CONTRACTS

Professor Mark Pettit, Jr.

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by Nicholas S. Shantar
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"Stop Kidding Yourself and Me Also!"

I. Goals of Contract Law:

a. The goal of contract law is to allow parties to contract under legal detriment.
   i. Promises are beneficial to society, for they breed specialization, trust, and economic growth.
   ii. Without legal enforcement, however, parties could be exploited by defectors.
   iii. Therefore, the courts intervene by attempting to enforce contracts whenever possible.
   iv. The goal of intervention is *not* punishment.
      1. Punishing contract breakers by awarding damages greater than those resulting from a breach would make people reluctant to contract.
         a. If a party contracts to perform something but decides not to, then awarding the damaged party excessive punitive damages would make the breaching party avoid contracting in the future.
         b. Since contract are beneficial to society, courts ought not impose damages beyond those actually suffered.
            i. Awarding damages allows a party to recover, so the damaged party is theoretically as well off as it would be if the contract had been performed.
            ii. Plus, breaching parties will not lose all incentive to contract in the future.
      2. Further, it is unfair to punish a breaching party, for breaking an economic promise is hardly a hell-worthy transgression.
         a. Punishment vis-à-vis compensation would put the damaged party in a better position than it would have otherwise been, but a damaged party has no right to recover more than it actually suffered.
         b. There is no right to recover more than the actual damage because there's no fault requirement in proving breach of contract; a party is liable no matter what.
      3. Society benefits from some breaches: The theory of "efficient breach."
         a. Posner argues that if a party can be made as well off as it would have been had the contract been performed, and the breaching party can make additional money by breaching, then, economically speaking, it's beneficial for a party to breach.

b. Therefore, the primary goals of contract law are to:
   1. Enforce legally recognized agreements.
   2. Compensate parties damaged by broken agreements.

   } *UCC § 1-106*

II. Damages and Other Remedies:

a. Expectation interest:

i. Attempts to put the promisee in the position he would have been had the contract been performed by the promisor, less any costs the promisee would not incur as the result of non-performance.
ii. *Formula 1*: Where are you now; where were you supposed to be? Difference = Expectation Interest.
iii. *Formula 2*: Gross income less costs saved from breach.
iv.

Expected ——————
} Expectation Interest.
Received ——————

v. All things being equal, courts prefer the expectation interest because it enforces the promise made by promisor.

vi.

> **Brief Box 1**: *Hawkins v. McGee (1929).*
> [Defendant promised plaintiff a hand "as good as new," but delivered a hand badly scarred, hairy, and unusable.]
> Assuming a contract, plaintiff is not entitled to the damages for pain and suffering, for such was part of the consideration he agreed to pay. Rather, plaintiff is entitled only to the difference between the hand *promised* and the hand *delivered*.

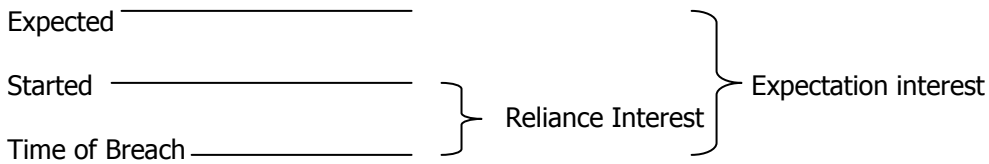
vii. **Restatement (Second) of Contracts, § 347**:
   1. Subject to the limitations stated in §§ 350-353, the injured party has a right to damages based on his *expectation interest* as measured by:
      a. the loss in the value to him of the other party's performance caused by its failure or deficiency, 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.

viii. Generally, expectation interest is the greatest damage award.

b. Reliance Interest:

i. Attempts to put the promisee back in his position *prior* to contract formation.
   1. Compensates promisee for losses incurred in performing any consideration on behalf of the promisor.

ii. *Formula*: Where are you now; where were you at contract formation (usually zero)? Difference = Restitution Interest



iii. Generally, the reliance interest is less than expectation interest but greater than restitution interest.

iv. Essential Reliance:
   1. A party's costs necessary to performing its consideration.
   2. E.g.: If A agrees to paint B's house, and A goes out and buys paint but B repudiates, then A's "essential reliance" was the cost of the paint.
      a. Since A could not paint B's house without buying (or otherwise acquiring) paint, A's costs were essential to performance.

v. Incidental Reliance:
   1. A party's costs not necessary to the performing of its consideration, but incurred in reliance on the contract's performance.
   2. E.g.: A agrees to sell B a Ferrari, and B takes out an advertisement for the Ferrari asking a slightly higher price; if A breaches, then B's "incidental reliance" is the cost of the advertisement.
      a. B did not need to take out the advertisement to complete his contract with A, but he still did based on A's promise of delivery.

c. Restitution Interest:

i. Attempts to deprive the promisor of any consideration given by the promisee.

ii. However, restitution interest does not compensate promisee for costs incurred via performance.

iii. *Formula:* Where is the breaching party now; what did non-breaching party give him? Difference = *Restitution Interest*.
iv. Unjust enrichment:
    1. When a promisor obtains a benefit but breaches a contract, he is said to be "unjustly enriched" because he received something for nothing at the expense of the promisee.
    2. Though perhaps unjust, when the courts award damages in excess of actual damages, the award is not "Unjust Enrichment" proper.
        a. Unjust enrichment applies to breaching parties, not to damaged parties.

Calculating Various Interests:

Facts: I agree to send to you a copy of the Restatement (to by delivered tomorrow), in return for your agreement to pay me $10.00 and to give me a photocopy of your class notes. Assume that the Restatement has a market value of $15.00; that your notes have a market value of $1.00; and that it costs you $3.00 to photocopy your notes. You pay me the $10.00 and give me a photocopy of your notes. I refuse to deliver or return your money or the notes. You sue for damages. (Note: Payments do not include any consequential or incidental damages endured due to breech.)

1. How much would you be entitled to:
    a. If limited to the restitution interest?
        i. Restitution interest attempts to put the promisor in the position he/she was in prior to the formation of the contract—to deprive him/her of the consideration given by the promisee. Accordingly, the promisor would pay me $10.00; further, since the copy of notes was delivered, I would be provided with the market value of the notes, or $1.00. I would not receive anything for lost monies making the notes. Total: $11.00.
    b. If limited to the reliance interest?
        i. Reliance interest attempts to put a promisee in his/her position prior to the formation of the contract. Accordingly, I would be entitled to $3.00 for the photocopying of my notes and $10.00 for my cash payment. I would not receive $1.00 for the class notes because my total expenses relying on the contract does not include the market value of the notes. Total: $13.00
    c. If limited to the ruling in Hawkins v. McGee?
        i. The ruling in Hawkins v. McGee outlines an expectation interest—attempting to put the promisee in the position he/she would have been in had the contract been performed. Accordingly, I would receive $15.00, the market value of the Restatement.
2. If you had gave me the photocopy of the notes but not paid me anything, what amount would you be entitled to:
    a. If limited to the restitution interest?
        i. If I gave you the notes, but nothing else, then you would be deprived of the benefit I gave you, or $1.00, under the restitution interest.
    b. If limited to the reliance interest?
        i. Since I spent $3.00 copying the notes, I would receive $3.00 for my expenses and nothing else.
    c. If limited to the expectation interest?
        i. I was expecting a market value return of $15.00, the price of the Restatement. However, since I did not pay the $10.00 cash I am only entitled to $5.00.
3. If you had not paid me anything in advance and had not photocopied your notes, what amount would you be entitled to:
    a. If limited to the restitution interest?
        i. Nothing. No consideration was exchanged between the promisee and the promisor.
    b. If limited to the reliance interest?

i. Nothing. I incurred no debts or expenses subsequent to the contract's formation.

c. If limited to the expectation interest?

i. Since I was expecting a market value of $15.00, I would be entitled to it less any expenses not incurred for not having performed the contract. Since I was planning in paying $10.00, that amount is subtracted from my award--$5.00 payment. Since I was planning on photocopying the notes for $3.00 but did not incur that expense, subtract that too--$2.00 payment. The market value of the notes is irrelevant because they were never produced. Subsequently, I'm entitled to $2.00 under the expectation interest.

4. If the market value of the Restatement was $9.00 (and you prepaid $10.00 and gave me the notes (costing $3.00 to photocopy and have a $1.00 market value) what amount would you recover:
   a. If limited to the expectation interest?
      i. I expected to obtain a market value of $9.00. Therefore, I receive $9.00, the value of what I expected.
   b. If limited to the reliance interest?
      i. I incurred costs of $10.00 cash payment and $3.00 to photocopy my notes. Accordingly, I should receive $13.00.
   c. If limited to the restitution interest?
      i. You benefited $10.00 cash and a set of notes worth $1.00 on the market. Accordingly, I would receive $11.00.
5. Assuming, once again, that the market value of the Restatement was $15.00, if you had photocopied your notes, but had not given them to me and had not paid me anything in advance, what amount would you be entitled to?
   a. If limited to the expectation interest?
      i. I was expecting a market value of $15.00. Since I still have the notes, I get $14.00 because they're still worth $1.00. Further, since I gave you no cash, I'm entitled to $10.00 less--$4.00 payment.
   b. If limited to the reliance interest?
      i. I incurred $3.00 for the copying of the notes, but the notes are still worth $1.00--$2.00 payment.
   c. If limited to the restitution interest?
      i. I gave you no consideration; you owe me nothing.

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d. <u>Damages for Breach of Contract Involving the Transactions of Goods.</u>

i. Article 2 of the UCC pertains to the *sale* and *transactions* of goods.

ii. In some cases, sections of Article 2 contradict the general goal in § 1-106.

iii.

> **Brief Box 2**: *Tongish v. Thomas (1992).*
> [Plaintiff contracted with defendant for the purchase of seeds, and agreed with a third party to sell them to a third party at whatever price it paid to Thomas, plus 55 cents. Defendant breached contract when the market price rose. Plaintiff sued for the difference between the market price at the time of breach and the contract price—§ 2-713. Defendant claimed that plaintiff is only entitled to its *profit*, i.e. the .55 cents lost per sale, and not the difference in values—§ 1-106.]
> According to § 2-713, the plaintiff can recover the full difference between the market price at the time of breach and the contract price (at the time of formation). Although this compensates him more than his actual loss, the specificity of § 2-713 overrides the general rule of § 1-106, and defendant's willful breach should not be overlooked.

iv. Section 2-713 states, in relevant part:
   1. [T]he measure of damages for non-delivery or repudiation by the seller is the difference between the *market price* at the time *when the buyer learned of the*

breach and the *contract price* together with any incidental and consequential damages . . . less expenses saved in consequence of the seller's breach.

2. Market price is to be determined as of the *place for tender* or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

v. Thus, in the event a seller breaches a contract, the buyer is entitled to the difference between what he agreed to pay and the market price *at the time he learned of the breach*.

Market Price ← Cover cost at time of breach

− Contract Price ← What you should have paid

Expectation Interest

1. If the seller breached, but the market price at the time of breach was less than the contract price, then buyer has no damages—the buyer can get the goods for less than he contracted for.

   [Contract Price > Market Price] ⊃ Buyer has No (Positive) Damages

2. If the buyer breached, but the contract price was lower than the market price at the time of breach, then the seller has no damages—the seller can get more for the goods than he contracted for.

   [Contract Price < Market Price] ⊃ Seller has No (Positive) Damages

e. Construction Contracts and Contracts for Real Property Improvements.

i. ***Restatement (Second) of Contract, § 348***:

1. If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on:
   a. The diminution in the market price of the property caused by the breach, or
   b. the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss of value to him.

ii. Ordinarily, the award sought for damages in a construction or improvement contract is the cost of completion.

1. If the construction is complete, but the good delivered has a defect or is otherwise unfit for the purpose intended, the injured party may recover the difference between the value of the good promised and the good received.
   a. I.e., his expectation interest.

iii. However, if the cost of completion grossly exceeds the value of the good to be obtained, the damaged party may only recover the difference between the value of the good promised and the good received.

iv. Note that Restatement § 348 is technical about calculating the value—is it the value to the injured party, or the strict market price?

1. If the value of the construction to the person is proved with *certainty*, then this value prevails. If not,
2. Section (b) says "probable loss in value to him," meaning that if what he claims is the value is a likely a reasonable estimation, the court will award the cost of completion—even if more (but not disproportionately more) than the market value of the good to be attained.
3. Section (a), however, makes no mention of personal valuation; it only applies the market price in the event the promisee cannot show a personal value with sufficient certainty.

v.

Brief Box 3: *Groves v. John Wunder Co. (1939).*
[Plaintiff contracted for the removal of dirt and sand from his land so that it would be level and could be developed. Defendant removed sand and sold it, but did not level the land. If leveled, the land would be worth $12,000, but the cost of leveling it would be $60,000.]
The defendant's breach was willful. The law aims at giving the disappointed promisee what he was promised had the contract been performed; the lack of value in the land is irrelevant, since parties are free to improve land at their own discretion, even if economically unsound. Restatement, § 346(b) only states that a structure need not be torn down to remedy small defects; it does not apply to contracts to improve land. Defendant pays the cost of completion.

vi. The court in *Groves* awarded the cost of completion, a full five times the value of the land had the contract been completed. Twenty years later, the Oklahoma Supreme Court considered the issue presented in *Groves*.

Brief Box 4: *Peevyhouse v. Garland Coal Mining Co. (1963).*
[Defendant agreed to strip-mine coal from plaintiff's land in exchange for some of the profits and the restoration of the land once the mining ceased. Defendant did not fill in the land, but if it had the land would only be worth $300. The cost of filling in the land was about $29,000.]
According to Restatement (Second) of Contracts, § 348, a party is only entitled to the cost of completion only if the value to be attained is not grossly disproportionate to the cost of completion. The Peevyhouses wanted the money form the coal beneath their land; no reasonable person would spend $29,000 to improve land worth only $300 when finished. The disproportionate result is an economic waste of $28,700. (If a property owner contracts for improvements alone, then the cost of performance will generally prevail.) Plaintiff gets the market value difference, not the cost of completion.

1. *Peevyhouse* strictly applied § 348.
2. *Groves* strictly applied § 346 Restatement (Second)—it only applied § 346 to structures, not land.
    a. Peevyhouses may have been better off under a § 346 argument because § 348 applies the concept of proportionality between the value of the good received and the good delivered and § 346 applies only to structures.
3. Note, however, that *Peevyhouse* and *Groves* can be distinguished.
    a. *Groves* involved a cost only 5 times the value of land, so a court might rule the cost of completion was not grossly outweighed by the value of the land promised. The cost of completing the land in *Peevyhouse* was about 97 times more than the land was worth.
    b. Peevyhouses wanted money from coal extraction, but Groves wanted land level for development.
        i. Weak distinction since Groves wanted to sell the land for profit!

f. Limitations on Damages:

i. Foreseeability or Remoteness of Harm.
1. Section 351 Restatement (Second) of Contracts:
    a. Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
    b. Loss may be foreseeable as a probable result of a breach because it follows from the breach
        i. in the ordinary course of events, or

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

c. A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

2. Thus, the breaching party is liable only for damages it could have reasonably foresee *at contract formation*.
3.

> **Brief Box 5**: *Hadley v. Baxendale (1854).*
> [Plaintiff delivered the shaft of a mill that had stopped working, but didn't tell the delivery-service (defendant) that the mill would not operate until the replacement was received. (He didn't quite tell the clerk enough so that the defendant could foresee harms if it breached.) Defendant delivered the shaft late, and plaintiff's mill was shut down longer than anticipated, thereby resulting in damages.]
> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in the contemplation of bother parties, at the time they made the contract, as the probably result of the breach."

4. Posner agrees that contracting parties should disclose the potential damages resulting from a breach.
    a. E.g.: Roll of film taken atop Mount Everest.
        i. If the developer has no idea of the costs of replacing the film—i.e., the cost of a trip to the top of Mount Everest—then he will treat the film with no more care than he would an ordinary, easily-replaceable roll of film.
        ii. If courts do not impose a duty to disclose before contract formation, then the photographer will have no incentive to warn the developer of the costs should the film be lost or destroyed, for either way his costs are covered.
        iii. If there is no duty to disclose, then society will have to pay twice for the same roll of film if the developer screws up, but had the developer known of the potential consequences of breach, then he could have taken extra special care or refused the contract altogether.
5. Most courts do not require a *conclusive* probability of harm.
    a. Few, if any, require a "more likely than not" standard.
    b. Most require only a significant chance that the damage follow from the breach—perhaps a 20% chance, or even a 10% chance.
6. The foreseeability of damage need only be present in the mind of the breaching party for it to be liable for damages.
7. The foreseeability of damage limitation is both subjective and objective.
    a. Subjective: Did the breaching party actually know that the damage would probably result from a breach?
    b. Objective: Should the breaching party have known that the damage could probably happen if it breached?
8. If the breaching party cannot be held to have reasonably foreseen the consequences of breach, then it is liable only for the consequences it actually foresaw.

ii. Certainty of Harm:

1. Restatement (Second) of Contracts, § 352:

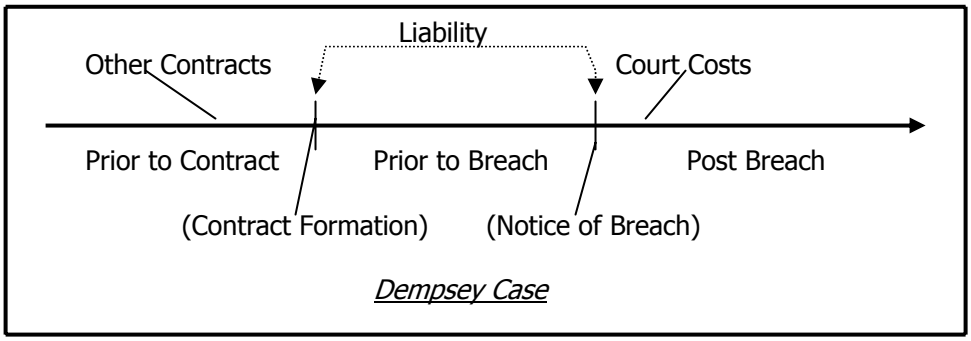
a. Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.

b.

Brief Box 6: *Chicago Coliseum Club v. Jack Dempsey (1932).*
[Plaintiff boxing-match promoter contracted with plaintiff prize-fighter for a scheduled fight it had been preparing. Defendant breached; advising plaintiff, he wrote, "***stop kidding yourself and me also***." Plaintiff had to cancel its scheduled fight.]
(After examining several important "contenders" for measuring damages, the court ruled.) The certainty of profits from a sports-entertainment contest is entirely speculative. Thus, expectation interest is not available to plaintiffs, and they may recover only on their reliance interest from the time defendant entered into the contract and the time defendant notified plaintiff of breach.
***Important case; explains damages well: see brief.*

c. The court in *Dempsey* employed a stringent standard for the reasonable certainty of harm.
    i. Some courts would have allowed a very conservative expectation of profits based on previous fights.

d. Further, the court did not hold Dempsey liable for costs incurred prior to his signing the contract with Chicago Club.

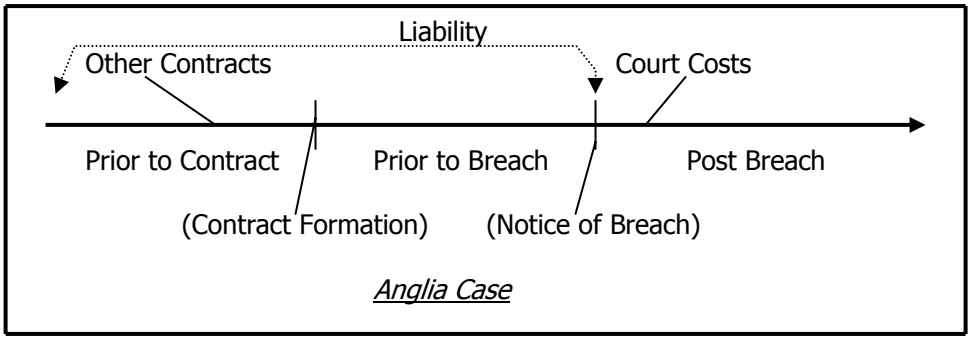


Dempsey Case

    i. Not all courts agree with the measure of damages employed by the *Dempsey* court:
        1. Some courts, e.g., *Dempsey*, hold defendants liable only for plaintiff's reliance *after* contract formation.
        2. Other courts, e.g., *Anglia*, *infra.*, hold defendants liable for all reliance by plaintiff, including expenses incurred prior to defendant's signing.
    ii. Courts rely on precedent to establish which damage calculation to impose.
    iii.

Brief Box 7: *Anglia Television v. Reed (1971).*
[Defendant actor contracted with plaintiff television producer to star in a production it had been working on. Plaintiff was forced to cancel his performance because his agent miscalculated his schedule.]
A plaintiff who chooses to recover his reliance interest may do so without necessarily being limited to the expenses incurred after contract formation with the breaching party. The breaching party may have to pay damages for plaintiff's entire reliance interest during the project if the defendant knew at the time of formation with reasonable certainty that the whole project would be

compromised if he breached.

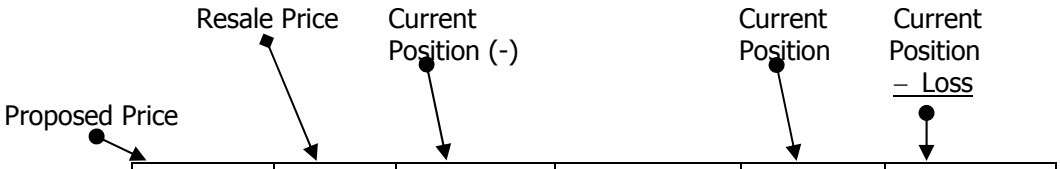


Anglia Case

2. If no damages are shown, then the party will receive only *nominal* damages pursuant to § 346 of the Restatement (Second).
3. Or, if the party cannot show reasonable damages (or if it entered into a losing contract) it has a right to its reliance interest instead—§ 349.
    a.

Brief Box 8: *Mistletoe Express v. Locke (1988).*
[Plaintiff Locke contracted with Defendant to provide a delivery service. Plaintiff incurred expenses in performing the contract. Defendant prematurely terminated the contract, and Locke sued even though she had not made any profits from her business.]
Plaintiffs may choose to recover their reliance interest in place of their expectation interest. If plaintiff chooses to do so, however, defendant breachers may deduct any losses they can prove with reasonable certainty that the plaintiff did not suffer precisely because of defendant's breach. In this case, defendant did not prove with reasonable certainty that plaintiff would have sustained a loss had the contract been given its full term. Consequently, damages may not be reduced, and plaintiff is entitled to her entire reliance interest.

    b. Restatement (Second) of Contracts, § 349:
        i. As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance,
        ii. *less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed*.
    c. Theoretically, in a losing contract if the breaching party can show with reasonable certainty that the defendant would have lost money on the contract had it been performed, then expectation equals reliance interest.
        i. In effect, the reliance interest is reduced to the loss that would have occurred had the contract been performed—i.e., the damaged party's expectation interest.
        ii. E.g.: Assume buyer will resell the goods on the market after receiving them; assume the additional costs are the costs incurred by buyer to receive the goods from the seller (perhaps in transportation to receive goods); assume adjusted reliance interest is the reliance interest minus losses saved because of breach; assume that seller did not deliver goods and buyer did not pay for them:



Contract Price:	Market Price:	Additional Costs:	Expectation Interest:	Reliance Interest	Adjusted Reliance Interest:
$ 125	$ 150	$ 75	$ 25 (Net: –$50)	$ 75	$ 25 ($50 Loss)
4,500	5,000	1,000	500 (Net: -500)	1000	500 (500 Loss)
6000	7000	2000	1000 (Net: -1000)	2000	1000 (1000 Loss)

iii. Avoidability of Harm:
   1. Restatement (Second) of Contracts, § 350:
      a. Except as stated in Subsection (b), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
      b. The injured party is not precluded from recovery by the rule stated in subsection (a) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.
   2. Parties must mitigate their damages once they learn of a breach.
      a. They cannot sit back and let their expenses accrue.
      b. Once notified of a breach, a party may recover its expectation interest, or reliance interest.
         i. E.g.: The gross expectancy the non-breaching party would have received, less any expenses saved, or the cost of performance up to that point of breach plus any profits.
         ii. E.g.: Or, if it chooses, the party may recover the expenses up to the point of breach.
      c. Theoretically, the non-breaching party is in as good a position as it would have otherwise been had the contract been performed, and the breaching party does not have to waste money on something it does not want.
         i. Mitigating damages stops economic inefficiency.
         ii. It would be downright stupid to continue building a bridge after you learned the city didn't want it anymore.
         iii.

Brief Box 9: *Rockingham County v. Luten Bridge Co. (1929).*
[Plaintiff bridge-builder finished constructing a bridge after receiving notice that defendant city repudiated its contract. Plaintiff sued to recover the entire cost of the bridge; defendant contested, claiming that plaintiff had a duty to mitigate and should have stopped construction when notified of the breach.]
In theory, the damaged party can recover entirely if the breaching party pays its reliance interest up until the point of breach plus any profits the injured party would have received had the contract been fully performed. There is no reason, then, why a party should

have to pay for an the completion of a structure it no longer required when the injured party could have walked away and recovered completely.

