### Contracts

### What promises should the law enforce?

#### Consideration

1. A promise to make a gift is not enforceable for lack of consideration (*Dougherty v. Salt*)
   1. Conditional donative promises are unenforceable, but conditional bargain promises are; the condition is a price which constitutes consideration
2. Nominal consideration is insufficient to create a binding contract (*Schnell v. Nell*, will for a penny)
   1. Objects of indeterminate value can be exchanged inequitably
   2. Generally, courts shouldn’t question adequacy of consideration
3. A waiver of a legal right is sufficient consideration for a promise (*Hamer v. Sidway,* stops drinking)
   1. Is the surrender of some legal rights still nominal consideration?
4. **Duress** – improper threats that leave victim with no reasonable alternative (*RSC §175*)
   1. Inadequacy of consideration will not void a contract (*Batsakis*, Greek currency exchange)
   2. Duress must be attributable to the party against whom it is alleged (*Chounard*, economic stress)
5. **Unconscionability** – the principle is one of preventing oppression and unfair surprise (*UCC §2-302*)
   1. Attack the signing process (*Williams v. Walker Thomas*, unreasonable contract signed without knowledge of terms is unconscionable)
   2. Attack contract’s applicability to the particular situation (*Martin v. Allianz Insurance,* no insurance notification until after amputation, but failed)
6. **Illusory Promise** – two ways to draw real/illusory distinction
   1. Determine if real consideration was offered: if not, invalidate for lack of consideration
      1. If an individual limits his options upon taking an action, the contract conditioned on that action is binding (*Scott v. Morgaues Lumber*)
         1. If a contract may be exited at any time, the promise is illusory (*Miami Coca-Cola Bottling v. Orange Crush*)
         2. A contract that requires ten days’ notice is not illusory (*Lindner*)
      2. A party that hasn’t limited options has not given consideration; promise is illusory (*Asal*)
   2. Determine if there is an implicit promise to do something: if so, contract is binding
      1. Contractual promises implied if doing so is supported by the contract (*Wood v. Lucy*)
      2. Employee may assume that he will be given a good faith opportunity to perform his job (*Grouse v. Group Health Plan*)
7. **Legal Duty** – performance of a legal duty owed to the promisor which is neither doubtful nor the subject of honest dispute is not consideration (*RSC §73*)
   * 1. Performance of public duty doesn’t entitle promisee to a quid pro quo (*Gray v. Martino*)
   1. A promise modifying an unfulfilled contractual duty is binding if the modification was fair under unexpected circumstances, or if justice requires enforcement due to a material change of position made in reliance (*RSC §89*)
      1. When a party does what he has already contracted to do, he cannot demand additional compensation (*Lingenfelder v. Wainwright*)
         1. Reconcilable with *Schwartzreich* (new employment contract)?
      2. If parties voluntarily agree, agreements when unexpected difficulties arise during performance are enforceable even without additional consideration (*Angel v. Murray*)
8. All exceptions arise out of a desire to protect individuals from their own desperation
9. **Waiver** – A promise to perform a conditional duty in spite of the condition’s non-occurrence is binding unless occurrence was a material part of the agreed exchange and the promisee was under no duty that it occur, or uncertainty was a risk the promisor assumed (*RSC §84*)
   1. Usually applies to technical/procedural elements (architectural certificate)
   2. Repeated oral waiver of a condition is enforceable when condition is not directly related to the contract core (*Clark v. West*, rate per page if no liquor)

#### Form

1. Reliance on form may under-deter undesirable contracts or dismissal of other substantive issues

#### Reliance

1. A promise which should be reasonably expected to induce action and which does induce such action is binding if injustice would otherwise result (*RSC §90*)
   1. Promisor is affected only be reliance which he does or should foresee
   2. Even without consideration, reliance on an action-inducing promise creates a contract (*Feinberg*)
      1. If promise did not induce action, there is not reliance (*Hayes v. Plantations Steel*)
      2. Considerations of justice can overrule inducement rule (*Katz v. Danny Dare*)

