Note: Any reference to page numbers are from the textbook required in Fall 2011

Contract Overview

Sources of Contract Law

(1) Common Law – Judge decided cases (imported from Britain). Common law is dynamic (changes constantly). Affected by societal changes.
(2) Restatement of Contracts – P. 150 of source materials. First restatement – 1930s. Second restatement – 1981. Restatement promulgated by American Law Institute (ALI). Succinct statements about different concepts in contract law. Can be a restatement of what the ALI would like the law to be. Courts can used the Restatement as a guide to overrule Common Law (when it is judged to be out of date) and create a newer version of Common Law. Courts can also use the Restatement to re-clarify Common Law. Restatement is not law or statute!
(3) Uniform Commercial Code (UCC) – Critical Statutes adopted by all 50 states. Note: There is not federal contract law. Every state has adopted the UCC but there are differences in the UCC between states. UCC has 9 articles. UCC begins on P. 1 of source materials. We will deal with Articles 1, 2, and 9.
(4) United Nations Convention on the International Sales of Goods (CISG) – P. 358 of source materials. Treaty of 75 countries dealing with commercial transactions between parties in 2 different countries. CISG can supplant local law, if applicable.

What constitutes a contract? 4 basic elements:

(1) It will occur in the future.
(2) Promises are made.
(3) Each party is exchanging value.
(4) Enforcement - Court can give a remedy if one party does not come through on the promise. Primary remedy is usually not to require the person to come through on the promise. The primary remedy is to have one party pay the other party money.

Intention to be legally bound

"Meeting of the minds": does not matter in contracts. Only external manifestations matter, not the "mind".

CISG (Contracts for the International Sale of Goods): Can use subjective intent (Article 8 Section 1) as long as the other party to the contract was aware of the intent.

UCC: Same as restatement

Restatement: What a reasonable person thinks

Leonard v. PepsiCo (P. 39) - Court ruled that no "reasonable" person would have considered this commercial as an offer. They would understand that the advertisement was "mere puffery" and not statements of fact. Barnes v. Trees – objective manifestation of mutual assent is considered a contract if

a reasonable person considers it as serious. Lucy v. Zehmer – Mental assent of the parties is not required for contract formation. Only the objective evidence (from "outward manifestations") is relevant to a contract. Newman V. Schiff – expression of mutual assent (and not the assent itself) is the essential element in formation of a contract. MCC Marble v. D'Agostino – US courts typically only look at objective intent. This case was governed by CISG, which judges by subject intent.

- Must judge what a "reasonable" person would have thought in order to judge if a contract is made.
- Subjective view cannot be taken into account because you cannot prove that a person is thinking what he says. This can lead to an abuse of the system.
- An offer is only considered valid if a reasonable person would understand the actions to be a legitimate offer.

Lucy v. Zehmer (P. 44)

- External manifestations matter…not subjective state of mind of the party.

Interpreting Statements to Determine Legal Consequences

Gault v. Sideman (P. 46)

- Very hard to sue a doctor based in contract. Doctor did make a promise to cure the condition but patients should not take these promises to be a contract…it would be a danger to the public. Discretion should also be given to the doctors in their words…they can be a benefit if they give hope to the patient. There was no intention to be bound by the promise. The promise was used for the treatment. The court stated you must take into account issues of PUBLIC POLICY: factors about the environment in which we live.
- Public policy is key in this case.

HAWKINS V. MCGEE (P. 48)

- The doctor in this case also promised a cure but this doctor had not performed this procedure before and was not an expert in the field. He also constantly badgered the patient to let him perform the surgery. The doctor does not deserve the protection of Public Policy.

Balfour v. Balfour (P. 49) - An agreement such as this does not constitute a contract because the parties did not intend the agreement to be decided by legal consequences. This sort of precedent would flood courts with frivolous cases. When the agreement was made, the parties did not intend for the agreement to be sued upon.

- FLOODGATES argument – the court would be inundated with cases such as this if the wife had won. This was a social issue, not intended for legal purposes. The parties did not intend for the agreement to be for legal consequences.
- Public policy is key

Express Statements Concerning Legal Consequences

Letters of intent usually merely express the intention of the parties in a continuing negotiation. It will not constitute a binding contract. It ordinarily includes a statement to the effect that neither party is legally bound to the other.

Venture Associates Corp. v. Zenith Data Systems Corp. (P. 52) - When Zenith broke off negotiations due to Venture's refusal to add a third party guaranty, they did not act in bad faith or violate any party of the agreement. This was an agreement to negotiate and not a contract. There were closed no terms of the contract in the agreement. Zenith also did not act in bad faith when it asked for more money for the company during negotiations. Zenith has a right to obtain fair value for Heath at the time of sale.

- An agreement to negotiate does not constitute a binding contract.
- **The judge did agree that a contract had been formed, but only to negotiate in GOOD FAITH – defined as (by UCC in 1-201 (20)) "honesty in fact and the observance of reasonable commercial standards of fair dealing". (UCC 2-103) "the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade". (UCC 1-304) "Every contract or duty within (the UCC) imposes an obligation of good faith in its performance and enforcement."**
- It is most likely not acting in good faith if you do not have a "reasonable" reason for breaking off negotiations. The subjective motive of the party is taken into account for good faith.

Contemplation of Final Writing

Arnold Palmer Golf Co. v. Fuqua Industries (P. 56) - Intent to enter a contract must be judged on the parties' discussions and extrinsic evidence. A fact finder must resolve the question of whether the parties intended a contract. The memorandum also stated that "a general understanding (had) been reached." The court also cited Melo-Sonics Corps v. Cropp to show that a full hearing must take place before a case is dismissed in order to have a finder of fact resolve the question.

- There must a trial to find if the two parties intended to be legally bound. There may have been language in the memorandum calling for there to be a good reason to back out of the agreement. Fuqua may have intended to be bound by the press release generated by the company. Intent is key in these cases. Also key is to what extent they agreed in the letter.
- Parties may orally or informally enter into essential terms of a contract and bind themselves. Only the facts will tell the story. The difference here between Venture v Zenith is that the details in the Memorandum of Intent was explicit. There were more binding details there.
- While all provisions were not structured, intent was clear.

Arbitron Inc. V. Tralyn Broadcasting, Inc. (P. 62) - The UCC holds that agreements are enforceable without a set price if the price is fixed in good faith (by the seller). The UCC also rejects that an agreement to agree as well as the grounds of "indefiniteness" is unenforceable. The Appeals court rejects the district courts claim that the clause is unenforceable because a new rate to be paid Arbitron in the event owner ship change occurred was not specified

- Scope of UCC – 2-102: "This Article applies to transactions in goods"
- 2-105: A good "means all things which are movable at the time of identification to the contract of sale other and money and investment securities". Court states it is not clear if UCC applies to this case.
- **2-305("gap filler"): "The parties if they so intend can conclude a contract for sale even though the price is not settled."**
- 2-204(3) (sanctions gap fillers): "Even though one or more terns are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract."
- 2-305(2): did the price get fixed in "good faith"?…meaning "honest in fact and the observance of reasonable commercial standards of fair dealing in the trade" (2-103(1)(b)).
- You would want to look at similar prices in the industry as well as previous deals that Arbitron has made with other companies in the past.

Offers

When an offer is made, one of the following things can happen:

- Acceptance (contract formed);
- Rejection (no contract formed);
- Counter offer (usually accompanied by a rejection – but not all the time). Counter offers welcome acceptance, rejection, or a counter offer by the original offeror
- Revocation by the offeror.

Preliminary Negotiations Versus Offers

Southworth v. Oliver (P. 66)

- "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" (Restatement 24).
- You must look at it from the point of view of the offeree to see if he/she thinks an offer has been made. If the offeree thinks that a contract will be formed if he/she says "I accept" (and if a **reasonable person** thinks that too"), then the contract is formed.
- It doesn't matter what the offerer is thinking (subjective doesn't matter). Even though he sent the letter to more than 1 person, the first person to respond is the one who accepts the offer. This case is atypical.
- The **first** and strongest guide to identify an offer is the manner in which a reasonable man in the position of the the offeree would believe. *not what the offerer intended*
    - **2nd** is the language used. If there are no words of promise, undertaking or commitment it is likely it was just a phase of negotiations.
    - **3rd** is the determination of the party or parties to whom the purported offer has been addressed. If it distinctly names names ... it looks more like an offer
    - **4th** definiteness of the proposal has bearing. The more definite, the more it is likely a commitment.

Problem 1 (P. 75)

- Even though the letter specified a "quote" (which typically means no offer), the letter also said it was for "immediate acceptance". Hence it counts as an offer.

Zanakis-Pico v. Cutter Dodge, Inc. (P. 76)

- Advertisements are typically not offers. But if ad is misleading or the seller does not uphold the ad, you may have protection under consumer protection legislation (not under the Restatement).
- In a very few cases, an advertisement could be a binding contact. Those must contain some language of commitment or some invitation to take action without further communication. There must be unusually clear words indicating this.
- In most cases, and this one, advertisers merely invite customers into their business. It is not until money changes hands that a contract has been born.

Leftkowitz v. Great Minneaplois Surplus Store (P. 78)

- The ad exception applied. Very specific action (first come first serve) and price applied. Language must be clear definite and explicit.

Maryland Supreme Corp. v. Blake Co. (P. 79)

- Deals with sub-contractors and general contractors. Even though Supreme specified it is a "quotation" in the letter, it is still an offer.
- The intention of both parties was clear. This is an enormous determining factor. A mere quote of prices may not have been sufficient, but because express language was included, it constituted a contract.
- Blacke also started to perform the contract, also. This comes into play.

Interstate Industries v. Barclay Industries (P. 83)

- Court stated that the letter sent by Barclay is not an offer, but a price quotation. It differs from Supreme in that Supreme actually started to perform the contract. Barclay did not start providing anything yet.
- Absent special circumstances, a purchase order in response to a quotation is usually deemed an offer. When Interstate submitted their purchase order, it was an offer an Barclay had the right to refuse the order.
- In some circumstances, purchase orders can be accepting an offer if previous experiences between the two parties treated the quotation as an offer.
- Must take into account all outside circumstances when judging if an offer is made.

Identifying the Offeror and Offeree

BC Tire Corp. v. GTE Directories Corp. (P. 87)

- BC is the offeror and GTE only accepts if the ad is published.
- BC is the "accidental offeror" – assumed that they were accepting an offer to publish their ad but in effect were offering GTE the right to offer their ad.

Antonucci v. Stevens Dodge, Inc. P. 89

- Offeror is the "master of the offer"…he has much power over the offer

Duration of Offers

Vaskie v. West American Insurance Co. (P. 90)

- Default rule about length of offers is, if no time specified, for a reasonable period of time. See section 41 of restatement. Reasonable amount of time is a matter of fact.
- Similar provision exists in the UCC (2-309) stating that the time for delivery, if not specified, shall be for a reasonable time. Circumstantial evidence must be taken into account in deciding reasonable time, not just the statute of limitations.
- If an offering defendant wishes to limit the duration of his offer to a certain time, whether a date two years from the accident or otherwise, he need only so state in the offer itself. He is the master of his offer.
- **UCC Absence of Specific Time Provisions; Notice of Termination**
    - **(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.**
    - **(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either property.**
    - **(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.**
- Speculative Transactions - When dealing with property which is subject to rapid fluctuation in value, the 'reasonable time' is relatively short. This is to prevent the offeror of assuming the risk of such fluctuations.

Caldwell v. Cline (P. 94)

- Cline was not specific enough. He did not state when the 8 days was supposed to start. By default, period of time begins when the person receives the offer. The offeror can overrule that by giving a specific date. Offeror can also make an unreasonable time limit if they choose to do this.
- **CISG is different from the Restatement: Article 20(1) states that the offer is made from the date the offer is mailed, not from when the offer is received. This is different than Caldwell v. Cline. Default rule is that the acceptance date is the date the letter is mailed.**

Termination of Power of Acceptance

Rejection

Chaplin v. Consolidated Edison Co. of New York (P. 96)

- "Private right (cause) of action" – Right for an individual to bring a suit.
- Can categorize the letter on Sept. 17 as a rejection (by the plaintiff) or a revocation (by Con Ed). It could be a revocation as the letter said if the agreement is not satisfactory, "then I must withdraw all offers of settlement."
- Once the Plaintiffs rejected the offer the first time, it extinguished the offer. An offer is extinguished upon rejection. Thus, at the time of the plaintiffs purported acceptance, no offer existed.

Revocations, Acceptances and the "Mailbox" Rule

When is offer effective – when received.

When is Acceptance effective – when mailed (Mailbox rule) (unless otherwise specified – mailbox rule is the default rule)

When is rejection effective – when received

When is revocation effective – when received

Restatement 64 refers to telephone or teletype – it is instantaneous.

In CISG, Mailbox rule is not applicable.

In UCC, Mailbox rule does not apply.

Farley v. Champs Fine Foods, Inc. (P. 98)

- A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.
- Even though a definite time in which acceptance may be made is named in a proposal, the proposer may revoke his proposal within that period.
- The acceptance of an offer is binding from the moment an offeree deposits a properly addressed letter of acceptance in the mailbox, but only if there is an express or implied authorization that the mail system is to be used.

P. 104 – Problem 1:

- Mailbox rule says the acceptance was sent to the offeror even though the offeree got the letter back.
- If an offeree can get the letter back, it takes away the power of the offer from the offeror. Mailbox rule also allows contracts to be formed faster.

- It protects the offeree (because they have increased risk…the offeror has the power).

Problem 2:

- Strict application of the mailbox rule is not allowable here as it gives the offeror "detrimental reliance." The offeror relies on the rejection via e-mail to get another contract with Carr.

Problem 6:

- The initial agreement is an "option". Under an option agreement, the mailbox rule does not apply.
- Because the offeror has given up his revocation rights (increases his risk), the acceptance is effective upon receipt and not upon mailing. There is no need to protect the offeree under an "option".
- If you say "you must respond in 10 days," you are limiting how long the offer lasts. Acceptance could include putting the letter in the mail. Unless otherwise specified, the mailbox rule applies.

Indirect Revocation

Dickinson v. Dodds (P. 105)

- Dodds never told Dickinson that he was revoking the offer. But Dickinson did know, through a reliable source, that Dodds was revoking the offer.
- Once one party is aware that the other has other motives than to sell to the other, this is sufficient enough to constitute the revocation of the offer.
- **Restatement 43 – An offeree's power of acceptance is terminated when the offer takes "definite action" inconsistent with an intention to enter into the proposed contract and the offeree acquires "reliable information" to that effect. Dickinson did have reliable information and tried to act on this information.**

Hoover Motor Express Co. v. Clements Paper Co. (P. 107)

- The Supreme Court of Tennessee held that the telephone conversation (in which the defendant indicated he had cold feet), should have indicated to the offeree that the offeror/defendant had withdrawn the offer since: "It is sufficient to constitute a withdrawal that knowledge of acts by the offeror inconsistent with the continuance of the offer is brought home to the offeree.

Counter Offers

Ardente v. Horan (P. 108)

- You know it's a counter-offer because the seller said "that isn't the deal I offered."
- Mirror image rule – offer and acceptance to not match. Acceptance becomes a counter-offer. A counter-offer is (usually) a rejection and a new offer.

- In this case, it was a rejection because the buyers find these extra items to be critical in the offer. To show that this isn't an outright rejection, you could say "We accept but would you consider throwing in….". Make it clear that the extra things are not a counter-offer.
- Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed.
- Restatement 39 states counter-offers

Death or Incapacity

Beall v. Beall (P. 111)

- "as tenants by the entirety" – they own the land together but, if one of it dies, the other (by operation of law) will own the property. Also known as "joint with right of survivorship"
- Offer is revoked upon death. There was no agreement because Calvin did not pay $100 on the last option renewal…hence it was an offer.
- The death of an offeror revokes his offer or causes his offer to lapse. Therefore, after death, the formation of that 'apparent state of mind of the parties (which is crucial for mutual consent), is rendered impossible.

Making Offers Irrevocable

How to make an offer irrevocable:

- enforceable option contract
- Reliance (Common law) & Firm offers (UCC)
- Part performance (for unilateral contracts)

Option Contract – Rights of First Refusal

Orlowski v. Moore (P. 113)

- Right of first purchase = right of first refusal; Option only comes into effect when someone else makes an offer on the property.
- Must look at practical considerations (as well as the parties' actions and options) when deciding what a "reasonable time" is. Orlowski also knew that the Moores were looking to sell the property from Day 1.
- Where no time is specified for the performance of an act, the law implies that it must be done within a reasonable time, and what is a reasonable time depends entirely upon the circumstances of each case.
- An option contract creates an irrevocable offer as long as some payment is received at the time of the contract.

Irrevocability through Reliance – Firm Offers

Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc. (P. 116)

- Uses Restatement
- General rule is that a sub-contractor's bid to a general contractor is considered an offer.
- Issue in this case is whether Johnson's offer is irrevocable. 2 views on this issue:
    - (1) Hand – Sub-contractor's offer is revocable. Unfair to the general contractor, as his bid to the owner is "locked in". The general bears the risk that Sub's quote may go up.
    - (2) Traynor – Sub-contractor's offer is irrevocable under certain circumstances. General relies on the sub-contractor's bid. More favorable to the general. Not very fair to the sub-contractor because, even though they are locked into the bid, they are not even sure the general contractor will choose their bid.
- Traynor is the more modernly accepted view. If Hand's view is used, it will incline the general contractor to raise their bid in order to allow for higher sub-contractor's bid later on. Traynor's view will generally allow for a lower price
- Pavel court did adopt the Traynor view. Pavel relies on Johnson's bid for their bid to the NIH.
- Court used Section 87-2 of the restatement regarding option contracts. Sub-contractor is the offeror. Pavel relies on the bid of Johnson for their own bid. However, the court showed that Pavel really didn't rely on the bid by accepting other sub-bids. In this case, Johnson's offer was not irrevocable.
- The Drennan decision (a courts ruling in a general/subcontractor job) has been very influential. It held that the subcontractors bid is irrevocable.
- Promissory estoppel requires the general contractor to prove that he actually and reasonably relied on the subcontractor's sub-bid. Some observations from the court:
    - (1) when a general contractor engages in bid shopping, or actively encouraged bid chopping, it is strong evidence that the general did not rely on the sub bid
    - (2) prompt notice by the general to the sub that they intend to use the sub on the job, is weighty evidence that the general did rely on that bid
    - (3) if a sub bid is so low that a reasonably prudent general contractor would not rely upon it, then it is not valid.
    - the trial court, and not a jury, must determine that binding the sub is necessary to prevent injustice.