3. Employment Contracts:
    a. Wrongfully terminated contractual employees must also mitigate their damages (in the absence of a valid liquidated damages clause).
    b. I.e.: If A wrongfully repudiates his three-year contract with B, B cannot take a three-year vacation.
        i. Rather, B must make reasonable efforts to find similar work.
        ii. B does not have to be successful in his attempts.
    c. However, damaged employees do not need to accept work of an inferior or different kind.
    d.

Brief Box 10: *Shirley MacLaine v. Fox (1979).*
[Shirley MacLaine contracted with Fox to start in a song-and-dance file; Fox cancelled the production, offering MacLaine a role in its dramatic country feature. MacLaine refused and sued for damages.]
The duty to mitigate employment contracts does not force an employee to accept work of a different or inferior kind. As a matter of law (!) MacLaine is entitled to full recovery because the difference between the contracted film and substitute film is so profound.

    e. If a damaged party accepts other work, even if it's inferior or of a different kind than the work contracted for, the monies received from such employment are subtracted from the damages owed by defendant employer.

g. Damages for Breach of Contract by Buyer:

i. The UCC provides that in the event a buyer breaches a contract, the seller is entitled to the difference between the unpaid contract price and the market price at the time of delivery.
    1. Section 2-708:
        a. Subject to subsection (b) . . . the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . . less expenses saved in consequence of the buyer's breach.
        b. If the measure of damages provided in subsection (b) is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages, . . . due allowance for costs reasonably incurred, and due credit for payments of resale.
    2. Thus, a seller may recover his expectation interest as determined by the contract-market differential, or, if the figure determined by the contract-market differential is less than he would have been had the contract been performed, he may recover his profits (plus various expenses).

        a. Seller's damages:

C/P (what he was supposed to get from buyer)
-M/P (what he can get on the market now).
Seller's damages

b. Subsection (2) of § 2-708 (pertaining to profits in the event the contract-market differential is insufficient) is applied only in very particular circumstances.
   i. Most of the time, the injured party's profit is the same as the contract-market differential.
   ii. Subsection (2) comes into play when the seller can establish that he lost a sale.
      1. Even though the seller may not have lost money on the particular sale to the buyer (because he resold the merchandise for the same or more than the contract price), the seller could have sold two instead of just one.
      2. This is the case when seller's have a virtually unlimited supply of merchandise, such as automobile dealers, boat dealers, etc.
      3. See *Neri*, infra.

ii. Deposits:
   1. If the buyer has made a deposit, he is entitled to restitution of the deposit under the conditions of UCC 2-718(2):
      a. Where the seller justifiably withholds delivery of goods because of buyer's breach, the buyer is entitled to restitution of any amount [or deposit] by which the sum of his payments exceeds
         i. [a valid liquidated damage clause, infra].
         ii. in the absence of a liquidated damages clause, 20% of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is less.
         iii. The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes:
            1. A right to recover damages under the provisions of this Article (2) other than subsection (1) [liquidated damages].

b.

Brief Box 11: *Neri v. Retail Marine Corp. (1972).*
[Plaintiff buyer made a $4,250 deposit for a boat, but later breached the contract. Defendant seller claimed it was entitled to the full deposit because, although it eventually sold the boat to another customer, it lost a sale and incurred overhead expenses.]
§ 2-718 says that the buyer has a right to recovery of a deposit in the event of breach, and the value of that in this case is $500. However, § 2-718(3)(a) says that the value of $500 is subject to offset by other sections. § 2-708 says that the buyer may recover damages either under the contract-market differential, or its profits if the contract-market differential is insufficient. In this case, defendant lost a sale, so he is entitled to his profits, overhead expenses, and incidental damages.
***Important, complicated case: See Brief.*

2. Understanding Damages with Deposits:

M/P	C/P	DEP	Unpaid C/P	Buyer's D	Seller's D
150	125	75	50	100	0 (-100)
275	200	100	100	175	0 (-175)
250	275	100	175	75	0 (-75)
250	225	25	200	50	0 (-50)
100	175	25	150	0 (-50)	50

Buyer's D: Buyer's damages (if seller breaches) (MP – UPCP).
Seller's D: Seller's damages (if buyer breaches) (UPCP – MP).

3. Pertaining to § 2-718, there is some question whether the court in *Neri* calculated the correct damages.
    a. UCC § 2-718(3)(a) uses the word "offset."
        i. The *Neri* court interpreted "offset" to mean "replaced by" alternative damages within Article 2—"alternate" approach.
        ii. A stricter reading of § 2-718(3)(a), however, means that the damages calculated in § 2-718(2)(b) are subject to offset, meaning "addition or subtraction"—"cumulative" approach.
            1. Thus, Retail Marine would have been entitled to $500, plus it's profits (and additional expenses).
            2. The court, however, eliminated the $500 entirely, and just awarded Retail its profits and expenses.
        iii. There is some ambiguity in § 2-718, and courts can interpret it differently.
        iv. If, however, the seller's damages are in excess of the award in § 2-718(2)(b), then either § 2-708 will be applied (giving seller his profits) or § 2-718(2)(b) will be added to his anticipated profits.
            1. Courts will not limit the seller's damages only to the damages in § 2-718 (20% or $500) if his damages are greater.

h. **Liquidated Damages Clauses:**
    i. Liquidated damage clauses attempt to contract around the default damage rules by specifying the amount of damages in the event of a breach.
        1. Generally, liquidated damages clauses are enforceable, so long as they are not punitive in nature and a reasonable in the face of uncertainty.
            a. Section 355 of the Restatement (Second) of Contracts provides:
            b. Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.
        2. The goal of damages is compensation, not punishment.
        3. If stipulated damage clause is unreasonable, then default damages come back into play.
    ii. Section 356 of the Restatement (Second) of Contracts expressly addresses liquidated damages:
        1. Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on the grounds of public policy as a penalty.
            a. Reasonable in the light of anticipated damages (at contract formation).
            b. Or, reasonable in the light of actual damages (*at the time breach occurs*).
            c. A party may choose either one to argue for the enforcement (or rejection) of a liquidated damages clause.
        2. A term in a bond providing for an amount of money as a penalty for non-occurrence of the condition of the bond is unenforceable on grounds of public policy to the extent that the amount exceeds the loss caused by such non-occurrence.
    iii. Further, § 2-718(1) of the UCC states:
        1. Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining and adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Brief Box 12: *Kemble v. Farren (1829).*
[Plaintiff theater owner sued defendant performer for breach of contract. Plaintiff sought the entire stipulated damages of L1000.]
The contract provided states that in the event of any breach, no matter how slight, the breaching party will pay the entire stipulated damage. Sweeping clauses covering every type of breach are unreasonable on their faces. The stipulated damages were punitive, not compensatory as judged at the time of formation. Actual damages are irrelevant to this court.

iv. The court in *Kemble* refused to consider the actual damages via hindsight. Modern courts combine the hindsight approach with the uncertainty of damages at the time of contract.
v. In testing a the enforceability of a liquidated damage clause, the courts will apply three tests:
    1. The actual intent of the parties at the time of formation—compensation or penalty for breaching.
    2. The uncertainty of damages at the time of formation.
        a. Generally, the more uncertain the damages, the more enforceable the liquidated damages clause.
        b. If damages are easily calculable, then default damages will apply if liquidated damages are grossly excessive, indicating they're penalty clauses.
    3. The reasonableness of specified damages as a forecast of damages in the event of a breach.
        a. But test 2 requires uncertainty!
        b. How can one be reasonable in the face of uncertainty?
            i. Essentially, one must make a reasonable estimation of damages that are reasonably uncertain.
            ii. The more uncertain, the more leeway allowed in reasonable formation.
            iii. Forecast of reasonable damages means a party's "best guess" as to uncertain damages.
    4.

Brief Box 13: *Wassenaar v. Towne Hotel (1993).*
[Wassenaar contracted with Towne to serve as a manager for three years. Towne breached the contract. Wassenaar got another job three months later, but sued to recover the remaining salary in his three-year contract.]
Liquidated damages must be reasonable in the totality of circumstances. The more uncertain the damages at the time of formation, the more leeway the parties have to provide their own damages. If damages are easily calculable, then the latitude afforded the parties is very limited. If damages are virtually incalculable, then damages may be provided almost at will. The only thing certain is that plaintiff suffered some damages, including some consequential damages. It follows that the liquidated damage clause was reasonable, and once a clause is deemed reasonable, there is no duty to mitigate damages.

    5. Evidence of actual damages is usually introduced to show liquidated damages at the time of contract formation were unreasonable.
        a. A truly excessive clause may be unreasonable on its face if it turns out to be in gross excess of actual damages.
        b. Otherwise, courts rely on the uncertainty *at the time of formation*, and the reasonability of the forecast based on the degree of uncertainty.
    6. What about under-liquidated damages?
        a. That is, when the damages stipulated are unreasonably low.
        b. UCC § 2-718 does not eliminate the possibility of unreasonably low damages; however, the comment states that under-liquidated damages are considered unconscionable.

7. If the damages are uncertain at the time of formation, but the parties know they will be easily calculable at the time of breach, then a liquidated damage clause is unenforceable unless the damages are very close to the actual damages.
    a. MP/CP at the time of breach is not known when the parties form the contract, but they know that the MP/CP in the event of a breach will easily determine damages.
    b. Some courts, however, do not care about retroactive approach; they only care about what the parties actually knew at the time of formation.
    c. The UCC permits either an exclusively prospective approach at the time of formation or a combination of the reasonable forecast of uncertain damages and the actual damages.

i. **Specific Performance**:
    i. In some cases, the damaged party may ask the court to enforce a contract by making the breaching party actually perform or tender its consideration in lieu of damages.
        1. Traditionally, specific performance was sought in equity courts.
            a. Equity courts were courts of "justice" before they were courts of law.
            b. The judge retains discretion to determine what justice demands.
        2. Equitable remedies, including specific performance, were permitted whenever damage awards were an inadequate means of compensation.
    ii. Today equitable remedies courts have merged with courts of law in most jurisdictions, but the courts retain equitable powers.
        1. Courts will order a party to perform some aspect of a contract under penalty of contempt of court.
            a. If the party refuses to cooperate, the court may fine him, throw him in jail, or take other action until the party complies with the court's decree.
                i. "You hold the keys to your own cell."
            b. In courts of law, the court may force the sale of property to pay a judgment, but a party is never faced with the more severe penalties for contempt of court.
                i. Courts of law cannot take taxes, child support, living expenses, federal wages (unless in a federal court), pensions, etc.
        2. Hence, it is possible to be "judgment proof" in a court of law, though not necessarily in equity court.

iii. Specific performance in contracts involving the sale of land:
    1. Specific performance is *almost always* available in contracts involving the sale of land.
        a. Land is presumed to be unique, even if it's virtually indistinguishable from other parcels of land.
        b. Since land is always unique, if a party asks for the forced compliance with a sales contract involving land, the party will almost always receive it, assuming the contract is enforceable.
        c. However, if a third party *innocently* takes the land from the seller, then the buyer may be limited to monetary damages—two contracts, first come, first served.

Brief Box 14: *Loveless v. Diehl (1963).*
[Plaintiff Diehl took possession of Loveless' land, planning to exercise its contracted right to purchase the land. After making several improvements, Diehl could not purchase the land, so he contracted with a third party to sell the land in an effort to regain some of his improvement costs. Loveless intervened, and Diehl sued, asking for damages and specific performance of the sale of land.]
In the original ruling, the court ruled that in cases where the damaged party contracted to sell the land to a third party for a specific price, normal damages apply—i.e., the difference between the contract price with the third party and the contract price with Loveless.

A subsequent ruling held that specific performance is always permitted in cases involving the sale of land, for land is always unique. That Diehl agreed to sell the land to a third party was immaterial. Public policy demands contracts for the sale of land with third parties should not be undermined.

iv. Specific performance in contracts involving the sale of personal property (chattels).

1. UCC § 2-716 provides:
    a. Specific performance may be ordered where the [promised] goods are *unique* or in other proper circumstances.
    b. The judgment (decree) for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
    c. The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

Brief Box 15: *Cumbest v. Harris (1978).*
[Plaintiff pawned stereo equipment he personally constructed and collected over a period of 15 years. Defendant did not allow plaintiff to repurchase the equipment, as promised in the contract. Many of the items were not replaceable, and some that were required lengthy waiting periods.]
In this case the personal property was so unique as to warrant specific performance. Normally specific performance is not available for cases involving the sale of goods; however, if such goods are so unique as to require a lengthy time to recover, if recovery is even possible, then specific performance may be appropriate.

    d. Personal property (chattels) is presumed *not* to be unique; however, if a party shows it is particularly unique or of extremely sentimental value, a court can elect to decree specific performance.
    e. Likewise, if a party cannot get a replacement for the property without undue hardship, the court may order specific performance, possibly depending on the damages without cover.

v. Specific performance in contracts involving personal service, employment.

1. Specific performance is never available in cases involving person service.
    a. Ordering one party to serve another party, even if a contract exists, is akin to slavery and is inconsistent with moral principles.
    b. Forcing a party to perform is unlikely to produce effective compensation anyway.
        i. The performing party will resent the employer and have less incentive to perform good work.
        ii. Plus, the administrative costs involved in supervising a person's conduct are enormous.
    c.

Brief Box 16: *The Case of Mary Clark (1821).*
[Mary Clark entered into a personal service contract with Johnston for a period of twenty-years, but she decided she no longer wanted to work for him. Johnston asked for specific performance and received it, and Mark Clark appealed.]
Contracts for personal service cannot be enforced. The state constitution prohibits involuntary servitude, and even though Clark contracted to serve she cannot be forced to do so. If the state required personal service, it would be enforcing a most degrading and demoralizing affair. Where the courts refuse to enforce a contract, a private party may not do so by force. The very fact that Clark wishes to leave Johnston's home indicates that she is there against her free will. A state that professes equality and refuses to protect freedom is worse than any other kind of state.

2. However, courts may prohibit—i.e., "enjoin"—a breaching employee from performing services to other employers during the duration of the broken contract.
    a. This is not considered to be slavery, only enforcement of an agreement not to work for others.
        i. The agreement not to work for others is called an "anticompetitive clause."
        ii. In some courts, an express anticompetitive clause is required for an injunction; however, in most jurisdictions an implicit anticompetitive clause can be created.
        iii. Typically, anticompetitive clauses are enforced in equity only against alternative work in the *same industry*—i.e., those parties who the breaching party could adversely affect the non-breaching party's business.
            1. See *Duff*, infra.
    b.

Brief Box 17: *Lumley v. Wagner (1852).*
[Seeking more money from another party, defendant terminated an employment contract with plaintiff. Plaintiff sought an injunction preventing her from performing other employment in an attempt to force her to work for him.]
The contract between the parties contained an express agreement that the defendant would not work for another employer during the duration of her contract with plaintiff. The court can enforce part of the agreement without forcing defendant to work for plaintiff—she can still choose not to work. Prior courts have not granted injunctions baring alternative employment, but the contracts in those cases did not contain an express clause in which defendant agreed not to perform for others. An injunction against alternative employment may therefore be granted.

    c. Injunctions against alternative employment are not granted in every case involving an employee's breach of contract.
        i. Rather, the work the employee agrees to perform must be unique and reasonably extraordinary, such that the employer would incur great expense finding a replacement if one can be found at all.
        ii. McDonalds could probably not enjoin its drive-thru workers from working at Burger King (even if they contracted).
        iii. McDonalds probably could enjoin Ronald McDonald from working at Burger King if old Ronald contracted with McDonald's.
3. The breaching party remains liable for damages in contracts involving personal service if no injunction is granted.
4. Constructive Anticompetitive Clauses:
    a. In most courts, if a provision against alternative employment is implied by the terms of the contract, an express anticompetitive clause need not be present for an injunction *during the employment term*.

Brief Box 18: *Duff v. Russell (1891).*
[Seeking to make more money working for another employer, defendant breached her contract with plaintiff. Plaintiff sought to enjoin her from performing from the other employer. The contract between plaintiff and defendant did not contain an express clause prohibiting employment for others, but did state that defendant agreed to work seven times a week.]
Although the contract did not contain a specific clause to the contrary, defendant implied she would not work for others by signing the contract, for the contract stated she agreed to work seven times a week (but not on Sundays). Constructive exclusive employment is therefore created by the very nature of the contract. (Other proposed excuses are not genuine). An injunction against alternative work is granted.

b. Anticompetitive clauses are *not* constructed for periods outside the contractual period.
    i. In an employment contract, anticompetitive clauses pertaining to employment after the contract has expired must be written in the original agreement.
    ii. Even written anticompetitive clauses are subject to strict scrutiny for policy reasons of promoting a free-market.
c. "Good Faith" Negotiations Clauses.

> **Brief Box 19**: *ABC v. Wolf (1981).*
> [Plaintiff ABC sought to enjoin defendant Wolf from performing his contract with CBS because Wolf breached his agreement with ABC by violating the good-faith negotiation clause pertaining to post-contractual employment options.]
> The court refused to grant ABC and injunction against Wolf from working for CBS just because Wolf breached the good-faith negotiations clause in his contract with ABC. Anticompetitive clauses are implied only insofar as they pertain to the contract term; they cannot be implied pertaining to a post-contractual period (unless they deal with exposing trade secrets or other tortious conduct).
> **See Brief.

d. Although a negative clause barring alternative employment during the contract period may be enforced, violation of a "good faith" negotiation clause does not entail that the court can void all contracts signed in violation of the clause.
e. Anticompetitive clauses (or negative clauses) are enforceable during the contract term—if enforced they are not extended beyond the term.
f. Additionally, anticompetitive clauses can be enforced if trade secrets or a similar justification exists.
g. Alternatively, the default damages apply.

j. Restitution On/Off The Contract:

i. Courts award restitution interest under their powers of equity.
ii. Generally, the injured party is entitled to receive its restitution interest in the alternative to expectation (or reliance) interest.
    1. Restatement (Second) of Contracts § 373:
        a. Subject to the rule stated in subsection (2), on a breach by nonperformance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of partial performance or reliance.
            i. Thus, if A paints part of B's house, but B breaches the contract, then A gets his restitution for the painting—i.e., he gets whatever the partial paint-job is reasonably worth to B.
        b. (§ 373(2)) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.
            i. Thus, if the only remaining payment is some set sum of money, the damaged party cannot recover the entire value of the work performed.
            ii. If A paints B's house for $50, and B breaches, A cannot get the market price (say $100) for the house—he can only get the remaining contract price.

c.

Brief Box 20: *Bush v. Canfield (1818).*
[Plaintiff buyer provided defendant flour seller with a $5,000 deposit for flour; defendant breached, but the market price dropped below the contract price. Plaintiff sued for full recovery of the deposit; defendant argued to subtract the anticipated losses of the plaintiff.]
Plaintiff receives the entire deposit back, for the defendant should not benefit from its breach. (Just because the market value was less at the time and place for tender, it does not follow that the deal was a losing one.)

2. Even a breaching party can recover restitution for work performed or partial delivery of goods.
    a. Restatement (Second) of Contracts § 374:
        i. [T]he party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.
        ii. To the extent that . . . [a liquidated damage clause entitles the non-breaching party to the breaching party's performance], that party is not entitled to restitution if the value of the performance . . . is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. *See* Restatement (Second) of Contracts § 356(1), pertaining to testing the validity of liquidated damages clauses.
    b. Expectation acts as a limit on restitution where the breaching party seeks to recover; a non-breaching party may recover its reliance without being limited to expectation, see Bush v. Canfield.
    c. Suppose B promises to deliver A 1,000 bails of hay at $1 each. On the day of the sale, B breaches, providing only 500 of the bails. On the same day, the market price of hay rises to $1.25. A doesn't pay B anything. What are B's damages?
        i. B can recover payment for the 500 delivered bails of hay—$500.
        ii. B must pay damages from his breach for the remaining 500 bails not delivered. (In effect, the 500 bails delivered are taken out of the equation.)
        iii. A must pay 500 x .25 ($125) more than he would have had to had the contract been performed—his "cover" cost.
        iv. Thus, A can subtract his damages from the $500 owed B for the initial 500 bails.
        v. Accordingly, A owes B $375. (The breaching party does not lose all rights to restitution.)
    d. Suppose A promises to paint B's house for $500. A paints a 95% of the house, but then has a fight with A and unjustifiably quits. A refuses to pay B anything. B sues A. What are B's damages?
        i. Assume the painted house was worth exactly $500 more had it been fully painted.
        ii. Since B painted 95% of the house, A must pay B for the 95%; he must give B $475.
        iii. However, if A the only person A can find to finish the job will cost A $50, then B owes A $25:
            1. In effect, A must pay $525 for a painted house rather than the contract price of $500.
            2. In that case, B will be paid $450—$475 for his work, less damages to A.
        iv. If the contract price was 100, then in no case will A get more than the contract price for his unfinished work, even if the value of his

services was under-appreciated in the overall market. This is because expectation does act as a limitation on the breaching party, even where it does not on a non-breaching party.

e.

Brief Box 21: *Britton v. Turner (1834).*
[Plaintiff laborer served defendant for nine month in exchange for $120 at the end of the contract. Plaintiff breached; defendant refused to pay him anything.]
Plaintiff is entitled to his restitution interest, for defendant should not receive a free benefit. In the event the defendant sustained damages in completing the work promised by plaintiff, he can subtract damages from the money owed plaintiff. If the sum of damages (cover) is greater than the value of the work performed, the beaching party gets nothing (and might owe under another interest).

3. Measuring Restitution:
    a. Restatement (Second) of Contracts § 371 states:
        i. If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either:
            1. The reasonable value to the non-breaching party of what he *received* in terms of what it would have cost him to obtain it from a person in the claimant's position.
            2. Or, the extent to which the other party's property has been increased in value or his other interest advanced.
        ii. If (1) applies, then the non-restitution party must pay what the good or service is reasonably worth.
        iii. Alternatively, if (2) applies, then the non-restitution party must pay for the property (real or personal) value increase.
        iv. At no time, however, does the value exceed the total contract price if the breaching party is seeking restitution.
4. Restitution of deposit in a contract for the sale of goods:
    a. *See* **Brief Box 11**: *Neri v. Retail Marine Corp. (1972).*
    b. *See* UCC § 2-718.
5. Restitution of deposit in a contract for the sale of land:
    a. Courts recognize a breaching party's right to restitution if the non-breaching party has retained an undue benefit despite the breach.
    b. If the breaching party can establish that the non-breaching party has received money in excess of actual or liquidated damages, then the breaching party can recover those excessive moneys. *See* Restatement (Second) of Contracts § 374.
    c.

Brief Box 22: *Vines v. Orchard Hills Inc. (1980).*
[Plaintiff breaching party left a deposit for a condo.]
(1) Whereas older courts did not permit a breaching party to recover any restitution, modern courts reason that a breaching party can recover restitution if and only if the buyer establishes that the seller retains enrichment beyond his actual damages. To do otherwise would unjustly enrich the non-breaching party, and punish the breaching party for good-faith partial performance when even bad-faith complete refusal is not punished. However, the question of the enforceability of the liquidated damages clause in light of the gain sustained by Orchard at the time of trial remains. The breaching party must establish the non-breaching party has nonetheless been unjustly enriched. Since the parties agreed to a liquidated damages clause, the question becomes whether the liquidated damages clause is valid and enforceable as a reasonable estimation of

uncertain damages sustained because of Vines' breach. If a party does not suffer *any* damages, however, then the liquidated damages clause is not enforceable.

6. Restitution in Quasi-Contractual Situations.
    a. A party may still recover restitution for services provided in a quasi-contractual situation. *See* Restatement (Second) of Contracts § 374.
        i. Quasi-Contractual situations are legally imposed contracts in the interest of justice.
        ii. The law creates quasi-contractual situations to prevent unjust enrichment where no formal contract or implied contract was made but a party received a benefit.
        iii. For a quasi-contract to exist, however, the benefit must be unconscionable for the other party to retain without payment, and the work may not be done by a (mere) volunteer.

Brief Box 23: *Cotnam v. Wisdom (1907).*
[Plaintiff sued defendant executor for services rendered to unconscious decedent.]
In some cases the law creates a contract, even though no actual contract formation occurred between the parties. A person knocked unconscious in an accident may be held liable in assumpsit for necessaries furnished to him in good faith while in that unfortunate and helpless condition. In such cases, the doctor is entitled to a restitution for his services because the decedent, though dead, nonetheless received the benefit of a greater chance to survive his unfortunate condition.

    b. A party may recover restitution in implied contractual situations as well.
7. Restitution for "mere volunteers"; i.e., no contract.
    a. A party may not recover restitution for work performed on a volunteer basis.
    b. A party may not recover restitution where no contract, express or implied, or recognized quasi-contract, exists.
    c.

