# What Law Applies?

## UCC Article 2

1. Sale of Goods
   1. Sale – title to goods passes from the seller to the buyer for a price. UCC 2-106(1)
   2. Goods – all things movable. UCC 2-105(1)
      1. Tangible things but not money, real estate, services, or intangibles, or to construction contracts.
2. Special rules govern transactions between merchants
   1. Merchant – one by following a particular occupation, has or represents having knowledge or skill concerning the goods/professional user of the goods. UCC 2-104(1)
3. Contracts involving Goods and Nongoods
   1. Determine which aspect is dominant and apply the law governing that aspect to the whole contract. If the contract divides payment between goods and services, then Article 2 will apply to the goods portion.

## Common Law

1. Any contract not governed by UCC

# Is there a Valid Contract?

## Intent to Contract

1. Mutual Assent
   1. Meeting of the Minds
      1. Objective, not subjective. ***See Ray***
      2. Test for intent – the objective measure of a party’s intention is. ***R2d 19, 20***:
         1. What the other party actually knew; or
         2. What the other party should have known – what a reasonable person in the position of the other party would conclude that his objective manifestations of intent meant.
   2. Offer and Acceptance. ***See Lonergan***
2. Signed document
   1. Duty to Read – If no fraud, duress, or mutual mistake, a party is bound to a signed document which he has read or not read if he has the capacity to understand it. ***See Ray***

## Offer

1. Is there a valid offer?
   1. Definition – An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. ***R2d 24***
   2. Manifestation of a present intent to contract demonstrated by a promise, undertaking or commitment;
      1. Use of Broad Communications Media – typically solicitation of an offer
      2. Advertisements
         1. Typically invitations for offers
         2. Offer if language of the advertisement can be construed as a promise – the terms are certain and definite, and the offeree is clearly identified. ***See Izadi***.
         3. “Bait and switch” – an offer which is made not in order to sell the advertised product at the advertised price, but rather to draw the customer to the store to sell him another similar product which is more profitable to the advertiser.
            1. This may invoke a line of persuasive authority that a binding offer may be implied from the very fact that deliberately misleading advertising intentionally leads the reader to the conclusion that a valid offer exists. ***See Izadi***.
      3. Price quotation – general rule is that a price quotation is not an offer but rather an invitation to enter into negotiations or a solicitation for offers. But, if sufficiently detailed, price quotes can amount to an offer. ***Brown Machine***.
      4. Purchase order – can constitute offer. ***Brown Machine***.
      5. Industry Custom
      6. Not preliminary negotiations
         1. Solicitation of bids merely serve as a basis for preliminary negotiations. ***See Brown Machine***
         2. “A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.” ***R2d 26***; ***See Lonergan***
   3. Communicated to an identified offeree; and
   4. Definite and certain terms
      1. Requirements
         1. Real Estate – land and price
         2. Sale of goods – quantity
         3. Employment – if duration not specified, the offer if accepted, is construed as creating a contract terminable at the will of either party
         4. Other Services – nature of the work must be included
      2. Missing Terms
         1. Court can supply reasonable terms for those that are missing. Common law and UCC 2-204, UCC 2-305
      3. Vague Terms
         1. Can be cured by part performance
         2. Can be cured by acceptance
         3. Focus on contract as distinguished from offer
      4. Terms of be agreed on later – okay if not material (price okay)
2. Creates power of acceptance; has the offer been terminated?
   1. Termination by Offeror – Revocation
      1. General Rule
         1. Offeror is free to revoke his offer at any time before it is accepted. ***See Petterson***; ***See James Baird***
         2. Revocation is effective when received by offerree
      2. Irrevocable offers:
         1. Merchant’s firm offer under UCC
         2. Option contract – offeree gave consideration to hold open offer
         3. Detrimental reliance – *See Pre-Acceptance Reliance under Promissory Estoppel*
         4. Beginning performance in response to unilateral contract offer. ***R2d 45***
            1. Does not apply when preparing to perform
            2. If the offeror’s cooperation is necessary for performance, his withholding of it upon the tender of performance is the equivalent of commencing performance. ***R2d 45***
   2. Termination by Offeree
      1. Rejection – effective when received
         1. Express rejection. R2d 36
         2. Counteroffer acts as rejection. ***R2d 39(1)***; ***See Poel***
            1. “A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.” ***R2d 59***.
      2. Lapse of time – must accept within specified or reasonable time. ***R2d 41***
   3. Termination by operation of law when:
      1. Death or insanity of either party. R2d 48
      2. Destruction of subject matter of the contract. R2d 36
      3. Supervening illegality of subject matter of contract. R2d 36

## Acceptance

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. ***R2d 50(1)***
2. Methods of Acceptance
   1. UCC – reasonable means
   2. Unilateral contract – completion of performance or partial performance. ***R2d 50(2)***
   3. Bilateral contract – promise or performance
      1. Generally, acceptance must be communicated
      2. Generally, silence is not acceptance UNLESS:
         1. “(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
            1. (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
            2. (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
            3. (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
         2. (2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.” ***R2d 69***.
   4. Offeror is master of her offer
3. Unequivocal acceptance
   1. Common law – acceptance of each and every term of the offer (mirror image rule). ***Poel***; ***R2d 58***.
      1. Minor discrepancies okay? Classical v. Romantic court
      2. Last shot-rule – Where the final communication in the process of offer and acceptance contains new or different terms, the recipient is deemed to have accepted those terms by conduct if she performs without objecting to them. ***Poel?***; ***R2d 69***.
   2. UCC 2-207
      1. Two scenarios
         1. “Battle of the forms” – Offer and acceptance are usually pre-printed forms, with blanks left for the particular “negotiated” terms to be filled in. The non-negotiated sections often differ.
         2. Oral agreement and then written confirmation – not clear 2-207 covers this since already have acceptance in oral agreement.
      2. “(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.”
         1. Acceptance expressly made conditional on the offeror’s assent to terms not contained in the original offer, is counteroffer rather than an acceptance. ***See Brown Machine***.
      3. “(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
         1. (a) the offer expressly limits acceptance to the terms of the offer;”
         2. “(b) they materially alter it; or”
            1. An additional term is said to materially alter a contract “if its incorporation into the contract without express awareness by the other party would result in surprise or hardship.” ***Dale*** (reading of cmt.4).

Boilerplate language not given much weight. ***See Dale***.

* + - * 1. Posner in different jurisdiction – Dale read cmt 4 wrong. Real reading is “If material alteration, then surprise or hardship.” Therefore, if no surprise and hardship, then no material alteration. Surprise and hardship are necessary conditions but not sufficient conditions. Allowing a party to get out of a contract just because it is a hardship makes it too easy to get out of a contract.
        2. See cmt 4 for examples – negating standard warranties
      1. “(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”
    1. “(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.”
       1. Supplementary terms – 2-314 and 2-315 (implied warranties of merchantability and fitness; 2-715 (damages provisions, including seller liability for consequential damages); and 1-303 (terms that are deemed part of the parties’ agreement by virtue of the Code’s provisions regarding “course of performance,” “course of dealing,” and “usage of trade.”

1. Acceptance effective upon dispatch (mailbox rule)
   1. Unless the offer stipulates that acceptance is not effective until received or an option contract is involved
   2. Limitation – offeror opts out; rejection sent first

## Consideration

1. Functions – Evidentiary, Cautionary, Channeling
2. Detriment to promisee or legal benefit to promisor (courts focus on detriment)
   1. Legal detriment and benefit
      1. Legal detriment – promisee does something he is under no legal obligation to do or refrains from doing something that he has a legal right to do. ***Hamer***
      2. Legal benefit – forbearance or performance of an act by the promise which the promisor was not legally entitled to expect or demand, but which confers a benefit on the promisor
   2. Adequacy generally irrelevant. ***R2d 79***; ***See Allegheny***
      1. Unless token or sham consideration
         1. ***Dougherty*** (“value received” in promissory note not sufficient to constitute consideration).
      2. Opposing view – The legal detriment incurred must be the “quid pro quo,” or the “price” of the promise, and the inducement for which it was made. ***See Pennsy***
      3. Economic benefit not required
3. Bargained-for exchange
   1. Act of forbearance by promisee must be of benefit to promisor
      1. “A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.” ***R2d 71(2)***
      2. (1) A waiver of a legal right (2) at the request of another party is a sufficient consideration for a promise. ***See Hamer***.
   2. Gift.
      1. Pure gift – no consideration. ***See Dougherty***.
      2. Conditional gift v. Bargain
         1. An aid in distinguishing between conduct that constitutes consideration and conduct that is a condition to a gift is an inquiry into whether the occurrence of the condition would **benefit the promisor**. If so, it is fair inference that the occurrence was requested as consideration. ***See Pennsy***; ***See Allegheny***.
         2. The conduct of moving to see someone constitutes a condition to a gift and not bargained-for exchange. ***See Kirksey***.
   3. Consideration or Condition? ***See Plowman*** (P’s travel to D’s office to pick up their checks was simply a condition imposed upon them in obtaining gratuitous pensions.)
   4. Overt bargaining
      1. Actual negotiation. ***See Baehr***.
      2. Actual bargaining unnecessary. ***See Pennsy***. Economic benefit not required
   5. Past consideration – Past consideration, consideration made before a contract is created, cannot support an enforceable contract, because the detriment had been performed before the contract was created and thus could not have been in exchange for the promise. ***See Plowman***.
4. Pre-existing legal duty not consideration
   1. Exceptions
      1. Written promise to pay time-barred debt
      2. New or different consideration promised
      3. Material Benefit Rule – Promise to pay arising out of past material benefit. R2d 86
      4. Promise ratifying a voidable obligation (e.g. minor ratifying upon reaching age of majority)
      5. Compromise of honest dispute
      6. Unforeseen circumstance rising to the level of impracticability
      7. Good faith modification under UCC 2-209
5. Substitutes for consideration
   1. Promissory Estoppel
      1. Elements:
         1. (1) “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person;” and (2) “which does induce such action or forbearance is binding.” (3) “if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.” R2d 90(1). ***See Wright***; ***See Pop’s Cones***.
            1. ***Wright Dissent*** – high threshold for third element – no reason to think she could not find natural father. Important factual question had not been resolved in lower courts.
         2. An agreement that lacks consideration may be enforceable based on promissory estoppel when: (1) a promise; (2) a detrimental reliance on such promise; (3) injustice can be avoided *only* by enforcement of the promise. ***See Katz*** (Note: does not require that promisee relinquish a legal interest).
         3. An agreement that lacks consideration may be enforceable based on promissory estoppel when: (1) the promisor reasonably expected the promisee to act in reliance on the promise; (2) the promisee acted as could reasonably be expected in relying on the promise; and (3) a refusal by the court to enforce the promise must be virtually to sanction the perpetration of fraud or must result in other injustice. ***Berryman*** (narrows promissory estoppel).
      2. Charitable subscriptions
         1. Therefore, courts often apply promissory estoppel to charitable subscription cases. ***See Maryland*** (chooses not to apply promissory estoppel because no action induced or forbearance or detrimental reliance. No allocation by UJA to its beneficiary organization was threatened or thwarted by the failure to collect the Polinger pledge in its entirety. UJA borrowed no money on the faith and credit of the pledge.)
         2. Courts often do not impose detrimental reliance requirement where the promise is a charitable subscription (subscription – written promise). ***See Allegheny*** (Cardozo trying to go this route but didn’t fully go here).
         3. Some promises of charitable contribution can have consideration. ***See Allegheny*** (Benefit to promisor was college perpetuated name and kept up memorial but seems a stretch because no legal detriment to college – college didn’t have right to not use money in certain way since didn’t have money in the first place).
      3. Promises to Pay Pensions and other fringe benefits – many such promises, insofar as they represent an employer’s attempt to ensure continued service by his employees, are supported by consideration, and are therefore enforceable as ordinary contracts. ***See Katz***.
      4. Promise to perform business service – a person who promises to perform some business service for another may be liable under a promissory estoppel theory, if the other person relies on the promise by entering or failing to enter some other transaction.
         1. Promise to obtain insurance – ***See Shoemaker***.
      5. Pre-Acceptance Reliance
         1. General Rule
            1. Reasonable reliance on a promise binds an offeror even if there is no other consideration. E.g. general contract reliance on subcontract quote for project bid. ***Drennan*** (based on R2d 90); ***But cf.*** ***James Baird***.
            2. “An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.” R2d 87(2)
            3. Option Contracts – Option contract without consideration is no more than a continuing offer to sell. It can only be made binding without consideration via promissory estoppel, but it is unlikely that an option holder will rely upon it reasonably when there has been no consideration, because she likely knows it is not binding. ***See Berryman*** (No pre-acceptance reliance between real estate agent and land owners.
         2. Mostly applies to construction bidding situation. ***See Berryman*** (No pre-acceptance reliance between real estate agent and land owners); ***But Cf. Pop’s Cones.***
   2. Restitution in the Absence of a Promise (implied in law or quasi contracts)
      1. General Rule
         1. R3d of Restitution § 1 – “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”
      2. Elements – ***See Watts***; ***See Commerce***
         1. (1) a benefit conferred on D by P
         2. (2) appreciation or knowledge by D of the benefit
         3. (3) acceptance or retention of the benefit by D
         4. (4) under circumstances making it inequitable for D to retain the benefit.
      3. Implications – Many procedural or evidentiary rules applicable to contracts will not apply when restitution is the basis for recovery. ***See Pelo*** (constitutional claims regarding the rights to contract do not apply to restitutionary claims).
      4. Consent
         1. Consent is generally required.
            1. “The general rule is that where one renders services of value to another with his knowledge and consent, the presumption is that the one rendering the services expects to be compensated, and that the one to whom the services are rendered intends to pay for the same, and so the law implies a promise to pay.” ***See Pelo***
            2. Restatement of Restitution § 2 – “A person who officiously confers a benefit upon another is not entitled to restitution therefor.”

R3d of Restitution § 2 cmt. a. – “Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place.”

Posner – officiousness means an unbargained-for benefit is conferred in circumstances where the costs of a voluntary bargain would have been low.

* + - 1. Can be without consent:
         1. R1st of Restitution § 116 – “A person who has supplied things or services to another, although acting without the other’s knowledge or consent, is entitled to restitution therefor from the other if:

(a) He acted unofficiously and with intent to charge therefor, and

(b) The things or services were necessary to prevent the other from suffering serious harm or pain, and

(c) The person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent; and

(d) 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.” ***See Pelo***.