#### Restitution

1. A promise recognizing a previous benefit is binding if injustice would otherwise result (*RSC §86*)
   1. Bull-boy distinction: *Mills v. Wyman* (injured boy) and *Boothe v. Fitzpatrick* (escaped bull)
   2. *Webb v. McGowin* (moves falling rock) contrasts with *Harrington v. Taylor* (blocks axe with hand)

### Remedies

1. Contract law does not permit punitive damages unless the breach amounted to a tort

#### Expectations Damages

1. Aim is to put complaining party in position he would have been in if the contract had been performed
2. The appropriate measure of expectation damages is the difference between the value of what was promised and the value of what was received, plus foreseeable incidental damages (*Hawkins v. McGee*)
3. Restoration vs. diminution in value as a measure of expectation damages?
   1. If restoration is incidental to contract’s main purpose, and benefit is grossly disproportionate to cost of performance, damages are limited to diminution in value (*Peevyhouse*)
      1. *Peevyhouse* dissent: Defendant’s breach of contract is bad faith, and the law will not make a better contract for parties than the one they have. Restoration is appropriate
      2. Methods of distinguishing include: good faith, sentimentality, personal/commercial use
         1. Aesthetic considerations warranted restoration damages (*Elmira v. McLane*), but not in *Droher v. Toushin* (sagging floor)
4. Injured party’s damages = Contract Price – (Cost to Complete Work + Amount Paid Before Breach)
5. Damages for breach by seller
   1. If seller fails to deliver, buyer may cancel, recover previously made payments, and either cover or recover damages for non-delivery (*UCC §2-711*)
      1. Buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of substitute goods. Buyer may recover the difference between the cost of cover and the contract price (*UCC §2-712*)
      2. Damages for non-delivery is difference between market price at the time when the buyer learned of the breach and contract price. Market price is determined where seller’s interest in goods stops and buyer’s begins (place of tender) (*UCC §2-713*)
   2. Market damages may be in excess of plaintiff’s loss
      1. Court may use market price for different-quality goods than those for which the buyer contracted, if the goods are a reasonable substitute *(Egerer v. CSR West,* gravel costs)
      2. Under cost-plus contracts, plaintiff never gains more than commission; damages are capped at the amount of the lost commission (*HWH Cattle*)
6. Damages for breach by buyer
   1. Damages for non-acceptance are difference between market price at the time and place for tender and the unpaid contract price, plus incidental costs. If damages are inadequate to put the seller in as good a position as performance, damages are profit (including reasonable overhead) which the seller would have made from performance, plus incidental costs (*UCC §2-708*)
   2. Lost volume sellers may recover profit they would have received if contract was performed (*Neri v. Retail Marine*)
      1. Boat dealers are lost volume sellers; used car dealers aren’t (*Lazenby Garages v. Wright*)
7. **Mitigation** – injured party must, so far as possible without loss, mitigate damages caused by contract breach (*Rockingham County v. Luten Bridge*)
   1. Mitigation must be commercially reasonable (*Madsen v. Murrey*, holey pool tables)
   2. Parties not required to take steps most prudent or advantageous to defaulter (*Kellett Aircraft*)
   3. Reasonable but unsuccessful efforts to mitigate are acceptable (*RSC §350*)
   4. Employee’s rejection of inferior employment is not a failure to mitigate (*Shirley MacLaine*)
      1. Definition of comparable employment is fluid. This is dangerous to employees
         1. Location, prestige, advancement opportunities are rationales for rejection
         2. Reasonable expenses incurred in attempts to mitigate are recoverable as damages (*Eddie v. Ginsberg*)
8. **Foreseeability** – damages limited to consequences of breach 1) fairly and reasonably thought to arise naturally or 2) known by both parties when contract was made (*Hadley v. Baxendale*)
   1. No consequential damages for losses not reasonably preventable by cover or otherwise (*UCC §2-715*)
   2. If defendant can reasonably foresee that loss is a serious possibility of breach of contract, plaintiffs may recover profits lost as a result of the breach (*Victoria Laundry*)
   3. Plaintiff need not show that his harm was the most foreseeable of possible harms, only that his harm is not so remote to make it unforeseeable to a reasonable man at the time of contracting (*Hector Martinez v. Southern Pacific*, machine delivery delay)
9. **Certainty** – damages must be caused by breach and provable with reasonable certainty (*Kenford v. Erie County*)
   1. Reconcilable with *Rombola v. Cosindas* (horseracing) or *Contemporary Mission v. Famous Music* (Billboard position)?
   2. A new business must lay a basis for a reasonable estimate for damages to recover
10. **Emotional Distress**
    1. Because employment contracts aren’t entered into for personal reasons as much as for economic, there is no recovery for emotional damages (*Valentine v. General American Credit*)
       1. Contracts of a personal nature may permit emotional damages (*Lane v. Kindercare*)
    2. Emotional distress damages are excluded unless the breach also caused bodily harm or emotional disturbance is a particularly likely result of the breach (*RSC §353*)
11. Mitigation, foreseeability, certainty and emotional damages are all attempts to limit expectation damages
12. **Liquidated Damages** – a stipulated damage clause must be a reasonable forecast of the provable injury resulting from breach, otherwise the clause is unenforceable as a penalty
    1. Stipulated damages must be a reasonable forecast of compensation for a harm incapable of accurate estimation (*Wasserman’s v. Middletown*)
       1. Reasonable forecast can be an estimate of what the legal system would provide, or the parties’ actual expectation damages. However, if forecast is too high, legal system may declare the liquidated damages clause a penalty
       2. A forecast’s reasonableness is assessed at the time of contract formation or at breach
          1. In *Hutchinson v. Tompkins*, damages are easily discerned at breach, so damages must be ascertainable at contract formation to invalidate liquidated damages
       3. If actual damages are capable of accurate estimation, no reason to have liquidated damages (*Lee Oldsmobile v. Kaiden*, down payment is penalty)
    2. Consequential damages may be limited or excluded unless unconscionable. Limitation of consequential damages for personal injury is prima facie unconscionable (*UCC §2-179*)
       1. Unequal bargaining power or limited experience are factors in determining a consequential damage limitation unconscionable (*Moscatiello v. PCEC*)
       2. Consequential damage limitations are also unconscionable if seller’s breach of warranty was in bad faith (*Pierce v. Catalina Yachts*)
13. Specific performance will not be ordered unless damages are inadequate to protect the expectation interest of the injured party (*RSC §359*)
    1. Significant factors in determining if damages are adequate: 1) difficulty of proving damages with reasonable certainty, 2) difficulty of finding suitable substitute performance and 3) likelihood that damages could not be collected (*RSC §360*)
       1. Employment contracts are not specifically enforced (*RSC §367*)
    2. Specific performance when the goods are unique or in other proper circumstances (*UCC §2-716*)