Firm offer

- **UCC 2-205 – statute stating that an offer by a MERCHANT in a SIGNED writing which by its terms gives assurance that it will be held open (i.e. "I will hold this offer open for…") is not revocable.**
- A "merchant" (from UCC – 2-104) means" a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods…" The seller must deal in the good he is selling.

- **If the seller is not a merchant, the buyer must enter into an "option contract" to keep the offer from being revoked. If the seller is a merchant, however, the signed writing is enough to make it irrevocable.**
- The period of irrevocability is defined by a "reasonable time" (based on nature of good etc.) but, in no event may it exceed 3 months (it can be less if the reasonable time is judged to be less than 3 months). However, if the form is supplied by the buyer, it must also be signed by the seller. This protects the "accidental offeror" i.e. seller. If this is signed by the seller, the irrevocability term is created.

CISG note – Note 3 P. 124

Irrevocability through Part Performance – Section 45 of Restatements

Unilateral Contract

Unilateral contract

- "If you do this, I will give you this." Contract is formed AFTER the task is completed…the offeree does not promise anything.
- Bilateral contracts, by contrast, are when both parties promise to do something.
- Bilateral – equals one duty and one right per party. Unilateral – equals one duty and one right TOTAL.
- The offeror has the duty to pay and the offeree has the right to the money.

Dahl v. HEM Pharmaceuticals Corp. (P. 126)

- Unilateral contracts appears to have escaped HEM's notice. HEM sought and obtained the subjects actual performance, they didn't seek double blind testing. There was a binding contract.

The Part Performance Problem

Offeror cannot revoke the offer when the offeree is in the middle of doing the task. This is governed by restatement 45. An option contract is created when the offeree "begins" the task.

Petterson v. Pattberg (P. 128)

- This is an offer for a unilateral contract. No contract is formed until Petterson pays the money (completes the task). Petterson did not complete performance (even though he paid the quarterly payment, he did not actually give Pattberg the final money).
- Pattberg did not accept the final money. This ludicrous because it makes Pattberg part of the offeree (by asking him to accept the money).
- **Restatement 45 corrected this logic, although it is hard to apply here as the beginning and end of the performance may be at the same time (when he gives the final payment to Pattberg). The offer could be revoked before Petterson came to Pattberg with the money (started the**

performance). The initial quarterly payment is not part of the performance (Petterson has to pay this anyway).

The Nature of Acceptance

Knowledge and Motivation

Simmons v. United States (P.133)

- The unilateral contract was formed. The offer was known by Simmons, even though he did not go there with the intent of completing the offer. Motivation is not relevant. Once he completed the offer, he made the contract.
- At some point in the formation of a unilateral contract, you must have knowledge of the offer. The point that knowledge must be gained is up for debate.
- This "private reward" in Simmons is different from a "public reward". You do not need knowledge of the offer in a public reward to be entitled to the money (see bottom of P. 134).

The Requirement of Volition

Carlill v. Carbolic Smoke Ball Co. (P. 135)

- This is a unilateral contract, the performance is taking the drug for the required amount. The contract is formed at this point.
- Getting the flu is considered a "condition" you must require in order to get the money. The duty of the company to pay requires the satisfaction of the condition.
- Getting the flu is not volition and thus is not part of the performance.

The Manner of Acceptance

The Modern Analysis

Empire Machinery Co. v. Litton Business Telephone Systems (P. 138)

- Litton made Empire the "accidental offeror" by providing a sales agreement for Empire to sign. Litton did not sign the form, however, and thus did not accept the offer. However, the court said that Empire, as the offeror, can change the manner of acceptance, as long as Litton accepts (which it did by its actions).
- **See UCC 2-206 (P. 144). UCC changed the (old i.e. common law) traditional acceptance manner (that the offeree must accept in a certain manner) by saying that, unless otherwise unambiguously indicated, an offer to make a contract shall be construed as inviting acceptance IN ANY MANNER and by any medium reasonable in the circumstances.**
- **Second restatement changed the (old) traditional acceptance manner to be closer to the UCC (see restatement 30 (2)).**

Corinthian Pharmaceutical Systems Inc. v. Lederle Laboratories (P. 145)

- Key is that Lederle did not accept the offer by Corinthian when Corinthian called the automated line.
- Lederle had no knowledge of the order when the automated machine gave a tracking number to Corinthian. Lederle sent the 50 vials as a customer relation matter…it was an accommodation (UCC 2-206(b)).
- If Lederle had not stated that the 50 vials were an accommodation (and, thus, a counteroffer), they ran the risk of it being interpreted that the contract had been made for the 1000 vials. If no more vials were shipped, Lederle may be in breach of the contract.
- If Lederle notified Corinthian of the price change 1 week after sending the 50 vials and sent the rest at the new price, see 1-205 (b), they must notify Corinthian within a seasonable (aka reasonable) time. One week later may be interpreted as not a reasonable time. Lederle may be in breach.

Arduini v. Board of Education (P. 149)

- Liquidated damages – an agreement beforehand as to what the damages will be if the contract is breached.
- By continuing his duties after receiving the new policy on September 13, he accepted the policy.
- It was a bilateral contract, even though he didn't verbally promise, he did keep teaching. That was his promise. It couldn't be unilateral because that would imply that the contract was not formed until he completed the school year (completed performance).

Silence as Acceptance

Vogt v. Madden (P. 151)

- Restatement 69 states that silence by the offeree normally does not operate as an acceptance to an offer.
- Three exceptions
    - Those where the offeree silently takes offered benefits
    - Those where one party relies on the other party's manifestation of intention that silence may operate as acceptance.
    - Previous dealings
- Vogt's testimony that "I was under the impression we had an agreement" is not concrete.

Problem 2 (P. 155)

Your unreasonable offer of "doing nothing after 10 days, I will assume you accept the deal", binds you (the offeror) to Nancy when she comes with the money. Nancy, however, is not bound. You created the mess, hence you are bound to it.

Problem 3 (P. 155)

You are liable for half of the cost as you are taking benefits from the offer.

The Notice Requirement

Peterson v. Thompson (P. 155)

- Must characterize the initial discussion. Discussion between Thompson and Case was not forming a contract.
- Rather, the contract is formed when the tractor is picked up AND when the seller is notified. The contract requires performance.
- **See UCC 2-206 (2) – "an offeror who is not notified of acceptance (picking up the truck) within a reasonable time may treat the offer as having lapsed before acceptance"**

The Deviant Acceptance – The "Battle of the Forms

Common law and UCC both have a solution when an the terms in the offerors and offerees forms do not match:

- **Restatement: When buyer purchase order and seller acknowledgement do not match (i.e. one party has a clause that the other does not), the common law states that the form of the last party who sent a form is binding (the "last shot" wins) when the contract is made (See P. 168).**
    - Ex: When buyer sends a purchase order with no dispute resolution clause, and then the seller sends an acknowledgement with a dispute resolution clause, the seller's form wins because it was sent last.
    - Note:The dispute resolution clause is considered an "additional term" (it is not a different term as the first form did not contain any dispute resolution clause)
- **UCC states (from 2-207) – (2) says that the "additional term" is construed as a proposal for addition to the contract (other party has to say yes or no) UNLESS contract is between 2 merchants. If it is between 2 merchants, than the additional terms automatically becomes part of the contract unless (a)(b)(c).**
    - ****NOTE: most courts rule that dispute resolution clauses are considered materially altering the contract and thus, the additional term would not become part of the contract. Common law would says the clause becomes part of the contract because of the "last shot" principle ****

Ex2: Seller send offer with 90 day warranty. Buyer sends acceptance with unlimited warranty (life of product). The warranty disagreements are "different" terms i.e. both forms address the warranty. 2-207 does not address different terms. There are 3 ways to address the different terms: (1) Same as "additional terms" (2) use "gap fillers" (majority opinion) (in this case, warranty would be a "reasonable amount of time" (3) Offer prevails. If you had the "expressly made" (this acceptance is expressly made conditional on your agreement to additional terms) clause, you look at UCC 2-207(3) and go to the "gap filler" rule i.e. the warranty is a "reasonable amount of time".

Note: UCC "gap filler" is the default. If additional terms are added, you must go to UCC2-207(2)

Dorton v. Collins Aikman Corp. (P. 169) -

- UCC 2-207: Section 1 – a contract is recognized notwithstanding the fact that an acceptance or confirmation contains terms additional to or different from those of the offer or prior agreement, provided that the offeree's intent to accept the offer is definitely expressed. When a contract is formed under section 1, the additional terms are treated as proposals for addition to the contract under sub-section 2.
- Conversely, when no contract is formed under section 1 the entire transaction aborts at this point. Between merchants, the "additions" are part of the contract unless…See 2-207 (2)(a,b,c). Note that if one of the parties is not a merchant, only the first sentence of 2-207(2) applies: "The additional terms are to be construed as proposals for addition to the contract.

Rolling ("Layered" Contracts) – ProCD v. Zeindenberg (P. 178)

- Ziendenberg bought software that had license terms on the inside of the box. The trial court looked at 2-204 (1) of the UCC which allows a contract to "be made in any manner sufficient to show agreement, including conduct by both parties which recognize the existence of a contract."
- The "offer" by the Pro-CD is rolling until the buyer has a reasonable opportunity to review the terms inside the box and decide whether they accept.
- Court said 2-207 did not apply as there was only "one form" (inside the box)

Hill v. Gateway (P. 180) – similar to ProCD. Hill is bound by the arbitrations clause inside the box while Gateway is also bound by the "lifetime service" and other customer benefits it offers.

- Gateway said that 2-207 does not apply. Only 2-204 applies. The offer was conditional on acceptance of the additional terms.
- Court referred to this as a "rolling offer", offer includes the shipping of the computer and the terms that the person sees when getting the computer. Only after this happens is a contract made. Note: This is not a universally accepted rule. Some say that the contract is made when the person buys the computer. The majority, however, use the "rolling offer" rule.

Warranties (P. 159-162)

Representation by the seller about the quality of the goods

3 kinds of warranties:

(1) Express warranty – "the color will never fade", "they are unbreakable" – Applies to all sellers. A statement is made by the manufacturer. See 2-313
(2) Implied warranty of merchantability (2-314) – the seller must be a merchant "with respect to goods of that kind" in this type of warranty. The products are fit for the ordinary purposes for which the goods are used. The products are fair or average quality. Ex: If a linoleum floor turns yellow, it is not fit for ordinary purposes. The warranty is implied. Nothing need be said.

(3) Implied warranty of fitness for a particular purpose (2-315) – Applies to all sellers. Nothing is wrong with the product. The product is simply the wrong good for what the buyer needs. Ex: if a buyer needs a specific type of lubricant, and the seller send the wrong lubricant, the product is wrong for the buyer. It requires that buys is relying on the seller's skill or judgment and the seller has reason to know that the buyer is relying on him.

2-316 – exclusion or modification of warranties. See section 2 and section 3. To exclude implied warrant of merchantability, the merchant has to specify that the product is "as is" or "without all faults" (either oral or in writing). Implied warranty of fitness has to be excluded in writing.

The Validation Process

Four kinds of validation devices:

(1) Seal
(2) Consideration
(3) Promissory estoppel (detrimental reliance)
(4) Moral obligation (other)

Seal and other formalistic devices

Seals has either been abolished in many jurisdictions or constitutes only presumptive evidence of enforceability in others.

Knott v. Racicot (P. 185) - Owner of the land received an offer from a third party. This then gave the tenant of the land the option for right of first refusal. The seller objected to the right of first refusal by arguing that the seal was not a validation device and was outdated.

- Court stated that the seal was not a validation device. They did say that the option contract was valid, however, due to Restatement (Second) 87(1).
- UCC 2-203 – made seals inoperative in contracts. You must find another validation device.

Consideration

Two Essential Elements:

(1) Legal value - is either a detriment to the promisee (i.e. pay money) or benefit to the promisor
(2) Bargained-for-exchange - the promise induces the detriment to the promisee. Also, the detriment induces the promise.

Giving someone something as a gift has no consideration. There is no legal value (the person pays nothing) and the promise to give the gift does not induce detriment to the promisee.

Putting some related "condition" on the gift (i.e. walking somewhere to get the gift) is not consideration either. It does not rise to the level of a legal detriment.

If you are buying something for a price that is considerably less than the value of the product, there is still consideration. For the most part, you do not look at the "underlying value" of the product….UNLESS you are only giving this small amount of money simply to give a pretense to consideration i.e. to avoid making it look like a gift.

Hamer v. Sidway (P. 190) -The nephew gave up legal rights (i.e. had a legal detriment) by refraining from these legal activities (drinking, smoking, gambling)

Courts normally will not inquire into the value of the consideration unless:

(1)Equitable action (ex. suit for an injunction) (see McKinnon v. Benedict)

(2) Money exception (ex. Money changes hands between the parties) (see Schnell v. Snell)

McKinnon v. Benedict (P. 194) - Even though Benedict paid off the loan quickly, the agreement still said he had restrictions for 25 years. 25 years is not reasonable for the 5k loan.

- Courts will not normally inquire into the value (adequacy) of the consideration. This is the first of 2 exceptions – when there is an inadequacy in equity. Courts can seek into the value of the consideration when you are seeking an injunction or performance.
- **See Restatement 364 – Specific performance or an injunction will be refused if such relief would be unfair because**
    - **(1) the contract was induced by mistake or by unfair practices**
    - **(2) the relief would cause unreasonable hardship or loss to the party in breach or to third persons or**
    - **(3) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.**
- Note: If McKinnon had sought damages instead of an injunction, Restatement 364 would not apply. McKinnon may likely win.

Schnell v. Nell (P. 200) - Upon Theresa's death, the joint property became her husband's property. Hence, she had no money in her estate. Her husband decided to fulfill her wishes by giving each person $200 and they would give him one cent in return. Agreement was later challenged by saying there was no consideration. Court said that one cent for $200 is inadequate consideration.

- Second exception – when money is exchanged for money
- While there was legal value, there was no bargained for exchange. The promise of $200 did not cause the detriment of one cent. The exchange of one penny did not cause $200 to be given. It was merely a pretense and both parties knew this.
- You do not have to rely on the money exception. You can look at the lack of bargained for exchange.

Thomas v. Thomas (P. 203) – Widow paid one pound per year and was allowed to live on her husband's land.

- Different from Schnell because there is not a money exchange. There is an agreement for the widow to live on the land in exchange for 1 pound and maintenance of the land.
- Motivation of the executor is irrelevant. Simply look at the transaction.

Recitals

Recitals are clauses that list certain facts of a lease.

1464-Eight, Ltd. V. Joppich (P. 218) – minority opinion that the option contract Joppich agreed to with 1464 allowing them to buy back the land within 18 months if nothing was built is valid even though the $10 option is not officially paid.

- Consideration for the option is $10. It is an enforceable agreement, even though the developer never paid the $10 for the consideration. **But the common law rule (and still the majority rule) states that you must still pay the consideration.**
- **However, restatement 87(1) states that an option contract is binding if it is in writing, signed, and recites a purported consideration i.e. they don't care if you pay the $10. The $10 is merely ceremonial i.e. nominal. It is similar to the seal.**

Absence of Detriment – Mutuality of Obligation – illusory promise – requirement Contracts

Centerville Builders, Inc. v. Wynne (P. 222) – Court made an incorrect decision by stating Centerville acted in good faith. They did not as they cancelled the agreement simply because it got a better offer. Because clause 6 was inserted (stating that the agreement is subject to satisfactory purchase & Sales agreement between seller and buyer) and clause 9 was deleted (stating that the seller would not negotiate with anyone else), it does not excuse the seller from acting in good faith.

- No promise is really made due to clause 6. It is an "illusory" promise due to the fact that it depended solely on the subjective will of either party. **However, this is not true.** It was an actual promise (see Arnold Palmer case). Both parties had the obligation to perform IN GOOD FAITH. The seller did not act in good faith because it cancelled the agreement simply because it got a better offer. Getting a higher price is not good faith.
- Mutuality of obligation – another name for the fact that there is consideration. Not much meaning besides that.
- Illusory promise just means there must be consideration. Each promise must relate to another promise.

Scott v. Moragues Lumber Co (P. 226) - If I buy a boat, I will haul your stuff. Once the person bought the boat, he did not haul his stuff. He stated that it was an illusory promise.

- Court stated that he is incorrect. Buying the boat is a condition of the agreement. Once he bought the boat, he was obligated to haul the stuff.

Requirement and Output Contracts

Requirement contract – seller is required to produce and provide all the product that the buyer needs. The buyer can only buy from the seller. There is also the obligation of good faith.

Output contract – Buyer is required to buy all the output of the seller. The seller cannot sell to anyone else. There is also the obligation of good faith.

There was controversy of if these contracts were enforceable (because there is not much detriment due to no requirement to buy things)

Common law and UCC 2-306 (1) stated that these are enforceable contracts.

UCC 2-306 (1) – output and requirements that may occur IN GOOD FAITH. Good faith is usually key in these contracts. Consideration is not normally judged.

McMichael v. Price (P. 228) – Because Price could not buy sand from anywhere else without breaching contract, McMichael was, in turn, required to provide as much sand as Price needed.