* + - * 1. R1st of Restitution §116 cmt. b – if a person is otherwise not fully mentally competent, a person rendering necessaries or professional services is entitled to recover from such person although the person expresses an unwillingness to accept the services. ***See Pelo***.
    1. Applications
       1. Protection of Another’s Life or Health. R3d of Restitution § 20. ***See Pelo***.
       2. Protection of Another’s Property. R3d of Restitution § 21
       3. Sub-Contractors. ***See Commerce***.
       4. Unmarried Cohabitation. ***See Watts***. R3d of Restitution § 28
  1. Promissory Restitution
     1. Rule: If Promisor benefits from promisee’s action(s) and Promisor subsequently promises to pay for benefit, then promise is enforceable
        1. Note: No bargained-for exchange required
     2. Majority – Doctrine of “Moral Obligation”
        1. Moral obligation is insufficient as consideration to support a subsequent express promise. ***See Mills*** (without prior valid obligation).
        2. It may be sufficient in few specific cases.
     3. Minority – Material Benefit Rule
        1. If a person receives a material benefit from another, other than gratuitously, a subsequent promise to compensate the person for rendering such benefit is enforceable. ***See Webb*** (or there was a preexisting valid obligation).
        2. R2d 86
  2. Implied-in-fact contracts
     1. Common law – “he who is silent, does not give his consent.”
     2. Modern view: Recognize silence as mode of acceptance in several scenarios. In these scenarios, the parties do not expressly exchange an offer and acceptance, but indicate by their silence (or non-verbal conduct) their understanding that a contract is being formed.
        1. True contracts like express contracts
        2. Different from implied-in-law contracts because the party receiving the benefit of services or property had “requested” it.
     3. Scenarios
        1. Request made: When a person “requests another to perform services for him or to transfer property to him,” the law will infer a bargain to pay. R3d §107(2)

## No Defenses to Formation or Enforcement

1. Fraud and misrepresentation (includes concealment and nondisclosure)
   1. General Rule
      1. R2d 164. ***See Hill.***
         1. “(1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
         2. (2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.”
      2. Elements of actual fraud are: a material misrepresentation of past or existing fact by the party to be charged which (***Park 100***):
         1. Was false
         2. Was made with knowledge or in reckless ignorance of the falsity,
         3. Was relied upon by the complaining party, and
         4. Proximately caused the complaining party injury
   2. Fraud in the execution v. fraud in the inducement
      1. Fraud in the execution (fraud in the factum) – void
         1. Party is deceived as to the nature of the writing, **e.g.** ***Park 100*** (court found that contract could not be enforced due to fraud in that D was told they were signing lease agreement but were actually signing a personal guaranty of lease. D did not read but attorney said he examined and approved the lease); **but cf.** ***Ray*** (duty to read traditionally binds parties to signed agreements whether the agreement is read or not).
         2. R2d 166 “If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, the court at the request of the recipient may reform the writing to express the terms of the agreement as asserted,
            1. (a) if the recipient was justified in relying on the misrepresentation, and
            2. (b) except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.”
      2. Fraud in the inducement (fraudulent misrepresentation) – voidable
         1. Where the party knows what he is signing but does so as the result of misrepresentations e.g. ***Hill***.
         2. Misrepresentation – false assertion of fact
         3. Fraudulent – intended to induce a party to enter into a contract and the maker knows or believes the assertion is false or knows that he does not have a basis for what he states or implies with the assertion
         4. Can be inferred from conduct; e.g. concealment or sometimes even nondisclosure
   3. Duty to Disclose
      1. ***R2d 161***; ***See Hill.***– “A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
         1. (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
         2. (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
         3. (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
         4. (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.”
      2. ***Hill*** (Florida Rule adopted) – “where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”
         1. “A matter is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction in question.”
      3. ***Hill*** (California Rule not adopted) – “Where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not know to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.”
      4. Innocent or negligent non-disclosure
         1. Several courts have indicated that a party who seeks rescission because of nondisclosure must show actual knowledge by the other party of the undisclosed fact.
         2. ***R2d 161***- fact must be “known to him.”
      5. Costly Investigation – Anthony Kronman
         1. Disclosure of deliberately acquired information should not be required because it is socially desirable to give parties an incentive to acquire information. Casually acquired information does not reflect an investment of resources and disclosure should be required for such information, because disclosure is the least costly methods of reducing mistaken contracts.
   4. Nonfraudulent misrepresentation – contract voidable if material
      1. General rule – contract is voidable by the innocent party if the innocent party justifiably relied on the misrepresentation and the misrepresentation was material. A misrepresentation is material if (1) it would induce a reasonable person to agree, or (2) the maker knows that for some special reason it is likely to induce the particular recipient to agree, even if a reasonable person would not.
2. Illegality of consideration or subject matter – usually renders contract void
   1. Compare illegal purpose – if the contract was formed for an illegal purpose, the contract is only voidable by the party who (1) did not know of the purpose, or (2) knew but did not facilitate the purpose and the purpose does not involve serious moral turpitude. If both parties knew of the illegal purpose and facilitated it, or knew and the purpose involves serious moral turpitude, the contract is void and unenforceable. R2d 182
   2. Licensing – if a contract is illegal solely because a party does not have a required license, whether the contract will be enforceable depends on the reason for the license: Revenue raising – contract enforceable; Protection of public – contract not enforceable (void)
      1. Contracts made in violation of regulatory statutes enacted for the protection of the public, as opposed to statutes intended merely to provide revenue, are rendered null and unenforceable. ***Derico***.
      2. R2d 181 – “If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if
         1. (a) the requirement has a regulatory purpose, and
         2. (b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.”
      3. “It is the general doctrine, now settled by great weight of authority, that where a license is required for the protection of the public, and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void.” ***Hiram***.
      4. Equitable Exception - should not apply when “it causes great disproportionate hardships…” Hiram.
3. Incapacity
   1. Infancy, mental incapacity, intoxication
4. Duress
   1. Direct Physical Force – contract void. ***R2d 174***
   2. Improper threat leaves the victim no reasonable alternative – contract voidable by victim
      1. ***R1st 492***; ***See Totem***.
         1. “(a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
         2. (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.”
      2. ***R2d 175*** ; ***See*** ***Kelsey-Hayes***
         1. (1) If (i) a party's manifestation of assent is induced by an (ii) improper threat by the other party that (iii) leaves the victim no reasonable alternative, the contract is voidable by the victim.
         2. (2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.
      3. Professor Williston; ***See Totem.***
         1. “(1) The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and
         2. (2) Such act or threat must be one which deprives the victim of his unfettered will.”
      4. ***Totem*** (quoting Grimshaw) – Duress exists where:
         1. “(1) one party involuntarily accepted the terms of another
         2. (2) circumstances permitted no other alternative, and
         3. (3) such circumstances were the result of coercive acts of the other party” (as opposed to the “defendant’s necessities”)
      5. ***Totem*** application (CB 559)
         1. Deliberate withholding payment of an acknowledged debt
         2. Knowing that other party had no choice but to accept an inadequate sum
         3. Other party faced with impending bankruptcy and unable to meet pressing debts other than by accepting the immediate cash payment offered
         4. Through necessity, other party thus involuntarily accepts an inadequate settlement offer and executed release of all claims under contract
      6. “In order to state a claim of economic duress a buyer coerced into executing a modification to an existing agreement 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.” ***Kelsey-Hayes***.
   3. Inducement of Involuntary Assent
      1. Substantial contribution – “[The improper threat must induce the making of the contract,” meaning that the threat must “substantially contribute” to the manifestation of assent. R2d 175 Comment c
      2. Subjective
         1. Whether the will of the person induced by the threat was overcome rather than that of a reasonably firm person. ***See Totem***.
         2. “The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress…All attendant circumstances must be considers, including such matters as the age, background and relationship of the parties.” R2d 175 Comment c.
   4. Improper Threats
      1. R2d 176
         1. “(1) A threat is improper if
            1. (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
            2. (b) what is threatened is a criminal prosecution,
            3. (c) what is threatened is the use of civil process and the threat is made in bad faith, or
            4. (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
         2. (2) A threat is improper if the resulting exchange is not on fair terms, and
            1. (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
            2. (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
            3. (c) what is threatened is otherwise a use of power for illegitimate ends.”
   5. Reasonable Alternative – ***Totem***
      1. What may be reasonable alternative?
         1. Available legal remedy such as an action for breach of contract
         2. Where one party wrongfully threatens to withhold goods, services or money from another unless certain demands are met, the availability on the market of similar goods and services or of other sources of funds may also provide an alternative
      2. What may not be reasonable alternative?
         1. Where the delay involved in pursuing that remedy would cause immediate and irreparable loss to one’s economic or business interest.
   6. Must Threatening Party cause Hardship?
      1. Most courts say yes – the fact that a party agreed to a settlement because of a desperate need for cash could not be the basis for duress unless the other side had caused the financial hardship. *See Selmer*.
      2. A few courts have held that it is enough that one party takes advantage of the other side’s dire circumstances without having caused the financial hardship. *See Butitta*.
5. Undue Influence
   1. ***Odorizzi***
      1. “the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating person make the latter's influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person.”
      2. “persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment…The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. In this sense, undue influence has been called overpersuasion.”
      3. Characteristics often found in cases of overpersuasion: “(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, (7) statements that there is no time to consult financial advisers or attorneys.”
      4. Do not need:
         1. Misrepresentations of law
         2. A confidential or authoritative relationship between the parties need not be present but still a consideration
      5. “taking an unfair advantage of another’s weakness of mind; or…taking a grossly oppressive and unfair advantage of another’s necessities or distress.”
   2. ***R2d 177***
      1. “(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.
      2. (2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.
      3. (3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.”
6. Statute of Frauds – certain contracts must be in writing, signed by the party to be charged
   1. Agreements covered. ***R2d 110(1); UCC 2-201***
      1. Marriage – when marriage is consideration for promise (e.g., If you marry my son, I will buy you a car)
      2. Year – promise that cannot be performed within one year
         1. Part performance does not satisfy
         2. Effective date runs from the date of the agreement
         3. Contracts not within statute
            1. Possibility of completion within one year
            2. Right to terminate within year?
      3. Land – promises creating interests in land (e.g., leases, easements, fixtures, mineral rights, mortgages)
      4. Executors and administrators – promises to pay estate debts from own funds
      5. Goods – contracts for sale of goods for a price of $500 or more
      6. Suretyship – promise to answer for debt of another
   2. Writing – “Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
      1. (a) reasonably identifies the subject matter of the contract,
      2. (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
      3. (c) states with reasonable certainty the essential terms of the unperformed promises in the contract.” ***R2d 131***
   3. Separate Writings
      1. Statute of Frauds does not require writing to be in one document – Separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion, may be pieced together to find an enforceable contract under the Statute of Frauds. ***R2d 132***; ***Crabtree***.
      2. Threshold Requirements– to permit the satisfaction of the Statute of Frauds by a series of signed and unsigned writings contains two strict threshold requirements ***(Crabtree)***:
         1. Signed writing must itself establish “a contractual relationship between the parties.”
            1. R2d 133 does not require the signed writing to establish a contractual relationship.
         2. The unsigned writing must “on its face refer to the same transaction as set forth in the one that was signed.”
      3. Parol evidence
         1. Compliance with threshold requirements cannot be decided with parol evidence.
         2. Parol evidence to portray the circumstances surrounding the making of the memorandum – is permissible in order to establish a connection. ***See Crabtree*** (testimony must be very convincing).
   4. Signature – liberally construed by most courts
   5. Effect – majority finds noncompliance renders the contract unenforceable at the option of the party to be charged
   6. Exception – Promissory Estoppel
      1. R2d 139; ***See McIntosh***; ***See Alaska Democratic Party***
         1. “(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
         2. (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) 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; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was forseeable by the promisor.”
      2. Can apply to oral employment contracts. ***See McIntosh***
7. Unconscionability
   1. General Rule – court may refuse to enforce to avoid unfair terms
      1. “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” ***Williams***.
         1. “Meaningful choice is to be determined in light of all circumstances – for example, gross inequality in bargaining power, manner in which the contract was entered, did each party considering his obvious education 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 by deceptive sales practices.” ***Williams***.
         2. “In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances exiting when the contract was made…The terms are to be considered “in the light of the general commercial background and the commercial needs of the particular trade or case…whether the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place.” ***Williams***.
      2. ***R2d 208*** – “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”
      3. UNIDROIT Principles of International Commercial Contracts Art. 3.2.7
         1. (1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
            1. (a) the fact that the other party has taken unfair advantage of the first party’s dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and
            2. (b) the nature and purpose of the contract.
         2. (2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.
         3. (3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.2.10(2) apply accordingly.
      4. Procedural/Substantive Unconscionability – ***Higgins***
         1. Both procedural and substantive unconscionability must be present – the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required and vice versa.
         2. Procedural unconscionability – oppression or surprise due to unequal bargaining power, “surprise” being a function of the disappointed reasonable expectations of the weaker party.”
            1. Adhesion contract? – Contract that is imposed and drafted by the party of superior bargaining strength and relegates to the other party only the opportunity to adhere to the contract or reject it.
         3. Substantive unconscionability – overly harsh or one-sided results
   2. Arbitration Clause
      1. If an arbitration agreement is unconscionable, it will not be enforced. ***Higgins***.
      2. An arbitration clause in a written agreement may not be enforced if only the clause, as opposed to the entire agreement, is being challenged and the clause is unconscionable. ***Higgins***.
   3. No Duty to Read
      1. “There is no rule that if a party reads an agreement he or she is barred from claiming it is unconscionable.” ***Higgins***.
   4. Effect
      1. “[I]f a court finds that the terms of an agreement made under this chapter are unconscionable, the court “may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable provision, or it may so limit the application of any unconscionable provision as to avoid any unconscionable result.” ***Derico***.
      2. ***UCC 2-302***; ***See Williams***.
         1. “(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
         2. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”

# What are the Terms of the Contract?

## Interpretation

1. Approach – Modified objective (mutual assent)
   1. No Degrees of Fault – ***Joyner***: (1) Meeting of the minds – where parties have attributed different meanings to a term within a contract, there is no meeting of the minds on that provision and a court will not enforce either party’s meaning. (2) Where one party knows or has reason to know what the other party means by certain language and the other party does not know or have reason to know of the meaning attached to the disputed language by the first party, the court will enforce the contract in accordance with the innocent party’s meaning.
   2. Degrees of Fault – ***R2d 201***.
      1. “(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
      2. (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
         1. (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
         2. (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
      3. (3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.”
   3. Misunderstanding – ***R2d 20***
      1. “(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
         1. (a) neither party knows or has reason to know the meaning attached by the other; or
         2. (b) each party knows or each party has reason to know the meaning attached by the other.”
      2. (2) similar to ***R2d 201*** (2) supra
2. Maxims
   1. (Many under CB p. 382)
   2. Interpret contract as a whole
   3. Written or typed terms prevail over printed. ***Poel***.
   4. Custom and usage in business and locale is considered
   5. Court will try to find contract valid
   6. Words generally given plain meaning
   7. Contra proferentem – a contractual ambiguity should generally be resolved against the party who drafted the language in question. Generally employed where the parties have unequal bargaining positions but is not expressly limited those situations. E.g. Adhesion contracts. ***See Joyner*** (court found that no unequal bargaining positions because both had experience in real estate).
   8. Noscitur a sociis (known by its companions)
   9. Ejusdem generis (of the same type)
   10. Expressio unius exclusion alterius
   11. Ut magis valeat quam pereat
   12. Omnia praesumuntur contra proferentem
   13. Specific provision is exception to a general one
   14. Public interest preferred
   15. All terms will be interpreted, where possible, so that they will have a reasonable, lawful, and effective meaning. ***R2d 203(a).***
3. Reasonable Expectations Doctrine
   1. Originally applied to insurance policies but may be applicable to other adhesion contracts.
   2. Strict form: “The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” ***See C&J Fertilizer***.
   3. R2d § 211. Standardized Agreements
      1. “(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
      2. (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
      3. **(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.**”
   4. Limits: some states require presence of ambiguity
   5. Some courts have not adopted it