#### Reliance Damages

1. Aim is to put complaining party in position he would have been in if the contract had never happened
   1. More lenient measure of damages; adds plaintiff’s expenditures made in reliance on promise (*Sullivan v. O’Connor*)
2. Reliance damages are used when expectation damages are insufficient to compensate victim
   1. When breacher has notice that breach will lead to unusual loss, breacher is liable for real damage suffered (*Security Stove v. American Rys. Express*)
      1. Breacher’s liability includes losses incurred before contract formation (*Anglia Television v. Reed*)
      2. Defendant can prove that plaintiff would have realized a loss but for defendant’s breach, and reduce reliance damages by that amount

#### Restitution Damages

1. Aim is to disgorge benefit enjoyed by defendant by breaching contract
2. Restitution damages may be either 1) the reasonable value of the non-breaching party’s services or 2) the extent to which the other party’s property has increased in value (*RSC §371*)
3. Disagreement as to whether restitution damages may be the reasonable value of the performance when that amount exceeds the non-breaching party’s expectation damages (*U.S. v. Algernon Blair*)
   1. Why should non-breaching party get benefit of breach? Alternatively, why should courts rescue a party from a bad contract?
4. Restitution damages permissible even without a contract if benefits were accepted voluntarily (*Dandeneau v. Seymour*, sap house renovation)

