**Contracts Outline**

* Parts of Argument
	+ The law is on my side
	+ And it’s a good thing too
* Arguments of justification
	+ Fairness
	+ Consequential
	+ Role of the Courts

**PART ONE: WHAT PROMISES SHOULD THE LAW ENFORCE? – THE DOCTRINE OF CONSIDERATION**

* Four Possibilities
	+ Bargains/gifts
	+ Forms
	+ Reliance
	+ Section 86 (acknowledgment of past benefit received)
* PROMISE: **RS §2(1)** manifestation of an intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that commitment has been made.

**#Simple Donative Promises**

* #Gifts are NOT bargains. No consideration.
* [Gift Promises] *Dougherty v. Salt* (Aunt Tillie gave Charlie $3k; estate refused to pay)
	+ **Lack of consideration 🡪 unenforceable. A promise to make a gift is not enforceable.**
	+ **RS §17(1)**: Except as stated in subsection (2), the **formation of a contract requires a bargain** in which there is a manifestation of mutual assent to the exchange and a consideration.
* Classic bargain theory: (1) consideration = bargains (2) formed by offer & acceptance (3) remedy = damages
* **RS §71(1)**: To constitute **consideration**, a performance or a return promise **must be bargained** for.
	+ Mere pretense does not suffice 🡪 false recital of consideration or nominal consideration.
* **RS §79**: If consideration is met 🡪 bargain. No additional requirement of gain/advantage/benefit or loss/disadvantage/detriment for either party; equivalence in values exchanged; or “mutuality of obligation.”
* [Conditional Gift v. Conditional Bargain]
	+ C Gift: performance = **means** to make gift. C Bargain: performance = **price** to make promise. (p.16)

**Forms**

* A [gift] promise can be enforceable if in proper form (will, trust, inter vivos transfer – not contracts)
	+ If people want something to be enforceable, they should have a way to do it.
* Von Mehren’s reasons for relying on form to determine enforceability:
	+ Evidentiary (correct form provides proof that a promise was made);
	+ Cautionary (complying with form cautions people that promise is legally enforceable);
	+ Channeling (helps court determine easily what promises should be enforced);
	+ Deterrence (helps prevent transactions of suspect/marginal value)
* Seals used to make contracts enforceable, but declined (to just writing” L.S.”), so most states have gotten rid of their special status; potential replacements are
	+ Accept nominal consideration
	+ Witnesses
	+ Notary
	+ Many states(MS, MO, CA) are starting to adopt statutes that make written instruments presumptive evidence of consideration in some or all types of cases
* [Nomiinal Consideration] *Schnell v. Nell* (wrote elaborate contract to give $ to dead wife’s friends in exchange for 1 cent)
	+ **Nominal consideration is unenforceable**. Nominal = no consideration. Contract was really a gift.
		- Fake bargain. Cannot bargain over past. Contract said “past love…”
	+ NOMINAL CONSIDERATION: form, but not substance of bargain. Promisor does not view what she gives up as the **price** of what she gets.

**Element of #Reliance**

* **RS §90**: A promise which the promisor should **reasonably expect** to induce action or forbearance on the part of the promise…and does induce such action or forbearance is **binding if injustice can be avoided** only by enforcement of the promise. [Promissory Estoppel]
	+ [CLASSIC] *Kirksey v. Kirksey* (guy tells sister-in-law widow to sell land and come live on his property; 2 years later, kicked her off)
		- No bargain (gift), but **reliance**. Enforceable.
	+ Pensions enforceable when person retired b/c of reliance. *Feinberg v. Pfeeffer Co.*
		- Would have worked if not for promised pension.
	+ No pension if didn’t rely on it. *Hayes v. Plantations Steel Co.*
* EQUITABLE ESTOPPEL (estoppel in pais): a misstatement of fact and foreseeable reliance on the misstatement. Cannot introduce evidence that misstatement is false if it was relied on.

**RS §86: #Promise for Benefit Received**

* **RS §86**
	+ **(1)** A promise made in **recognition of a benefit previously received** by the promisor from the promise is binding to the extent necessary to **prevent injustice**.
	+ **(2)** A promise is not binding…(a) promise **conferred benefit as a gift** or…promisor has not been unjustly enriched; or (b) to the extent that it value is **disproportionate** to the benefit.
		- **RS §86 v. Consideration = timing**
		- Illustrations (CB p.66)
* Traditional Uses
	+ Debt barred by SoL; Debt incurred when underage; debt discharged by bankruptcy.
	+ Recogntion 🡪 affirms contract.
* [Not Enforced] *Mills v. Wyman* (Son cared for after wreckage; father promised to pay for care)
	+ Not under RS §86 because **benefit was not to the father**.
	+ Father really didn’t benefit??
* [Enforced] *Webb v. McGowin* (man saves guy on construction site; loses leg; guy promises to take care of man)
	+ Valid and enforceable contract. Material benefit received, though no original duty/contract.
	+ **Benefit recognized material and substantial 🡪 enforceable.**

**The #Bargain Principle & Its Limits**

* “…elementary principle, that the law will not enter into an inquiry as the adequacy of the consideration…” *Westlake v. Adams, C.P.*
	+ [General Idea] Parties are **best judge** of their own deals.
* [Legal Right] *Hamer v. Sidway* (uncle promised $5k if nephew gave up drinking, gambling, etc.)
	+ “In general a **waiver of any legal right** at the request of another party is…**sufficient consideration**”
	+ Problems: can’t almost anything be a legal right? Expand “nominal consideration” 🡪 violates above principle.
	+ [BASIC TENSION]: **Form of bargain v. “real bargain”**
		- What is “nominal”? Don’t want to go too far b/c we want parties to set terms of deal. Don’t want to not go far enough or everything becomes a bargain.
	+ “Detriment” for considerations means giving up something which immediately prior thereto the promise was privileged to retain, or doing or refraining form doing something, or not to refrain from doing. *Davies v. Martel Laboratory Services Inc.* (give got MBA on promise of company)
* [Uneven Bargain] *Hancock Bank & Trust Co v. Shell Oil Co*. (bank leased premises for gas station)
	+ Courts have **traditionally declined** to relieve a party from contract merely because he made what he regards as a **bad or uneven bargain**.

Doctrine Of #Duress

* If duress 🡪 unenforceable. Duress NOT unconscionability. U.S. has **narrow duress** conception. Courts reluctant to not enforce contracts just b/c they’re **bad bargains**.
	+ **RS §175**
		- **(1)**: If a party’s manifestation of assent is **induced by an improper** threat by the other part that leaves the victim **no reasonable alternative**, the contract is **voidable** by the victim.
		- **(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.
	+ **RS § 176**
		- **(1)**: A threat is improper if:
			* (a) what is threatened is a crime or tort
			* (b) what is threatened is criminal prosecution
			* (c) what is threatened is the use of civil process and the threat is made in bad faith, or
			* (d) the threat is a breach of the duty of good faith and fair dealing under a contact with the recipient.
		- **(2)**: A threat is improper if the resulting exchange is not on fair terms, and
			* (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat.
			* (b) the effectiveness of the threat inducing the manifestation of asset is significantly increased by prior unfair dealing by the party making the threat, or
			* (c) what is threatened is otherwise a **use of power for illegitimate ends**. Ex. hummer and water in the desert?
				+ Implied threat to not make contract is NOT duress (part of bargain process).
				+ Hard bargaining between experienced parties of relative equal power ought not to be discouraged. Parties are generally held to resulting agreement…as long as contract has been dictated by general economic forces.
* *Batsakis v. Demotsis*  (sold 500,000 drachmae ($25) for $2k; affirmed for plaintiff 🡪 $2k)
	+ **Mere inadequacy of consideration** will NOT void a contract.
		- Imbalance of bargaining power irrelevant. Def. got exactly what she bargained for. No duress because there is not threat and “my terms or no deal” is not considered a threat.
* [Unlawful Action] *Chouinard v. Chouinard* (father/brother refused to sign loan agreement until ownership issue settled)
	+ duress must be the **result of action by party**.
		- Crucial element missing: **wrongful act** by the def to create and take advantage of untenable situation. Had nothing to do with tough situation. Not duress simply b/c they wouldn’t throw a rope free of strings.

#Unconscionability

* **UCC §2-302**: If the court as a matter of law finds contract…to have been unconscionable at the time it was made…refuse to enforce.
* Comment 1: Principle is one of the **prevention of oppression and unfair surprise** and not of disturbance of allocation of risks because of superior bargaining power.
* Defense to consideration, yet courts are **reluctant** to declare contracts unconscionable. Lean towards “superior bargaining power.”
* **RS §208**: Unconsionability
	+ Scope: …in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process, fraud, or unenforceable on grounds of public policy.
	+ Overall imbalance: Inadequacy of consideration does NOT invalidate a contract, but gross disparity in values exchanged may be an important factor to consider.
* [Unreasonable Bargain/Public Duty] *Post v. Jones* (whaling vessel stranded; sold oil at steep discount to passing ships)
* D took advantage of power to make **unreasonable bargain*.***
* Cannot turn **public duty into traffic of profit**.
* [Factors] *Williams v. Walker-Thomas Furniture Co.* (terms that split remaining loans to keep all furtniture)
	+ 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.
	+ Other factors: gross inequality of bargaining power, terms consider in light of circumstances.

The Problem of Mutuality (Illusory Promises)

* **RS §77**: A promise or apparent promise is not consideration if by its terms the promisor or purported promisor **reserves a choice** of alternative performances. (performance optional)
* **Illusory promise**: One side makes real promise, the other side makes illusory promise 🡪 no consideration. It is a **bargain**, but it **lacks consideration**. [CB 119]
	+ IP does not shrink the boundaries of a party’s realm of choice. 🡪 Promise is not illusory if the promisor’s options are limited in some way, no matter how slight.
	+ For promise to be valid, it must constrict the scope of potential choice—foreclose the actor’s future possibilities in order to be a promise at all.
* [Conditional Promise] *Scott v. Moragues Lumber Co.* (contracted to ship lumber once vessel was bought)
	+ Conditional promise is binding. **Obliged** under contract, but is not under **duty to perform** until conditional satisfied.
	+ Not illusory b/c D **gave up ability** to charter future vessel to someone else. 🡪 choices restricted.
* *Office Pavilion S. Florida, Inc. v. Asal Prods., Inc.*
	+ Illusory. “Ill buy chars if I feel like it.” Agreement was “hunting license” 🡪 no obligation.
	+ Not like *Wood*. Used **Form**.
* [Mutuality] *Lindner v. Mid-Continent Petroleum Corp.* (10 day lease termination notice)
	+ Mutuality does NOT mean **exactly coextensive**. Only that each person **views** the other’s duty as **consideration**. Consideration b/c notice to cancel.
* [Cancellation] *Miami Coca-Cola v. Orange Crush Co.* (Coca Cola allowed contractually to manufacture OC indefinitely)
	+ Contract not binding if one party can **cancel at any time**. IP 🡪 Coke not bound in any way.
	+ What if 10 minute cancellation? 1 day? 10 days? (*Linder*).
* [Satisfaction] *Mattei v. Hopper* (Clause for 120-day period to arrange leases)
	+ “Satisfactory” can be measurable in business context 🡪 reasonably satisfied, or satisfied in good faith. Not, “whatever I want to do.”
* [Implied Promise] *Wood v. Lucy, Lady Duff-Gordon* (Wood hired to endorse/market Lucy’s products)
	+ **Implied promise** to use reasonable (good-faith) effort 🡪 consideration, even though contract is **silent**. Found “real” by reading it into transaction.
		- *Wood* allows a high degree of judicial interpretation of contracts (substance over form). Principle: to understand contract, you need to involve circumstances the way the parties must have understood them.
	+ **UCC §2-306(2)** – exclusive dealing imposes a **best efforts/good faith** requirement on both parties (usually as measured by commercial standards of fair dealing)
* How do we know if Illusory??
	+ Mechanical or Formal—10 days notice, use boat, etc.
	+ “What is deal?”—*Wood*. Not look for words/form, but try to understand implied terms.
* [Obligation] *Grouse v. Group Health Plan, Inc.* (Guy left job when received offer, rescinded b/c no references)
	+ Used Reliance, but didn’t have to. Court could have found **obligation** to give guy a “good faith opportunity” at employment 🡪 there is a deal, so not IP.
	+ *White v. Roche* went other way w/ same facts. Upheld employment-at-will.

Performance Of A #Legal Duty

* **Legal-duty rule**: no consideration if party was already obliged to perform act by general law or contract.
	+ **RS §73**: PoLD owed to a promisor that is not doubtful nor subject of honest dispute is not consideration
		- Worried about bribery, vulnerability of promisor to threats (hold-up jobs), protection of public services only going to those who pay.
* [Police Officer] *Gray v. Martino* ($500 to find jewelry thief)
	+ Public policy/sound morals forbid that PO should demand/receive reward for services discharged in official duty.
		- Part of job to catch thief.
	+ If PO is **out of his jurisdiction**, he can claim reward. *Denny v. Reppert*
* [Strict LDR] *Foakes v. Beer* (Beer agreed to forgive interest if Foakes repaid sum immediately)
	+ No consideration for forgiving interest. Had existing legal duty to pay interest. *Foakes* applies when the claim is **undisputed, liquidated, and due**
* [Mid-Job Changes] *Lingenfelder v. Wainwright Brewery Co.* (contractor threatened to quit work unless paid more; D refused to pay extra at end)
	+ Only performing legal duty **under original contract** 🡪 NO consideration.
		- Hold-up job. Enforce would put a premium on bad faith. No economic reason to substitute original contract.
	+ LDR does not apply when old contract is nulled or voided. *Schwartzreich v. Bauman-Basch, Inc.* (parties tore of signatures at bottom of contract)
	+ How to reconcile *Lingenfelder* and *Schwartzreich*?
		- Contract begun or not? **Formal** distinction of ripping? Hold-up and not hold-up?
		- \*\*\*Reason for legal duty is independent of reason for modification. Both cases, performance was the same before and after. LDR is very mechanical in assessing duty. Doesn’t go into reasons for modifications.
* **RS §89**: Modification of Executory Contract
	+ **(a)**: A promise modifying a duty under a contract not fully performed on either side is **binding** if the modification is **fair and equitable in view of circumstances** NOT anticipated by the parties when the contract was formed.
		- Nothing about LDR. In tension with **RS §73**.
	+ **UCC §2-209 (c2)**: modifications must me **test of good faith**. Cannot modify w/o legitimate commercial reason.
* [Modern Trend] *Angel v. Murray* (garbage collector under 5-yr contract wants adjustment b/c of increased trash)
	+ Can enforce agreements modifying contracts when **unexpected or unanticipated difficulties** arise during he course of the performance, even though there is no consideration for the modification, as long as the **parties agree voluntarily**.
	+ **Accord v. Substituted contract**:
		- Accord: Duty under original contract is undisputed, liquidated, had matured, and involved the payment of money.
		- Substituted contract: duty under original contract is disputed, unliquidated, had not matured, and involved performance rather than money.

