The Contracts Experience

I. THE CONCEPT OF CONTRACT

A. Introduction

B. Obligations and the law

- Entering into contracts is completely discretionary, acting in nonfeasance does not necessarily result in liability—principle of freedom of contract. See, e.g., *Hurley v. Eddingfield*, doctor has no obligation to go treat a dying patient.

2. Legal documents and instruments
    a. contracts and writing
    b. standard form contracts: introduction
        i. which paradigm?
        ii. contracts of adhesion

3. Categories
    a. Contract- was there non-performance of any contractual duty?
    b. Mutual mistake- "mutual mistake as to existence or identity of the subject matter of an agreement prevents the creation of contractual liability."
    c. Fraud- intentional, purpose is to "induce another to part with property or to surrender some legal right."
    d. Constructive fraud- same as prior, but deception is "made innocently."
    e. Trust- fiduciary relationship, trustee takes care of property for benefit of beneficiary (in accordance with terms of trust).
    f. Constructive trust- label used where there is no actual trust, but it is just to require property holder to act as if he were the trustee for another— main trigger here is existence of dependency (See, e.g., *Jackson v. Seymour,* sister sells brother land without knowledge of valuable timber on property, sister sues brother for $ and wins because of special fraternal relationship and dependence on brother).

II. Expectation

A. Restitution interest- prevention of unjust enrichment. P, in reliance of promise of D, has conferred value on D.

- Most need for judicial intervention, strongest case for relief.

B. Reliance interest- in reliance of promise, P has changed his position detrimentally. Object is to make P "whole" again.

- Moderate need for judicial intervention, moderate case for relief.

C. Expectation interest- without insisting on reliance by promisee or enrichment of promisor, give promisee value of expectancy which the promise created. Put P in as good a position as he would have occupied had D performed promise.

- Weakest case for judicial intervention, weakest case for relief

D. Overall, law favors healing disturbed status quo rather over bringing new situations into existence.

III. WHAT PROMISES DO WE ENFORCE

A. Gordley: indicia of an imbalance of power in a contract is the presence of terms that place losses, not on least cost avoider, but on person who is the highest cost avoider between the 2 parties.

B. Bargain : The Classic Paradigm

- **2nd Restatement, s. 17:** Formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration

- **2nd Restatement, s. 71:** To constitute consideration a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise.

- Consideration
    - Courts will not inquire into the nature of a consideration (See, e.g., *Hamer v. Sidway*: uncle promised nephew sum of money in exchange for certain restrictions on his behavior, court upheld this as a valid K).
    - Gift promises without sufficient consideration will not be enforced (See, e.g. *Dougherty v. Salt*: aunt promises sum of money to young nephew, dies and note is not included in will, court finds the promise lacks consideration and is not enforceable).
    - Process: state promise whose enforcement is at issue, identify promisor and promisee with respect to that promise.
    - A **promise is supported by consideration** if there is:
        - 1. Detriment to promisee (if promise constrains autonomy of promisee).
        - 2. Detriment is bargained-for (it's bargained-for if the detriment is the thing that induces the promise).
        - 3. Promise is bargained-for (it's bargained for if the promise is the thing that induces detriment).

C. The Law's Response

1. Forebearance based on an invalid claim is still sufficient consideration as long as the claim was made in good faith (this supports settlements out of court, furthers important public policy measures, assumption that parties will do due diligence before agreeing to settlement which is why this is accepted; See, e.g. *Fiege v. Boehm*: man found not to be father of infant still has to pay support under terms of his settlement with the mother, because he agreed to the settlement K based on mother's good-faith claim that he was the father).
    - NB: Courts hesitant to overturn settlements, tend to regard them as contracts—on pure contract terms, there is a presumption that a party is bound by the terms of a settlement.

2. Valid consideration exists if one desists from doing what one has a legal right to do—constraint on autonomy is sufficient consideration (See, e.g., *Langer v. Superior Steel Corp.*, retiree's agreement to not seek employment with competitor and to remain loyal to company was sufficient consideration to support his retirement contract).
    - NB: key fact in *Langer* was that the employer paid for 4 years, established w/o doubt that there was a promise by the employer and the employer found it satisfactory.

D. What Does "Bargain" Exclude?

1. Consideration is lacking for a party when that party's signature was not originally contemplated as part of the deal, and when the other party does not even know of the signature (See, e.g., *US v. Meadors*: wife's superfluous signature on a guaranty did not cause her liability, bargained-for exchanges are neither necessary nor sufficient for the existence of consideration, akin to case in which X promises to pay Y $ if Y gives up smoking, and Y gives up smoking without ever learning of X's promise).
    - NB: *Meadors* more cleanly thought of under doctrine of mutual assent.

E. Other Issues in Bargained-For Exchange

1. Nominal consideration
    - Rule that courts do not inquire into adequacy of consideration implies that as long as it is given in return for a promise, even something of nominal value will make—this is not exactly true anymore, this is the very formalistic view of consideration expressed in the 1st Restatement
    - 2nd Restatement broke with "peppercorn" view—s.79: nominal consideration ok in some circumstances, not ok in others (option contracts ok, donative promises not ok).

2. Rules governing the legal system

- Transaction facilitating rules—rules that make it easier for parties to enter into and get the benefits of enforceable transactions.
    - Rule that defines what constitutes acceptance of offer—what kind of reaction will create a binding contract?
- Normative rules—rules of justice
    - Fraud: we provide demanding standards for remedying fraud, much harsher than BoC.
- Institutional rules—rules that aid the functioning of courts and other legal institutions
    - Courts favoring out of court settlements and enforcing them.

F. Undercurrents

1. Fossilization
    - Enduring traditional doctrines that depart from original justifications and are full of exceptions
    - **NB: slow evolution of the law contributes to respect for the rule of law; not an all together bad thing.**
2. Legitimation
    - Puts law's stamp of approval on social behaviors (ex: death penalty for innocents, still ok as long as procedures followed in litigation were proper—can't recover for wrongful conviction or death).

IV. WANING OF CONSIDERATION

A. Introduction
    - Consideration considered as more of an artifact than accurately reflecting today's social policies and priorities.

B. For mutuality to exist, thereby rendering the contract binding, there must be reciprocal obligations to buy and sell, language in contract must support mutuality (See, e.g., *McMichael v. Price*, parties contracted to requirement contract and court found that there was sufficient mutuality to make the K enforceable since there was a provision that D agreed to buy all requirements of sand from P, couldn't get it elsewhere).

1. The Modern Meaning of Mutuality

a. Exclusivity implies promise and good faith, establishes sufficient mutuality for K to be enforceable (**See, e.g., *Wood v. Lucy, Lady Duff Gordon*, P had exclusive right to sell designs and use D's endorsement on products, D put her endorsements on goods without his knowledge, court found this breached the agreement they had).**
    - There is generally no K if either side has a "free way out"
    - Mutuality is conceptualized as a subset of consideration.
    - If you can find persuasive narrative explaining why the parties entered into the K, odds are that it will be enforceable.

C. Good Faith—implied duty of good faith in K law.

a. **2nd Restatement s.205:** "Every K imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

b. **s. 1-203 of UCC:** "Every K or duty within this Act imposes an obligation of good faith in its performance or enforcement."—makes obligation of good faith non-disclaimable.

c. Types of K using implied duty of good faith to avoid consideration/mutuality problems: exclusive dealing Ks, requirement and output Ks, Ks containing personal satisfaction or termination clauses, and modified Ks.

d. **s. 2-306(1) of UCC:** "A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded."
    - Weistart argues that it should be read as precluding market speculation that was disfavored pre-Code, but "disproportionate" language should be de-emphasized so that flexibility is mostly retained.

e. Personal Satisfaction and Termination Clauses
- Personal satisfaction clauses require good faith implication to avoid mutuality problems—courts have begun implying good faith to avoid nullifying Ks that would otherwise lack consideration.
- Termination clauses—act of giving notice necessary to terminate K=detriment constituting consideration (for courts relying on consideration analysis).
- Good faith requirements provide sufficient constraint on the purchaser's behavior to constitute consideration; if we believe the basic transaction is legitimate, we are prepared to allow 1 party to have broad discretion to the level of personal satisfaction. (See, e.g., *Omni Group, Inc. v. Seattle-First National Bank*; promisor's duty to exercise his judgment in good faith is an adequate consideration to support the K).
    - Omni could have avoided good faith problem by taking out option—would have had the ability to say no, would have been essentially unlimited

D. Modified Contracts
- Pre-existing duty rule: if the K is modified in a way that does not require one of the parties to incur any additional detriment, the modified K will arguably not be supported by consideration because of a pre-existing duty to perform based in the original K.
- One technique is to dispense with consideration requirement altogether when contract modifications are both voluntary and made in good faith.
- **UCC 2-209:** "An agreement modifying a K within this article needs no consideration to be binding."
    - Extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith."
    - NB: ONLY APPLIES TO SALE OF GOODS- if K involves service and goods, must evaluate what is predominant in K (ex: painting a room= paint + service, but service is the predominant element of K therefore s. 2-209 doesn't apply).
- **2nd Restatement s.89:** "a promise modifying a duty under a K not fully performed on either side is binding a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the K was made"
    - Comment A: this section "deals with bargains which are without consideration only because of the rule that performance of a legal duty to the promisor is not consideration."
- After K is formed, one party seeks to modify it without giving anything back to the party taking the burden—generally unenforceable unless there is an additional consideration, frequently comes up in settlement of debts (See, e.g., *Levine v. Blumenthal*, presents majority common law view, still good law—court held that lessor's oral promise to accept a reduced rent was not enforceable because lessee did not provide any additional consideration for the modification).

E. Formality
- Sometimes formality can be a sufficient basis for enforcing a promise even in the absence of consideration.
- Justifications for use:
    - Provide evidence of seriousness
    - Promote deliberation
    - Sort expression of parties into legally recognized forms and categories
- **UCC and 2nd Restatement give deference to formality**—some jurisdictions still give legal recognition to the seal.
- EX: *firm offer*—term of art used in UCC to describe options that are enforceable without consideration in sale-of-goods context.
    - Offer that offeror has promised not to revoke prior to a specified time, or prior to the occurrence of a specified event.
    - **S. 2-205 of UCC:** "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not

revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed 3 months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

F. a) The vast majority of commercial transactions inherently have bargained-for consideration present.
b) "Good faith" has "solved" the consideration problem in the discretionary performance cases.
c) **Consideration formerly impeded the process of healthy mid-term K modification. That is now much less of a problem because of the rules in UCC 2-209 and Restatement s. 89.**
d) When courts more fully accept that a very remote possibility of an economic return is sufficient to bind a promise, then many of the remaining cases involving questionable enforceability are avoided.
e. Promissory estoppel has significantly lessened the need to have a perfect rule on consideration. Promisees who are damaged by relying on serious unilateral promises can now be compensated.

V. BEYOND CONSIDERATION

A. The Dangers of Categorization
- Whether a case falls into a category mainly determined by how lawyer frames facts—get rules of law most favorable to clients.

B. Restitution

1. Introduction
- Designed to prevent unjust enrichment—certain elements relating to enrichment and injustice must be satisfied in order to get restitutionary recovery.
- Presence/absence of a K in vicinity of restitution claim can have significant effect on whether court will order restitution—law also recognizes both promissory and non-promissory claims for restitution but presence/absence of promise to make restitution can have significant impact on claimant's ability to recover.
- Law of restitution now available to provide legal and equitable remedies designed to prevent unjust enrichment.