### Assent

#### Interpretation

1. No manifestation of mutual assent if
   1. parties use materially different meanings and neither knows or has reason to know the other’s meaning or (*Raffles*, name of ship)
   2. each party knows or has reason to know the other’s meaning
2. Manifestations are operative in accordance with the meaning attached by one of the parties if
   1. that party does not know of any different meaning used by the other, and the other knows the first party’s meaning or
   2. that party has no reason to know of any different meaning attached by the other, and the other has reason to know the first party’s meaning (*RSC §20*)
      1. More reasonable meaning prevails (*Embry v. McKittrick*, “go ahead” renews contract)
3. If the words or actions of a party have one reasonable meaning, his undisclosed intention is irrelevant, unless that intention is known to the other party (*Lucy v. Zehmer*)
   1. Represents Williston’s objective view of assent; a contract neither party wanted can be found
4. When parties disagree on a contract’s essential term, the court supplies a reasonable term (*RSC §204*)
5. Examining parties’ intent in forming contract is equitable (*Spaulding v. Morse*, Army/college child support)
   1. Should a purposive reading undermine unambiguous contract? (*Lawson v. Martin Timber*)

#### Offer

1. Offer justifies another to understanding that his assent is invited and will create a contract (*RSC §24*)
   1. Not an offer if person who receives it knows or has reason to know that other party does not intend to conclude a bargain until later (*RSC §26*)
2. Obligation is formed if performance is promised in exchange for something requested (*Lefkowitz*, fur coat)
   1. Offer can be modified before acceptance, but new conditions cannot be added after acceptance
   2. Advertisements are generally invitations to deal, not offers (*Fisher v. Bell*, switchblade)

#### Power of Acceptance

1. **Rejection/Counter-offer**
   1. Rejection terminates offeree’s power of acceptance, unless offeree manifests a contrary intention or takes offer under advisement (*RSC §38*)
   2. Rejection terminates power of acceptance even if rejection is made before offer lapsed
   3. A counter-offer is an offer proposing a bargain differing from the original offer and relating to the same matter. A counter-offer terminates offeree’s power of acceptance (*RSC §39*)
   4. A reply to an offer conditional on offeror’s assent to additional terms is a counter-offer (*RSC §59*)
      1. Offeree may protest language without altering or purporting to alter terms of the contract and not constitute a counter-offer (*Price v. Oklahoma College*)
2. **Death/Incapacity of Offeror –** terminates the offeree’s power of acceptance
3. **Lapse of Time** – power of acceptance terminates at specified time or after reasonable time (*RSC §41*)
4. **Revocation** – once the offeree begins performance, an option contract is created
   1. Acceptance usually effective when dispatched; revocation effective when received

#### Option Contracts

1. When offer invites acceptance by rendering performance (not promissory acceptance), and offeree begins performance, option contract is created (Unilateral contract) (*RSC §45*)
   1. Offeror’s duty of performance is conditional on completion of invited performance
   2. Preparation to perform does not create a binding option contract (*Ragosta v. Wilder*, fork shop)
      1. However, can be made binding through form, consideration or reliance (*RSC §87*)
      2. Reliance creates a contract, and a promise not to revoke (*Drennan v. Star Paving*)
2. In cases of doubt, offeree may accept offer by promising to perform or rendering performance (*RSC §32*)
   1. When this is the case, offeree’s beginning to perform is an acceptance by performance, and operates as a promise to render complete performance, creating a bilateral contract (*RSC §62*)
3. A signed writing to keep an offer open is not revocable for lack of consideration during the time stated, or a reasonable time not longer than three months (*UCC §2-205*)
4. Power of acceptance of option contract not terminated by rejection, counter-offer, revocation or death/incapacity (*RSC §37*)

#### Acceptance

1. If offeree fails to reply to offer, acceptance only if:
   1. Offeree takes benefit of offered services with reasonable opportunity to reject and reason to know they were offered with the expectation of compensation (*Day v. Caton*, wall construction)
      1. Imposes a duty to speak (*Ganley*, broker commission)
   2. Reasonable that offeree should notify offeror of his intention not to accept (*RSC §69*)
      1. Notification must be within a reasonable time. If not, court will imply a contract (not reliance or restitution damages) (*Kukuska*, hail insurance)
   3. If neither of these exceptions applies, no contract (*Vogt v. Madden*, sharecrop)
   4. If party possesses goods, acceptance is imputed