## Parol Evidence Rule

1. General – When parties intend that a writing is the final expression of their bargain, no prior (oral or written) or contemporaneous (oral) expressions are admissible to vary the terms of the writing. ***Thompson*** (“parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.”)
2. Integration
   1. Integration – document of which both parties intend to represent a final expression of their agreement. ***See R2d 209***.
   2. Partial Integration – document not intended by the parties to include all details of their agreement. ***See R2d 210***.
   3. Total Integration – document intended by the parties to include all the details of their agreement
3. General Rule (***Thompson*** (when partial integration, parol evidence may be admitted to prove the part omitted); ***See R2d 213, 215, 216)***
   1. Partial integration – no evidence of prior or contemporaneous agreements or negotiations (oral or written) may be admitted if this evidence would contradict a term of the writing.
   2. Total integration – no evidence of prior or contemporaneous agreements or negotiations (oral or written) may be admitted which would either contradict or add to the writing.
4. Approaches
   1. “Four corners” approach – determination of integration (partial or total) must be determined within the writing without resort to extrinsic evidence. ***See Thompson***.
      1. Merger clause – states that the writing is intended to be final and complete, given conclusive or nearly conclusive weight. *Williston*; ***Thompson*** (If it imports on its face to be a complete expression of the whole agreement (merger/integration clause?), it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement)
   2. Contextual approach – “[A] writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.” R2d 210, Comment b.
      1. Merger clause not solely determinative.
5. Evidence outside scope of the rule may be admitted:
   1. Evidence to establish that the writing is or is not an integrated agreement. R2d 214(a).
   2. Evidence to establish that the integrated agreement, if any, is completely or partially integrated. R2d 214(b).
   3. Subsequent agreements
   4. Evidence to explain meaning of the agreement. R2d 214(c). ***Thompson***.
      1. Classical Courts – only if ambiguity. ***See Hershon Majority*** (Modified objective approach – parol evidence may be used to determine whether a contract ambiguity exists in the first place (unless that evidence varied, altered, or contradicted the writing’s clear meaning) and to resolve any ambiguity by ascertaining the parties’ intent.)
      2. Modern Courts – can be used to show special meaning even if that language is facially clear. R2d 214, comment b. ***See Hershon Dissent***.
   5. Evidence to show that effectiveness of the agreement was subject to an oral condition precedent. R2d 217
   6. Evidence to show that the agreement was invalid for any reason, such as fraud, duress, undue influence, incapacity, mistake or illegality. R2d 214(d)
      1. Fraud
         1. Some courts limit to just fraud in the factum but some also include fraud in the inducement
         2. ***Sherrodd*** Majority: Parol evidence can be offered to establish fraud but not where evidence is of prior fraudulent oral agreement contradicting a term in the written agreement.
         3. ***Sherrodd*** Dissent: Parol evidence can be offered to establish that a contract was induced by fraud without above exception
      2. Mutual Mistake. ***See Sherrodd***
   7. Evidence to establish a right to an “equitable” remedy, such as “reformation” of the contract. R2d 214 (e). – typically need clear and convincing evidence that a part of the agreement was inadvertently omitted.
   8. Consistent additional terms/collateral agreement
      1. ***Thompson*** (Strict) – only applies to an agreement about a “Subject distinct from that to which the writing relates.” E.g. A warrant is considered a contract term and must be included in the contract. ***Thompson***.
      2. R2d 216(2): an agreement will not be regarded as fully integrated if the parties have made a consistent additional agreement which is either agreed to for separate consideration or is “such a term as in the circumstances might naturally be omitted from the writing.”
      3. UCC 2-202: “consistent additional terms” should be excluded under 2-202(b) only where the court concludes that if such terms had actually been agreed upon they would “certainly have been included in the document.”
   9. Evidence showing true consideration paid
   10. Evidence in action for reformation

## Supplementing the Agreement

1. Reasonable Efforts
   1. A promise to use reasonable efforts can be implied from a writing to achieve proper business efficacy even though it is imperfectly expressed. ***Wood***.
   2. UCC 2-306(2) – imposes a “best efforts” obligation in cases where the contract for sale calls for “exclusive dealing.” ***See Wood*** (regarded as genesis for this UCC provision).
2. Good Faith and Fair Dealing
   1. UCC
      1. Imposes obligation of good faith in its performance and enforcement. UCC 1-304.
      2. Good faith – honesty in fact and the observance of reasonable commercial standards. UCC 1-201(20)
   2. Does not apply to the termination of an at-will employment relationship.
      1. Exceptions:
         1. A termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract. ***Olga Monge***
         2. Construe Monge to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn. A discharge due to sickness or age do not fall under this narrow category. ***Robert Howard***
         3. Public policy is not restricted to those enunciated in a statute. Public policy exceptions giving rise to wrongful discharge actions may also be based on non-statutory policies and do not need to be “strong and clear.” ***David Cloutier***
         4. (1) Termination threatens clear mandates of public policy founded on constitutional, legislative, administrative or established judicial authority; (2) applies to contractual terms outside an at-will employment relationship, including earned compensation and promise of evaluation. ***Donahue***.
      2. Presumption of at-will
         1. Exceptions: (1) additional consideration; sometimes (2) employer has committed itself by public statements in personnel manuals or otherwise to refrain from terminating employees except for good cause; and (3) promissory estoppel. ***Donahue***.
3. Warranties
   1. No more “Caveat emptor” – let the buyer beware
   2. Common Law
      1. Implied Warranty of Skillful Construction/Habitability
         * 1. Habitability – end result
           2. Skillful construction – Imposes by legal implication a contractual liability on a homebuilder for skillful performance and quality of a newly constructed home. ***See Caceci***.

how it’s made so may cover more than habitability

Builder-seller’s knowledge is not relevant and merger clause has no legal effect. ***See Caceci***.

* 1. UCC
     1. Implied warranty of merchantability – ***UCC 2-314***; ***See Bayliner***
        1. “(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
        2. (2) Goods to be merchantable must be at least such as
           1. (a) pass without objection in the trade under the contract description; and
           2. (b) in the case of fungible goods, are of fair average quality within the description; and
           3. (c) are fit for the ordinary purposes for which such goods are used; and
           4. (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
           5. (e) are adequately contained, packaged, and labeled as the agreement may require; and
           6. (f) conform to the promise or affirmations of fact made on the container or label if any.
        3. (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.”
     2. Implied warranty of fitness – ***UCC 2-315***
        1. “Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”
        2. Not limited to merchants
        3. Does not require a showing that the goods are defective in any way – merely that the goods are not fit for the buyer’s particular purpose. ***See Bayliner***.
     3. Express warranty
        1. Written or oral express warranty given by a seller or manufacturer of a consumer product concerning the quality or nature of the goods. ***See Bayliner*** (mere puffery or sales talk is not specific enough to serve as a basis for a binding commitment).
        2. UCC 2-313
           1. “(1) Express warranties by the seller are created as follows:”

Making a representation about the goods: “(a) 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.”

Giving a description: “(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.”

Displaying a sample or model: “(c) 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.

* + - * 1. (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.”
    1. Disclaimers
       1. Express Warranty Disclaimer: UCC 2-316 (1)
       2. Implied Warranty of Merchantability Disclaimer: UCC 2-316(2)
       3. Implied Warranty of Fitness Disclaimer: UCC 2-316(3)

## Modification of Terms

1. Common Law
   1. Additional consideration needed
   2. Written contract can be modified orally even if contrary provision
   3. Parol evidence admissible to show subsequent oral modifications of a written contract
2. UCC Article 2
   1. No consideration needed so long as in good faith. ***UCC 2-209***
   2. Must be in writing if, as modified, contract is for $500 or more
   3. Gives effect to provisions prohibiting oral modification
   4. Parol evidence admissible to show subsequent oral modifications of a written contract

# Has Performance Been Excused or Discharged?

## Is there a Condition to a Party’s Performance in the Contract?

1. A duty of immediate performance with respect to a conditional promise does not become absolute until the conditions (1) have been performed, or (2) have been legally excused.
2. Yes, has the condition been excused?
3. No, has the duty been discharged?

## Has the Condition Been Excused?

1. Reasons for excuse
   1. Substantial performance (constructive conditions) or literal performance (express conditions)
   2. Breach of contract – an actual breach of the contract when performance is due will excuse the duty of counterperformance. Counterperformance will be excused at common law only if the breach is material.
   3. Hindrance or failure to cooperate – if a party having a duty of performance that is subject to a condition prevents the condition from occurring, the condition will be excused if such prevention is wrongful.
   4. Anticipatory repudiation – party unequivocally indicates he will not perform before time of performance
   5. Prospective inability or unwillingness to perform – doubts as to party’s performance
   6. Divisibility of contract – if a party performs one of the units of a divisible contract, he is entitled to the agreed-on equivalent for that unit even if he fails to perform the other units
   7. Waiver or estoppel
2. Yes, has the duty been discharged?
3. No, has the condition been satisfied?
   1. No, the party has no present absolute duty to perform.
   2. Yes, has the duty been discharged?

## Has the Absolute Duty Been Discharged?

1. Once it is determined that a party is under an immediate duty to perform, the duty to perform must be discharged.
2. Has the duty been discharged by:
   1. Performance or tender of performance
   2. Occurrence of condition subsequent
   3. Illegality of subject matter after contract was made
   4. Rescission of contract
   5. Novation (replacing parties) or substituted contract (replacing contract)
   6. Accord and satisfaction
   7. Release – a release and/or contract not to sue will serve to discharge contractual duties
   8. Lapse – neither party does anything
   9. Mistake
   10. Impossibility, Impracticability, or Frustration of Purpose
   11. Modification of contract – if a contract is subsequently modified by the parties, this will serve to discharge those terms of the original contract that are the subject of the modification.
3. Yes, party’s contractual duties have been discharged
4. No, performance due or party is in breach.
5. Mistake
   1. Contractual Mistake
      1. A mistake is a belief that is not in accord with the facts. ***R2d 151***
      2. “The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed.” ***Lenawee***; ***See R2d 152***
   2. Unilateral mistake – contract is voidable if
      1. General Rule
         1. “Unilateral mistake may afford ground for recission where there is a material mistake and such mistake is so palpable that the party not in error will be put on notice of its existence.” ***Wil-Fred*** (Williston).
            1. Later cases have relaxed requirement that mistake be palpable.
         2. In IL, conditions generally required for recission are ***(Wil-Fred***):
            1. (a) that the mistake relate to a material feature of the contract
            2. (b) that it occurred notwithstanding the exercise of reasonable care [(***But. Cf. R2d 157***)]
            3. (c) that it is of such grave consequence that enforcement of the contract would be unconscionable [(as applied, in Wil-Fred, unconscionable = “substantial hardship”)]
            4. (d) and that the other party can be placed in status quos.
            5. AND evidence of these conditions must be clear and positive.

Note: more demanding than preponderance of the evidence but not as demanding as beyond a reasonable doubt

* + - 1. ***R2d 153*** “Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
         1. (a) the effect of the mistake is such that enforcement of the contract would be unconscionable [(severe enough to cause substantial loss)], or
         2. (b) the other party had reason to know of the mistake or his fault caused the mistake.”
    1. Mistake of Fact v. Mistake of Judgment
       1. Often said that rescission will be permitted for mistakes of fact (e.g. clerical errors) but not for mistakes of judgment. ***But cf. Wil-Fred*** (“we believe in fairness to the individual bidder, that the facts surrounding the error, not the label, i.e., “mistake of fact” or “mistake of judgment,” should determine whether relief is granted).
    2. Mens Rea: “A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.” ***R2d 157***; ***But cf. Wil-Fred***
    3. Content of writing – unilateral mistake as to content of writing could lead to unenforceable agreement but not very likely.
  1. Mutual mistake
     1. General Rule
        1. “A contract may be rescinded because of a mutual misapprehension of the parties, but this remedy is granted only in the sound discretion of the court.” Court should use “case-by-case analysis.” ***Lenawee***.
        2. R2d 152; ***See*** ***Lenawee***.
           1. “(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
           2. (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.”
        3. Who bears the risk of mistake?
           1. “A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.” R2d 154; ***See Lenawee***

* + - * 1. “as is” clause indicates party buying property bears risk. ***Lenawee***.
    1. Remedy
       1. Written expression – when the mutual mistake consists of the failure of the written contract to state accurately the actual agreement of the parties, reformation of the contract to express the parties’ mutual intent is the normal remedy.
       2. Equitable relief – the relief available for mutual mistake other than a mistake in the writing is ordinarily rescission, along with any restitution that may appear appropriate.
  1. Ambiguous terms
     1. Neither party or one party aware of ambiguity = no contract unless both parties happened to intend the same meaning
     2. Both parties aware of ambiguity = no contract unless both parties happened to intend the same meaning
     3. One party aware of ambiguity = contract enforced according to the intention of the party who was unaware of the ambiguity
     4. Subjective intention of parties controls since objective test does not work in this situation