- Price was bound by a solemn covenant of the contract to purchase all the sand which he was able to sell from the defendant.
- It was the intent of the parties to enter into a contract which would be mutually binding.

Vulcan Materials Company v. Atofina Chemicals, Inc. (P. 230)- Vulcan and Atofina entered into a requirements contract. When Atofina closed their plant, they stated their requirements were zero. Did Atofina act in good faith? No. They simply did not like the price that Vulcan was charging. They switched production to another plant with a provider that gave them a better price.

- **2-306(1) – "except that no quantity unreasonably…" This has been interpreted to refer to increases, not decreases. Atofina decreased.**
- **UCC restricts the ability of the buyer to increase purchases, not decrease them. They can decrease their requirement but only in good faith. Getting a better price is not considered good faith.**
- If they simply went out of business, that would be a different story.

Exclusive Dealing

B. Lewis Productions, Inc. v. Angelou (P. 232– Example of an exclusive deal. The agreement between BLP and Angelou was profit-sharing and meant Angelou and BLP had nothing to gain if either failed to perform or gave minimal effort. Each party had an obligation to make "reasonable efforts" in furtherance of the Agreement in order to vindicate the "business efficacy" that both parties must have contemplated when they entered the Agreement.

- **2-306(2) – deals with exclusive dealing – an exclusive dealing requires an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale. There is a higher duty imposed on both parties (it is beyond good faith…it is BEST EFFORTS).**

- **How does best efforts differ from good faith? They should use *reasonable diligence, reasonable effort, and due diligence* as well as good faith.**
- Instead of breaking off the contract, Angelou should have requested that Lewis re-negotiate with Hallmark and get a better deal.
- See footnote on P. 234 – If no contract makes no provision for duration, the contract is presumed to be terminable at will. Angelou should have terminated the contract after asking Lewis to re-negotiate the deal with Hallmark.
- Angelou is not allowed to negotiate with someone else while she has a contract with BLP.

Voidable Promises and Consideration – Capacity to Contract

Milicic v. The Basketball Marketing Co., Inc. (P. 236) - A contract can be voided if the minor disaffirms it at any reasonable time after he attains majority. Infants are not competent to contract. Marketing blocked Darko's effort so enter into an agreement with Adidas.

- There was consideration but that is not the issue. Darko lacked the capacity to contract.
- This is a one way street, though. The minor can pull out of the contract but the other party cannot. The contract is "voidable" – it is up to the minor to void the contract.
- If Darko had done the same thing with regards to leasing an apartment, the contract is not voidable because, due to PA law, "necessities" (i.e. food, clothing, shelter) do not apply (See top of P. 237).
- Intoxicated persons can also void a contract if "the other party has reason to know" that the person is intoxicated. (see restatement 16).
- Mental illness can also void a contract if he is unable to understand or unable to act reasonably. This is different from intoxication because the other party doesn't have to be aware of the mental illness. See Restatement 15.

The Pre-Existing Duty Rule

Slattery v. Wells Fargo Armored Service Corp. (P. 238) - Slattery was under a duty to provide his employers with all information ascertained through interrogation. Slattery was also unaware of the offer. He was under a pre-existing duty to furnish his employers with all useful information. Performance of a pre-existing duty does not amount to consideration necessary to support a contract.

- This is a private reward case and a unilateral case (all reward cases are unilateral). You have to have knowledge of the reward in order to accept the reward.
- Slattery was obligated to turn the information in because he was under previous contract with law enforcement to give all information over. This is an exemption to consideration as he had a pre-existing duty.
- The pre-existing duty rule is quite controversial. However, it is a common law rule.

Modifications of the Pre-Existing Duty Rule

Angel v. Murray (Maher) (P. 242) - A subsequent agreement to award additional compensation is unenforceable if the contractor is only performing work which would have been required of him under the original contract. However, when unexpected or unanticipated difficulties arise, the court should enforce agreements modifying contracts even though there is no consideration.

- Under old pre-existing duty rule - The modification of the deal was not supported by consideration. It was a unilateral addition. They gave more money even though Maher was still obligated to pick all the trash without the additional money.
- This court, however, ruled that, due to unanticipated changes (an increase in house), the increase in money made the contract more fair.
- See restatement 89 - a promise modifying the duty is binding if the modification is fair and equitable in view of circumstances NOT ANTICIPATED BY THE PARTIES WHEN THE CONTRACT WAS MADE. Hence, the new restatement is going away from old pre-existing duty rule and allowing modifications to have consideration.
- The pre-existing duty rule prevents the "hold-up game" (see bottom of P. 243) – in this case, there was no hold-up game. There were changes in the original assumptions of the agreement (i.e. increase in houses).
- If the court had made the opposite decision (i.e. the payments were not binding), Maher would not have to give back the extra money already given to him because once a contract is FULLY PERFORMED, you cannot raise consideration issues!

Disputed Claims, Modifications, Accord and Satisfaction

Ruble Forest Products, Inc. v. Lancer Mobile Homes of Oregon (P. 246) - There is evidence to support the fact that a valid compromise is made in good faith. A compromise or settlement constitutes a valid binding agreement and is sufficient consideration to support a new contract when each party acts in good faith. Plaintiff argues that it was not in good faith when defendant coerced the plaintiff by refusing to pay their debt. The court does not accept this view.

The Invalid Claim

Dyer v. National By-Products, Inc. (P. 252) - Good faith forbearance to litigate a claim is sufficient consideration to uphold a contract of settlement. Even though the claim was found to not be valid, if Dyer thought that the claim was valid at the time of compromise, there is consideration. The court must decide if Dyer's forbearance to assert his claim was in good faith.

Accord and Satisfaction

Assume a contract where A owes B $10k. They then enter into a modified agreement, where A owes B a red truck within 30 days. This is called an accord – when original agreement is not terminated but instead it is suspended. If A does deliver the truck within 30 days, then this is "satisfaction". The original obligation (pay $10k) is terminated. If A does not deliver the truck within 30 days, B has the option to either pursue the $10k (because the original contract was not terminated) or pursue the red truck.

This is a special type of modification. In order to tell if the modification is accord and satisfaction, the parties should specify this in the contract.

Promissory Estoppel

It is not consideration but it is a validation device!

Elements of Promissory Estoppel (from restatement 90): (1) there be a promise (2) the promisor must reasonably expect the promise to induce reliance (3) there must be actual reliance (4) injustice can be avoided only by enforcing the promise.

The Expansive Application of Promisory Estoppel

Feinberg v. Pfeiffer Co. (P. 263) - The plaintiff retired from a lucrative position in reliance up on the defendant's promise to pay her an annuity or pension. The promissory estoppels is used instead of consideration.

- Defendant argued there was no consideration for the $200/month (and they are right). There is no bargained for exchange as the promise of $200/ month was not given in exchange for anything. It was merely stated that she would receive the money whenever she retired
- Promissory estoppel was developed to resolve this dispute.
- Restatement Section 90(1)
    - First restatement had a much stricter standard for Promissory estoppel – said there must be definite and substantial action by the promisee, did not allow third parties.

Pre-contractual Reliance – Promissory estoppel may apply

Pop's Cones, Inc. v. Resorts International Hotel, Inc. (P. 271) - Defendant should reasonably have expected to induce action or forbearance on the part of plaintiff to his precise instruction "not to renew the lease" and pack up the store. Plaintiff relied to its detriment on the defendant's assurances.

- No one had claimed an agreement had been reached. However, plaintiff relied upon the promises made by the defendant.
- Key issue: Was TCBY reasonable in relying upon Resorts?
- She took quite a big risk in relying on some corporate officer's assurances. To avoid getting into this issue, she could have asked the current landlord to extend her lease month to month or over 6 months until she got the other location.
- **Restatement 90 – "A promise…is binding if injustice can be avoided only by enforcement of the promise"**

Other (Moral Obligation)

Cases where courts enforce contracts when there are no seals (or other formalistic device), consideration, and promissory estoppels.

Past Consideration – Moral Obligation

Passante v. McWilliam (P. 282) - The 3% was a gift. As a lawyer, the plaintiff should have advised the company of the need for independent counsel in connection with its promise of 3%. The stock was not bargained for. The plaintiff had already arranged for the loan before the idea of 3% was brought up. Thus, no consideration existed. The 3% was a "moral obligation" and legally unenforceable.

- The 3% stock given to Passante was actually in Korbel's name (so that McWilliam would not know).
- Legal issue is: there is no consideration for the 3% stock given to Passante. There was legal value (he got 3% of the stock for getting the loan for the company). There was no bargain for exchange, however. The company did not say "we will give you 3% if you get us the loan." The promise of 3% was made after the loan was procured.
- If there was a bargained situation, however, Passante violated ethics because he was their lawyer. He should have advised them to obtain independent counsel for the deal of 3%.
- There was no promissory estoppel either. They did promise to give 3% but Passante never did anything to rely on this 3%.
- This may be called "past consideration" (P. 286-287), which is not allowed.
- Some courts have fixed this by the doctrine in In Re Hatten's Estate.

The Material Beneft Doctrine

In Re Hatten's Estate (P. 288) - The note had valuable consideration considering that the family had rendered services. There was a moral obligation on the part of Hatten to pay Monsted the 25k.

- Hatten received free meals and transportation during his life and promised 25k to Monsted in exchange when he died.
- Estate said Hatten had no consideration since the meals were done before he promised 25k. However, **the court cited provision 86 in the Restatement (Material Benefit rule) states that a promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.** The promise is not binding as long as the promise conferred the benefit as a gift or the value is disproportionate to the benefit.
- NOTE – this could be applied to the previous case. In fact, it is more compelling in the previous case. Monsted may have considered the meals as a gift to Hatten. The court in the previous case, however, REJECTS provision 86. In fact, MOST COURTS reject Provision 86.

Promises Uniformly Enforced through Moral Obligation

First Hawaiian Bank v. Zukerkorn (P. 294) - Defendant stated that the collection of these notes was barred by the 6 year statute of limitations unless something occurred which started it running anew. Court stated that a new promise by the defendant to pay his debt is binding, regardless of the statute of limitations. The promise may be express or implied. Defendant denies acknowledging the note. Even if he did acknowledge the debt, it may not be a new promise based on other evidence. This is an issue for the trier of fact.

- If a debt is already barred by the statute of limitations, no consideration is needed for a promise to pay the old debt.
- **Restatement 82 – A promise to pay an old debt is binding even if the statute of limitations has expired. No consideration is required. The following facts operate as such a promise: A voluntary acknowledgment of the previous debt, if he makes a payment on the debt, stating that the statute of limitation will not be raised as a defense.**
- If Zukerkorn had said "I promise to pay the debt", he would be bound by this promise. A jury is to decide if he acknowledged the specific debt or began payment on the debt.

Operative Expressions of Assent

The Statute of Frauds

Goes back to English law, where the parties to a contract could not testify in court. Thus, certain contracts were not enforceable unless in writing.

England rescinded their statute of fraud in the 50's. We still have these statutes, however.

Reason for contracts in writing:

(1) evidentiary (need proof the contract existed)

(2) cautionary (parties will take it seriously if it is in writing.

Most courts don't like the statute of frauds. They think it is an antiquated notion. Thus, there are number of exceptions to the statute (i.e. examples where you do not need the contracts in writing)

Restatement 110 – If a contract falls into one of these classes, it must be in writing to be enforceable (i.e. it is "within the statute" of frauds). If the classes do not fall into one of these classes ("MYLEGS") (or is an exception), it is "without the statute.":

(1) consideration of marriage (M)
(2) contracts which cannot be performed within than one year (Y) (note, indefinite duration contracts do not fall in the statute of frauds
(3) interest of land (L)
(4) contract of an executor (E)
(5) Goods over $500 (G)
(6) surety (S) - MYLEGS

There are also separate requirements for what "in writing" entails.

Critical initial question in statute of frauds is: "Is this one of the contracts that has to be in writing"

Second: Is this the Restatement or UCC? Goods is UCC 2-201, Restatement is all others

Third: Does it fit with the exceptions in the UCC or Restatement, respectably?

Surety

Debtor (has contract with creditor to pay back the loan), Creditor (has contract with debtor to give the loan), Surety (has contract with creditor to pay the loan if debtor cannot and also a contract with debtor).

Contract between surety and creditor if within the statute of fraud (i.e. has to be in writing). Contract between debtor and creditor is not within the statute (i.e. does not have to be in writing).

If the surety admits to orally agreeing with the creditor, you cannot use the statute.

Another name for surety is a guarantor

Problem 1 (P. 306) – Head is debtor, Café is the creditor, Johnson is the surety.

Problem 2 – Father (or his estate) is debtor, Dr. Lawrence is creditor, Daughter is surety. There is a dispute as to whether the daughter said "whatever the cost is…I will pay for it". Doctor said this was a direct agreement with the daughter and she was not the surety. Court looked at the actions of the doctor. They found that he first went to the estate, then the widow, and finally the daughter. This shows evidence that he thought the daughter was a surety. Thus, it required a writing. There was no writing.

Armbruster, Inc. v. Barron (P. 307) - Barron and the others had promised to pay RBR's debts in order to protect their interests in the project. He was acting to serve his own "pecuniary" purpose. As this agreement was a made as a desire to preserve a present investment and insure future profits, it did not need to be in writing. Also, the fact that RBR was a fledging corporation (and not established)meant the benefit Barron stood to receive from his guaranty was more immediate and direct than if he had guaranteed debt of a more firmly established corporation.

- It was an oral contract.
- This is not a surety contract because of Barron's nature in the company. He had a 33.3% stake in the company. Percentage alone is not determinate, though. The company is also a start-up. There is a significant higher risk to the creditor as the company has no assets. This is a risk corporation. If a corporation has been operating for a while, and there is a guarantee by the shareholders for a debt, they will apply the surety situation. However, this is not the case here.
- The "main purpose" or "leading object" exception – the main purpose of the supposed surety.

Marriage Agreements

Dewberry v. George (P. 311) – Antenuptial (prenuptial) agreements and part performance. While the statute that requires agreement in consideration of marriage to be in writing applies in this case, the agreement was made and is enforceable under the part performance exception to the statute of frauds. The contract was proven by clear, cogent, and convincing evidence. The acts of both parties also relied upon as constituting part performance. Also, the trial court had found that there was complete performance of the contract.

- This is a consideration of marriage case. A mutual promise to marry is not considered within the statute.
- The promises that Dewberry and George were made in consideration of marriage (i.e. neither party would marry each other if the other did not agree to the conditions.). However, the agreement was not in writing.
- This is an exception to the writing. They did not completely fill the agreement made, but they did enough of it (part performance). If they had completely filled the agreement, the statute would be irrelevant.
- Part performance in the statute of frauds is different from most contracts in that it means most of the promise is fulfilled.

Contracts for the Sale of Land

Contracts vs. Conveyance

Statute of frauds include both contracts for the sale of land as well as conveyances of land.

Cain v. Cross (P. 315) – Part Performance and Remedies. Cain argues that paying the 10K was part performance the statute of frauds does not apply. However, in order for the contract to be enforceable under the doctrine of part performance, require more than the mere payment of money. The party must take possession of the property, pay the purchase money, either in whole or in part, and make improvements to the land or change it in some way in reliance on the oral agreement.

- Sale of an interest in land case. This includes sale of land and conveyance of land. (see P. 316-317)
- Similar to Dewberry in that it involves part performance. Court says the 10k down payment is not a significant amount of part performance to be an exception to the statute. Paying the 10k does not tell you anything about the agreement. It could be payment for anything.
- Part performance is closer to substantial performance.
- Entering into a lease is not deemed to be sale of a land unless it is longer than a year. An easement (right to use part of the land) is deemed to be a sale of an interest. Merely providing services to their land is not considered sale of an interest.

Contracts Not Performable Within One Year from Formation

C.R. Klewin, Inc. v. Flagship Properties, Inc. (P. 319) - An oral contract that does not say, in express terms, that performance is to have a specific duration beyond one year is, as a matter of law, the functional equivalent of a contract of indefinite duration. Like a contract of indefinite duration, such a contract is enforceable because it is outside the statute regardless of how long completion will actually take. The destructive force of the statute should be narrowed, not broadened. Thus, the contract must state how long the contract is supposed to last in order to be within the statute.

- Court does not use the statute of fraud in regards to the one year provision. They look at the oral agreement terms. The oral agreement did not have a duration. The contract did not specify that it was "not to be performed within one year" nor did it specify duration of contract.
- This is a very limited view of the statute of fraud. Not all courts will require that the oral agreement specifies that the contract is "not to be performed within one year".

Differences between restatement and UCC regarding memos

Restatement 131 – Requisites of a memorandum for non-UCC contracts – If you are within the statute, you need a writing that contains the following:

(1) It has to be signed on behalf of the party (signer) to be charged i.e. the defendant i.e. the person you are suing to enforce the agreement.
(2) It has to reasonably identify the subject matter of the contract
(3) Be sufficient to indicate a contract has been made or offered by the signer to the other party i.e. the defendant made an offer or sent a signed document.
(4) States with reasonable certainty the essential terms of the unperformed promises in the contract. NOTE: this is different than UCC, it is a more expansive requirement than the UCC.

Restatement 132 – as long as one of the writings is signed, there may be several unsigned writings that clearly indicate that they relate to the same transaction.

UCC 2-201(1) (Formal requirement, statute of frauds) – core provisions:

(1) Deals with goods for the price of at least $500
(2) Writing must be sufficient to indicate a contract has been made (same as restatement)
(3) Signed by party against whom enforcement is sought (same as restatement)
(4) Terms do not have to be exact but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing. You must state the quantity of goods in the contract! (different from restatement)

UCC 2-201(2) – special provision only in the UCC – for contracts between merchants (similar to 2-207(2)), they will be enforced if one of the parties sends a confirming memorandum, which is signed by the sender and indicates that a contract has been made (with a quantity specified), UNLESS written notice of objection to its contents is given with 10 days after it is received (otherwise, recipient cannot raise the statute of frauds defense). This is different because the recipient is the one against whom enforcement is sought. Also, the letter is not signed by the recipient. It makes a more flexible standard between merchants.