#Waiver Of A Contractual Duty

* Kind of like **RS §86**. Waive contractual duty in acknowledgement of material benefit.
	+ **RS §84**
* [Implied] *Clark v. West* (author promised $6 per page if didn’t drink, $2 if he did; author drank, but publisher knew and did not object and repeatedly avowed/represented to P he’d get full price)
	+ Actions/words implied waiver of contractual duty. Drinking provision **not material part of contract**.
		- Could argue reliance as well (D kept writing after publisher did not object to drinking)
* **Consideration not necessary** for waiver. Is for modification. *Nassau Trust Co. v. Montrose Concrete Products Corp.*

**PART TWO: REMEDIES FOR BREACH OF CONTRACT (#damages)**

**Introduction**

* **RS §344**: “Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:
	+ **Expectation interest** – 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,
	+ **Reliance interest** – interest in being reimbursed for loss caused by reliance on contract by being put in as good a position as would have been in had contract not been made
	+ **Restitution interest** – interest in having restored to him any benefit that he has conferred on the other party [benefit disgorged]”
	+ **Default remedy is expectation damages**
* Three Measures of Damages
	+ **Expectation**: put plaintiff in the position he would have been in had the contract been performed
		- What is the benefit of the bargain? Lost profits?
		- Frequently objective in practice (§350-§353)
		- Favored because they encourage performance; aggrieved party is theoretically indifferent to breach
		- Efficient breach: cost of breach < cost of performance
	+ **Reliance**: put plaintiff in the position he would have been in had the contract never existed
		- What has the plaintiff lost in reliance on the bargain?
		- Frequently the most objective standard
		- Provides weak incentives for performance
	+ **Restitution**: put plaintiff in the position he was in before he surrendered a benefit to the other party
		- What benefit must be disgorged by the breaching party
* **Note**: **Punitive damages** are NOT recoverable unless the conduct constituting breach is also a tort (§355), though they are nevertheless relatively common.
* In-Class Example
	+ D goes to an antique store at closing time on a Friday and agrees to pay P $100 for a mirror, which he will come back to pick up (and pay for) on Monday
		- Example 1: D calls Monday morning and says he doesn’t want it anymore
			* **Expectation damages**: uncompensated expectation of profit even though no real injury
		- Example 2: P crates mirror for shipment over weekend, D calls Monday to cancel the deal
			* **Reliance damages**: expenses and time spent to crate mirror in reliance on contract
		- Example 3: D takes mirror with him and promises to pay on Monday. Uses the mirror at a fancy dinner party and then returns it on Monday claiming he doesn’t want to purchase it
			* **Restitution damages**: D benefited without payment, P should be able to disgorge benefit
* Reasons for utilizing expectation damages over reliance damages
	+ Easier to measure contract price than forgone speculative / opportunity price
	+ Incentive to breach only exists if in best interests of both parties (includes cost to other)
* [Classic Expectation] *Hawkins v. McGee* (doctor botched hand surgery)
	+ **Expectation damages** = value of perfect hand (what doctor promised) – damaged hand.
	+ **Reliance damages** would have been functioning hand (way hand was before)
	+ Can make the damage awards large or small:
		- Expectation: Big – loses gainful employment for life, misery, pain. Small – hand was already abnormal and can shave/wax hand or wear a glove
		- Reliance: Big – Valued old hand more, and pain is relevant. Small – out of pocket expenses and pain
		- Restitution: Big – doctor got valuable experience and fee. Small – disgorge the fee
		- Point is that varying outcomes can result from each of the measures (not a single formula)
* [E.D. Explained]
	+ Only difference between **promised and actual condition** may be considered. This may include suffering in excess of what was bargained for, but this should not be a separate category of damages. *McQuaid v. Michou*
	+ **Therapeutic assurances** by doctors (e.g. “it won’t be any worse than it is now”) are **insufficient** as a matter of law to constitute an express contract. *Van Zee v. Witzke*
	+ **Reliance damages** may be fairer in *Hawkins*-like cases (don’t want to frighten doctors into practicing ‘defensive medicine’) *Sullivan v. O’Connor*
* **Theory of Efficient Breach** – Posner
	+ Breach is good in market economy. Allocates goods to those who want them the most. Ex. widgets.
	+ Response by Gergen: it would be **unjust enrichment**. Guy who breaches shouldn’t profit. $ should go to guy who didn’t breach 🡪 **restitution damages**. Changes system. Ppl won’t breach as often.

**#Expectation Damages**

Breach By Person Who Has Contracted To Perform Services

* Damages measured either by (1) **diminution of value** or (2) **reasonable cost of performance-- RS §348(2)**
	+ CoP generally favored unless
		- Cost is disproportionate to benefit, and
		- Breached contract provision is incidental
		- Or unless it causes “economic waste” or “undue expense”
* [DoV] *Peevyhouse v. Garland Coal & Mining Co.* (D agreed to fix land after coal mining backyard; cost of repairing land $29k would only increase property value by $300)
	+ **DoV** appropriate b/c contract provision **incidental to main purpose** and **CoP grossly disproportionate** to benefit conferred (economic waste)
	+ Both sides embrace **ED**, but what does that mean?
		- Majority: same **economic position** if contract had been preformed (**DoV**).
		- Minority: same **physical position** if contract had been preformed (**CoP**).
	+ Applied *Peevyhouse* b/c remediation costs are **grossly disproportionate** to the loss in value of the land. *Schneberger v. Apache Corp.*
	+ **DoV** when cost of completion is excessive. *HP Droher & Sons v. Toushin*
	+ **DoV** when economically wasteful of public funds. *Eastern Steamship Lines, Inc. v. United States*
	+ **DoV** to avoid **unreasonable economic waste**. *Grossman Holdings LTD v. Hourihan* (house facing wrong direction)
* [CoP] *City School District of the City of Elmira v. McLane Construction Co.* (beams in swimming pool house)
	+ CoP when **central to contract**.
	+ Built for a **particular owner** (**CoP** more likely) v. built for **commercial purposes** (**DoM** more likely). *Fox v. Webb*
* **Fact-finder** is in best position to determine whether owner will actually complete performance or whether he is only interested in obtaining most $$. *Advanced, Inc. v. Wilks*
* Damages for “loss of pleasure and amenity” (less than CoP) for too-shallow pool. *Ruxley Electronics & Construction Ltd. V. Forsyth*

Breach By Person Who Has Contracted To Have Services Performed

* [Failure To Pay] *Aiello Construction, Inc. v. Nationwide Tractor…* (did some work, but not all)
	+ Damages: **profit of contract**. Wrong to pay whole amount b/c it includes labor and materials **he didn’t use**.

Damages For Breach Of A Contract For The Sale Of Goods (UCC)

* UCC applies to all **transactions in goods** (**UCC §2-102**)
	+ Goods are **all things movable** (**UCC §2-105**).
		- Doesn’t include money, investment securities, real estate or things in action
		- Includes unborn animals, growing crops, things attached to but separable from realty
			* Houses are goods if they are moveable w/o material harm (**UCC §2-701**).
		- **Services** NOT covered by UCC, but combination of goods and services may be. Depends on **primary purpose of the sale**.
			* Many courts use “predominant purpose” test.
			* “Graveman” test – breaks contract into components.
		- New UCC: **info is NOT goods** (no one has adopted yet)

Breach By Seller: #Buyer’s Remedies

* **UCC §2-711**: Buyer’s Remedies in General
	+ **(1)(a)**: **“Cover”** – buy goods at market, get value between goods and contract price.
		- Qualified by **UCC §2-712**: Make in **good faith** and **without reasonable delay** make any **reasonable purchase** in order to substitute contract goods.
		- You don’t have to cover. It’s an **option**.
	+ **(1)(b)**: **Recover Damages**
		- Qualified by **UCC §2-713**: Difference of market price when **buyer learned of breach** and the contract price.
		- Market price: determined as of the **place for tender** or, in cases of rejection after arrival or revocation of acceptance, as of the **place of arrival**. 🡪 place where seller’s interest in goods stops and buyers begins. Contract will specify where that is.
	+ Can also recover any **incidental or consequential damages UCC §2-715** for both of above.
* [Damaged Goods] *Continental Sand & Gravel, Inc. v. K&K Sand & Gravel, Inc.*
	+ Damages generally should represent the difference between the **value of the goods at the time of acceptance** and **the value they would have had** if they had been as warranted (**UCC §2-714(2)**).
		- **Cost of repair** is proper standard. NOT like *Peevyhouse*.
* Ok to use “hypothetical cover”/market price when cover happens much later. *Egerer v. CSR West, LLC*
	+ **UCC §2-723** gives court “reasonable leeway” in finding a price.
	+ Where no market price is available, evidence of spot sale prices is proper.
	+ *Egerer* didn’t cover, wanted market damages. Awarded. Not exactly the same time of goods, but court said it was a **“reasonable substitute”**.
* Difference in value can often be **“approximated by the cost to repair**the goods so they conform to warranty” *Manouchehri v. Heim*
* If you **cover**, can you get market damages?
	+ **NO**. *White & Summers&* Argument
		- Bad policy: you want to put buyer in position he that he would have been if the contract preformed. If you give market, you give **too much**.
		- Statutory arg: “or” **UCC §2-711**
	+ **YES**. *J. Peters*
		- Market price is reliable alternative. Hard to tell what cover is. Why should breacher get benefit of fortuitous windfall?
		- Comment is NOT law. “or” is not exclusive. Alternative is not forbidden.
* [Over Compensation] *H-W-H Cattle Company, Inc. v. Schroeder* (didn’t cover, had contract to resale)
	+ Didn’t cover and doesn’t get market. Understand UCC as trying not to **over compensate**.
		- Previous book had case that said over/under compensation didn’t matter. Two views to UCC.

Breach By Buyer: #Seller’s Remedies

* **UCC §2-703**: in General
	+ Option 1 **UCC §2-706**: resell and recover damages. Difference between **resell and contract** + incidental damages.
		- Must be resold in **good faith** and in a **commercially reasonable manner**
	+ Option 2 **UCC §2-708(1)**: difference between **market price and contract** + incidental damages.
		- At **time and place of tender** (different than buyer)
	+ Option 3 **UCC §2-708(2) “Lost Profits”**: Applies when you are a **lost volume seller**. Can get new buyer, but wouldn’t have the **same number of contracts**.
		- Depends if seller sold everything he could have sold.
* **Also see 2-709 – Action for Price & 2-710 – Incidental Damages**
* [Lost Profits] *Neri v. Retail Marine Corp.* (sold boat; obtained new buyer)
	+ Second sale is not a resale but a lost volume seller.
		- W/o breach, seller would have had two sales, not one.
		- Awarded lost profits + incidentals.
	+ Dealers in unique goods (like secondhand cars) are NOT lost-volume sellers. *Lazenby Garages Ltd. V. Wright*.

**#Limits on Expectation Damages: Mitigation, Certainty, Foreseeability, Mental Distress**

#Mitigation

* **RS §350**: Avoidability as a Limitation on Damages
	+ **(1)** Except for **(2)**, damages are not recoverable for loss…that could have avoided without **undue risk, burden or humiliation.**
	+ **(2)** …not precluded from recovery…to the extent he has made **reasonable but unsuccessful efforts** to avoid loss.
* **UCC §2-704(2)** – Good unfinished 🡪 seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.
* **UCC §2-715(2)** – Buyer’s Incidental and Consequential Damages
* [Halt Work] *Rockingham County v. Luten Bridge Co.* (contract breached; continued to work on bridge)
	+ After **notice of breach, duty to do nothing** to increase damages.
		- Not entitled to cost after repudiation.
	+ Is company really made whole? What about exp of work and addition to portfolio?
* Dismantling pool tables for firewood is failure to mitigate. Not **commercially reasonable**. *Madsen v. Murry Sons Co.*
* To mitigate, may go with **more reliable, readily available** replacement even if **more expensive**. *In re Kellett Aircrap Corp.*
* Injured party is expected to use **reasonable diligence** to mitigate 🡪 only required to incur **slight expense and reasonable effort**. *Bank One, Texas N.A. v. Taylor*
* No duty to mitigate in **anticipation of breach**. *S.J. Groves & Sons Co. v. Warner Co.*
* [Employment] *Shirley MacLaine Parker v. Twentieth Century-Fox Film Corp.* (movie contract for “Big Country, Big Man” held not comparable to “Bloomer Girl”)
	+ General Rule: have to cover by taking **comparable (substantially similar) employment**. What is comparable?
		- **Every job** can be made the same, and different.
	+ No duty to mitigate if job is **far distance**. *Punkar v. King Plastic Corp.*
	+ Costs of a “**prudent attempt**” to mitigate (looking for job) are recoverable even if they aggravate overall damages. *Mr. Eddie, Inc. v. Ginsberg*
	+ Don’t need to seek/take **inferior employment**, but if you do, counts to mitigate damages. *Southern Keswick, Inc. v. Whetherholt*
	+ **Note**: Can be compensated for **injury to reputation** if you can identify specific employment opportunities you missed, and/or loss of opportunity to **advance in profession** (radio personalities, etc.)