#### Implied Contracts

1. Implied in fact contracts are identical to express contracts without verbal/written assent
2. Courts create implied-in-law contracts to justify restitution damages and prevent unjust enrichment (*Nursing Care Services v. Dobos*)
3. Are contracts formed expressly, gradually over time (implied-in-fact), or when concerns of unjust enrichment are present (implied-in-law)?
4. An implied covenant of good faith and fair dealing may be implied into an at-will employment contract, in that employees cannot be fired for bad cause (*Wagenseller,* hospital grouping up)
   1. Employment manual may create a unilateral contract made binding by employee’s performance
      1. Can employee be fired for refusing to consent to changes in a manual?

#### Indefiniteness

1. An offer cannot be accepted to form a contract unless terms are reasonably certain. Terms are reasonably certain if they determine breach and adequate remedy (*RSC §33, UCC §2-204*)
   1. Part performance may remove uncertainty and establish a contract. Reliance may also make a remedy appropriate. *(RSC §34*)
      1. Reliance on preliminary negotiations is actionable even without a contract (*Red Owl*)
   2. Court will not supply essential terms to form a contract between the parties (*Cheever*, publishing)
   3. Subcontract bids are not indefinite due to lack of terms other than price (*Saliba v. Allen*)
      1. General contractor may add reasonable terms to subcontractor agreement

#### Preliminary Negotiations

1. Are *Martin* and *Moolenaar* distinguishable (agreements to agree on future rent amount)
   1. *Martin* examines four corners of document (Williston)
   2. *Moolenaar* attempts to protect parties’ intent to be bound by every term (Corbin)
2. Agreement to negotiate in good faith can be binding if both parties intended to be bound, and definite terms and consideration were present (*Channel Homes v. Grossman*)
   1. Difficult to enforce negotiation agreement, but desire for liability before contract formation

#### Parol Evidence Rule

1. **Integration** – an agreement reasonably appearing to be final is an integrated agreement (*RSC §209*)
   1. A completely integrated agreement is a complete and exclusive statement of terms (*RSC §210*)
      1. Writing itself cannot prove complete integration; intention of the parties is relevant
   2. A binding integrated agreement discharges inconsistent prior agreements. A binding completely integrated agreement discharges all prior agreements (*RSC §213*)
      1. A consistent additional term is admissible to supplement an integrated agreement, but not a completely integrated agreement (*RSC §216)*
      2. An agreement is not completely integrated if a consistent additional term is omitted, if supported by separate consideration or might naturally be omitted
   3. UCC §2-202 focuses on the intent of the parties and permits explanatory evidence à la Corbin
2. **Consistency** – additional terms must be inconsistent with the agreement to be inadmissible
   1. Inconsistent terms negate a term of the contract (Williston) or are not reasonably harmonious with the contract (Corbin)?
3. **Merger Clause** – neither dispositive nor irrelevant
   1. The presence of a merger clause cannot estop a claim of fraudulent misrepresentation that induced a party to sign a contract (*Snyder v. Lovercheck*, rye field blight)
4. **Language –** Williston argues contract may reflect the intention of neither party, since contract language’s plain meaning controls. Corbin argues contract shouldn’t mean something neither party wanted
   1. Plain language should be the end of the inquiry, to prevent parties’ attempting to dissolve their own deal after disappointment with the bargain (*Steuart v. McChesney*, property tax valuation)
      1. The test is whether the offered evidence is relevant to prove a possible meaning of the contractual language (*Pacific Gas*, insurance indemnification) (*Sanders v. FedEx*, definition of independent contractor)
      2. Facial ambiguity irrelevant to if external evidence can explain contract’s meaning (*UCC §2-202*)
         1. Course of performance is performance by *these* parties in *this* contract; course of dealing is performance by *these* parties in previous contracts (*UCC §1-303*)
5. **Usage of Trade** – knowledge of trade usage terms is imputed to parties (*Foxco v. Fabric World*)
   1. Consistent with RSC §220, saying usage is relevant if each party knew or reason had to know of the usage, and neither party knew the other employed a different meaning?
   2. Most controlling is literal meaning, then course of performance, course of dealing, and finally trade usage (*UCC §1-201(3)*)
      1. Not always followed; a usage should be allowed to modify the written agreement, as long as it doesn’t totally negate it (*Nanakuli Paving v. Shell Oil*)
      2. Trade usage may add a non-existent term to the contract (*C-Thru v. Midland*)
6. **Oral Modification** – general rule at common law is that oral modification is permissible, even in presence of a no oral modification clause
   1. A modification does not need consideration to be enforceable (*UCC §2-209*)
      1. If a contract includes an n.o.m. clause, modifications must be in writing
      2. Above rule doesn’t apply to waivers, but waiver can be retracted by reasonable notification unless the other party has already materially relied on waiver