Brief Box 24: *Martin v. Little, Brown & Co. (1981).*
Plaintiff offered to inform defendant where defendant's publication was reprinted without permission. Defendant accepted. Plaintiff sued to recover one-third of the copyright infringement].
Martin's initial letter did not expressly or by implication suggest a desire to negotiate for money; neither did Brown's letter of invitation. Rather, Brown invited Martin to send his copy, and Martin volunteered. When a person volunteers work, an intention to pay cannot be inferred. To sustain a claim of unjust enrichment, it must be shown by the facts pleaded that a person wrongly secured or passively received a benefit that it would be unconscionable to retain. Martin volunteered the information to Brown. Accordingly, there is no cause of action for restitution.

k. Review of Damages:

Brief Box 25: *Sullivan v. O'Connor (1973).*
[Plaintiff claimed defendant doctor breached a contract to deliver a better-looking nose.]
[Some argue that courts should not recognize medical promises as contracts on ground of public policy, preferring the law of torts apply. However, the law of Massachusetts treats them as valid. On the one hand, there is risk that a patient will infer a contract when the physician did not intend to make one, and that a jury will unjustly award defendant. On the other hand, not allowing claims for breach of a medical contract would expose the public to the enticements of charlatans, thereby threatening the public's confidence in the medical profession. The law goes between the horns, allowing such suits but requiring a higher standard of proof.]
What is the proper measure of damages?
Restitution Interest: The restitution measure of damages is too meager, for the plaintiff will almost always suffer some injury in excess of the money she paid.
Expectation Interest: In Hawkins v. McGee, the NH Supreme Court ruled that the proper measure of damages was the difference in the value of the hand as promised and the value of the hand as delivered. Damages for pain and suffering, insofar as offered as consideration, were not recoverable. [Even if the defendant acted non-negligently, reasonableness is not an excuse for breach of contract.]
Reliance Interest: Other courts, e.g., New York, prefer the reliance interest measure of damages. The goal is to compensate the damaged party to the point where she was before the contract was performed. Under this theory, plaintiff could recover pain and suffering for all three operations, out-of-pocket expenses, and the value of her nose contrasted with its value before the contract. Courts using the reliance interest view restitution as too meager but expectancy too speculative—what is the value of the promised condition? Damages for mental pain and suffering are ordinarily not allowed in breach of contract cases. However, if the reliance interest is given, surely any pain in excess of the contracted-for pain should be compensated—in fact, the theory supports compensation for *all* pain and suffering.

ARTICLE II—CONTRACT FORMATION:

I. Introduction to Offer and Acceptance:

a. The basic tenant of contract formation is that the parties mutually assent or agree to enter into a bargained-for exchange of goods and/or services.
b. Theoretically, the parties must agree at the same point in time.
    i. If one party agrees to enter into a contract but the other party does not, then there is no contract formation.
    ii. The parties must create a "meeting of the minds."
    iii. Typically, parties contract when one party makes an *offer* and the other *accepts* the offer.
c. Manifestation of Mutual Assent: Meeting of the Minds.
    i. Restatement (Second) of Contracts, § 18:
    Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance [at the same time].
d. Bargain Requirement:
    i. Implicit in the idea of a contract is a mutual bargain exchanging something between the parties.
    ii. In any contract, an exchange between the parties *must* take place.
    iii. The exchange can involve (1) tangible goods, (2) tangible goods and intangible services, or (3) intangible goods.
        (1) E.g., exchanging crops for money.
        (2) E.g., exchanging money for labor.
        (3) E.g., exchanging one service for another service.
    iv. ***Restatement (Second) of Contracts, § 17—Requirement of Bargain****:*
        (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
        (2) *Whether or not there is a bargain, a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.*
e. Exchange and Consideration:
    i. Exchange is the good or service offered by the offeror to the offeree.
    ii. Consideration is the good or service the offeree agrees to give the offeror in exchange for the good or service offered.
    iii. Generally, both "exchange" and "consideration" are referred to simply as "consideration." The difference between them lies in who offered what to whom, but the importance of who made the offer becomes moot once an agreement is made.
    iv. Consideration is simply "anything of value that induces the other party to assent to the contract."
    v. Consequently, a contract involves a bargained for exchange of goods and or services (consideration)—the parties must exchange consideration.
f. Offer and Acceptance:
    i. ***Restatement (Second) of Contracts, § 22—Mode of Assent****: Offer and Acceptance*
        (1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.
        (2) *A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.*
    ii. The precise point in time of contract formation need not be established to infer a contract.
g. Offer:

i. ***Restatement (Second) of Contracts, § 24—Offer Defined***:
   (1) 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.
ii. An offeror may revoke her offer only *before* the offeree accepts.

h. Acceptance, Power of:
   i. An "acceptance" is an agreement to accept the terms of an offer.
   ii. The offeree is given the contractual right of "power of acceptance" once an offeror makes her offer.
   iii. ***Restatement (Second) of Contracts, § 35—Offeree's Power of Acceptance****:*
      (1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.
      (2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in § 36.
   iv. ***Restatement (Second) of Contracts, § 36—Method of Termination of the Power of Acceptance****:*
      (1) An offeree's power of acceptance may be terminated by:
         (a) rejection or counter-offer by the offeree.
         (b) lapse of time
         (c) revocation by the offeror
         (d) death or incapacity of the offeror or offeree
      (2) In addition, an offeree's power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.
         a. § 36(1)(a)—explained:
            i. If an offeree agrees to perform consideration only on the condition that the offeror change any part of the offered consideration, then the offer is terminated—the so-called "mirror image rule," different from UCC § 2-207.
            ii. The offeror may make a new offer to the offeree, adjusted according to the offeree's demands, but the original offer no longer stands.
            iii. The offeree cannot accept the original offer if the offeror rejects his counter-offer—the offeror must make another offer.
         b. § 36(1)(b)—explained:
            i. if a sufficient period of time transpires after the offer is made, then the offer terminates on its own accord.
         c. § 36(1)(c)—explained:
            i. The offeror has the power to revoke the offer *before* the offeree accepts it.
            ii. If A offers an exchange to B, he can revoke the offer at anytime before B accepts.
            iii. **Restatement (Second) of Contracts, § 42***—Revocation by Communication From the Offeror Received by Offeree:*
            An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.
         d. § 36(1)(d)—explained:
            i. If the offeror dies, the offeree cannot accept the offer.
            ii. If the offeree dies, her estate cannot accept the offer.
   v. Power of Acceptance Otherwise Terminated:
      (1) If the offeree receives notice that the offeror no longer intends to enter into the agreement offered, then the offer is terminated, even if the offeree received no express notice from the offeror.
      (2) **Restatement (Second) of Contracts, § 43**—Indirect Communication of Revocation:

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.

vi. Option Contracts:

(1) An option contract is one that provides the offeree time to accept some other offer—in two words, an "irrevocable offer."

(2) Essentially, the parties contract for the offeree's option to enter into a future contract.

(3) The parties must contract for the option in accordance with the ordinary laws governing contract law.

a. The offeree must offer the offeror some consideration for holding the offer open.

b. In effect, the offeror agrees to forfeit his power of termination in exchange for something from the offeree.

c. The offeree agrees to exchange that something else for the offeror surrendering his right to revoke the offer.

(4) ***Restatement (Second) of Contracts, § 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.

(5) An option contract limits the offeror's power to terminate his agreement.

a. By virtue of a contract, the offer stays open such that the offeror cannot revoke her offer and a counter-offer cannot terminate the offer.

b. Further, the offer withstands the death of the offeror.

c. The option contract usually contains some period of time in which the offeree has to accept the other offer; if not, then the offer is not terminated by a lapse of time.

(6) ***Restatement (Second) of Contracts, § 37—Termination of Power of Acceptance Under Option Contract****:*

Notwithstanding §§ 38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are not met for the discharge of a contractual duty.

i. Introductory/ Review Case:

Brief Box 26: *Dickinson v. Dodds (1876).*

[Defendant agreed to sell his land to plaintiff. Plaintiff did not accept the offer, instead asking for time to consider the offer. Defendant agreed to give him time, but plaintiff offered no consideration. Later, plaintiff learned defendant intended to sell the land to a third party.]

The document, though beginning "I hereby agree to sell," was nothing but an offer.

It is clear settled law that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was free to withdrawal the offer. Dodds need not expressly inform Dickinson of his withdrawal, either. If a party receives notice that the other party is negotiating for the sale of land to some third party, then there is no question that his offer to the initial party is withdrawn

II. Objective Theory of Mutual Assent:

a. A contract may be formed irrespective of actual intent to be bound if the parties act such that they are reasonable in believing the other party gives assent (unless they actually know the other party is not giving consent).

b.

Brief Box 27: *Embry v. Hargadine Dry Goods Co. (1907).*

[Plaintiff told his employer that he would leave on the spot unless the employer contracted with him for another year's labor. The employer told him to "go ahead, you're all right." The employer later fired him, claiming that he did not intend to contract with plaintiff.]

Contract law does not take into account the subjective intentions of the parties. Rather,

contract law considers a contract formed when words or acts of the parties indicate so. Whether one party secretly cherishes intentions inconsistent with those words or acts is irrelevant. In general, the court determines as a matter of law whether the alleged words would constitute a contract if spoken. If the words are in dispute, then the question whether they were used or not is one of fact for the jury.

c. The term "meeting of the minds" does not mean the parties must meet on a subjective level.
    i. The theory of contract formation is objective, in that it asks whether the parties were reasonable in believing the other party assented.
    ii. The reasonableness test, however, is not that of a reasonable third party; rather, the test is whether the parties themselves were reasonable, given what they knew at the time of contract formation.
    iii. Further, the party claiming a contract was formed must actually believe a contract was formed; courts will not enforce a contract, even if a third party would think a contract were signed, if both parties mutually knew they were not contracting.
        (1) Imagine watching two people sign a document promising the transfer of land for $400 and then laughing after signing it.
        (2) A third person may think they've sold the land, but if both parties knew the contract was a joke then there is no contract.
        (3) There is a subjective component to the objective test; the person claiming a contract was formed must actually believe one was being formed.
    iv. Whereas the jury determines what was said, the judge determines whether a contract was actually formed, based on the jury's finding.
    v. Problem: From an evidentiary standpoint, should evidence of subjective intent be admissible?
        (1) Yes: If a party offers evidence of subjective intent—e.g., a memo stating that no contract was formed—such evidence indicates that his story is more likely truthful.
            a. If two parties offer different accounts about what was said, then the jury must determine what was actually said.
            b. If a party has evidence of its subjective intent, the jury should be allowed to hear the evidence to help it determine whether that party's story is true.
                i. This assumes that a party does not act contrary to its subjective beliefs.
        (2) No: Evidence of subjective intent will cloud a jury's mind, for such evidence encourages juries to find that a contract was not made based on assertions made behind the other party's back.
            a. Evidence of subjective intent is irrelevant.
            b. What matters is what was said, not what was intended.
        (3) Courts are divided on this issue, but a majority of jurisdictions do not allow evidence of subjective intent.
    vi. ***Restatement (Second) of Contracts, § 19—Conduct as Manifestation of Assent***.
        (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
        (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
        (3) *The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.*

Brief Box 28: *Lucy v. Zehmer (1954).*
[Plaintiff sought specific performance for a contract for the sale of land from defendant. Defendant denied intending to enter into a contract, claiming he was drunk when he signed the bill of sale.]
Even if the court assumes that Zehmer was just jesting Lucy, the fact remains that Lucy believed Zehmer's conduct to convey a sale of the Ferguson Farm to him. The evidence shows that Lucy was warranted in believing a sale had occurred. Contract law looks to the outward expression of a person as manifesting his intention rather than to his secret, unexpressed intention. "The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

vii. Lucy applies the same two prong test:
(1) Actual belief that a contract was formed—subjective.
(2) Reasonableness in believing a contract was formed—objective.

viii. Drunkenness does not present a capacity problem if the person contracting still possessed the ability to comprehend the nature and consequences of his actions.

III. What is an Offer?

a. Advertisements / Inviting Others to Make Offers—Preliminary Negotiations:
i. An advertisement is not an offer.
(1) Rather, contract law views advertisements as an invitation to others to make offers.
(2) Thus, if P sees D's newspaper ad, D is not liable for breach of contract if D runs out of stock.
(3) Advertisements are not communicated to a particular buyer, but even if they are courts do not generally view them as offers.
(4)

Brief Box 29: *Nebraska Seed v. Harsh (1915).*
[Defendant sent plaintiff seed distributor a letter saying he had an approximate amount of seed and that he wanted $2.25 per hundred weight. Plaintiff sent an immediate "acceptance" of the "offer."]
The language is general, indicating an advertisement addressed generally to those in the seed business. If a proposal is nothing more that an invitation to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. To hold that Harsh's letter was an offer would be to hold that where any party sends out letters to a number of dealers, each of those dealers who accepts could sue him for breach of contract.

(5) In determining whether the document in question is an offer or a general advertisement, courts will consider:
a. The language itself—if general, then probably not a contract.
b. The past procedures of the company and of similar companies in the defendant's locale.
c. To whom the document is addressed and how many other people the defendant sent the document to—§ 29
d. The definiteness of the terms—§ 33—i.e., the ability to determine a *reasonable* basis for breach and a *reasonable* remedy.

ii. ***Restatement (Second) of Contracts, § 26—Preliminary Negotiations***:
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.

iii. ***Restatement (Second) of Contracts, § 29—To Whom an Offer is Addressed:***
(1) The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.

(2) An offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise or renders a specified performance.

iv. **Restatement (Second) of Contracts, § 33—Certainty (of Terms)**:

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

(3) *The fact that one or more terms of a proposed bargain are left open or uncertain may (but may not) show that a manifestation of intention is not intended to be understood as an offer or as an acceptance*.

[§ 33 is similar to the UCC provision that permits contracts with uncertain terms. If a party agrees to all terms but the time of delivery, the contract remains enforceable. A contracts to buy B's land; B agrees to mortgage A's purchase if A cannot find a bank to do it; B breaches; A seeks specific performance; held: there is a contract, but specific performance is available only if A can purchase B's land outright.]

b. **UCC Article 2—Sale of Goods**:

i. **§ 2-204—Formation in General**: "Loosey-Goosey Contract Formation" A.K.A.: "If you can write it reasonably, we'll enforce it!"

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale (of goods) does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

a. § 2-204(3) provides that damages must be of a certain basis.

i. Thus, if A claims he formed a contract for the sale of goods with B, but did not specify the amount to be sold, the time of delivery, the price per unit, etc. then a basis for damages becomes almost impossible—the contract may not be enforceable.

b. Generally, the UCC permits a contract without certain terms—where terms are missing, a "reasonableness" test determines the terms. [See § 2-305 (Open Price Term); § 2-308 (Open Delivery Location); § 2-309 (Open Time).]

IV. Memorial Contemplation—"Letters of Intent":

a. In many business proposals, parties will write a letter of intent to conclude a deal once certain further provisions are formulated.

b. Depending on the language, a letter of intent to contract may or may not constitute a contract.

i. If the letter says that there are many details to be worked out and that the final contract is subject to the acceptance of further negotiations, then it probably does not constitute a contract.

ii. However, if the parties agree as to all the terms verbally, but they want to have their lawyer's "write it up," then a contract has been formed—if the lawyer does write it up, then the parol evidence rule applies and the letter of intent is inadmissible.

c. **Restatement (Second) of Contracts, § 27—Existence of Contract Where Written Memorial Is Contemplated**:

Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

d. If the agreements are legitimate negotiations, then there is no contract—§ 26.

> **Brief Box 30**: *Emporo Manufacturing Co. v. Ball-Co Inc. (1989).*
> [P and D entered into negotiations for the sale of P's business, but the deal went through. P sent D a letter of intent, stating clearly that the offer was subject to further agreements; P sued when D "breached," even though P took efforts to ensure no contract was implied.]
> The words "subject to" may be used carelessly, and if the parties already agreed to terms such that the definitive agreement was nothing but a memorializing of the terms, then the letter of intent would be enforceable. Neither the text nor the structure of this letter suggests that it was a one-sided commitment. Ball-Co's lawyer stated that the "terms and conditions are generally acceptable but that some clarifications are needed." This is an ominous noise in a negotiation.

V. Mailbox Rule – When is Acceptance Communicated?

a. The mailbox rule states that an acceptance is valid upon sending (whereas revocation is valid upon receipt).

b.

> **Brief Box 31**: *Morrison v. Thoelke (1963).*
> [D sent P an offer; P mailed his acceptance; P repudiated by phone before D received acceptance; P sued for quiet title; D counter-sued for specific performance.]
> "It was early decided that the contract was completed upon the mailing of the acceptance," for the mailing party manifests objective assent. The justification for the mailbox-rule is that there must be a point in time when a contract is complete. [Citing Corbin pp. 377]: Whether courts choose the time of receipt or of sending, one party will not know a contract has been formed. The rule throwing the risk on the offeror has the merit of closing the deal more quickly and enabling performance more promptly.

c. Why the mailbox rule?
   i. Chiefly, to protect offerees.
      (1) If an offeree accepts an offer and begins relying on it, we do not want the offeror to be able to revoke his offer.
   ii. Infinite regression problem:
      (1) If the offeror must wait to hear from the offeree, then the offeree must wait to hear that the offeror has heard from the offeree; if the offeree must wait to hear from the offeror that he has received the offeree's correspondence, then the offeror must wait to hear that the offeree has received confirmation of the correspondence; if the offeror has to wait to hear that the offeree has received correspondence of the confirmation, then the offeree must wait for confirmation of the confirmation of the correspondence….
   iii. Meeting of the minds:
      (1) Theoretically, the minds meet upon mailing as long as the offer has not been revoked and the offeree accepts—the mailing is a continuation of the offer.
   iv. Further, valid upon mailing is conducive to business.
      (1) Someone is going to have to endure the risk of not knowing when the contract is formed.
      (2) In almost every case, there is no reason to suspect that the offeror wishes to revoke prior to the offeree's acceptance.

(3) Since business begins faster—i.e., less time is wasted sitting around waiting to receive acceptances—a general rule permitting offerees to begin performance sooner than later is preferable.

v. Unfair reception:

(1) It is unfair to permit the offeror to intercept the acceptance and destroy it.

d. Origins: Adams v. Lindsell. and Cooke v. Oxford:

i. The so-called "Adams v. Lindsell" rule was promulgated where the offeror sought to revoke his offer after the offeree had accepted it and begun relying on the contract.

(1) Thus, the purpose of the rule was to protect offerees from relying on contracts that the offeror could revoke past acceptance.

ii. In Cooke, the same result occurred—the offeree began relying on a contract that was subsequently revoked.

e. Morrison: Difference?

i. In Morrison, the mailbox rule is invoked to protect the offeror, not the offeree.

ii. I.e., we're concerned about the offeree's power to revoke acceptance.

iii. If the offeror must wait for acceptance, and the offeree intercepts the acceptance before the offeror receives it, then the offeror has no idea and is not harmed.

iv. Some conclude that a different rule should apply where the offeree seeks to revoke an acceptance sent by mail—no one is harmed, because no one is relying on the contract until the offeror receives the contract. The offeree is not placed at risk.

f. General Rules:

i. THE MAILBOX RULE APPLIES ONLY TO ACCEPTANCES; IT DOES NOT APPLY TO OFFERS, REVOCATIONS, OTHER TRANSACTIONS, ETC!

(1) Acceptances = valid upon sending; revocations = valid upon receipt.

ii. **Restatement (Second) of Contracts, § 63—Time When Acceptance Takes Effect**:

Unless the offer provides otherwise,

(a) *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*

(b) *An acceptance under an option contract is not operative until received by the offeror.*

iii. **Restatement (Second) of Contracts, § 64—Acceptance by Telephone or Teletype**:

Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.

iv. **Restatement (Second) of Contracts, § 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.

v. **Restatement (Second) of Contracts, § 66—Acceptance Must be Properly Dispatched**:

An acceptance sent by mail or otherwise from a distance is not operative when dispatched, unless it is properly addressed and such other precautions taken as are ordinarily observed to insure safe transmission of similar messages.

g. Special Considerations:

i. An offeror can specify the appropriate medium to convey acceptance, ruling out mail, telephone, or other means as he deems appropriate—see § 65.

ii. The court will look at the language of the contract and the method of sending to determine whether a particular medium is appropriate.

(1) The moral: If you're an offeror, specify telephone acceptance—that way, you know when you're bound to the contract; if you're an offeree, don't send anything in the mail unless you really, really, mean it.

iii. Option Contracts:

(1) The mailbox rule does not apply to option contracts for two reasons.

a. The offeror relinquishes his right to revoke for a specific period of time in exchange for a set consideration; permitting the offeree to extend this time would cause the offeror to lose an opportunity to present his offer to others once the option period expires.
b. The purpose of the rule is to protect offerees from having the offer revoked after acceptance—in an option contract, the offeree knows how much time he has to accept, so there's no risk of revocation post-acceptance.

VI. Silence as Acceptance:

a. Ordinarily, a party cannot rely on silence as acceptance.
   i. If A sends B an unsolicited shipment of goods, and A and B have had no prior dealings, then A is not obliged to pay B for the goods if he does not notify B of his non-acceptance.
   ii. However, if A used B's goods, with the understanding that B wanted compensation for them, then A must pay B the reasonable value of the goods (or the reasonable terms in the contract).
   iii. (In most states, if A (a seller) sends B (a consumer) unsolicited goods, then B can keep the goods—this is imposed by an unsolicited goods statute.
b. Standing Offers:
   i. Where A leaves an offer open to B to accept and goods of a certain kind B sends, then A is obliged to pay for the goods upon sending, not upon receipt.
      (1) If the offer was truly standing, then B accepts via sending the goods—unilateral contract.
c. If A consents to B's shipments, then there is an obligation to inform B of non-acceptance.
   i. Think of those wonderful "CD Clubs."—unless you send the CD back within a specified, reasonable time, you are liable to pay for the CD.
   ii. This is so because the buyer consented to receiving offers for goods, and, though he retains the option of non-acceptance, he must inform the seller within a reasonable time that he does not accept lest the offeror believe he has.
d. Prior dealings:
   i. If, however, A and B have had prior dealings, and A sends B goods that B would normally accept, B is obliged to at least inform A of non-acceptance—but not to pay B outright unless there was a standing offer.
   ii.

Brief Box 32: *Hobbs v. Massasoit Whip Co. (1893).*
[P sent D some eel skins for use in making whips; P had shipped D similar skins in the past and D accepted and paid for them; D did not notify P of non-acceptance; P believed D accepted; the skins were destroyed.]
A sufficient period of silence also warranted plaintiff's belief that defendant had accepted the skins. This conclusion stands on the proposition that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party.

   iii. **Restatement (Second) of Contracts, § 69**—Acceptance by Silence or Exercise of Dominion:
      (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
         a. Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
         b. Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

c. Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But, if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

iv. Thus, in Hobbs D had past dealings with P such that it was reasonable that D would inform P of non-acceptance.

(1) Even if there were no prior dealings, if D used the eel skins, he would have to pay the price stated in the contract; if he didn't use them, he could do nothing.

(2) If so, P still retained the right to refuse acceptance on ground where D acted wrongfully towards his property—he retains the right to ratify or not ratify D's acceptance if D violates the goods prior to notification of acceptance.

a. Suppose that P sends D some goods, and D decides to use them without notifying P of acceptance. P, thinking that D has not accepted the goods, sells them to another buyer, and he actually obtains a higher price than he offered D. P contracts to sell the goods to a third party, but, upon attempted revocation of his offer, learns that D has used them. Since D did not notify P of acceptance, P still had a right to revoke the offer, and the goods remained his. P can deny D's acceptance and sue D for the higher contract price with the third party.

VII. Unilateral Contracts—Acceptance = Performance:

a. What is a unilateral contract, anyway?

i. In its most basic form, a unilateral contract is any contract where the offeror specifies, either expressly or impliedly in the language of the contract, that the acceptance of the offer is contingent upon actual performance of a specified consideration; once accepted in such a manner, the offeror agrees to render a specific consideration to the offeree.

ii. The offeror is the master of his own offer—i.e., he retains the right to specify that a contract is unilateral.

iii. In a unilateral contract proper, the offeree cannot accept by *mere* words—performance is acceptance.

b. Paradigm Case: Rewards—The case of Blackbeard and Bluebeard.

i. Suppose that Blackbeard offers Bluebeard a unilateral contract where A promises to pay anyone $1000 for finding his lost parrot.

(1) If someone else finds the parrot, B cannot sue A for breach of contract solely on the ground that B told A he accepted the offer.

(2) That is, A's offer to B was not contingent on a promise to sell the bird, but rather on an actual performance of finding the bird.

(3) The offeror was interested in a performance alone, not necessarily with a specified person—he wanted his damn bird back and didn't care who actually found it.

ii. Thus, in the case of rewards, the doctrine of unilateral contract permits a person to allow any one of a number of people to perform the consideration he desires.

(1) Blackbeard wants many people working to look for his parrot.

(2) He does not want to contract with a single person, Bluebeard and wait for Bluebeard to repudiate before he can hire another pirate to look for his bird! A pirate without a parrot is like a ship without plunders!

iii. Of course, Blackbeard may choose to hire Bluebeard exclusively to find his parrot.

(1) Perhaps Bluebeard is a better parrot finder than he is a pirate—though history doesn't quite record this.

(2) Blackbeard, the master of his offer, may hire Bluebeard to find his parrot, but if Bluebird is unsuccessful Blackbeard may not be able to sue him for breach of contract anyway—Bluebeard may have an excuse under the doctrine of impossibility, for the damn parrot is lost at sea!

iv.

Brief Box 33: *Carlill v Carbolic Smoke Ball Co. (1893).*
[D ran an add promising 100L to be paid to anyone who used a smoke ball and still managed to contract influenza. P purchased a ball in reliance on the add, but nonetheless contracted influenza.]