#Foreseeability

* **RS §351**: Unforeseeability and Related Limitations on Damages
	+ **(1)** Damages are not recoverable for loss that party in breach **did not have reason to foresee** as a **probable result** of the breach when the contract was made
	+ **(2)** Loss may be foreseeable as a probably result of breach because it follows from the breach
		- in the **ordinary course of events**, or
		- as a result of **special circumstances** that party in breach had **reason to know**
	+ **(3)** Court may limit damages for foreseeable loss by **excluding recovery for loss of profits**, by allowing recovery only for loss incurred in reliance, etc.
	+ **(ca)** Only has to be **probable**, not necessary. **Objective test**, need not to have loss in mind when making the contract.
* **UCC §2-715(2)(a)**: damages from ***seller’s breach*** include those which seller at time of contracting **had reason to know** and which could **not reasonably be prevented** by cover or otherwise.
* [General Rule] *Hadley v. Baxendale* (delay in delivery of repaired crank shaft kept mill closed; Hadely wanted lost profits)
	+ Only liable for damages **arising naturally/reasonably foreseeable** or “reasonably supposed to have been in the **contemplation of both parties**, at time they made contract, as the **probable result** of breach”
	+ The **type and amount** of loss must be reasonable foreseeable. *Victoria Laundry v. Newman*
* [Broad] *Martinez v. Southern Pacific Transporation* (late delivery of strip-mining parts.
	+ Not required to show harm was **most foreseeable**, only demonstrate it was **foreseeable to a reasonable man**.
* If you don’t try to cover, you can’t recover consequential damages. *Panhandle Agri-Service, Inc. v. Becker*
* Damages divided up by multiple parties who were “substantial cause” of harm. *S.J. Groves v. Warner*

#Certainty

* **RS §352**: Damages are not recoverable for loss beyond an amount that the evidence permits to be established with **reasonable certainty**.
	+ Burden on innocent party to establish damages.
* *Kenford Co. v. Erie County* (stadium not built)
	+ Profits to speculative for reasonable certainty. Beyond the capability of the most sophisticated procdures.
* Reasonable certainty does NOT require absolute certainty. Damages can be **approximation**, “capable of measurement based upon known reliable factors without undue speculation.” *Ashland Management v. Janien* (investment model)
	+ Future race horse winnings held to be reasonably certain. *Rombola v. Cosindas*

#Mental Distress

* **RS §353**: Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm of the contract or the breach is of such a kind that **serious emotional disturbance was a particularly likely result**.
* No award for mental distress for termination of employment*. Valentine v. General American Credit*
	+ **Primary purpose** of employment contract is **economic** and not to secure the protection of personal interests. The **psychic satisfaction** of employment is **secondary**.
* Emotional distress damages awarded when contract is **personal**. *Lane v. Kindercare Learning Centers, Inc.* (bad daycare)
* Mental distress damages awarded when contract is for **entertainment/leisure**. *Jarvis v. Swan Tours, Ltd.* (holiday in Switzerland)

**Avoiding Expectation Damages**

#Liquidated Damages

* **RS §356(1)**: Damages may be liquidated…but only at amount that is **reasonable in the light of the anticipated or actual loss** caused by breach and the **difficulties of proof** of loss…**unreasonably large** liquidated damages is **unenforceable** on grounds of public policy as a **penalty**.
* **UCC § 2-718**: liquidated damages must be **reasonable** in light of actual or anticipated harm…**difficulties of proof of loss**…**inconvenience or non feasibility** of otherwise obtaining an adequate remedy.
* **Three Elements of LD**
	+ Reasonable estimate of harm
	+ Incapable of accurate estimation. If it is 🡪 go to seller’s/buyer’s remedies.
	+ Estimate harm at time of contract or time at breach? Timing issue.
		- Look at actual harm and see if reasonable, or harm anticipated at time of contract.
		- Reasonable at time of contract, but may be unreasonable after damage. Must be anticipated AND actual loss (not “or” like **RS §356** says)
* Policy Considerations
	+ Benefits
		- Parties might know damages better than courts.
		- Avoids costs of litigation.
		- Fair to let parties agree. Freedom of contract.
		- Harm is much bigger than legal system allows
	+ Problems
		- Allows private parties to determine remedies 🡪 public policy concern.
		- Unequal bargaining power. Exploitation. Oppression.
		- People aren’t really thinking about breach when they sign contract. Hidden clauses.
		- Damages might be a lot higher than we want it to be.
* [Rule] *Wasserman’s Inc. v. Middletown* (LD set at 25% of gross receipts)
	+ LD has to be a **reasonable forecast of harm** or **incapable or very difficult of accurate estimate**. LD here had nothing to do with harm. Must be penalty.
		- Good faith estimate of damages = enforceable.
		- Penalty or punishment of breaching party = unenforceable.
* [Easily Ascertainable] *Lee Oldsmobile v. Kaiden* (deposit on Rolls Royce, doesn’t buy; sues for deposit)
	+ LD clause to keep deposit is unenforceable because damages were **easily ascertainable*.***
		- **Deposit = Penalty**. Damages are capable of accurate estimation.
	+ **If you know formula for damages, must go with it**.

#Specific Performance

* **RS §359(1)**: Specific performance or an injunction will not be ordered if **damages would be adequate** to protect the expectation interest of the injured party.
	+ Determining if damages would be adequate **RS §360**
		- Difficulty of proving damages with reasonable certainty
		- Difficulty of procuring a suitable substitute performance by means of money damages
		- Likelihood that an award of damages could not be collected.
	+ U.S. – damages are **rule**, specific performance is **exception**.
	+ Why?
		- Concept of freedom
		- Won’t perform **sincerely**.
		- Hard for court to monitor
		- Find someone else to do it.
	+ Why not?
		- Avoid all other rules
		- Enforcing **promises**
		- Damages are inadequate substitute.
	+ SP ordered 🡪 usually leads to negotiation to contract away.
* **UCC § 2-716(1)**: SP may be decreed where the **goods are unique** or in other proper circumstances.
	+ Similar to employment, you can make any goods unique or non-unique.
	+ **Traditional thought**: Land is unique. Becoming less unique w/mass production development.
	+ Cannot get SP on **personal services**. Employment contracts are NOT enforced (performance involves personal relations)
	+ Comment says above seeks to **further a more liberal attitude**.
* [Construction Contracts] *London Bucket Co. v. Stewart* (D breached contract to install heating system for large hotel)
	+ General rule that contracts for **building construction will NOT be specifically enforced** b/c **ordinarily damages are adequate** remedy and, in part, b/c of the **incapacity of the court to superintend** the performance.
* [Enforced] *Walgreen Co. v. Sara Creek Property Co.* (lease to prevent another pharmacy)
	+ Weigh costs/benefits of SP. Hard to estimate damages (costly, inescapably innacurate) 🡪 enforce.
* Contract provisions requiring the issuance of an injunction are NOT binding upon a trial court. *Ed Bertholet & Associates v. Stefanko*

**#Reliance Damages**

* If lost profits or other additional damages ***cannot*** be **calculated with reasonable certainty**, and SP is **inappropriate or impossible**, court may award **reliance damages**.
	+ Reliance damages **cannot** be greater than expectation damages
		- Ppl enter contracts that they expect to be profitable. Don’t want **windfall**. Reliance damages theoretically fall w/in expectation damages.
		- Courts may lower reliance damages if D can show contract would be unprofitable.
	+ **Opportunity cost** is NOT part of reliance damages. Narrow. Just **out of pocket expenses**.
* [Fallback Option] *Security Stove & Mfg. Co. v. American Rys. Express Co.* (D breached by not shipping all furnace parts to convention where PL had exhibit)
	+ Expectation damages could have been zero (**uncertain**). Awarded damages for expenses incurred before contract was made as **fallback option**. **Out of pocket expenses for contract**.
	+ Hard to calculate b/c stove wasn’t meant to be sold.
* [Before Contract] *Anglia Television v. Reed* (actor backed out of movie; couldn’t find replacement)
	+ Reliance damages **include those incurred before contract** (relied on future contract)
	+ PL liable even though expenses would have been incurred w/o breach. Breach made the waste.
* If D proves that P would have **lost money = ceiling**. Reliance damages **cannot exceed** expectation. D can decrease expenses to the point that he shows P would have incurred a loss of contract had been completed. *L. Albert & Sons v. Armstrong Rubber Co.*
	+ Hard to prove. Onus shifts to D. *C.C.C. Films (London) v. Impact Quadrant Films Ltd.*

**#Restitution Damages (benefit conferred)**

* Recapture of a **benefit conferred**, the retention of which would leave D unjustly enriched (different idea than UI in bad bargain). Breaching party **should not benefit** by breach.
	+ Restitution ***can exceed*** expectation damages. As idea, NOT limited by ED. ***True alternative to ED***. Awarded when ED cannot be calculated with certainty. (Ex. bricks for $1000. Seller breaches. Buyer covers at $700. Get $300 back.)
	+ [Two Types Of Restitution Damages]
		- RD for ***breach of contract***. ED are too uncertain. Does not depend on UI. Different than reliance damages in **two ways**:
			* (1) measure of damages is the value of the performance P rendered, NOT the costs incurred.
			* (2) it is unsettled whether and when a P may recover restitutionary damages where the D can prove w/ reasonable certainty that expectation damages would be less.
		- RD in favor of a ***P in default***. Benefits-based.
* **RS § 370**: Requirement That Benefit Be Conferred
	+ A party is entitled to restitution ***only to the extent*** that he has **conferred a benefit** on the other party by way of part performance or reliance.
* **RS § 371**: Measure of Restitution Interest
	+ Sum of money measured by either
		- Reasonable value to the other party of what he received in terms of what it woulc have cost him to obtain it from a person in the claimant’s position, or
		- The extent to which the other party’s property has been increased in value or his other interests advanced.

RD For Breach Of Contract

* [Reasonable Value Of Services] *Osteen v. Johnson* (D payed $2,500 to promote P as country singer; didn’t fulfilled his end)
	+ P entitled to ***reasonable value of services*** 🡪 $2,500 minus whatever partial performance D did.
	+ Traditionally, RD for breach have been vied as benefit-based 🡪 based on the **market value** of the performance rendered. In contrast, **reliance damages** are based on costs incurred by P.
	+ Can recover for lost time even though not working. *Randolph v. Castle* (contract for $2.10 of coal removed)
* [Restitution Exceeded Expectation Damages] *United States v. Algernon Blair, Inc.* (subcontractor losing money on deal [$0 ED]; wants restitution)
	+ Can recover **reasonable value of services *irrespective*** of expected value of contract (would have lost $$ if contract was completed). Called QUANTUM MERUIT. **Restitution can be > than expectation damages.**
		- Basic fight between RSC and RTC is about *Algernon Blair*.
	+ **RT § 38(2)(b)**: rejects *Algernon Blair*. Restitutionary damages in a bargain contest **may NOT exceed** “the price of such performance as determined by reference to the parties’ agreement.
		- Critique of *Algernon Blair*. Damages should be limited by expectation. Defangs restitution. ***Capped at contract rate*** (cannot except the unpaid balance of the contract price).
		- Restitution in CLASSIC FORMis ***not measured against contract***.

RD In Favor Of A P In Default (Restitution For Contract Breaker)

* **RT § 36**: Restitution to a party in Default
	+ (1) Party whose material breach prevents a recovery on the contract has claim to RD **as necessary to prevent unjust enrichment.**
	+ (2) Enrichment from receipt of an incomplete or defective contractual performance is measured by **comparison to the recipient’s position** had the contract been performed. BoP is on claimant.
* [Classic] *Britton v. Turner* (works for 9 months and breaches, not paid ‘til end of year; sues for 9 mo.’s wages)
	+ Entitled to ***reasonable value of work*** minus damages from breaching.
* [Partial Performance] *Kutzin v. Pirnie* (real estate deal; down payment but then breached)
	+ Entitled to recover **any benefit that they conferred by way of part performance** in **excess of loss** that they caused by breach (***get back whatever is above damages you caused***).
		- BUT, **BoP** is on party who claims unjust enrichment.
		- Unjust if breach results in total forfeiture of part payments under a contract of sale.
	+ **UCC** works this way – ***restitution less damages*** (contract breaker gets $)
* [Quantum Meruit]
	+ Generally, quantum meruit recovery will **NOT** be awarded where ***conduct has been willfull***. *R.J. Berke & Co. v. Griffin, Inc.*
		- If not willfull, entitled to restitutionary claim. *Vines v. Orchard Hills, Inc.*