2. The Historical Role of Restitution
   a. A voluntary act of courtesy does not create a legal liability for the party who benefited from the act. To make the party liable, he must have either requested the act, or, after he knew the act had been done, must have promised to pay for it (See, e.g., *Glenn v. Savage*, voluntary service of saving lumber from river was considered gratuitous and formed no ground of action/legal liability, benefitor did not have to pay).
      - NB: Holes in the narrative of the court, should have asked about:
        - Parties' business relationship
        - Who bought the lumber
        - Who put lumber where it was located
        - Why did Glenn save the lumber? Legal duty or good Samaritan?
        - Why didn't Savage just pay?
   b. Physician's assistance of an unconscious person creates a quasi-contract and resulting legal liability on the part of the unconscious person to pay physician for services rendered; public policy: want to encourage doctors to assist those in need (See, e.g., *Cotnam v. Wisdom*, injured person who received treatment from 2 doctors at scene of accident had to pay for their medical attention, even though he still died due to his injuries).

3. The Elements of Restitution
   a. Whenever unjust enrichment occurs, the law recognizes an independent cause of action that is designed to provide an appropriate remedy—law typically implies a quasi contract to implement restitutionary objectives.
   b. Restitution as an Independent Cause of Action

- Independent cause of action from formal contract context—allows P to recover amount of $ or property that is necessary to prevent unjust enrichment.
- Essence: unjust enrichment at expense of another, tortuous acquisition of a benefit at expense of another.

c. Restitution as a Contract Remedy
- 2nd Restatement:
- **s. 370**: entitled to restitution to extent that you confer benefit on other party via part performance/reliance.
- **S. 371**: sum of money to protect restitution interest, measured by a) reasonable value to other party of what he received in terms of what it would have cost him to obtain it from person in claimant's position, or b) extent to which other party's property has been increased in value.
- **S. 372: BoC**—restitution for any benefit conferred, including part performance or reliance. If all duties have been performed under the K and no performance by other party remains due other than payment of definite sum→no right to restitution.
- **S. 374:** If you are in BoC, and party justifiably refuses to perform on ground that remaining duties of performance have been discharged by your BoC, you can get restitution for benefits conferred, in excess of loss that was caused by your own breach.

d. Components of a Restitution Claim

i. **Enrichment**
- Disgorgement principle—D required to disgorge whatever benefit was received at expense of P. Ct. must determine whether D was enriched at expense of P, Ct. must measure amount of that enrichment.

ii. **Injustice**
- Law has focused on the motive of the plaintiff who confers the benefit—2nd restatement expressly denies Ps who confer benefits officiously from a right to restitution—"officiousness" meaning interference in the affairs of others not justified by the circumstances under which the interference takes place.
- Requirement that P intended to charge for the services rendered rather than providing them as gifts

iii. Effect of a Contract
- Common circumstance: when 2 parties believe that they have a K, but some problem in the formation or performance process makes the K unenforceable (e.g., fraud, illegality of performance), therefore it would be unjust to allow the enriched party to retain the benefits provided by the enriching party—law usually makes enriched party give restitution to enriching party.
- 2nd Restatement s. 370: limits restitution to benefits conferred in part performance or reliance; s. 371: measures restitutionary recovery by the reasonable value of the benefits conferred on the party from whom restitution is sought.
- Risk-allocating Ks can preclude restitution allegations (buy painting from garage sale, find out later it's worth $1 million—no restitution to seller), can also limit recovery to amount due under contract in event of BoC.

4. Promissory Restitution (Moral Obligation)
- Promissory restitution: enforcement of promises in absence of consideration to prevent unjust enrichment.
- Promissory estoppel: not concerned with unjust enrichment, just protection of justifiable reliance.

a. Past Consideration—any benefit received by the promisor that could serve as consideration for the promise at issue was conferred before the promise was made.
b. Moral Obligation—cases present arguable moral claims for enforcement of the promise at issue.

i. Moral obligation alone is insufficient to enforce a promise to pay restitution—must be some previous obligation and consideration to form a basis for an effective promise (See, e.g., *Mills v. Wyman*, D's promise to P to pay for P's care for his dead son was not enforceable)
   - NB: Court identifies 3 exceptions to general rule that moral obligation is not an adequate basis for enforcement: debts barred by statute of limitations, debts discharged in bankruptcy, and debts incurred by minors.
   - Also: modern courts should be able to reconsider Mills under language of s. 86.

ii. Material benefit rule: a moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty/liability resting on the promisor (See, e.g., *Webb v. McGowan,* company obliged to continue paying medical bills of employee who was chronically injured in the course of saving the life of the company's president).

iii. **2nd Restatement, s. 86**
   - **"Moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor**."

C. Promissory Estoppel

1. **2nd Restatement, s. 90:**

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

   2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
      - Promise must induce reliance, reliance must be foreseeable, enforcement of the promise must be necessary to avoid injustice.

2. The Restoration of Reliance
   a. Promissory notes can be enforceable under the doctrine of promissory estoppel if they will reasonably cause action or forbearance and if justice will only be avoided by enforcing the promise (see, e.g., *Ricketts v. Scothorn*, grandfather's note promising $2000 so that "none of my grandchildren work" was enforceable because he contemplated her quitting her job as consequence of gift, intentionally influenced her to alter her position for the worse on reliance of his gift, not enforcing promise would be unjust).

   b. Elements of Promissory Estoppel
      i. Promissory estoppel is sufficient in the absence of consideration to make a promise enforceable (See, e.g., *Feinberg v. Pfeiffer Co.*, secretary's retirement benefits caused her to rely on them for income, caused her to leave her job, would be unable to find employment somewhere else).

   c. At-Will Employment
      i. Permanent employment means "at will" employment—terminable at the will of either party, discharge without cause does not constitute BoC (See, e.g., *Forrer v. Sears, Roebuck & Co.*, employee of 18 years who left was convinced to come back to work at Sears, was fired after 6 months back with the company, court found that his firing did not constitute a BoC because he was an at-will employee and employer had fulfilled promise).
      ii. Promissory estoppel implies a contract in law where none exists in fact, and an employment contract "at will" can give rise to an action for damages via promissory estoppel if the contract is anticipatorily repudiated (See, e.g., *Grouse v. Group Health Plan, Inc.*, guy made offer by D, declined another offer from another employer and resigned from job; because D couldn't get a reference for the guy they hired another person, court found that D was at fault under promissory estoppel doctrine).

3.Promissory estoppel v. K law

a. **Promissory estoppel is outside the realm of K law**—if proper K exists, promissory estoppel is not appropriate doctrine, turn to BoC, etc.

b. If there is a contract present in a transaction, analysis should be based on K law remedies (reliance, restitution, etc.) instead of promissory estoppel (See, e.g., *Hoffman v. Red Owl Stores, Inc.*, Hoffman was in negotiations with Red Owl to establish grocery store, Red Owl misled Hoffman on multiple occasions and requested more money, etc., court came to right conclusion but used wrong analysis).

- There was a contract that could have been applied in this case: offer, acceptance, general duty of good faith, implied term that will give you an opportunity to prove yourself.
- Court could have used K law: reliance, restitution.

VI. CONTRACTS AND PUBLIC POLICY

A. Contracts and Public Policy

1. Freedom of Contract
   - In US law, general presumption of freedom of contract: can contract with whomever you want, for whatever you want, with few restrictions.
2. Contracts and Illegality
   a. The Notion of Illegality
      i. Can't make a K to kidnap someone and expect it to be enforced.—in determining whether a statutory or regulatory violation renders a K unenforceable is the **intent** underlying the provision that is violated.
      ii. Ask whether public policy that is reflected in the particular regulation is so strong as to render void all contracts that fail to comply with it.
   b. Although part of a K may be unenforceable due to its illegality, it does not preclude all claims against one party made by the other that fall outside the scope of the definition of the illegal conduct (see, e.g., *Holland v. Morse Diesel International, Inc.*, unlicensed contractors are barred from seeking compensation under CA law, but P wants to pursue civil rights claim against employer that arose out of his employment, court found that P can pursue civil rights claims but cannot seek damages for sums due on contract with employer).
3. Capacity to contract
   a. **Youthfulness, mental incapacity and intoxication are all defenses that could render contract voidable.**
   b. A minor who disaffirms a K for the purchase of an item which is not a necessity may recover his purchase price without liability for use, depreciation, damage, or other diminution in value—you just get back whatever the minor has (see, e.g. *Halbman v. Lemke*, minor buys car and is paying in installments until title is transferred, during payment car breaks and garage who repairs it takes out transmission to satisfy lien on car, court holds that minor is entitled to restitution).

4. Unequal Bargains
   a. Courts will not inquire into the adequacy of consideration because it is not enough to invalidate a K—without evidence of fraud, duress, or misrepresentation, Court won't void K merely because of insufficient consideration (see, e.g., *Batsakis v. Demotsis*, D was loaned money in Greece during WWII, made written promise to pay P $2000 in US currency regardless of relative value to drachmae loaned, Court upheld contract).
   - NB: Not really the precedent that is applied today, **courts will in fact look into consideration, court should have thought about other unique factors**—promise made under duress, unable to know value of drachmae v. dollars, etc.).
5. Contracts and Social Choice
   a. Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding and enforced in any dispute between them (see, e.g., *Kass v. Kass*, ex-wife wanted custody of pre-zygotes so she could have them

implanted, although consent form explicitly left them for research in this situation, court found that the consent agreement was enforceable).

- NB: with different facts, Ct. would likely find that consent agreement was not enforceable—happened to support ultimate public policy rationale (can't compel anyone to become a parent against his will).

b. **Prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions** (see, e.g., *AZ v. BZ*, husband wanted to prohibit wife from using frozen embryos held in cryopreservation in the clinic, even though the consent form they had signed provided that the wife would receive them upon "separation" the court found that the consent agreement was not binding).

- NB: underlying reasoning reflects *Kass v. Kass*, in that social policy decision was to not compel anyone to become a parent.

VII. THE OBJECTIVE THEORY

A. Subjective/objective dichotomy

- **Modern US K law purports to deal with "objective manifestations" of parties' intentions and agreements, not with the "subjective intent" of any individual involved.**
- Importance is mainly in determining whether a K has been formed (issue of mutual assent) and in determining how to interpret an existing agreement.
- Objective theory brings with it a simplified factual inquiry.

B. The Subjective Theory

1. No K between parties because each assented to a different K—requirement that there must be a meeting of the minds for a binding K to arise (see, e.g., *Raffles v. Wichelhaus*, Peerless case, two different ships named Peerless, each party thought the other meant the same one but were ultimately incorrect, contract was deemed unenforceable).

C. The Objective Theory

- Meeting of the minds= "apparent" meeting of the minds
- Reasonable person standard
- Actions can also be construed as communications
- Law clearly favors objective theory of K—what would a reasonable person (usually in role of recipient) who knows of the K and the circumstances, take it to mean?
- In commercial context: frequently reduce terms of contracts to words that are only understood in that context, e.g., 2x4 really means 1.5x3.5, legal system view this as just.
- **2nd restatement: s. 220(1):** "an agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage."
  - Still not necessarily enforceable if either party knows that the meaning attached by usage is inconsistent with its normal use.
- Most courts will use the baseline assumption that courts will privilege the dominant culture: if X sells cares to lots of people from Y's culture, at some point he would be expected to know Y's assumptions—big difference if it's a 1-off transaction v. repeated customers.