We must first consider whether defendant intended this to be a contract or *mere* puff that meant nothing at all. We hold that it was a contract, for defendant advertised that it deposited money into a bank account for the purpose of honoring the contract. The very purpose of the advertisement was to inform those who wished to perform that the offer was not a mere "puff"; there was a promise as plain as words can make it.
Since there was a promise, the question becomes whether it is binding. Offers are made to anyone who performs the specified consideration giving rise to the reward. Performance of the conditions by any person constitutes acceptance of the offer. Ordinarily, an offeree must notify the offeror of acceptance; however, rewards are an exception to the general rule. Either that in such cases the notification need not antedate notification of the performance. An offer of a reward is a continuing offer; the offer here was never revoked. In a case of this kind, the person who makes the offer shows by his language and form the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

v. The offeror need not be notified of acceptance, unless one of several conditions are met.
   (1) Again, think of the reward scenario—if someone posts a reward, they do not want everyone calling them up and saying "I accept" before rendering performance.
vi. **Restatement (Second) of Contracts, § 54**—Acceptance by Performance; Necessity of Notification:
   (1) 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.
   (2) If an offeree who accepts by rendering a performance 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
      a. The offeree exercises reasonable diligence to notify the offeror of acceptance, or
      b. The offeror learns of the performance within a reasonable time,
      c. *Or the offer indicates that notification of acceptance is not required.*

c. Unilateral Contracts: Further Understanding.
   i. Another way of considering unilateral contracts is that they impose obligations on one party—the offeror.
      (1) The offeree, by choosing not to perform or by abandoning attempted performance, cannot be sued for breach of contract.
      (2) The offeror, however, can be sued if the offeree accepts by rendering complete performance.
d. Revocation: Acceptance Equals Performance.
   i. The offeror can revoke his offer at any time prior to partial performance, for the offeree has not accepted until he renders at least some performance.
   ii. Had Carbolic Smoke Ball Co. revoked the offer in its add prior to Carlill purchasing the ball, Carlill could not have received the 100L reward. (There is an exception for partial performance, infra.)

Brief Box 34: *Petterson v. Pattberg* (1928)
[D told P that he would accept 780 less for paying off the mortgage if D paid him prior to 31 May. P came to D's residency prior to 31 May, but D told him that he had sold the mortgage to someone else. P never tendered the money to D.]
Pattberg proposed to Petterson the making of a unilateral contract, the gift of a promise in exchange for the performance of a specified act. The thing conditionally promised by Pattberg was the reduction of the mortgage debt in exchange for full payment of the reduced mortgage balance prior to the due date. According to Williston, "If an act is requested, that very act and no other must be given." Further, Langdell writes, "In case of offers for a consideration, the performance of the consideration is always deemed a condition." An offer to enter into a unilateral contract may be withdrawn before the act requested has been performed. However, when the offeree approaches the offeror with the intention of proffering performance, but the offeror withdraws the offer, a difficult problem arises. Can the offeror revoke his offer upon proposed performance of the consideration? Williston writes, "The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say "I revoke" before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated." In this case, before a tender of the necessary money had been made, the offeror informed the offeree that revoked his offer. An offer to sell property may be withdrawn before acceptance without any formal notice if the offeree has actual knowledge of an inconsistent act prior to acceptance.

e. The dissenting opinion claimed that if P offered to tender the money to D, then D could not revoke at that time.
    i. If it were otherwise, D made his performance part of the performance required for P to accept the contract!
    ii. If a party can make one of his own actions a necessary part of the given consideration in its own offer of a unilateral contract, then that party can revoke simply by refusing to accept tender.
    iii. Since tender offers to perform immediately, P's acceptance by performance should not be limited to D's acceptance—P has done everything he logically can to perform the contract.
    iv. Modern law accepts this view over the majority in Petterson—see Restatement (Second) of Contracts, § 45.
    v. See Restatement (Second) of Contracts, §§ 42-43, infra
f. Unilateral vs. Bilateral: (Old school presumption of Bilateral)

Brief Box 35: *Davis v. Jacoby (1934).*
[P agreed to move into D's house and help him and his wife in exchange for their land when they died. D died before P moved, but D's wife still lived. P took care of D's wife until she died. The will left D's property to distant nephews. The court had to determine whether the contract was unilateral or bilateral. If unilateral, then the contract was revoked upon D's death, and P gets nothing. If bilateral, then the contract was formed, and P gets the land.]
Although the legal distinction between unilateral and bilateral contracts is well settled, there is difficulty in determining which one any particular contract is. On the one hand, an offer to sell that is accepted is a bilateral contract; on the other, an offer of a reward for some service is a unilateral contract. Somewhere between these two polar paradigms lies everything else. Accordingly, whether a contract is unilateral or bilateral depends on: (1) the intent of the offer, and (2) the facts and circumstances of each case. When in doubt, Restatement (First) of Contracts expressly provides that there is a strong presumption an offer is a bilateral contract. Williston also favors a presumption of bilateral contracts: "It is not always easy to determine whether an offeror requests an act or a promise to do the act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed." Our own cases are consistent with the restatement and Williston.

(1) Accordingly, in distinguishing whether a contract was bilateral or unilateral, the court will look to:
    a. The circumstances between the parties; and,
    b. The intent of the parties.
(2) In Davis, the court rules that there was a bilateral contract because D wanted *assurance* that he and his wife would be taken care of.
(3) However, there is reason to suspect that the court interpreted a bilateral contract *merely* because it wanted P to receive the land instead of D's distant relatives.
    a. The court probably would be hesitant to say that D could sue P for breach of contract if P decided he could not leave for business reasons.
    b. The contract, when viewed in light of the opposing party, seems unilateral, if contractual at all.
(4) Thus, in determining whether a contract was unilateral or bilateral, be sure to consider it from the perspective of both parties.
    a. If D breached, does it seem right that he could sue P for not performing?
        i. If so, then the contract was bilateral—an exchange of promises.
        ii. If it doesn't seem like D could have sued P if the scenario were reversed, then the contract was most likely unilateral—only the offeror was bound, and only if the offeree actually performed.

g. Partial vs. Complete Performance—New vs. Old: Option Contracts
    i. Whereas courts used to say that only complete performance binds the offeror to pay the offeree, courts now recognize that if a party begins performance, begins tendering, or tenders the offeror's consideration, then an option contract is created between the parties—the offeree has the option of completing the contract and the offeror cannot revoke the offer.
    ii. Partial Performance and Unilateral Contracts, an early example.

Brief Box 36: *Brackenbury v Hodgkin (1917)*
[P unilaterally promised D her farm if D moved back home and took care of her. P moved in, but P and D did not get along. D attempted to remove P, but P sued for specific performance in order to get the land. D was still alive during the dispute.]
There is a legal and binding contract. The offer was in writing and its terms cannot be disputed. There was no need that it be accepted in words or with a counter-promise, for performance alone was sufficient—the contract was unilateral. The promise becomes binding when the act is performed. The contract created an equitable interest in the land. Hodgkin's letter is in accordance with our statute requiring that trusts be written, but that "no formality need be observed" and that "a letter is sufficient to establish a trust." Defendant's contention that plaintiffs failed to perform in that they rendered improper and unkind treatment on Hodgkin, therefore forfeiting any right to equitable relief. This is a question of fact, and the sitting judge determined it in favor of plaintiffs—thus, it is viewed deferentially. Even so, the record indicates, so far as we can tell, that Hodgkin was the provoking cause in the family difficulties.

    a. There is reason to doubt that specific performance was appropriate in this case, even though the plaintiffs were not seeking it.
        i. Remember, the law does not like forced associations.
        ii. By refusing to make P sue for damages, the court forcibly made P live with D so long as D chose to remain in P's house!
        iii. The court could have enjoined D from hiring other caretakers, or it could have provided P with damages.

iii. **Restatement (Second) of Contracts, § 45**—Option Contract Created by Part Performance or Tender:
   (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is crated when the offeree tenders or begins the invited performance or tenders a beginning of it.
   (2) *The 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.*

iv. **Restatement (Second) of Contracts, § 50**—Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise:
   (1) 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.
   (2) 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.
   (3) *Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.*

v. Today, if a party begins to render performance, the law creates an option contract—
   (1) The offeror cannot revoke his offer until the specified time allotted for full performance has expired.
   (2) The offeree must complete the performance by the time the offer expires—completion must be complete before the offeree obtains the offeror's promise.
   (3) Suppose that if Blackbeard gives Bluebeard 100 gold doubloons before the end of the day, Bluebeard will give Blackbeard his beloved parrot.
      a. If Blackbeard gives Bluebeard 30 doubloons, but has to go back to the ship to get the remainder, Bluebeard cannot sell the parrot to someone else until the day has expired—Blackbeard has the option of purchasing the parrot with the remaining 70 coins until the end of the day.
      b. If Blackbeard does not give Bluebeard the remaining 70 coins by the end of the day, then Bluebeard can sell the bird to someone else the next day.
   (4) Partial performance gives a prior-right to completing the performance.

vi. Complications: Offeror is Master of his Offer.
   (1) Clearly Unilateral:
      a. The above scenario between Blackbeard and Bluebeard supposes that Bluebeard expressly stated that his offer was accepted only by performance.
      b. If the contract specifies that *only* performance constitutes acceptance, then the offeree must accept by performance alone—or at least partial performance—and Restatement (Second) of Contracts, § 45 applies.
      c. The offeree is not bound to perform at any time, even if he abandons performance.
   (2) Clearly Bilateral:
      a. If the offeror specifies that the contract is bilateral in nature, then the offeree accepts by *promising* to perform—via manifestation of mutual assent.
      b. The offeree is bound, of course, to execute his promise.
   (3) Either: The offeree's choice, no § 45.
      a. If the offeror clearly states that the offeree can choose to be bound by promise, or can choose by performance, then the offeree can decide whether to accept via performance or promise.
         i. **Restatement (Second) of Contracts, § 30**—Form of Acceptance Invited:
            1. *An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may*

empower the offeree to make a selection of terms in his acceptance.

2. *Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.*

b. Thus, the old school presumption of bilateralness is no longer the view of most courts—in the absence of a clear mode of acceptance, the offeree may choose any medium reasonable in the circumstances.
   i. If the offeror does not clearly state what counts as acceptance, and if the circumstances don't indicate either way, then the offeree can accept either by performance *or* by promise:
   ii. **Restatement (Second) of Contracts, § 32**—Invitation of Promise or Performance:
   In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

c. However, once the offeree has a choice, § 45 no longer applies. Rather, § 62 takes over:
   i. **Restatement (Second) of Contracts,** § **62—**Effect of Performance by Offeree Where Offer Invites Either Performance or Promise:
      1. *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 of a beginning of it is an acceptance by performance*.
      2. *Such an acceptance operates as a promise to render complete performance.*
   ii. If the offeree chooses to accept by promise, then he is bound to perform that promise—the contract is bilateral.
   iii. Either way, the offeree is bound.

VIII. Filling in Gaps:

a. Either intentionally or accidentally, parties entering into a contract often fail to specify every term and every condition.
   i. Freedom of contract:
      (1) Freedom of contract includes the ability to contract with confidence the court will enforce imperfect agreements.
      (2) However, freedom of contract also includes the notion that courts will not make contracts that the parties themselves did not agree to.
      (3) Since every case involving a contract necessarily involves a dispute, one party will usually want the contract forced under the first theory, and the other party will want the court not to enforce the contract on ground of the second.
      (4) The court's role in filling in gaps necessarily walks the line between the two competing contractual theories.
   ii. Nonetheless, both UCC § 2-204 and Restatement (Second) of Contracts, § 204 state that, although courts may fill in gaps, they will only do so in the event that there is a certainty to damages and a meaningful bargain—or at least an intention to bargain.

b. Traditionally, courts were very reluctant to fill in gaps, but, as the need for supplying terms in order to uphold agreements became apparently essential to the purpose of contract law, courts began to supply terms. But, courts still required the contract terms be certain.

c. *Mere* Agreements to Agree:

Brief Box 37: *Sun Printing v. Remington Paper (1923).*
[P contracted with D to buy paper for 12 months. The first 4 months were contracted for with a specific price. The last 8 required the parties to agree to price and to how long that price would be in effect. D stopped delivering after the 4 months, saying there was no contract. P sued, saying that at each month D must accept the maximum price agreed to.]
Sun and Remington left two terms to be settled in December 1915—the price per hundred pounds of paper and how long that price was effective. Both needed to be determined. If price alone was open for adjustment, then Sun's argument that it had an option to purchase the paper might have merit. If Sun and Remington reached a price, then Sun could purchase at that price; if not, then Sun could purchase the paper at the maximum price—the price charged by Canada. Even granting this set maximum price, however, the length of the term agreed upon remains problematic: If the parties agree to pay a certain amount one month, who says they agree to pay the same amount next month? Since the buyer's and seller's exchange would not fluctuate within a given term, it follows that the length of the term is germane: Markets fluctuate; where one party wants a price to remain constant, the other will necessarily want it to change. The contract was thus incomplete.

d. Judge Crane's dissent in Sun argued that the court should supply one of various terms to the contract, but Cardozo maintained that was precisely what courts should not do in deciding whether to enforce a contract—simply pick one where many exist.
    i. These two competing views still represent the modern debate on gap filling, but the law has changed to accommodate Crane's opinion more than Cardozo's.
e. Modern Gap Filling:
    i. Restatement (Second) of Contracts, § 204 provides for the court to supply terms.
        (1) Restatement (Second) of Contracts, § 204 requires that the parties:
            a. Bargain (not merely intend to bargain)
            b. Such that they sufficiently define a contract.
        (2) **Restatement (Second) of Contracts, § 204**—Supplying an Omitted Essential Term:
        When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.
    ii. Further when parties contract, their methods of choosing terms affects how the court will supply terms if one of the parties later contests the contract:
    iii. **Restatement (Second) of Contracts, § 34**—Certainty and choice of terms; effect of performance or reliance:
        (1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.
        (2) Part of performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.
        (3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.
    iv. The UCC, in particular, allows a court to supply almost any term, provided that a reasonably certain basis for giving an appropriate remedy exists.
        (1) § 2-204 requires:
            a. An intention to enter into a bargain.
            b. A reasonably certain basis for giving a remedy.
    v. **UCC § 2-204—Formation in General**: "Loosey-Goosey Contract Formation"
        (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
        (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale (of goods) does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonable certain basis for giving an appropriate remedy.

vi. **§ 2-305—Open Price Term**:
   (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case, the price is a reasonable price at the time for delivery if
      a. Nothing is said as to price; or
      b. The price is left to be agreed by the parties and they fail to agree; or
      c. The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
   (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
   (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
   (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

vii. **UCC § 2-308**—Absence of Specified Place for Delivery:
   (1) Unless otherwise agreed,
      a. The place for delivery of goods is the seller's place of business or if he has none his residence; but
      b. In a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
      c. Documents of title may be delivered through customary banking channels.

viii. **UCC § 2-309**—Absence of Specific Time Provisions; Notice of Termination.
   (1) The time of shipment or delivery or any other action under a contract is not provided in this Article or agreed upon shall be a reasonable time.
   (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
   (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

f. "Illusory" promises:
   i. Buyers and sellers often wish to contract with one another, despite the fact that they do not know their requirements beforehand.
      (1) Market fluctuations may require a buyer to need more one year and less the next.
      (2) In the case of perishable goods, the ability for the buyer to contract with a seller based on "however much he needs" is essential.
      (3) It is also essential for a seller because a seller does not want to allow a buyer to go to someone else in an expanding market.
      (4) Or, in the case of an output contract, the seller wants to trap the buyer into purchasing all that he can produce.
      (5) Hence, both buyer and seller want contracts that enable them to specify everything by the amount needed or the amount produced.
   ii.

Brief Box 38: *New York Iron v US Radiator (1903).*
[D agreed to sell to P all the radiator that P needed in the year 1899. P needed more than ever before because the contract price with D was beneficial, given the rising market. D stopped delivering, arguing that the law implies a maximum threshold of obligation in a requirements contract—the most the buyer has ever needed in the past.]
Defendant claims that courts should impose a necessary upper-limit on its obligation to sell to the buyer based on the buyer's maximum needs in the past. However, the defendant bound the plaintiff to deal exclusively in goods to be ordered from it under the contract and to enlarge and develop the market for the defendant's wares so far as possible. However, the buyer is limited to orders arising from good faith and fair dealings—he cannot speculate on the market by ordering an excessive amount and stockpiling for future profits. Custom, conditions of trade, and good faith limit the plaintiff's order, but not his past aggregate limit.

iii. Requirements vs. Output:
  (1) Requirements contracts are where the seller agrees to supply the buyer with "all that he needs" for a given term.
  (2) Output contracts are where a buyer agrees to buy all the supply can produce in a given term.

iv. Illusory?
  (1) Courts did not traditionally uphold output or requirements contracts.
  (2) The theory was that either the buyer, in a requirements contract, or the seller, in an output contract, was not bound.
  (3) Thus, the courts began imposing obligations on parties to make output or requirements contracts enforceable.
  (4) Exclusivity Requirement:
    a. If a buyer promises to buy "all he needs" from a seller, then he does not actually need any if he buys from another supplier.
    b. Likewise, if a buyer promises to buy all a seller can output, the seller does not actually output anything if is sells it all to another buyer.
    c. Hence, modern courts require output or requirements contracts to be *exclusive* between the parties: The buyer and seller cannot buy from or sell to other merchants—at least not the particular good contract for.
  (5) Good Faith Requirement:
    a. If a buyer simply chooses not to buy anything, then his promise was not a promise at all—the seller was obligated to sell at the buyer's whim, but the buyer was not obligated to buy anything.
    b. If a seller simply chooses not to produce anything, then his promise was not a promise at all—the buyer was obligated to buy at the seller's whim, but the seller was not obligated to actually make anything.
    c. Hence, modern courts interpret a requirement of good faith and fair dealings: A buyer must buy all that he actually needs from the exclusive seller—he cannot shut down his business to avoid a loss; a seller must make all that he actually can—he cannot stop production to save money or to make more money in the future because of a rising market.
  (6) Today, output and requirements contracts are specifically endorsed by the UCC.
    a.

Brief Box 39: *Eastern Airlines Inc. v. Gulf Oil Corp. (1975).*
[P contracted with D where D would supply all of P's fuel requirements. In light of a gas crisis, D demanded more money from P. P sued, seeking specific performance of the contract.]

Gulf argues that its contract with Eastern is invalid because it lacks mutuality, is vague, and renders Gulf subject to Eastern's whim. The parties concede that the contract is an exclusive requirements contract: Eastern must purchase its Eastern district jet fuel from Gulf; Gulf must supply Eastern's good faith demands. The law developed a view that requirements contracts could be binding where the purchaser had an operating business. The "lack of mutuality" and "indefiniteness" were resolved since the court could determine the volume of goods provided for by reference to objective evidence of the volume of goods required to operate the specified business. Further, the UCC § 2-306 specifically approves requirements contracts. [A buyer may make good-faith demands for its requirements, and, in light of a stated estimate, may expand the quantity demanded based on a reasonably proportionate increase from past needs.]

v. **UCC § 2-306**—Output, Requirements and Exclusive Dealings:
   (1) *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*.
   (2) *A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale*.

vi. UCC § 2-306:
   (1) Under the UCC, an exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems of subsection (1).
   (2) The maximum amount a buyer can demand, or a seller can force a buyer to buy, is the good faith amount that the buyer needs, or the seller can produce, subject to that which is *reasonably proportional* with:
      a. In the absence of a specified amount, that which the buyer has required in the past.
      b. In the presence of a stated estimate, that stated estimate, which acts as a center-line.
      c. In the presence of a maximum or minimum amount, that maximum or minimum amount acts as a clear limit of intended elasticity.
   (3) Thus, if a requirements contract specifies that 1000 is the most the buyer will need, he is limited to 1000. The 1000 figure acts as a clear limit for his needs.
   (4) The question of whether a requirements or output contract is in fact a contract is answered in the affirmative; however, what amounts to a breach of a output or requirements contract remains the source of litigation.
   (5) What counts as reasonable?
      a. Ultimately, it's a question of fact.
      b. However, double the required amount is not necessarily unreasonable, but it may be given the circumstances.
         i. E.g., if A required 1 one year and 2 the next year, this might be reasonable if you're talking about chairs; however, it might be patently unreasonable if you're talking about B2 bombers.

vii. Another type of illusory promise does not deal specifically with output and requirement contracts, but does concern an exclusive promise and requirement of good faith.
   (1)

Brief Box 40: *Wood v. Lady Duff Gordon (1917).*
D exclusively contracted with P to sell her goods and market her name. D

breached by selling her own goods through persons other than P.]
It is true that Woods does not explicitly promise that he will use reasonable efforts to place the Gordon's endorsements and market her designs. However, such a promise is fairly implied. The law has outgrown its primitive stage of formalism. If the contract is instinct with an obligation, imperfectly expressed, there is a contract. The implication of a promise is apparent in the instant case.

(2) Cardozo is not departing from his opinion in Sun v. Remington.
   a. In Sun, Cardozo said that if the plaintiff pleaded that the defendant breached its duty of good faith to negotiate with Sun, then the plaintiff might have a claim.
   b. However, the plaintiff's in Sun pleaded that there was only an option contract; they pleaded a particular interpretation of the contract that the court found to be incorrect in light of multiple ambiguities.

(3) Traditionally, courts were left to infer a requirement of good faith from the language of the contract.
   a. Today, the UCC implies a good faith agreement in § 2-306.
   b. There is some disagreement, however, among the courts about whether the UCC would apply in a situation like Gordon.
      i. Some courts hold that where A contracts with B where B will sell A's goods, the contract is one of services, not one of transacting goods.
      ii. However, some courts interpret § 2-102's "transactions" as being broader than the term "sale of goods," though many refer to Article 2 in this way. Consequently, some courts would hold that the UCC applies in cases where A promises to sell B's goods to third parties.
         1. If a court interprets the UCC in this way, then § 2-306(2) applies, and there is a requirement of good faith in light of the type of contract itself.
            a. *(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes (unless otherwise agreed) an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale*.
         2. If a court does not interpret the UCC to include transactions to third parties, then the court will interpret whether there is a requirement of good faith by virtue of the language of the contract.
         3. Both the UCC and common law approach require a contract that is exclusive between the parties—that is, they agree to bargain amid themselves and no one else—for there to be a binding promise.

IX. Interpreting Assent Objectively and Subjectively—Ambiguous Contract Terms.

a. Objective theory prevails.
   i. As with interpreting whether a contract exists at all, American courts prefer the objective theory of assent.
   ii. In dealing with contract terms, courts will consider the objective meaning of the terms to be controlling, even though traditionally English courts claimed that in the event one party understood a term to mean something different than the other party, there was no meeting of the minds—hence, no contract.

b. Subjective theory? The Peerless Case:
   i.

Brief Box 41: *Raffles v. Wichelhaus (Eng. 1864)*
[D contracted with P to purchase some cotton, shipped on a boat called "Peerless." P sent the cotton on a second ship, also called "Peerless," but not on the same ship that D thought the cotton was coming on. D refused the cotton that came on the second ship, pleading that it thought to be shipped ex Peerless meant that it would be shipped on the first boat (which sailed in October) rather than the second boat (which sailed in December.]

Plaintiff: It doesn't matter what ship the cotton came from, as long as the cotton came from a ship called "Peerless." The time of the sailing is not written in the contract. The defendant has no right to attempt to contradict a written contract if that contract is good upon its face. In such a case, subjective intentions should be irrelevant.
Court: It's like saying that you're buying goods from one warehouse when you're really getting them from another, or it's like saying you're buying wine from one estate in Spain but getting wine from a second estate in France by the same name.
Defendant: There is nothing on the face of this particular contract to show that any particular ship called the "Peerless" was meant. The moment there were two ships called the Peerless that both set sail from Bombay there was a latent ambiguity in the contract—one ship sailed in October, the other in December. If so, there can be no contract, for there was no consensus—hence no binding contract.
Court: You're right. There is no contract.

ii. Is the Peerless case using a subjective or objective theory of assent to the contract term?
   (1) Subjective: The court concludes that since the defendant did not know that plaintiff meant a different ship, there is no contract because there was no meeting of the minds—each party envisaged another ship.
   (2) Objective: In this case, the term "Peerless" is ambiguous as written. An objective person in the defendant's shoes could have reasonably thought that the term Peerless applied to either ship—the contract was unclear as to which ship it meant, and the court will not impose a meaning arbitrarily favoring one party over the other.

iii. What would happen if plaintiff shipped nothing on either ship?
   (1) On the one hand, if there was no contract, then defendant could not sue plaintiff for failing to deliver!
   (2) On the other hand, it seems the parties contracted for the exchange of cotton, and in the face of two interpretations, the shipper cannot abandon both interpretations—either he picks one and is safe from liability, or he picks neither and buyer can sue him.
      a. The set of all interpretations included shipping on some ship, though we do not know which ones.
      b. Seller cannot abandon the set of all interpretations.

c. Modern Rules of Interpretation:
   i. **Restatement (Second) of Contracts, § 200**—Interpretation of Promise or Agreement:

Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.

   ii. **Restatement (Second) of Contracts, § 201**—Whose Meaning Prevails:
      (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
      (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made:
         a. That party did not know any different meaning attached by the other, and the other knew the meaning attached by the first party; or

b. That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) *Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.*

iii. Comments to § 201:

(1) According to § 201(1), if both parties agree that a term means X, then the term means X, regardless of if objectively the term might mean Y.
   a. Thus if both parties agree that "dog" means "cat," then "dog" means "cat" for purposes of interpreting the contract.