**PART THREE: ASSENT**

**Interpretation of Contract**

* [Classic Contract Theory]
	+ Theory of interpretation that was ***purely objective***. Did NOT like “meeting of the minds.” Gave language its **natural and appropriate meeting**.
		- Assent is based on **words/acts** (objective), and NOT what the **parties want** (subjective). **External, not internal**.
		- Nothing to do w/ personal, individual intent (what they had in mind). **Words, not unexpressed intent**.
	+ Ex. both parties call horse “cow”
		- 1st Restatement: **no contract**.
		- 2nd Restatement: if both have **same meaning** in mind 🡪 contract. Rejected RF. **Reject objective if parties agree**.
* **RS § 20** – Effect of Misunderstanding
	+ (1) No contract if parties attach materially different meanings to their manifestations and
		- **neither party knows/reason to know** the meaning attached by the other; OR
		- **each party knows/reason to know** the meaning attached by other.
			* ***No or equal fault 🡪 no basis to choose fault***.
			* Not a neutral outcome. Victory for said who wants contract/no contract.
	+ (2) **One** of the parties **knows/reason to know** of meaning attached by other party 🡪 meaning of the **ignorant party**.
* **RS § 201** – Whose Meaning Prevails
	+ (1) Parties **attach same meaning** 🡪 interpreted according to that meaning.
	+ (2) Parties **attach different meanings**, interpreted to one of the parties meanings if
		- (a) that party who **did not know/had reason to know** of any different meaning attached by the other and the other **knew/had reason to know**.
* [Outward Manifestation] *Lucy v. Zehmer*
	+ Mental assent of the parties **is not necessary**. Look to ***outward manifestation*** rather than secret, unexpressed intent. Would **reasonable person** take offer as legitimate?
	+ “High as a Georgia pine.” Should Lucy have known Zehmer was joking? Should Zehmer know Lucy is serious?
		- Easy to come up w. reasons on both sides. Too much “reason to know” on both sides 🡪 no contract?
		- ***Law usually adopts the understanding of the part who was less at fault***.
	+ **RS § 12, 16** – Capacity to Contract
		- Not bound if not legally capable. May be partial.
		- A “natural person” who manifests assent is bound UNLESS
			* Under guardianship
			* An infant
			* Mentally ill or defective
			* Intoxicated
		- Person who is so drunk he does not know what he is doing ***is voidable***IF the other party has **reason to know** of the intoxication.
			* Courts have been ambivalent about intoxication.
* [Mutual Misunderstanding] *Raffles v. Wichelhaus* (two ships; both called peerless)
	+ ***Both*** didn’t know/had reason to know what other meant. **Neither at fault = no contract**.
	+ **No sensible basis** for choosing 🡪 no contract. *Oswald v. Allen* (rare coins)
* [Same Meaning] *Sprucewood Investment Corp. v. Alaska Housing Finance Corp.* (had same meaning, but one party tried to rely on industry meaning instead)
	+ At time of formation, if parties attach **same meaning** (and parties are aware the other has that meaning) **🡪 contract takes that meaning**. ***Same idea in mind 🡪 idea prevails***.
* [Reasonable Interpretation] *Embry v. Hargadine* (employment contract for the next year)
	+ If ***reasonable to understand it as contract 🡪 enforced***.
* [Language Barrier] *Morales v. Sun Constructors, Inc.* (had interpreter, but did know about arbitration clause)
	+ In the **absence of fraud**, does NOT matter that P cannot read, write, speak englsh. **Immaterial**. Knew he didn’t speak English; incumbent upon him to figure out what contract says.
		- ***One view; other courts have gone different way***.
* [Purposeful Versus Literal Reading]
	+ **RS § 204** – Supplying an Omitted Essential Term
		- Court will supply essential missing term that is **reasonable in the circumstances**.
	+ **Williams**: “Intentions” is not just about getting in brains and not just about policy. Courts often insert non-logical implications
		- **Eisenburg**: Courts ask, “which interpretation is ***more reasonable***.”
		- **Fish**: Can’t know meaning of term w/o context.
	+ [Purpose]
		- Take ***purpose*** **NOT** literal meaning of terms. Look at what parties meant, taken in context. *Lawson v. Martin Timber Co.* (“in event of high water”; high water, but didn’t prevent timber being removed)
			* Clear overturning of literal interpretation.
		- Looked at ***main purpose and objectives*** of contract. *Spaulding v. Morse* (divorce agreement to provide money after high school for college; went into army)
	+ [Two Principles] J. Posner, *Beanstalk Group, Inc. v. AM General Co.* (Hummer trademark)
		- Written contracts are usually enforced in accordance w/ ordinary meaning of language and w/o recourse to evidence beyond the contract. **Strong presumption, BUT rebuttable**:
			* (1) Contract will not be interpreted literally if doing so would ***produce absurd results*** (meaning result that parties, as rational persons pursuing rational ends, are very unlikely to have agreed to seek)
			* (2) Contract must be ***interpreted as a whole***. Sentences are NOT isolated units of meaning, but take meaning from other sentences in the same document.

**#Offer and #Acceptance**

* [Classic System] – No offer = no contract. Someone ***has*** to make an offer.
	+ Invitation to deal is NOT an offer. Question 1: is it an offer or invitation to deal?
	+ At ***moment*** of acceptance of an offer 🡪 **contract**.

What Constitutes An Offer

* **RS § 24** – 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**.
	+ A proposal of a GIFT is NOT an offer; there must be an **element of exchange**.
	+ Elements:
		- Communicated
			* Words are primary indicators. Terms of art – “offer,” “quote,” “proposal” – are useful but not conclusive.
			* If omit significant terms 🡪 less likely to be an offer.
			* Relationship between parties is important. Cast light on how communication reasonably should be understood.
			* If parties members of same community/trade 🡪 look to common practices or trade usages.
		- Indicate a desire to enter into a contract – specify performance to be exchanged and the terms that will govern relationship.
		- Directed at some person or group
		- Must invite acceptance
		- Create reasonable understanding that upon acceptance, a contract will arise w/o any further approval.
* **RS § 26 –** PRELIMNARY NEGOTIATIONS. A manifestation of willingness to enter into a bargain is NOT an offer if the person to whom it is addressed knows/reason to know that the person making it ***does not intend*** to conclude a bargain until he has **made a further manifestation of assent**.
* [Preliminary Negotations] *Lonergan v. Scolnick* (advertisement in paper, form letter, and confirmed the person had found the property through a letter: said “if you’re really interested, you will have to decide fast”)
	+ Negotiations were **purely preliminary**. No offer. No contract unless the **minds of the parties** have met and **mutually agreed on upon some specific thing**. Correspondence was intention to find out if P was ***interested***, rather than make a definite offer. Some **further expression of assent** was necessary.
		- If offeree knows/reason to know that offeror does not intend promise/manifestation as an expression of his fixed purpose **until he has given a further expression of assent** 🡪 has not made an offer.
		- D intended to sell to first-comer and reserved the right to do so.
	+ An offer must be made under circumstances evidencing an ***express or implied intention***that its acceptance shall **constitute a binding contract**. No contract b/c seller reserved the right to not accept an order. Merely an invitation to submit an offer. *Regent Lighting Corp. v. CMT Corp.*
* [Offer] *Lefkowitz v. Great Minneapolis Surplus Store* (advertisement for coats, “first come first serve”; refused to sell b/c not a woman)
	+ Test of whether a binding agreement may originate in advertisements addressed to general public is whether the facts show that **some performance was promised in *positive terms*** **in return from something requested**. Offer must be **clear, definite, and explicit** 🡪 leaves ***nothing open for negotiation***.
		- Cannot modify offer AFTER acceptance by “house rule.”
	+ Advertisement for 11% financing on car NOT an offer b/c not everyone qualifies and dealership does not have an unlimited number of cars to sell. Unreasonable for D to believe it was offer. *Ford Motor Credit Co. v. Russell*.
	+ Most advertisements presumed to be invitation to negotiate/consider/examine. Offer = **invite performance of a specific act** and leave **nothing for negotiation**. Ex. award advertisement; get watch “just for opening letter”; hole-in-one gets car at specific price. RULE: whether advertiser, in ***clear and positive terms***, promised to render performance in exchange for **something requested**, and whether the recipient reasonably might have concluded that by acting in accordance with the request a contract would be formed. (offer for advert for car at specific price; **unique laws for cars**). *Donavan v. RRL Corp.*
* [Termination Of Power Of Acceptance]
	+ **RS § 36** – Four Ways to Terminate
		- Rejection or counter-offer by the offeree
		- Lapse of time
		- Revocation by the offeror – effective when it is ***communicated*** to the offeree. Can be communicated through reliable sources.
		- Death or incapacity of the offeror or offeree
			* Also terminated by non-occurrence of any condition of acceptance under the terms of offer.
	+ **RS § 37­** – Excluded lapse of time, RS 36 does NOT apply to **option contracts**.
		- **RS § 87** – OPTION CONTRACT (**binding, irrevocable offer**)
			* (1) Offer is an option contract if it
				+ (a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair timers w/in a reasonable time; or

Option contract ***by form***.

* + - * + (b) is made irrevocable by statute
			* (2) If offer induces reliance 🡪 option contract to extent necessary to avoid injustice.
		- **RS § 45** – if UNILATERAL CONTRACT (requires ***performance*** instead of a promise). Option contract **created** upon performance, e.g walking across bridge. Contract upon completion of performance.
			* Becomes option contract when performance begins OR
			* Can give consideration ($$) for option contract. Ex. give $ to hold apartment open for 24 hours. Or form (RS 87).
		- **RS § 32** – In case of **doubt**, an offer is interpreted as inviting the offeree to accept **either by promising to perform or by rending performance**.
		- **RS § 62** – If offer invites performance OR promise 🡪 **contract made** upon the **beginning of performance**. Not option contract, but a contract.
		- [THREE TYPES]
			* (1) Classic: revoke before accepted.
			* (2) RS 45: beginning of performance creates option contract.
			* (3) RS 32/62: Once start, bound to finish. Changes the deal and makes it into contract.
		- **UCC § 2-205** – FIRM OFFERS
			* Enforced by form. Offer held open during time stated or reasonable time. Cannot exceed 3 months.
				+ Changes common law rule that an offer is freely revocable, even if offeror has promised to hold it open, unless supported by consideration or reliance. Now, can make an irrevocable offer—“a firm offer”—w/o the need for considerations.
				+ Restrictions: must be a merchant. Offer must be in a signed writing. Offer must contain “assurance that it will be help open.” And period cannot exceed three months.
	+ **RS § 38** – REJECTION
		- (1) PoA is terminated by rejection of offer unless offeror has manifested a contrary intention.
		- (2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.
			* Terminated w/o proof of reliance on the part of the offeror.
	+ **RS § 39** – COUNTER-OFFERS
		- (1) Counter offer is an offer made by an offeree to his offeror relating to **the same matter** as the original offer and **proposing a substituted bargain differing** from that proposed by the original offer.
		- (2) PoA terminated by making CO, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.
			* Protects offeror. Discourages bargaining by offeree. “offeror is master of his bargain.” See illustrations (p. 174).
		- **RS § 59** – PURPORTED ACCEPTANCE WHICH ADDS QUALIFCATIONS
			* 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.
			* Teacher who accept contract but with protest language under signature is NOT a counter offer b/c language **did not in tenor or letter alter or purport to alter any term of the contract**. All he said was, “I don’t like your offer.” *Price v. Oklahoma*
		- [Mirror-Image Rule] – Classic contract law rule that says that if a purported acceptance varied from the offer in ***any respect***, no matter how minor 🡪 no contract.
			* Softened by UCC 2-207 and RS 59. Modern rule is to tolerate minor discrepancies and to apply the rule only where the response makes ***material changes*** in the transaction.
	+ **RS § 41** – LAPSE OF TIME
		- (1) PoA is terminated at the time specified in the offer, or, if no time is specified, at the end of a ***reasonable time***.
		- (2) What is a reasonable time is a **question of fact**, depending on all the circumstances existing when the offer and attempted acceptance are made.
			* Includes nature of the proposed contract, the purposes of the parites, the course of dealing b/t them, and any relevant usages of trade. Q: time thought satisfactory to the offeror by a reasonable man in the position of the offeree?
			* If bargaining face to face over telephone, time for acceptance does not usually extend beyond the end of the conversation unless a contrary intention is indicated.
* [Cases]
	+ [Renewed Offer] Telegraph that responded to counter-offer by saying, “cannot reduce price” 🡪 renewed original offer **by implication**. *Livingstone v. Evans*.
	+ [Mere Request] Mere request to add cookroom is NOT counter-offer. Landlord free to comply/not comply. Acceptance is complete and not depended on additional matter. *Culton v. Gilchrist.*
	+ [Preparing For Performance] Under **RS § 45**, must ***begin performance***, not just **prepare for performance*.*** *Ragosta v. Wilder* (told P they’d sell “The Fork Shop” if came to the bank w/ money before Nov. 1; D decided not to sell after P scheduled for a later date and took out loan)
		- Financing not consideration. P began financing before D made a definite offer. Never paid or began to pay. No performance.
		- Equitable estoppel (RS 90) does not apply here.
	+ [Reliance] Subcontractor cannot revoke bid b/c contractor ***relied*** on it. Made offer an **option contract**. *Drennan v. Star Paving Co.*
		- Enforces through reliances theory. NOT unilateral contract, so RS 45 doesn’t apply.
		- ***Implied promise*** not to revoke (no overt promise) b/c of reliance on bid.
		- *Drennan* leads to **RS § 87(2)** – ***reliance creates option contract***. (Protecting exposed offeree by reliance).
		- Some courts have rejected *Drennan* b/c of the asymmetrical relationship between contractors and subs (sub bound to general, but general not bound to sub 🡪 bid-chopping).
		- Reliance still bound sub even though bid was **oral**. *Allen M. Campbell Co. v. Virginia Metal*

Transacting At A #Distance

* [General Rule] – ACCEPTANCE becomes ***effective upon dispatch*** (mailbox/dispatch rule) and REVOCATION becomes ***effective upon receipt***
	+ Issue when letter mailed never reaches destination – contract still exists under this rule
	+ Protects the offeree
	+ Contract can be worded to made acceptance only upon receipt🡪offeror is master of his bargain
* **RS § 64** – [Acceptance By Phone]
	+ Acceptance by means of **substantially instantaneous two-way communication** is treated as though the parties were in each other’s presence (**§64**)
* **RS § 30 –** [Form Of Acceptance Invited]
	+ Offer can invite acceptance to be made by an affirmative answer in words, by performing or refraining from performing a specified act, or by offerees choice
	+ Unless language or circumstances say otherwise, acceptance is by any means reasonable
	+ **RS §60** – If the offer states explicitly a place, time, or manner of acceptance, these terms must be complied with in order to create a contract (but if these things are merely suggested, another method of acceptance is not precluded)
	+ **UCC §2 -206(1)** – Unless otherwise indicated, a contract invites acceptance in any way reasonable under the circumstances
* **RS § 49 – [**Effect Of Delay In Communication Of Offer]
	+ No extension if offeree knows (or has reason to know) of the delay. If offeror’s fault, and offeree doesn’t know of delay (nor has reason to know), then offeree gets time to accept that he would have had
* **RS § 63 – [**Acceptance Effective On Dispatch]
	+ Acceptance takes effect as soon as it leaves offeree’s possession (i.e. upon dispatch), even if it never reaches offeror (acceptance under option contract not valid until receipt)
		- Comments suggest this means that even if the offeree recaptures his acceptance while it is en route, it is still effective, since he already dispatched it
		- **RS § 66** – Acceptance by mail only takes effect upon dispatch if properly addressed, etc.
		- **RS § 67** – If acceptance mailed in unreasonable manner, it is only effective upon dispatch if it is received at the same time a reasonably dispatched acceptance would have arrived
* **RS § 65** – Medium of acceptance is reasonable if it is customary in similar transactions
* [Example] Send a rejection and an acceptance (reject 1st and accept later). Whichever arrives first controls, since other side might rely on receiving the rejection (**§ 40**)
	+ Idea is that offeror may rely on the rejection, so don’t want to force acceptance
	+ Can retract rejection but not acceptance