1. Impossibility, Impracticability, or Frustration of purpose
   1. Early Cases
      1. *Paradine* – court found renter liable for non-payment although he couldn’t use land since it was repossessed by Prince and army. Court justified decision say “because he might have provided against it by his contract.” In other words, party could have included provision to protect himself.
      2. *Taylor –* performance hall burned down. Court absolved D of liability holding that because the hall was essential to the performance of the contract, and the parties had contracted on the basis of its continued existence, D’s duty of performance should be excused.
      3. *Krell* – D agreed to pay P for the use of a room overlooking the route that the coronation procession of King Edward VII would travel. Sudden illness of the king forced cancellation of his coronation, however, making P’s room useless to D for that purpose on that day. Court held D was excused from his duty of payment.
   2. Impossibility
      1. Objective – the duties could not be performed by anyone
      2. Timing – impossibility arises after the contract has been entered into. Note: if it existed before the contract was formed, then it is a contract formation problem – mistake
      3. Specific situations
         1. Death or the physical incapacity of a person necessary to effectuate the contract
         2. Supervening illegality
         3. Subsequent destruction of contract’s subject matter or means of performance. Destruction must not have been the fault of either party.
      4. Force Majeure clauses
         1. Provide for excuse where performance is prevented or delayed by circumstances “beyond the control” of the party seeking excuse.
         2. Tend to include governmental regulations, natural events, strikes and labor disputes
         3. Usually track ground covered by UCC 2-615 and R2d provisions but sometimes go beyond such provisions.
         4. However, can be struck down under concepts such as good faith and unconscionability.
   3. Impracticability
      1. Test – extreme and unreasonable difficulty and/or expense; and its nonoccurrence was a basic assumption of the parties.
      2. UCC 2-615
         1. “Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
            1. (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
            2. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
            3. (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.”
         2. Comment 9 – suggests section could be applied to buyers in some circumstances
      3. Governmental Regulation
         1. Can be basis for excuse:
            1. UCC 2-615 – “compliance in good faith with any applicable foreign or domestic governmental regulation or order” can be basis of relief.
            2. R2d 264 – “If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.”
         2. Unless “[a] subsequent governmental regulation like a statute or ordinance may prohibit a tenant from legally using the premises for its originally intended purpose. In these circumstances, the tenant’s purpose is substantially frustrated thereby relieving the tenant from any further obligation to pay rent. The tenant is not relieved from the obligation to pay rent if there is a serviceable use still available consistent with the use provision in the lease. The fact that the use is less valuable or less profitable or even unprofitable does not mean the tenant’s use has been substantially frustrated.” ***Mel Frank***.
   4. Frustration
      1. “Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.” ***R2d 265***; ***See Mel Frank***.
      2. “First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. This involves essentially the same sorts of determinations that are involved under the general rule on impracticability. See Comments b and c to § 261. The foreseeability of the event is here, as it is there, a factor in that determination, but the mere fact that the event was foreseeable does not compel the conclusion that its non-occurrence was not such a basic assumption.” ***R2d 265 cmt. a***; ***See Mel Frank***.
2. Modification
   1. Pre-Existing Duty Modified
      1. No consideration when
         1. “Consent to such a demand [for more money]…[is]…without consideration, for the reason that it was based solely upon [the previous] agreement to render the exact services, and none other than they were already under contract to render.” A***laska Packers***.
         2. “A subsequent contract or modification is invalid and therefore does not supersede an earlier contract when the subsequent contract was entered into under duress.” ***Kelsey-Hayes***.
         3. Employer’s promise of job security or fair treatment contained in a personnel manual that are deemed to become binding through the unilateral contract formation process are later modified ineffective because unsupported by consideration. *Demasse v. ITT Corp*. *But Cf. Asmus v. Pacific Bell* (employer may unilaterally terminate announced policy of indefinite duration, if employer makes the change after a reasonable time, on reasonable notice, and without interfering with employees’ vested benefits; given those limitation, no additional consideration is required).
      2. No consideration needed – UCC 2-209 - “(1) An agreement modifying a contract within this Article [(relating to sales contracts)] needs no consideration to be binding. ***See*** ***Kelsey-Hayes***.
         1. UCC 2-209 cmt 2 – Must meet test of good faith – “the extortion of a ‘modification’ without legitimate commercial reason” violated good faith
   2. Exceptions to Pre-Existing Duty Rule
      1. Substantial difference
         1. R2d 73 – “Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.”
      2. Equity
         1. R2d 89 - “A promise modifying a duty under a contract not fully performed on either side is binding
            1. (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
            2. (b) to the extent provided by statute; or
            3. (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.”
      3. Mutual Release

# Have the Terms of the Contract Been Breached?

## Material or Minor Breach (Common Law)

1. Minor breach – obligee gains the substantial benefit of bargain so aggrieved party must perform, but right to damages
2. Material breach – obligee does not gain substantial benefit of bargain so no duty to perform, immediate right to damages and other remedies
   1. To determine materiality of breach, courts generally apply following six criteria (R2d 275):
      1. Amount of benefit received
      2. Adequacy of damages
      3. Extent of part performance
      4. Hardship to breaching party
      5. Negligent or willful behavior
      6. Likelihood of full performance
   2. Constructive condition – requires substantial performance
      1. General Rule – when performance is substantial, breach is not material and thus constitutes a fulfillment of constructive condition to the other party’s duty of performance
         1. Each party’s duty of performance is implicitly conditioned on there being no uncured material failure of performance by the other party. Minor or immaterial deviations from the contractual provisions do not amount to failure of a condition to the other party’s duty to perform. However, even a minor deviation will give the other party a right to recover damages for that nonperformance, but those damages may be negligible.
         2. R2d 237 – “Except as stated in § 240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.”
      2. Remedy
         1. Mens Rea
            1. “Willful transgressor” is not entitled to recover under substantial performance. ***Jacobs***.
            2. A willful breach does not automatically bar recovery, but the motive of the breaching party is a factor to be considered in determining whether performance was substantial. ***R2d 231(e) and cmt. f***.
         2. Damages – “The measure of damages for breach of a construction contract where the breaching party has substantially performed with trivial deviation is the difference between the value of the construction as contracted for and the value of the construction as built, rather than complete forfeiture by the breaching party.” ***Jacobs***.
         3. Specific Performance – Factors: “purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition.” ***Jacobs***.
         4. Restitution (quantum meruit) for the reasonable value of its services
         5. Divisibility – R2d 240
            1. Two requirements: (1) it must be possible to apportion the performances of the parties into corresponding pairs of part performances. (2) it must be proper to treat these pairs of part performances as “agreed equivalents.”
   3. Express Condition
      1. General Rule
         1. “Express conditions must be literally performed, whereas constructive conditions, which ordinarily arise from language of promise, are subject to the precept that substantial compliance is sufficient.” Oppenheimer.
         2. R2d 225
            1. “(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
            2. (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
            3. (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.”
         3. R2d 229 – “To the extent that 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.” ***See Oppenheimer***.
         4. 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.” R2d 237 cmt. d; see Oppenheimer.
         5. R2d 84(1) – a waiver is effective without either consideration or reliance, but only if the condition waived was not either a material part of the performance that the obligor was to receive in exchange or a material part of the risk assumed.
      2. Exceptions
         1. Public Policy
            1. “..an express condition…has the same sanctity as the promise itself. Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must…generally enforce the will of the parties unless to do so will violate public policy.” Public policy seems to consider when plaintiff “stands to suffer some forfeiture or undue hardship” or whether parties stand on equal bargaining ground. However, court can shape constructive condition in such a way as to do justice and avoid hardship as it pleases. ***Oppenheimer (quoting Williston)***.
         2. Doctrine of prevention – “Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.” ***R2d 245***.
            1. ***R2d 245 cmt. a*** – “Where a duty of one party is subject to the occurrence of a condition, the additional duty of good faith and fair dealing imposed on him under § 205 may require some cooperation on his part, either by refraining from conduct that will prevent or hinder the occurrence of that condition or by taking affirmative steps to cause its occurrence…Under this Section it has the further effect of excusing the non-occurrence of the condition itself, so that performance of the duty that was originally subject to its occurrence can become due in spite of its non-occurrence…The rule stated in this Section only applies, however, where the lack of cooperation constitutes a breach, either of a duty imposed by the terms of the agreement itself or of a duty imposed by a term supplied by the court. There is no breach if the risk of such a lack of cooperation was assumed by the other party or if the lack of cooperation is justifiable.”
         3. Forfeiture
            1. R2d 229 – a court may excuse the nonoccurrence of a condition where forfeiture would otherwise result, unless the conditioning event was a material part of the parties’ exchange.

Cmt. b – forfeiture is “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.”

* + - * 1. Landlord-Tenant

“[A]lthough the tenant has no legal interest in the renewal period until the required notice is given, yet an equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed.” ***JNA Realty Corp***.

“A tenant or mortgagor should not be denied equitable relief from the consequences of his own neglect or inadvertence if a forfeiture would result…The rule applies even though the tenant or mortgagor, by his inadvertence, has neglected to perform an affirmative duty and thus breached a covenant in the agreement…On occasion the court has cautioned that equitable relief would be denied where there has been a willful or gross neglect, but it has been reluctant to employ the sanction when a forfeiture would result.” ***JNA Realty Corp***.

Equity should relieve against it if default has been due to mere venial inattention and if relief can be granted without damage to the lender. “The gravity of the fault must be compared with the gravity of the hardship.” ***JNA Realty Corp*** (quoting Cardozo).

* + 1. Satisfaction Provision
       1. Contracts frequently contain express terms that condition one party’s duty of performance on his “satisfaction” with the performance of the other party – courts don’t typically interpret them as conferring unlimited power to party determine his own satisfaction without external check.
       2. Two possible standards:
          1. Reasonableness/objective

Usually employed in cases where “commercial quality, operative fitness, or mechanical utility” are in question. ***See Morin***.

R2d 228 – objective test should be preferred when it is “practicable to determine whether a reasonable person in the position of the obligor would be satisfied.” ***See Morin***.

Construction of commercial buildings. ***See Morin***.

* + - * 1. Promisee’s honest dissatisfaction/subjective

Usually employed in cases where “personal aesthetics or fancy” are at issue. ***See Morin***.

R2d 228 cmt. a – subjective standard should be used only where “the agreement leaves no doubt that it is only honest dissatisfaction that is meant and no more.”

R2d 227 cmt. b – greater tolerance for subjective test when the contract conditions performance by one party on the other’s performance to the satisfaction of an independent third party, such as an architect or engineer, on the assumption that a third party is less likely to be affected by “selfish interests” of the obligor.

## Perfect Tender Rule (UCC 2)

If goods or delivery fail to conform to contract in any way, buyer generally may reject all, accept all, or accept any commercial units and reject rest

# What Remedies are Available if the Contract has Been Breached?

## Specific Performance

1. General rule
   1. If legal remedy (damages) is inadequate, court may order breaching party to perform (land and rare or unique goods)
      1. Inadequate? R2d 360. “In determining whether the remedy in damages would be adequate, the following circumstances are significant:
         1. (a) the difficulty of proving damages with reasonable certainty,
         2. (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and
         3. (c) the likelihood that an award of damages could not be collected.”
      2. Certainty
         1. R2d 362 – “Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.”
            1. Cmt b – “Degree of certainty required. If specific performance or an injunction is to be granted, it is important that the terms of the contract are sufficiently certain to enable the order to be drafted with precision because of the availability of the contempt power for disobedience. Before concluding that the required certainty is lacking, however, a court will avail itself of all of the usual aids in determining the scope of the agreement…Apparent difficulties of enforcement due to uncertainty may disappear in the light of courageous common sense…A contract is not too uncertain merely because a promisor is given a choice of performing in several ways, whether expressed as alternative performances or otherwise…Even though subsidiary terms have been left to determination by future agreement, if performance has begun by mutual consent, equitable relief may be appropriate with the court supplying the missing terms so as to assure the promisor all advantages that he reasonably expected.”
         2. An option contract containing “some terms which are subject to further negotiation between plaintiff and defendant will not bar a decree for specific performance, if in the court’s discretion specific performance should be granted.” ***City Stores Co***.
   2. UCC
      1. Buyer: UCC 2-716
         1. “(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
         2. (2)The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
         3. (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.”
      2. Seller: UCC 2-709 “(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price…
         1. (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.”
2. Generally not available for service contracts
3. Sometimes construction contracts when damages would be:
   1. Inadequate (“would not be a just and reasonable substitute”) or
   2. Impracticable (“it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law”), and
   3. “Some jurisdictions in the United States have opposed granting specific performance of contracts for construction of buildings and other contracts requiring extensive supervision of the court” but the “importance of specific performance to the plaintiff” outweighs the “difficulties of supervision” by the court. ***City Stores***.
4. Equitable defenses available since specific performance is an equitable remedy – laches and unclean hands
5. Limitations
   1. Difficulty in Enforcement
      1. R2d 366 – “A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.”
   2. Unfairness – R2d 364
      1. “(1) Specific performance or an injunction will be refused if such relief would be unfair because
         1. (a) the contract was induced by mistake or by unfair practices,
         2. (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or
         3. (c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.
      2. (2) Specific performance or an injunction will be granted in spite of a term of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons.”

## Damages

1. Three interests as the basis for awarding damages: expectation, reliance and restitution
   1. R2d 344 – Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:
      1. (a) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
      2. (b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
      3. (c) his “restitution interest,” which is his interest in having restored to him any benefit that he has conferred on the other party.
2. Expectation Damages
   1. Measure of expectation damages
      1. R2d 347 – “the injured party has a right to damages based on his expectation interest as measured by
         1. (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
         2. (b) any other loss, including incidental or consequential loss, caused by the breach, less
         3. (c) any cost or other loss that he has avoided by not having to perform.”
      2. General measure for expectation damages = loss in value + other loss - cost avoided - loss avoided
         1. "Loss in value": difference between value to injured party of the performance he should have received (under the contract terms) and the value to him of what, if anything, he actually did receive.
         2. "Other loss" (also, "incidental" or "consequential" damages)
         3. "cost avoided" (amount injured party might save in expenses by not having to complete performance after the breach)
      3. Alternative formula: expectation damage = expected profit + unreimbursed expenses.
         1. "loss avoided" (amount the injured party might save by reallocating or reselling materials planned for use in the breached contract)
   2. Determining Damages
      1. No Proof – “[W]here a plaintiff proves a breach of a contractual duty he is entitled to damages; however, when he offers no proof of actual damages or the proof is vague and speculative, he is entitled to no more than nominal damages.” ***Roth***.
   3. Loss in Value
      1. Real Estate – “When a purchaser defaults upon a contract for the sale of real estate, the seller may recover the difference between the contract price and the market value of the property at the time of the breach; but the seller may not recover the expenses incidental to ownership pending the resale of the property.” ***Roesch***.
         1. “When, following the breach of a real estate sales contract, the seller resells the property, the resale price may be used to determine the market value of the property at the time of the breach if the resale occurred within a reasonable time after the breach and at the highest price obtainable.” ***Roesch***.
      2. Difference in Cost Between Bargained for Service and New Service
         1. “Damages in breach of contract cases are ordinarily measured by the expectations of the parties. The nonbreaching party is entitled to full compensation for the loss of his or her bargain that is, losses necessarily flowing from the breach which are proven to a reasonable certainty and were within contemplation of the parties when the contract was made.” Court should focus on the value of services “bargained” for rather than the “objective value of the services.” ***Handicapped***.
         2. “[D]amages for breach of an employment contract include the cost of obtaining other services equivalent to that promised but not performed, plus any foreseeable consequential damages.” ***Handicapped***.
         3. “An injured party must take all reasonable steps to mitigate damages.” ***Handicapped***.
      3. Difference in Cost Between Bargained for Service and Market Value of Service/Gain by Defendant
         1. “Disgorgement” Principle
         2. Principles – gains not derived from plaintiff’s property so restitution doesn’t apply but deterrence and punishment apply along with idea that a man ought not to profit from his own wrong.
         3. “The measure of damages for breach of an employment contract by an employee is the cost of obtaining other service equivalent to that promised and not performed. Compensation for additional consequential injury may be recovered if at the time the contract was made the employee had reason to foresee that such injury would result from his breach.” “Fair value” of value of previous employee’s services is their new compensation. ***Roth***.
      4. Cost to Complete
         1. “[I]njured party may recover those damages which are the direct, natural and immediate consequence of the breach and which can reasonably be said to have been in the contemplation of the parties when the contract was made.” ***American Standard***.
         2. Economic Waste Exception
            1. “When, however, there has been a substantial performance of the contract made in food faith but defects exist, the correction of which would result in economic waste, courts have measured the damages as the difference between the value of the property as constructed and the value if performance had been properly completed.” ***American Standard***; ***R2d 346*** (requires “unreasonable economic waste”).
            2. “The ‘economic waste’ of the type which calls for application of the ‘diminution in value’ rule generally entails defects in construction which are irremediable or which may not be repaired without a substantial tearing down of the structure as in Jacobs & Youngs. When, however, the breach is of a covenant which is only incidental to the main purpose of the contract and completion would be disproportionately costly, courts have applied the diminution in value measure even where no destruction of the work is entailed.” ***American Standard***.
            3. In construction cases in NY, “a contractor who would ask the court to apply the diminution of value measure ‘as an instrument of justice’ must not have breached the contract intentionally and must show substantial performance made in good faith.” ***American Standard***.
      5. Diminished Value
         1. Posner – cost-to-restore damages overcompensates the owner; if the owner had truly wanted restoration of the property, he could have brought an action for specific performance.
      6. R2d 348
         1. (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on.
            1. (a) the diminution in the market price of the property caused by the breach, or
            2. (b) 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.
   4. Consequential Damages
      1. R2d 351
         1. “(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
         2. (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
            1. (a) in the ordinary course of events, or
            2. (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
         3. (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”
      2. 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.”
      3. ***Hadley*** (rule as stated, not applied) – Breach of contract damages should be those “fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probably result of the breach of it.”
         1. Note on application:
            1. “at the time they made the contract”
            2. Loss needs to be foreseeable, but not manner in which it occurs
            3. Focus of foreseeability is on the breaching party
            4. Partly objective standard for foreseeability
            5. Loss must be forseeable as a “probable” results of the breach
            6. Liability not limited to losses that are necessary or inevitable, but it does not extend to remote losses
      4. CISG – “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”
   5. Cost Avoided
      1. Duty to mitigate damages
         1. R2d 350
            1. “(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
            2. (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”
         2. “[A]fter an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or…the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant’s wrongful act.” ***Rockingham*** (quoting Williston).
      2. Lost volume
         1. Lost volume seller of damages – the lost volume of business the non-breaching seller incurs on buyer’s breach. ***Jetz***.
            1. “This court follows the general rule that loss of profits resulting from a breach of contract may be recovered as damages when such profits are proved with reasonable certainty, and when they may reasonably be considered to have been within the contemplation of the parties.” ***Jetz***.
         2. Applies to goods and services. ***Jetz***.
         3. ***R2d 350 cmt. d*** – “Lost volume. The mere fact that an injured party can make arrangements for the disposition of the goods or services that he was to supply under the contract does not necessarily mean that by doing so he will avoid loss. If he would have entered into both transactions but for the breach, he has “lost volume” as a result of the breach. See Comment f to § 347. In that case the second transaction is not a “substitute” for the first one.” ***See Jetz***.
         4. ***R2d 347 cmt. f*** – “Lost volume. Whether a subsequent transaction is a substitute for the broken contract sometimes raises difficult questions of fact. If the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have “lost volume” and the subsequent transaction is not a substitute for the broken contract. The injured party's damages are then based on the net profit that he has lost as a result of the broken contract. Since entrepreneurs try to operate at optimum capacity, however, it is possible that an additional transaction would not have been profitable and that the injured party would not have chosen to expand his business by undertaking it had there been no breach. It is sometimes assumed that he would have done so, but the question is one of fact to be resolved according to the circumstances of each case.” ***See Jetz***.
         5. ***UCC 2***-***708(2)*** “If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.”
3. Reliance damages
   1. When can’t measure expectation damages – “Where anticipated profits are too speculative to be determined, monies spent in part performance, in preparation for or in reliance on the contract are recoverable.” ***Wartzman***.
   2. Purpose – put the plaintiff in the position she would have been in had the contract never been formed.
   3. Limitations
      1. Proof of loss that would have occurred if contract was performed
         1. “If it can be shown that full performance would have resulted in a net loss, the plaintiff cannot escape the consequences of a bad bargain by falling back on his reliance interest. Where the breach has prevented an anticipated gain and made proof of loss difficult to ascertain, ‘the injured party has a right to damages based upon 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.’” ***Wartzman*** (quoting ***R2d 349***).
      2. Foreseeability
         1. “A contracting party is expected to take account of only those risks that are foreseeable at the time he makes the contract and is not liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a probable result of such a breach.” ***Wartzman***.
         2. R2d 351
            1. “(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
            2. (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