1. Inner intentions can't make a K enforceable or unenforceable if the words used were sufficient to constitute a K—only express words count, not intentions that may be inconsistent with the words (see, e.g., *Embry v. Hargadine, McKittrick Dry Goods Co*., employee stated to employer that he needed a K for another year or he would quit, employer said "go ahead, you're all right," and employee took him at his word, fired a month later, court found in favor of employee because a reasonable person in the same situation would have interpreted the employer's utterance the same way).
2. Mental assent of the parties to a K is not requisite for the formation of a K, even if serious offer and acceptance in secret jest, K would still be binding (see, e.g., *Lucy v. Zehmer*, man sells farm at bar, claimed he offered to sell it in jest, but other party accepted, court enforces K because the outward expressions would be interpreted by a reasonable person as a valid offer).

- NB: 2nd restatement: if one party is deceived and has no reason to know of the joke, the law takes the joker at his word.

D. Issues In Cognition

1. Puffing in Advertising
   - If a person relies on puffery, while a company knows it's puffery and that people will rely on it, that might increase the company's liability.
   - Law's response: if it's benign it's fine, but if it's reasonable factual content it could cause legal problems
   - Puffery influencing a party's expectations in a contracts setting: could diminish scrutiny of company w/ whom you're entering into a K; idea of warranty (promise/representation), breach of warranty (representation wasn't true), express/implied warranties (don't have to ask TV salesman if the TV will burn down your house).
2. Limitations on Cognition
   - Examples: prenuptial agreements, student loans, credit cards marketed to college students, state lotteries.

VIII. INFORMATION AND DISAPPOINTMENT

A. Generally misrepresentations must be those of facts rather than opinions to be actionable, but there are exceptions—notably when parties are not dealing at arm's length (see, e.g., *Vokes v. Arthur Murray, Inc.*, older widow buys over $30k worth of dance lessons based on misrepresentations of her dancing ability, court finds in favor of widow because it was reasonable to believe that D had superior knowledge of P's dance abilities and potential; also subjected her to "objective" measures that should have given them another opportunity to comment on her abilities).

1. Intent to Deceive
   - Fraud: intent requirement highlights cases that are most offensive to social norms, imposes high barrier to recovery, reserved for worst cases of misconduct.
   - Warranty/innocent misrepresentation: no requirement of intent to deceive, but gives lower remedies for aggrieved party (damages available for breach of warranty, but not for innocent misrepresentation).
   - Punitive damages available for fraud convictions—demonstrates society's strong interest in deeming this behavior morally reprehensible.

B. Misrepresentations can be assertions—written, spoken, or an action—and those misrepresentations can be cause for relief (see, e.g., *Norton v. Poplos*, sign for property stated it was zoned M-1 and did not disclose that restrictions on lot included prior approval of usage by committee, after K was signed, buyer learned of restrictions and that land would therefore be unsuitable, court finds in favor of buyer).

- **2nd Restatement s. 164:** "If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the K is voidable by the recipient."
- **2nd Restatement, s. 159:** Although a statement may be facially true, it may constitute an actionable misrepresentation if it causes a false impression as to the true state of affairs, and the actor fails to provide qualifying information to cure the mistaken belief.
- Would be unjust to allow a person who has made innocent misrepresentations to retain the fruits of a bargain induced by such misrepresentations.
- Boilerplate provisions ("as is", merger clauses [do not rely on any written or oral representations not expressly written in the contract]) are not binding on misrepresentations.
- NB: rescission only works well if you do it early: if buyer had put $500k into renovating the building it would not have been as clear a result.

C. Contracting Out of Misrepresentations

- Courts have had varying responses to "as is" and merger clauses—will sometimes find that they do not bar buyers' requests for relief in the event of misrepresentation. However,

sometimes they transfer risk and are found to be enforceable—especially given more weight when they are bargained for.

1. Warranties
   - Warranty= promise or affirmation, typically with respect to a good or a service; relates to level of quality or performance that will be delivered.
   - In US jurisprudence, warranty commonly associated with sale of goods.
   - UCC: seller is required to live up to express statements that it makes about the character or quality of the goods sold; if seller is a merchant, general implied warranty of merchantability applies to sale of goods, implication that goods "are fit for the ordinary purposes for which such goods are used" and that the goods will "pass without objection in the trade" under their description.
     - **UCC 2-313:** Express warranties by seller are created by a) any affirmation of fact or promise made by the seller that becomes part of the basis of the bargain; b) any description of the goods which is made part of the basis of the bargain; c) any sample or model which is made part of the basis of the bargain.
     - **UCC 2-314:** Warranty that goods shall be merchantable is implied in a K for their sale if the seller is a merchant of goods of that kind.
       - Merchantable: "pass without objection in the trade," "fair average quality," "fit for ordinary purpose," "even kind, quality and quantity within each unit," "adequately contained, packaged, labeled as agreement requires," "conform to the promise or affirmations of fact made on the container or label if any."
     - **UCC 2-315:** At time of contract, when seller has more information than buyer and buyer is relying on seller's skill or judgment to select/furnish suitable goods, there is an implied warranty that the goods shall be fit for such purposes.
   - Express warranties very difficult to disclaim.
   - Courts increasingly recognizing implied warranty of workmanlike service that applies to repairs and services—still up for debate.
   - Many states have imposed warranty of quality for new residential construction (either by statute or common law).
   - Express warranty vs. innocent misrepresentation—disappointed expectation because of reliance on something that was stated.
     - Huge limitation on remedies for unintentional misrepresentation; usually courts will only give you rescission, and not damages (big change in circumstances makes things more complicated).
     - Breach of Warranty—you can get rescission damages AND damages sometimes; often difference in price btwn what you would have paid 1st for a property and a comparable one (presumably will have to pay more)
     - NB: Warranties normally trump caveat emptor.
   -

D. What Must Be Disclosed?
   - **2nd Restatement s. 161:** "A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing; or d) where the other person is entitled to know the fact because of a relation of trust and confidence between them."
     - NB: reflects ambivalence about whether disclosure is required: does not say there is a general duty to disclose information, only necessary as follows:
       - Would correct known mistaken assumption of other party;
       - Only if disclosure is compelled by "reasonable standards of fair dealing."

1. Vendee not bound to communicate information about price to the vendor, there is no duty to disclose, but you can't actively deceive someone (see, e.g., *Laidlaw v. Organ*, buyer was not obliged to inform seller of event that would surely affect price—take with grain of salt because this situation is virtually impossible to occur today with speed and ease of communication).

2. Provisions in contract that eliminate all liability for fraud are not enforceable; when the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer (see, e.g., *Hill v. Jones*, sellers' nondisclosure of previous termite problems was considered to be nondisclosure of a material fact).

- Ct. decides you can't use merger clause to get out of duty to disclose, doesn't actually capture intent of parties as a boilerplate clause—would be different if the clause was separately negoatiated.

3. "As is" clauses can protect sellers from nondisclosure claims (not fraud or misrepresentations (see, e.g., *Richey v. Patrick*, "as is" clause in deed K prevented purchasers of home from gaining relief when they discovered their home had severe problems with black sediment in the water; ct. found the clause transferred the risk to the purchaser).

- NB: There can be something in the K that shifts risk, or there can be something in the facts that shifts risk.

4. Puzzles and Problems
   a. NB: in world of big corporate litigation there is really no duty to disclose—very small slice of society where this is true.
   b. Example from 2nd restatement: A is a violin expert. Pays visit to B's musical instrument shop. Finds violin that he immediately recognizes as a Stradivarius because of his expertise, knows it is worth at least $50k. Violin priced at $100. Without disclosing info or identity, A buys violin from B for $100. A is not liable to B.
      - Serves social purpose in remedying misallocation of valuable objects; promotes efficiency; protects knowledge of buyer.

D. Good Faith

1. "Good faith" is violated when acts violate community standards of decency, fairness, or reasonableness. Exists to ensure that parties to a K act w/faithfulness to agreed common purpose and consistency w/ justified expectations of other party (see, e.g., *Carmichael v. Adirondack Bottled Gas Corp.*, K recognized continued interaction of parties after termination of K, good faith applies in that context as well).
   - Unusual because it bases the remedy (even PD) purely on violation of good faith—cts. have more recently been saying that the violation of good faith has to be attached to some other duty under the contract for a remedy.
2. General duty of good faith only comes into full effect from the beginning of a finalized K, not during negotiations (see, e.g., *Market Street Associates v. Frey*, parties do not necessarily have to remind each other of the terms of their contract; duty of good faith is an attempt to approximate terms that parties would have negotiated had they forseen the circumstances that give rise to the dispute).
   - NB: **2nd Restatement, s. 205, Comment C:** "Bad faith in negotiation, although not within the scope of this Section, may be subject to sanctions…subject of rules as to capacity to contract, mutual assent, consideration, fraud, duress…remedies for bad faith in absence of agreement are found in law of torts or restitution."

3. **2nd Restatement, s. 205:** "Every K imposes on each party a duty of good faith and fair dealing in its performance and its enforcement."
   - Comment: In the case of a merchant the **UCC s. 1-201(19**) provides that good faith means 'honesty in fact and the observance of reasonable commercial

standards of fair dealing in the trade'… good faith performance or enforcement of a contract **emphasizes faithfulness to an agreed common purpose** and consistency with the justified expectations of the other party; **it excludes** a variety of types of **conduct** characterized as involving "bad faith" because they **violate community standards of decency, fairness, or reasonableness**."

6. The Content of the Duty
7. The Scope of the Duty
8. Employment at Will Contracts
   a. Problems in Termination
   b. Fortune v. National Cash Register Co.

E. Mutual Mistake
2. Beachcomber Coins, Inc. v. Boskett
4. Lenawee County Board of Health v. Messerly
5. When Is the Risk Allocated ?

a. There can be something in the K that shifts risk, or there can be something in facts/context that shifts risk.

b. When is rescission not appropriate because the risk in question has been allocated to one party or another?

- **2nd Restatement, s. 154:** "A party bears a risk of a mistake when…the risk is allocated to him by the ct. on the ground that it is **reasonable** in the circumstances to do so."
  - As is clause
  - If one party is much better equipped to avoid cost
  - Imbalance in knowledge about risk (technical details in engineering→allocate risk to person w/ expertise in subject matter)
  - Give weight to desirability of finality: if too much time goes by, risk allocated differently (important for rescission, must act quickly before reliance is caused).
  - Whether K was standard form or if terms were negoatiated.

G. Changed Circumstances

NB: In event of natural disaster preventing a party from performing a K, the general rule is a combination of "the K comes to an end and both parties are excused from their duties," and "the court should allocate the loss to the party who is in the position to avoid or limit the loss at the lower cost."