#Modes Of Acceptance

* [Accepting By Act Or Performance]
	+ **RS § 32** – In case of **doubt**, an offer is interpreted as inviting the offeree to accept **either by promising to perform or by rending performance**. Doubt 🡪 either works.
	+ **UCC § 2-206(1)** – “unless otherwise unambiguously indicated by the language or circumstances…an offer to make a contract shall be construed as inviting acceptance by ***any manner reasonable under the circumstances***.”
* [#Silence As Acceptance]
	+ **RS § 69** – Silence as Acceptance
		- (1) Silence and inaction operate as acceptance in the following cases only:
			* (a) offeree ***takes the benefit*** of offered served w/ **reasonable opportunity to reject** them and **reason to know** that they were offered with the **expectation of compensation**.
				+ Problematic: might want to add, person reasonably **wanted** services. Ex. guy shows up and mows lawn or paints house.
			* (b) offeror has stated or give the offerree **reason to understand** that assent by me manifest by silence/action, and the offeree in remaining silent/inactive ***intends to accept*** the offer.
			* (c) b/c of ***previous dealings*** or otherwise, it is **reasonable** that the offeree should notify the offeror if she does not intend to accept.
		- (2) Offeree accepts if he acts **inconsistent** w/ offeror’s ownership of offered property. If act is wrongful as against offeror 🡪 acceptance only if ratified by him.
	+ [No Contract] Sharecropping agreement NOT renewed by silence. Past agreements had been **explicit**. No benefit conferred to offeror. D never communicated silence would be taken as acceptance. *Vogt v. Madden*
	+ [Previous Dealings & Benefit Recieved] – Had ***duty to reject*** proposed commission fee if did not like it b/c of pas working relationship. Reasonable to expect past procedure to continue in the absence of a written contract. **Cannot be silent and then later benefit from it**. *Ganley v. G&W Limited Partnership*
		- Past dealings lead to sort of “standing offer” for eelskins. Sending them to D made **duty to act** on them. Silence + failure to act for unreasonable time = acceptance. *Hobbs v. Massasoit Whip Co.*
		- Continued to send newspaper even tho D asked them to stop subscription. D continued to take from post office and read paper 🡪 acceptance. **Received benefit**. *Austin v. Burge*
	+ [Unjust Enrichment] – Duty to act upon an insurance application **in reasonable time**. Unreasonably delay led to interpretation of silence as acceptance. *Kukuska v. Home Mut. Hail-Tornado Ins. Co.* (applied for hail insurance in early june; heard back day before storm in August)
		- Not really RS 69.
	+ [Assumed Control] When lady assumed control over goods of husband 🡪 constituted acceptance of shipment. *Louisville Tin & Stove Co. v. Lay*
* [Acceptance By Electronic Agent] – ***see p. 555***
	+ Current law makes it so that computers are authorized to make and accept offers through automatic transactions, etc. because as a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own.

**#Implied Contract and Related Non-Contractual Claims**

* CONTRACT IMPLIED IN FACT (comes from parties): real contract; made deal based on circumstances. Ex. point to order at restaurant.
* CONTRACT IMPLIED IN LAW (deal comes from court): Restitution. Doesn’t require real deal at all. Obligations imposed by law on grounds of justice and equity. Purpose is to prevent unjust enrichment. Ex. emergency situation – patient unconscious. Needs to pay even though no contract. Why? Received benefit.
* [Implied In Law] *Nursing Care Servics, Inc. v. Dobos* (D had doctor-ordered nursing care, thought it would be covered by medicare or something; never signed or orally agreed to them)
	+ Contract implied in law. Part of care fell squarely within emergency aid exception. For other part: if services are rendered which are ***knowingly and voluntarily accepted***, law presumes such services are given and received in **expectation of being paid for**, and will imply a promise to pay what they are **reasonably worth**.
		- **RS § 20** – restitution is available for professional services required for the protection of another’s life or health if the circumstances justify the decision to intervene w/o request.
			* Exception to general principle that no liability for restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant’s intervention in the absence of a contract.
	+ [Unjust Enrichment] *Vertex, Inc. v. City of Waterbury*
		- Lower courts **left out restitution/unjust enrichment/implied in law contract** (same thing). Only looked at implied in fact. P seeking recovery for unjust enrichment must prove:
			* (1) that the D were benefited
			* (2) that the D unjustly did not pay the P for benefits
			* (3) failure of payment was to P’s detriment.
* [Implied In Fact – Silence As Acceptance] *Day v. Caton* (watched worker build wall, said nothing)
	+ Stands in **silence**, **sees valuable services rendered** + **knowledge** on his part that the party rendering the services **expects payment** thereafter 🡪 treated as evidence of agreement.
		- Would NOT apply if notice of work was a single occasion and causally w/ little opportunity to say he didn’t want work done or could only stop work at great expense of time/trouble.
* [At-Will #Employment] *Wagenseller v. Scottsdale Memorial* (nurse; fired after things went weird on rafting trip)
	+ In absence of a contract 🡪 you can fire for **good cause or no cause**, but NOT for bad cause.
		- Every contract has ***good faith***, but courts seem scared to apply it in employment contract.
	+ How are we to read implied contract terms?
		- Public policy considerations?
		- Is **employment manual** part of contract? Possibly accept if you show up to work?
	+ [Historically] if silent, one year deal. Liable for terminating employee w/in year w/o “reasonable cause.”
	+ [19th CENTURY CHANGE – INDUSTRIAL REVOLUTION] – U.S. moves to employment-at-will. Can terminate ***for any reason*** – good, bad, or no cause. Burden on P to show contract. U.S. adopts in *Martin v. New York Life Insurance Co.* 🡪 swiftly became general rule.
	+ [Recent Years] – General dissatisfaction with at-will doctrine. General trend to **create exceptions**. ***Three exceptions***:
		- **Public policy exception** (most accepted) – permits recovery upon a finding that the employer’s conduct undermined some ***important public policy*.**
			* Began when statute prohibited discharge.
			* Expanded to include discharge in violation of a statutory expression of public policy (e.g. discharge for refusal to commit perjury).
			* Later courts allowed for violation of public policy, even absent any statutory prohibition (absent for work on jury duty). Most expansive 🡪 employer liable for firing employee who refused to go out with him (bad faith/malice). **Key is proper definition of public policy** (right to join a union; refused to break statutes; not perform unlicensed medical procedure; refused to sign false statement; filing worker’s comp claim)
				+ Most courts require a ***clear mandate*** of public policy (found in statutes; constitution; and judicial decisions). Must strike at the heart of citizen’s social rights, duties, and responsibilities.
		- **Contract exception**: requires ***proof of an implied-in-fact promise*** of employment for a specific duration, as found in the circumstances surrounding the employment relationship, including assurances of job security in **manuals or memoranda**.
		- **Good Faith and Fair Dealing**: implied-in-law covenant of ***good faith and fair dealing***.

**#Indefiniteness**

* INDEFINITENESS: If **indefinite** 🡪 ***no agreement***. Haven’t come to terms, so no contract.
* [Essential Terms] *Academy Chicago Publishers v. Cheever* (publishing agreement for dead husband’s short stories; didn’t specify a lot of details)
	+ For contract, must be ***definite as to the material/essential terms***.
		- Agreement did not provide means for the court to determine the intent of the parties.
		- Can be enforced w/o some terms, but **need essential terms**. Not role of the court to spell out and provide core provisions.
	+ ***Cannot agree to agree***. Have not decided anything. **Need terms!***Ridgway v. Wharton* (Lord Wensleydale)
	+ **Basic essentials** are sufficiently definite. Not necessary for a writing to contain every possible provision. *Berg Agency v. Sleepword-Willinboro, Inc.*
	+ (1) Courts should fill gaps in contract to ensure fairness where the reasonable expectations are ***fairly clear***. Contracts tend to be skeletal. Too much burden to provide every detail. (2) Courts should NOT provision for which party ***did not and probably would not*** have agreed to. Greater degree of certainty is required for specific performance as compared to damages. *Rego v. Decker*
	+ Enforcing incomplete agreements is a ***necessary fact*** of economic life. *Arok*
	+ Look to ***industry practice*** to determine what is normal for essential terms. *Saliba* (subcontract bid; D argued it was too indefinite; OK b/c normal in industry).
* **RS § 33** – Certainty
	+ (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are ***reasonably certain***.
	+ (2) Reasonably certain if they provide a ***basis for determining***the existence of a **breach** and for **giving an appropriate remedy**.
	+ (3) Terms left open/uncertain may show that manifestation of intention was not intended to be understood as an offer or as an acceptance.
* **RS § 34** – Certainty and Choice of Terms; Effect of Performance/Reliance
	+ Terms may be reasonably certain even though it empowers one party to make a ***selection of terms*** in the course of performance.
	+ ***Part performance*** may remove uncertainty and establish contract.
	+ ***Action in reliance*** on an agreement may make a contract even though uncertainty is NOT removed.
* [Ucc Gap Fillers] – represent ordinary understanding. Would be used if parties agreed beforehand.
	+ **UCC § 2-204** – Formation in General
		- (1) Contract may be made in **any manner sufficient** to show agreement, including conduct which recognizes existence of contract.
		- (2) Contract may be found even though the **moment of its making** is ***uncertain***.
		- (3) Even though some terms missing 🡪 contract does not fail if parties ***intended*** to make contract and there is ***reasonable basis*** for giving a remedy.
	+ **UCC § 2-305** – If have contract with **no price** 🡪 ***reasonable price***. No contract if parties intend not to be bound until the price is fixed.
	+ **UCC § 2-308** – Unless otherwise agreed, place for deliver of goods in ***seller’s place of business***.
	+ **UCC § 2-309** - If time unspecified 🡪 ***reasonable time***.
* [Applied]
	+ Renewable option for a land-rental agreement was found to have a right to renew at a ***reasonable rent***. *Moolenaar v. Co-Build Companies Inc.*
	+ Option to extent the lease is **unenforceable** 🡪 ***only an agreement to agree***. Would have worked if there was some formula included in how to calculate rent. *Martin v. Schumacher*

**#Preliminary Negotiations**

* [Negotiate In Good Faith] *Channel Homes v. Grossman*
	+ Although no contract was signed, binding agreement found to ***negotiate in good faith***, for which terms where sufficiently definite, and supported by consideration (letter of intent). Parties ***well on their way*** 🡪 committed. **UCC § 2-204(2)** (contract may be found w/o definite moment).
	+ Letter of intent found to NOT impose an obligation to negotiate in good faith. May impose duty; full extent of duty to negotiate in good faith can only be determined from the **terms of the letter of intent itself**.
* [Reliance] *Hoffman v. Red Owl Stores* (did a bunch of stuff to prepare to a franchise owner of grocery store)
	+ When promissory representations falling short of a definite offer are tendered and ***relied upon*** in the course of negotiations 🡪 damages may be awarded to **avoid injustice**.
		- **Liability w/o contract.** Reliance theory different than good faith.
		- Got **reliance damages** (out of pocket), but NOT opportunity costs.
		- Reliance has to be ***reasonable***.
	+ Conditional promise not reasonable basis for reliance. Alleged promise was made **informally**. Too many conditions. Sophisticated business. No unjust enrichment. *Gruen Industries v. Biller*
	+ Promisory estoppel can apply to promises that are ***indefinite or incomplete***, including agreements to agree. *Neiss v. Ehlers*
	+ Commencing negotiations do NOT by itself imposed any duty on either party not to be unreasonable or not to break off negotiations, for any reason or for no reason. However, things **may be done** which do then impose a duty of continued barging only in good faith. E.g. preexisting agreement in regard to modification of term, letter of intent, in course of negotiations so mislead another by promises/representations upon which second party detrimentally relies as to bring in reliance. *Racine v. California*