#### Form Contracts

1. Implied warranty of merchantability for goods of which seller is a merchant (*UCC §2-314*)
   1. Modification of merchantability warranty is permitted in conspicuous writing (*UCC §2-316*)
      1. Conspicuous requirement only addresses signing parties’ knowledge, not ability to negotiate or alter behavior in response to contract terms
2. If a party assents to an agreement and has reason to believe that similar writings are regularly used in similar agreements, writing is an integrated agreement respecting the writing’s terms (*RSC §211*)
3. If a party has reason to believe that assenting party would not assent if specific terms in agreement were known, that term is not part of the agreement
4. Parties’ reasonable expectations induced by a promise carry weight in analyzing the parties’ contract, even if the contract is unambiguous on its face (*Darner Motors*, wrong insurance coverage)
   1. Failure to read boilerplate terms more limited than those expressly agreed to doesn’t bar remedy
   2. Conflicts with *Sardo v. Fidelity* (jeweler does not receive coverage for jewelry theft)
5. *Gordinier v. Aetna* discusses several limits to enforcement of boilerplate terms in form contracts
   1. If terms cannot be understood by reasonably intelligent person, objective and reasonable expectations of an average person apply
   2. If party did not receive adequate notice of an unusual or unexpected term
   3. If party’s activity creates an objective impression of coverage in the mind of a reasonable party
   4. If a party induced the other to reasonably believe a promise expressly denied in the contract

#### Mistake

1. A contract is voidable if a party’s mistake has an adverse material effect on the agreement unless 1) the agreement allocates risk of mistake to him 2) he knows of his limited knowledge but treats it as sufficient or 3) the risk is reasonably allocated to him by the court. Enforcement must be unconscionable or the other party had reason to know of the mistake or his fault caused the mistake (*RSC §§153-54*)
2. **Mechanical errors**
   1. Breach of duty of good faith may limit relief for mistake (*Donovan v. RRL,* mispriced Jaguar ad)
   2. Unconscionability can be procedural (unequal bargaining power) or substantive (gross disparity)
   3. Offeree has duty to inquire if a presumption of error is reasonable (*Speckel v. Perkins*)
3. **Mistake in transcription –** when a writing doesn’t express parties’ agreement due to mistake, court may reform the writing to express the agreement, unless another’s rights will be unfairly affected (*RSC §155*)
   1. Generally, parol evidence rule does not apply to transcription mistake cases
4. **Mutual mistake**
   1. If there is a difference in the substance of the thing bargained for, there is no contract (*Sherwood v. Walker*, barren cow)
      1. Reconcilable with *Wood v. Boynton* (uncut diamond for $1)? Seller was aware of her lack of knowledge and proceeded regardless
   2. In cases of mistake by two equally innocent parties, courts must determine which party should assume the loss resulting from the mutual mistake (*Lenawee County v. Messerly*, toxic ground)
      1. Merger clause shifts risk to buyer
      2. Reconcilable with *Beachcomber Coins v. Boskett* (counterfeit coin)? Both parties were convinced of coin’s genuineness, so court found no assumption of risk
5. **Duty to disclose** – action intended or known to prevent another from learning a fact is an assertion that the fact does not exist (*RSC §160*)
   1. Non-disclosure of a fact is an assertion that the fact does not exist if:
      1. Disclosure of the fact is necessary to prevent a previous assertion from being materially fraudulent or a material misrepresentation
      2. Disclosure would correct the other party’s mistake and is a failure to act in good faith
      3. Disclosure would correct the other party’s mistake as to a writing’s content or effect
      4. The other party is entitled to know the fact because of a relation of trust (*RSC §161*)
   2. Non-disclosure sometimes encouraged to permit profit from knowledge (*U.S. v. Dial*)
   3. An affirmation or description of the goods made by seller to buyer which is made part of the basis of the bargain creates an express warranty (*UCC §2-313*)