Contracts for Sale of Goods (UCC)

Azevedo v. Minister (P. 326) - As per the UCC code, normally a contract for goods greater than $500 is not enforceable unless in writing. However, if within a reasonable time a writing in confirmation of the contract is received by the receiving party (and they have a reason to know its contact), it is enforceable unless written notice of objection is given within 10 days after it is received. Also, the court states that

the statute of fraud is no defense to subsection 3c of the code which makes enforceable an oral contract "with respect to good which have been received and accepted. Thus, did Minister's accounting constitute confirming memoranda within the standards of the code (Yes) and were they sent within a reasonable time (Yes). Subsection 2 of UCC2-201 holds the recipient bound unless he communicates his objection within 10 days (Azevedo did not). The delay from November 9 to January 21 is not unreasonable, either. January 21 was when the account was nearing depletion.

- Illustration of UCC 2-201(2)
- Memo sent by Minister indicated the quantities! Under 2-201(1), Minister would lose. There was no writing that the buyer had signed. However, 2-201(2) corrects this.
- Although the letter was not signed by Minister, the Minister's letterhead was used. 2-201 (37) states "signed includes using any symbol executed or adopted with present intention to adopt or accept a writing". So letterhead is acceptable.

Problem 1 (P. 333) – this is one of the exceptions to the statute of fraud. However, the UCC applies here under 2-201(3) (exceptions to the UCC 2-201(1) (NOTE –neither party is merchant) – (c) – with respect to goods for which payment has been made and accepted or which have been received and accepted. However, the car is indivisible and cannot be divided up for the $1000 paid. Some courts say this is sufficient for the exceptions, others say it is not.

Problem 3 – use 2-201(3)(a) – if goods are to be specially manufactured for the buy and are not suitable for sale to others (as in this case), and the seller has made a substantial beginning of their manufacture or commitments (as in this case), the contract is enforceable.

Admission That the Contract Was Made

Lewis v. Hughes (P. 341) - 2-201(3) a contract which does not satisfy 2-201(1) is enforceable if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise that a contract was made. Hughes made an involuntary admission on the stand and thus, 2-201(3) is satisfied.

- UCC applies here (it is a good). If you don't discuss payment terms, you go to the gap filler.
- This is an example of 2-201(3)(b). Hughes admitted that a contract for sale was made. He should have said they discussed the price but never reached an agreement on the terms. However, he admitted the agreement. It is immaterial if the agreement was oral or written.

Estoppel and the Statute of Frauds

Alaska Democratic Party v. Rice (P. 336) - The purpose of the Statute of Frauds is to prevent fraud by requiring that certain categories of contracts be reduced to writing. It was not intended, however, as an escape route for persons seeking to avoid obligations. Rice would be a victim of injustice if the promise was not honored. The promissory estoppels overrules the statute of fraud.

- This falls under the "one year" provision of the statute of frauds. Note: nothing about the arrangement says it has to be done by a certain period of time. So you could use that defense for Rice.
- However, court uses promissory estoppel to overrule the statute of frauds. Using restatement 139 (of which the first paragraph is similar to section 90), which deals with oral promises, it says that there must be even more proof of the reliance (must be significant enough) than a promissory estoppels in writing (under section 90). (c) the extent to which the action or forebearance corroborates evidence of the making ad terms of the promise, or the making and terms are otherwise established by clear and convincing evidence.
- Rice moved all the way to Alaska. This is compelling evidence that there was an underlying promise that she relied upon. If she had already lived in Alaska (or had family in Alaska), this may have caused her to lose the case.
- The key is that restatement 139 (oral promissory estoppels) is much harder to prove that restatement 90 (written promissory estoppels).

CISG and statute of fraud – there is no statute of fraud in the CISG!

Are electronic signatures recognized in the statute of frauds? Yes, they are the same as manual signatures.

The Parol Evidence Rule

Parol evidence rule (PER) applies before the written contract. After the written contract, modification take the place of PER

Can be tricky but only comes up as an issue in a very narrow class of situations.

PER deals with oral dealings (or prior written dealings that are not contracts) either contemporaneously or before the written contract. Finder of fact must decide if the court will hear testimony about this oral dealings. If theses oral dealings happen after the contract, PER is not relevant.

"total integration": The parties intended that the written contract contained EVERYTHING the parties agreed to. If the court finds total integration, it will not allow the oral evidence to be submitted to the finder of fact. This finding is done as a matter of law!

"partial integration": The parties intended that everything contained in the agreement is the final word on the subjects contained in the agreement. Whether the oral evidence is submitted to the finder of fact is if the prior oral agreement contradicts what is in the contract. If the oral agreement does contradict, the court will not allow finder of fact to hear the information. If the oral agreement does not contradict, the court will allow the finder of fact to hear the testimony.

The Application of the Rule

Traudt v. Nebraska Public Power District (P. 349) - The easement signed by the plaintiffs calls for a total payment of 1k. The court says that this instrument is complete on the subject of consideration to be

paid for the easement. Thus, any contemporaneous talks regarding consideration do not apply. The oral agreement was not for a separate consideration for an additional payment. "the chief and most satisfactory index for the judge is found in the circumstance whether or not the PARTICULAR ELEMENT OF THE ALLEGED EXTRINSIC NEGOTIATION IS DEALT WITH AT ALL IN THE WRITING."

- Easement is the right to use some portion of the land. Easement of land is within the statute of fraud (it is a sale in the interest of land).
- The oral promise to pay extra if the company gives other people more money, it the statement in question. Is it governed by the PER? If yes, the testimony should be given to the finder of fact. The court will make a determination (as a matter of law) if the written contract was "integrated" (i.e. final and complete).
- Even if the court decided there was "partial integration", the oral agreement contradicts what is in the written contract. The court did not allow the finder of fact to hear the testimony.

<u>How does the court determine total or partial integration?</u>

Common law originally gave many tests. The Restatement and UCC has boiled down the tests considerably.

Most common tests (P. 355):

(1) Appearance test: court bases integration on how the contract looks (not a very complete test…very subjective)
(2) Separate consideration test: court looks at to see if the oral agreement furnished separate consideration in addition to the consideration of the written contract. Ex: party also agrees to sell the easement to another part for a separate consideration.
(3) Natural omission Test: court looks at the subject matter of the alleged prior agreement. If the subject matter may naturally be made in a separate agreement, it is admissible. Hard to admit (favors party that wants to keep testimony out).
(4) Certain Inclusion Test: Unless the court can say that the subject matter of the prior agreement would certainly have been included in the final contract, it is admissible. Very easy to admit (favors the party that wants to include the testimony).
(5) Writing omission Test: If the subject matter of the alleged prior agreement is not mentioned in the final contract, the prior agreement is admissible.

Most often used are 2,3, and 4

Restatement version of PER (Section 216): (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated (i.e. total integration)

216(2) tells what test to use to test integrations: An agreement is not completely integrated if the writing omits a consistent additional agreed term which is either agreed to for separate consideration

(Separate consideration test), or such a term as in the circumstances might naturally be omitted from the writing (Natural omission test)

Masterson v. Sine (P. 357) - The option clause does not state that this is acomplete agreement. The option is silent on the question of assignability. The oral agreement is "a collateral agreement such that alleged might naturally be made as a separate agreement." The trial court should not have excluded the evidence that the parties did not want the option to be assignable to other parties.

- Materson's trustee in bankruptcy wanted the house so they could sell it and use the money to pay off Masterson's creditors.
- Both parties wanted to keep the house in the family so they made a separate oral agreement.
- Judge Traynor did not think too highly of the PER. He thought that you shouldn't keep testimony from the finders of fact unless absolutely necessary. Traynor prefers test (3) and (4), but really likes (4) because that test admits the testimony most easily. The case is not one in which the parties would certainly have included the collateral agreement in the deed. If a test can't be kept out by (3), it definitely cannot be kept out by (4).
- To prevent any previous oral agreements to be added, you should use a clause in the written agreement (called the merger clause): See P. 361.

UCC version of PER

For the most part, it is the same as Restatement.

UCC 2-202: partial integration is referred to as "final expression". If found, you can hear evidence of consistent, additional terms. The final expression cannot be contradicted by evidence of any prior agreement but may be explained or supplemented by: (a) (b). Total integration is referred to as "complete and exclusive statement" (b). If found, you cannot hear evidence of consistent additional terms (same as restatement)

Difference between UCC and Restatement is in 2-202(a) – regardless of integration, the court can always hear testimony regarding "course of performance, course of dealing, or usage of trade (Section 1-303)."

Course of performance: behavior of the parties during the contract at issue.

Course of dealing: how the parties have behaved with each other IN PRIOR CONTRACTS

Usage of trade: what are the common arrangements within the industry.

Tests for UCC integration: If the additional terms are such that, if agreed upon, they would have certainly been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact. This the hardest test to keep the evidence from the trier of fact. Test (4)

The UCC Parol Evidence Rule – Trade Usage, Prior Dealings

Ralph's Distributing Co. v. AMF, Inc. (P. 361) - This case is governed by UCC. Ralph's claim that by including the designated sales territory in franchise agreements, the parties intended to make Ralph's sole distributor. Even if that did not happen, they did so in subsequent oral modifications of the 1968-69 franchise agreement. Courts found that the contract was silent as to whether or not Ralph's was exclusive distributor in that territory. Therefore, Ralph's course of performance and usage of trade evidence does not contradict any explicit contractual term. This parol evidence should be admissible. There was testimony and evidence that support the fact that Ralph's was the exclusive dealer of the ski-daddlers. There is a genuine issue as to whether the parties intended to include an exclusivity term.

- Ralph's want to introduce information about usage of trade and course of performance. Court stated that even if the contract is total integration, the usage of trade and course of performance must be heard.

Columbia Nitrogen Corp. v. Royster Co. (P. 365) - Columbia alleges that, in light of the usage of the trade and course of dealing, there was no duty by Columbia to accept at the quoted prices the minimum quantities stated in the contract (court agreed that evidence was improperly excluded to show this). Court held that contracts for materials in the mixed fertilizer industry are mere projections to be adjusted according to market forces. While evidence of usage of trade and course of dealing should be excluded when it cannot be construed as consistent with the terms of the contract, the contract does not expressly state that course of dealing and usage of trade cannot be used to explain or supplement the written contract. Contract is also silent about adjusting prices and quantities to reflect a declining market. The default clause of the contract also only refers to the failure of the buyer to pay for delivered phosphate. The contract failed to state any consequences of Columbia's refusal to take delivery.

- Columbia wants to introduce course of dealing and usage of trade to justify lowering their amount to buy. Previous dealings show that, when the roles were reversed, Royster frequently lowered their amount and price that they wanted to buy.
- To fix this, the parties should have put a clause in the contract to exclude course of dealing and usage of trade from being looked at.

Condition Precedent, Fraud and the Parol Evidence Rule

Smith v. Rosenthal Toyota, Inc.

- The PER does not apply to an oral condition preceding the written agreement that Smith was not bound to by the car unless his wife said O.K. Even though it is a prior, contemporaneous agreement, the courts use a judicial exception regarding oral conditions precedent to formation as a common law tool to get around the PER.
- Another common law exception is that courts will always hear evidence of fraud and not use the PER.
- Another common law exception is if there is a term in an agreement that the parties differ on what it means. In this case, the court does not use PER.

Modification of agreements – UCC version (2-209)

Section (1) - An agreement modifying a contract needs no consideration to be binding (this is different from the common law). This usually causes no problems.

Sections (2)-(5) are controversial, however.

If the parties have a clause in a contract saying "any modification of the contract must be in writing and signed by both contracts" (clause is referred to as "No Oral Modification (NOM)), 2-201(2) says that any oral modification is not effective. Courts will enforce the NOM clause and, thus, you do not have to look at 2-201(3). NOM clauses have become boilerplate.

UCC - When we have a modification, we don't worry about consideration. We look at if the modification is in writing. If there is an NOM clause, the modification must be in writing. If there is no NOM, we look at 2-209(3) to see if it must be in writing.

2-209(4) – if you cannot win under section 2 or 3, an attempt at modification can operate as a waiver (i.e. the party waives any right to terminate the agreement).

2-209(5) – parties can retract the waiver by reasonable notification unless the other party has relied on the waiver.

If the merchant gives a non-merchant a contract with NOM clause, 2-209(2) says that the non-merchant must sign the contract to make it enforceable (similar to firm offers).

An NOM clause does not apply if an oral dealing happens that causes one party to rely on another (this is considered a waiver). The party who gave the waiver is allowed to retract the waiver if the other party does not rely on the waiver, however. A waiver is another way of saying "I agree to the oral agreement we have made changing the terms of the contract."

Ex: Buyer orally contracts and requests seller delay delivery of goods for 2 weeks (i.e. the buyer waives the right to receive the goods on time). There is an NOM clause. If the seller relies on this delay, the buyer cannot retract the waiver and say he wants the goods earlier than 2 weeks. If the seller does not rely on the delay, the buyer can retract the waiver.

Zemco Manufacturing, Inc. v. Navistar International Transportation Corp (P. 369)

- Zemco and Navistar had a written agreement between them. It was a requirements contract (zemco had to supply all requirements of Navistar).
- A new company stole Navistar's business from Zemco. Zemco says Navistar violated the agreement. This agreement was renewed annually through oral agreements, however. This renewal is a modification because it modifies the term of the agreement (the year it starts and ends).
- Navistar said the modification was not enforceable because of 2-209(3) says that the requirements of the statute of fraud must be satisfied if the contract is modified within its

provisions (this is a good over $500 so it is in the statute of fraud). There is a dispute among courts regarding this section. **Most courts** (including this one) say that any modification of an agreement under the statute of frauds must be in writing, also. A minority of courts say you must look at what term is changed and, if you look at the original agreement, does this term fall under the statute? See 2-201(1) – the written agreement must only state the quantity of goods. Thus, in the minority's rule, only a change in quantity must be in writing.

- Note: you could say that, if the contract is modified to exclude the statute of frauds (i.e. the price of goods falls below $500), the modification then does not have to be in writing.
- One exception to the rule that a quantity does have to be stated if it is a requirement contract (as in this case) or outputs contract.
- The other dispute is whether the document that Navistar produced (a printout) was signed by Navistar (as it has to be in order to bring the statute of frauds against a charged party).

Interpretation

Latent Ambiguity - Raffles v. Wichelhaus (P. 410)

- zRestatement 20 – if the parties have attached materially different meanings to their manifestation, and neither party has either way to know of the disagreement, there is no contract. If one party knows about the difference and the other doesn't, restatement protects the innocent party and no contract is formed.

Mistake

Restatement 151 - A mistake is a belief that is not in accord with the facts.

Two kinds of mistake cases:

(1) Mutual Mistake – a mistake as to a basic assumption on which the contract was made which has a material effect on the agreed exchange of performances (i.e. does the difference matter).
(2) Unilateral Mistake

Mutual Mistake – Restatment 152: the contract is voidable by the adversely affected party (i.e. the party can say either he can go through with this or he doesn't) UNLESS he bears the risk of the mistake under Restatment 154.

Restatement 154 – You bear the risk of the mistake when (1) the risk is allocated to him by agreement of the parties (i.e. you will take part in this agreement no matter what) OR (2) the party is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts but treats his limited knowledge as sufficient ("conscious ignorance") OR (3) the risk is allocated to the party by the court on the ground that it is reasonable to do so.

Mutual Mistake

Hoell v. Waters (P.413)

Unilateral Mistake – Restatement 153 – For a mistake of one party at the time the contract was made as to a (1) basic assumption on which he made the contract has a (2) material effect on the agreed exchange of performances that is adverse to him, the contract is voidable if he does not bear the risk of the mistake under the rule stated in 154 and: **(a) (b)**

Harder for a party to void the contract in a unilateral mistake because the party who made the mistake must show that the risk of the mistake was not allocated to him (same as mutual) PLUS… **(a)** the effect of the mistake is such that enforcement of the contract would be unconscionable (equivalent to a grave injustice) or **(b)** the other party had reason to know of the mistake or his fault caused the mistake

Mistake in Expression

Anderson Brother's Corp. v. O'Meara (P. 421)

- Buyer bought the product for a different purpose than designed (the seller was not aware that they wanted to buy the product for this purpose). After the product did not work for the buyer's intended purpose, they wanted to get their money back.
- This is a unilateral mistake as the seller did not know the purpose for which the buyer was going to use the product. Only the buyer made a mistake.
- Court said that the buyer proceeded with conscious ignorance. Thus, he bore the risk of the mistake. Thus, the contract is enforceable.
- If the seller was told by the buyer of the intention to use the product for the alternative and relied on the seller's expertise, 153(b) may apply. However, there may be a breach of the implied warranty of merchantability as the seller did not say that this product was not good for that purpose

Mistake in Offer

Speckel v. Perkins (P. 418)

- There was a mistake in the offer in this case. With a mistake in offers, there is never formation of an agreement. The offer and acceptance never matched up. The plaintiffs lawyer knew that the defendant made a mistake in putting the offer of $50k instead of $15k.

Unilateral Mistake – Release

Lanci v. Metropolitan Insurance, Co. (P. 425) – deals with mistake in insurance policy settlement.

- There was a unilateral mistake because the party was under a false assumption as to what the limits of the insurance policy were (the other party knew the correct limit). The party wanted to void the settlement made due to the mistake. The contract is voidable because the insurance company had reason to know of the mistake.

Releases – "Unknown Injury"

LaFleur v. C.C. Pierce Co. (P. 427) – another insurance policy settlement.

