or known by the ∆s** *if, but only if,* damages for the breach account for those special circumstances
         1. A/k/a direct damages + *foreseeable* consequential damages.
   2. **R2d § 351**:
      1. **§ 351(1)**: Damages are not recoverable for a loss ***If*** the breaching party did not have reason to foresee the damages as a probable result of the breach when the K was made.
      2. **§ 351(2)**: Loss may be foreseeable as a probable result of a breach because it follows from the breach:
         1. **(a)**: in the ordinary course of events; or
         2. **(b)**: as a result of (i) special circumstances; (ii) beyond the ordinary course of events; and (3) about which the party in breach had reason to know.
      3. **§ 351(3)**: A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise ***if*** it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.
   3. **UCC § 2-715(2)**: Consequential damages resulting from the seller’s breach include
      1. **(a)**: Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
      2. **(b)**: Injury to person or property proximately resulting from any breach of warranty.
2. **Mitigation of Damages** (a/k/a cost avoided and loss avoided)
   1. **Duty to Mitigate:**
      1. *Rockingham County v. Luten Bridge Co* (Classical): ***If*** π has received notice of the breach, ***then*** π has duty not to do anything that would increase damages flowing from the breach.
      2. **R2d § 350**:
         1. **§ 350(1)**: Except as stated in **§ 350(2)**, damages are not recoverable for losses that the injured party could have avoided without undue risk, burden, or humiliation.
         2. **§ 350(2)**: The injured party is not precluded from recovery by the rule stated in **§ 350(1)** to the extent that he has made reasonable but unsuccessful efforts to avoid loss.
   2. **Limit on Duty to Mitigate: Lost-Volume Seller**
      1. *Jetz Service Co. v. Salina Properties* (Classical): ***If*** the injured party (1) could have entered into the subsequent K; (2) would have entered into the subsequent K; and (3) could have had the benefit of both Ks even if the K had not been broken, ***Then*** the seller is a lost-volume seller and his recovery is based on the lost profit from the original K only.

**NON-RECOVERABLE DAMAGES**

* **Emotional Distress** (*Erlich v. Menezes–*Classical)**:**
  + No recovery for emotional disturbance UNLESS (1) the breach also caused bodily harm; OR (2) the breach is of such a kind that serious emotional disturbance was a particularly likely result (for example, guests/innkeepers and carriage/disposition of dead bodies).
    - This is **R2d § 353**.
* **Tortious Breach of K** (*Erlich v. Menezes*–Classical)**:**
  + ***If*** (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the K are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the K intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages, ***Then*** there is tortious breach of K.

**RELIANCE DAMAGES**

**An Alternative to Expectation Damages**

* *Wartzman v. Hightower Productions, Ltd.* (Romantic: creates remedy for reliance where **π could not prove expectation damages w/ reasonable certainty** even if such damages would’ve otherwise been available): ***If*** the breach (1) has prevented an anticipated gain; and (2) made proof of a loss difficult to ascertain, ***Then*** the injured party has a right to damages based upon her reliance interest, including expenditures made in preparation for performance or in performance, less any loss the party in breach can prove with reasonable certainty that the injured party would have suffered had the K been performed, ***Unless*** it can be shown that full performance would have resulted in a net loss
  + **R2d § 349** (Damages Based on Reliance Interest): As an alternative to **§ 347** (expectation damages), the “**THEN**” part of the rule stated above.
* **Equal Opportunity Principle for Reliance Damages:** If both parties have an equal opportunity to mitigate damages, then the injured party need not mitigate damages.

**General Reliance** (discretion to award reliance or expectation damages)

* *Walser v. Toyota*: If reliance is used as a substitute for consideration, then the court has discretion to award either reliance or expectation damages.

**Promissory Estoppel Context** (gives court discretion)

* **R2d § 90** states “[t]he remedy granted for breach may be limited as justice requires.”
  + Gives court discretion to limit recovery to reliance as “measured by the extent of the promisee’s reliance rather than by the terms of the promise” when reliance is the basis of enforcement.
    - Application in *Walser*: out-of-pocket expenses was w/in tct’s discretion.

**SPECIFIC PERFORMANCE**

* *City Stores Co. v. Ammerman*: Where legal remedies are neither practicable nor adequate, specific performance may be granted.

**LIQUIDATED DAMAGES** (all from *Wasserman*)

* *Wasserman’s Inc. v. Township of Middletown*:
  + **Rule** (Classical): Parties to a K may not fix a penalty for its breach.
    - Such Ks are unlawful.
  + **Rule** (Romantic): Two rules:
    - **Necessary condition for damage clause to be enforceable:** A stipulated damage clause is enforceable only if it constitutes a reasonable forecast of the provable injury resulting from breach.
    - **Necessary and sufficient condition for damage clause to be enforceable:** A stipulated damage clause is enforceable if and only if it is reasonable under the totality of the circumstances.
      * When applying: “The greater the difficulty of estimating or proving damages, the more likely the stipulated damages will appear reasonable.”
      * If the damages provided for in the K are grossly disproportionate to the actual harm sustained, the courts usually conclude that the parties’ original expectations were unreasonable.
    - **R2d § 356(1)** (basically **UCC § 2-718**): Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
    - **UCC § 2-718** (basically same as **R2d § 356(1)**): Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual los caused by the breach, the difficulties of proof of loss, **and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy**. A term fixing unreasonably large liquidated damages is void as a penalty.

**What Brewer Wants:**

Brewer wants his students to demonstrate what he thinks is proper legal reasoning. He wants them to consider the facts of a hypo about a specific party and from those facts, make an inference to the best legal explanation (identify the doctrines under which a party has the best chance of winning). Once the student has identified the 3 or 4 best “legal explanations,” she chooses one rule from among the many that she has seen for each doctrine. She explains why this particular rule was chosen (and not another) and applies it to the fact pattern as the court that issued the opinion from which the rule was taken would have applied it (If it was a romantic court, apply it romantically; if classical, apply it classically).