### Performance

#### Unexpected Circumstance

1. Impracticability excuses non-occurrence of a condition if occurrence is not a material part of the exchange and forfeiture would otherwise result (*RSC §271*)
   1. Delay in delivery is not breach when performance has been made impracticable by occurrence of a condition whose non-occurrence was a basic assumption of the contract (*UCC §2-615*)
      1. Historically, impossibility for loss of contracted-for item (*Taylor v. Caldwell,* concert hall)
      2. Shifts to impracticability if ordinary means are insufficient (*Mineral Park v. Howard*)
2. Risk of economic impossibility is not an unexpected circumstance (*U.S. v. Wegematic*, SSD)
   1. There must be a significant variation between expected cost and cost of performance to render performance impracticable (*Transatlantic Financing v. U.S.*)
   2. When impracticability without fault occurs, courts attempt to find an equitable solution
3. Impracticability determines whether risk of intervening circumstance was assigned to one of the parties
4. If contract requires preparatory actions and contract is never completed, restitution for completed work is appropriate (*Albre Marble v. John Bowen*)
5. If the event preventing contract performance was not contemplated by either party at contract formation, both parties are discharged from further performance (*Krell v. Henry*)
   1. Do supervening circumstances frustrate the purpose or entire design of the project? (*Marks Realty v. Hotel Hermitage*, yacht race program) (*La Cumbre Golf v. Santa Barbara Hotel*, hotel burned down) (*Chase v. Paonessa*, concrete median barriers)
   2. Supplier may assume risk that purchaser will not perform to avoid placing loss on ignorant supplier of supplier (*Power Engineering v. Krug*, Iraq embargo)

#### Good Faith Performance

Where is good faith? <– Egotist – Rational Capitalist – Chivalry – Solidarity – Saint – >

1. In every contract there is an implied covenant that neither party will do anything to injure the right of the other party to benefit from the agreement
   1. Not applicable if evidence of misrepresentation would conflict with the parol evidence rule
2. There may be implied covenants to use reasonable diligence in performing a contract (*Seggebrush v. Stosor*, gasoline pump down the street)
3. Can the good faith duty be overridden by performance that is not financially disastrous? (*Bloor v. Falstaff Brewing*, sharp decline in beer sales)
4. Implied covenants of good faith cannot overcome an express contractual term
5. The duty of good faith is halfway between a fiduciary duty and refraining from active fraud (*Market Street v. Frey*, non-disclosure of contract oversight)
   1. Deliberately taking advantage of a party’s mistake during performance is a breach of good faith