(2) Subjective: According to § 201(2)(a), if A subjectively believes that the term means X, but B believes it means Y and A knows that B believes Y, then Y is the term.
   a. Thus, if one party is aware that the other party believes the term to mean something other than what it itself believes, then that meaning applies.

(3) Objective: According to § 201(2)(b), if one party is reasonable in interpreting the term in one way, and the other party *should* know that they will interpret it that way, then that way is the term.

(4) Essentially, a party wishing the court to adopt its interpretation over the conflicting interpretation offered by its adversary must show that:
   a. Its own interpretation is reasonable, AND
   b. That its adversary's is unreasonable.

(5) If the party wishing the court to adopt its interpretation fails to establish either of these, then the contract is void on ground of mutual mistake—a stalemate—if the adversary cannot show that its own interpretation is both reasonable and that the other's is unreasonable—§ 201(3).

(6) Some commentators hold that there is a distinction between vagueness and ambiguity—courts do not use such terms.
   a. An ambiguity occurs where there are two interpretations, either one of which must be the correct interpretation.
   b. A vagueness occurs where there are more than two interpretations, any one of which may be the correct one.
   c. Commentators argue that as a practical matter courts are more likely to find there is no contract when faced with an ambiguity, and more likely to find there is a contract when faced with a vague term.

iv. "What is a Chicken?" UCC Customs and Usage:

Brief Box 42: *Frigaliment Importing v. B.N.S. Sales Corp (1960)*.
[P contracted with D to buy "chickens"; D delivered stewing chickens, not broiling chickens; P claimed that the contract term "chickens" meant broilers, not stewing chickens.]
The word "chicken" is ambiguous. We turn to the language of the contract. Defendant notes that the contract did not just specify "chicken," but US Fresh Frozen Chicken, Grade A, Government Inspected. Plaintiff makes several arguments.
Plaintiff contends that there was a definite trade usage that "chicken" meant only "young chicken." However, defendant showed that it was new to the poultry trade, thereby bringing it within the principle that "when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear by proving either (1) that he had actual knowledge of the usage, or that (2) the usage is so generally known in the community that actual knowledge may be inferred. There is no proof as to (1). In order to show (2), plaintiff must show: (a) the usage is of so long continuance, (b) is so well established, (c) so notorious, (d) so universal, and (e) so reasonable in itself, that a strong presumption exists that the parties contracted with reference to the

obvious meaning. Plaintiff attempted to establish this through the testimony of three witnesses. [After rejecting the witnesses testimony as conclusive], Defendant's witness said that a "chicken" is anything within the classes of "chicken" in the Department of Agriculture's regulations, which include "stewing chickens" and "broilers." Defendant alleges that the contract specifically incorporated this definition by virtue of the language in the contract, and its witnesses testified to the merit of this argument. Plaintiff fails to meet its burden of showing that defendant's interpretation of the contract term "chicken" was unreasonable.

v. In contracts for the transactions of goods, the UCC establishes a hierarchy for interpreting terms within a contract.
   (1) As expected, the UCC starts with the express terms given by the parties, in an effort to give the parties maximum control over their agreement.
   (2) The UCC then progresses to broader interpretation mechanisms, ultimately ending up with common trade usage.
   (3) The hierarchy is as follows:
      a. Express terms in the contract—the terms of the agreement itself.
      b. Course of performance within the contract—the ways the parties have performed the particular contract terms up to the point of dispute.
      c. Course of dealings between the parties—the way the parties have performed similar contracts, if any, in the past.
      d. Usage of trade—the way others in the trade industry employ the words in the contract.

vi. **UCC § 1-205**—Course of Dealing and Usage of Trade, in relevant part:
   (1) *A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct*.
   (2) *A usage of trade is any practice or method of dealing having an expectation that it will be observed with respect to the transaction in question*.
   (3) *A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement*.
   (4) *The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade*.

vii. **UCC § 2-208**—Course of Performance or Practical Construction:
   (1) *Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement*.
   (2) *The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever possible as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade*.

X. Written Agreements:

a. **Parol Evidence Rule**: "IF YOU WRITE AT ALL, WRITE IT ALL."
   i. In General: When parties write a contract that encapsulates everything they previously agreed to, then the written contract replaces, and thus excludes, all other agreements contrary to the written word.
      (1) Parol Evidence Rule applies to evidence prior to a writing; subsequent oral agreements or writings are not excluded by it.

(2) Parol Evidence Rule applies only to writings.
(3) Parol Evidence Rule excludes evidence of oral and written agreements prior to the final agreement, but only to the extent that such agreements exclude consistent additional terms.

ii. **Restatement (Second) of Contracts, § 213**—Parol Evidence Rule:
(1) *A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them*.
(2) *A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope*.
(3) *An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it [the agreement] had not been integrated*.

iii. **Restatement (Second) of Contracts, § 216**—Consistent Additional Terms:
(1) *Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated*.
(2) *An agreement is not completely integrated if the writing omits a consistent additional agreed term which is*
a. *agreed to for separate consideration, or*
b. *such a term as in the circumstances might naturally be omitted from the writing*.

iv. The Parol Evidence Rule is not a rule of evidence, per se, nor it is a rule for interpretation; rather it is a general rule excluding alternative agreements once the parties form a valid written agreement.
(1) The written agreement is a final manifestation of assent, but does not mean that it is necessarily exclusive of all terms of an agreement.
(2) The written agreement may only reflect part of the overall agreement.
(3) Consequently, evidence involving the existence of additional terms not included in the agreement is not excluded, unless one party can show that the written agreement was an exclusive writing—no other terms were involved.

v. Parol Evidence Rule is limited, however.
(1) The rule cannot be invoked to suppress evidence of additional terms, unless:
a. The additional term is inconsistent with any of the written terms in the agreement; or
b. The writing contains some mention or dealing of the term; or
c. The agreement is proven to be a complete and exclusive agreement between the parties.
(2) The party wishing to exclude the proposed additional term must show one of the above three qualifications applies.
(3) In determining whether to add the consistent term, the court will conduct a preliminary hearing to determine whether:
a. The parties intended to add the term, or incorporate it within the meaning of the written terms; and,
b. The conduct and circumstances of the agreement.
c. The jury will then determine what was said.
(4) The terminology of the Restatement (second) distinguishes between "integrated agreements," or finalized writings of one or more terms, and "completely integrated agreements," or finalized writings of each and every term.
a. If the court finds the writing is a binding (valid) integrated agreement, then evidence to the contrary regarding the particular integrated terms is not considered.
i. An agreement is "integrated," not in the sense that it is inclusive of all terms, in the sense that it is a finalization of all prior dealings and negotiations leading up to a particular term.

b. If the court finds the writing is a binding (valid) completely integrated agreement, then no evidence about additional terms is considered—at least not to the extent the court finds even consistent terms within the "scope" of the writing.
c. If there is evidence of an additional term with additional consideration, then the agreement is not completely integrated—there is in effect another contract, and the writing of one contract does not exclude the existence of another.
d. Finally, if the terms of an agreement are so clear as to naturally compel one to infer that the written words included it, then the naturally inferred meaning is not excluded.

(5) Or, in the particularly confusing terminology of the Restatement (Second):

vi. **Restatement (Second) of Contracts, § 209**—Integrated Agreements:
(1) *An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement*.
(2) *Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.*
Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

vii. **Restatement (Second) of Contracts, § 210**—Completely and Partially Integrated Agreements:
(1) *A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement*.
(2) *A partially integrated agreement is an integrated agreement other than a completely integrated agreement*.
(3) *Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule*.

viii. **Restatement (Second) of Contracts, § 214**—Evidence of Prior or Contemporaneous Agreements and Negotiations:
Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish:
a. *that the writing is or is not an integrated agreement*;
b. *that the integrated agreement, if any, is completely or partially integrated*;
c. *the meaning of the writing, whether or not integrated*;
d. *illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause*.
e. *ground for granting or denying rescission, reformation, specific performance, or other remedy*.

ix. Restatement § 210 and UCC § 202 permits parol evidence to determine whether a contract was a completely integrated agreement, but some courts and scholars argue that if the contract contains an express clause that clearly states the agreement is completely integrated, parol evidence is excluded to determine even whether the agreement was completely integrated.
(1) I.e., so-called "integration" or "merger clauses"—e.g., "This agreement constitutes a final written expression of all terms of agreements in a complete and exclusive statement."
(2) Others go even further and say that unless one would expect the agreement to include other terms the writing is presumed to be complete—a minority view not common today.

x. The UCC takes a slightly different approach, but the interpretation is similar:

(1) Essentially, the UCC permits consistent additional terms unless the court finds the writing was an exclusive statement of all terms.
(2) Course of dealing, course of performance, or usage of trade may explain or supplement terms—not *anything!*
(3) Under no circumstances, however, will such evidence contradict written terms.

xi. UCC § 2-202—Final Written Expression:

(1) The terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or a contemporaneous oral agreement but may be explained or supplemented
   a. by course of dealing or usage of trade (§ 1-205) or by course of performance (§ 2-208); and
   b. by evidence of consistent additional terms unless the court find the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

xii. Two examples of the courts imposing the Parol Evidence Rule. In the first, Brown, the court finds that the plaintiff can supplement the written agreement with a term consistent with the writing. In the second, PG&E, the court permits parol evidence to interpret the parties' true intent and meaning of the words, holding that language is always a matter of interpretation and rejecting the view that language may ever be clear.

Brief Box 43: Brown v. Oliver (1929).
[D sold a hotel to P. P and D discussed that the hotel would include the furniture inside. The writing said nothing about the furniture. D removed the furniture. P sued to recover it, but D claimed the Parol Evidence Rule prohibited evidence of the agreement outside the four corners of the writing.]

The writing only included reference to the land; it contained nothing to indicate the parities were dealing with respect to any subject except land. An agreement outside the written contract does not contradict anything within the writing. If the parties intended to limit the writing to the single subject of land, the other subject of the furniture could be proved by parol. Intention was a question of fact to be determined by investigating conversations, conduct, and circumstances. The court determined that the writing included nothing about the furniture, so parol evidence was appropriate.

Brief Box 44: *PG&E v. Thomas Drayage Co. (1968).*
[D agreed to take out insurance to cover damages from working; in its contract with P, D did not exempt P's damages as was the custom. P suffered damages and sued to recover from D; D said that the meaning of the language must be interpreted in light of the parties' intention.]
The exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone. However, words do not have absolute and constant referents: The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that as never intended. Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose.

a. Plaintiff in PG&E stated that since the language of the contract was unambiguous, the parol evidence rule prohibits interpreting the terms via extrinsic evidence.
b. However, California rejects this argument, stating that the language is never clear enough and that the parties' true intention are what matters, something external evidence is always relevant for determining.
c. This is consistent with the objective theory of assent, in that it does not look at the subjective minds of the parties', but rather considers objective evidence external to the writing.
d. Further, the Parol Evidence Rule should not be used to impose obligations that neither party wanted, even if the language is clear.
e. Essentially, PG&E says that it doesn't make sense not to consider external evidence for the purpose of interpreting what a contract term means—the goal is to get to the true intentions of the parties, so any evidence is relevant in determining the true meaning.
f. Some say that a clear writing excludes even evidence to interpret what it means, but the Restatement states the predominant rule.

b. Mutual Mistake in Writing: Reformation

i. Although the Parol Evidence Rule excludes considering evidence of inconsistent terms *not* in the written agreement, equity courts apply a narrow exception to the rule when the writing itself is incorrect.
ii. **Restatement (Second) of Contracts, § 155**—When Mistake of Both Parties as to Written Expression Justifies Reformation:
Where a writing that evinces or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.
iii. In cases covered by § 155, the parties agree to terms other than what they wrote down—they wrote the wrong thing down, but both knew they were supposed to write something different.
iv. We're not talking about interpretation of a word; we're talking about a wrong word!
v. "Equity regards as done that which ought to be done," so a party can seek reformation of a contract, usually only upon a showing "beyond a reasonable doubt" that the contract as written was written incorrectly.

> **Brief Box 45**: *Travelers Insurance v. Bailey (1964).*
> [D bought a life insurance policy from P with a annuity of $500 a year; P used the wrong form, so D was to get $500 a month. D did not know or rely on the policy; when he received it from his mother 30 years after the contract, P sought to amend it.]
> Where there has been established beyond a reasonable doubt a specific contractual agreement between parties, and a subsequent erroneous rendition of the terms of the agreement in a material particular, the party penalized by the error is entitled to reformation, if there has been no prejudicial change of position by the other party while ignorant of the mistake.

vi. Williston: "The writing didn't say what the parties wanted the writing to say."
(1) I.e., they didn't want to use those words.
(2) The parties are not contesting the interpretation or meaning of a word; one of them is saying they wrote the wrong word altogether.

c. Battle of the Forms:

i. Applies to writings only, but one writing is enough.
ii. Applies to acceptance of offers with additional or modified terms.
iii. Mirror Image Rule:

(1) At common law, if A accepts B's contract with any modification or addition, his acceptance is not an acceptance proper; rather, it is a counteroffer.
(2) Thus, if A sends B a writing saying, "I agree to your terms, but let's change one term or add one," B has rejected A's offer and made a counteroffer. If A rejects B's counteroffer, B cannot then accept A's original offer.
(3) At common law, the mirror image rule prevented:
    a. Confusion—A offers B a contract for 20,000, and B says he wants 30,000; both A and B reconsider and accept each other's offer; which one is binding?
    b. Unfairness—A offers B a contract; B rejects, leading A to think that B doesn't accept; A does not revoke; B reconsiders and accepts; A offered to someone else in the meantime.
(4) *Mere* inquiry does not constitute a counteroffer.
(5) If offeror makes a continuous offer—i.e., one where he agrees that no rejection or counteroffer will terminate the offeree's power of acceptance—then, a counteroffer or rejection does not remove the offeree's power of acceptance.
(6) However, a continuous offer is not one where offeror merely gives a person a certain amount of time to accept—if A gives B until Friday to accept, but does not promise that no matter what the offer stays open, then the first rejection rejects.

iv. UCC: The UCC rejects the mirror image rule—§ 2-207.
(1) "Last Shot"—parties contracting for goods frequently took the "last shot" at making their terms binding.
    a. E.g., A offers B a contract. B accepts via sending a written form, but alters the terms. A wants the contract, and either doesn't notice the alterations or decides not to worry about them because he doesn't think there's a breach. B's terms control.
(2) In an effort to promote fair contracts, the UCC may create a contract where the terms of conflicting forms are different.
(3) In such cases, the terms controlling are the original terms of the offer, not the terms of the acceptance, unless:
    a. The offeree's counteroffer (AKA "conditional acceptance") makes it clear that he is unwilling to proceed without the alterations—most courts require the manifestation of unwillingness to be express.
    b. Between merchants, the alterations become binding unless:
        i. the original offer expressly states that acceptance can make no alterations.
        ii. the alterations <u>materially alter</u> the offer—a change in warranties is prima facie a material altering; a change consistent with trade usage is probably okay, unless unreasonable.
        iii. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
(4) Conduct may still establish a contract even though the writings are insufficient to establish a contract.

Brief Box 46: *<u>Step-Saver v. Wyse (1991).</u>*
[P orally offered D (TSL) a contract for the sale of a computer program. D accepted, but sent its form on the program limiting liability.]
The UCC establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties' contract is not sufficient to establish the party's consent to the terms of the writing to the extent that the terms of the writing either add to, or differ from, the terms detailed in the parties' earlier writings or discussions. Where the offeree (in this case, TSL) makes a claim of an express conditional acceptance, the offeree

must show an unwillingness to proceed with the transaction unless the additional or different terms are included in the contract.

(5) Knockout Rule:
   a. Subsection 3 of § 2-207 provides that if neither form controls, a contract may still be created.
   b. In such cases, the terms the parties agree to control and the default rules of the UCC apply.
   c. Some courts apply the knockout rule to all "battles of forms."
      i. The terms consistent between the writings control.
      ii. Anything additional is simply knocked out—i.e., not part of the agreement.
      iii. The revision of the UCC is considering applying the knockout rule in place of § 2-207.

(6) UCC § 2-207 is intended to cover two types of cases:
   a. Written confirmation (acceptance) alters the terms of an oral agreement—*adds* terms not discussed or changes terms.
   b. Written acceptance adds or changes further minor terms or alterations to the terms—adds the word "rush" in front of "delivery."

v. **UCC § 2-207—***Additional Terms in Acceptance or Confirmation*:
   (1) *A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms*.
   (2) *The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless*:
      a. *the offer expressly limits acceptance to the terms of the offer*;
      b. *the materially alter it*;
      c. *or notification of objection to them has already been given or is given within a reasonable time after notice of them is received*.
   (3) *Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act*.

vi. **UCC § 2-316**—Exclusion or Modification of Warranties:
   (1) *Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (§ 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable*.
   (2) *Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof."*

d. **Statute of Frauds**: Requirement of a Writing:
   i. Courts recognize that in some cases the consideration is of such value that the parties must write the terms down.

(1) This prevents fraudulent claims of oral contracts or any contract without a writing.
(2) Any writing will do; it does not have to be a contract per se, but something written must exist.

ii. Statute of Frauds applies to:
(1) (one-year provision)—contracts where performance *must* take more than one year.
a. In cases where performance *cannot* be performed within a year, the parties must have a writing.
b. This requirement of possibility is strict—if A contracts with B to serve B for B's life, then, technically, there is no need for a writing: B could have died before a year was out.
c. If B promises to work for two years, then there must be a writing. It's impossible to perform work for two years work in one year!
i. Restatement (Second) of Contracts, § 130:
1. Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.
2. When one party to a contract has completed his performance, the one-year provision of the Statute does not prevent enforcement of the promises of other parties.
(2) contracts where the consideration is an interest in land—whether to *sell*, *trade*, or *lease*.
a. Restatement (Second) of Contracts, § 125:
i. A promise to transfer to any person any interest in land is within the Statute of Frauds. . .
b. In contracts for the transfer of land, sometimes, courts will award specific performance if there is a continual manifestation of assent against the party whom enforcement is sought—see § 129.
(3) Other contracts, including marriage contracts, suretyship contracts, and various others depending on the state.
(4) Value is significant:
a. UCC requires a writing for the sale of goods valued over $500.

iii. Failure to have a writing in the statute of frauds means that the contract is not enforceable.

Brief Box 47: *Boone v. Coe (1913).*
[D promised to let P sharecrop for one year upon P's arrival. P arrived some time later. D did not let him sharecrop.]
In these cases, the plaintiff can recover a restitution interest: (1) a reasonable fee for his actual services, (2) the increased amount of value in the leasor's land, or (3) any amount paid to the leasor. In this case plaintiffs merely sustained a loss. Defendant received no benefit. The contract is unenforceable, so defendant was within his legal rights to decline to carry it out. [The contract, by definition could not take less than one year.]

(1) Plaintiffs can, however, recover a restitution interest—a claim for a remedy without a contract anyway.
a. Quantum meruit—claim for restitution without a contract.
b. Benefit on D's property—D must pay the reasonable value of service or increase in value to his property.
c. Services for probate—reasonable value of services.

iv. Statute of Frauds in contracts for the transfer of goods:

(1) The UCC requires a writing in cases involving the transfer of goods valued at more than $500.
(2) A writing must be "sufficient to indicate that a contract has been made," so, presumably, an offer is insufficient—contra § 131, infra.
(3) However, the UCC permits several exceptions to the Statute of Frauds.
    a. Specially Manufactured Goods:
        i. If the goods are made custom order for the buyer, then there need not be a writing.
        ii. The theory is that the buyer must have communicated the specifications with the seller—the statute of frauds is evidentiary in nature.
        iii. Further, the seller would not normally may a custom made good for someone that he could not sell to someone else without a contract with the buyer.
        iv. However, the specially manufactured good exception does not apply to goods that have not yet been manufactured. It applies only to goods that have been substantially begun or if the seller has made substantial agreements to render performance.
    b. Party admission:
        i. If the party admits the existence of a contract in its pleadings or other court proceedings.
        ii. However, the extent to which the contract is enforceable is only to the degree the party admits—not necessarily the whole of the contract.
    c. Merchants Formalizing at a later date:
        i. Between merchants, if the parties formalize an agreement after the contract has been made, and if the merchant receiving the agreement doesn't reject or complain within ten days, then the writing is sufficient to establish a contract.
    d. Performance:
        i. The parties are liable to pay for and to receive payment for any goods actually delivered and accepted.
        ii. Presumably not, however, for the remaining goods in the contract that have not been received or shipped.

Brief Box 48: *Riley v. Capital Airlines (1960).*
[P orally contracted with D to supply jet fuel for five years. D later breached.] This is not a case of goods being specially manufactured followed by a subsequent breach by the buyer. We distinguish this case from Goddard v. Binney, wherein a contract to build a carriage to the buyer's specifications was held outside the statute of frauds. We held in Farrow v. Burns that partial performance does not remove a contract from the statute of frauds. Since plaintiff received payment for all of his deliveries, he is owed nothing, and the contract is unenforceable as a matter of law.
However, plaintiff purchased expensive equipment in order to fulfill adequately the provisions of the contract. I am of the opinion that he purchased them in good faith pursuant to the *defendant's specifications*; he should be able to recover for the items purchased to perform his contract.

v. Courts will sometimes award a party its reliance interest if it finds a contract that is unenforceable because of the statute of frauds.
    a. If one party relied on another in good faith, then, even if the court finds no enforceable contract, it may award the party its reliance interest, or part thereof, if it finds sufficient evidence of a contract outside the statute of frauds.

vi. **Restatement (Second) of Contracts, § 139**—Enforcement by Virtue of Reliance:
   (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
   (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
      a. the availability and adequacy of other remedies, particularly cancellation and restitution;
      b. the definite and substantial character of the action or forbearance in relation to the remedy sought;
      c. the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
      d. the reasonableness of the action or forbearance;
      e. the extent to which the action or forbearance was foreseeable by the promisor.

vii. UCC § 2-201—Statute of Frauds:
   (1) Except as otherwise provided in this Section, a contract for the sale of goods for the price of $500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. . . . A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
   (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.
   (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable:
      a. if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
      b. if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in a court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
      c. with respect to goods for which payment has been made and accepted or which have been received and accepted.

viii. Partial performance:
   (1) Partial performance by the party seeking enforcement may, in rare cases, take a contract from out of the statute of frauds, but only if it is unequivocally referable to the contract wishing to be enforced.
   (2) Courts determine as a matter of law whether partial performance is unequivocally referable.

e. Satisfying the Statute of Frauds:
   i. What kind of writings count?

(1) The **UCC** says that any writing "*sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought*."
   a. Presumably, a memorandum of an offer will not suffice, but an acceptance letter may, especially if it states the terms.

(2) **Restatement (Second) of Contracts, § 131**—General Requisites of a Memorandum:
Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by *any writings*, signed by or on behalf of the party to be charged, which
   a. *reasonably identifies the subject matter of the contract*,
   b. is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
   c. *states with reasonable certainty the essential terms of the unperformed promises in the contract*.

Brief Box 49: *Schwedes v. Romain (1978).*
[P contracted with D to purchase land. D sent an offer to P, which P accepted orally. P tried to enforce the contract, even though the acceptance was oral.]
Here, there is no evidence that any *consideration* moved from plaintiffs to defendants. A contract for the sale of real estate is invalid unless it, or some note, is in writing subscribed by the parties to be charged. Here there is no writing binding Schwedes to buy this property. Schwedes oral promise was not legally binding. That so, there is no ground for specific performance, since there is no enforceable contract. The Schwedes merely undertook actions in the contemplation of eventual performance—the obtaining financing, offering to pay the full amount, and nothing further. As a matter of law, obtaining financing and making studies of the real property have been held insufficient part performance to preclude the defense of the statute of frauds. The law does not impose the doctrine of promissory estoppel merely on the ground a party backed out of an unenforceable contract. Promissory estoppel only suffices to remove a contract from the statute of frauds where the statute itself would render a fraud.

(3) There is some question whether the court got it right in Schewedes.
(4) Restatement (Second) of Contracts, § 131 says that a memo of an offer signed by the party charged with breach may be sufficient.

f. What counts as a signature:
   i. "The signature required does not necessarily have to be written in ink at the bottom of the purported guarantee but may include any symbol or signature; whether written, printed or stamped; on any part of the document so long as the intent to be bound is demonstrated." Parma Tile Mosaic & Marble Co. v. Estate of Fred Short, 590 N.Y.S.2d 1019 (N.Y. Supreme. 1992).