- In this case, the insurance company retained a "release" stating the plaintiff cannot sue under injury if they take the settlement. After the initial injury, he took a settlement. However, after the settlement, the condition got much worse and the plaintiff wanted to void the "release" to get more money. Insurance company said no.
- The court does not go through the typical "mistake" analysis (even though you could look at this as a mutual mistake). Instead, the court interprets the language of the "release." Court said that the release protected against "known injuries" but not "unknown injuries". If the release had different language, they could avoid the mutual mistake.

Unilateral Mistake – Clerical Error

First Baptist Church of Moultrie v. Barber Contracting Co. (P. 429)

- Contractor made a bid but made a mistake in the bid. They refused to sign the contract. They said that the agreement they made on the price should be void. This is a unilateral mistake.
- The plaintiff could prove a unilateral mistake by showing the owner should have known of the mistake by looking at the other bids and seeing that they were so much higher than the incorrect bid. You could also show that there was a grave injustice (unconscionable) because the contractor would suffer a huge loss.
- Court ruled that this was a unilateral mistake and the contract was voidable.

Mistake of Value

Estate of Nelson v. Rice (P. 434)

- Estate brought in an appraiser to judge the value of goods in the estate. The appraiser, however, could not appraise fine art and thus, did not appraise a painting.
- A buyer bought the painting for $60 and found out that the painting was worth much more. He then auctioned the painting for $1million. Estate sued saying there was a mistake in value by both parties (i.e. a mutual mistake).
- Court said this was a mutual mistake. Case boils down to whether the estate bore risk of the mistake. There was not much of a contract so it is unlikely it allocated the risk to the estate. Does "conscious ignorance apply"? (i.e. did the estate know enough to know that they were ignorant?) They did have conscious ignorance because they brought in an appraiser but did not have the painting appraised. Thus, they knew they did not know enough.

Note 1 (P. 436) – Seller sold a stone for significantly less to the buyer. Court said that the buyer was not an expert in uncut diamonds and there was no evidence of fraud. Both parties knew they didn't know the price. Thus, there was no mutual mistake. Thus, the contract was not voidable.

Note 3 (P. 436-437) – Seller sold a cow for a price, believing it was fertile. Buyer later found that the cow was sterile. This contract is voidable because there was a mistake in what the seller and buyer knew. Thus, there was a mutual mistake.

Interpretation

Standards of Interpretation

Mellon Bank v. Aetna Business Credit Corp. (P. 393) - Insolvency is an established term and the parties must be bound by the objective manifestations of their intent. The court should not have excluded liabilities of the borrower in the agreement. The condition for insolvency was placed in the contract and should be followed.

- Aetna says that, once you have built the building, we will give you 2.5 million (this is called a permanent loan). The borrowers then go to Mellon to get a 2.2 million "short term" (construction) loan to actually build the building. Banks prefer short term loans and insurance companies prefer long term loans.
- The 3 party agreement says that Aetna will give money to the borrower in order to pay the short term loan off. Mellon and Aetna agree that Aetna will only pay under certain conditions. Aetna says that these conditions were not satisfied and, thus, they will not pay Mellon.
- The main issue is "what does insolvency mean?" There are two ways to be insolvent: (1) liabilities exceed their assets and/or (2) inability to pay debts. The two parties disagree on what is considered a "liability."
- Mellon said that the contract says you have to look at the parties liability EXCLUDING the current project being built. Aetna says that you have to include the current project.
- Unless the term is vague, the court will usually not allow extrinsic evidence. How do you determine if something is "vague"? In many cases, the courts will not be able to tell if a term is vague until they hear the extrinsic evidence. The judge will usually hear the evidence and, if both interpretations of the term are plausible, the judge will allow the jury to hear both interpretations.
- The judge had to decide who bears the risk of the construction project not succeeding. The judge determined Aetna bore the risk and that is why they added the insolvency clause in the agreement (against Mellon's objections). As the project did not succeed, if Aetna had paid Mellon, the loan they had with the borrowers would automatically go into default as the borrowers would not be able to pay.
- The PER is inapplicable to questions of interpretation. Thus, all prior oral dealings are allowed to be heard by the court.
- Ultimately, you have to look at the intention of the parties and all evidence to decide what the ambiguous term means.

Rules Guides and Maxims (P. 402-403)

Contra Proferentem – If the court is unsure about what the parties meant, they will give the benefit of the doubt to the party that didn't draft the document. To avoid this, put a provision that states, if there is a future ambiguity, the contract will not be held against the drafting party.

Expressio Unius Est Exclusio Alterius – If you make a list in the contract (Ex: you shall not do the following things…), unless you indicate otherwise, any things not specified are meant to be excluded. To avoid this, state that the list is "not limited to the following."

Ejusdem Generis – Similar items can be interpreted as being close enough to the items in the list to include these items.

Vague or Equivocal Meanings

Frigaliment Importing Co. v. B.N.S. International Sales Corp. (P. 405) - Defendant states that chicken is any bird of that genus that meets the specifications of weight and quality, including "stewing chicken" or "fowl". See bottom of P. 406 for german translation argument. The court followed the terms that the Dept. of Agriculture used for Chicken. Plaintiff should also have known that it would be impossible to obtain 2.5-3 pound chicken for broiling and frying at the price they were sold for.

- Today, this case would be decided under the CISG. However, CISG did not exist at the time.
- Usage of trade supports the plaintiff's view. However, the defendants were new to the industry and was unaware of the usage of trade. If the defendants were experienced in the industry, they may have well lost this case.
- The USDA term for chicken support the defendant's stance.
- The court went with the broader definition of the term "chicken" as the buyer had not overwhelmingly proved that the narrower definition is needed.

Abuse of the Bargaining Process (P. 439)

Reasons why a court may not enforce a contract (from bad behavior to neutral behavior):

- Physical duress ("gun to your head"- contract is only voidable by the person with a gun to his head)
- Improper threats (Restatement 175, 176)
- Fraud (party induces the other person to make a mistake even though they know their statements are false)
- Misrepresentation (the party may not know that their statements are false when making them to the other party – however, a reasonable person would be induced into the contract when the statement was made to them)
- Undue Influence (very narrow set of circumstances – the nature of the relationship is such that one party trusts the other party to make a good contract but this does not happen),
- Unconscionability
- Bad faith
- Public Policy (courts will not enforce the contract due to public policy concerns)

Duty to Read

Party does not want contract enforced because they did not read part or all of the contract.

Magliozzi v. P&T Container Service Co., Inc. (P. 441) - The initial agreement between P&T and Crusader had no imdemnity agreement in the letter. However, on each pick-up order ticket, there was a clause on the back for indemnity. The court found that the pickup ticket does not operate as a modifications. The pickup ticket makes no reference or language on the face of the ticket to any terms on the reverse of the ticket. P&T asked that 2-207 must be followed but this is not allowed because the contract was formed prior to any of these pick-up tickets.

- As the indemnity clause was on the back of the ticket, a reasonable person would have no reason to know to look on the back for a clause. As far as Crusader knew, there was nothing on the back. There must be some notification that there is something to read (not just a receipt of pick-up).

Problem 1 P. 443 – To avoid people not reading the ticket/receipt, have a big sign that people cannot miss erected in your parking/delivery area informing them of the policy.

Standardized Contracts – The "Reasonable Expectations" Solution

Max True Plastering Co. v. United States Fidelity and Guaranty Co.(P. 444) - If the insurer creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy. Only under unambiguous terms or contracts containing unexpected exclusions arising from technical or obscure language should this expectation be followed, however. The court agrees.

- Fidelity bond – a type of insurance contract stating that, if you suffer a lost based on the dishonesty of your employees, we will cover the loss.
- Insurance company said that this particular loss does not apply as it was not blatantly stealing money but, instead, diverting money to a new company. There was a question for the court to decide if this instance applies to the insurance policy.
- In certain circumstances, you must look at, not what the contract said, but what a reasonable person (in the position of the insured) would expect in an insurance policy
- Adhesion contract – A contract between parties where one party has a significantly higher bargaining position. It is a "take it or leave it" policy. This is a frequently used contract.
- Reasonable expectation policy requirement – (1) adhesion contract, (2) ambiguity in the contract OR complexity language that a reasonable person would not understand. If these conditions are satisfied, you may use the reasonable expectation policy, regardless of the contract language.
- In a minority of courts, they will take the reasonable expectation policy and apply it to contracts that are not insurance policies. This does not happen often, though.

From Fraud to Unconscionability

Germantown Mfg. Co. v. Rawlinson (P. 450)

- Germantown violated almost every single abuse of the bargaining process.
- This company has the same coverage that USF&G had.
- The issue in this case is about the second note. It did not specify the amount of money but it did describe a mechanism to arrive at an amount. Ms. Rawlinson was told the amount of the second note would be small.
- She alleges fraud (misrepresentation by a statement not in accordance with the facts) – this occurred by the mis-statement that the amount of the second note would be nominal. A misrepresentation is fraud when he knows or believes that the assertion is not in accord with the facts (162(1)(a). See (b) and (c) for the other ways a misrepresentation is fraudulent. The misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent (162(2))
- Restatement 164(1) – If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient. Not every misrepresentation allows for the contract to be voidable. The misrepresentation must either be fraudulent (bad faith) or material (good faith but still voidable).
- She also alleges duress by (improper threat) – Restatement 175(1): If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. Restatement 176 – tells what an improper threat is.

Duty to Disclose (P. 460)

Hypothetical – A person applies for a loan but, in the process of review, he loses his job. However, he does not say anything to the bank about missing their job. Is this "non-disclosure" considered a misrepresentation? Yes. Restatement 161 – A person's non-disclosure of a fact to him is equivalent to an assertion that the fact does not exist in the following cases only: (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material. See (b)-(e) for other situations when non-disclosure is equivalent to an assertion.

If a person discovers that there is a valuable mineral storage on the land through his own research and he does not disclose it, 161(b) may apply – where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to failure to act in good faith and in accordance with reasonable standards of fair dealing. However, it is unlikely that it would apply as going out and doing their own research is not bad faith. He is not required to tell all his research to the other party.

If the person did not do research but, instead, found out about the mineral storage from a neighbor but does not disclose it, that may be bad faith. If you did research and trespassed on the land to do this, it may be bad faith. It is a fine line.

The Unconscionability Analysis

Party only wants part of the contract not enforced, not all of the contract.

It is embodied in the UCC 2-302 and Restatement 208. However, these provisions do not define unconscionability. Statutes do not define this either. It is up to the courts and is a matter of LAW.

Williams v. Walker- Thomas Furniture Co. (P. 461) - The contract was commercially unreasonable and, thus, the party had little bargaining value or real choice. Thus, he most likely did not consent to the terms

- The agreement was "unreasonably favorable" to Walker-Thomas. 2-302(1) says that, if a court finds that the contract is unconscionable, the court may refuse to enforce the contract completely OR only refuse to enforce the unconscionable clause OR limit the application of the unconscionable clause. 2-302(2), when it is claimed that a clause may be unconscionable, the parties will be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
- Cross-collateralization: as long as you are making payments on some property, all properties you have acquired from us are collateral in case you default on the debt. To stop making the properties collateral, pay off everything and then wait to buy more items.
- Walker-Thomas could argue that this practice is actually the least costly way for the consumer to obtain these goods. If this was not done, Walker-Thomas would have to increase the prices of all goods or increase the interest charged to cover their expenses.
- 2 types of unconscionability: procedural (ex: contract of adhesion is all that is needed to prove procedural unconscionability (this is the view of the 9th circuit, most courts require more)) and substantive
- Many courts say you need both procedural and substantive unconscionability.

Ingle v. Circuit City Stores, Inc. (P. 465) - A contract to arbitrate is unenforceable under the doctrine of unconscionability when there is both a procedural and substantive element of unconscionability. Circuit city had both elements

- Court said it was unconscionable that all claims by the employee must be handled by arbitration. Also key is that there is no mutuality of conditions between Ingle and Circuit City. Many provisions apply only to the employee and not to Circuit City.
- Supreme court has recently overruled states by saying federal law allows for arbitration clauses.

The Pervasive "Good Faith" Requirement – 1-201(20); 2-103(1)(b); 1-304; Restatement 205

Market Street Associates v. Frey (P. 473) - You could argue both ways (that Market Street was acting in good faith or was not.

- JC Penney entered into this "sale and leaseback" agreement with Pension trust in order to obtain future loans for improvements/construction

- This case deals with contract performance, not contract formation.
- The issue is: what is the obligation of Market Street in regards to telling the pension trust about the provision in the contract. The judge tries to analyze the motivation of Market Street in the case. Was Market Trust trying to trick the pension trust by not informing them of the provision or was Market Street performing the contract in good faith? You can make persuasive arguments both ways.

Agreements Against Public Policy – "Illegal Bargains"

Public Policy in Legislation – Regulatory vs. Nonregulatory

U.S. Nursing Corp. v. Saint Joseph Medical Center (P. 482)

- Issue is: Can the hospital terminate the contract without following the "seven day" clause? The hospital refused to follow the clause because U.S. Nursing did not obtain a license.
- Restatement 181: U.S. Nursing was prohibited from performing their services because they had no license (requirement). The "promise in consideration of doing that act" (i.e. terminate and give 7 days pay) is unenforceable on the grounds of public policy if: (a) the requirement has a regulatory purpose AND (b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.Court ruled that the nursing requirement is regulatory (and not just simply revenue raising). The statute's primary purpose is to assure that the nursing company will employ the proper staff to perform their duties.
- If the purpose of the statute was not regulatory, the hospital would have to pay the money.
- However, as the court had ruled that the statute was regulatory, it must look at section (b) to see if the promise was enforceable. Was the interest in enforcement of the promise clearly outweighed by the public policy behind the requirement? Court says no – the promise to pay the 7 days is not great as U.S. Nursing did not provide services. This 7 day payment is just a penalty and not a payment for services rendered.

Problem 1 (P. 487) – Promise should be enforceable as the purpose of the state requirement is not regulatory (it only serves the purpose to regulate the number of centers and not the quality).

Problem 2 (P. 487) – As the contractor got money (in the pre-payment) for no services, you could argue that the public policy does outweigh the interest in the promise.

Contracts in Restraint of Trade

2 types of restraint:

(1) Direct – two parties enter into an agreement to not compete with each other in a type of business. Also, one parties pays another party to not compete with them. DIRECT RESTRAINTS ARE NOT ENFORCEABLE.
(2) Ancillary – an agreement not to compete but the provision is part of a larger agreement between the parties. Typical example – covenants not to compete.

Fine Foods, Inc. v. Dahlin (P. 487)

- Fine Foods was buying the "intangible good will" of the other company – this includes the ability of the company to keep its client and provide its services. Fine Foods wanted to protect the intangible good will by entering Dahlin into a covenant not to compete.
- The first thing to decide if the person actually violated the covenant to compete. The court ruled that he did violate the agreement as the provision stated that "or otherwise engage" (look at principles of interpretation).
- You then look at Restatement 188 – A convenant is unreasonable if - (1)(b): the promisee's (Fine Foods) need is outweighed by the hardship to the promisor and the likely injury to the public. Court ruled that the promisee's need is not outweighed by the hardship to the promisor or injury to the public.
- The court had to look at the specific industry in question to look at its public policy implications.
- Restatement 188(2) – (a), (b), (c) – types of convenants to compete (ancillary restraints)

Boisen v. Petersen Flying Service (P. 491)

- This is distinct from Fine Foods in that the court finds there is no need for ANY covenant not to compete. Restatement 188(1)(a) – is the restraint greater than is needed to protect the promisee's legitimate interest.
- Boisen had not interacted with any clients and had not learned any trade secrets in his employment.
- The only thing that the covenant is protecting is having another competitor in the industry. Boisen could not exploit a previous relationship with the clients or exploit a trade secret earned.
- This is an unusual case. Usually, most employers have something that they need to protect.

Blue Pencil Rule (P. 496) – historically, courts would, instead of voiding the entire contract, void only the part of the agreement that it finds to be unreasonable.

Marriage Contracts

Wilcox v. Trautz (P. 496)

- Court said that, regardless of their co-habitation, the agreement was enforceable.
- You could argue that an improper threat was made on the plaintiff: Restatement (176)(2)(b). This may have helped the plaintiff to win the case.

Wagering

Metropolitan Creditors Service v. Sadri (P. 502)

- Casino should have sued the defendant in NV court and then, when it got judgment from NV, invoke the full faith and credit clause to get the money from CA courts. This likely would have worked.
- CA's public policy is to not give the casino the ability to credit customers for their debt.

- Problem 1 (P. 506) – As the act of gambling is legal in GA, there is no grounds to not split the debt
- Note 2 (P. 507) – Mere knowledge that the party is going to use the product for illegal purposes is not sufficient consideration to enforce a contract to sell the product. The other party must be shown to facilitate the illegal activities (i.e. the seller is getting money for the product AND will take a share of the money in the future that the product reaps).

Conditions, Breach, and Repudiation

The Nature and Effect of Condition

Restatment 224 – Condition Defined – A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

Disregard Condition precedent and Condition subsequent – these terms are no longer used in the Restatement

Condition - The party does not have to perform until the condition is met. It is not a breach of the agreement. While the seller does not have to perform since the condition is not met, he cannot sue for breach of agreement.

As opposed to a condition, a **promise** is something that, if not done, is a breach of the agreement. The seller can sue for not performing the promise.

If something is deemed to be BOTH a promise and a condition, it is called a **promissory condition**. The seller can sue the buyer for breach AND he does not have to perform if the condition is not met (he gets the "best of both worlds").

Highland Inns Corp. v. American Landmark Corp. (P. 509)

- The issue here is not whether a condition is made. The issue what the condition is referring to.
- The court determined that the parties have actually made an option contract through their condition.
- It is a question of what the parties intended. The parties intended for the buyer to not be obligated to get a mortgage. Getting a mortgage was a condition of the contract. If the party did not get the mortgage, however, the other party is entitled to the deposit. This is what the contract stipulates.
- If there is ambiguity in the contract, the court will hold this ambiguity against the drafter of the contract.