* + - * 1. (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.”
    1. Duty to Mitigate Damages
       1. Doctrine of “avoidable consequences” – Plaintiff has duty to mitigate damages. ***Wartzman***.
       2. “Equal Opportunity” exception – “The party who is in default may not mitigate his damages by showing that the other party could have reduced those damages by expending large amounts of money or incurring substantial obligations…Since such risks arose because of the breach, they are to be borne by the defaulting party.” ***Wartzman***.
    2. Certainty – “Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.” R2d 352
  1. Promissory Estoppel
     1. Debate over whether promissory estoppel cases should be limited to recovery of reliance damages as opposed to allowing expectancy damages.
     2. R2d 90(1) – “(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.” ***See Walser***.
        1. Cmt. d – “A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise.”
     3. A trial court has discretion to award expectation, reliance or some other form of remedy when the basis of recovery is promissory estoppel.
        1. R2d 90(1) language is permissive – “The remedy granted for breach may be limited as justice requires” – and the “Minnesota courts, like the other courts addressing this issue, treat the damages decision under section 90 as being with the district court’s discretion…We will not disturb a district court’s discretionary decision if that decision remains within “the range of choice” available to the district court, accounts for all relevant factors, does not rely on irrelevant factors, and does not constitute a ‘clear error of judgment’” ***Walser***.

1. Restitution
   1. Terminology – when a contract is unenforceable or no contract between the parties exists, an action to recover restitutionary damages often is referred to as an action for an implied in law contract, an action in quasi-contract, or an action for quantum meruit.
   2. Measure of damages – value of the benefit conferred
   3. Specific Applications
      1. Contract breached – contract has been breached and the nonbreaching party has not fully performed
      2. When contract unenforceable – quasi-contract remedy
      3. When a contract was made but is unenforceable and unjust enrichment otherwise would result.
   4. When no contract involved – quasi-contract remedy
      1. When there is no contractual relationship between the parties if:
         1. The plaintiff has conferred a benefit on the defendant by rendering services or expending properties;
         2. The plaintiff conferred the benefit with the reasonable expectation of being compensated for its value;
         3. The defendant knew or had reason to know of the plaintiff’s expectation; and
         4. The defendant would be unjustly enriched if he were allowed to retain the benefit without compensating the plaintiff.
2. Stipulated Damages Clause/Liquidated Damages
   1. General Rule – Parties to a contract may stipulate what damages are to be paid in the event of a breach.
      1. Typical Elements
         1. Actual damages difficult to calculate at the time of contracting
         2. Amount is a reasonable forecast of the likely damages (not punitive)
      2. UCC 2-718 – “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 harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.”
      3. R2d 356(1) – “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 the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”
      4. “The validity of these “stipulated damage clauses” has depended on a judicial assessment of the clauses as an unenforceable penalty or as an enforceable provision for “liquidated damage.” Parties to a contract may not fix a penalty for its breach.” ***Wasserman’s***.
         1. Liquidated damages – “the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs.
         2. Penalty – “the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach.” ***Wasserman’s***.
   2. Reasonableness – “A stipulated damage clause ‘must constitute a reasonable forecast of the provable injury resulting from breach; otherwise, the clause will be unenforceable as a penalty and the non-breaching party will be limited to conventional damage measures.’” ***Wasserman’s***.
      1. “Consistent with the principle of reasonableness, New Jersey courts have viewed enforceability of stipulated damages clauses as depending on whether the set amount ‘is a reasonable forecast of just compensation for the harm that is caused by the breach’ and whether that harm ‘is incapable or very difficult of accurate estimate.’ Uncertainty or difficulty in assessing damages is best viewed not as an independent test,…but rather as an element of assessing the reasonableness of a liquidated damages clause… Thus, ‘[t]he greater the difficulty of estimating or proving damages, the more likely the stipulated damages will appear reasonable.’” ***Wasserman’s***.
      2. “The purpose of a stipulated damages clause is not to compel the promisor to perform, but to compensate the promisee for non-performance. Thus, the subject cancellation clause is unreasonable if it does more than compensate plaintiffs for their approximate actual damages caused by the breach.” ***Wasserman’s***.
   3. Who bears the burden? – The party challenging a stipulated damages clause “must establish that its application amounts to a penalty.”
3. Nonrecoverable Damages
   1. Emotional Distress
      1. “Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.” ***Erlich***.
      2. Under Contract Law – “Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.” ***R2d 353***; ***See*** ***Erlich*** (quote R2d 353).
         1. Cmt. a – common examples of when emotional disturbance was a particularly likely result are: “contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. Breach of such a contract is particularly likely to cause serious emotional disturbance. Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may by chance cause even more severe emotional disturbance, but, if the contract is not one where this was a particularly likely risk, there is no recovery for such disturbance.”
      3. Under Tort law – “[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law…Tort damages have been permitted in contract cases where a breach of duty directly causes physical injury…; for breach of the covenant of good faith and fair dealing in insurance contract…; for wrongful discharge in violation of fundamental public policy…; or where the contract was fraudulently induced…In each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm…” “Generally, outside the insurance context, “a tortious breach of contract…may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion or; (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship or substantial consequential damages.” Need more than just “economic injury” to support “a recovery for mental suffering.” ***Erlich***.
   2. Punitive Damages
      1. R2d 355 – “Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”
      2. Why are they not recoverable?
         1. Damage remedies available in contract are only such as will compensate the plaintiff for harm actually caused and should not put the injured party in a better position than she would have occupied if the contract had been performed.
         2. Contract law is system founded not on “fault” but on “strict liability” for the consequences of the breach; since culpability plays no part in determining liability it should also play no party in fashioning the remedy.
         3. Contract remedies should promote efficiency and therefore should deter only inefficient breaches of contract; punitive damage awards could deter even efficient breaches, which ought rather to be encouraged.
      3. Exception – insurance contracts
         1. Courts have held insurance companies liable in tort to their insured for bad faith refusal to honor claims brought by third parties. ***See Erlich***.

## Rescission and Reformation

1. Rescission – contract voidable /rescinded if mutual mistake of material fact, unilateral mistake that other party knew or should have known or extreme hardship, misrepresentation of material factor, or duress, undue influence, illegality, incapacity, or failure of consideration.
2. Reformation – writing changed to conform to parties’ original intent if mutual mistake, unilateral mistake and party knows of it and does not disclose, or misrepresentation

# Theories

## Master Rules

Rule (1): (There is O and there is A and there is C) if and only if there is F

["There is offer and acceptance and consideration if and only if there is prima facie contractual obligation."]

Rule (2): If (F and not-T) then K

["If there is there is prima facie contractual obligation and it's not the case that the sufficient conditions for some defeater doctrine rule are true, then there is contractual obligation all things considered"]

*Restatement (Second) of Contracts* § 90 rule:

Rule (3) If (P and R and D and I) then K

["If there is a promise and there is a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and there is a promise which does induce such action or forbearance on the part of the promisee or a third person and Injustice can be avoided only by enforcement of the promise) then there is contractual obligation all things considered"]

### Master rule for "all things considered" contractual obligation:

Rule (4):

### (There is O and A and C) if and only if F

### and

### either (F & ~T)

### or

### (P & R & D & I)

### if and only if

### K

## Fancy Language

Inference to the best legal explanation

Enthymematic – a syllogism or other argument in which a premise or the conclusion is unexpressed.

## Three Overarching Issues

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. the fact of unequal capacities
3. the allocation of risk

## 3 F’s

Formal – To interpret a rule "formally" is to interpret the rule so as to give it literal normative force at the point of application apart from both its background rationale (i.e., the original reason for adopting the rule) or any other norm that would suggest or require that the interpreter not do so.

Formality - some item (often, but not always, some type of writing) that has its **legal significance** (or at least part of its legal significance) **by virtue of a rule**. Every item commonly referred to as a "formality" can be traced to a **rule** that might be formally interpreted, but not every rule that might be formally interpreted can be traced to what is commonly referred to as a formality.

Formal Efficacy - There is at least one characteristic a rule must have in order to be capable of being interpreted formally: in the context in which the rule is interpreted, there must be a discernible literal meaning at the point of applicationthat can plausibly be ascribed to the rule. Without such a meaning, the interpreter would not be able to "give the rule literal normative force at the point of application."

It is probably best to allow that the extent to which a rule has a discernible literal meaning at the point of applicationis a matter of degree. Thus, we shall describe a rule as having a "high degree of **formal efficacy,"** a "low degree of formal efficacy," and so on.

Examples: rule with high degree of formal efficacy: "Any person driving with .01% blood alcohol is driving under the influence."

rule with low degree of formal efficacy: "Any person driving in an unreasonably intoxicated state is driving under the influence."

There are **reasons for adopting rules that have a high degree of formal efficacy**: e.g., rule of law values of predictability, notice, constraint on government.

There are also **reasons for adopting rules that have a low degree of formal efficacy**: e.g., values of flexible decision-making, doing justice in the individual case.

These "reasons" will typically be expressed as **moral propositions** or **policy propositions** (and will rely on **experiential propositions** as well).

## Classical v. Romantic

1. Classical
   1. Rationales for Rules of Contract Law
      1. "laissez faire"
      2. anti-paternalistic
      3. parties as autonomous self-insurers and self-protectors
      4. "man as an island"
      5. Judicial Role: judge as neutral referee 🡪 Separation of Powers
      6. obligation (almost) only as matter of "objectively" provable deliberate clear bargained for promises
      7. Principal classical rationale for enforcing a promise: bargained for exchange
      8. Principal classical rule for determining whether a putative contract is an actual contract: "consideration"
         1. R2d 71
2. Romantic
   1. Rationales for Rules of Contract Law
      1. communitarian
      2. paternalistic
      3. parties as "heteronymous" guardians with (enforced) fiduciary duties toward one another
      4. obligation as matter of benefit conferred ("quasi-contract") or reliance foreseeable induced -- including reliance on bargained for exchanges (thus "contract" special case of tort -- "contort" idea, contract as civil liability for promissory behavior)
      5. every man "his brother's keeper"
      6. Judicial Role: judge as roving fairness and "field-leveling" commissioner.
      7. Principal romantic rationale for determining whether a putative contract is an actual contract: do "justice" in the individual case
         1. R2d 90

## Rule Playing Options

***Classical judge***

**can give narrow interpretation of Romantic rule**

Hand, *James Baird* on promissory estoppel using *disanalogy*, narrowing scope of promissory estoppel, **does not apply** to commercial settings where parties are trying to bargain

*Mills* on promissory restitution using disanalogy to narrow rule "If there's moral obligation then there's consideration" saying that moral obligation is insufficient consideration. Need other pre-existing obligation that will suffice for consideration.

*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)

*Bayliner* Classically narrows romantic UCC warranty rules by saying none of them apply to boat purchaser

**can give Classical interpretation of a Romantic rule**

*Maryland National Bank* Promissory estoppel has been applied to charitable subscriptions in jurisdiction but chooses not to apply promissory estoppel because no action induced or forbearance or detrimental reliance. No allocation by UJA to its beneficiary organization was threatened or thwarted by the failure to collect the Polinger pledge in its entirety. UJA borrowed no money on the faith and credit of the pledge.

*Howard* on *Monge* rule e.g., *Howard*, using disanalogy to narrow *Monge* rule to public policy

*Berryman* threshold for reasonable reliance as element of promissory estoppel depends on person. Real Estate agent held to higher standard of reasonable reliance because should know the law better when it comes to real estate agreements.

**can give broad interpretation to Classical rule**

*Jacob and Youngs dissent:* Jacobs failed to perform as specified. It makes no difference why Kent wanted a particular kind of pipe. Failure to use the kind of pipe specified was either intentional or due to gross neglect which amounted to the same thing.