Article III—Multiple Party Transactions:

I. Assignment of Rights:

a. If A contracts with B, B can generally assign his right to the consideration in which he bargained with A for to a third party (C).
b. The assignment is one form of transfer; not all transfers are assignments.
    i. For instance, granting someone power of attorney is a transfer of one's exclusive right to alienate himself from certain properties, but granting power of attorney does not grant the person receiving that power the title to that property.
    ii. Alternatively, appointing someone as an agent does not give that person any right to receive title to any consideration from the employer's contracts.
c. An assignment of rights is a transfer in which the complete, irrevocable right to receive a consideration (or a complete right to receive part of a consideration) is transferred to someone not originally entitled to receive that particular consideration.
    i. Transfers are assignments only if they are complete, absolute transfers of a right to a consideration.
    ii. Furthermore, transfers are assignments only if the transfer is an irrevocable right to a consideration not originally supposed to go to the party receiving the right.
    iii. In contractual terms, the party assigning the right is usually referred to as the assignor; the party receiving the right is referred to as the assignee.
    iv. Rights to receive the consideration from one contract may be assigned to another party in exchange for some other consideration.
        1. E.g., A contracts with B for 10 pigs of iron in exchange for $100 which B pays to A in advance; C comes along and offers B $150 for the 10 pigs of iron; B cannot manufacture an additional 10 pigs of iron, but he can transfer the right to C for the initial 10 pigs of iron (if he decides its worth the $50 profit he can make on the deal); C then obtains a right to sue A for the pigs of iron if A does not deliver them.
        2. As a practical matter, if a person transfers a right without exchanging it for a consideration, the right to the assigned right is revocable, so the transfer is not an assignment proper.
d. Mere authorization is permission to accept or exchange on behalf of the transferor but does not give the transferee any rights against the original party.

> **Brief Box 50:** *Kelly Health Care v. Prudential Insurance (1983).*
>
> [An insured party (B) authorized P to collect from D, his insurance company; B authorized D to pay P for the benefits received.]
> If an assignment is less than absolute, it is not an assignment; the obligee must have intended to dispossess himself of an identified interest to vest indefeasible title in the transferee. The obligee must not retain (1) any control over the fund assigned, (2) any authority to collect, or (3) any form of revocation. Since the authorization was revocable, it is the creation of a mere power of attorney and agency, not an assignment. Furthermore, Kelly is not entitled to recover against Prudential as a third party beneficiary, for such recovery is limited to where the parties clearly and definitely intended to confer a benefit on the particular party seeking to enforce the contract between those parties. Here, such a contention would fail, for at best Kelly was a potential and incidental beneficiary, not an intended beneficiary at the time of contract formation. *See Part III.*

    i. The dissenting opinion in Kelly argued that the intentions of the parties in the above contract were clear, despite the particular language used.
    ii. Furthermore, efficiency demands that the dispute be settled in a single action, rather than in two (B suing D to recover money for a suit from P against B).
e. Restatement and Assignment—§ 317:

i. § 317 generally permits assignment, but requires that the transfer of rights be complete and irrevocable.
ii. However, rights cannot be assigned where:
    1. assignment materially changes the duty to be performed by the obligor (the party contracted with).
    2. assignment materially increases the burden or risk imposed on the obligor.
    3. assignment materially impairs the obligor's chance of obtaining a return performance (where the assignor also delegates duties to the assignee).
    4. assignment is prohibited by law.
    5. assignment is prohibited on ground of public policy.
    6. assignment is precluded by the terms of the contract.
iii. The essential difference between § 317 and the UCC (§ 2-210(b)) is that in the restatement the parties can agree to not assign the right to a consideration upon performance; in the UCC the right to a performance (or to damages) upon his own complete performance can always be assigned to another party.
iv. **Restatement (Second) of Contracts, § 317—Assignment of a Right:**
    1. An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.
    2. A contractual right can be assigned unless
        a. the substitution of a right of the assignee for the right of the assignor would materially chance the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
        b. the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
        c. assignment is validly precluded by contract.

f. Assignment and the UCC—§ 2-210(b):
    i. The UCC deals with assignment similarly to the restatement:
        1. The UCC permits the parties to agree not to assign rights to third parties; however, upon the completion of a performance, the party who completed performance can always assign the right to the consideration to a third party, irrespective of the contract terms.
        2. Otherwise, the UCC permits assignment unless:
            a. the assignment materially increases the burden or risk imposed on the obligor,
            b. the assignment materially impairs his chance of obtaining return performance from the assignee (if rights and duties are transferred).
    ii. **UCC § 2-210(b)—Assignment of Rights**:
    Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

II. Delegation of Duties:

a. Whereas assignments are the legal transfers of a right to a consideration that are necessarily complete, delegations of duties are not complete, in that the duty remains in the "assignor" to perform his duty with the party initially contracted with.

i. If assignment is a complete transfer, it is analogous to passing a football: A throws to B and B catches the ball.
    1. A cannot "revoke" his pass once he's thrown the ball.
    2. B has the ball where A does not.
ii. If assignments are like passing balls, delegations are like spreading a disease.
    1. B delegates a duty owed to A to C the way that B gives C a disease.
    2. B still has the disease; his transfer of it to B does not rid him of it.
iii. Delegation of a duty does not relieve the original promisor of his duty to carry out his promise. The delegator may, however, sue the delegatee for damages resulting from the suit if the delegatee does not perform.

b. A party cannot delegate a promise to perform a personal service to another person; personal service contracts are non-delegable.
    i. If the Angels pay 100 million to Darrin Erstad to play for five years, Erstad cannot delegate this duty to, say, his mother in exchange for 5 million and expect to get the remaining 95 million.
    ii. The parties contracted such that B would perform for A; A wanted B specifically; so transferring the duty to B is prohibited.
    iii. The above reasoning begins to break down where it does not matter who performs the service B contracted for.
        1. If C can perform it just as well as B, then what is the basis for A's complaint?
        2. As a practical matter, however, A probably wont complain if there is no real difference between B and C, for the cost of litigation would cost A money.
        3. Therefore, we should expect to see suits to recover against a person who delegates a personal service contract to another only when it actually matters that the initial obligor performs.

c. The ability to delegate one's duty promotes economic efficiency.
    i. If A contracts with B to deliver 10 pigs of iron in exchange for $150, but B finds C, who is willing to do the same job for $100, then B should be able to delegate to C for the additional $50 in profits on ground of economic policy, for the person who can perform at the lowest price should be the one to perform.
        1. Suppose that A contracts with B for the 10 pigs of iron, which B intends to manufacture by hand. However, B meets C, who has just invented a machine to do the same work. The work should not be, by default, limited to B's hands; B should be able to give the work to C if the end product is the same. In the end, society does not waste the additional money spent performing the work by hand; the additional money becomes profit. C also profits from his machine.
    ii. Economically speaking, it makes sense that one can delegate duties to others if one finds another willing to do it for less consideration. Of course, should that party fail, the initial person with the duty is still obligated to pay damages.
    iii. In general, a society with negotiable duties is more flexible to market changes, so, since people are natural profit maximizers, it follows that more flexibility is desirable.

d. Whereas delegability is the default rule, it is subject to certain limitations (in addition to the prohibition on personal services contracts).
    i. If the party who contracted with the delegator has a substantial interest in having the delegator perform the consideration, then the delegator cannot delegate the duty to another person.
        1. This principle includes personal service contracts as a subset.
    ii. If the party who contracted with the delegator has a substantial interest in controlling the acts of the particular delegator, then the duty to perform those acts cannot be delegated.
    iii. Parties can agree that the duties of one party (or both) are non-delegable.

e. If many persons could potentially perform the work or manufacture the goods, does it matter that the delegator delegates to a competitor of the party initially contracted with?
    i. That is, if A contracts with B to distribute A's goods, can B delegate its duty to A to C, a competitor of A's?

ii. UCC § 2-210(a) says a duty is non-delegable if the other party has a substantial interest in having the original party perform; it does not explicitly say that a duty is non-delegable if the delegator delegates a duty to a competitor, who is just one of the many people who could perform the duty for the other party.

iii. However, the purpose of § 2-210(a) is to prevent the delegator from delegating a duty to someone adverse to the other party (A).
   1. Since the delegation is presumably beneficial to B (because he could only delegate a duty upon giving a consideration worth less to him than the cost of his own performance), the only real question is whether delegation to C will put A at a disadvantage.
   2. If B's delegation to a particular party is substantially detrimental to A, then A does have a substantial interest in seeing B perform the work (if only because B is simply not C!).
   3. It all comes down to how broadly or narrowly the court is willing to interpret § 2-210(a):
      a. Courts ought to read § 2-210(a) term "interest in having his original promisor perform" broadly enough so as to include the interest of prohibiting another party from performing because that party's performance is detrimental it.
      b. He has an interest in the original party performing simply because it is not the other party.
      c. § 2-210(a) should not be read to include only the prohibition on delegation where the particular party sworn to perform is the only one who could perform the consideration.

iv. UCC § 2-210(a)—Delegation of Performance:
A party may perform his duty through a delegate unless otherwise agreed or unless the other part has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

v.

Brief Box 51: *Sally Beauty Co. v. Nexxus Products Co. (1986).*

[B contracted with D to distribute D's products for one-year; P, owned by a direct competitor of D's, bought out B. D cancelled the agreement.]

Here, Nexxus contracted for Best's "best-efforts" in promoting the sale of is products. Unlike Best, Sally Beauty Co. is a wholly-owned subsidiary of one of Nexxus' direct competitors. This is a significant distinction, for it raises serious questions regarding Sally Beauty Co's. ability to perform the distribution agreement in the same manner as Best. The delegate was not bargained for and the obligee need not consent to the substitution.

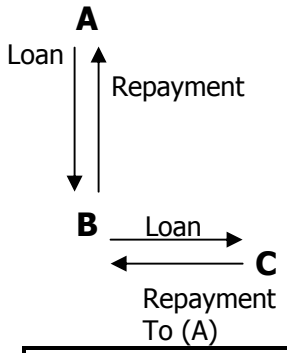
   1. According to the Nexxus court, as a matter of law, a party cannot delegate a duty to a subsidiary of a wholly-owned competitor of the party to whom the duty is owed.
   2. In his dissent, Posner argues that whether the direct competitor in Nexxus gives Nexxus a substantial interest in preventing Sally Beauty from performing should be a question of fact, not law. Posner points out that Sally Beauty distributes many products from many competitors of its parent company, so it seems counterintuitive to say that Sally would single out Nexxus for demise. Finally, Posner points out that canceling the contract was not the only option available to Nexxus:
      a. Nexxus could have requested reasonable assurance under UCC § 2-609.
      b. Nexxus could have sued Sally Beauty if it in fact failed to use its best efforts to promote Nexxux's products.

3. Whether a duty is non-delegable to a competitor as a matter of law or fact, the Nexxus court seems unanimous on several issues:
    a. If delegating to a direct competitor substantially affects the interests of the party to whom the delegator owes a duty, then that party can cancel the contract upon delegation.
    b. Thus, § 2-210(a) is not limited to prohibiting the delegation of a duty to cases where only a particular party could perform; it includes cases where the particular party delegated *to* cannot perform.
    c. Ultimately, the court divides on whether a party to who a duty is owed has a substantial interest in preventing the party delegated to from performing.

III. Third Party Beneficiaries:

a. Where A contracts with B and B delegates his duty to C, can A sue C, or is A limited to suing B alone? Does the doctrine of privity of contract prevent A from going after C because C was never privy to any contract with A?
    i. Generally, so long as one party is the intended beneficiary of another contract, that party can sue the breaching party for failing to provide him with that benefit.
    ii. That is, the third party (C) can enforce a contract between A and B if C was a particularly intended beneficiary of the A-B contract.
    iii. A (the promisee) contracted with B (the promisor) to confer a benefit or repay a debt owed to C (the beneficiary).

b. A loans (contracts) with B; B owes a consideration to A, but gives it to C instead in exchange for the consideration of having C pay A back on B's behalf. B cannot pay A (he's now broke); can A sue C directly? Yes. Even though A was not privy to the B-C contract, A was the intended (and only) beneficiary of the B-C contract, so A can sue C for breaching his contract with B. (A can also sue B for breaching the A-B contract, but in this case B is broke).



Brief Box 53: *Lawrence v. Fox (1859).*
[H owed money to L, but gave it to F for the consideration that F will give it to L for H. F did not give the money to L.]
See Farley v. Cleveland (where B sells to C a good owed to A and C promises to pay A for the good, A gains a contractual right against C). However, in Farley C made the promise to pay A to both A and B. Here, Fox promised nothing to Lawrence directly. Notwithstanding the lack of a promise to Lawrence, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it. The law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded. Though many of the cases upon which an implied promise was found involved trusts, the rule of law maintained here was the source of the holdings in those cases; it is not the case that the trusts themselves promulgated the rule.

c. Limitations on Third-Party Beneficiaries.
   i. Not anyone who stands to benefit from a contract can sue the breaching party in that contract.
   ii. Initially, only the non-breaching party on the contract could sue the breaching party.
      1. This is the so-called doctrine of privity of contract.
      2. The doctrine has been widely abolished in tort law, and is subject to limitations in contracts.
   iii. One exception to the doctrine of privity of contract is that a particularly intended beneficiary of a contract can sue the breaching party.
      1. This is comparable to a suit for a trust fund, where the beneficiary sues the trustee for breaching his agreement with the trustor to give the beneficiary certain property.
      2. The purpose of the contract must have been to benefit the third party; mere incidental benefits are never enough.
      3. Essentially, A's consideration for some consideration conferred to B is that C will receive some consideration on behalf of A. If B does not perform, then A can sue him. If B does not perform, then C can sue him. They cannot both sue C, however. By definition, only one party can be the intended beneficiary of a given consideration—side effect benefits, even if intentional, are not "intended" if they mere side effects of a consideration given to A.
         a. E.g., if A contracts with B and B breaches, A's child C cannot sue for breach of contract for lost money for college if A is going to C for damages. C's right to recovery is usurped by A's right to recovery for his own damages; even though C has damages, the money B pays to A is compensation for those damages. C was just an incidental beneficiary.
         b. It would be unjust to make B pay for the same consideration to both A and C; he could have only deprived one of them of a single consideration (or part of a consideration).

d. Three types of Beneficiaries: Donee Beneficiaries, Creditor beneficiaries, and Incidental Beneficiaries.
   i. <u>Donee Beneficiaries:</u>
      1. Traditionally, courts only recognized a third-party beneficiary's right to recover against the promisor where the promisee (as a debtor) contracted to repay a debt owed to the beneficiary (as a creditor).
      2. In the early 20th century, however, courts began to recognize that a third-party beneficiary could be merely the recipient of a gift from the promisee, so long as the intention of the parties, specifically the promisee, was to confer some material benefit on the third party.
      3.

Brief Box 53: *<u>Seaver v. Ransom (1918).</u>*
[Before his death, D promised his wife that he would leave the value of his wife's house to P in his own will. D died, but did not leave anything to P. D's wife owed nothing to P.]

Many jurisdictions now recognize the right of the beneficiary to sue on a contract made expressly for his benefit, for it is just and practical to allow the beneficiary to recover what the promisor promised. Such an action is recognized (1) where the promisee owes the beneficiary money, (2) where the contract is made for the benefit of the wife or child, (3) where a city seeks to protect its inhabitants by covenants for their benefit, and (4) where the promise runs directly to the beneficiary although he does not furnish the consideration. In Buchanan v. Tilden, the court extended the doctrine to include benefits to beneficiaries to which the promisee did not owe an obligation to—so-called donee beneficiaries.

a. See Restatement (Second) of Contracts, § 302(1)(b), infra.

ii. Creditor Beneficiaries:
   1. Creditor beneficiaries are all those third parties to which the promisee owed a debt to, the purpose of which his contract with the promisor was to repay.
   2. Creditor beneficiaries can sue, as long as the purpose of the contract was to repay the particular debt owed.
   3. See Lawrence v. Fox.
   4. See Restatement (Second) of Contracts, § 302(1)(a), infra.

iii. Incidental Beneficiaries:
   1. Incidental beneficiaries may not recover as third-party beneficiaries.
   2. An incidental beneficiary is one who stood to benefit from a contract, but the purpose of the contract, as manifested by the parties intentions, was not to benefit the third party.
      a. If A and B contract, with full knowledge that C will derive some benefit but without the specific intention of rendering that benefit on C, then C is an incidental beneficiary.
      b. Essentially, A and B would still have made the contract even if C did not exist or did not stand to benefit from the exchange of the consideration.
      c. In determining whether a third-party was intended, courts look to the purpose of the contract; specifically courts look to see if the promisor (the party rendering the benefit on the third party) was intended to either:
         i. Repay a debt of a debtor, or
         ii. Give something to the third party on behalf of the promisee.
      d. If the purpose of the contract was not to repay a debt or to give some gift to the third party, the third party is considered a mere incidental beneficiary—see § 302, unless the parties agree otherwise.

Brief Box 54: *Sisters of St. Joseph v. Russell (1994).*
[D was injured on the job. As part of a settlement agreement, the insurance company agreed to pay for all of D's past expenses. The insurance company did not pay P. P sued on a theory of third-party beneficiary.]

At the time the DCS agreement was signed, plaintiff was a creditor beneficiary of the DCS agreement if the parties intended the agreement to benefit plaintiff. Various provisions of the DCS agreement demonstrate that Aetna agreed to pay the sums set forth in the agreement, including the hospital fees. Further, the agreement demonstrates that the parties intended for all health care providers to be paid, but simply wished to divide up the payment responsibility between the past and the future. Thus, the jury could properly infer that the parties intended the hospital to be the creditor beneficiary of the DCS agreement.

   3. Restatement (Second) of Contracts, § 315—Effect of a Promise of Incidental Benefit:
      An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.

iv. Restatement (Second) of Contracts, § 302—Intended and Incidental Beneficiaries:
   1. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
      a. the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
      b. the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

2. An incidental beneficiary is a beneficiary who is not an intended beneficiary.

e. Defenses to Third Party Beneficiary Claims:
   i. Restatement (Second) of Contracts, § 309(4) states that "The conduct of the beneficiary may give rise to claims and defenses which may be asserted against him by the obligor (promisor), and his right may be affected by the terms of an agreement made by him."
   ii. Thus, if A contracts with B for the benefit of C, such as to repay a debt owed to C, and C incurred that debt unreasonably and unnecessarily, then C's right to recover the debt is affected the same as if he were to sue A for recovery.
      1. Suppose that A and C had a former contract which A breached. A contracts with B to pay all of C's damages that A owes; A is leaving the country for a short while and will be unable to pay C personally, but a settlement agreement is expected any day now. The settlement agreement falls through, and C attempts to sue on the A-B contract where B promised to pay C's damages on behalf of A. B can still assert the defense that C, for instance, failed to mitigate his damages or that C's damages were uncertain.
      2. Suppose that A and B contract for the benefit of C and A decides not to give the benefit to C after all. Though B is contractually bound to A to give C the corpus, C cannot sue B successfully because B can raise the defense that the gift was revoked before transfer to C—A could assert the same defense.
      3. In general, then, B (the promisor) can assert the same defenses that A could assert (the promisee), but can only do so if it will not violate his contract with A.
         a. If A contracts with B for the benefit of C and B refuses to benefit C according to his contract with A, B can still sue C, even though A could defend against a suit by C if A refused to pay on the grounds of revocation of a gift.
         b. If B were to defend on ground that A could revoke the gift so B can too, B would violate his contract with A; though A could sue B to get the gift back and then re-give it to C, so long as A does not intervene in the suit, B can still sue C for the benefit as a matter of judicial economy.
   iii. However, the parties may still contract such that defenses otherwise-available do not apply.

I. CONSIDERATION:

a. Generally:

i. If duties are what you have to do, consideration is what you get for it.
ii. A contract is enforceable only if there is a consideration offered and accepted in exchange for a return consideration.
iii. Mere promises to convey certain goods, services, or money are, generally, not legally enforceable—there must be something had from promising to act in legal detriment.
iv. The parties need not actually benefit from that which is given.
v. Generally, the amount of consideration—i.e., the "value"—of that which is exchanged is irrelevant, even in comparison to the consideration promised by the other party.
    1. However, nominal "consideration" is no consideration at all; by definition, it does not exist.

b. "Bargained For" Theory of Consideration:

i. Traditionally, a person could promise to give someone something and make his promise irrevocable by sealing a writing conveying his promise to that person.
ii. Today, in most courts, a promise without consideration, even if sealed and in writing, is unenforceable.
iii. <u>What is consideration?</u>
    1. The Restatement adopts the "bargain theory" of consideration—i.e., P and D must exchange something for something else, and must be induced to promise their half of the bargain by the prospect or desire to get what the other is offering.
    2. If P promises to give D something as a gift, then if D promises to give something out of gratitude, there is no consideration—P was not induced by D's promise of a return gift when P made his original promise to give something to D.
        a. Had D not promised a return gift, P would still have promised his gift to D.
        b. This is the "but for inducement test:" But for D's promise or performance, P would not have promised D something. P was induced by D's promise, and D was induced by P's promise.
    3. Older courts, and still some today, used to look at consideration merely as "legal detriment"—i.e., P or D promised to refrain from doing something he could legally do, or doing something he could legally refrain from doing.
        a. Today, most courts reject the mere "legal detriment" standard.
        b. P does not have to give D $100, and D does not have to accept $100 from P for doing nothing—D could refuse the money. The legal detriment theory, if an isolated understanding of consideration, necessarily admits "gift promises," which courts are not willing to enforce.
        c. Thus, the Restatement reasons that the true notion of consideration lies in inducement—the very reason the parties contracted was at least in part because they wanted what each other offered.
    4. Economically speaking, society has no interest in enforcing promises that do not have a consideration.
        a. If A promises to B some gift and B does not promise anything in return, there is no economic benefit—A is not getting something he values more than what he is giving up.
        b. Society benefits from economic exchanges because wealth is created—exchanges are almost never even, at least from the perspective of the parties. Each party seeks to improve his situation by giving up something in return for something he values more.
        c. This benefits society by creating wealth and value.
    5. Risk:

a. If a person is bound by a promise, there is a risk that something unexpected will change and he will be unable or no longer willing to perform.
b. Ordinarily, courts justify enforcing a contract on two grounds:
    i. The party risked something in exchange for something he wanted more, at least at the time of contract formation, so he stood to gain something.
    ii. The other party risked something as well, so there was a mutual risk that, if things changed, one of the parties would be adversely affected.
c. Promises without mutual consideration lack these qualities.
d. A person who no longer wishes to obligate himself to render a promise for nothing in exchange ought, therefore, to be excused from rendering that promise because the other party did not undergo a similar risk.

iv. In general:
1. A contract is an enforceable promise (§§ 1 and 2);
2. With some exceptions (§ 17(2)), to be enforceable a promise must be supported by a consideration (§ 17(1));
3. A promise is supported by a consideration if it is bargained for (§ 71(1));
4. A promise is bargained for "if it is sought by the promisor and is given by the promisee in exchange for that promise." (§ 71(2)).

v. Restatement (Second) of Contracts, § 17—Requirement of a Bargain:
1. Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
2. Whether or not there is a bargain, a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.

vi. Restatement (Second) of Contracts, § 71—Requirement of Exchange; Types of Exchange:
1. To constitute consideration, a performance or a return promise must be bargained for.
2. A performance or return promise is bargained for it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
3. The performance may consist of
    a. an act other than a promise, or
    b. a forbearance, or
    c. the creation, modification, or destruction of a legal relation.
4. The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

vii. A person need not seek the promise from another for its own sake; he may seek it because he wants to use the good or service promised for something else.
1. Just because P has no use for D's paint unless P is going to have his house painted, D's promise is not without consideration.
2. Or, just because P has no use for a tire because he has no car himself, his promise to buy a tire from a tire dealer does not fail for want of consideration.
3. A person may be primarily motivated by something else, so long as he is in part motivated to make his promise in exchange for something offered—as long as he would not do the deal without the return promise.
    a. If A and B are business partners, B may choose to accept A's shipment of goods he does not actually need in order to create a good relationship with A. Of course, B would not have paid A for the shipment unless he got something, namely the goods he was promised. B can choose to take a loss because his promise was motivated, at least in part, by A's return promise to deliver the goods.

b. Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so.
c. So long as one of the motivating factors was to obtain the return promise, a contract does not fail for want of consideration.

viii. Restatement (Second) of Contracts, § 81—Consideration as Motive or Inducing Cause:

1. The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.
2. The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.

c. Mere Gift Promises:

i. E.g.: A promises to give money to B or promises to pay one of B's debts.

> **Brief Box 55:** *Fischer v. Union (1904).*
> [D gave his land to P, promising to pay off the remaining debt on the land. D died without paying off the debt on the land, but he complete transfer of the land to P. P sued to recover the debt owed on the land.]
>
> As part of the delivered deed, Williams promised to pay the remaining debt on the mortgages. The one-dollar transferred was by no means an exchange. The real and only consideration for the promise to pay the mortgages was love. The promise was a gift, and the property, subject to the two mortgages, became Bertha's. The promise to pay the additional mortgages, however, has no greater force than would a mere promise to pay her debts for her. There was no consideration.

ii. Accordingly, only a contract supported by consideration is legally enforceable.

1. In the above case, D's promise, though he clearly wanted his daughter to be in good care, was not supported by consideration in the form of the transmission of a mere dollar to him from his daughter.
   a. The fact that it was only a dollar is, generally, irrelevant.
   b. However, no one would say that "but for the promise to give him a dollar, the defendant would not have promised to pay the debt on his land."
   c. Therefore, the promise to pay the land was not induced, at least in part, by the dollar, and the contract was not a contract proper—it was a mere gift, given, perhaps, in exchange for a mere satisfaction.
2. A "bargain" includes the idea of mutual inducement from opposing promises.