Interpretation – Promise or Condition

Howard v. Federal Crop Insurance Corp. (P. 515)

- There is no question that the provision not to plow the field until an insurance inspection occurs was in the policy and that the insured violated the provisions. The question is: what is the consequence of this violation?
- If the provision was a condition, the insurance company does not play the claim. The party has created a forfeiture on the policy.
- If the provision was a promise, the insurance company will still have to pay but they may be able to hold the other party liable for damages from plowing the crop.
- Restatement 227(1) – in case of ambiguity, the preferred interpretation is one that will reduce the obligee's risk of forfeiture

Main Electric, Ltd. v. Printz Services Corp. (P. 519)

- Clause of the contract could be considered a "pay if paid" clause – the general will pay the sub if the owner pays the general.
- Court, however, says this clause is a promise for the general contractor to pay the sub at a specific time. It is not conditional on the general contractor getting paid.
- Again, courts are hesitant to make a decision that will cause the sub to have a forfeiture on payments.
- If it was a condition, the sub would have to be concerned with the financial strength of the owner, not just the general. If the parties want this to happen, they have to make it clear in the contract that the sub bears the risk of owner default.
- Parties need to make it very clear that the clause is a condition.

Precedent vs. Subsequent condition – Restatement (Second) of Contracts Analysis

"Condition precedent" is now the same as a condition. Restatement 224

"Condition subsequent" is now the same as "event that terminates a duty." Restatement 230

Cambria Savings & Loan Association v. Estate of Gross (P. 527)

- The event that terminates the duty is the failure to get the disability insurance (condition subsequent).
- A condition is different because you are not obligated until the event occurs.

Condition of Personal Satisfaction

An agreement where a subjective standard is used to judge satisfaction. This is usually done for a product that is one of aesthetics. It must be a **good faith** honest subjective standard, however.

This is as opposed to an objective view, which are usually done for a commercial product.

Elec-trol, Inc. v. C.J. Kern Contractors, Inc (P. 531)

- In disputes between the owner and the general or the general and the sub, when an architect is brought in to judge the work done, the architect uses the **good faith subjective** standard in deciding.
- Restatement 228 – the objective standard is preferred but you can contract otherwise.

Express and Implied Conditions Distinguished

Express – Can be oral or written or done by conduct (although some courts will call conduct as an "implied in fact" condition).

Implied – a condition that the court imposes (also called "constructive" condition or "implied in law" condition).

A typical constructive condition is, if there is an exchange in promises, which promise (performance) goes first. In general, the default rule is that, if not clear, the court will say that each performance should happen simultaneously Restatement 234(1).

Restatement 234(2) – where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party (ex: sale of real estate or employer payment)

Bell v. Elder (P. 539)

- There are 2 promises in this case (buyer must obtain a permit and seller must furnish water and electrical power).
- Court ruled that both promises must be done simultaneously because this is not specified in the contract. As neither party performed their promise, "neither party could claim a breach by the other until the party claiming breach tendered performance of its concurrent obligation."
- The seller was in a position to perform (i.e. they had the water and electrical ready to be installed) but the buyer had not obtained the permit. The seller had "tendered performance" (i.e. said they are ready to perform) and this is good enough in this situation.

R.G. Pope Construction Co. v. Guard Rail of Roanoke, Inc. (P. 543)

- Guard Rail walked away from the job after Pope said that there would be a delay in the construction and then would not re-negotiate for a higher price. While, most times, a party cannot just walk away like that, the court said that there was a condition in the contract between Pope and Guard Rail.
- As the condition ("constructive condition of cooperation") said that Pope must provide the opportunity for Guard Rail to perform, and this condition did not happen (Pope delayed the construction), Guard Rail did not have to perform.
- The court imposed a constructive condition on the two parties.

Divisible (Severable) vs. Entire Contracts

Divisible – various performances are agreed to (i.e. you are delivering goods every month for a year or you are renting several signs for an advertiser), even though they are part of one contract, the renting of each sign is separate from the others.

What happens when there is a failure on one part of the contract?

Thunderstick Lodge, Inc. v. Reuer (P. 546)

- There was an initial lease with 2 additional 10-year options. This is in violation of a South Dakota statutes which says that you cannot have a lease for more than 20 years.
- Reuer (the owner) wanted to void the entire contract. The court, however, said that the contract could be enforced for the 20 years.
- The contract had a severability clause (saying to not throw out the entire contract if only one part is unenforceable). Two questions to ask whether there are severable actions: Are there corresponding pairs of part performances? (i.e. the lease for 10 years and the rent for 10 years) Are the parts of each pair regarded as agreed equivalents? (i.e. are the performances of equivalent value)
- Restatement 240 – part performances as agreed equivalents
- If one party had front-loaded or back-loaded the rent, this contract may not be so easily severable. The court may still have interpreted the contract as severable even if the severability clause was not in the contract.

UCC – Installment contracts

Same as severable contracts.

If you buy one piece of machinery and want to pay for it in installments, that is NOT an installment contracts as defined by the UCC.

UCC 2-612(1) (Installment contract) – a contract which requires delivery of goods in separate lots to be separately accepted. This has nothing to do with installment payments. It only deals with delivering goods in separate shipments. NOTE: the separate deliveries are NOT separate. They are one installment contract.

What happens if one of the parties makes a mistake on one of the installment (i.e. the seller makes a mistake in installment #2 shipment)? Generally, the contract still continues and installment #3 is still valid (UCC 2-612(2)).

UCC 2-612(3) – voiding the entire installment contract. There must be a severe mistake.

Breach

Three kinds:

(1) total and material breach – if the breach by the promisor is total and material, the promisee can withhold performance, terminate the contract, and sue for damages.

(2) material breach – the promisee can suspend performance, require the promisor to cure the breach, and sue for damages.
(3) immaterial Breach – the promisee can sue for damages (but they cannot withhold performance)

Materiality of Breach

Walker & Co. v. Harrison (P. 549) (First Restatement)

- This is a "lease purchase" – the lessee agreed to make 36 monthly payments and then they would own the sign (this is a non-UCC defined "installment contract").
- Lessee said that the failure to maintain the sign constituted a "total and material breach" by the lessor. Thus, he stopped payment and sued for damages.
- The court disagreed that this was not a total nor was it a material breach. The court said the lessee could have fixed the damages himself, the sign was still working. Thus, the lessee was still getting the benefits from the sign.
- While the lessee may be able to sue for damages, as it is an immaterial breach, they cannot withhold performance (i.e. stop payment).
- Restatement 241 – circumstances significant in determining whether a failure is material.
- Restatement 242 – circumstances significant in determining when remaining duties are discharged (i.e. is it a total breach)

Associated Builders, Inc. v. Coggins (P. 551) (Second Restatement)

- Agreement said that, if Coggins paid the last 2 installment payments on time, Associated would knock 20k off the payment.
- As Coggins paid the last installment payment late, Associated refused to reduce the amount by 20k.
- Court had to decide if the breach was material (Restatement 241). Court said that "slight delay of payment that causes on detriment or prejudice to the oblige is not a material breach." Associated could be compensated for the late payment, however, by receiving interest. The breach is not material, however, and Associated could not terminate the agreement.
- The only way Associated could say that this breach is material if the date they needed the money by was significant (i.e. the money was being used on that day for an immediate purpose).

Substantial Performance and Material Breach

Jacobs & Young, Inc. v. Kent (P. 557)

- Contract stated that all pipe must be from Reading. Plaintiff, however, did not use Reading for all of the pipe. It is undisputed that there is a breach of contract.
- The plaintiff argued that this was not a material breach, however, as the pipe used was not much different from the Reading pipe. Court said that it was not a material breach because they substantially performed their obligation.
- A material breach is not allowed if a party substantially performs their obligations.

- If the used of only Reading pipe was a condition, the owners would not have had to pay the remaining amount. The use of only Reading pipe, however, was a promise and the owners still have to pay.
- The parties should have said that the use of Reading pipe is a condition precedent to payment of the certain part of the contract. If this were the case, Kent would have won.
- "Excusing the non-occurrence of the condition" – the court will read the court as if the condition were never there. There are circumstances where a court will say that, even if the provision is written as a condition, they will still treat it as a promise (court may has used this if the parties in Jacobs had written their provision as a condition). See Restatement 229.
- Restatement 229 – Excuse of a condition to avoid forfeiture – If the non-occurrence of a condition would cause disproportionate forfeiture, a court my excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.
- It may also make a difference if Jacob was a willful and intentional breacher of the contract.
- Restatement 241 – a willful breach is not automatically a material breach. It is only one factor (241(e)) used to judge if it is material.

<u>UCC treatment of breach</u>

<u>The "Perfect Tender" Rule – Rejection- Revocation of Acceptance</u>

<u>Ramirez v. Autosport (P. 566)</u>

- The dealer obviously breached by not having the camper ready by the date stated. The Ramirez allowed them to fix the problem but during the second pickup there were wet cushions (still a breach)
- UCC is very broad in its definition of breach . UCC 2-601 (perfect tender rule): if the goods or the tender of delivery fail IN ANY RESPECT to conform to the contract, the buyer may (1) reject the whole; or (2) accept the whole; or (3) accept any commercial unit or units and reject the rest. Buyer can hold the seller to a "perfect tender"
- If the buyer rejects the good, go to 2-602: Rejection has to be within a reasonable time after delivery or tender. The seller has the right to cure the error (2-508) in some cases. If the rejection occurs before the time of performance is due, they have an absolute right to cure. If the rejection occurs after the time of performance and the seller has reasonable grounds to believe that their goods would be acceptable (for any reason), the seller has more time to cure the problem
- If the buyer accepts the good, go to 2-606: The buyer may accept if he fails to make an effective rejection (i.e. he takes the goods and walks away or he does nothing). After acceptance, the buyer can "revoke the acceptance" (UCC 2-608 – requires much higher threshold than outright rejection) if the non-conformity substantially impairs the value (i.e. it is a huge damage) and the buyer accepted the good on the reasonable assumption it would be cured or the buyer did not reasonably discover the non-conformity on acceptance (ex: if the dealer makes express assurances that the good is "perfect"). If these criteria are met, the buyer can revoke the acceptance and we move to rejection(2-602)/cure(2-508) options for the seller

- UCC 2-508 – Cure by Seller of Improper Tender or Delivery; Replacement

Repudiation

Before the time of performance has arrived, one of the party says (either directly or indirectly through conduct) that they will not be performing. Since the other party knows that a breach is going to be made, can they take steps prior to the performance due date to find another party? Can also be called Anticipatory Repudiation

Anticipatory Repudiation

Flatt & Sons Co., Inc. v. Schupf (P. 572)

- Plaintiff (buyer) sent letter stating that they would not be able to get zoning for the land they wanted to buy but that they still wanted to buy the land (at a lower price).
- Sellers did not want to sell for the lower price. Buyer came back and said that they would buy it for the original price. Seller said that they buyer was too late and that the buyer repudiated the contract when they said zoning approval would not be obtained and asked for a lower price.
- Restatement 250 – Repudiation is a statement by the obligor (the buyer) to the oblige (seller) indicating that the obligor would commit a breach. Restatement does not say that the statement must be clear and unequivocal. The restatement only goes by what a reasonable person would think.
- Appeals court said that a repudiation did not occur and interpreted the buyers letter as a request for modification and not a repudiation.
- Assuming it was a repudiation, the court says that the buyer can retract the repudiation when they agreed to buy it at the original price. Retraction is acceptable under Restatement 256 – if you notify the other party that you are retracting the repudiation BEFORE the other party had materially changes his position in reliance on the repudiation OR the other party indicates that he considers the repudiation is final, this retraction is acceptable .

UCC Repudiation clauses

2-610 – similar to Restatment 250. Also states that the repudiation statement does not have to be clear and unequivocable.

2-610 (Retraction of Anticipatory Repudiation) – same as Restatement 256

Repudiation by Good Faith Mistake

Chamberlin v. Puckett Construction co. (P. 579)

- Plaintiff (sub-contractor) made changes to the contract and initialed each change but refused to go forward until the president of the general contractor (defendant) initialed each change.
- General contractor then assumed that the plaintiff repudiated the contract and decided to go with another sub-contractor .

- Plaintiff argues that he thought, in good faith, that the contract would not be enforceable without the initials from the defendant.
- Court ruled that it was not required for the defendant to initial the changes and the plaintiff repudiated the contract.
- If you are not going to perform, and you are wrong, you will have repudiated the contract and you bear the risk.

Prospective Failure of Performance - Demanding Adequate Assurances

If you stop performance because you think the other party has repudiated, and you are wrong, then you actually have repudiated.

Party wants the other party to prove that they will not repudiate. If the other party cannot prove this, then the other party will not perform based on anticipatory repudiation.

Scott v. Crown (P. 581)

- Seller heard from the department of agriculture that the buyer had problems with making payments. The buyer had not repudiated or breached anything , though, as payment was not due yet.
- Seller had an option to stop performance (without repudiation) by UCC 2-609 (Right to adequate assurance of performance). If the seller has **reasonable grounds for insecurity**, he may demand assurance from the buyer and, until he receives the assurance, the seller may suspend any performance.
- The seller better be sure he actually has reasonable grounds because, if the court rules he does not, the seller will have repudiated.
- The seller has to give the buyer 30 days to give assurances. These assurances can be money or proof that you have the money. If assurances are not given within 30 days, repudiation by that party has occurred.
- If the seller asks for too much assurance, he may be in trouble too.
- The seller made an error in this case, however, by stopping performance AND THEN asking for assurance. The seller should have asked for assurance and then stopped performance.
- Note 3 P. 585 – Insolvency, by itself, is not an act of repudiation, as it is not a voluntary act. You must go through the mechanism of adequate insurance in order to declare the party as having repudiated.

Excused Conditions – Prevention, Hindrance, and Waiver

A court can read the contract and excuse the non-occurrence of the condition. The parties still have a claim for breach of a contract but they cannot say that the breach is a condition for not performing. Restatement 229 – if the non-occurrence of a condition would cause a DISPROPORTIONATE FORFEITURE, the court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange. This is a very high threshold to meet.

Rohde v. Massachusetts Mutual Life Insurance, Co. (P. 586)

- The insurance contract had a condition for the insurance company to evaluate the application in good faith. The condition that must be satisfied is for the insured to be judged as an "acceptable risk".
- The court is saying that the insurance company should pretend that the insured wasn't dead and go through the normal analysis of an insured's application as though he were alive. The company did not do this, however. They simply refused the application because of death.
- The court then read the contract as if the condition did not exist because the insurance company did not act in good faith (i.e. did not evaluate the application). Therefore, the insurance company must pay the insured.
- If an insurance policy states that the insurance company will issue a policy until they finish evaluating the application, they will be bound if the insured dies in that interim period. The court did not read the contract this way in this case. Instead, they said that the condition was not satisfied and they were bound, anyway.

Standard Supply Co. v. Reliance Insurance Co. (P. 589)

- A waiver excuses the condition. The party says(through words or actions) that they will perform anyway even though the condition has not been satisfied.
- Insurance clause stated that the building must be occupied in order for insurance to occur. An unoccupied building is a higher risk for insurance companies. This is a standard insurance clause.
- After the report was submitted by the inspector stating that the property was not vacant, Reliance asked Eaves to question the plaintiff about the name of the person who was occupying the dwelling. The plaintiff did not respond.
- Insurance company said that they were no liable because the house was vacant. Thus, the condition of occupancy was not satisfied. The court says that the insurance company waived the condition because they knew that the house was vacant (even though the report said the house was not vacant). The critical fault of the insurance company was that they asked Eaves to find out who was the tenant. Thus, they showed that they were unsure if the house was occupied and this constituted a waiver. Had they not raised the question of occupancy, they may have won the case.
- After this case, the second Restatement was issued which gave provision 84 – Promise to perform a duty in spite of non-occurrence of a condition (i.e. waiver of a condition) – a waiver is binding in spite of the non-occurrence of the condition is binding UNLESS (a) the occurrence of the condition was a material part of the agreed exchange for the performance
- The insurance company may have won using this provision as occupancy was a material part of the policy. The insured could prevent this by establishing that there was consideration for the waiver. Section 84 does not apply to waivers that are given by consideration.
- 84(2) deals with revocation of a waiver.

Rose v. Mitsubishi International Corp.

- Plaintiff had option to buy a deep water facility and entered into an agreement with the defendant to finance the purchase. One of the conditions for financing of the contract was that an insurance company would issue title policies indicating clear and marketable title to the parties once they purchase the party.
- The plaintiff, however, was unable to obtain a policy. The defendant then refused to provide the financing. Plaintiff said that the defendant waived the condition. The court applied 84(1)(a) and said that, even if the defendant waived the condition, the obtaining of a policy was a material part of the agreement and thus, the condition could not be waived.

Risk Allocation: Impossibility, Impracticability and Frustration of Purpose

Even though one of the parties did not perform, they had a good reason to perform and, thus, they should not be found to have breached.

These reasons tend to be on external events that occur.

Origins

Taylor v. Caldwell (P. 597)

- Plaintiff contracted to use a hall and garden for concert on 4 days. But, because the hall was destroyed by fire, the court found that an exception should be made to the old thinking that you must perform no matter what. The court ruled that the fire made the concerts an "impossibility" to perform.

Commercial Impracticability

Restatement 261 - A party's performance is made impracticable (easier than impossible) when, without his fault, the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.

You can void impracticability by allocating the risk to one party in a contract.

UCC 2-615 – Excuse by Failure of Presupposed Conditions – your performance cannot be unduly burdensome if an unexpected condition occurs – similar to Restatement. Misjudging market value fluctuations of a product is not considered a sufficient impracticability. Market price change is not normally considered a supervening event. However, if a war causes the change, that may be judged an impracticability

Transatlantic Financing Corp. v. United States (P. 604)

- Due to a war, the plaintiff had to change the route of travel and this increased his operating expenses by 10%.
- Was the changing of the route (1) a true impracticability, (2) did a supervening event occur that was unexpected and the non-occurrence with a basic assumption, and (3) was neither party allocated the risk to cause the impracticability?