1. Impossibility and Impracticability
   a. Impossibility/impracticability of performance due to an event, the non-occurrence of which was an assumption upon which the K was based, will release parties from contractual obligations; "implied condition of the existence of the thing" (see, e.g., *Taylor v. Caldwell*, hall owner released from contractual obligation/damages under K it had with performer due to the impracticability of having the event after a fire destroyed the hall).

   b. Insufficient production of a secondary supplier is not sufficient for a primary supplier to cancel his contractual obligations with a purchaser—if factory had burned down, or war made it impossible, or crop failed, those might suffice (see, e.g., *Canadian Industrial Alcohol Company v. Dunbar Molasses Company*, molasses company was liable for non-performance in its K with Canadian Industrial because their sugar producer did not provide them with enough sugar; the court found this to be the fault/responsibility of Dunbar to find a plan B rather than breaching the K with Canadian).

   c. Failure of party to achieve an anticipated profit does NOT constitute mistake of fact that would allow alteration/rescission of K under mutual mistake, and it does not constitute commercial impracticability; party seeking to excuse performance must show that performance will only come at a loss and that the loss will be especially severe and unreasonable (see, e.g. *Louisiana Power & Light Co. v. Allegheny Ludlum Industries*, Allegheny's costs for raw materials increased significantly (one by 185%) due to world oil

crisis and it breached, Louisiana Power sued for damages and Allegheny was liable because its arguments of mutual mistake and impracticability were insufficient on the facts).

c. The UCC Provisions

- **UCC 2-613: Goods destroyed before delivery**
  - "Where the K requires for its performance goods identified when K is made, and goods suffer casualty without fault of either party before risk of loss passes to buyer…then (a) if loss is total K is avoided"
- **UCC 2-615: Excuse by failure of presupposed conditions**
  - Delay in delivery/non-delivery in whole/in part by seller is not a breach of duty under K for sale if performance as agreed has been made **impracticable** by the occurrence of something that was assumed would not happen at time of K, or by compliance in good faith with any foreign or domestic gov't regulation or order, whether or not it later proves to be invalid.
    - When above affects only part of seller's capacity to perform, he must allocate production and deliveries amng customers but may do so in any manner which is fair and reasonable.
    - Seller must notify buyer **seasonably** that there will be delay or non delivery, and when allocation is required above, of estimated quota consequently available for buyer.

d. Restatements

Duty of performance will be excused if…

- **2nd Restatement s. 263:** if the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the K was made.
- **2nd Restatement s. 261:** Where, after K is made, party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his duty to render that performance is discharged, unless language or circumstances indicate the contrary."

3. Frustration of Purpose
   a. Concept of indifference—is caterer indifferent to how her food is used? Does she care at all about the type of event? No, clearly not—she will make food for whatever purpose. K still exists and other party still must pay.
      - Similar to professor's offer: student is indifferent (no intention of being a programmer) and professor still has to pay.
   b. Where the occurrence of an event is an essential condition to a K, the non occurrence of the event will invalidate the K (see, e.g., *Krell v. Henry*, prospective renter of room to watch king's coronation procession was not liable for damages because the king's coronation procession was canceled, and K was predicated on that event).
      - Important to note that this is frustration of purpose and NOT impracticability
      - Epsom cab hypothetical is key: shows distinction between renting room for express purpose of watching parade (lessor knew of express/conditional purpose as advertisement stated as much) and renting cab to get to Epsom to watch race; indifference of cab driver of occurrence of race, but lessor was only renting apartment because of the procession.

VIII. OFFER AND ACCEPTANCE

A. Introduction

1. An offer per se does not bind the offeree—instead it gives offeree the power to create a K by articulating his acceptance. Proper acceptance=K formed.

- Offeree's power to accept offer and create enforceable K doesn't exist indefinitely, may be terminated by:
    - A) offeror, who can revoke offer prior to acceptance
    - B) offeree, by rejecting offer or making counter-offer with different terms
    - C) lapse of time
    - D) death/legal incapacity of either party
    - E) non-occurrence of any condition of acceptance that the offeror imposed in making the offer

2. 2nd Restatement, s. 24, 25, 26

- **S.24**: An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.
- **S. 25**: If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.
- **S. 26:** A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

B. Offer

1. There can be no contract unless the minds of the parties have mutually agreed upon some specific thing—usually evidenced by one party making an offer that is accepted by the other party; must decide whether negotiations are preliminary or if the intent was to make a definite offer (see, e.g., *Lonergan v. Skolnick,* P sues D for having sold property that he thought he had accepted an offer for, court finds in favor of D because negotiations had not concluded and D had reserved the right to sell to the first-comer).
    - For an offer to exist, one side must fix the position to give the other side a chance to accept on that particular offer.
    - Can't accept an offer if you don't know about it, even if you perform the thing that was offered.

2. Question of whether a party has made an offer turns on the intent of that party, as assessed under the objective theory of contracts.
    - NB: factors that are relevant in determining whether party has made an offer: specificity of putative offer and the number of people to whom it is addressed.

3. In determining whether the definition of an offer has been met, the Court needs to look to the facts of particular case (4 factors):
    i. actual language used (vague at critical points? Invitation for future discussion? Puffery?)
    ii. complexity of subject matter (hard to understand, many things that could go wrong—e.g., houses, cars, boats).
    iii. what are the norms of the trade? How do transactions normally unfold? Inspection standard, etc.
    iv. relative cost of item ($20 v. $20 million—implicit question of where $ will come from; getting credit can be uncertain).

4. Laura does considerable research on various TVs, a product she considers buying. She was impressed by a review and decided on a particular Sony model. She walked into Best Buy, found Sony model, and looked at it for about 10 minutes. Shelf price tag says $1495. Laura approaches salesperson nearby and says "I'll buy one of these," pointing to model she wants. Is there a contract?

- NO: Laura's statement is actually the first offer that is made—requires a response from Best Buy to constitute a K.

5. Offers may be revoked at any time before acceptance (see, e.g., *Dickinson v. Dodds*, offer to sell property was revoked when the offeree learned facts inconsistent with the continued existence of the offer, no consideration given by offeree to keep option of offer open, therefore not enforceable.)

- NB: This standard has been limited by scope of 2nd Restatement, which specifies that offeree is held to a standard of a reasonable person acting in good faith—the decision here is hyper formalistic.
- Hyper-revocability of offers: if the offeror dies, the offer dies too.
  - Has potential to cause problems: *Dickinson v. Dodds*, *Petterson v. Pattberg*—issue of reliance on part of the offeree.
- **STATE OF THE LAW:** hyper-revocability still dominant rule, but there have been intrusions into its extent (unacceptable in real estate development, you have to take out options when you check out property and buy time via a negotiated option, can't just up and revoke offer)
  - **2nd Restatement s. 45:** performance only, if you begin performance offeree gets an option
  - **2nd Restatement s. 87(2)** applies PE to notion of hyper revocability
  - **UCC 2-205**: sale of goods cases, make offer, promise to keep open for certain amount of time, 2-205 makes enforceable for 3 months

6. Counter offer

- **§39 of Restatement: offeree's power of acceptance is terminated by his counter offer HOWEVER inquiries don't terminate offers.**
- Could say, "I don't know, seems high, would you take less? Like $4800?" that would be an inquiry and you would still be able to accept the first offer."

C. Acceptance

A. Restatements

1. 2nd Restatement, s. 50: Acceptance of Offer defined, acceptance by performance; acceptance by promise.

- Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
- Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.
- Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.
- *EX: A sends to B plans for a summer cottage to be built on A's land in a remote area, and writes "If you will undertake to build a cottage in accordance with the enclosed plans, I will pay you $5000." B cannot accept by beginning or completing performance, since A's letter calls for acceptance by promise.*

2. 2nd Restatement, s. 51: Effect of part performance without knowledge or offer

- Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.
- *EX: A posts a notice on his bulletin board offering a specified bonus to any employee who remains in A's employment for four months. B, one of the employees, continues to work for one month before learning of the offer. Thereafter, B completes the four month period of employment. B is entitled to the bonus.*

3. 2nd Restatement, s. 53: Acceptance by performance, manifestation of intention not to accept

- An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance.
- Except as stated in s. 69, the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non acceptance.
- Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.
- *EX: A, an elderly widow apparently in dire poverty, promises B, a distant relative of her deceased husband, that she will pay for board and lodging in B's home. B furnishes board and lodging to A for a year without requesting or receiving any payment, and on A's death states that nothing is due to B. It is a question of fact on all circumstances whether B has manifested an intention not to seek payment even if A is found to have left a substantial bank account.*

4. 2nd Restatement, s. 54: Acceptance by performance, necessity of notification to offeror
   - Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.
   - If an offeree who accepts by rendering a promise has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless:
     - The offeree exercises reasonable diligence to notify the offeror of acceptance, or
     - The offeror learns of the performance within a reasonable time, or
     - The offer indicates that notification of acceptance is not required.
     - *EX: A, a news paper, requests B to discontinue distribution of a rival newspaper, and offers to pay B $10 per week as long as B abstains from such distribution. B discontinues the distribution. B has accepted the offer, and no notification to A is required.*

5. 2nd Restatement, s. 56: Acceptance by promise, necessity of notification to offeror
   - Except as stated in s. 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably.
   - *EX: A makes written application for life insurance through an agent for B Insurance Company, pays the 1st premium, and is given a receipt stating that it shall take effect as of the date of approval at B's home office. Approval at home office in accordance with B's usual practice is an acceptance of A's offer even though no steps are taken to notify A.*

6.2nd Restatement, s. 58: Necessity of acceptance complying with terms of offer
   - An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered.
   - *EX: A offers to sell a book to B for $5 and states that no other acceptance will be honored but the mailing of B's personal check for exactly $5. B personally tenders $5 in legal tender, or mails check for $10. There is no K.*

7. 2nd Restatement, s. 59: Purported acceptance which adds qualification
   - A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.
   - *EX: A makes a written offer to sell B a patent in exchange for B's promise to pay $10k if B's adviser X approves the purchase. B signs the writing in a space labeled "accepted" and returns writing to A. B has made conditional promise and an*

unconditional acceptance. There is a K, but B's duty to pay the price is conditional on X's approval.

8. 2nd Restatement, s. 60: Acceptance of offer which states place, time, or manner of acceptance.

- If an offer prescribes the place, time, or manner of acceptance its terms in this respect must be complied with in order to create a K. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.
- *EX: A offers to sell his land to B on certain terms, also saying, you may accept by leaving word at my house. This indicates one operative mode of acceptance, but B's power is not limited to that mode alone. A personal statement to A would serve just as well.*

9. 2nd Restatement, s. 61: Acceptance which requests change of terms.

- An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.
- *A offers to sell specified hardware to B on stated terms. B replies: I accept your offer, ship in accordance with your statement. Please send me also one No. 5 hand saw at your list price. The request for the saw is a separate offer, not counter offer.*

10. 2nd Restatement, s. 62: Effect of performance by offeree where offer invites either performance or promise.

- Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender or a beginning of it is an acceptance by performance.
- Such an acceptance operates as a promise to render complete performance.
- *EX: A, a regular customer of B, orders fragile goods from B which B carries in stock and ships in his own trucks. Following his usual practice, B selects the goods ordered, tags them as A's, crates them and loads them on a truck at substantial expense. Performance has begun, and A's offer is irrevocable.*

11. 2nd Restatement, s. 63: Time when acceptance takes effect.

- Unless the offer provides otherwise,
- An acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror, but
- An acceptance under an option contract is not operative until received by the offeror.
- *EX: A offers to insure B's house against fire, the insurance to take effect upon actual payment of the premium, and invites B to reply by mailing his check for a specified amount. B duly mails check. While B's letter is in transit, the house burns. The loss is within the period of insurance coverage.*

12. 2nd Restatement, s. 65: Reasonableness of medium of acceptance.

- Unless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received.

13. 2nd Restatement, s. 67: Effect of receipt of acceptance improperly dispatched.

- Where an acceptance is seasonably dispatched but the offeree uses means of transmission not invited by the offer or fails to exercise reasonable diligence to insure safe transmission, it is treated as operative upon dispatch if received within the time in which a properly dispatched acceptance would normally have arrived.
- NB: once acceptance reaches offeror, means of transmission become irrelevant.