*Baehr*: (1) Actual bargaining is necessary for consideration. “Bargain” does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other. (2) Offer to delay bringing suit for unpaid rent does not create sufficient consideration when D did not ask P to delay bringing the suit and the delay was likely motivated by personal convenience.

*Plowman*: Past consideration is not consideration because if the detriment has already been performed, it could not be in exchange for the promise. Going to pick up checks is condition not legal detriment.

*Petterson* – Petterson tries to “perform” on unilateral contract by giving Pattberg money for mortgage. Court finds that Pattberg had right to withdraw at any time before performance although Petterson was going to pay before deadline Pattberg created. (Also court ignores some romantic rules see dissent).

*Thompson* 1) “parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument;” (2) when partial integration, parol evidence may be admitted to prove the part omitted; (3) to determine when partial or total, must look within “four corners.” If it imports on its face to be a complete expression of the whole agreement (merger/integration clause?), it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement; (4) collateral agreement exception only applies to an agreement about a “subject distinct from that to which the writing relates;” and (5) evidence to explain meaning is exception to parol evidence rule.

**can adopt a Classical rule (when such a rule did not seem to exist in the jurisdiction)**

**can reject a Romantic rule**

*Monge* dissent

*McIntosh* Dissent makes 2 classical arguments: (1) separation of powers: SoF is a statute! (2) You’re abandoning the rationale for adopting the rule (these situations are fraud-suspect) and the rationale for following the rule (predictability)

*Williams*: unconscionability should be used cautiously (if at all). Any remedy to protect the public from exploitative contracts more appropriately resides with the legislature (Separation of Powers). The installment contract was not exploitative.

***Romantic judge***

**can give narrow interpretation to Classical rule**

*Monge* majority, employment at will rule

*Jacob & Youngs*: Narrowly interpreted when a condition is express. Term specifying specific pipe is construed by Cardozo as only constructive—not express—condition, even though K language requires that “all specifications be met.” Also, Cardozo romantically construes that purpose of naming pipe was just to ensure high quality. Rationale: impact of defective performance is disproportionally minimal as compared to voiding K and ripping out pipes (Law/econ would agree).

*Morin*: Satisfaction clause requires objective measure in cases where “commercial quality, operative fitness, or mechanical utility” are in question. Posner sidesteps K language and makes many assumptions to go behind the language.

**can give Romantic interpretation of a Classical rule**

Cardozo, *Allegheny College*, rules for consideration vs. gratuitous promise - An assumption of duty to carry out the conditions of a gift is valid consideration.

*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. Cook: (§45) Substantial performance is sufficient consideration 🡪 binds offeror (romantic interpretation of classical rule)

**can give broad interpretation to Romantic rule**

*Wright* majority and concurrence (replacing "injustice can be avoided only by enforcing the promise" with "there is an injustice")

*Cloutier?*

*Webb* on promissory restitution using disanalogy to *narrow the narrowing* (and thus expanding) the *Mills* rule – adding disjointly sufficient condition for consideration, "there is a material benefit to the promisor" A moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit or there was preexisting valid obligation. (added material benefit option to Mills)

Traynor, *Drennan*, amalgam of § 45 and § 90 (also may count as adopting a new Romantic rule) to create what is found in R2d as § 87(2), analogy, expanding scope of promissory estoppel, **does** apply to commercial settings where parties are trying to bargain (compare language of *Restatement (Second) of Contracts* § 90 ("a **promise** with the promisor should reasonably expect . . . " and *Restatement (Second) of Contracts* § 87(2) ("an offer which the offeror should reasonably expect"

*Caceci*: When builder sells house to buyer, implied warranty that house was constructed skillfully and habitable, even if there’s a merger clause and caveat emptor (“buyer beware”). Disclaimer would have to be conspicuous. Circumstances have changed since caveat emptor days so common law can change; Emphasis on party capacity (buyer can’t inspect); Fairness (best cost avoider) note this is also law/econ; common sense that bought house would be habitable (like C&J “reasonable expectation”); and unequal bargaining power. Classical response: floor started sagging FOUR YEARS later! This is long implied warranty. buyer should bargain for this to ensure enforcement of deal between parties and maintain stability; Parties should be able to exchange warranty for cheaper price.

*Williams*: (unconscionability) courts have power to refuse to enforce contract found to be unconscionable. Seem to look more at substantive not procedural unconscionability.

*Petterson dissent*: It is a principle of fundamental justice that if a promisor is himself the cause of failure of performance either of an obligation due him of a condition upon which his own liability depends, he cannot take advantage of the failure” (quoting Williston).

**can adopt a Romantic rule (when such a rule did not seem to exist in the jurisdiction)**

*Monge* majority

*Shoemaker*

Traynor, *Drennan*, (also may count as giving broad interpretation to existing Romantic rule rules, "§ 90 exists in this state")

*Pop’s Cones?*

*Hoffman* (discussed in Pop's Cones and Note 2 after)

*McIntosh* - SoF is based on outdated assumptions, and its underlying policies are best served by allowing reliance (§139).

*Caceci*: case provided the court with its first opportunity to address the departure from caveat emptor in the home building industry and recognize an implied warranty of skillful construction.

**Rejects Adoption of a Classical Rule**

# Cases

## Theories

* ***Olga Monge v. Beebe Rubber Company (Sup. Ct. of NH 1974)***

Synopsis: P sued D claiming that she was fired because she refused D’s foreman’s advances. Court held that there was sufficient evidence to find for P but remanded the case for a new trial unless P consents to a reduction of the verdict.

Tool: A termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract.

* ***Robert Howard v. Dorr Woolen Company (Sup. Ct. of NH 1980)***

Synopsis: P alleges that the D discharged Baldwin because of his age, health, and to deny him his accrued retirement benefits. P argues that such allegations constitute a discharge motivated by bad faith, malice, or retaliation, and warrants recovery for breach of contract under Monge. Court found for D and dismissed appeal.

Tool: Construe Monge to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn. A discharge due to sickness or age do not fall under this narrow category.

* **David Cloutier v. The Great Atlantic & Pacific Tea Company (Sup. Ct. of NH 1981)**

Synopsis: P sued D for wrongful discharge. Court found P sufficiently established a public policy to satisfy the test for the wrongful discharge of an employee set forth in Howard.

Tool: Public policy is not restricted to those enunciated in a statute. Public policy exceptions giving rise to wrongful discharge actions may also be based on non-statutory policies and do not need to be “strong and clear.”

## Is There a Valid Contract?

* ***Ray v. William G. Eurice & Bros., Inc. (Md. Ct. App. 1952)***

Synopsis: Ray (P), an engineer, presented architect’s plants to Eurice (D) to solicit a bid for the construction of a house. Revised plans were attached to a contract which was read and signed by D. D refused to perform, and P sued for breach. Court found for P.

Tool: A party’s outward manifestations of an intent to contract are sufficient to bind him to the agreement (objective theory). Thus, a party is bound to a signed document which he has read or not read with the capacity to understand it (“duty to read” rule), absent fraud, duress, and mutual mistake.

* ***Lonergan v. Scolnick (Cal. Dist. Ct. App. 1954)***

Synopsis: Lonergan (P) wrote Scolnick (D), the seller of property being offered for sale. D informed P that if he wanted the property he would have to act fast. P sent a letter one week later stating he wanted the property. D had already sold the property. P brought suit for specific performance and/or damages alleging that a valid contract had been formed. Court found for D.

Tool: (1) There is no meeting of the minds, and, therefore, no enforceable contract, unless communications between the parties evidence a definite offer and acceptance. (2) Objective theory – if the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

* ***Izadi v. Machado (Gus) Ford, Inc. (Fla. Dist. Ct. App. 1989)***

Synopsis: Izadi (P) attempted to purchase a car by offering Machado Ford (D) cash for the gross cost of the car minus $3,000 for which he expected to be credited pursuant to a D advertisement. D refused P’s offer and his interpretation of their advertisement. P sued D claiming breach of contract, fraud, and statutory violations involving misleading advertising.

Tool: (1) If an offer is conveyed by the objective reading of an advertisement, it does not matter that the advertiser may subjectively have not intended for its chosen language to constitute a binding offer. However, the offeree must have relied on the misrepresentation in manifesting his assent (offeree could not have known that such an offer was not intended). (2) A binding offer may be implied from the very fact that deliberately misleading advertising intentionally leads the reader to the conclusion that a valid offer exists.

* ***Petterson v. Pattbery (NY Ct. of App. 1928)***

Synopsis: Pattberg (D) offered to discount the mortgage on Petterson’s (P) estate on the condition that it be paid on a certain date. D then sold the mortgage before P, as executor of the estate, had paid him.

Tool: An offer to enter into a unilateral contract may be withdrawn at any time prior to performance of the act requested to be done.

* ***Poel v. Brunswick-Balke-Collender Co. of New York (Ct. of App. of NY 1915)***

Synopsis: D placed phone order with P. P sent D letter to confirm. D sent P a letter with new conditions and saying that the acceptance of the order had to be acknowledged. P never acknowledged. D backed out of order. P sued D. Court found for D, because D’s response was counter-offer and P did not accept.

Tool: A contract is not formed if the terms of acceptance do not directly mirror the terms of the offer.

* ***Dale Horning Co., Inc. Dba Architectural Glass & Metal Co. V. Falconer Glass Industries Inc. (Dist. Ct., SD IN 1990)***

Synopsis: Glazing subcontractor (P) brought action against glass supplier (D) to recover consequential damages for breach of warranty under UCC. Court found that D’s limitation of consequential damages contained on its standard/boilerplate form is not a term of the parties’ contract under UCC 2-207.

Tool: UCC 2–207(2) provides that where, as here, both parties are merchants, such terms become part of the contract unless they materially alter the prior agreement. An additional term is said to materially alter a contract “if its incorporation into the contract without express awareness by the other party would result in surprise or hardship.”

* ***Brown Machine, Inc. v. Hercules, Inc. (Mo. Ct. App. 1989)***

Synopsis: Hercules (D), which purchased a trim press from Brown (P) through an exchange of boilerplate forms, refused to indemnify P in a lawsuit brought by a D employee who was injured while using the trim press, claiming that P’s price quotation with boilerplate language of indemnification was only invitation for D to submit offer to which D counteroffered and P accepted. Court found for D because its written purchase order was a counteroffer.

Tool: Under UCC 2-207(1), an offeree’s reply that purports to accept an offer but makes acceptance conditional on the offeror’s assent to terms not contained in the original offer, is a counteroffer rather than an acceptance.

* ***Hamer v. Sidway (N.Y. Ct. App. 1891)***

Synopsis: Sidway’s (D) decedent promised to pay $5,000 to Hamer’s (P) assignor if he would forbear from the use of liquor, tobacco, swearing, or playing cards or billiards for money until his 21st birthday. P kept promise but D did not pay. Court ruled for P finding that there was sufficient consideration.

Tool: In general, if (1) a waiver of a legal right and (2) at the request of another party, then there is sufficient consideration for a promise.

* ***Dougherty v. Salt (N.Y. Ct. App. 1919)***

Synopsis: Dougherty (P) brought suit against Salt (D), P’s aunt’s executor, to enforce note aunt left him for $3,000. Court ruled for D finding no consideration in purely donative promise.

Tool: (1) A promise of no more than an executory gift (donative promise) is not supported by consideration, because promisor receives no value for promise, and the mere recital of value would not suffice, where it was plain that none had in fact been given. (2) A note that is not supported by consideration is unenforceable.

* ***Baehr v. Penn-O-Tex Oil Corp. (1960)***

Synopsis: Kemp was heavily indebted to D. P sought to recover unpaid rent from Kemp and said they would delay legal action. D promised to pay the rent Kemp owed P but never did. P sued D. Court found for D because there was no consideration in promising to delay legal action given that D did not ask for it and delay was likely rooted in personal motivation.

Tool: (1) Actual bargaining is necessary for consideration. “Bargain” does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other. (2) Offer to delay bringing suit for unpaid rent does not create sufficient consideration when D did not ask P to delay bringing the suit and the delay was likely motivated by personal convenience.

* ***Pennsy Supply, Inc. v. American Ash Recycling Corp. of Pennsylvania (Pa. Super. Ct. 2006)***

Synopsis: Pennsy Supply, Inc. (P) contended that its disposal of a hazardous material it had obtained for free from American Ash Recycling Corp. (D) constituted consideration necessary to support various breach of contract, warranty and merchantability claims. Court agreed with P and reversed grant of demurrer to D.

Tool: (1) Consideration is a benefit to the promisor or a detriment to the promise. (2) It is not enough that the promisee has suffered a legal detriment at the request of the promisor. The detriment must be the “quid pro quo,” or the “price” of the promise, and the inducement for which it was made. If the promisor merely intends to make a gift to the promise upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract. (3) Bargaining process is unnecessary to establish consideration; the facts need merely show that the promise induced the detriment and the detriment induced the promise.

* ***Plowman v. Indian Refining Co. (E.D. Ill. 1937)***

Synopsis: Plowman (P) and others sought to enforce a retirement agreement between them and their former employer, Indian Refining (D). Court ruled for D because past services are not sufficient consideration to support the enforceability of a contract to provide continuing payments to former employees.

Tool: Past consideration, consideration made before a contract is created, cannot support an enforceable contract, because the detriment had been performed before the contract was created and thus could not have been in exchange for the promise.

* ***Kirksey v. Kirksey (Alabama Supreme Court 1845)***

Synopsis: Kirksey (D) promised “Sister Antillico” (P) a place to raise her family on the condition that “you come down and see me.” D kicked P out after two years. P sued to recover damages for breach of a promise. Court found for D because promise was not bargained for but gratuitous.

Tool: A promise on the condition of moving to see someone is not given as a bargained exchange so there is not consideration to be enforceable. Note: May have been decided differently today under promissory estoppel.

* ***Wright v. Newman (Supreme Court of Georgia 1996)***

Synopsis: P sought child support from D. D is not the biological father of P’s son but for ten years D held himself out to be the child’s father. Court ruled for P under promissory estoppel since P detrimentally relied on D’s promise to support her son.

Tool: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.”

* ***Allegheny College v. National Chautaugua County Bank of Jamestown (Supreme Court of NY 1927)***

Synopsis: D’s decedent promised to give money to college (P) but had not received most of it by the time she died. P sued for money. Court found for P because there was an assumption of duty to maintain the memorial and perpetuate the name of the founder when P received first batch of money.

Tool (Cardozo): An assumption of duty to carry out the conditions of a gift is valid consideration.

* ***Maryland National Bank v. United Jewish Appeal Fed’n of Greater Washington, Inc. (Ct. of App. MD 1979)***

Synopsis: Charity, P, brought suit against bank and representative, D, for $133,500 of an unpaid pledge to P. Court ruled for D because found no consideration and promissory estoppel did not apply because no action or forbearance had been induced.

Tool: Promissory estoppel applies to charitable subscriptions only if action induced, forbearance and detrimental reliance.

* ***Katz v. Danny Dare, Inc. (Mo. Ct. Ap. 1980)***

Synopsis: Dare (D) contended that Katz (P) did not give up anything of value in return for pension benefits, and that, thus, it’s promise to pay such benefits was unenforceable.