> **Brief Box 56:** *Hamer v. Sidway (1918).*
>
> [D promised P $5,000 if P refrained from smoking, drinking, and gambling until he was 21. P did, but D died and his executor refused to give over the money to P. P had a letter in which D wrote that P had in fact earned the money.]
> D insists that the contact was without consideration to support it, for P only did what was independently best for himself. D suggests that without the conveying of a benefit on the promisor, there is no consideration. This is an intolerable rule, for in many cases it would raise the question of whether the promisee was in fact benefited by his own performance. The Exchequer Chamber defined consideration as: "A valuable consideration in the sense of law may consist either in some right, interest, profit *or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility give, suffered or undertaken by the other*." Since P acted to his legal detriment, D's estate must pay him.

3. One of the problems with the legal detriment theory of consideration is that is would support all gift promises, for P did not have to accept the gift.
4. However, the above court overlooks that problem, insisting instead that acting to one's own detriment constitutes consideration.
5. The question remains whether P would have acted any differently had his uncle not promised him the money.
    a. It seems likely he would, for all of P's renounced habits are addictive and P was young.
    b. Thus, D did give consideration to P, and P was truly induced by D's promise to pay him.
6. However, did P give consideration to D?
    a. D certainly got nothing of value for himself; if anything, he got the mere satisfaction of knowing his nephew would get off to a good start in life.
    b. However, if D was saving the money for P anyway, and would have given it to P regardless of whether P actually stopped smoking, drinking, etc., then D was not induced by P's promise and there was no consideration—the promise was a mere gift, couched in conditional language.
7. This is a tough case, and the court ultimately decided on the side of P, probably because the equities in P's favor were so strong: P gave up certain liberties for six years; D admitted the money belonged to P; only D's executor said the money was not P's.
8. Promises like the one in Hamer v. Sidway appear to be conditional gifts, which are unenforceable in most courts no matter what.

d. Conditional Gift Promises:

i. Conditional gift promises are likewise unenforceable.
    1. If A says to B, "If you go and buy a coat, I'll pay for it," then A is not bound to pay for it because his promise, while inducing B to go and buy the coat, was not induced by B's going to the store—A did not want B to go to the store.
    2. If A says to B, "If you go to college I'll give you $100," then A is not bound to pay B because, though B may have been induced to go to college for the trivial amount of money, A was not induced to give B the money by B's going to college, but rather as a gift to B. Of course, if A offers B one million to go to college and B quits his job and goes to college, A may be bound—if A was not going to give B the money unless he went to college and if B was not going to go to college unless B gave him the money, then A is probably bound.

ii. Some cases involving "conditional gift promises" may be difficult; it is a substantial question of fact whether the gift was an offer of gratuity or a legitimate bargain.
    1. The essential question is: Was one of D's motives for offering a return promise a desire to see or get the particular return promise from P?
    2. If D offers P $10 to do a somersault, then D is bound if and only if:
        a. P would not have done the somersault without the $10.
        b. D would not have given P the $10 without the somersault.
        c. That is, if D was not thinking "wouldn't it be cute to see her do a somersault before I give her this money?"

e. Past Consideration:

i. Ordering is key: If P promised to do something as a gift for D and D promised something in return at some time later, then P cannot claim that D had offered consideration in light of the gift given by P.
    1. By definition, a person cannot be induced by something that he did not even know existed.
    2. Once a gift is given, a person cannot be induced to offer a return promise by it, for he already has it.
        a. Suppose A gives B $100 as a gift. Two weeks later, B promises to give A $100.

b. B's promise was induced by A's performance—But for A giving B the $100, B would not have given A $100.
c. A is certainly not induced by B's promise, for A already gave B the $100. Since A gave B $100 as a gift (i.e., without a consideration) there is no way that A was induced by a return promise that A did not even know would occur.
d. Thus, past consideration is no consideration at all.
e. Both the A-B and the B-A promise were gift promises; the necessarily fail for lack of inducement—i.e., a bargain.

ii. One cannot claim that the other party was induced by consideration already performed in the past: he did not know that a return promise was forthcoming, so he was not induced by the forthcoming promise. One cannot use a past gift or contract as consideration for a present or future gift or contract.

Brief Box 57: *Moore v. Elmer (1901).*
[P gave D some psychic readings (but did not allege that D owed her a debt); D said that if he died when P said he would that he would pay off P's mortgage. D did die.]

There was no consideration; the agreement was a mere wager. The complaint alleges no prior debt owed by Elmer to plaintiff. The complaint did not allege that there was an understanding that the defendant would pay plaintiff for the readings. There was no such understanding, an the consideration was executed and would not support a promise made at a later time. Consideration must be confined to cases where the personal service itself implies an undertaking to pay; mere favors cannot be turned into a consideration at a later time by the fact that the service was requested. Plaintiff does not allege that the agreement sued upon was in consideration for the satisfaction of a prior debt; courts cannot imply that a promise (or wager) is automatically in satisfaction of another debt.

1. If P had pled that D owed her a debt, then D would have offered consideration because D's desire to get out of debt would have induced his promise to bet the house, so to speak. However, even then P could not claim that her performance was induced by D's promise—she did not know (even though she was psychic) that D would promise the house. She would have known, however, that D would pay her somehow.
2. As a matter of timing, something that has already happened can't be induced by something that happens later; that which is done cannot induce that which has yet to be done.

iii. Suppose that D promises P to pay for services already rendered on D's friend.
1. P might be able to claim that D's promise to pay was induced by P's having rendered a performance.
2. P cannot claim that P himself was induced by D's promise because P had already rendered the performance.
a. P did the work without any knowledge of D's promise (or even existence), so the fact that D promised to pay for his friend was an offer not supported by any consideration from P.

iv. Exceptions to Past Consideration Doctrine:
1. If P owes a debt to D, but D's ability to collect that debt expires because of a statute of limitations, then, if D promises something to P without any consideration from P, then D is required to pay P because of a preexisting duty.
a. Suppose D promised to pay P $100 for mowing P's 10 acre lawn but never did. P does not sue D then.
b. Sometime later, however, after the statute of limitations tolls, D made a promise to give a gift to P but did not keep it.
c. In this case, the courts will sometimes allow P to sue D on the theory that D had a past obligation to P.

2. If P helped an infant D, and D promises to give something to P as an adult, then P's past performance can be consideration for that "gift" and D must pay P.
3. If D owed P money, but declared bankruptcy, and D promises something to P, then P can claim that the past consideration of the loan was consideration for the otherwise gift that D promised.
4. Finally, if P did something for D as a mere volunteer and D later promised to pay P for it, D is liable to P for his work as a mere volunteer in light of the fact that D ratified P's work as being of value to him.
    a. P mows D's lawn without D's knowledge. D comes home. D need not pay P anything. However, if D says he promises to give P $100 for the lawn, then D must pay P.

f. Mere Moral Obligations are not Enough:

Brief Box 58: *Mills v. Wyman (1825).*
[P helped D's independent son who later died. D promised to pay P for his services after learning that about them; P did not know about the services until after they were performed.]

Promises made by persons who inconsiderately make them without any consideration cannot be enforced by legal action. There was no consideration here. Wyman's son was not a minor, so Wyman had no legal obligation to pay his debts. Further, the services were finished prior to Wyman's promise. Some jurisdictions hold that a mere moral obligation can give rise to contractual liability. We hold, however, that there must be some preexisting obligation to form a basis for an effective promise.

i. Thus, the general position that moral obligation is a sufficient consideration for an express promise is limited to cases where at some time a good or valuable consideration has existed—see past consideration, exceptions.

g. Actual Material Benefit on Promisor:

i. If P renders an actual material benefit on D, and P subsequently promises to pay for that material benefit, then P is generally liable for his promise, despite the fact it would otherwise fail for want of consideration.
    1. P's benefit could not have induced D's promise because P did not know that D would promise him anything—he rendered the benefit without a contract.
    2. D's subsequent promise is past consideration, but courts are willing to hold D liable because P rendered a benefit on D and D agreed to pay for it later.

ii.

Brief Box 59: *Webb v. McGowin (1935).*
[Rather than allowing a block of wood to fall on and kill or injury D, P fell with the block and suffered serious injuries. D promised to give P $15 for the remainder of P's life in consideration for the material benefit P rendered on him. D's executor stopped paying.]

This was a material benefit to him of infinitely more value than any financial aid he could have received. A subsequent promise to pay for the services rendered, though wanting consideration, is valid in light of the fact that the promise satisfied a moral debt. Cases to the contrary are easily distinguished, for in them the promisor did not *himself* receive a material benefit.

1. Cf. Mills v. Wyman (P did not render a material benefit on D, but rather on D's emancipated son.)
2. Accordingly, if A promises to pay B for taking care of A's bull, then, even though A did not induce B with a promise of compensation, A is still obligated to perform.
3. However, if A promises to pay B for taking care of his emancipated son, then A is not liable because A's son was not A's property!

iii. Restatement (Second) of Contracts, § 86—Promise for Benefit Received:

1. A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
2. A promise is not binding under Subsection (1):
    a. if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
    b. to the extent that its value is disproportionate to the benefit.

iv. If D's promise was really a gift, and not for the material benefit received, then, despite the fact that P may have rendered a material benefit on D, D's promise was not intended to pay the moral debt; consequently, there is no consideration for the gift and D is not obligated to give it to P.

1. In short, the moral promise made subsequent to a material benefit received is binding if and only if D promised something to P for that material benefit itself.

v. Further, if D promises $1,000,000 in the heat of the moment, so to speak, in consideration for P saving his dog, then D's promise is probably not enforceable.

1. The promise was so disproportional to the value of the benefit received, it is likely that the promise would still fail: D was thankful; he wasn't really promising a million dollars.
2. However, P could make the argument that he is entitled to a reward for the reasonable value of his services in light of the fact that P promised something.

h. "Inadequate consideration."

i. Consideration is one of those words that isn't prone to modification or clarification—i.e., there is no such thing as "inadequate," "valid," "invalid," "sufficient," "beneficial," or "adequate" consideration.

1. If you have consideration, you're done.
2. Anything that is "inadequate" must mean that there was no consideration in the first place.

ii. Courts do not inquire into whether the parties have made a fair deal.

1. Maybe a 1986 Nintendo is really worth $500 to someone who is a really big fan of playing old video games.
2. Maybe a glass of water is worth $10,000 to someone who hasn't had a drink in three days.
3.

Brief Box 63: *Batsakis v. Demotsis (1948).*
[P gave D 500,000 drachmas in exchange for a promissory note to pay P $2,000. At the time of transfer, the value of 500,000 drachmas was disputed, but the court assumed they were worth what P said—only $25.00.]

The transaction amounted to a sale by B of the money in consideration for the execution of the instrument sued on. It is not contended that the money had no value. Thus, the plea of want of consideration was unavailing. Mere inadequacy of consideration will not void a contract. According to D's own testimony, she got exactly what she bargained for.

iii. Restatement (Second) of Contracts, § 79—Adequacy of Consideration; Mutuality of Obligation:

If the requirement of consideration is met, there is no additional requirement of:

a. a gain, advantage, or benefit to the promisor or a loss, disadvantage or detriment to the promisee; or
b. equivalence in the values exchanged; or
c. "mutuality of obligation."

iv. There are various reasons for not inquiring into the value of consideration:

1. Courts do not have the resources to make examinations into every reason why a bargain was made—everyone who entered into a losing deal would try to get the contract rescinded for want of "adequate" consideration.
2. Courts are no better at determining what X is worth to a promisor than the promisor is.
3. People speculate and make bad deals—maybe they really want to get out of an risk that went against them.
4. The "bargain-for" theory of consideration solves the problem of inadequacy: If A wasn't induced by B's promise to give him X, then A's promise is not binding. Disparity in value, with or without other circumstances, sometimes indicates that the purported consideration was not in fact bargained-for.

v. Restatement (Second) of Contracts, § 364—Effect of Unfairness:

1. Specific performance or an injunction will be refused if such relief would be unfair because
    a. the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

i. Preexisting Duty Rule:

i. What is a preexisting duty?
1. If A and B contract whereby B promises to perform some duty X for some good Y, then B has a legal duty to perform X and A has a legal duty to give Y to B.
    a. Accordingly, if A promises to give B Y only if B performs some additional duty Z and B agrees to do X and Z for Y, then B's promise to do Z will necessarily fail for want of consideration: A is already liable to give Y to B.
        i. Any additional promise secured in consideration for that which is already owed is without consideration to the extent that it demands more than that which is already owed.
    b. A's obligation to give Y to B is a preexisting duty—insofar as the law is concerned, the bargain is locked-in. Y is B's, so anything else promised for Y is without consideration.
    c. B's obligation to perform X for A is a preexisting duty—insofar as the law is concerned, the performance must be performed for the consideration sought. A already has the right to have X performed, so any additional promise A makes for X is without consideration.
2. Contract modification, then, concerns additional obligations the parties assign to each other. They can be binding.

ii. Two types of modification:
1. Unilateral: One party must perform more than he originally bargained for.
    a. E.g., Darth Vader made Lando surrender the princess and the wookie in exchange for keeping the empire out of Bespin forever, but Vader already promised to keep the empire out of Bespin forever in exchange for Han Solo.
    b. E.g., A promises to give B $5.00 for mowing his lawn, and B agrees. Later, B sees C, who is getting $10 for mowing a smaller lawn. B becomes upset and goes back to A. B tells A that he will not mow A's lawn unless he gets $10. A reluctantly agrees.
    c. When the modification is unilateral, then generally it is unenforceable for want of consideration to the extent that it requires a performance in excess of that which was already promised.

Brief Box 60: *Stilk v Myrick (1809).*
[P was a crewmember on D's ship. Some of the crewmembers deserted, leaving P to do more work than originally bargained-for, or so P claimed. D's captian agreed to pay P part of the wages not receivable by the deserting workers.]

The agreement here is void for want of consideration. Before they sailed from London they had undertaken to do all that they could under all the emergencies of the voyage to bring the ship in safely. They had sold all their services till the voyage should be completed. If they had completed their agreement, but agreed to stay on in exchange for a higher amount (because of the extra workload that would be required of them) then there would be consideration and the agreement for higher wages would be enforceable.

i. Note, the court makes a finding of fact that the crewmembers were committed to performing duties in the absence of other crewmembers.
ii. Had it found otherwise, there would have been a bilateral modification, which would have created a binding modification on both parties.

d. So, Lando's promise to give the wookie and the princess to Darth is without consideration; Lando is liable to Darth only for Han Solo.
e. Further, A's promise to pay B $10 is unenforceable to the extent that it exceeds that which was already promised—$5.
    i. Just because a person seeks to modify a contract, the preexisting duty is not discharged or excused—both parties are liable under their original contract.
    ii. However, if A actually pays B the $10, then, even though $5 was without consideration, A cannot sue B for restitution.
    iii. Objections to contracts on ground of lack of consideration generally cannot be made once a performance has been fully rendered.
        1. If a person cannot sue to regain a gift that they already gave to someone, they certainly can't sue for giving what they promised subsequent to the agreement.
f. In short, additional duties require additional consideration.

Brief Box 61: *Alaska Packers Assn. v. Domenico (1902).*
[P threatened to walk out on his contractual duty to unload fish for D. Fearing lost profits, D reluctantly agreed to give P additional money. P resumed work, but P only offered to pay him what was originally owed.]

The fishing season was short, and other men were unavailable to fill it. Given the large amount of capital Alaska had in its cannery, the crewmembers demands were not based in equity; they were a hostile, inequitable threat. Alaska asked the crewmembers to do nothing more than they had already contracted to do.

2. Bilateral: Both parties agree to do more than they originally bargained for, so to speak.
    a. If A agrees to do some additional duty Z in exchange for some additional consideration from B, then the modification is enforceable.
    b. Essentially, A and B have entered into a second contract: The additional duty Z for the additional consideration.
    c. Notice that A's promise to do the additional duty Z must be induced by B's offer of additional consideration.
        i. If A promises to do the additional duty Z as a favor to B, and B agrees to give A $5 for his time, then A is not bound to do the additional duty Z for want of consideration.
        ii. Hence, one should treat bilateral contract modifications as independent contracts for theoretical purposes.

Brief Box 62: *Brian Construction v. Brighenti (1978).*
[P promised D money for construction work. Later, D discovered more work needed to be done to complete his original agreement. P reluctantly agreed to give D more money, and D resumed work. D later stopped work. P sued for damages.

When the subsequent agreement imposes upon the one seeking greater compensation an additional obligation or burden not previously assumed, the agreement, supported by consideration, is valid and binding upon the parties. The promise of additional compensation in return for the promise that the additional work required would be undertaken constitutes a separate, valid agreement supported by valid consideration.

iii. **Restatement (Second) of Contracts, § 89—Modification of Executory Contract**:
A promise modifying a duty under a contract 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 contract was made; or
   b. to the extent provided by statute; or
   c. to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

2. Notice the Restatement doesn't talk about additional consideration. It does, however, talk about unanticipated circumstances. If the circumstances were truly unanticipated, then the parties could argue that they were not bound in the first place, couldn't they?
   a. Does § 89 have anything to do with preexisting duties? Doesn't it concern making new contracts that further the duties in older agreements?
   b. Was the promisee really bound to do an unanticipated duty, but the promisor is still bound to render his promise? Does it matter?
3. The above analysis differs with respect to doing fewer duties.
   a. If A promises to do W and X for B in exchange for Y, and B tells A that he does not have to do W, then A cannot sue B for damages for not doing W.
   b. However, if B changes his mind and tells A that he must do W and X, then A must perform W and X. B's promise to not hold A liable for W is without consideration since A is already obligated to do W. Upon completion of X, however, A is probably not liable for W.

iv. Why not just destroy the old contract?
1. If A requires more from B for X and B agrees, then can't A and B just destroy the old contract and write another one including the additional duties?
   a. Technically, yes. If A and B both agree to destroy the old contract through bilateral rescission, then the contract is no longer binding.
   b. However, there must be some point where both parties agree that neither of them are bound by the original agreement.
2. As a practical matter, in most modification situations, both parties are not willing to say that neither of them are bound.
   a. The preexisting duties still exist—the question is whether the parties should take on new duties in exchange for new consideration.
   b. They are no destroying; they are modifying.

v. **Preexisting Duties and Settlements**:
1. A, a creditor, sues B, a debtor, for $100, and B admits he owes A $100. However, B promises to pay A only $50. B agrees, then sues A for the remaining $50.
   a. Held: A can recover the additional $50 because B previously owed it to A and B admitted he owed $100 to A.

b. A got nothing from the settlement agreement, which is a contract.

2. A, a creditor, sues B, a debtor, for $100, and B admits he owes A only $50. B promises to pay A $75 in exchange for a settlement agreement. B agrees to accept $75. A tries to sue B for the remaining $25.
    a. Held: A cannot recover the additional $25 because the amount was not disputed and there is no preexisting duty problem because B admitted he only owed $50.
    b. B got more than A admitted to paying, so B's promise is with consideration.
3. A, a creditor, sues B, a debtor, for $100, and B admits he owes A only $50. B promises to pay only the $50. A reluctantly agrees to accept the $50. A tries to sue B for the remaining $50.
    a. Held: Courts split on this.
        i. In one sense, there was no consideration: A got part of what B owed him in exchange for a settlement agreement, but B was already obligated to pay the full $100.
        ii. In another sense, the policy reasons for settling disputes support holding that unless B admits he owes more, A's agreement is binding. If B really owed that much more, we would expect A to sue him for the full amount rather than take the settlement agreement.
    b. The Restatement says the debtor wins for reasons of public policy: If A is willing to settle his agreement is binding unless B admits he actually owes A more than he is willing to pay.

vi. **UCC**:

1. (After all that) there is no preexisting duty rule in contracts for the transaction of goods.
    a. The UCC explicitly does away with the preexisting duty rule.
    b. Essentially, if A requires more consideration from B to perform some duty X and B agrees, then B is liable for the additional consideration for X.
        i. B could call the whole thing off before promising to give additional consideration—he could sue A for damages.
        ii. The fact that B is willing to pay more entails either that B's damages are more than the additional consideration, or will be harder to recover than is worth to B. It also makes economic sense.
2. Good faith requirement:
    a. Nonetheless, the UCC does not allow parties to exploit each other.
        i. If A promises to do X for B, but, being an egoist, decides he wants more money, then, even if B promises more money, B may not be obligated for the additional amount.
        ii. Accordingly, A can only request more money in good faith—he needs the money lest he not get what he thought he was bargaining for.
        iii. Of course, B could always say "no" to A and sue A for breach of contract if A does not come through as he promised.
        iv. However, on promising to give A more money, B is liable lest A's demand is in bad faith.
    b. Posner supports this theory of the preexisting duty rule, arguing that the preexisting duty rule should be grounded in the theory of duress, not consideration.
        i. Essentially, critics of the rule argue it does too much:
            1. Some one-sided modifications are economically sound.
            2. The rule manipulates the doctrine of consideration.
            3. The rule allows bad faith exploitation in exchange for an economically unfair consideration.

3. **UCC § 2-209—Modification, Rescission, and Waiver**:
    a. An agreement modifying a contract within this Article needs no consideration to be binding.
    b. Comment 1: This section seeks to protect and make effective all necessary and desirable modification of sales contracts without regard to the technicalities which at present hamper such adjustments. Modifications made under Subsection 1 must meet the test of good faith imposed by this Act. The test of "good faith" between merchants or as against merchants includes "observance of reasonable standards of fair dealing in the trade."

j. Settlement Agreements: When, if ever, is Agreeing Not to Sue "Consideration?"

i. What if A agrees to not to sue B in exchange of for a return promise or, as is almost always the case, money? Is the promise enforceable?
    1. Generally, yes: An agreement not to sue is sufficient consideration for a settlement agreement, which is essentially a contract.
        a. Society has an interest in settling disputes.
        b. Courts have an administrative interest in settling disputes.
        c. So long as there is some merit to the claim forborne, then a forbearance is consideration as long (as all the other requirements of the consideration are met, i.e., inducement, etc.)
    2. However, judicial economy is not an excuse for flagrant injustice: To some extent, courts are worried about extortion.
        a. The mere nuisance value of a claim may embolden frivolous law suits by unscrupulous plaintiffs.
        b. Thus, agreeing to settle a claim does not always constitute consideration.

ii. The question is: *How much* merit must there be to the claim forborne to constitute consideration? Courts split on this issue.
    1. Objective test: There must be some actual legal merit to the claim forborne lest there be no consideration.
        a. Even if A thinks he has a legal claim, if there is no actual chance that A's legal theory could yield any recovery for A, then there is no consideration for the settlement agreement and B need not honor it.
            i. There must be a legitimate, actual dispute of fact or law for the settlement agreement to be supported by consideration.
            ii. If A believes the facts are such that would permit him to sue, but it turns out that he is wrong, then his settlement agreement is unenforceable.
            iii. If A makes a mistake of law, then his settlement agreement is without consideration if in fact the law does not permit him to recover against B.
        b. As a practical matter, this limits A's desire to settle—he doesn't know if his settlement agreement will be challenged in the future.
        c. To some extent, this also requires courts to inquire into whether A's claim had merit if B ever challenges the settlement agreement.
        d. The public policy value in settlements compels most courts to reject an outright objective approach, but it is out there.
    2. Subjective Approach: Requirement of Actual, Good-Faith Belief.
        a. Most courts hold that as long as A actually believes the facts and law permit him to recover against B, then A's settlement agreement with B is supported by consideration, even if the actual facts and/or law do not permit recovery.
        b. That is, there need not be an actual chance of winning the suit forborne, but there must be a:
            i. Good-faith belief in the face of a bad claim—you must have an actual belief you have a claim.

1. This solves the problem of extortion without compromising the value in settlement agreements: If A is just extorting B, then he is, by definition, in bad-faith.
2. However, this may involve an inquiry into A's subjective mindset when he settled the case.
3. Courts may look to consider various external factors in determining A's mindset:

ii. If A subsequently learns he had no claim, then it makes no difference; the time for determining whether A acted on a good faith belief is when A signed the settlement agreement.

3. Combined Approach?:—Probably still a Subjective Approach.
   a. Some courts accept a subjective test—Did A actually believe he had a claim against B?—but inquire into whether A acted reasonably in believing he had a claim.
   b. Evidence that A acted unreasonably goes to show that he did not actually believe he had a claim.
      i. I don't know if this means that a flagrantly unreasonable belief that is nonetheless actual means the settlement agreement is without consideration.
      ii. Perhaps courts employing the subjective approach consider the reasonableness of A's beliefs and make a determination as to what A actually believed based on whether he was reasonable.
      iii. If so, in effect, the test is partially objective, but in a different sense:
         1. The claim may not have been objectively legally valid, but A was objectively reasonable in believing it was.
   c. Anyway, this is what the court in the following case seems to employ.

Brief Box 64: *Dyer v. National By-Product (1986).*
[P signed a settlement agreement with D for life employment in exchange for not suing for worker's compensation from D. However, the state worker's compensation statute did not permit such a recovery. D fired P.]