14. 2nd Restatement, s. 68: What constitutes receipt of revocation, rejection, or acceptance.
    - A written revocation, rejection, or acceptance is received when the writing comes into possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.
    - *EX: A sends B by mail an offer, but later, desiring to revoke the offer, telegraphs B to that effect. The messenger boy carrying the telegram from receiving office meets C, B's neighbor, who volunteers to carry the telegram to B, and accordingly is given it by the messenger boy. C forgets to deliver it to B until the following morning. An acceptance by B mailed prior to this time constitutes a K.*

15. 2nd Restatement, s. 69: Acceptance by silence or exercise of dominion
    - Silence and inaction = acceptance in following cases only:
        - Offeree takes benefit with reasonable opportunity to reject them and reason to know they were offered with expectation of compensation.
        - Offeror states assent can be silent/inaction, and offeree in remaining so intends to accept offer
        - Previous dealings establish it is reasonable that offeree should notify offeror if he doesn't intend to accept
        - *EX: A gives several lessons on the violin to B's child, intending to give child course of 20 lessons, and to charge B the price. B never requested A to give this instruction but silently allows lessons to be continued to their end, having reason to know A's intention. B is bound to pay price,*

16. UCC s. 2-206: Offer and acceptance in formation of K
    - Intent of statute is to show that any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear it will not be acceptable.
    - Either shipment or prompt promise to ship is a proper means of acceptance of an offer looking to current shipment.
    - Beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to offeror.

B. Mailbox rule: K is operative from date of mailing acceptance, not date of receipt (see, e.g., *Morrison v. Thoelke*, acceptance was effective when letter was deposited, repudiation of offer was invalid because it was postmarked after the sending of the letter).
    - NB: Mailbox rule can be overridden by terms of the offer, usually doesn't apply to option contract
    - 1990 ABA recommendation: mailbox rule shouldn't be applied to e-contracts, acceptance effective on receipt and not sending.

e. **Restatement (2d) of Contracts, Section 69**

3. Acceptance by Performance
    a. **Restatement (2d) of Contracts, Section 45**
    b. An offer may be revoked at any time prior to acceptance (see, e.g., *Petterson v. Pattberg*, P shows up at door with cash in hand, D refuses to see him and physically take money, court agrees that D had right to repudiate offer at that moment).
        - Extremely high formalism—making acceptance contingent on full performance can generate unjust results.
        - Unilateral contracts: common in offering rewards, offeree can suffer significant reliance injury.
        - Under s. 45, P would have prevailed in establishing an option contract by showing up at door—tendering beginning of performance, would have been BoC.

4. Mutual Assent and Consideration

a. Offeree must know of offer and act in reliance of that offer (see, e.g., *Glover v. Jewish War Veterans of US*, P found out about reward day after she gave PD info about suspect's whereabouts, PD found suspects based on her evidence, court thought it was clear that D offered info voluntarily, therefore no mutual consent, therefore was not entitled to the reward).

b. An offer can be accepted by performance when the means of acceptance is not specified (see, e.g. *Industrial America v. Fulton Industries*, Defendant made offer in the Wall Street Journal, to buy industrial product lines via a broker, by contacting Defendant and opening communication between them and B-H, Deutsch acted in acceptance of their offer, this constituted enforceable K).

- Rejected the idea that you could figure out "primary" motive when there are mixed motives—Court won't make inquiry into motive as long as you reasonably knew about the offer.

D. Pragmatic Alternatives

1. Options

- Option = irrevocable offer; law willing to relax insistence on bargained for exchange: small/fictitious amounts of consideration are adequate to support irrevocability.
- **Class: "a true option can best be described as a binding mini-contract between parties that requires the offeror to keep the promise open for an agreed period of time." Consideration exists for mini contract, promise to keep K open is exchanged for a small fee (constitutes restriction on autonomy).**
- Possible to sell options (property, object) except for things that are highly personal (option contract for someone to paint your cat)

a. 2nd Restatement, s. 45: Option contract created by part performance or tender

- Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
- Offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
- *EX: A makes a written promise to pay $5k to B, a hospital, to aid it in its humanitarian work. Relying upon this and other like promises, B proceeds in its humanitarian work, expending large sums of $ and incurring large liabilities. Performance by B has begun, and A's offer is irrevocable.*
- NB: this section has very limited application because there are not many performance only (unilateral) contracts in business context—s. 87(2) doesn't have this problem.

b. 2nd Restatement, s. 25: Option contracts

- An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer

c. 2nd Restatement, s. 87: Option contract

- An offer is binding as an option contract if it
  - a) is in writing and signed by the offeror, recites a purported consideration [super formalism] for the making of the offer, and proposes an exchange on fair terms within a reasonable time, or
  - b) is made irrevocable by statute
- An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
- **Class: example of unenforceable option: "In exchange for the $300 you paid me, I hereby grant you an option to purchase my cabin in CO at a price I will determine when you indicate your willingness to buy. This option will remain open for 45 days." NOT enforceable bc an offer has to be specific—"price I will determine" means there's still a material fact missing. Therefore unenforceable.**

- **NB: 2nd Restatement s. 87(1) does NOT reject formalism in connection with options—embraces it. "Recites purported consideration," no consideration has to exist as long as you say it happens.**
  - **S. 87(1) significantly undermines concept of consideration throughout R, takes huge hit to its credibility for concept of consideration**
  - **Law still embraces symbolism: handshakes, signatures—why you have to hand over a quarter to finalize an option if that's what's required**

b. **UCC s. 2-205: Firm offers**

- An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time state or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
- **Class: takes consideration out of it: if you make an option, it's enforceable (must have signed writing, etc.) and throws out consideration.**
- **2-205 does NOT throw out formality in the creating of an enforceable option: must be in writing, signed, 3 months limitation. BUT whatever objection to option you have, you can't rely on consideration grounds**
- **I offer to sell you my car for $5000 and you say that you are very interested but that you have to talk to a particular relative about this transaction and that will take at least 3 days. I respond "no problem, I promise not to sell the car to anyone else for the next three days." NOT ENFORCEABLE. Offer not made by merchant, not signed, not in writing.**
  - **Only possible recourse is with 87(2)—will need to show economic loss that comes from reliance.**

2. Option Alternatives
   a. Right of first refusal
      - First promisee gets chance to buy property at the same price as the second person's offer
      - Real estate agents don't like this bc it prevents bidding wars
      - Outside buyers dislike it as well, negotiating price is not costless and 1st party can just swoop in and take first offer w/o doing any work
      - Some outside buyers refuse to enter bids once they find out about right of 1st refusal
      - To make this more fair, should compensate other side for their bargaining.
   b. Negative sale
      - Owner promises not to sell the property to any other party for a specified period of time; owner may also agree not to seek other offers on the party.
   c. Drop dead money
      - If owner of property does sell it to another party, owner agrees to pay a specified amount of $ to the promisee to compensate her for both the expenses she incurred and other investment opportunities she lost while investigating property in question

o NB: Lawyers include definitions of when negotiations begin/end, can therefore negotiate start and end of good faith into negotiations—contract for negotiating a contract

3. Qualified Acceptance
   a. used to operate as counter offers in light of the mirror image rule
   b. The Mirror-Image Rule- acceptance must precisely match an offer in order for a contract to be formed.

- Acceptance must match offer (see, e.g., *Poel v. Brunswick-Balke-Collender Co. of NY*, acceptance didn't precisely match wording of offer, therefore no enforceable K because mutual assent was lacking)
  - NB: case is uncommon, usually courts are only willing to dissolve Ks in cases of large discrepancies between offers and acceptances—had to be material or substantial

- Demonstrates strict and unwise application of mirror image rule—agreement of substantive terms, new term was part of preprinted form and maybe not meant to be included there, other party never actually objected to its inclusion, objected on other grounds.
- Mirror image rule: terms of acceptance must match offer, if they don't then the "acceptance" counts as a counter offer and wipes out the first offer. Mirror image rule isn't dead yet but courts aren't as rigid in its application—shouldn't be completely abandoned but universality of it is troubling.
- Younger judges showing impatience with this, more open to flexibility in seeing counter offers as inquiries.

c. The Battle of the Forms

i. UCC Section 2-207: Additional terms in acceptance or confirmation

- **Only applies to goods**,
- (1) additional terms can be construed as acceptance, unless acceptance is expressly made conditional on them—then construed as proposals for addition to K;
- (2) between merchants terms become part of K unless:
    - a) offer expressly limits acceptance to terms of offer,
    - (b) they materially alter it (e.g., negating standard warranties), or
    - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received (no answer w/in reasonable amt of time-assume new terms are assented to);
- (3) conduct by both parties that recognizes existence of K is sufficient to establish one, even if writings do not otherwise establish one.
- Comment: two common situations: 1) written confirmations, 2) exchange of acknowledgement forms; these often conflict with each other but parties proceed with transaction.
- **CLASS: essence of UCC §2-207 is that throwing in additional terms in your response doesn't kill the offer, constitutes acceptance, unless they materially differ from the offer (then they're off the table). This is a slight modification of common law counteroffer rule, and is intended to address the problem of the battle of the forms. 2-207 can be seen as saving modern business contracts—allowing mindless use of contracts to stand**
- **CLASS: in exchange of standard form Ks, new reading of 2-207 is that the first set of terms sent will control (s.1 of 2-207).** Additional terms in following Ks are construed as mere proposals for additions to K unless they materially alter it (change in venue is definitely material change). Message is that if you don't like the first paper, call off the deal
    - **INSTITUTIONAL RULE:** cts saying that business world has to swallow uncertainty by imposing clear rule: **first paper controls**

3. Incomplete Agreements

a. Introduction

i. Especially common in complex deals, parties may reach prelim agreement on most of terms and reflect the terms in a letter of intent, contemplates further action before K is finalized.

- **CLASS: key test is whether there is a good external reference for setting the term; court needs high degree of reliability before they will do this**

ii. Letter of intent are generally not binding, are normal parts of doing business/making deals, support larger goal of negotiating in stages (**see, e.g., *Empro Manufacturing Co., Inc v. Ball-Co Manufacturing, Inc.*, letter of intent was not found to be binding, as evinced from terms in K and attorney's letter that stated "some clarifications [were] needed" before finalizing deal; can't get into subjective mindset of parties—objective theory of K**).

- Two most important facts of *Empro*: 1) agreement was subject to board/shareholder approval; 2) attorney says "some clarification is needed."

b. Enforcement of Ks with open terms possible under modern doctrine, as long as parties have intended to be bound despite presence of open terms, and if parties have given ct. a basis for determining appropriate remedy for breach (see, e.g. *Joseph Martin, Jr. Delicatessen v.*

Schumacher, ct held that commercial lease renewal option was unenforceable because it didn't specify a rental rate for the renewal period, can be partially explained by involvement of real estate rather than good).