Tool: Promissory estoppel does not require the promisee to relinquish a legal interest.

* ***Shoemaker v. Commonwealth Bank (Superior Court of Pennsylvania 1997)***

Synopsis: P sued D for promissory estoppel given D’s alleged failure to obtain insurance coverage for P’s home. Court reversed summary judgment considering evidence that P instructed D to purchase insurance.

Tool: A mortgagor who is obligated by a mortgage to maintain insurance on their property can establish a cause of action in promissory estoppel based upon an oral promise made by the mortgagee to obtain insurance.

* ***Credit Bureau Enterprises, Inc. v. Pelo (Supreme Court of Iowa 2000)***

Synopsis: Pelo (D) was hospitalized for instable mental behavior. The hospital and later credit bureau (P) sought payment for services rendered but D refused to pay. Court found D was liable under theory of implied in law contract (restitution).

Tool: In certain circumstances, including protection of another’s life/health, restitution for services performed will be required even though the recipient did not request or voluntarily consent to receive such services.

* ***Commerce Partnership 9098 Limited Partnership v. Equity Contracting Co. (Florida District Court of Appeals En Banc 1997)***

Synopsis: Equity Contracting Co. (P), a subcontractor on a construction job was not paid by the general contractor and brought restitution action alleging that Commerce Partnership (D), property owner, had been unjustly enriched and sought payment for work it had performed. Court reversed and remanded in favor of D because P had to prove that D had not paid general contractor for work.

Tool: A subcontractor’s restitution (quasi-contract) action against owner must prove: (1) the subcontractor exhausted all remedies against the general contractor and still remains unpaid; and (2) the owner must not have given consideration to any person for the improvements furnished by the subcontractor.

* ***Watts v. Watts (Supreme Court of Wisconsin 1987)***

Synopsis: P sues D upon the termination of their non-marital cohabitation seeking an order for an accounting of their assets accumulated during the cohabitation and a determination of her share of that property. Court reversed dismissal of action for unjust enrichment finding that it can apply to unmarried cohabitants where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.

Tool: An action for unjust enrichment has three elements: (1) a benefit conferred on D by P; (2) appreciation or knowledge by D of the benefit; and (3) acceptance or retention of the benefit by D under circumstances making it inequitable for D to retain the benefit.

* ***Mills v. Wyman (Massachusetts Supreme Judicial Court 1825)***

Synopsis: P took care of D’s son without being requested to do so and for so doing P promised D compensation for expenses. D later refused to pay P. P brought action in assumpsit. Court found for D because no other preexisting obligation to pay except moral obligation.

Tool: Moral obligation is insufficient consideration for a promise. Needs to be some other preexisting obligation that will suffice for valid consideration.

* ***Webb v. McGowin (Alabama Court of Appeals 1935)***

Synopsis: P saved D’s decedent’s life. Decedent in return, promised P compensation which he gave regularly until he died. D refused to continue paying P. Court found for P holding that moral obligation is sufficient consideration in certain circumstances.

Tool: A moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit or there was preexisting valid obligation. Justification – subsequent promise to pay by D for services rendered “was an affirmance or ratification of what [P] had done raising the presumption that the services had been rendered at [D’s] request.” AKA “Material Benefit” rule – If a person receives a material benefit from another, other than gratuitously, a subsequent promise to compensate the person for rendering such benefit is enforceable.

* ***James Baird Co. v. Gimbel Bros., Inc. (2d. Cir. 1933)***

Synopsis: Gimbel (D) offered to supply linoleum to contractors who were bidding on a project. Baird (P), relying on D’s quoted prices, submitted a bid and later received a message from D that its quoted prices were in error. P’s bid was accepted but D refused to recognize contract. Court found for D, because use by a general contractor of a subcontractor’s bid does not constitute acceptance.

Tool: (1) Where an offer is withdrawn before it is accepted, and the offer language does not indicate a contrary intention, a contract is not formed. (2) The doctrine of promissory estoppel is not applicable where an offer is made for an exchanged act or promise and no consideration has been received by the offeror. This is because promissory estoppel deals with reliance on “promises” and an “offer” is not the same as a donative promise but is rather “not meant to become a promise until a consideration has been received.” Note: majority of courts now hold that justifiable detrimental reliance on an offer renders it irrevocable.

* ***Drennan v. Star Paving Co.* (Cal. Sup. Ct. 1958)**

Synopsis: Drennan (P) sued Star (D) to recover damages when D could not perform the paving work at the price quoted in its subcontracting bid. Court ruled for P, because P reasonably relied on D’s offer.

Tool: Reasonable reliance on a promise binds an offeror even if there is no other consideration.

* ***Berryman v. Kmoch (Sup. Ct. of Kansas 1977)***

Synopsis: Kmoch (P) claimed his expenditures of time and money in attempting to attract buyers constituted consideration to support the enforceability of an option on Berryman’s (D) land. Court found for D because P did not reasonably rely on promise since P was real estate agent and knew agreement was not enforceable without appropriate consideration.

Tool: (1) An offeror’s power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect. (2) An agreement that lacks consideration may be enforceable based on promissory estoppel when: (a) the promisor reasonably expected the promise to rely on the promise; (b) the promise reasonably relied on the promise; and (c) a failure to enforce the promise would result in perpetuation of fraud or result in other injustice.

* ***Pop’s Cones, Inc. v. Resorts International Hotel, Inc. (Sup. Ct. of NY, App. Div. 1998)***

Synopsis: Pop’s (P), a TCBY franchisee operating in Margate, after discussions with Resorts International Hotel (D) on the possibility of leasing space in its hotel, relied on D’s assurances that the deal would be approved, and did not renew its lease on its Margate location. P sued D seeking damages under promissory estoppel. Court reversed summary judgment for D overruling earlier NY cases requiring a “clear and definite promise” for a promissory estoppel action.

Tool: Overrule earlier NJ cases requiring a “clear and definite promise” for a promissory estoppel action and followed R2d 90 approach.

* ***McIntosh v. Murphy (Supreme Court of Hawaii, 1970)***

Synopsis: McIntosh (P) sued Murphy (D), his employer for breach of an alleged one-year oral employment contract for which P moved from California to Hawaii. Court found that it was unnecessary to determine whether contract fell within one-year provision of Frauds since promissory estoppel applied under R2d 139.

Tool: R2d 139

* ***Alaska Democratic Party v. Rice (Alaska Sup. Ct. 1997)***

Synopsis: When Rice (P) was promised a job by the Alaska Democratic Party (D) that never materialized after she moved to Alaska, she sued on theory of promissory estoppel. Court found for D that promissory estoppel applied under Restatement even though contract fell under one-year provision of statute of frauds.

Tool: R2d 139

* ***Crabtree v. Elizabeth Arden Sales Corp. (NY Ct. App. 1953)***

Synopsis: Crabtree (P) was hired by Arden (D). No formal contract was signed but separate writings pieced together showed P to have been hired for 2 years with pay raises after the first and second six months. When he did not receive his second pay raise, P sued D for damages for breach. Court found for D holding that the separate writing constituted an enforceable contract.

Tool: (1) Statute of Frauds does not require writing to be in one document. Separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion, may be pieced together to find an enforceable contract under the Statute of Frauds. (2) Parol evidence – to portray the circumstances surrounding the making of the memorandum – is permissible in order to establish a connection.

* ***Hill v. Jones (Ariz Ct. App. 1986)***

Synopsis: Before buying Jones’s (D) home, Hill (P) asked whether it had been infested with termites, and D denied that there had been previous infestations, despite firsthand knowledge of them. Court found that contract integration clause could not free D from his own fraud and that D was liable for not disclosing prior termite infestation since this was a material fact as held in past cases.

Tool: (1) any provision in a contract making it possible for a party thereto to free himself from the consequences of his own fraud in procuring its execution is invalid and necessarily constitutes no defense. (2) “Where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”

* ***Park 100 Investors, Inc. v. Kartes (Ind. Ct. App. 1995)***

Synopsis: Park 100 (P) sought to collect unpaid rent from the Karteses (D) under a provision of the lease which D signed because it was called lease agreement but included a personal guaranty of lease, which had not been discussed. P heard D ask lawyers if they had reviewed lease agreement and P said nothing about guaranty provision. Court found in favor of D holding that P employed misrepresentation to induce D to sign the contract.

Tool: Elements of actual fraud are: a material misrepresentation of past or existing fact by the party to be charged which: (a) Was false; (B) Was made with knowledge or in reckless ignorance of the falsity; (c) Was relied upon by the complaining party; and (d) Proximately caused the complaining party injury

* ***Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co. (Alaska Sup. Ct. 1978)***

Synopsis: Totem (P) claimed that Alyeska (D) had used economic duress to get P to sign a binding release of all claims it had against D after D terminated a contract with P. Court reversed summary judgment finding that there was an issue of material fact regarding economic duress, because P alleged that D’s actions caused delays for P in transporting materials and thus caused D additional expenses; thus D faced bankruptcy or settling all claims with P for very little money.

Tool: Duress exists where: (1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party” (as opposed to the “defendant’s necessities”)

* ***Odorizzi v. Bloomfield School District (Cal. Dist. Ct. App. 1966)***

Synopsis: Odorizzi (P) was arrested on homosexual charges. Immediately after his release the School District (D) convinced him to resign telling him that if he did not do so D would be forced to suspend and then dismiss him. Court found undue influence was a jury issue and reversed judgment for a new trial.

Tool: “[U]ndue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object.”

* ***Williams v. Walker-Thomas Furniture Co. (DC Cir. 1965)***

Synopsis: Walker-Thomas (P) sold to Williams (D) furniture burdened by a cross-collateral clause (P retained the right to repossess all items previously purchased in the event of any default). Subsequent to D’s default, P sought to replevy all goods previously purchased by D. Court remanded holding that terms of the contract could be found to be unconscionable.

Tool: The courts have the power to refuse enforcement of contracts found to be unconscionable. “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Meaningful choice is to be determined in light of all circumstances – for example, gross inequality in bargaining power, manner in which the contract was entered, did each party considering his obvious education 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 by deceptive sales practices.”

* ***Higgins v. Superior Court of Los Angeles County (Cal Ct. App. 2006)***

Synopsis: The Higginses (P) contended that arbitration provisions of a written agreement and release compelling arbitration of claims arising from the production and broadcast of a television program were unconscionable. Court granted writ of mandate finding that an arbitration clause in a written agreement may not be enforced if only the clause as opposed to the entire agreement is being challenged and the clause is unconscionable.

Tool: (1) If an arbitration agreement is unconscionable, it will not be enforced. (2) An arbitration clause in a written agreement may not be enforced if only the clause, as opposed to the entire agreement, is being challenged and the clause is unconscionable. (3) Elements of unconscionability: (a) procedural unconscionability (adhesion contract?); and (b) substantive unconscionability. (4) “There is no rule that if a party reads an agreement he or she is barred from claiming it is unconscionable.”

* ***Derico v. Duncan (Sup. Ct. of AL 1982)***

Synopsis: Court found that Duncan (D), in failing to obtain a license to engage in the business of making consumer loans, was in direct violation of State law. The court held because the conditions of the statute were made for the benefit of the public, and not for the raising of revenue only, an agreement that did not comply with the statutory conditions was void.

Tool: “[I]f a court finds that the terms of an agreement made under this chapter are unconscionable, the court “may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable provision, or it may so limit the application of any unconscionable provision as to avoid any unconscionable result.”

* ***Hiram Ricker & Sons v. SIMS (CA1 1974)***

Synopsis: Ricker (P) rented out space and services to the Students International Meditation Society (D) at his golf resort. P sued D for allegedly not paying full bill. Court certified to ME Sup. Ct. to determine whether “Randall decision” or an equitable exception to Randall applies.

Tool: (1) Randall decision – “It is the general doctrine, now settled by great weight of authority, that where a license is required for the protection of the public, and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void.” (2) Equitable Exception - should not apply when “it causes great disproportionate hardships

## What are the Terms of the Contract?

* ***Joyner v. Adams (NC Ct. of App. 1987)***

Synopsis: Joyner (P) contended that the rent escalation clause of a lease was triggered by Adams’ (D) failure to properly develop the property. D contended that building sewer and water lines constituted developing the property. Court remanded to lower court to determine whether either pary had knowledge of the other party’s interpretation.

Tool: (1) Meeting of the minds – where parties have attributed different meanings to a term within a contract, there is no meeting of the minds on that provision and a court will not enforce either party’s meaning. (2) Where one party knows or has reason to know what the other party means by certain language and the other party does not know or have reason to know of the meaning attached to the disputed language by the first party, the court will enforce the contract in accordance with the innocent party’s meaning.

* ***C&J Fertilizer, Inc. v. Allied Mutual Insurance Co. (Sup. Ct. of IW 1975)***

Synopsis: C&J Fertilizer (P) had an insurance policy with Allied Mutual Insurance Co. (D) covering it for burglary loss. A burglary occurred, but D refused to pay because there were no visible marks or physical damage to the building exterior at the place of entry, as required under the policy. Evidence of oral discussions suggest that such specific visible marks required were not discussed. Court reversed and remanded in favor of P because P had no reason to reasonably expect the specific visible marks requirement to be in the policy.

Tool: Doctrine of Reasonable Expectations – The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

* ***Thompson v. Libby (Minnesota Sup. Ct. 1885)***

Synopsis: Thompson (P) brought an action to enforce a written contract for the sale of logs. Libby (D) defended on an oral warranty. Court found for P because looking at four corners, agreement was complete.

Tool: (1) “parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument;” (2) when partial integration, parol evidence may be admitted to prove the part omitted; (3) to determine when partial or total, must look within “four corners.” If it imports on its face to be a complete expression of the whole agreement (merger/integration clause?), it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement; (4) collateral agreement exception only applies to an agreement about a “subject distinct from that to which the writing relates;” and (5) evidence to explain meaning is exception to parol evidence rule.

* ***Hershon v. Gibraltar Bldg. & Loan Assn. (US Court of Appeals, DC 1989)***

Synopsis: Hershon, etc. (P) sued P for declaratory judgment contending that Release agreement included “all claims” and thus discharged P’s debts to Gibraltar (D). D contended that it only covered claims “in dispute.” Court found for P considering “all claims” language to be unambiguous and thus parol evidence cannot be used.

Tool: (1) Majority: If no facial ambiguity exists, parol evidence should be excluded. However, parol evidence may be used to determine whether a contract ambiguity exists in the first place (unless that evidence varied, altered, or contradicted the writing’s clear meaning) and to resolve any ambiguity by ascertaining the parties’ intent. (2) Minority: Parol evidence can be used to show special meaning even if that language is facially clear.

* ***Sherrodd, Inc. v. Morrison-Knudsen Co. (Sup. Ct. of Montana 1991)***

Synopsis: Sherrodd (P), a construction subcontractor, alleged that the price provisions in the written construction contract should be set aside because of Morrison-Knudsen’s (D) subcontractor’s alleged fraud and breach of the of the covenant of good faith and fair dealing. Court found for D because parol evidence rule calls for written agreement to supersede previous oral agreements despite alleged fraudulent statement.