- The court says that the mere knowledge that something may occur (the canal may be close) is not the same as being allocating the risk. Both parties can know that something could occur, thus, the risk is not allocated either way.
- However, as the plaintiff was aware that something may occur, they could have mitigated their risk by buying insurance.
- The higher cost coupled with the risk that the **plaintiff could have done something about it** does not make this situation impracticable.
- 2-615(b) – dealing with an event that affects only a part of the seller's capacity to perform, he must allocate production and delivery among his customers in a fair and reasonable manner.

Long Term Supply Contracts

Missouri Public Service Co. v. Peabody Coal Co. (P. 609)

- The plaintiff's claim for impracticability was simply a change in the market, not a supervening event. Thus, as there was no supervening event and the fact that they were simply losing money (not considered impracticable), this does not make it an impracticability.

Force Majeure Clauses

Clause used to void a judgment of impracticability by the courts and simply give one party any reason to get out of a contract. It is the parties way of keeping the courts out of judging impracticability.

Northern Indiana Public Service Co. v. Carbon County Coal Co. (P. 617)

- NIPSCO had a force majeure clause which allowed NIPSCO to stop taking delivery for ANY CAUSE BEYOND ITS REASONABLE CONTROL
- The court has to interpret the force majeure clause. The court says that the supervening force (County order) was not forcing NIPSCO to stop buying the coal. The force only said that, if they did buy the coal, NIPSCO could not pass the price onto the consumer. This is not covered under the force majeure clause. Thus, it was not an impracticability.
- The court does not use 2-615 due to the existence of the force majeure clause.

Frustration of Purpose

Krell v. Henry (P. 623)

- Famous frustration of purpose case.
- Hotel room booked for a coronation. Coronation was cancelled. Thus, the tenant is excused from booking the room. It makes no sense for him to perform. Thus, it is not impracticable, just frustrating
- If the coronation was simply re-scheduled for a different day, the tenant may still be excused as the hotel will get the same rate for coronation, just on a different day.
- Restatement 265 – Discharge by Supervening Frustration – a party's principals purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of

which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Pieper, Inc. v. Land O'Lakes Farmland Feed, LLC

- Contract drafting is critical to this case
- The Recital in the agreement shows the principal purpose in which the parties intended to enter into the agreement. The recital shows that the principal purpose of the agreement is for LOLFF to buy Pieper's pigs and ONLY Pieper's pigs AS LONG AS THEY HAD A THIRD PARTY BUYER.
- LOLFF was frustrated because there was no longer a third party buyer for the pigs. Thus, LOLFF had a frustrated purpose and was no longer obligated to perform.
- The recital was not a force majeure clause because both parties did not agree to the recital.

Remedies

Three interests in remedies that parties may pursue

- Expectations Interest (primary interest used) – interest that drives the typical remedy in most contracts. Party expects contract to be performed and they lost profits because the contract was breached
    - Specific performance - The remedy puts the party who did not breach in the position if the contract had been performed by forcing the party to perform. The ultimate expectation interest – it is the exception rather than the rule.
    - Damages – the typical expectations interest - gives money in order to bring the non-breaching party back to a position if the contract had been performed
- Reliance interest – If the court cannot calculate how much profit the non-breaching party has lost, the court will ask how much the party has spent in reliance on the contract. The court them gives money back to the party in order to restore them to the position they were in before the contract was agreed upon ("status quo ante").
- Restitution interest - The non-breaching party did not lose any profit or spent money in reliance on the contract, but the breaching party has profited off the agreement. The court calculates the benefit conferred on the breaching party.

The expectation interest and its limitations

The Foreseeability Limitation

Hadley v. Baxendale (P. 632)

- This case is very relevant to our common understanding of remedies
- There was a significant delay in the breaching party fixing the product. The non-breaching party relied on the repair to be done by a certain date.
- The breaching party could not operate the mill and thus had expected damages from the lost time (i.e. all of the profits lost).

- The court decided there ought to be limitations on the damage. They introduced the concept of "foreseeability". The breaching party has to know or have reason to know that these consequences would occur if they had breached.
- The court ruled that the breaching party would have no reason to know that the mill would be shut down had they not fixed the part on time.
- Restatement 351 – Unforeseeability and Related Limitations on Damages. (1) – statement of the principle. (2) – circumstances when loss may be foreseeable. If a party has reason to know (by a person telling them or seeing for themselves) that the results would occur, then they are foreseeable. (3) – court may limit the damages for foreseeable loss if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation
- General damages = damages that almost anyone would foresee
- Special damages = damages that only the breaching party would foresee

Spang Industries, Fort Pitt Bridge Division v. Aetna Casualty & Surety Co. (P. 637)

- Court said that, if 2 parties decide on a term of a contract at a time after the original contract is made, you judge foreseeability on the breach of this term AT THE TIME THE TERM WAS AGREED UPON, not the time of the original contract.

Consequential Damages – Hadley v. Baxendale and the UCC

Cricket Alley Corp. v. Data Terminal Systems, Inc. (P. 644)

- UCC 2-715 – Buyer's Incidental and Consequential Damages
  - Incidental damages(1) – damages that happen as a matter of fact during the sale of goods. They are standard damages (similar to general damages)
  - Consequential damages (2) – loss resulting from general or particular requirements
- Is the expenses incurred due to the failure of The DTS registers and Wang computers to be compatible (i.e. consequential damage)? Court said yes. The damages could be foreseeable by DTS.
- Cover – the buyer had to go buy a good because the seller didn't deliver. UCC 2-712 – (1) - a buyer may "cover" by making in good faith and without unreasonable delay any **reasonable purchase** of or contract to purchase goods in substitution for those due from the seller. (2) - The buyer may get as damages the difference between the cost of the cover and the contract price **together with any incidental or consequential damages** as defined in 2-715, but less expenses saved in consequence of the seller's breach.
- 2-713 – "Hypothetical cover" – the buyer really didn't go out and buy goods to cover but the court acts like they did. This is only used if the buyer actually didn't cover.
- 2-714 – Buyer's Damages for breach in regard to accepted goods – if buyer accepts the defective goods, the court has to decide what the difference in value is between the accepted defective goods and what goods they actually should have received.
- 2-706 – if the buyer incorrectly rejects goods, the seller may be able to resell the goods and could collect damages if they sell the goods for a significant discount than what the buyer had

originally agreed to buy the good at. THE SELLER CANNOT GET CONSEQUENTIAL DAMAGES. They can get incidental damages. This is different from the buyer damages as the buyer can always get incidental and consequential damages. This is due to the fact that the only thing the seller wanted was to just sell the good. IF they do resell the good, they are put back in the position before the original agreement.

- 2-708(1) – Seller's damages for non-acceptance or repudiation – similar to a hypothetical cover – the seller does not actually re-sell the good
- "Lost Volume seller" – where the cover does not work for the seller. Ex – when a seller mass produces an item, the fact that they will likely sell all products without one party breaching the contract, they still are down 1 sale because the buyer breached. NOTE: this does not work with specially made goods tailored to a particular buyer. 2-708(2) – description of the lost volume seller situation.

The Certainty Limitation

The Drews Co. v. Ledwith- Wolfe Associates, Inc. (P. 650)

- Builder of a restaurant was late in completing the project. Buyer of the restaurant wanted damages for profits that they would have made if the restaurant was completed on time. Court ruled that new businesses cannot recover for these kind of damages because they are too hard to calculate.
- New businesses can recover for lost profits. However, these are harder to calculate than for businesses that are established.
- Restatement 352 – Uncertainty as a limitation on damages – damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.

The Emotional Distress Limitation

Deli v. University of Minnesota (P. 654)

- Except in very specific situations (under contract), it is rare to recover damages for emotional distress. Restatement 353 – loss due to emotional disturbance – recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particular likely result.

The Mitigation Limitation - Avoidable Consequences

Soules v. Independent School District No. 518 (P. 658)

- The teacher that got fired and didn't take a crappy job somewhere else. She was wrongfully terminated.
- It is well-settled law in this state and elsewhere that in employment contract cases an employer is entitled to a reduction in the amount of the recoverable wage loss of a wrongfully discharged

employee if the evidence establishes that the employee made no reasonable effort to seek or accept similar employment.

- Restatement 350 - Avoidability as a Limitation on Damages
  1. Except as stated in subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.
  2. The injured party is not precluded from recovery by the rule stated in subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.
- If you don't take precautions to mitigate losses, your damages may be reduced.
- Here, the court believed that accepting a job at less pay is not undue risk, burden or humiliation.
- The more difficult issue here is how much to reduce her damages for failure to take the worse job.
- Because the job she lost was part time, she should not be penalized for working full time hours for less money. The court reduced the lost damages by one half.
- Three things here
  (1) you have to make a determination that they could have reduced their loss
  (2) when you do reduce the amount make sure they are of the same amount of hours - full v part time
  (3) If its a UCC issue, know that this issue is covered in the UCC.
- UCC 2-715(2)(a): Consequential damages . . . include any loss . . . which could not reasonably be prevented by cover or otherwise.
- Where a seller fails to deliver goods to a buyer and the buyer makes no effort to attempt to purchase similar products from a substitute supplier, i.e. the buyer makes no effort to "cover," the UCC clearly precludes recovery of consequential damages.

<u>Liquidated Damages</u>

<u>Lind Building Corp. v. Pacific Bellevue Developments (P. 666)</u>

- The case where the plaintiff didn't perform his end on buying land after twice getting a time extension.
- Liquidated damages are an amount that the parties agree on to mitigate the damages.
- Restatement 356 - Liquidated Damages and Penalties
  (1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
  (2) A term in a bond providing for an amount of money as a penalty for non-occurrence of the condition of the bond is unenforceable on grounds of public policy to the extent that the amount exceeds the loss caused by such non-occurrence.
- The principal that damages should be compensatory only is violated if substantial sums are recovered as liquidated damages in cases where there is no actual damage or loss as a consequence of the breach.

- Here the seller was greedy. As a result the court found a way to legitimately say, 'not only are you not entitled to recover the losses (because you made out just fine), you also have to pay their attorney fees.

UCC Liquidation or limitation of damages; Deposits

- See 2-718
- If you agree to other deals that compensate you the courts will not recognize your losses or award damages.

Expectation Recovery - Construction Contracts - Cost of Completion v. Diminution in Value

- Spoons example: (same as pg. 673)
- Builders cost = 90,000
- Contract price = $100,000
- Builder expense thus far $50,000, which the owner has covered.
- Now the owner kicks him off. How much has the builder lost (the expectation interest)? Contract cost - cost to complete. 100,000 - 40,000= 60,000 which is the 10K in profit, plus 50K in expenses.
- If builder breaches, the owner had to pay another company $60k to finish the project. The owner's expectation interest is the cost of the substitute company – the cost of the remainder of the project has the original builder completed the project. As he has already expended 50k,the owner would have had to spend 50k more in the original contract. Thus, 60k-50k = 10k (the amount extra the owner had to pay to have the contract finished).
- The concept here is that you are trying to make the builder or owner whole again. You are entitled to the profit (or loss from hiring another builder) regardless of how much you have performed if the other party has breached.

American Standard, Inc. v. Schectman (P. 674)

- The plaintiffs hired a company to clean the land off after they closed a plant. The defendant did most of the work, but did not grade the land. The issue is whether or not the general rule of damages for breach of a construction contract is that the injured party may recover those damages which are the direct, natural and immediate consequence of the breach and which can reasonably be said to have been in the contemplation of the parties when the contract was made.
- The courts are all over the place on this issue. This is just one case.
- It is at the courts discretion to rule on these types of cases. In many circumstances, what the party does after they have been breached is a good indicator of how it will go.
- That the fulfillment of defendant's promise would add little or nothing to the sale value of the property does not excuse the default.
- The court found that when a contract is substantially performed in good faith, the correct measure of damages for any defect would be the difference in value of the property as

constructed from what its value would be if the contract were properly performed.
The court found that in the instant case, the contract was not substantially performed and therefore, the correct measure of damages would be the cost of completion.

- The owner has a right to make "improvements" on his value, even if doing so would diminish its market value. The Df can't say this his performance would not be beneficial to the Pl. The Pl specifically contracted to have this done, so there is a value.

The Reliance and Restitution Interests

Reliance = payment of out of pocket expenses that someone incurred.

Restitution = simply having the breaching party pay back the amount of benefit they received.

CBS, InC. v. Merrick (P. 678)

- This case is about the screenplay and the dolt who dragged his feet on the show 'Blood and Money'.
- Merrick manipulated the whole thing such that nothing was ready at the time.
- What would CBS' expectations damages been? How much profit they would have made but who knows how much that would have been? Very difficult to tell.
- Is there a reliance interest here from CBS? Yes, they paid for the director and the screenwriter.
- Because we can't calculate the expectations damages, we look to the reliance interests. CBS is trying to recover the amount they paid.

Alternative Relief for Breach of Contract

Doering Equipment Co. v. John Deere Co. (P. 682)

- Doering was bitter because they were in a crappy deal that they undertook with John Deere golf care products. Apparently they were hired to sell the shit but nobody wanted it. The distributer (Doering) didn't want to buy more because they couldn't sell it. They wanted to terminate the entire deal right then.
- There were no expectation damages because they lost money every year. About ½ mill over 3 years. Obviously, they then asked for reliance damages. Reliance damages were their out of pocket expenses.
- Restatement 349 - Damages Based on Reliance Interest- As an alternative to the measure of damages stated in 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for preparation or in performance, but less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.
- Here, there was no casual connection between the breach and the loss JD is claiming.
- Also, there were no missed profits anyway. The product sucked and was costing money, not making it.

- The proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed.

United States v Algernon Blair Inc. (P. 684)

- A contractor sub-contractor issue
- When the general wouldn't pay for the crane, the sub walked off the job. The court determined it was the general's responsibility to pay for the crane, therefore they were in breach.
- The issue here is the sub would have lost 37K if they had completed the contract. Perhaps that is the real reason they walked. They estimate they had completed 28% of the job. There were some out of pocket expenses related to this work (reliance). But they still wouldn't have been ahead on this strategy. So they went to restitution interest. They conferred a benefit.
- Restatement 373 - The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.
- In the case of a contract on which the injured party would have sustained a loss instead of having made a profit, his restitution interest may give him a larger recovery than would damages on either an expectation or reliance interest.

Defaulting Plaintiff Recovery

Telespectrum Worldwide, Inc. v. Grace Marie Enterprises, Inc. (P. 688)

- Even though the plaintiff breached the contract, they were still owed money for services rendered. The plaintiff was entitled to restitution.
- Restatement 374 – restitution in favor of party in breach - party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance IN EXCESS of the loss that he has caused by his own breach.
- Computation is hardest in this case.

Problem P. 687

- Expectation interest = contract price – cost to complete
- Reliance Interest = out of pocket cost – any loss that you would have incurred had you completed the contract
- Expectation and reliance typically only used in breach of contract
- Restitution = amount of money put into the project
- Builder has agreed to build a house for O at a contract price of 100k. When the house was half completed, O breached the contract. B had expended 90,000 in labor and materials. The benefit conferred upon O at the time (in terms of the reasonable value of having another perform the work done at that point) was $90,000. If O had allowed B to complete the contract, it is clear that the cost to B would have been $180,000, i.e. a loss of 80,000. What would B recover under the expectation, reliance, or restitution interests?

- Contract Price = 100k. Cost to complete = 180-90(cost already put in by B) = 90. B had expended 90k
- Expectation interest = 100-90= 10k. Reliance interest = 90-80 = 10k. Restitution interest = 90k
- In this case, the builder should go after restitution interest. This is not always the case. Here, the builder made a bad deal

Quasi Contract

Anderson v. Schwegel (P. 689)

- This is a mutual mistake (both were mistaken as to the scope of the services).
- This is not a breach of contract but one party conferred a benefit and the other party was not compensated for the benefit.
- Normally, to decide the restitution for services, you look at the increase in value of the property by the services. However, in this case, the plaintiff specifically requested that the services be made to the property. Thus, they looked at the value of the services to decide restitution.

Estate of Frances Cleveland v. Gordon (P. 693)

- If money is given to a family member, typically this is done with the expectation that you will not get the money back. This is for public policy reasons.
- In this case, the niece clearly had in mind that she would be reimbursed and the aunt understood that the niece expected this. The court said that, even though there was no agreement, the niece could still be reimbursed for the money spent.
- Restitution theory is used to address an obvious injustice.

Specific Performance

The court requires you to complete be the contract by either performing something in order to complete a contract or being prevented from doing something as stated in a contract (injunction).

It is not the typical remedy! If there is an inadequate remedy of law (i.e. damages is not possible), specific performance can be mandated by the court. Typically used when there is only one type of special product available and no damages can be calculated for this product

UCC 2-716(1) – Specific performance may be decreed where the goods are unique or in other proper circumstances.

Limitations on Granting Equitable Remedies

Walgreen Company v. Sara Creek Property Company (P. 699)

- The question here is: What is the proper remedy in this case? Defendant wanted damages to be given to the plaintiff but plaintiff wanted an injunction.

- To decide damages, you would have to be able to calculate the profit lost by the plaintiff over the next 10 years if the other pharmacy was allowed to move in as well as the money that the plaintiff would make over the next 10 years if the other pharmacy was not allowed to move in.
- You also have to look at the cost of having an injunction vs. the cost of enforcing damages. If the cost of enforcing the injunction was so great, the court could decide to try and calculate the damages to the best of their ability.
- Court decided that damages could not be calculated with any degree of certainty and an injunction would not be that expensive to enforce. The court also says that, if the parties really want to avoid an injunction, they will sit down and come up with a settlement by themselves.