- Traditional/formalistic view was that courts wouldn't enforce incomplete Ks b/c of lack of mutual assent: now **2nd Restatement §33(2) and UCC 2-204(3) permit enforcement of Ks with open terms if parties have intended to be bound despite presence of open terms—must give ct basis for appropriate remedy for breach.**
- Ct needs high degree of reliability to set terms
- Ks w/ open terms frequently come up in very complex transactions (ex: Empro), arranging for sale of business is very complicated bc it moves in stages and small steps.
    - Ex: ballpark price, use it to get idea of a deal rolling

c. Restatement (2d) of Contracts, Section 33: Certainty

- 1) Terms of K must be reasonably certain
- 2) Reasonably certain = provide basis for determining existence of a breach and giving appropriate remedy
- 3) If 1 or more terms of a proposed bargain are left open/uncertain that may show that a manifestation of intention is not intended to be understood as offer or acceptance.
    - Comment, Certainty of terms: actions of the parties also count in determining intent, even with missing or unspecified terms; when parties have intended to conclude a bargain, uncertainty as to incidental/collateral matters is seldom fatal to K.

d. UCC Section 2-204: Formation in general (gap-filling rule)

- 1) K for sale of goods is ok in any form that is "sufficient to show agreement," including conduct by both parties that recognizes existence of K.
- 2) K for sale may be present even if the moment of its making is undetermined.
- 3) Even if 1 or more terms are left open, K doesn't automatically fail as long as parties have intended to make a K and there is reasonably certain basis for appropriate remedy.

e. UCC Section 2-305: Open price term

- 1) Parties can conclude K for sale even if price isn't settled; if so the price is a reasonable one @ time of **delivery** if:
    - A) nothing is said as to price;
    - B) Price is left to be agreed by parties and they fail to agree (*Schumaker*)
    - C) Price is to be fixed in terms of agreed market/other set standard and it is not so set or recorded
- 2) Price to be fixed by seller/buyer means price to fix in good faith.
- 3) When price left to be fixed otherwise than by agreement of parties fails to be fixed through fault of one party, other may treat K as cancelled or fix reasonable price himself (has option)
- 4) When parties intend not to be bound unless price is fixed, and it is not fixed, there is no K—in this case buyer must return any goods/pay reasonable value @ time of delivery and seller must return any portion of price paid.
- Comment: recognize parties' intent to be bound is dominant; good faith includes observance of reasonable commercial standards of fair dealing in trade if party is a merchant; wrongful interference by one party with any agreed mechanism for fixing price can be treated by other party as repudiation justifying cancellation, or failure to take cooperative action (shifts to aggrieved party reasonable leeway in fixing price).

f. UCC Section 2-309: Absence of specific time provisions; notice of termination

- 1) Time for any action under K, if not provided or agreed upon is a reasonable time.
- 2) when K provides for successive performances, is indefinite in duration, it's valid for reasonable time but unless otherwise agreed, may be terminated at any time by either party.
- 3) termination of K by one party (except upon occurrence of agreed event) requires reasonable notification be received by other party; agreement dispensing with notification is invalid if that would be unconscionable.
- Comments: overarching principles are avoidance of surprises, protection of good faith, and notice to reduce uncertainty; when time for delivery is left open, unreasonably

early offers/demands for delivery are considered expressions of desire/intent, not final positions that could create breach.

IX. BARGAINING AND POWER

A. Introduction
- Outcome can depend on relative power—can lead to questionable terms in Ks
- Unconscionability is another filter that we can apply to determine whether we will respect SF K (doesn't dominate/control SF K area, and its limitation is that it's really expensive to prove unconscionability bc you need so much contextual information).
    - Mutual mistake is much simpler to decide, as are the rest of the filters (fraud, duty to disclose, misrepresentation, etc.)

B. Form Contracts: Cases

1. General duty to read is still alive in US (see, e.g., *Merit Music Service, Inc. v. Sonneborn*, Ds are liable for BoC even though they thought they were signing "a note" and there was some possible foul play on the part of P; basic rule that there was no reason why P should have known that Ds didn't understand what they were signing).
    - **Ct recognizes there are several grounds that can supersede duty to read: signature obtained by duress, other party's fraud, mutual mistake, misrepresentation, breach of duty to disclose.**
    - **Cites 1st restatement: party not bound by signing K "if the other party knows, or as a reasonable person should know, that the apparent acceptor does not intend what his works or other acts ostensibly indicate."**
2. In order to be enforceable, written disclaimer of implied warranty of merchantability made in connection w/ sale of goods must be conspicuous to a reasonable person (see, e.g., *Cate v. Dover Corp*, disclaimer contained in text undistinguished in typeface, size or color within a form purporting to grant warranty is not conspicuous, and is unenforceable unless buyer has actual knowledge of the disclaimer).
3. SF Ks can be entirely void if their T&C conceal/misrepresent true nature of conduct with other party and if no reasonable person would have understood the T&C (see, e.g., *Amber Duick v. Toyota Motor Sales, Inc.*, arbitration clause in K was not binding because K was void ab initio, on account of fraud at inception within the T&C of the K).
    - **NB: This puts limitation on ad speak; can't use ad speak when taking away certain rights, here right to privacy**

C. Form Contracts: Commentary

1. Prevailing rule from UCC 2-207 is that first papers are given greatest weight in exchange of form Ks.

2. Several grounds that can supersede the duty to read (as recognized by *Merit Music)*: a) signature obtained by duress, 2) other party's fraud, 3) mutual mistake, d) misrepresentation, e) breach of duty to disclose.
    - Also, party is not bound by signing K if the other party knows, or as a reasonable person should know, that the apparent acceptor does not intend what his works or other acts ostensibly indicate.

3. Accepted that if one party had presented a K form that contained uncompleted blanks and obtained signature of other side, party presenting K could not later fill in blanks with terms that were different from those discussed/not discussed at all.

4. There are some terms in SF Ks that are more suspect than others:
- Integrity of personal safety
- Due process in a legal process—can't strip away important DP rights (waive discovery, b/c no person would agree to that if they really knew what it means)
- Transferring extreme financial loss to other side by way of surprise

- NB: Gordley's doctrine—does K allocate loss to party who is not the least cost avoider? If so, indication that K is unfair.

5. 7 approaches that could reduce questionable aspects of SF Ks

- Regulate specific terms of K
- Get both sides together to negotiate SF K (ex: NC Real Estate K, NC Realtor's Assoc. working w/ NC Bar Assoc.—balanced parties' interests, don't regulate terms that can be negotiated).
- Gov't issued SF K w/ blank area for vendors' idiosyncracies (increases likelihood of competition of terms, puts language up front, predictable)
- **Pretesting language—Weistart's favorite**
- OZ law: whether stronger party imposed conditions that were not necessary to protect their legitimate business interest
- Whether the stronger party made adequate disclosure to the weaker party
- Use of undue influence, pressure or unfair tactics.

F. Unconscionability

- NB: U. doesn't domination SF K area; limitation is that it is hugely expensive to prove U. because you need so much contextual information, requiring expensive inquiry—mutual mistake is much easier to decide.

1. The UCC and the Modern Doctrine
   - Llewellyn wanted specific provision for standardized K, instead UCC 2-302 turned into general policing doctrine for K law, extending beyond sale of goods.

2. UCC Section 2-302

- 1) If court finds (as matter of law) the K or any clause of K to have been unconscionable at time it was made, ct can refuse to enforce the K, can enforce remainder of K (striking u. clause), or may limit application of any u. clause as to avoid any u. result.
- 2) When claim of u. is made, parties allowed reasonable opportunity to present evidence as to commercial setting, purpose and effect to aid ct. in making determination.
- Comment: Intent of section is to allow courts to police explicitly against Ks or clauses which they find to be unconscionable. Cts can rely entirely on u. to enforce/not enforce a K; basic test is whether, in light of general commercial background and commercial needs of trade/case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of making the K. Principle is to avoid oppression and unfair surprise- **not** of disturbance of allocation of risks because of superior bargaining power."
- NB: section is addressed to the court, and decision is to be made by the **court** and not the jury—only agreement which results from ct's action on these matters is to be submitted to jury.

3. Where the element of unconscionability is present at the time a K is made, the K should not be enforced (see, e.g., *Williams v. Walker-Thomas Furniture Company*, case occurs in context of recent adoption of UCC, including 2-302, specifically allowing courts to void Ks on unconscionability grounds; case says little about U. on the facts).
   - Seems like unconscionability is the consumer's shield against SF Ks written by corps w/ huge legal teams and incentives to write the Ks as favorably to them as possible, w/o any regard for consumer

4. 3x rule can be used as a guidepost for U., main issue is philosophical problem of freedom of K v. protecting victims of gross inequality of bargaining power (see, e.g., *Jones v. Star Credit Corp.*, sale of freezer worth $300 max to family on welfare, conducted at their home, for $1200 was unconscionable under UCC 2-302).
   - NB: Court did not refund the $ that Ps had already paid—seems to indicate that unconscionability seen as shield against unfair business practices, not a sword.

X. DEFERENCE TO WRITINGS

A. Introduction
- NB: effects of merger clauses are limited, some things said in sales lots are not wiped out automatically: fraud, duty to disclose, misrepresentation
  - Innocent misrepresentation is not definitively in the list (see, e.g. *Norton v. Poplos*, there ct. held that it was sufficient to grant rescission of K).
- **Ks in writing are preferable for several reasons: makes courts' jobs easier, improves functioning of agents carrying out K, creates memorial of agreement which serves as a guide to future disputes, provides incentive to fully flesh out the deal**—the reason why there isn't a written K in every single case is bc of US tradition and culture—high rewards from moving quickly, low reliance on formalism (too continental)

B. The Statute of Frauds

1. Question raised by SoF: does K need to be in writing?
   - Designed to prevent fraud and perjury by requiring certain Ks to be made exclusively in writing (now: real estate)
   - Every material term in K must be reduced to written form
   - If SoF invoked, no parol proof allowed
   - To be sufficient, required writing must state w/ reasonable certainty:
     - Each party to contract and land, goods, and other subject matter to which K relates, and terms and conditions of all promises constituting the K and by whom/to whom promises are made (2nd Restatement, s. 207)
   - Unless writing (considered alone) expresses essential terms with sufficient certainty to constitute an enforceable K, it fails to meet the demands of the statute.
   - 1 year rule—**now majority of cts interpret 1 year rule by finding that if there is any conceivable way that the performance can be completed within a year, then statute of frauds doesn't bar enforcement**
2. **Present day importance of subject matter of original SoF: real estate transactions (very important), K for sale of goods over a certain amount (very important), agreeing to be liable for someone else's debt (somewhat important), contracts not to be performed within a year (somewhat important), executor responsible for debts of estate (not very important).**
3. K is not barred by 1-year rule if K doesn't state specific duration, no matter how long actual performance will take (see, e.g., *CR Klewin, Inc., v. Flagship Properties, Inc.*, an oral K to perform as construction manager on all phases of a project was found to be enforceable; K was outside of SoF ("functional equivalent of K of indefinite duration); effort by court to limit 1 year rule as much as possible).
4. **UCC Section 2-201: Formal requirements: statute of frauds**
   - 1) K for sale of goods >$500 is only enforceable with a writing
   - 2) If K doesn't satisfy first section, but is still valid, can be enforced if a) goods are specifically made for buyer and can't be sold in ordinary course of business, and seller already began making them; b) party against whom enforcement sought admits K for sale was made; c) if goods have been accepted/paid for.
   - NB: UCC Section 2-209(3) provides that modifications of K within scope of section 2-201 must be in writing to be enforceable
   - **NB: this section requires low standards for meeting SoF: looking for signed writing that recognizes contractual relationship; must state quantity and subject matter. Terms can be straight up wrong, law is just looking for acknowledgement of contractual relationship.**
   - Although it isn't explicitly specified by 2-201, K must have all other elements of normal K to be enforceable—meeting of minds/bargain

C. The Parol Evidence Rule- **principle of substantive law, institutional rule**

1. If a writing is a **total integration**, then the contents cannot be added to or varied by prior or contemporaneous oral or written terms. If there is a writing that is a **partial integration**, then

the partially integrated terms cannot be varied by prior or contemporaneous oral or written terms, but additional terms can be supplied from collateral oral or written sources.

Two key exceptions

1. the PER doesn't affect agreements entered into subsequent to the writing.
2. The rule doesn't preclude the use of parol evidence to show that there was a defect in the formation of the K, such as fraud, mutual mistake, lack of consideration, etc.