#### Substantial Performance

1. If buyer rejects seller’s goods for non-conformity and the time for performance has not expired, seller may notify of intention to cure and within contract time make a conforming delivery (*UCC §2-508*)
   1. If buyer rejects goods seller reasonably believed to be acceptable (with or w/o money allowance) seller may notify buyer and substitute conforming goods within a reasonable time (*T.W. Oil*)
      1. Doesn’t require seller to know goods are non-conforming; reasonable belief is sufficient
   2. Cure not available where faith in product is central to purchase (*Zabriskie Chevrolet v. Smith*)
   3. Repair not an acceptable form of cure if repair cuts to heart of bargain (*Manassas Autocars v. Couch*, new car purchase)
2. If goods fail in any respect to conform to the contract, buyer may 1) reject the whole (perfect tender), 2) accept the whole or 3) reject any non-conforming goods (*UCC §2-601*)
   1. Buyer may revoke acceptance if acceptance was based on: 1) assumption that cure was forthcoming and cure did not occur or 2) non-conformity was not discovered due to reasonable inducement either by difficulty of discovery or seller’s assurances (*UCC §2-608*)
      1. Revocation must occur within a reasonable time after buyer discovers or should have discovered grounds for revocation
3. Fairness and equity are more weighty than perfect tender rule’s consistency and certainty (*Jacob & Youngs v. Kent*, Reading pipe)
   1. Perfect tender has fallen out of favor since no performance is ever perfect; disincentivize using trivial contract provisions to wriggle out of deals
   2. Not determined by strict percentages since cost of remedy may exceed original outlay
   3. Bad faith contract breach doesn’t defeat recovery; balanced with other factors
4. The true measure of recovery is Unpaid Contract Price – (Cost of Completion + Additional Harm)
   1. But see *Grun v. Cope* (yellow shingles) where a performance only remediable by completely redoing work is not substantial performance

#### Express Conditions

|  |  |  |
| --- | --- | --- |
|  | Must buyer pay? | May buyer get damages? |
| Condition | No | No |
| Promise | Yes | Yes |
| Both | No | Yes |

1. Ambiguous language will be interpreted as a promise, not a condition (*Harmon Cable v. Scope Cable*)
   1. No specific form is necessary, but conditional language in one provision and not a second is evidence that the second is not a condition (*Howard v. FCIC*)
2. If non-occurrence of a condition causes disproportionate forfeiture, court may excuse non-occurrence unless occurrence is a material part of agreed exchange (*RSC §229*)
   1. Substantial performance is not applicable to excuse non-occurrence of an express condition unless concerns of forfeiture or unjust enrichment are present (*Oppenheimer v. Oppenheim*)
      1. If the condition’s purpose has been met, strict enforcement of the condition is unlikely
   2. Violation of express condition does not result in forfeiture if the non-breaching party did not suffer from the condition’s non-occurrence (*Aetna v. Murphy*, insurance notice)
      1. Breaching party has burden to prove that innocent party has not been harmed
3. A party’s failure to fulfill a condition excuses performance, but an independent promise to perform is required to create liability for damages (*Merritt Hill v. Windy Heights*)
   1. Parties must not interfere with (and in some cases must take action to ensure) a condition’s occurrence (*Johnson v. Coss*, Ford dealership)
      1. Conduct must have materially contributed to the condition’s non-occurrence
4. Repeatedly avowing waiver of a condition is enforceable when the condition is not directly related to the core of the contract (*Clark v. West*, rate per page if no liquor)

#### Material Breach

1. Material breach permits party to withhold performance; total breach permits party to terminate contract
   1. In determining material breach, these factors are relevant: 1) if injured party will lose reasonably expected benefit, 2) if injured party can be adequately compensated for the lost benefit, 3) if failing party will suffer forfeiture, 4) likelihood that failing party will cure and 5) if failing party’s conduct was in bad faith (*Walker v. Harrison*, tomato sign)
2. Promises are mutually dependent if the parties intend performance by one to be conditioned on performance by the other. Mutually dependent promises may be precedent, subsequent or concurrent
   1. Failure to substantially perform justifies withholding payment (*K&G Construction v. Harris*)
3. RSC §237 introduces cure into all contracts, not just those covered by the UCC
4. **Repudiation** – a party who renounces a contract is liable to the other party for breach of contract, even if time to perform contract has not arrived (*Hochster v. De La Tour*) (*RSC §253*)
5. **Insecurity** – when reasonable grounds to believe that a party may totally breach arise, the other party may demand adequate assurance and, if reasonable, suspend uncompensated performance until he receives such assurance (*RSC §251*) (*UCC §2-609*)
   1. Does not allow a party to redraft the contract based on subjective fear; an objective factual basis for concern is necessary (*PDM v. Brookhaven,* water holding tank)