**#Parol Evidence Rule** – prior agreement part of the deal or not? ***Happens all the time***.

* [BASIC RULE] – governs the effect of a written agreement on any prior oral or written agreements between the parties. The rule provides that a writing intended by the parties to be a full and final expression of their agreement may not be supplemented or contradicted by any oral or written agreements made prior to the writing.
	+ **RS § 213** – Parol Evidence Rule
		- (1) A binding integrated agreement discharges prior agreements to the extent that it is ***inconsistent*** with them
		- (2) A binding completely integrated agreement discharges prior agreements to the extent that they are ***within its scope***.
		- (3) If integrated agreement is not binding/voidable 🡪 does NOT discharge prior agreements.
			* Substantive rule about what deal is. Not about evidence. Not about writing v. speech.
			* **Difficulty: is there an integrated agreement?** Two rules: Williston & Corbin.
	+ **RS § 214** – Evidence of Prior or Contemporaneous Agreements and Negotiations. Admissable in evidence to establish
		- (1) that the writing **is or is not an integrated agreement**
		- (2) that the integrated agreement, if any is **completely or partially** integrated
		- (3) the **meaning of the writing**, whether or not integrated
		- (4) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause
		- (5) ground for granting or denying rescission, reformation, specific performance, or remedy
	+ [Williston] – stability is in the ***writing***. If inspection of contract shows a **full and complete agreement** 🡪 prior deal excluded. **Rule of form**. More secure transactions, less litigation.
		- Majority in *Mitchell v Lath* (remove of ice house off property). Obligations set forth in full detail. Refused to admit evidence of oral agreement. Three part test on the admissibility of parol evidence:
			* Must be collateral in form.
			* Must not contradict express or implied provisions of the written contract.
			* Must be one that parties would not ordinarily be expected to embody in the writing (fails on this count).
		- Fraud concerns: ppl can just make things up. Increases ability of parties to rely on the contract.
	+ [Corbin] – stability is in ***intent***. Even when form suggests otherwise. Impose upon the parties the agreement that the evidence indicates they in fact reached.
		- *Mitchell* dissent: Document alone will NOT suffice. Look at what parties ***intended***. Worried about defeating expectations of the parties. Writing itself could be a fraud.
		- **Corbin’s influence stronger now**.
* [Issue One – Integration]
	+ **RS § 228** – Agreement is integrated where parties adopt writing(s) as the ***final and complete expression*** of their agreement.
		- **RS § 209(3)** – writing reasonably appears to be a complete agreement (Williston) 🡪 taken to be integrated, UNLESS it is established by other evidence that the writing did NOT constitute a final expression (Corbin).
	+ **RS § 237** – Except for RS 240, the integration of an agreement means all **oral agreements** (past and contemporaneous) are **excluded**.
	+ **RS § 239** – Partial integration 🡪 past/oral agreements are operative to vary these terms only to the same extent as if the whole contract had been integrated.
	+ **RS § 240** – Oral contract not excluded if the agreement is not inconsistent with integrated contract and
		- (a) Is made for separate consideration.
		- (b) or is an agreement that would usually be made as a separate deal.
	+ **RS § 210** – Partially integrated = integrated to some terms, but not everything.
	+ **UCC § 2-202** – Writing ***intended*** by parties as final expression. Very Corbin-like.
	+ [NATURALLY WOULD HAVE BEEN INCLUDED] – Trial court is not limited to face of the document. Can look at surrounded circumstances 🡪 business parties are more likely to reduce their agreements to writing (especially when have lawyers); relative bargaining strength, since a transaction written at arms length may omit essential terms; apparent completeness and detail of the writing itself. However, court should ***presume*** that writing was intended to be integrated. Need substantial evidence to the contrary. *Hatley v. Stafford*
	+ Concern about the accuracy of human memory, but this is served by excluding PE that directly contradicts writing. Evidence of oral collateral agreement should be excluded only when the fact finder is likely to be misled. Rule is based on ***credibility of the evidence***.
* [Issue Two – Consistency]
	+ Bars ***inconsistent*** agreements. If consistent 🡪 could be allowed in.
	+ ***Complete integration*** doesn’t deal w/ inconsistencies. Consistency is a requirement for **partial integrated agreement**.
	+ Not inconsistent if you can do **both at the same time**. One doesn’t negate the other. Narrow inconsistent – sell one thing at $700 and $1000. Broader inconsistent = ***reasonably harmonious***. *Hunt Foods v. Doliner*
		- *Mitchell* majority 🡪 broad inconsistent. Should be in writing if part of the deal. Dissent 🡪 narrow. Can do both.
* [Issue Three – Merger Clauses] – provisions in contract that state the written contract is the entire contract b/t the parties. Typically **boilerplate provisions** –standardized and routinely inserted even when not specifically negotiated.
	+ Law is messy 🡪 some courts give great weight, others little.
		- **RS § 216**: …***may negate*** authority of oral contracts. Doesn’t solve problem. If agreed, ***likely*** to conclude issue.
	+ Pro: what more could you do? Con: worried about less sophisticated parties. Do we trust writing or intention?
	+ Gave great weight to merger clause; not susceptible of any other reasonable interpretation. Also looked at the surrounding circumstances – length of contract, exhaustive detail, and prolonged period of negotiation. *ARB v. E-Systems*
	+ Rejected merger clause; cited UCC 2-202 that parties must ***intend*** for agreement to be complete expression. Merger clause was **inconspicuous** 🡪 provides little evidence of intention. Merger clause which would deny effect of an express warranty **must be conspicuous**. *Seibel v. Layne & Bowler*
	+ Can depart from the PE rule only if PE is used to establish a separate and distinct contract, a condition precedent, ***fraud***, mistake or repudiation. P not precluded from asserting a claim ***for fraudulent misrepresentation*** by either the merger or disclaimer clauses. Allegation must be clear and distinct; only established by clear and convincing evidence. Simple negligence will not relieve a buyer from a poor bargain. No fraud in this case. *Snyder v. Lovercheck* (bought farm w/ poor land for growing rye)
		- Both Williston and Corbin agree that PE is ok for establishing **fraud, mutual misunderstanding, mistake, to establish a basis for reformation, or for purpose of interpretation**.
			* Reformation: if A and B both meant x, and drafting error says y, the court will apply doctrine of reformation to correct error.
* [Issue Four – Language]
	+ PE rule does not come into play until it is determined what is meant by what they wrote down. All evidence is admissible to interpret language. Construing a contract of debatable meaning by resort to circumstances and past negotiations is ***never*** a violation of the PE rule. *Garden State Plaza v. SS Kresge*
		- PE does NOT ***preclude evidence for the purpose of interpreting a written agreement***. BUT, classical contract law used [Plain Meaning Or Four Corners Rule] 🡪 extrinsic evidence cannot be introduced to help interpret a written contract unless the contract is ***ambiguous on its face***.
			* Courts go both ways with the plain meaning rule. RS and UCC reject plain meaning rule.
			* Williston: courts should give the language its ***natural and appropriate meaning***. If not unambiguous 🡪 no evidence admitted.
			* Corbin: no contract should ever be interpreted and enforced with a meaning that ***neither party gave it***.
	+ Can buy mean sell (or horse mean cow)?
		- First Restatement: NO. Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express.
		- Second Restatement: YES.
* [Issue Five – Usage Of Trade]
	+ **UCC § 2-202** – Express language CANNOT be contradicted by prior agreements, but can be ***supplemented and explained*** by usage of trade.
	+ [ORDER OF CONTROL] (higher up = closer to parites)
		- Express contract 🡪 course of performance (**this** contract, how they’ve acted) 🡪 course of dealing (parties NOT in this contract, but have dealt w/ each other previously) 🡪 usage of trade (what trade says terms mean; ex. thousand = 1,200 rabbits)
			* Order of control is ***often violated***. Don’t worry too much about it.
	+ Buyer was not member of trade association, but dealing w/ someone who was. **Should have found out**. Private, subjective intent of one party may be irrelevant. *Foxco v. Fabric World* (“first quality” meant some flaws in trade)
		- BUT, usage of trade disregarded in *Sprucewood v. Alaska* (“completely raze” meant tear down and sell)
	+ **UCC § 1-201(3)** – Agreement is what you agree to and not just what is written down. Found in language and course of performance, course of dealing usage of trade. Powerful. Not in contract, but implied to be there.
	+ **RS § 219/222** – usage is usual and customary practice. Usage of trade is regularity of observance in a place, vocation, or trade and to justify and expectation that it will be observed.
	+ **RS § 220** – agreement is interpreted according to usage if parties knew/reason to know of usage and no part knew/reason to know that the meaning attached by the other was inconsistent with usage.
	+ Price protect for concrete prices once bid was put in was usage of trade and course of dealings (how they did it in the past), but express agreement said price = posted price. Court put express agreement at bottom of order of control. *Nanakuli Paving v. Shell*
* [Issue Six – #Oral Modification]
	+ Contract says, “…can only be modified by written.” Do oral modifications work? ***After***, so NOT parol evidence.
		- Basic rule in common law: ***of course it can be modified!*** Theory: (1) parties can change their contracts by later contracts, (2) an oral modification is a later contract, (3) implied provision of the later contract is to abrogate the n.o.m. provision of earlier contract.
	+ **UCC § 2-209**
		- (1) modification ***needs no consideration*** to be enforceable, so that the legal-duty rule does not apply.
		- (2) if a contract for the sale of goods includes an n.o.m. clause, the modifications of the contract ***must be in writing*** (if merchant)
		- (4) BUT, can act as a ***waiver***.

**#Form Contracts**

* Issue: not whether FC are good/bad, but to **what extent they are enforceable.**
	+ “Dickered terms” – things you actually know.
	+ Blanket instead of specific intent? Assent to any terms not unreasonable or indecent? Some FC unconscionable?
	+ **Moves to get out of FC**
		- (1) Conspicuous
		- (2) Good Faith
		- (3) Some Oral Assurance to get around PE.
* **UCC § 1-201** – “Conspicuous” 🡪 term/clause that reasonable person would have noticed it.
* **UCC § 2-314** – Implied warranty that goods will be merchantable 🡪 would pass w/o objection in industry; if fungible goods, fair or average quality; are fit for ordinary purposes; adequately contained, packaged, and labeled; conform to promise of label or container.
* **UCC § 2-316** – To ***exclude or modify implied warning*** 🡪 must be **in writing and conspicuous**.
	+ Scared about not allowing room to limit implied warranties.
	+ Has to do with ***knowledge***. Doesn’t matter if you could do anything about it or if its unfair.
* [Disclaimer Of Warranty] *Moscatiello v. Pittsburg* (bought faulty concrete paiver)
	+ If you want to get rid of implied waiver 🡪 ***have to make it clear***. Needs to be **CONSPICUOUS** (reasonable person would have noticed it).
		- Person needs to be put on notice.
		- Implied that a paver is supposed to act like a paver. “I want this thing to do this” 🡪 implied that that is the deal.
* [Good Faith] *Pierce v. Catalina Yachts* (blisters on boat)
	+ D failed to act in ***good faith*** in failing to honor its remedy (diff. than conspicuous). Won’t enforce it.
* [Oral Assurance] *Darner Motor Sales v. Universal* (policy said 10/30, but rep said 100/300; opposite of PE rule 🡪 worried about document)
	+ Equitable estoppel and good faith prevents enforcement of contract terms at odds with level of insurance agreed to by the parties; reformation granted.
		- NOT bound to ***unknown terms*** in FC which are beyond the range of **reasonable expectations**. Not bound if insurer had reason to believe he would not accept.
		- **TENSION W/PE RULE**. Court said PE did not apply be/c bargain was ***illusiory*** 🡪 it was not actually read and bargained for (customers not expected to read FC b/c no power to negiotiate).
		- **RS § 211** – pretty strong endorsement of forms. Integration, except for subsection (3) 🡪 party wouldn’t agree if they knew term was included.
		- Narrower than good faith?
* *Gordinier v. Aetna*. Elaborated on *Darner* to say court will NOT enforce **unambiguous boilerplate terms** in FC (insurance) when:
	+ - (1) terms cannot be understood by reasonably intelligent consumer 🡪 court will interpret in light of objective, reasonable expectations of averaged insured.
		- (2) insured did not receive ***full and adequate*** notice of term or provision is unusual/unexpected or emasculates coverage.
		- (3) some activity by insurer created an objective impression of coverage in the mind of a reasonable insured
		- (4) (3) works even if coverage expressly denied in policy.
	+ Reasonable expectations doctrine applies if exclusion is (1) **bizarre/oppressive**, (2) eviscerates terms **explicitly agreed to**, or (3) eliminates the **dominant purpose** of the transaction. *Farm Bureau Mutual Insurance v. Sandbulte*
		- Should not exalt form over substance.

**#Mistake**

* Been part of contract law for forever.
	+ Pro
		- Consequence: wasteful to make ppl worry about mistakes.
		- Fairness: won’t bind ppl to deals they didn’t intend.
		- Windfall Problem: mistake is having unsettling effect on deal.
	+ Con
		- Stability of system undermined if big mistake doctrine?
		- Could undermine writing.
		- Incentivize people to be sloppy.

Mechanical Or Unilateral Mistakes

* **RS § 153** – Unilateral Mistake
	+ Mistake as to a basic assumption that has a material effect, voidable if doesn’t bear the burden under RS 154 and
		- (a) the effect of the mistake is such that enforcement of the contract would be ***unconscionable***, or
		- (b) the other party had ***reason to know*** of the mistake or his fault caused the mistake.
* **RS § 154** – When a Party Bears the Burden of a Mistake
	+ A party bears burden of 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** w/ 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 b/c its reasonable to do so.
* [Typo] *Donovan v. RRL Corp* (newspaper printed wrong Jaguar price in ad; would have been 12k windfall for P)
	+ No contract. Enforcement would be ***unconscionable***.
* [Reason To Know] *Speckel v. Perkins* (settlement over that says we can’t do $50k so I’ll offer you $50k; dictated through secretary)
	+ No contract b/c P ***should have known*** it was a mistake.

Mistakes In Transcription

* **RS § 155** – Mistake in Written Expression
	+ Writing has mistake b/c of **both** parties, the court may reform writing to express original agreement, except to the extent that third parties (like good faith purchasers) won’t be unfairly affected.
* Party entitled to reformation when original deal was established and mistake in contract. *Travelers Ins. Co. v. Bailey* (Order policy; contract said different amount)
* [Worries With Pe Rule] – Don’t want ppl falsely claiming prior oral agreement, so limited **substantively** (no reformation when parties contracted based on uncertainty/contingent events) and **procedurally** (heavy presumption that contract manifests true intent 🡪 high level of evidence required).