2. Only comes into play in situations where there is already a writing; for purposes of the rule, we don't care what prompted the parties to produce the writing.
   - Premised on hypothesis that when parties have voluntarily expressed agreement in written form, writing represents complete integration of their understanding.
   - Does not make parol proof inadmissible when they're not inconsistent with a written K, when the K is silent on the subject, and circumstances justify inference that it wasn't intended to constitute final inclusive statement.
   - NB: a **valid** merger clause will trump parol evidence rule (if it was bargained for and agreed to).

3. Two Classic Cases
   a. Prior oral agreements are enforceable only if they entail separate consideration on the part of the promisee; if they promise to pay additionally for some further service (see, e.g., *Mitchill v. Lath*, oral agreement to remove icehouse as part of sale of land was not enforced because it was not expressed in final contract).
   b. Evidence of collateral oral agreements should only be excluded if the fact finder is likely to be misled (see, e.g., *Masterson v. Sine*, oral agreement for non-assignability of property was enforced in bankruptcy proceedings because the evidence of the agreement was credible, the writing was in SF and therefore harder to adjust, and therefore written K couldn't be regarded as an integrated document).
4. Contrasting the Two Doctrines Text

D. Ambiguity and Interpretation
1. Traynorian take on interpretation: "judicial belief in the possibility of perfect verbal expression…is a primitive faith in the inherent potency and inherent meaning of words;" if a K can be plausibly interpreted in 2 ways (taking context into consideration) then extrinsic evidence is admissible (see, e.g., *Pacific Gas & Electric v. Thomas Drayage and Rigging*, because clause in question (indemnity) was reasonably susceptible to both D and P's alleged meaning, extrinsic evidence to support D's meaning was acceptable).
   - NB: important to note that Traynor was ahead of his time, saw world was shifting, introduced post modern conceptualizations to look at legal issues.
2. Kozinski's approach on interpretation: should adhere to PER and objective theory of K (see, e.g., *Trident Center v. General Life Insurance Co.*, have a law firm and an HMO suing each other, K could not be more clear, but because of Traynor's precedent he is obliged to use precedent that if one side is willing to claim that the K means one thing but parties agreed to another, court must consider parol evidence of possible ambiguity).

XII. REMEDIES

A. Introduction
   - Baseline principle: before a party can demand performance from the other side, the party must be ready, willing and able to perform his part of the K

Types of Recovery when the action is in K (when not in K, you can use restitution *Cotnam v. Wisdom* or PE *Ricketts v. Scothorn*).

A. Traditional damages
   1. Expectation damages: direct (2-702, 706, 709) incidental and consequential
   2. Reliance expenditures (alternative measure)

B. Rescission and restitution (cancel K and reimburse P for expenditures made)
C. Specific performance
D. Liquidated damages
E. Punitive damages

- Vast majority of remedies under K occur under A
- As general rule, no PD for BoC. Qualification: if the facts you allege also prove a tort, then you can sue in tort and get PD, and then in some cases if you plead a K but all the facts show a tort, you can get PD. Happens very rarely (ex: train co. losing body, ct found infliction of emotional distress, allowed PD).
- B-not asking for damages, backwards looking; request to restore injured party to position he was in before K.
- C- Ct orders party to perform K. Classic example is BoC to buy real estate.
- D- agreed upon damages; at time of K parties stipulate what damages will be for breach; ct will supervise to make sure parties are not taking huge advantage of each other; no freedom of K in setting damages.

1. The Problem of Remedies
    - Ultimate question in K law: what are we prepared to do if one party breaches? Importance of values attached to process of contracting.
    - Specific performance rare—preference is compensation via $, punishing breaching party not major objective.
    - NB: law encourages the retraction of repudiation, but repudiating party loses right to withdraw if other side has relied upon the repudiation and taken action to its detriment.
    - NB: **promissory estoppel and restitution** are remedies that are formulated according to non-contracts principles.

2. Have a breach, types of remedies that are available.

- Vast majority of remedies under contract occurs under traditional expectation damages.
- As a general rule, no PD for BoC. Qualification: if the facts that you allege also prove a tort, then you can sue in tort and get PD, and then in some cases if you plead a K but all the facts show a tort, you can get PD. Happens very rarely. Don't get PD for gratuitous BoC (even breach of good faith).
    - EX: NC case where train company entered into K to transport a body, and they lost it. Pled as BoC case, but Court found actual allegation of tort: infliction of emotional distress, will allow PD. Needs to be pled as tort or appear as tort.
    - Adirondack Gas: awarded PD, but not sure which cause of action they stemmed from. Was there another claim in P's complaint that was more purely tort? Look at exactly what was pled and where they attached PD.
- Rescission and restitution (cancel K and reimburse P for expenditures made)- not asking for damages. Backwards looking. Request to restore injured party to position he was in before the K.
- Liquidated damages- agreed upon damages. At time of K, parties stipulate what damages will be for breach. Court will still supervise to make sure parties are not taking huge advantage of each other. No freedom of K in setting damages.
- Specific performance- Court orders party to perform K. Classic example is BoC to buy real estate. If you are buyer and you breach, seller has option of asking court to issue order: if buyer doesn't agree he will be thrown in jail.
    - NB: we see paying money as damages, not as specific performance.
    - SP is really rare—Ct says you can't get SP if you will be adequately compensated by monetary reward. Strong preference for monetary relief. We will try to monetize the injury in 99% of cases out of respect for individual autonomy. Don't want to force parties to continue dealing with each other when they don't like each other anymore.

B. The Basic Formula

1. Introduction
    - Basic philosophy on direct damages: goal of traditional damages is to satisfy the original expectations of the injured party and give that party "the benefit of the bargain"

- "Benefit of bargain" = comparing what injured party would have received under K with the value of reasonably attainable alternative performance (aka market price); difference (if positive #) is awarded as damages
- Law monetizes injury and purports to put the injured party in the same position that he would have been in had the K been performed.
- Setting price for K: price of materials + price of labor + profit (includes overhead and risk [breach of buyer, etc.]).
  - NB: normal K profit = 25%

2. Historical Perspective
   - Possible to sue for BoC before the intended date of effect of the K; a contractual relationship= implicit promise that neither party will do anything to prejudice the other inconsistent with that relation (see, e.g., *Hochster v. De la Tour*, person who hired guide and repudiates K before anticipated date of effect of K is liable for BoC damages, even if he is sued before the anticipated date of effect).
3. Questioning the Norm Text
4. Efficient Breach
   a. Either seen as efficient allocation of resources, or violation of good faith duty.
      - Concept of efficient breach doesn't take into account costs of litigation, emotional distress, time, etc. Big assumption that market price will capture all values that injured party had in K. Expectation damages do NOT cover all losses brought about by BoC.

Professor Commentary

James R. Gordley		Video
Richard E. Speidel		Video
Lissa Broome	Video	
John Weistart	Video	
Melvin A. Eisenberg		Video
Elizabeth Hayes Patterson		Video

Beyond the Doctrine

John Weistart	Video	
Scott Merrell		Video

C. The Mechanics of Damages
   - Basic conceptualization of damages regardless of subject matter = **costs (costs spent/ costs saved) + profit (net profit, includes overhead).**

1. End result of award of **direct** expectation damages should be that injured party has basket of "economic results" that equal K price when totaled.
   - Law "monetizes" the injury and purports to put the injured party in the same position that he or she would have been in had the contract been performed.
   - Includes performance costs that are saved (not expended) when injured party is excused from further performance when other side commits a breach.
   - **Injured party is person to perform services/deliver goods**: party should receive basket of values = price of K.
   - **Injured party is person who would receive services/goods**: party should end up getting what was promised, or its equivalent, and pay out of pocket no more than original K price.

2. Calculating Damages
   - **Direct** damages: assume K price is $4 million. Must find substitute. Takes a long time, unable to produce as much as we thought we could, one we finally find costs $5 million. Direct damages is $1 million—the direct cost of getting the performance (or reasonable equivalent) that was promised by the original promisor.

- End result of award of direct expectation damages= injured party has basket of economic results (not necessarily $), that when totaled up equal the contract price.
  - NB: one of these economic results are costs saved (not expended) when injured party is excused from further performance when the other side commits a breach.

- Overhead- general costs of running a business that are not separately attributable to running a project or independently attributable to a specific contract (ex: rent).

- Direct damages affect two types of people: performers (do some service or deliver some goods) vs. recipients (buying something).
  - Performers: should receive basket of values that is the equivalent of the contract price—what they would have expected under the K price (when we add up everything, it should equal the K price).
  - Recipients: should receive what was promised, or its equivalent, and pay out of pocket no more than K price (printing press example: should pay no more than $4 million, aka K price).
  - Therefore expectation damages' goal is to give you what was promised. PROTECTION ALWAYS RELATED TO THE **CONTRACT** PRICE.

- **Incidental** damages: transaction costs; costs involved in arranging the substitute transaction (here, substitute printing press): shipping costs were greater, had to pay brokerage fee, had to pay engineer to do evaluation to see if it was really about the same (all are incidental to obtaining alternative performance from someone else because original guy breached).

- **Consequential** damages: MOST IMPORTANT- often much larger than direct damages. 2nd level/secondary damages caused by the breach, which are not incidental damages. Assume buyer had lined up several jobs that he was planning on running on new printing press, and buyer did not otherwise have the capacity to do those jobs—could only be done by new press. You will have to give up some of these contracts when you are searching for the replacement—consequential damages are the lost profits. Have to show **high probability** that these profits will happen, and you have to **quantify** them. If damages are highly speculative (would have better advertising presence, therefore maybe more revenue from advertising), you won't receive them. ****Hope for business is usually speculation, but it can be overcome.
  - EX: Bolts and screws—direct damages is usually nothing but consequential damages (the structure you built falls apart) are huge; can recover consequential/incidental damages even if you don't get direct damages.

3. The UCC Approach

§2-703: Seller's remedies in general

"Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then w/ respect to any goods directly affected and, if the breach is of the whole K, then also w/ respect to the whole undelivered balance, the aggrieved party may

a) withhold delivery of such goods;
b) stop delivery by any bailee as hereafter provided;
c) proceed under the next section respecting goods still unidentified to the K;
d) resell and recover damages as hereafter provided;
e) recover damages for non acceptance or in a proper case the price;
f) cancel"

§2-706: Seller's resale including contract for resale

§2-708: Seller's damages for non-acceptance or repudiation.
1) Diff btwn market price @ time of tender + incidental damages, minus expenses saved
2) Diff btwn resale price v. K price, + incidental damages, minus expenses saved.
NB: §2-706 makes it clear that "the seller is not accountable to the buyer for any profit made on any resale"

§2-708: Seller's damages for non-acceptance or repudiation
1) Subject to subjection 2 and to provisions of article w/ respect to proof of market price (2-723), measure of damages for non-acceptance or repudiation by buyer is the difference btwn market price at time and place for tender and the unpaid K price together w/ any incidental damages provided in this article (2-710) but less expenses saved in consequence of buyer's breach
- **Δ market price @ time &place for tender v. unpaid K price + incidental damages minus expenses**

2) if the measure of damages provided in subsection 1 is inadequate to put seller in as good a position as performance would have done, then measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together w/ any incidental damages provided in this article (2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

§2-709 Action for the price
1) when buyer fails to pay price **as it becomes due** seller may recover, w/ any incidental damages under next section, the price
a) of goods accepted or of conforming goods lost or damages w/in a commercially reasonable time after risk of their loss has passed to buyer; and
b) of goods identified to K if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
2) Where seller sues for price he must hold for buyer any goods which have been identified to K and are still in his control except if that resale becomes possible he may resell them at any time prior to collection of judgment. Net proceeds of any such resale must be credited to buyer and payment of judgment entitles him to any goods not resold.
3) After buyer has wrongfully rejected or revoked acceptance of goods or has **failed to make a payment due or has repudiated,** a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