Tool: (1) Parol Evidence Rule – a written contract may be altered only by a subsequent contract in writing or by an executed oral agreement. (2) Evidence of fraud exception does not apply where evidence is of prior fraudulent oral agreement contradicting a term in the written agreement. (3) Mutual mistake is exception to parol evidence rule.

* ***Wood v. Lucy, Lady Duff-Gordon (NY Ct. of App. 1917)*** (Romantic)

Synopsis: Wood (P), in an agreement, received the exclusive right to endorse designs with Lucy’s (D) name and to market all her fashion designed for which D would receive one-half the profits derived. D broke the contract by placing her enforcement on designs without P’s knowledge. Court found for P, because the promise to pay Lucy half the profits, make monthly accounting and acquire patents and copyrights as necessary, showed the intention of the parties that the promise has value by showing that P had some duties and thus was a promise to use reasonable efforts to bring profits and revenues into existence.

Tool: A promise to use reasonable efforts can be implied from a writing to achieve proper business efficacy even though it is imperfectly expressed.

* ***Donahue v. Federal Express Corp. (Pa. Super. Ct. 2000)*** (Classical)

Synopsis: Brion Donahue (P) worked for FedEx (D) as an at-will employee from until he was discharged. P often questioned company policies and practices. P sued D under various causes of action including wrongful termination for breach of an implied duty of good faith and fair dealing. Court found for D because such a duty does not apply to at-will employment relationships unless it violates public policy.

Tool: (1) Duty of good faith and fair dealing applies to contractual terms outside an at-will employment relationship, including earned compensation and promise of evaluation. (2) Duty of good faith and fair dealing does not apply to the termination of an at-will employment relationship unless that termination threatens clear mandates of public policy (Cf. Cloutier) founded on constitutional, legislative, administrative or established judicial authority. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. A private employer does not violate public policy by firing an employee for whistleblowing, when the employee was under no legal duty to report the acts at issue. (3) An employee can defeat the at-will presumption by establishing that he gave his employer additional consideration other than the services for which he was hired. Additional consideration exists when an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform. A general allegation of superior work performance is insufficient to establish additional consideration. (4) An employee cannot maintain a cause of action for wrongful discharge based on a specific intent to harm theory.

* ***Bayliner Marine Corp. v. Crow (Va. Sup. Ct. 1999)***

Synopsis: John Crow (P) entered into a written contract for the purchase of a sport fishing boat manufactured by Bayliner (D). The boat did not reach the speed that he hoped it would and that was included in “prop matrixes” for similar models. Furthermore, the sales brochure said that this model boat “delivers the kind of performance you need to get to the prime offshore fishing grounds.” Court found that the speed was not guaranteed by express warranty (prop matrixes about different models and brochure was general and not about specific boat feature); implied warranty of merchantability (boat did not meet Crow’s particular needs but no evidence that not merchantable and it was fit for ordinary purposes because Crow actually used boat); nor implied warranty of fitness (no evidence that Crow informed salesman of exact speed requirement.

Tool: (1) UCC 2-313 – Express Warranties; (2) UCC 2-314 – Implied Warranty of Merchantability and Usage of Trade; (3) UCC 2-315 – Implied Warranty of Fitness

* ***Caceci v. Di Canio Construction Corp. (NY Ct. App. 1988)***

Synopsis: The Cacecis (P) sued Di Canio Construction Corp. (D), the builder of their new home, when the floor began to crack and the slab foundation had to be replaced after several years. Court found for P under Housing Merchant warranty.

Tool: The “Housing Merchant” warranty (Implied warranty of skillful construction) imposes by legal implication a contractual liability on a homebuilder for skillful performance and quality of a newly constructed home. Builder-seller’s knowledge is not relevant and merger clause has no legal effect. Public policy reasons: buying house is big investment so want to harmonize with implied warranty of merchantability for other goods; unequal bargaining power; court has power to create common law.

## Has Performance Been Excused?

* ***Lenawee County Board of Health v. Messerly (Mich. Sup. Ct. 1982)***

Synopsis: When the Lenawee County Board of Health (P) found a defective sewage system shortly after the Pickleses purchased rental property from the Messerly’s (D) and sought a permanent injunction proscribing human habitation, the Pickleses sought recission of their contract on the grounds of mutual mistake. Court found that Pickleses should bare loss of mutual mistake because both parties did not know of mistake and per R2d 154(a), court should look to the allocation of risk agreed upon by the parties in the contract – Pickleses bought property “as is” clause which suggests Pickleses bore the risk.

Tool: (1) “A contract may be rescinded because of a mutual misapprehension of the parties, but this remedy is granted only in the sound discretion of the court.” Court should use “case-by-case analysis.” (2) R2d 152 and 154.

* ***Wil-Fred’s, Inc. v. Metropolitan Sanitary District (Ill. App. Ct. 1978)***

Synopsis: Contractor Wil-Fred’s, Inc. (P) withdrew a bid when its subcontractor proved unable to meet a subcontract commitment. Court affirmed recission of contract because evidence was clear and positive and (a) mistake was material to bid ($150K difference); (b) P exercised reasonable care by relying on subcontractor that had done good work before; (c) enforcement of contract would decrease P’s bonding capacity; and (d) Sanitary District won’t be hurt by withdrawal of the bid.

Tool: (1) “Unilateral mistake may afford ground for recission where there is a material mistake and such mistake is so palpable that the party not in error will be put on notice of its existence.” (2) In IL, conditions generally required for recission are: (a) that the mistake relate to a material feature of the contract; (b) that it occurred notwithstanding the exercise of reasonable care; (c) that it is of such grave consequence that enforcement of the contract would be unconscionable; (d) and that the other party can be placed in status quos. AND evidence of these conditions must be clear and positive.

* ***Mel Frank Tool & Supply, Inc. v. Di-Chem Co. (Iowa Sup. Ct. 1998)***

Synopsis: Di-Chem Co. (D) signed a three-year lease with Mel Frank (P) for a storage and distribution facility. D claimed it was going to be selling chemicals, but the use of the premises was limited to “storage and distribution.” A month later, city officials cited D for code violations and told D he could not use it for hazardous chemicals due to laws enacted after D took occupancy. D vacated the premises and P sued for breach of lease and damage to the property.

Tool: “A subsequent governmental regulation like a statute or ordinance may prohibit a tenant from legally using the premises for its originally intended purpose. In these circumstances, the tenant’s purpose is substantially frustrated thereby relieving the tenant from any further obligation to pay rent. The tenant is not relieved from the obligation to pay rent if there is a serviceable use still available consistent with the use provision in the lease. The fact that the use is less valuable or less profitable or even unprofitable does not mean the tenant’s use has been substantially frustrated.”

* ***Alaska Packers’ Association v. Domenic (CA9 1902)***

Synopsis: Seaman (P), who had agreed to ship from San Francisco to Alaska at a fixed pay, refused to continue working once they reached Alaska, and demanded a new contract with more compensation. Court found in favor of D since P were already under contract to do the work.

Tool: “Consent so such a demand…[is]…without consideration, for the reason that it was based solely upon [the previous] agreement to render the exact services, and none other than they were already under contract to render.”

* ***Kelsey-Hayes Co. v. Galtaco Redlaw Castings Corp. (ED Mich. 1990)***

Synopsis: When Galtaco Redlaw Castings Corp. (D) experienced financial losses and threatened to shut down operations, Kelsey-Hayes Co. (P), which had signed a three-year requirements contract, was forced to agree to pay higher prices to keep operations going.

Tool: “A subsequent contract or modification is invalid and therefore does not supersede an earlier contract when the subsequent contract was entered into under duress.”

## Have the Terms of the Contract been Breached?

* ***Jacob & Youngs, Inc. v. Kent (NY Ct. App. 1921)***

Synopsis: Jacobs & Young (P) was hired to build a $77K home for Kent (D). When the dwelling was completed, it was discovered that a pipe, not of Reading manufacture, which had been specified in the contract, was used. D refused to make final payment of $3K upon learning of this. Court found that P owed difference between value of construction as contracted and as built since D substantially performed contract.

Tool: “The measure of damages for breach of a construction contract where the breaching party has substantially performed with trivial deviation is the difference between the value of the construction as contracted for and the value of the construction as built, rather than complete forfeiture by the breaching party.”

* ***Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co. (NY Ct. App. 1995)***

Synopsis: When a express condition precedent was not satisfied, D declared a sublease agreement void and P sued for breach of contract, claiming substantial performance. Court found for D finding no public policy called for substantial performance analysis to express condition.

Tool: Substantial performance is not applicable to excuse the nonoccurrence of an express condition precedent.

* ***JNA Realty Corp. v. Cross Bay Chelsea, Inc (NY Ct. App. 1977)***

Synopsis: Cross Bay Chelsea (D) negligently failed to give lessor JNA (P) notice of intent to exercise a lease renewal option. Court found in favor of D in equity since failure to do so would have resulted in forfeiture to D.

Tool: “[A]lthough the tenant has no legal interest in the renewal period until the required notice is given, yet an equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed.”

* ***Morin Building Products Co. v. Baystone Construction, Inc. (CA7 1983)***

Synopsis: General Motors Corp., Baystone Construction (D) refused for aesthetic reasons, to approve aluminum siding installed by Morin (P), and did not pay P. Court found for P since objective standard should be used.

Tool: Objective standard should be employed in cases where “commercial quality, operative fitness, or mechanical utility” are in question. Subjective standard should be employed in cases where “personal aesthetics or fancy” are at issue.

## What Remedies are Available if the Contract has been Breached?

* ***Roesch v. Bray (Ct. of App. OH 1988)***

Synopsis: D backed out of contract to buy home from P. Court found that P was not entitled to consequential, general damages – different between contract price and selling price of house.

Tool: (1) “When a purchaser defaults upon a contract for the sale of real estate, the seller may recover the difference between the contract price and the market value of the property at the time of the breach; but the seller may not recover the expenses incidental to ownership pending the resale of the property.” (2) “When, following the breach of a real estate sales contract, the seller resells the property, the resale price may be used to determine the market value of the property at the time of the breach if the resale occurred within a reasonable time after the breach and at the highest price obtainable.”

* ***Hadley v. Baxendale (Eng. Rep. 1854)***

Synopsis: Hadley (P), a mill operator in Gloucester, arranged to have Baxendale’s (D) company, a carrier, ship his broken mill shaft to the engineer in Greenwich for a copy to be made. P suffered a 300 british pounds loss when D unreasonably delayed shipping the mill shaft causing the mill to be shut down longer than anticipated. Court granted new trial but gave below rule as instructions to lower court.

Tool: Breach of contract damages should be those “fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probably result of the breach of it.”

* ***Rockingham County v. Luten Bridge Co. (CA4 1929)***

Synopsis: Luten Bridge (P) continued a construction contract after Rockingham County (D) had wrongfully notified it that the contract was being repudiated. Court found that a party cannot continue his performance after absolute repudiation to perform by the other party in order to recover damages based on full performance.

Tool: “duty to mitigate damages”

* ***Jetz Service Co. v. Salina Properties (Kansas Court of Appeals 1993)***

Synopsis: Jetz (P) which installs and maintains coin-operated laundry equipment, was awarded damages to cover its lost profits when Salina (D) breached its lease. Court affirmed for D because D had several more washers and dryers available with which it could have fulfilled the subsequent contract so D “lost volume.”

Tool: R2d 350 cmt. d

* ***Handicapped Children’s Education Board v. Lukawszewski (Sup. Ct. of Wisconsin 1983)***

Synopsis: Lukaszewski (D) reneged on a contract to provide speech therapy services on behalf of the Handicapped Children’s Education Board (P). Court found that D breached employment contract and P was entitled to expectation damages based on loss from bargain.

Tool: “Damages in breach of contract cases are ordinarily measured by the expectations of the parties. The nonbreaching party is entitled to full compensation for the loss of his or her bargain that is, losses necessarily flowing from the breach which are proven to a reasonable certainty and were within contemplation of the parties when the contract was made.”

* ***Roth v. Speck (DC Municipal Court of Appeals 1956)***

Synopsis: Roth (P) hired Speck (D) to work in his beauty shop for one year, but D wuit after 6.5 months. Court found that damages should be D’s new compensation minus bargained for compensation with P.

Tool: “Fair value” of value of previous employee’s services is their new compensation

* ***American Standard, Inc. v. Schectman (NY App. Div. 1981)***

Synopsis: Schectman (D) contended that the correct measure of damages for his failure to complete grading American Standard, Inc’s (P) land was the diminution in value of the land but the court held that it was the cost of completion.

Tool: “[I]njured party may recover those damages which are the direct, natural and immediate consequence of the breach and which can reasonably be said to have been in the contemplation of the parties when the contract was made.”

* ***Erlich v. Menezes (Cal. Sup. Ct. 1999)***

Synopsis: Barry and Sandra Erlich (P) contracted with John Menezes (D) to build their “dream house.” The house leaked from everywhere. P sued D not only for negligent breach of contract in the construction of the home, but also sought damages for emotional distress. Court did not award damages for emotional distress.

Tool: “Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”

* ***Wartzman v. Hightower Productions, Ltd. (Md. Ct. Spec. App. 1983)***

Synopsis: Hightower Productions, Inc. (P) hired Wartzman (D), a law firm, to incorporate it, and when D forgot a vital part of the process, P, forced to cancel its project, sued D for damages. Court found that reliance damages were appropriate because it is the responsibility of the breaching party to show that performance of the contract would have resulted in a net loss.

Tool: “Where the breach has prevented an anticipated gain and made proof of loss difficult to ascertain, ‘the injured party has a right to damages based upon 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.’”

* ***Walser v. Toyota Motor Sales, USA, Inc. (CA8 1994)***

Synopsis: Walser (P) alleged that the district court erred in instructing the jury that damages were limited to the out-of-pocket expenditures made in reliance on Toyota’s (D) promise of a dealership. Court ruled that the district court did not abuse its discretion in limited the award of damages on the promissory estoppel claim to out-of-pocket expenses.

Tool: Determining damage decisions in promissory estoppel claims is a matter of discretion delegated to district courts.

* ***City Stores Co. v. Ammerman (DC Cir. 1968)***

Synopsis:

Tool: (1) A binding option contract is formed, despite the existence of express and implied conditions precedent and material terms remaining to be decided, where the substance of the agreement is clear. (2) An option contract containing “some terms which are subject to further negotiation between plaintiff and defendant will not bar a decree for specific performance, if in the court’s discretion specific performance should be granted.” Construction contracts may be specifically enforced where damages would be inadequate (“would not be a just and reasonable substitute”) or impracticable (“it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law”), and the “importance of specific performance” to the plaintiff outweighs the “difficulties of supervision” by the court.

* ***Wasserman’s Inc. v. Township of Middletown (Sup. Ct. of NJ 1994)***

Synopsis: Wasserman’s Inc (P), entered into a commercial lease with Township of Middletown (D) that contained a clause providing that if D cancelled the lease, it would pay P a pro-rata reimbursement for any improvement costs and damages of twenty-five percent of P’s average gross receipts for one year. D subsequently cancelled the lease but refused to pay the damages. Court found that D was liable and remanded for determination of validity of “stipulated damage clauses.”

Tool: A stipulated damage clause “must constitute a reasonable forecast of the provable injury resulting from breach; otherwise, the clause will be unenforceable as a penalty and the non-breaching party will be limited to conventional damage measures.”