Mutual Mistakes Or Shared Mistaken Assumptions

* + Mistaken factual assumption about the present state of the world outside the actors mind. Includes the many tacit assumptions built into contracts. Belief that ppl should not be trapped in deals they did not make.
	+ **RS § 153** – When Mistake Makes Contract Voidable
		- (1) Mistake of **both** parties as to **basic assumption** that has **material effect 🡪** void UNLESS RS 154.
	+ **RS § 154** – When a Party Bears the Burden of a Mistake
		- A party bears burden of 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** w/ respect to the facts to which the mistake relates but ***treats his limited knowledge as sufficient***, or
				+ Couldn’t limited knowledge include everything? 🡪 cmt. (c) “conscious ignorance.” Aware knowledge was limited.
			* (c) the risk is allocated to him by the court b/c its reasonable to do so.
	+ Both parties had reasonable idea about breeding status; rescission granted. Different than what was bargained for. *Sherwood v. Walker* (thought cow was not breeder; mistaken and sold too cheap)
		- Dissent: no conditions were attached to terms of sale 🡪 neither party knew condition of cow.
	+ No mutual mistake when timber was found to be of poorer quality on land. Seller told buyer to purchase on his on estimate. Buyer **knew there was uncertainty**. *Nester v. Michigan Land*
	+ Contract voided when rented room for King’s procession, not knowing he already cancelled. *Griffith v. Brymer*
	+ No recover b/c sold rock that turned out to be a diamond. D did not know, so no suppression of knowledge. She chose to sell it ***without further investigation***. *Wood v. Boynton*
	+ No recovery if both parties correctly believed at the time of sale that the painting was generally believed to be a Bierstadt. *Firestone v. Union League*
	+ No recover for selling a used safe for $50 that had $32k inside. Auctioneer assented to selling the contents of a locked compartment. *Everett v. Estate of Sumstad*
	+ No recover when purchase apartment had broken sewage system b/c bought building **“as is”**. Parties ***agreed to allocate the risk*** in the contract. *Lenawee County v. Messerly*
		- Rescission is NOT available for a party who has assumed the risk.
		- “as is” clause conspicuous? Different case if seller suspect/knew.
	+ Recovery when “Denver dime” turned out to be fake. Both parties **believed it was genuine**.P did NOT assume risk. Both parties were **certain it was genuine**. *Beachcomber Coins v. Boskett*

#Disclosure

* **RS § 161** – When Non-Disclosure is Equivalent to an Assertion
	+ Non-disclosure is equivalent to assertion that fact does not exist when
		- (a) D knows disclosure of fact is ***necessary*** to prevent a **previous assertion** from being a **misrepresentation** or from being **fraudulent or material**.
		- (b) D knows disclosure of fact would **correct a mistake** as to a ***basic assumption*** and non-disclosure amount to failure to act in **good faith**/**reasonable standards of fair dealing**.
		- (c) D knows that disclosure would **correct mistake** as to **contents/effect of a writing**, evidencing/embodying an agreement in whole or part.
		- (d) other person is ***entitled*** to know fact b/c of **relation of trust/confidence**.
* Duty to disclose **termite damage** (material fact affecting value of property). Sellers were fully aware of damage and knew buyer would not have purchased home. *Hill v. Jones*
	+ Whether fact is material is issue for jury. Material = reasonable person would attach importance in determining choice in transaction.
* Up to jury to decide if **roach infestation** that was intentionally concealed fact was of such ***significant nature*** as to justify recession. **Minor conditions** which ordinary sellers/purchasers disregard as little importance would not qualify. *Weintraub v. Krobatsch*
* Law of mistake is the ethic of the marketplace. Cannot lie, but ***can*** be silent (sometimes).

**PART FOUR: #PERFORMANCE**

[Four Doctrines Prior To Law Of Breach]

* Law of Impracticability
* Doctrine of Good Faith
* Substantial Performance
* Law of Conditions

**#Changed Circumstances**

* [Difference Between Mistake And Changed Circumstances]
	+ Similar: mistake is an ***assent doctrine at moment of contract***. Changed circumstances is ***after the contract was signed*** (performance).
		- Mistake: windfall cases.
		- Change Circumstances: disaster cases.
	+ Early on called impossibility cases, but NOT about impossible b/c you **can** promise the impossible. New word 🡪 **impracticable**.
		- \*\*\*World changes. What extent will parties be excused. BE CAREFUL (and exhaust all other options) before arguing **unconscionsability** and **impracticability** 🡪 NOT when anything changes. Would be no point of contract.
* **UCC § 2-615** - if impracticable 🡪 contract discharged.
	+ **(cmt. 4)** – Increased cost alone does NOT excuse performance unless the rise in cost is due to some **unforeseen contingency** which alters the ***essential nature*** of the performance.
		- Rise/collapse of market does NOT count.
		- Does count: severe shortage of raw materials due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply.
	+ *See also* 2-613, 614, 616
* **RS § 261** – permits discharge of a contractual duty when a party’s performance is made impracticable **without his fault** by the occurrence of an event, the non-occurrence of which was a ***basic assumption*** on which the contract was made
	+ Death/incapacity of person necessary for performance (262), *see* *other exceptions* 263-272.
* [Implied Condition] – Implied condition that the music hall contracted for performance would be there. Burned down. Parties contracted on the continued existence of the hall. Implied condition ***must be reasonable***. *Taylor v Caldwell*
	+ Problem: when do you imply condition? What conditions? *Taylor* (implied terms) has been abandoned 🡪 **does NOT represent the truth**. Parties would have differed as to what would happen if they foresaw fire.
* [Excessive And Unreasonable Cost] *Mineral Park v. Howard* (contracted to take dirt; but dirt under water was too difficult)
	+ Thing is impracticable when it can only be done at an ***excessive and unreasonable cost***. **New standard**. NOT about implied condition.
* [Assumed Risk] *U.S. v. Wegematic* (awarded computer contract after detailed proposal)
	+ D computer manufacturer liable despite high costs b/c he ***assumed risk***; court did not consider the costs excessive. *Mineral* doesn’t work.
	+ Tried to get out b/c of technological difficulties. Promoted as a **revolutionary breakthrough** 🡪 risk falls on him.
* [Balancing Test] *Transatlantic v. U.S.* (Suez canal closed on shipper)
	+ Shipper ***knew/should have known*** of unrest in middle east. Contract did not express condition of performance upon availability of Suez. Risk was allocated to company. Court used **a balancing test** 🡪 communities interest in having law enforced against commercial senselessness of requiring performance.
	+ **Three Requirements**
		- (1) Something unexpected occurred
		- (2) risk must not have been allocated by agreement/custom
		- (3) must render performance commercially impracticable.
	+ See also *American Trading v. Shell*, where court agreed with Transatlantic ruling (shipper was put on notice about possible Suez situation, and could have changed course, but did not)
* ***Above tests ultimately unsatisfying***. Alternatives:
	+ (1) Procedure
	+ (2) Remedies
* [Procedure]
	+ **Unidroit 6.2.2** – if event fundamentally alters the equilibrium
		- **6.2.3** 🡪 can request re-negotiations.
			* If fail 🡪 go to court. Gives incentives. Court can rewrite terms/void contract.
	+ Resolution is NOT a new formula (balancing test) or new standard, but ***new procedure***.
		- Parties, under threat of court, will do a better job.
* [Remedies] *Albre Marble v. John Bowen* (general had contract to be build a hospital void; sub had already incurred expenses)
	+ General contractor is liable to pay for expenses incurred that were ***specifically requested*** by contract. NOT restitution, but **reliance damages**.
		- Moving $$ around in light of what happened. Can us restitution or reliance damages.
		- NOT procedure or another standard.
* [Frustration Of Purpose] *Krell v. Henry* (room contracted for king’s coronation; later cancelled)
	+ Coronation went to ***substance of the contract***. Questions: (1) what was **foundation of the contract**? (2) what performance prevented? (3) was event which prevented the contract in contemplation of parties?
		- NOT like *Griffith* b/c cancelled ***after***contract was signed.
		- NOT saying “don’t have money” but “shouldn’t have to pay.”
	+ How far do we take idea?
		- Wedding dress when wedding cancelled? Nope. Get cab to go to airport, fight cancelled? No. Majority says not like cab case. D already paid 25 pounds.

**Obligation to Perform in #Good Faith**

* **UCC** & **RS** requires obligation to perform in good faith once ***within*** a contract.
	+ Not that you have no obligation prior, but stronger after.
	+ [SPECTRUM OF GOOD FAITH]
		- Egoist 🡪 Rational Capitalist 🡪 Chivalry 🡪 Solidarity 🡪 Saint.
* [Reasonable Diligence] *Seggebrush v. Stosor* (built gas station right next to one he was leasing)
	+ Clearly implied in contract that D needs to use ***reasonable diligence*** to operate gas station.
	+ **UCC § 2-306(2)** – exclusive dealing to sell goods requires ***best efforts*** to promote sale and ***best efforts*** to provide goods
	+ **RS § 205** – Every contract imposes upon each party a duty of ***good faith*** and ***fair dealing*** in its performance and its enforcement.
* [Spirit Of The Bargain] *Sanders v. Fedex* (independent deliverer; Fedex refused to allow him to buy routes)
	+ Evasion of the ***spirit of the bargain*** can be a violation of good faith. Applies to both ambiguous and unambiguous terms.
	+ Court can recognize new covenant under good faith from “course of dealings” or settled custom or usage of trade, but NOT if it would create obligations **inconsistent with express contractual terms**. Course of dealings is not standards of altruism it may have held itself true, but a demonstrated, settled longstanding pattern of dealing that the parties unquestionably would have relied on in entering contract. *Young Living Essential Oils v. Marin* (promised promotional materials, but not included in contract)
	+ Texas completely rejected standard of good faith and fair dealing in *English v. Fischer*
* [Take Advantage] *Market Street Associates v. Frey* (sneakily requested financing to trigger buy-back clause)
	+ Cannot ***deliberately take advantage*** of contracting partner. Duty of good faith greater w/in contract than in pre-contract.
		- Good faith is a compact reference to an **implied undertaking** NOT to take ***opportunistic advantage*** in a way that could not have been contemplated at the time of drafting (thus not resolved by parties).

**Doctrine of #Substantial Performance**

General Principle

* [Substantial Performance] – Attack on perfect tender rul. No question about breach of contract. Only need to **pay difference** in price.
* [Perfect Tender Rule] – buyer can refuse goods if delivery failed to conform in ***any way***. *Filey v Pope* (shipped good from different port in Scotland)
* [Difference In Value] *Jacob & Youngs v. Kent* (redding pipe)
	+ ***Trivial portion*** of the contract was not followed. Most cases the cost of replacement is the damages measure. But if cost of completion is **grossly and unfairly out of proportion** 🡪 damages is ***difference in value***.
		- It does NOT need to be trivial/non-trivial. Big things can be missing and still be SP.
		- Nothing is perfect. Cannot have contract system w/ perfect tender.
	+ [Essential Purpose] – Doctrine of SP is an inroad on the pure concept of freedom. Sacrifices preciseness of individual’s contractual expectations to society’s need for facilitating economic exchange. Enforces the ***essential purpose*** of contracts and eliminates **trivial excuses for nonperformance**. *Bruner v. Hines*
	+ [Willfulness] – To apply, the default should NOT be **willful** nor the defects so serious as to deprive the property of its **value for the intended use**, nor so pervade the whole work that a deduction in damages will not be fair compensation. *Jardine Estates v. Donna Brook*
		- **Contemporary view** is that even a **conscious and intentional departure** from the contract will NOT necessarily defeat recover, but may be considered as ***one of several factors***. Question is whether default is in line with good faith. *Vincenzi v. Cerro*
	+ [How Much Is Required] – Contractor must make a good faith effort to substantially perform. No mathematical rule relating to percentage of the price, cost of completion, or completeness can be laid down to determine SP of a building contract. Court said NOT SP. Left too much incomplete. Only restitution damages. *Kreyer v. Driscoll*
	+ [Taste In Personal Contract] – Hired contractor to install rust-colored shingles 🡪 ones installed had yellow streaks. ***No SP***, despite being structurally sound. Court said no evidence that P received any benefit, might have to replace the whole roof. *Grun v. Cope*
		- In the matter of homes and decoration, ***mere taste or preference may be controlling***, even if it seems **whimsical or trivial**.

Contracts For The Sale Of Goods

* Prior to the UCC, sale of goods followed the perfect tender rule (in theory at least). **UCC § 2-601** nominally preserves the perfect-tender rule, but other provisions strip most of it away 🡪 ***revocation of acceptance, installment contracts, cure, and good faith***.
* **UCC § 2-601** – [Buyer’s Rights On Improper Delivery]
	+ Subject to installment contracts, if goods fail in **any respect** to conform to conract, buy may
		- (a) reject the whole; or
		- (b) accept the whole; or
		- (c) accept any commercial unit or units and reject the rest
			* Does NOT apply where buyer accepts goods and **then** discovers a defect.
			* Maybe we want to keep perfect-tender in certain unjust situations?
* **UCC § 2-608** – [Revocation Of Acceptance In Whole Or In Part]
	+ (1) Buyer may revoke his acceptance of a lot or commercial unit whose ***non-conformity substantial impairs*** its **value to him** if he has accepted it
		- (a) on the ***reasonable assumption*** that its non-conformity would be **cured** and it has not been seasonably cured; or
		- (b) w/o discovery of such non-conformity if his acceptance was ***reasonably induced*** either by the **difficulty of discovery** before acceptance or by **seller’s assurances**.
	+ (2) Revocation must **occur within a reasonable time** after buyer discovers/should have discovered the ground for it and **before any substantial change** in condition of the goods which is not caused by their **own defects**. It is not effective until the buyer notifies the seller.
	+ (3) same rights/duties to goods either way.
* **UCC § 2-612** – [Installment Contracts]
	+ (1) Installment contract: on which requires/authorizes delivery of goods in separate lots to be separately accepted.
	+ (2) Can reject if non-conformity ***substantially impairs*** the value of that installment and **cannot be cured**; if doesn’t harm whole contract 🡪 must accept installment if seller gives **adequate acceptance of cure**.
	+ (3) if non-conforming installment ***substantially impairs******value of whole contract*** 🡪 breach of the whole. Contract reinstated if buyer accepts non-conforming installment w/o notifying of cancellation or if he demands performance on future installments.
* **UCC § 2-508** – [Cure By Seller Of Improper Tender/Delivery]
	+ (1) If goods rejected b/c of non-conformity and time for performance **has not yet expired** 🡪 seller may **seasonally notify buyer** of his intention to cure and may then w/in contract time make a **conforming delivery**.
	+ (2) If buyer rejects non-conforming tender that seller had ***reasonable grounds*** to believe it would be acceptable 🡪 seller gets a ***further reasonable time*** to cure.
		- *T.W. Oil v. Consolidated Edison* (sulfur level was off in oil shipment, but reason to except it would be ok 🡪 allowed to cure)
		- [No Cure Allowed] *Zabriskie Chevrolet v. Smith* (bought new chevy; car had serious problems; seller switched out transmission and tried to give back)
			* A cure which endeavors by substitution to tender a chattel **not within the agreement or contemplation** of the parties ***is invalid***. New car = peace of mind. Once faith is shaken, contract cannot be substantially performed.
			* No cure. Wanted a new vehicle, not a repainted one. *Manassas Autocars v. Couch* (splotch on van)
			* Section was NOT designed to give seller a **never-ending series of chances** to bring the item into conformity. Nor was it enacted to force the buyer to accept a nonconforming product as satisfaction of the contract.
		- [Allowed] – car allowed to be fixed b/c the court used a ***“drivability test.”*** *Gasque*
* [Good Faith] – To reject goods, it must be in ***good faith*** 🡪 cannot seize upon a minor defect to get out of the contract. Rejection of goods is a matter of performance (requirement to perform in good faith). *Printing Center of Texas v. Supermind Publishing*
	+ The chief objection to the continuation of the perfect tender rule was that buyers in a declining market would reject goods for minor non-conformities and force the loss on surprised sellers. *Ramirez v. Autosport*.