§2-710: Seller's Incidental Damages
Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

§2-711: Buyer's remedies in general: buyer's security interest in rejected goods
1) Where seller fails to make delivery or repudiates or buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if breach goes to whole K, buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
a) "cover" and have damages under next section as to all goods affected whether or not they have been identified to the K; or
b) recover damages for non-delivery as provided in this article (2-713)
2) Where seller fails to deliver/repudiates buyer may also
a) if goods have been identified, recover them as provided in article 2-502; or
b) in a proper case obtain specific performance or replevy goods as provided in article 2-716

§2-713: Buyer's damages for non-delivery or repudiation
1) w/ respect to proof of market price, measure of damages for non-delivery/repudiation by seller is difference btwn market price @ time when buyer learned of breach and K price together w/ any incidental and consequential damages provided in this article (2-715) but less expenses saved in consequence of seller's breach

§2-712: "Cover"; Buyer's procurement of substitute goods
1) after breach within preceding section buyer may "cover" by making in good faith and w/o unreasonable delay any reasonable purchase of or K to purchase goods in substitution for those due from seller
2) buyer may recover from seller as damages the diff. btwn cost of cover and K price together w/ any incidental or consequential damages as hereinafter defined (2-715), but less expenses saved in consequence of seller's breach
3) failure of buyer to effect cover does not bar him from any other remedy

4. Restatement Approach: §347—(NB: this is broad theory, UCC is the one you have to adhere to)
- Injured party has right to damages based on his expectation interest as measured by
    - A) loss in value to him of other party's performance caused by its failure or deficiency, plus
    - B) any other loss, including incidental or consequential loss, caused by the breach, less
    - C) any cost or other loss that he has avoided by not having to perform

D. Problems of Measurement
1. Uncertainty in Damages
- Default formula for injured buyers: **UCC 2-713(1): damages for non-delivery/repudiation = diff. (market price at BoC v. K price) + incidental + consequential – expenses saved**
    - NB: Market price = place for tender or place of arrival (different for formula for seller—market price set at when seller learns of BoC).
- For damages that are highly speculative (ex: lost future profits), one strategy to make it more appealing to ct is to say "my client lost at least x amount," that way you can set a bar without overreaching. Also plays into limit of cognition of judge—anchoring effect.

2. Economic Waste
a. Some courts will measure liquidated damages against how much performance will actually be worth: apply doctrine of waste and allow damages only for diminished value, not cost of correction (see, e.g., *Peevyhouse & Peevyhouse v. Garland Coal*, coal company's refusal to honor provision in K made with farmers to return their land to its prior state was ok according to ct. because cost of repairing it would be $20,000 but would only increase its value by $300).
- Completely bullshit decision, judges were being bribed, etc.

3. Lost Volume Sellers
a. Gains made by a lessor on a lease entered into after the breach are not to be deducted from his damages unless the breach enabled him to make the gains. Recoverable damages are ones that are reasonably within the contemplation of the parties at the time of the K (see, e.g., *Locks v. Wade,* lessor of jukebox was entitled to full damages upon D's repudiation of K, because of the reliance created in agreeing to rent out the jukebox).

E. Additional Losses
1. Consequential Damages
a. The breaching seller is liable for any loss resulting from the general or particular requirements of which the seller at the time of contracting had reason to know (see, e.g., *Hadley v. Baxendale*, because loss of profits due to delay in replacement shaft was not known to both parties, D can't be forced to pay them).

b. The UCC Approach

1. The basic inquiry is the same for seller's damages: MP v. KP
2. A special formula applies where there is breach of warranty: difference btwn the value of the goods if they had been as warranted and their value as delivered.
3. Buyer can't recover consequential damages that could have been prevented by cover.

- **2-710: Seller's Incidental Damages**
  - Incidental damages= commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after buyer's breach, in connection with return or resale of goods or otherwise resulting from breach—no consequential damages resulting from buyer's breach.

- **2-711: Buyer's remedies in general; buyer's security interest in rejected goods**
  - Buyer has not accepted or revoked acceptance: cover and have damages; recover damages for non delivery (7-213); recover goods if they have been identified; obtain specific performance or replevy in proper cases.
  - On rightful rejection or justifiable revocation of acceptance a buyer has security interest, and may hold such goods and resell them in manner as an aggrieved seller.
  - NB: buyer not allowed to award himself damages via resale; not entitled to profit from resale.

- **2-713: Buyer's damages for non-delivery or repudiation**
  - Damages = diff. (market price at BoC v. K price) + incidental + consequential – expenses saved
  - Market price = place for tender or place of arrival (in case of rejection after arrival or revocation of acceptance)
  - NB: exception for specific performance- if market price is unavailable because of a scarcity of goods of the type involved, good case for SP.
  - NB: this section applies ONLY to the extent that buyer has not covered.

- **2-712: Cover; buyer's procurement of substitute goods**
  - buyer may cover after breach by making reasonable purchase/contract to purchase in good faith and without unreasonable delay
  - damages = diff. (cover price v. K price) + incidental + consequential – expenses saved.
  - NB: cover is not mandatory—failure to do so doesn't bar from any other remedy
  - NB: this remedy is equivalent of seller's right to resell
  - NB: irrelevant whether hindsight proves that buyer's cover was not the cheapest/most effective; remedy available for merchants and consumers.

- **2-714: Buyer's damages for breach in regard to accepted goods**
  - when buyer has accepted goods and given notification, may recover for any non-conformity of tender the loss resulting in the ordinary course of events from seller's breach
  - damages for breach of warranty = diff. in value of goods accepted v. value they would have had under K; unless special circumstances show proximate damages of a different amount.
  - NB: this measure for damages not intended as exclusive measure
  - NB: "non conformity" refers to BoW and also any failure of the seller to perform according to his obligations under K

- **2-715: Buyer's incidental and consequential damages**
  - Incidental damages= expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and other reasonable expenses incident to delay or other breach

- Consequential damages= any loss resulting from general or particular requirements and needs of which seller at time of K had reason to know and which could not reasonably be prevented by cover or otherwise and injury to person or property proximately resulting from any breach.
  - NB: Only those damages that could not reasonably be prevented by cover
- NB: Rejection of tacit agreement test
- NB: any seller who doesn't want to take risk of consequential damages may use section on contractual limitation of remedy
- NB: burden of proving extent of loss incurred via consequential damages is on the buyer—wide standard for determining "loss"
- NB: "Proximate" cause turns on whether it was reasonable for buyer to use goods without such inspection as would have revealed the defects

- **2-716: Buyer's right to specific performance or replevin**
  - SP possible when goods are unique or in other proper circumstances
  - SP may include terms and conditions as to payment of price, damages, or other relief as ct may deem just
  - Buyer has right of replevin if after reasonable effort he can't cover goods or circumstances reasonably show that such effort will be futile, or if goods have shipped under reservation and satisfaction of security interest in them has been made or tendered.
  - NB: More liberal attitude toward SP of K of sale
  - NB: inability to cover is "strong evidence" of "other proper circumstances"
  - NB: section intended to give buyer rights to goods comparable to seller's rights to the price.

- **2-217: Deduction of damages from the price**
  - After notifying seller of intent to do so, buyer can deduct all/any damages resulting from breach, from the price still due on the K.
  - Relief NOT limited to BoW, but breach must be within same K that price is still owed
  - Buyer must give notification to avoid breach, "no formality of notice is required and any language which reasonably indicates the buyer's reason for holding up his payment is sufficient."

G. Liquidated Damages

1. Introduction
   - Cts implicitly reject freedom of K to set liquidated damages; strong preference for setting own damages regardless of what K says.
   - Useful for construction situation: each date beyond construction delayed will have damages attached; can't set rate of daily damages too high or court will invalidate it.
   - Limitations on cognition justify judicial review of LD clauses
2. Historical Perspective
   - Stems from use of penal bonds—written commitment under seal that promisor would pay a certain amount unless a stated condition (maybe performance); undermined by cts as they used them less and less frequently
   - In many jurisdictions, any indication that clause is intended as penalty/spur to performance risks invalidation
3. Using gross receipts as a basis for liquidated damages may not be enforceable as liquidated damages; may constitute an unenforceable penalty clause (see, e.g. *Wasserman's and Jo-Ro v. Township of Middletown*, CoA remanded to trial ct issue of whether LD clause requiring payment of LD based on P's gross receipts is a valid LD clause).
4. The UCC Approach
   - **§2-718(1)**: **Liquidation or limitation of damages; deposits**
     - (adopts approach of Restatement) clause is to be upheld if it specifies a sum that is reasonable **either** from the perspective of the time of formation or in light of the actual injury the plaintiff suffered.

- "Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy."
- While a term fixing unreasonably large liquidated damages is expressly made void as a penalty, an unreasonably small amount would be subject to similar criticism and might be stricken as unconscionable.

5. 2nd Restatement §364(1): "Specific performance or an injunction will be refused if such relief would be unfair bc a) the K was induced by mistake or by unfair practices, b) the relief would cause unreasonable hardship or loss to the party in breach or to third parties, or c) the exchange is grossly inadequate or the terms of the K are otherwise unfair."

I. Equitable Remedies
1. Introduction
2. The Sale of Real Property
   - SP still used for property
3. Specific performance depends not on physical uniqueness but uncertainty of valuation (see, e.g., *Van Wagner Advertising Corp. v. S&M Enterprises et al*, P's request for SP to regain access to well-placed billboard was denied in favor of damages, bc court found that it was possible to estimate damages instead).
4. Back in the day, injunction clauses prohibiting female performers from playing anywhere but the theater they had a K with was ok (see, e.g., *Lumley v. Wagner*, injunction clause was held up and enforced by ct).

J. Covenants Not to Compete
1. Introduction
   - Public policy implications of CNCs:
     - Risk taking and entrepreneurship in business
     - Autonomy, ability to choose your own job
   - There should be an income level at which CNCs become unenforceable—hard to claim that skills are unique
   - NB: an employer can both fire an employee and invoke a CNC against that employee
   - 2nd Restatement §188, comment g: "Post employment restraints are scrutinized with particular care bc they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood. This is especially so where the restraint is imposed by the employer's standardized printed form…*[Also] a line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business."*

2. CNCs will be scrutinized by courts and sometimes modified based on terms of CNC—change duration/geographic limitations (see, e.g., *Hopper v. All Pet Animal Clinic*, vet's CNC was enforced but modified to take her situation into account and bring agreement into line with actual needs of employer/employee).
3. Bargaining Power and Consent
   - Employer's interest—self preservation, law shouldn't require employers to destroy business by employing competitors
   - Employee's interest—lots of people not making a lot of $, what about concerns about autonomy, entrepreneurship, diversifying economy is at stake
   - Consumers' interest—should have the right to choose the person you want as a service provider, whatever the fight is between the employer and employee isn't related to my needs. What about freedom of K?

4. Protectable things v. non protectable things
   - In CA: no CNCs. Regarded as violation of state anti trust law. Only talks about clauses that prohibit working for another competitor. However, CA allows for protecting trade secrets,

customer lists that require time and effort to develop, information about carefully developed (quality, reliability, etc.) sources of supply (BIG DEAL).

- These are all very specific and protect specific information, but CA stipulates that they can't be broader than this.
- Answer is YES in CA: **can't simply protect yourself against competition**. Can only use it to protect definite things. Other states have become sloppy about this.