CISG view on scope of consequential damages

CISG 74 – uses the term "possible" consequence of the breach of the contract. This is easier to find than the restatement which uses "probable" – Restatement 351.

CISG view on Specific performance

CISG 46 – A buyer may require performance by the seller.

CISG 62 – a Seller may require the buyer to pay the price, take delivery or perform his other obligations

CISG 28 – a court does not have to offer specific performance unless it would do so under its own law. It can give damages.

Third Party Beneficiaries

A party who becomes a part of the contract after it originally has been formed. The third party does have rights in the contract but they are not identical to the main party's rights.

Origins

Lawrence v. Fox (P. 708)

- Fox is the promisor in this case (he was loaned the $300). Promisee is Holly (she loaned the money). Holly says that, since Holly owed $300 to Lawrence, Fox should just pay $300 to Lawrence (the third party beneficiary). Fox does not pay anyone.
- Can Holly sue Fox for the money? Yes. Can Lawrence sue Fox for the money. Yes.
- The third party beneficiary was intended to benefit from the original contract of Fox and Holly. Thus, to make things more efficient, the third party beneficiary (Lawrence) can sue the promisor (Fox).
- In this case, Lawrence is called the "creditor beneficiary".
- If Holly had told Fox to give the $300 to Lawrence just as a gift, Lawrence would have been called a "donee beneficiary".

- Restatement 302 – Incidental beneficiary is NOT a third party beneficiary. They have no rights in the contract. Intended beneficiary is equivalent to both the creditor beneficiary and the donee beneficiary. They are third party beneficiaries. An intended beneficiary exists if:
  (1) The performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary (debt - as in Lawrence v. Fox – the creditor beneficiary); OR
  (2) The circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance (gift - the donee beneficiary or if the whole contract is not about money but about services (i.e. delivery of a car)).

Test of "intention to benefit" – The Restatements

Problems P. 714

1. Harry is the promisor, Jeb is the promisee, and Jenny is the third party beneficiary. It falls under 302 (1)(b) because Harry did not have an obligation to pay jenny the money.
2. Big 10 is the promisor, Iowa is the promisee, and the sports memorabilia store is the third party. The sports memorabilia store is an incidential beneficiary as Iowa did not owe any money to the store and Iowa did not intend to give anything to the store as a gift.

Hickman v. Safeco Insurance Company (P. 711)

- The borrower gives lender (who holds the mortgage) money to hold and, when it is time to renew the policy, the money is used to pay for the policy. In this case, the policy for the house is under the name of the lender and NOT the borrower (homeowner). The house was lost. The lender negotiated with the insurance company for the money from the loss. The homeowner was given the excess money but decided that the lender did not get enough. They intended to sue the insurance company for more money.
- The insurance company is the promisor, the lender the promisee, and the homeowner the third party.
- Is the homeowner an intended beneficiary? Yes, under 302(1)(b), when you look at the policy. If the policy was for only the mortgage amount, the money would only have been intended for the lender and the contract would not have been intended for the homeowner. However, the policy gave the homeowner certain rights in the policy that showed the policy was intended to benefit the homeowner

Public Beneficiaries

Zigas v. Superior Court of the city and county of San Francisco (P. 718)

- Tenants lived in a building that the promisor owned (landlord). Landlord entered into agreement with the FHA (promisee) in which they agreed to keep the rent at a certain level in return for the FHA guaranteeing a loan to the landlord. Landlord ended up not keeping this promise. Can the tenants sue as third party beneficiaries?

- Court looks at: Shell v. Schmidt – Contractor was promisor, FHA was promisee, and 3rd party was home purchasers; Martinez – Socoma was promisor, Secretary of labor was promisee and 3rd was hard core unemployed in L.A.
- In this case and the 2 cases listed, the government has a claim against the promisor. Court ruled that this case is more like the Shell case, in which the court ruled that the 3rd party could sue the landlord. In both this case and Shell, the 3rd party was readily defined. The 3rd parties could not be defined in Martinez.

Owners and Subcontractors – Payment and Performance Bonds

Board of Education v. Hartford Accident & Indeminty Co. (P. 724)

- 2 bonds were issued – a performance and labor and materials bond. In both cases, the surety co. (defendant) was the promisor and the construction company is the promisee. In the performance bond, the Board of Education was the 3rd party. In the labor and materials bond, however, the labor and material company was the 3rd party.
- The Board of Ed. attempted to sue under the land and materials bond because the 3rd party in that case had been paid and had no reason to sue. Court ruled that Board of Ed. could not sue as they were not the 3rd party.

Owner-general-sub 3rd parties

In a general-sub case, historically, the sub-contractor is not a 3rd party in the owner-general contract (unless explicitly stated in the contract). Also, the owner is not a 3rd party in the general-sub contract (unless explicitly stated in the contract).

Vesting of Third Party Rights

Olson v. Etheridge (P. 731)

- Etheridge bought stock from Olson in exchange for cash, which etheridge would pay in installments.
- Later, Etheridge sold some stock to Engelhaupt in exchange for money. Engelhaupt would pay the money received to Olson's bank to pay down the initial agreement by Etheridge.
- At some point, Etheridge tells Engelhaupt to not pay Olson anymore and send it to a different bank that Etheridge owed money to. Olson objects to this and claimed he was a 3rd party beneficiary to the agreement between Etheridge and Engelhaupt. Olson said that his rights were "vested" in the agreement and Engelhaupt and Etheridge could not modify their agreement without Olson's agreement.
- Historically, the courts have followed Olson's contention that a party who is vested has rights and must agree before the parties in the contract modify the agreement.
- However, restatement 311 (variation of a duty to a beneficiary) – (1) – parties can agree to whatever they want; (2) – absent a specific provision, the parties retain the right to modify the agreement; (3) – parties are limited in modifying the agreement if the 3rd party beneficiary (a) is

notified or (b) detrimentally relies on the agreement or (c) brings suit or (d) manifests assent to the modification.

- Court said that Olson was not vested because (a-d) did not occur when agreement 2 was made.
- If Etheridge had gone to Olson and told him about the proposed agreement with Engelhaupt and Olson agreed, Etheridge and Engelhaupt would have been bound by the initial agreement and could not modify it unless Olson agreed.
- Etheridge is still bound to pay Olson for agreement 1, however.

Hypothetical

Promisor is a construction company, promisee is a developer, and 3rd party is the tenants of the proposed building. 3rd party beneficiary status is acknowledged.

If there are structural defects in the building, the 3rd party has a claim against someone. The 3rd party attempts to sue the promisor because they have more money. The construction company states they have a claim against the promisee for their designs.

The law states that the promisor can raise as a defense those claims against the promisee in defending against the 3rd party.

If promisor has no claim against the promisee in the original contract but has another contract with another developer and has a claim against this developer, the promisor cant raise as a defense those claims against the developer in the new contract in defending against the 3rd party in the initial contract. The promisor can only raise those claims in the original transaction in defending against the 3rd party.

Promisee's Right to Enforce the Promise

Drewen v. Bank of Manhattan Co. (P. 736)

- Husband and wife made initial agreement at the husband would not reduce the amount of their children's inheritance.
- After wife died, the husband changed his will to reduce the amounts that the children would receive. The will had a provision said that, if either children challenged the will, they would get nothing (in terrorem clause).
- The husband (estate) is the promisor, the wife (estate) is the promisee, and children are the 3rd party.
- Even though the children could not challenge it, the wife wanted to challenge the will and say that the initial will should still be binding. The wife's estate sued the husband's estate. There are really no damages that the wife can get as she was not going to get money in the original will anyway. The wife would be entitled to get specific performance (i.e. enforce the initial agreement).

The Cumulative Nature of the Beneficiary's Right

Erickson v. Grande Ronde Lumber Co. (P. 741)

- Grande Ronde owed Erickson money. Grande Ronde then entered into a merger agreement with Stoddard, in which Stoddard agreed to pay all of Grande Ronde's debt.
- Erickson has the ability to sue both Grande Ronde and Stoddard for the money due.
- Stoddard it the promisor, Grande Ronde is the promisee, and Erickson is the 3rd party. Erickson can obviously sue Stoddard, but he can also sue Grand Ronde. Stoddard and Grande Ronde cannot get together an independently decide who will pay Erickson.
- Erickson can sue both parties (Grande Ronde under the initial agreement and Stoddard as a 3rd party beneficiary) but can only collect enough to make him whole.
- If Erickson sued Grande Ronde first, Grande Ronde then should sue Erickson in order to get money to pay Erickson. Erickson does not have to sue both parties if he doesn't want to.

The Assignment of Rights and Delegation of Duties

The Nature of an Assignment

Assignments do not directly involve the law of contracts.

Promisor is the "obligor" and the promisee is the "obligee. The promisee then assigns right (as an assignor) to another party (the assignee). The transfer of the right is not a contract because there is no promise. It would be a contract if the assignor "promised" to transfer the right to the assignee. The actual transfer is not a contract and does not involve the law of contracts.

In general, assignments may be freely given. A person may assign a right or delegate a duty unless under certain circumstances.

Gratuitous Assignments

Gratuitous assignments are revocable and non-gratuitous assignments are irrevocable.

Unless the assignment is made for consideration or in total or partial satisfaction of a pre-existing debt, it is a gratuitous assignment.

Restatement 332 – Revocability of Gratuitous Assignments

(5) – assignments are gratuitous unless: (a) consideration is given (i.e. assignments are paid for or a promise is made to pay for the assignment) or (b)

A gratuitous assignment can become irrevocable if (1)(a) – the assignment is in a writing that is signed and is delivered to the assignor or (1)(b) – the assignment is accompanied by delivery of a writing in a type customarily accepted as a symbol or as evidence of the right assigned (i.e. a passbook).

(2) if the assignor dies or he assigns to someone else, or by notification from the assignor received by the assignee of by the obligor, the gratuitous assignment is considered revoked.

The Nature of Assignable Rights and Delegable Duties

Evening News Association v. Peterson (P. 747)

- Post-Newsweek assigned the right of Peterson's contract to Evening News. Peterson was the promisor (obligor) to Evening news as he had the obligation to perform for Evening News. He objected by saying that Post-newsweek could not assign the right of his contract to Evening News.
- Restatement 317 – Assignment of Right –(2) a contractual right can be assigned unless: (a) the assignment would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him
- The assignment here did not fall into any of the exceptions in 317. If Peterson only wanted to work with the old manager, he should have inserted in his agreement.
- Restatement 318 – delegation of Performance of Duty.

Crane Ice Cream Co. v. Terminal Freezing & Heating Co., (P. 751)

- Terminal (promisor/obligor) had a contract with Frederick (promisee/obligee) to supply ice. Frederick sold his company to Crane, which was a much larger company. When Frederick (assignor) was sold, they assigned their contract with Terminal to Crane (assignee). Terminal objected because they could not supply all the ice that Crane needed.
- Court said that the contract couldn't be assigned because the contract was personal (i.e. Terminal only wanted to deal with Frederick). Today, the analysis would not be that it is a personal contract but would be judged by Restatement 317(a) – the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor (i.e. more ice would be needed).
- If Frederick had sold to a company with the same demands, the contract would probably be assignable.

The Macke Co. v. Pizza of Gaithersburg, Inc. (P. 752)

- Pizza Co. (promisor/obligor) had a contract with Virginia Coffee (promisee/obligee). Virginia company (assignee) then sold their business to Macke (assignor). Pizza Co. had worked with Macke before and had problems. Hence, they wanted to work with Virginia.
- Pizza could argue that Macke could "materially impair his chance of obtaining return performance". They cannot say, however, that they do not like working with Macke.

Problem 2 P. 756 – Wyeth (promisor/obligor) contracted with Helga (promisee/obligee). Can Helga assign the rights to have Wyeth paint her friend? You can analyze it by saying that the contract is personal and the duty cannot be delegated (318(2)). You can also analyze it under 317 (materially changes the duty of Wyeth). If Helga had assigned her friend the right to accept money from Wyeth, would that be different? Yes because it is not a personal interest. A court would most likely say that Helga could assign her right to be paid but not painted.

Problem 3 – This right is assignable because, no matter who sits, the painting is worth $25. It does not change the duty of the obligor.

UCC provision on assignment (2-210)

- Comparable with Restatement version. (1) – party may delegate the duty unless the other party has a substantial interest in having his promise performed (318). (2) – all rights of either buyer or seller can be assigned except where the assignment would materially change the duty of another party, or increase materially the burden (317).

Partial Assignments

Space Coast Credit Union v. Walt Disney World, Co. (P. 757)

- WDW (promisor/obligor) had a contract with employee (promisee/obligee/assignor). Employee partially assigned his wages to be paid by WDW to the credit union (assignee). WDW objected to this because, if they paid the credit union and the employee objected later on, WDW did not want to be put in the position of paying the wages twice.
- Many states substantially limit (if not outright abolish) an employee assigning his wages to another party.
- Restatement 326 – partial assignment is allowed but if the obligor objects, the assignment is not allowed unless all persons entitled to the promised performance are joined in the proceeding, or unless joinder is not feasible and it is equitable to proceed without joinder.

Effects of Delegation

If a duty to pay is delegated to another party, can the person who is owed the money sue either party? Yes, the 2 parties can agree to delegate a duty, but the person owed the money can still sue the original debtor unless he agrees beforehand. The original promisee/obligee is still liable.

Rosenberg v. Son, Inc. (P. 759)

- Rosenberg (obligee) sold a dairy queen to Pratt (obligor/assignor) in agreement to payments by Pratt. Pratt assigned the payments to Son (assignee). Rosenberg consented to the assignment. Son (now an assignor) then sold the dairy queen to Merit (an assignee), without Rosenberg's consent (although he was aware of the sale). Presumably, Merit is now making payments to Rosenberg. Merit then goes bankrupt. Rosenberg is still owed money from the original sale.
- Rosenberg wanted to sue Son and Pratt because Merit has no money. Are Pratt and Son still liable to Rosenberg? The court said that Rosenberg consenting to the assignment is not the same as agreeing to release liability from Pratt.
- Also, Son agreed to indemnify Pratt to all liabilities in the future. Thus, the court said this signals that Pratt still thought he would be liable to the original debt.
- If Rosenberg collects from Pratt, Pratt now has a cause of action against Son because he agreed to pay the debt.

Future Rights

Speelman v. Pascal (P. 766)

- Pascal had an agreement with the estate of George Bernard Shaw. Pascal had the right to use Shaw's play "Pygmalion" to produce a movie. Ultimately, a play was produced that was successful, but this occurred after Pascal died. Before he died, however, he assigned Shaw a % of his royalties from the play. Pascal's heirs objected to the assignment. They argued that, as the play had not been produced when Pascal assigned, there was nothing to assign.
- Courts disagreed and said that there was something to be assigned due to the original agreement between Pascal and Shaw. The right and agreement were existing at the time of the play.
- Restatement 321 – Assignment of Future Rights – an assignment of a right expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an existing right. See (2) also

Problem P. 769 – Winiva is the assignor and the mother is the assignee. However, this is different from Speelman because there was not an original existing agreement between Winiva and some other party (i.e. a publisher). There is no agreement in which something can be assigned. This might well be a promise to assign, however, that is subject to contract law. The mother is not completely without action but it is harder than if there was an initial contract that an assignment could be made to.

Prohibition of Assignments – Anti-Assignment Clauses and UCC Changes

What happens when the agreement contains a clause that prohibits assignment?

Rumbin v. Utica Mutual Insurance Company (P. 771)

- Plaintiff and insurance company entered into a structured settlement to resolve a personal injury claim. Insurance company was to pay the plaintiff over 15 years. To fund this, the defendant (insurance company) entered into an annuity contract with Safeco
- Insurance company (obligor) is making payments to Rumbin (obligee) from the annuity contract. Plaintiff wants the money now so he assigns the right of getting payment from the annuity contract to J.G. Wentworth in exchange for a lump sum of cash. However, the annuity contract had a provision stating that no party may assign the annuity.
- The insurance company objected because they probably did not want to deal with Wentworth as they are giving the plaintiff a bad deal.
- What is the impact of the provision? Both the restatement and UCC state that these provisions only mean that you cannot delegate the duty but you can assign the rights.
- Restatement 322 – (1) a contract term prohibiting assignment of the contract bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
- (2) a provision strictly prohibiting assigning the rights does not prevent the assignment from being projected. The assignment is still effective but the agreement is violated and the

insurance company can collect damages from the breach from the assignor. Courts are reluctant to put limits on assignments.

- If there is language stating that "the assignor shall not have POWER to assign and any assignment is void," some courts may accept this provision to mean that any assignment is prohibited.
- UCC article 9 – if what you are assigning is a right to receive money, then no provision restricting assignment will be deemed to prohibit the assignment. Right to receive money is considered an "account". If the right is not to receive money, the assignment may be prohibited if you use the strict language above.

Defenses Against The Assignee – UCC 9-318

Seattle-First National Bank v. Oregon Pacific Industries (P. 775)

- Oregon Pacific (obligor) bought plywood from Centralia (obligee/assignor) and owed Centralia money. Centralia assigned the right to receive the money to Seattle-First (assignee).
- Seattle First sued Oregon Pacific for the money that it is owed. What defenses can Oregon Pacific use against the bank? Remember that in a 3rd party claim, Oregon Pacific could only raise claims that arise from their original agreement with Centralia. However, when dealing with an assignment, Oregon Pacific may ALSO raise as a defense any claims that it has on unrelated claims with Centralia that accrued BEFORE they were made aware that Centralia made the assignment to Seattle First.
- Restatement 336(2) – the right of assignee is subject to any defense or claim of the obligor which accrues BEFORE the obligor receives notification of the assignment.
- Must distinguish between 3rd party and assignee AND figure out who is the promisor/obligor, promisee/obligee/assignor, and assignee or 3rd party.