**#Express Conditions**

* To get what you want (avoid SP), make it a ***condition, not a promise***.
	+ [Express Condition] – explicit contractual provision that either
		- (1) a party to a contract does not come under a duty to perform unless and until some designated state of affairs occurs/fails to occur.
		- (2) if some designated state of affairs occurs/fails to occur, a party’s duty ot perform is suspended or terminated.
			* Allows parties to avoid substantial performance, or might be unwilling to promise that state of affairs will occur.
			* BUT, cannot sue for $$. No promise.
* [Explicit Express Condition] *Oppenheimer v. Oppenheim* (sublease had express condition
	+ Clear for sublease it was express condition. Substantial performance **CANNOT** be applied to express conditions. Different for ***implied conditions***. Courts will interpret **doubtful language** as embodying a ***promise*** ***rather than an express condition*** (especially so when forfeiture is at risk).
* [Damages] – No words of promise were employed 🡪 used “conditions precedent” and “subject to”. **Express condition**. NOT a breach of contract 🡪 entitled to return of deposit, but NOT **consequential damages**.
* [Condition Or A Promise] *Howard v. Federal Crop* (tobacco crop damages; plowed stalks in violation of insurance terms but in accord with state recommendation)
	+ General policy **opposed to forfeiture** 🡪 if **doubtful** whether promise or condition, ***will be construed as a promise***. Not be construed as a condition absent **language plainly requiring** such construction. Court ***read it*** as a promise.
	+ Whether contractual language is deemed a condition or a promise ***generally depends on the intentions of the parties***. Where intent is not clear 🡪 generally held to be a promise. *Harm Cable v. Scope Cable*
	+ **RS § 227**  - In resolving doubts of promise or condition 🡪 interpretation is preferred that will ***reduce the risk of forfeiture*** (promises), unless the event is with the obligee’s control or the circumstances indicate he **assumed the risk**.
	+ MECHANISM ONE: PLAY WITH THE DISTINCTION
* [Duty To Fulfill A Condition] *Johnson v. Cross* (trying to buy a Ford dealership; condition of deal that Ford approve)
	+ [Doctrine Of Prevention] – **Implied term**. If condition 🡪 need to make ***reasonable efforts*** to fulfill condition (duty of good faith/fair dealing). Cannot block fulfilling of condition, if do, condition is **waived/excused**.
		- Prevention doctrine doesn’t require proof that the condtion would have been fulfilled “but for” the wrongful conduct. Only need to show conduct ***contributed materially*** to non-occurrence of the condition.
	+ MECHANISM TWO: IMPLY A TERM
	+ Implied condition of notice for lease that requires landlord to keep apartment in good repair.
* [Excuse] *Aetna Casualty and Surety v. Murphy* (dentist filed insurance claim for damaged office two years after events occurred; delay violated explicit contract provision conditioning recovery on timely claim filing)
	+ Can excuse condition if ***it is not material***. Proper balance between insurance/insured is a **factual inquiry** into whether insurer was prejudiced by delay in giving notice. If no material prejudice 🡪 condition **excused**. Like enforcement of liquid damages when there is no damages. BoP is **on the insured**.
		- Importing idea of SP into law of conditions.
		- Insurance claims not bargained for like traditional bargain. Form contract. Would be harsh to strictly enforce.
	+ MECHANISM THREE: LAW OF EXCUSE
	+ **RS § 229** – [Excuse Of A Condition To Avoid Forfeiture]
		- To the extent that the non-occurrence of a condition would cause disproportiante forfeiture, a court may ***excuse the non-occurrence*** UNLESS its occurrence was a **material part** of the agreed exchange.
	+ 90 notice for insurance claim. Guy too disabled to give notice. **Provision barred on ground of public policy**. *Burne v. Franklin Life*
	+ Interpretation of the notice provision should be ***guided by its purpose***. *Great American Ins. v. C.G. Tate*
	+ **RS § 230(2)** – Condition not discharged if
		- (a) condition was not met b/c obligor breached **duty of good faith/fair dealing**; or
		- (b) event discharging condition could not be prevented b/c of ***impracticability*** and continuance of duty does not subject the obligor to a ***materially increased burden***.
	+ **RS § 271** – Impracticability as Excuse for Non-Occurrence of a Condition.
		- ***Impracticability*** EXCUSES the non-occurrence of a condition if the occurrence of the condition is NOT a **material** part of the agreed exchange and forfeiture would otherwise result. **See illustrations** (p. 256)
	+ Excused from giving notice to insurance company w/in 24 hours because P was in ICU. Would have been ***unreasonable***, even though P had a lawyer representing her that could have given notice. *Royal-Globe Insurance v. Craven*
	+ Author promised $6 per page if didn’t drink, $2 if he did; author drank, but publisher knew and did not object. **Condition waived**. *Clark v. West*
	+ **RS § 84** – Promise to preform a duty in spite of non-occurrence of a condition. (p. 191)

**Law of #Breach** (withholding performance and/or terminate a contract)

* **Restatement**
	+ “Material Breach” – give a party the power to withhold performance.
	+ “Total Breach” – give a party the power to terminate a contract.
		- For parties who have NOT breached the contract, unlike substantial performance.
* **Independent v. Dependent Promises**
	+ INDEPENDENT PROMISE – party can sue for breach of promise, but ***still*** have to keep your promise.
	+ DEPENDENT– if other party is in breach 🡪 you can ***withhold*** performance.
* **Mutual Dependency of Performances and Order of Performance**
	+ Promises used to be independent of each other. Just because the other side was not performing did not mean you could stop. In the 1960’s there gained momentum for making promises dependent on each other (began with landlord-tenant law). The law now views promises as dependent on each other rather than independent.
	+ Under modern contract law, the governing principle is that if A and B have a contract and under the contract A’s performance is to precede B’s performance, then B is not obligated to perform until A has performed (mutual dependency of performances)
		- A common way to express this principle is to say that A’s performance (or substantial performance) is an **implied condition** to B’s duty to perform
* **RS § 234** – Order of Performance (who goes first?)
	+ (1) Basic rule is ***simultaneous exchange***, UNLESS language/circumstances indicate the contrary.
		- Most fair way to do it. Maximum security. Avoids the burden of one party financing the other.
	+ (2) Except to the extent of (1), if performance of one party requires **a period of time** 🡪 that performance is due at an **earlier time** than that of the other party UNLESS language/circumstances indicate the contrary.
		- If NOT simultaneous 🡪 ***labor goes first***. Social institutional influence?
* **RS § 237** – Effect on Other Party’s Duties of a Failure to Render Performance (law of breach)
	+ Except for RS 240, **condition** that there be no ***uncured material*** failure.
		- **Conditional**. If other guy in ***uncured material*** failure 🡪 you don’t have to perform.
		- Two steps before you can walk away.
			* (1) Material failure (reference to substantial performance)
			* (2) Uncured.
				+ Introduces the concept of cure to ALL contracts.
				+ Have to give ***reasonable time*** to cure. Cannot walk away the moment other party does not show up.
		- If you walk away before (1) & (2) 🡪 then **you’re** in beach of contract. Not obvious how you know if two elements have been met.
* [Material Failure Of Performance]
	+ **RS § 241** – Circumstances Significant in Determining Whether a Failure is Material
		- (a) extent to which the injured party will be ***deprived of the benefit*** which he **reasonably expected**
		- (b) extent to which injured party can be ***adequately compensated*** for the part of the benefit of which he will be deprived
			* Easier to compensate = less material
		- (c) extent to which party failing to perform will ***suffer forfeiture***
			* Not about exterior assets, but **in this case**.
		- (d) the likelihood that the party failing to perform will ***cure his failure***, taking into account **all circumstances including reasonable assurances**
		- (e) extent to which behavior of failing party comports with ***standards of good faith/fair dealing***
	+ **RS § 242** – Significant Circumstances to Determine if Remaining Duties are Discharged
		- (a) those in RS 241
		- (b) extent to which it **reasonably appears** o the injured party that delay may prevent/hinder him in making **reasonable *substitute arrangements***
		- (c) extent to which agreement provides for ***performance without delay***; listed day is not enough unless circumstances, including agreement language, indicate performance or offer to perform by that day ***is important***.
	+ [Material Breach] *K & G Construction v. Harris* (subcontract knocks down wall with bulldozer and doesn’t fix it; contractor stops paying; sub refuses to work)
		- If refusal to pay is **justified** 🡪 sub is NOT justified in abandoning work. Abandonment = breach of contract. Allowed to bring action.
			* Non-payment was justified. Sub breached.
		- Although sometimes failure of one side to pay one installment does NOT justify stopping work, it can constitute material breach if party ***needed the money*** to continue working. *Zulla Steel v. A&M Gregos* (sub stopped working b/c installment payments stopped)
	+ [Not Material Breach] *Walker & Co. v. Harris* (dry cleaner rented advertising sign; sign became dirty; dry cleaner refused to pay)
		- Dirty sign was NOT material breach. Not justified in stopping payments.
* ALL THE RULES ARE DIFFERENT IF THERE IS A ***REPUDIATION***

**#Repudiation**

* Well established that a ***clear repudiation*** of a future performance obligation is **breach of contract**. Gives rise to an ***immediate*** claim for damages.
* **RS § 243(2)** – Not performing + repudiation = ***total breach****.* Don’t have to worry about (1) and (2) from RS 237.
* **RS § 250** – When a Statement or an Act is Repudiation
	+ (a) statement indicating that one party will commit a breach that would of itself allow claim for damages under RS 243
	+ (b) a **voluntary affirmative act** which renders the obligor ***unable or apparently unable*** to perform w/o such a breach.
		- Answer: it’s not clear when there is a repudiation.
* [Breach In Advance Or Anticipatory Breach] *Hochester v. De La Tour* (D wrote to P and notified that he no longer needed courier services and refused compensation; P sued prior to date of trip)
	+ After D repudiated 🡪 P should consider himself **absolved and not uselessly preparing**. At liberty to seek other services (mitigate damages) and should not have to wait until date of performance.
		- When parties contract for act on future date 🡪 implied promise NOT to undermine expectations (implied promise not to prevent completion of the contract).
	+ **RS § 253** – Repudiates a duty ***before breach by non-performance*** 🡪 **total breach**.
		- Williston: this is ***foolish***. Performance is not yet due (non-performance has not occurred). **No breach**.
		- Court in *Hochester* said ***stupid to wait around***. Implied term to not repudiate.
* [Right To Demand Assurance] *Pittsburgh-Des Moines Steal v. Brookhaven Manor Water* (P agreed to build water tank for D; P failed to get loan for tank; D demanded assurances [escrow financing] not in contract and suspended performance)
	+ No **reasonable grounds for insecurity**. Cannot ***rewrite contract***. P entitled to damages for suspension.
		- Basic question: good faith?
	+ **RS § 251** – When Failure to Give Assurance May Be Treated as a Repudiation
		- (1) When **reasonable grounds** arise to believe that party will commit breach by non-performance (RS 243) 🡪 oblige may ***demand adequate assurance*** of due performance and may, **if reasonable**, ***suspend performance*** for which he has not already received the agreed exchange until he receives such assurance.
		- (2) Failure to provide assurance w/in **reasonable time** 🡪 repudiation.
			* Can demand assurance ONLY if you have reasonable grounds.
			* You can repudiate and **take it back** UNLESS there is ***reliance*** on repudiation.
* **UCC § 2-609** – Right to Adequate Assurance of Performance
	+ (1) Contract for sale imposes an obligation that expectation of due performance will not be impaired. When **reasonable grounds for insecurity arise** with respect to performance by either party 🡪 may ***in writing demand adequate assurance*** of due performance. Until receives assurance, may if commercially reasonable **suspend any performance** for which he has not already received the agreed return.
	+ (2) Between **merchants** 🡪 reasonableness of grounds for insecurity determined by ***commercial standards***.
	+ (3) Acceptance of improper delivery/payment does NOT prejudice right to demand adequate assurance.
	+ After receipt of demand, failure to provide assurance within **reasonable time**, not exceeding 30 days, is a repudiation of contract.
* **UCC § 2-702(1)** – Where seller discovers the buyer to be insolvent he may ***refuse*** delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under 2-705.
* **UCC § 2-705 (1)** – Seller may stop delivery of goods in the possession of a carrier/other bailee when he discovers buyer to be **insolvent** and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.