The law favors the adjustment and settlement of controversies without resorting to court action. Compromise of a doubtful right asserted in good faith is sufficient consideration for a promise. Corbin writes "Forbearance to press a claim, or a promise of such forbearance, may be a sufficient consideration even though the claim is wholly invalid because (1) he is mistaken about the facts or (2) he is mistaken about the law. However, if there is no *reasonable ground* for the claimant's belief that it is just to try to enforce his claim, then a promise not to pursue it is not consideration; he must act in good faith." Essentially, he must not be making his claim or threatening suit for purposes of vexation or in order to realize on its "nuisance value." The potential claimant's good faith must be judged at the time the alleged settlement agreement was made.
Evidence of the invalidity of the claim is relevant, however, to show that potential claimant's belief was or was not in fact made in good faith.

iii. **Restatement (Second) of Contracts, § 74—Settlement of Claims**:

1. Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
   a. the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
   b. the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.

2. Thus, under the Restatement, either an objective chance of a claim or a subjective belief means there is sufficient consideration in a settlement agreement.
    a. This raises the question of whether a person who actually believed there wasn't a claim when he signed the agreement—i.e., a person who acted in bad faith—but later found out that he had a claim after all—i.e., an objective chance of winning, though previously unknown—could assert that a consideration supported the settlement agreement!
    b. A strict reading of § 74 would say that there was consideration.

II. INTENT TO BE LEGALLY BOUND:

a. Nominal "Consideration"

i. There is no such thing as qualified consideration, hence no such thing as nominal consideration.

ii. If a person exchanges money as mere pretense in an effort to show he wishes to be legally bound, then his promise is not supported by consideration under a bargain theory.
    1. Accordingly, the contract is unenforceable, even if the promisor manifestly and indubitably declares his intention to be legally bound.
    2. Generally, one cannot circumvent the doctrine of consideration with a signature or seal, even if witnessed.
        a. Some states, including Massachusetts, recognize legally enforceable promises notwithstanding lack of consideration if the parties observe some formalities.
        b. Most courts, and the Restatement, do not.

Brief Box 65: *Schnell v. Nell (1861).*
[D promised P she would give P $600 in "consideration" of his late wife's wishes. P offered her one-cent in return. D signed a "contract" to transfer the money, but later repudiated her promise.]

The consideration of one-cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement, but this doctrine does not apply to a mere exchange of sums of money whose value is exactly fixed. Rather, it applies to only things of indeterminate value. The consideration of one-cent is, plainly in this case, merely nominal, and *intended to be so*. The promise was simply one to make a gift; therefore, it was revocable. The demurrer to the answers should have been overruled.

    3. The so-called "Rule of Schnell v. Nell" applies to instantaneous transfers of money.
        a. That is, where P offers D one-cent for the *immediate* exchange of $600.
        b. Cf. Batstakis, BB #63, where the transfer of money was, essentially, a loan—D valued the money more at time T1 than the money was actually worth at time T1.

b. Exception: Option Contracts:

i. While mere formalities and nominal consideration do not create a legally binding agreement, mere formalities do create an option contract (irrevocable offer) under the Restatement (§ 87) and UCC (2-205).
    1. Economically speaking, option contracts induce other contracts, which is beneficial.
    2. Consideration shouldn't be needed at all—maybe time to decide is ordinary in the course of business.

ii. In fact, under the Restatement, the consideration need not be paid: reciting that there was a consideration is enough, if proved.
    1. Under § 87, there must be:

a. A writing signed by the offeror;
b. that recites a purported consideration for the option;
c. and proposes time to accept an otherwise enforceable contract (the contract underlying the option contract must be legally valid).

iii. Restatement (Second) of Contracts, § 87—Option Contract:
1. An offer is binding as an option contract if it
a. is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time.

c. Disclaiming Intention to be Bound:

i. What if B tells A that B is not intending to be legally bound by his promised performance or writing?
1. While manifesting an intention to be bound does not make an offer legally enforceable, manifesting an intention *not* to be bound is much stronger—it can destroy what might otherwise create a contractual obligation.
2. The most common form of manifesting an intention not to be bound is what is typically called a disclaimer.

> **Brief Box 66**: *Thomas v. First National Bank (1953).*
> [P signed a disclaimer, promising not to sue D if D failed to stop payment on a check. D failed to stop payment on P's check.]
>
> Plaintiff's stop-payment order was not absolute, for it was qualified by the release of liability. In the instant case the intention of the parties in relation to limiting the bank's liability was clearly expressed in the stop-payment direction executed by plaintiff. Notwithstanding the disagreement among various courts, the agreement does not fail on ground of public policy, for such agreements relate to private affairs.

ii. Public Policy:
1. Many kinds of disclaimers are void on ground of public policy.
2. The extent to which courts allow a party to escape liability on contractual grounds varies from state to state.
3. Most courts consider whether:
a. there was equal bargaining power between the parties.
b. there was an opportunity to bargain at all.
c. the disclaimer was conspicuous and in a conspicuous place.
d. whether there is a public interest in preventing the disclaimer.
e. the extent to which others will unknowingly be affected by the disclaimer.
4. Theoretically, it is always possible to challenge a disclaimer on ground of public policy: Courts do not uphold every kind of contract.
a. On the other hand, courts do not want to permit unlimited liability.
b. Balancing of factors, essentially.

iii. Employment Contracts:
1. Employees often receive handbooks from their employers, outlining the general policies and procedures of the company.
a. Courts are becoming more receptive to theories where an employee argues the handbook was a contract.
b. However, employers, at the insistence of their lawyers no doubt, are often one step ahead: They write somewhere in the handbook that they do not intend to be bound to the handbook, that the handbook is subject to change without notice, etc.
i. Courts will look to see if there is a disclaimer in the handbook.

ii. If there is one, it is not necessarily binding, especially if in an inconspicuous place.
iii. Promissory Estoppel may impair the employer from asserting the book is not binding anyway.

Brief Box 67: *Ferrera v. AC Nielsen (1990).*
[D issued P a handbook on the discharging policies of its company. D later fired P for reasons inconsistent with the handbook. The handbook contained a conspicuous disclaimer that the handbook was not to bind D.]

To create a contract, the employer must manifest a willingness to enter into a bargain that would justify the employee in understanding that his or her assent was invited. The handbook contains language on the very first page manifesting a clear intention *not* to be bound by the contents of the book: "Management has the right to change the policies and benefits of the Company in accordance with the needs of the business without notice."

2. Manifestations not to be bound often make it impossible, as a matter of law, for a reasonable person to have understood the defendant as inviting acceptance.
3. Restatement (Second) of Contracts, § 21:
    a. Neither real nor apparent intention to be bound are required to form a contract, but
    b. a manifestation of intention that a promise does not affect legal relationships may prevent the formation of a contract.
4. That is, you don't need language that says, "by the way I intend to be bound," but if you see language that says, "I do not intend to be bound," then you cannot reasonably have interpreted the language to mean that your acceptance created a contract.
    a. However, if you didn't see the disclaimer or manifestation of intention not to be bound, then you may have an argument—if a reasonable person wouldn't have seen it because it was in an inconspicuous place or written in a different language.

III. PROMISSORY ESTOPPEL:

a. In General:

i. After spending all that time saying there must be consideration to make an enforceable contract, it turns out that consideration may not be needed to make an enforceable promise!
    1. In some cases, if a person makes a promise, it is enforceable, notwithstanding want of consideration.
    2. Whether promissory estoppel is an exception proper to the consideration doctrine or is an independent claim is a matter of debate between courts.
        a. The question is germane: If promissory estoppel merely prevents a party from invoking the defense of want of consideration, then, all things being equal, the claim proceeds as a regular contract claim, subject to the default rules of contract law, including the Statute of Frauds.
        b. However, if promissory estoppel is an independent action, then the default doctrines of contract law do not necessarily apply—the action has its own rules.
ii. Essentially, a claim for promissory estoppel is a claim that the defendant:
    1. made a promise
    2. with actual knowledge or reason to know that

3. plaintiff would rely on that promise to his detriment
4. and plaintiff actually relied on the promise to his detriment
5. with reason to think that defendant would keep his promise.

iii. Equitable estoppel is similar, but pertains to conduct (including words), not promises. A person can raise an equitable estoppel claim if the defendant:
1. acted via conduct or words indicating facts,
2. with actual knowledge or reason to know that
3. plaintiff would rely on his representations to his detriment
4. and plaintiff actually relied on the representations in good faith
5. to plaintiff's detriment.

iv. Promissory estoppel emerged late in most American courts, and courts struggled with the initial terminology.

> **Brief Box 68:** *Ricketts v. Scothorn (1898).*
> [D promised P money as a gift. P relied on the promise and quit her job. D died. D's executor refused to pay D's promised amount.]
>
> The note was a gratuity and its deliverer looked for nothing in return. Ordinarily such promises are not enforceable, even when put in the form of a promissory note, for want of consideration. However, when a promisee makes an expenditure of money or assumption of liability by the promisee, on the [good] faith of the promise, there is a sufficient consideration. Actually, the true reason is the preclusion of the defendant [by his own conduct] to deny the consideration [exists].

1. Exactly what is defendant prohibited by his own conduct from doing?
   a. Is he estopped from raising a defense of want of consideration?
   b. Or, is he estopped from refusing to honor his promise?
   c. Notice the court in Ricketts initially thought the latter but clarified by asserting the former.
2. What is the appropriate remedy for promissory estoppel?
   a. Should plaintiff get expectation or reliance?
   b. If one views promissory estoppel as estopping defendant from invoking a defense on ground of want of consideration, then plaintiff should get expectation—there was a contract.
   c. Perhaps, however, plaintiff should only get reliance: D stood to get nothing in return.
   d. Courts split on this issue as well.

v. Restatement (FIRST) of Contracts, § 90—Promise Reasonably Inducing Definite and Substantial Action is Binding:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.

vi. Restatement (Second) of Contracts, § 90—Promise Reasonably Inducing Action or Forbearance:

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—i.e., reliance.

vii. RS2C § 90 Requires the court to ask:

1. Was the promise one which the promisor should reasonable expect to induce action or forbearance on the part of the promisee?
2. Did the promise induce such action or forbearance in fact?
3. Can injustice be avoided only by enforcement of the promise?

b. Land Conveyance:

i. If A promises to give B land, what constitutes reliance on the promise?

1. Generally, moving on the land will suffice.
2. Improving the land may also be enough.

Brief Box 69: *Greiner v. Greiner (1930).*
[D orally promised P land. P moved his house and family onto the land and made improvements to the land. D never gave P title. P later sought to eject D.]

A promise for breach of which the law gives remedy is a contract. In this instance there is no doubt whatever respecting the intention of D: she fulfilled her intention up to the point of the formal matter of executing and delivering a deed. That there was no consideration is immaterial, for P gave up his homestead in Logan county, moved to Mitchell, established himself and his family on the land, and made some improvements on the land, all in reliance on D's promise. There was enough here to say that justice required a conveyance of the land.

3. The court in Greiner granted P specific performance—super expectation!
4. What about the Statute of Frauds?
    a. It is likely in Greiner that partial performance removed the oral "contract" from the Statute of Frauds.
    b. Is it possible to have promissory estoppel without partial performance of the promise?
        i. Perhaps. What if P moved his house but D physically stopped him from landing it on the land? That would be substantial reliance on the promise without partial performance.
    c. In any event, whether there is a Statute of Frauds problem depends, yet again, on whether promissory estoppel is an independent action or merely estops D from raising a defense on ground of want of consideration.
    d. If promissory estoppel is really a contract claim, then the "contract" may fall within the Statute of Frauds.
    e. If promissory estoppel is not contract claim but an independent action, then the Statute of Frauds need not be satisfied.

c. Charitable Subscriptions:

i. As they struggled with whether to accept the doctrine of promissory estoppel, some courts manipulated the doctrine of consideration to enforce promises that today would fall squarely within the doctrine of promissory estoppel—if any doctrine at all.

ii. One example of such a manipulation occurred in cases involving charitable subscriptions.

1. A charitable subscription is where A promises to give money to B's foundation for the purposes of charity.
2. Courts often seek to enforce such promises, even though they are not supported by a return promise.

a. Notice that the donor's donation is not induced by any legally recognized detriment—
b. If courts recognize the so-called "interest" in seeing the poor or the under-educated receive funds as consideration, then anything becomes consideration, for courts can always find some self-serving interest in any donation.
c. Essentially, this is the problem with psychological egoism—anything can be interpreted to have a self-fulfilling motivation.
d.

Brief Box 70: *Allegheny College v. Chautauqua Bank of Jamestown (1927).* [D promised to give P-college money "in consideration for her interest in Christian education." D asked that the money be set up in a scholarship fund named after her. D later revoked the promise. P sued.]

The promisor wished to have a memorial to perpetuate her name. This is a valid consideration: A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust is upon the promisee by the acceptance of the money. The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

i. Justice Kellogg dissented on ground that at most a unilateral contract was created: The donor promised to give money on establishment of a fund in her name. Effectively, since the offer was revoked at the time of the donor's death, the college could not accept the offer.
ii. However, Kellogg does suggest he might find for the college on ground of promissory estoppel.
iii. Notice this still involves a difficult element for the college to prove: It must prove reasonable reliance on the promise to pay only after a person died—the facts indicate the college didn't rely on the promise at all.

iii. Section 90(2) of the (Second) Restatement, infra, recognizes that most courts wish to enforce charitable subscriptions.
1. Technically, even promissory estoppel will not support enforcing many charitable subscriptions for want of reliance.
2. To circumvent the problem, the Restatement simply eliminates the requirement of proof of reliance in cases involving charitable subscriptions.
a. Effectively, there is no requirement of reliance even, and any promise to donate money to a charity becomes enforceable, despite want of consideration *and* want of reliance on a promise!
b. This is just pandering contract doctrines to support an otherwise honorable goal—there is no estoppel or consideration here!
c. The problem with enforcing charitable subscriptions notwithstanding lack of reliance is that such promises are mere moral obligations, which courts do not enforce.
i. If A promises to pay B for saving A's legally emancipated son, the promise is unenforceable if B already saved the son. However, if A promises to donate $0.80 a day to the "Christian Relief Fund," his promise becomes binding!
3. (Section 90 also states that marriage settlements need not be supported by reliance or consideration to be enforceable either.)

d. Promises for Pensions:

i. If D promises to pay P money if P retires, and P relies on that promise when retiring, then P can recover her expectation in most courts—this is a paradigm promissory estoppel illustration.
   1. Notice that P might also have a breach of contract claim:
      a. If P was induced by the promise of a pension, knowing that not accepting the offer might mean she would get no pension, then D's promise to give her a pension, if induced by a desire to get rid of P, creates a legally binding obligation upon acceptance.
      b. Not all pensions are handled with promissory estoppel.
   2. If D does not wish to contract to be rid of P—i.e., D's promise is not induced by P's retirement—then P needs the doctrine of promissory estoppel to recover lest her claim fail for want of consideration.
      a. Effectively, D is estopped from repudiating his promise, not just the defense of want of consideration.
   3.

Brief Box 71: *Feinberg v Pfeiffer Co. (1959).*
[In recognition of her many years of service, D promised P a $200 per month pension for life if and when P decided to retire. P worked for two more years, then retired in reliance on the promise. Subsequent changes in the internal structure of D led to the repudiation of the pension.]

Plaintiff's reliance on the promise of a pension after her retirement is sufficient to support a claim of promissory estoppel. Indeed, one of the illustrations in Restatement 90 is the very situation at bar. The time that plaintiff discovered her illness in relation to when the payments stopped is immaterial—her illness was not induced by the promise of a pension. Plaintiff's reliance was her retirement from a lucrative position in reliance upon defendant's promise to pay her an annuity or pension.

ii. Lawyers and judges start with the doctrine of consideration, applying promissory estoppel only when there no consideration, or at least shaky consideration, is found.
   1. Promissory estoppel claims are often made in the alternative, in case the court finds a want of consideration.

e. Reliance on Offers?

i. If one can seek damages for relying on a promise, why not seek damages for relying on a mere offer?
ii. The most common example of reliance on an offer occurs in bids, especially construction bids.
   1. A subcontractor submits a bid which the general contractor relies on when making a general bid—if the general bid is accepted, the general contractor wants to rely on the initial offer.
   2. Notice that if the subcontractor revokes the offer, the general contractor might have to go with a higher bidder, thereby affecting the general contractor's profits or even ability to perform the job at all.
iii. Thus, in some cases, reliance on an offer is of paramount import.
   1. Initially, courts were very reluctant to accept such theories—most courts were reluctant to adopt promissory estoppel in the first place!

Brief Box 72: *James Baird Co. v. Gimbel (1933).*
[D sent an offer to P, which P relied on to make a general bid. P's bid was accepted, but D repudiated before P could inform D that P accepted D's bid.]

Unless there are circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted, the acceptance was too late. As

written, the agreement does not create an irrevocable offer. True, defendant knew that the contractors were relying on the offered price. However, upon winning the bid, plaintiff was not bound to use defendant—if the successful bidder repudiated its contract with the city, then we would not say the defendant could sue the bidder for breach. There was thus no contract between plaintiff and defendant. The doctrine of promissory estoppel is no help to plaintiff either. When a person makes a *promise* without consideration and someone reasonably relies on that *promise*, promissory estoppel kicks in to prevent an unjust consequence. Here, however, we have an *offer*. An *offer* is not a promise until accepted with consideration in return. To extend the doctrine of promissory estoppel to offers would be to hold that offerors, regardless of the stipulated conditions, could not revoke their offers.

2. Notice how the court in Baird finds that extending promissory estoppel to include estopping offerors from revoking offers entails that all offers are irrevocable.
    a. This is, no doubt, an overstatement, for there must be reliance on an offer for promissory estoppel to take effect.
    b. Nonetheless, the court is correct that the allowing recovery for reasonable reliance on an offer—by creating an irrevocable offer, effectively—does extend the doctrine of promissory estoppel.
3. Today, most courts are willing to allow claims for reliance on a mere offer, but the parties should never need to invoke such a doctrine.
    a. One party can make a conditional offer, which is beneficial because it binds the potentially accepting party in the event some condition is satisfied.
    b. Or, one party can make a conditional acceptance.
    c. Or, the language of the offer can provide for acceptance in a particular manner.
4.

Brief Box 73: *Drennan v. Star Paving Co. (1958).*
[D offered to do work for P for a specified price. P relied on D's offer in placing a general bid, which P won. Later, D claimed that he made a mistake. D revoked the offer before P could accept it. P mitigated his damages by seeking the next lowest bid.]

Notwithstanding the lack of a contract, Drennan contends that his reliance on the bid created an irrevocable offer. Since defendant's bid was silent on revocation, we must determine whether there are conditions to the right of revocation impose by law or reasonably inferable in fact. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract. However, the general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better lower bid.

5. General contractors, however, may be reluctant to be bound to use a particular bidder.
    a. Many general contractors "shop for bids" from many subcontractors, then offer the job to subcontractors they know and trust for the lowest price offered.
    b. If the trusted subcontractor declines the offer, then the general will use the subcontractor that actually bid the lowest.
6. The general contractor must act reasonably in relying a subcontractor's bid—if a bid is obviously erroneous, the offer is revocable or voidable on ground of unilateral mistake.

7. Further, many general contractors will not use the very lowest bidders when making their general bids:
    a. Using the second to lowest subcontract bids provides for extra profits if everything goes smoothly.
    b. Suing is a bitch: If one subcontractor backs out, it may not be worth it to go to court, but the general doesn't want to lose any expected profits.
    c. The general contractor must act in reasonable reliance on a bid for it to create an action in promissory estoppel—if there was a lower bid, then there is prima facie evidence of reasonableness.
    d. Finally, and most importantly, if the general contractor does not use the lowest bid, it looks like he was non-negligent in hiring the particular subcontractor—he didn't just want to maximize his profits, but wanted to do the job correctly.

iv. Restatement (Second) of Contracts, § 87(2)—Reliance on an Offer:
1. An offer which the offeror should reasonably expect to induce action or forbearance of 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.

f. Independent Action or Consideration Substitute?—Modern Trends, Modern Damages:

i. Traditionally, many courts viewed Promissory Estoppel as a substitute for consideration; however, many courts also limited recovery to the extent required by justice, as seen in the modern Restatement.
1.

Brief Box 74: *Goodman v. Dicker (1948).*
[D promised P that a corporation would grant P a franchise. P incurred expenses preparing for the business. The corporation did not grant the franchise.]

We are dealing with D's promise to P that the corporation would grant P a franchise. D is estopped from raising any defense inconsistent with his assurance that the corporation would grant the franchise, which P relied on. Justice and fair dealings require estoppel on these facts. We disagree, however, that the proper measure of damages is expectancy. We find that the proper measure of damage is the actual loss sustained by expenditures made in reliance upon D's assurance of a dealer franchise.

2. Notice that the court in Goodman thought promissory estoppel was a shield: it stopped defendant from raising any defense based on want of consideration.
3. However, also notice that the court limited recovery to reliance, indicating that promissory estoppel required a different measure of damages than expectation.

ii. Before long, many courts began viewing promissory estoppel as an independent action, one entirely separate from a breach of contract claim.
1.

Brief Box 75: *Hoffman v. Red Owl Stores, Inc (1965).*
[D promised P that Red Owl would grant P a franchise. P sold his store and moved to the proposed location. Red Owl did not grant P a franchise.]

Though the contract may have failed for indefiniteness at the time the deal fell through, an action in promissory estoppel is not an action in contract—promissory estoppel is not merely a substitute for consideration as was traditionally held in most jurisdictions. Restatement (Second) of Contracts, § 90 does not require all the elements of a contract. However, the evidence does not support a finding for lost profits. In addition to moving expenses, injustice requires only the difference between the fair market value of the store and the actual price received for the

store.

iii. Whether a court views an action in promissory estoppel as a substitute for consideration or an independent action may affect various elements of P's case.
   1. If promissory estoppel is an independent action, then:
      a. P may recover, even if a contract claim would have failed for indefiniteness.
      b. The Statute of Frauds may not be applicable.
      c. Damages are limited as justice requires.

g. Promise Requirement:

i. Promissory estoppel, of course, requires that the promisor actually make a promise to the promisee.

1.

Brief Box 76: *Blatt v. USC (1970).*
[D told P that P would "be eligible" for a legal honor society if he finished in the top 10% of his class. P finished in the top 5% of his class, but was not admitted to the honor society.]

Essentially, P seeks to establish a unilateral contract: If he performed at a certain level, then USC would be bound to admit him. However, there was no benefit accruing to USC; consequently, there was no consideration for any alleged promise or representations of defendants. [But Cf. Hamer v. Sidway (holding that "legal detriment," without an actual benefit conveyed on the promisor, can constitute consideration if the promisor was induced by such detriment.)] Therefore, if Blatt is to recover, he must do so under a theory of promissory estoppel.
There is no claim for promissory estoppel. Though P points out that he might have done only average in Law School, the reliance here was *not* of a *definite and substantial* character. Finally, even if we allowed the promissory estoppel claim as a substitute for consideration, P has not pleaded a breach of contract claim, for he only alleges "eligibility" not outright admission.

   a. Notice the Court in Blatt still views promissory estoppel as a consideration substitute.
   b. Blatt probably would have come out the same under Restatement (Second) of Contracts, § 90, even though the court applied the First § 90, because the university only promised him "eligibility," not admission.
   c. Further, would injustice require admission to the legal society?

2.

Brief Box 77: *Ypsilanti v. General Motors (1993).*
[D told P that a tax abatement would allow D to retain several hundred jobs in the city. P granted D the tax abatement, but D later decided to move operations.]

The abatement statute does not create a contract between GM and the Town. The Courts have decided that the state legislature did not intend to create contractual right for the State when it enacted the statute.
The town contends that GM, by its statements and conduct, represented that it would provide continuous employment at the Willow Run plant if the government continued to provide tax abatements. Here, GM stated that it would continue production and maintain continuous employment at the Willow Run plant, subject to favorable market demand. This statement was a promise; the city relied on it, which GM should have reasonably expected. GM insists that the phrase "subject to demand" proscribes the Town from any reasonable reliance on the promise, but GM still produces the Caprice. GM's statement means that if there were a sufficient market demand to make the Caprice at all, then they would be made at Willow

Run. Further, the promise produced reliance or forbearance on the part of the Town in some $2 million in local government taxes. Finally, GM's promise must be enforced if injustice is to be avoided. GM does not assert economic necessity as a defense. We find that closing the Willow Run production facility would be a grave injustice, which justice requires us to estop.

a. Was the correct remedy an injunction? Couldn't the court have ordered a payment of the taxes? Isn't this akin to specific enforcement in an employment contract?

ii. GM appealed the lower court's decision.

Brief Box 78: *Ypsilanti v. GM (1993).*
The trial court's finding that defendant promised to keep its production of the Caprice and other cars at Willow Run is clearly erroneous. The mere fact that a corporation solicits a tax abatement cannot be evidence of a promise. The fact that a company uses hyperbole and puffery in seeking an advantage or concession does not necessarily create a promise. The statement "subject to favorable market demand" was nothing more than the kind of hyperbole a corporation would use to obtain the tax abatement benefits afforded by the statute and willingly offered by the Town.
Even if there was a promise, reliance on the promise would have been unreasonable. Nowhere has it been held that a tax abatement carries a promise of continued employment.

h. Reasonable Reliance Requirement?:

i. Restatement § 90 only requires that the promisor reasonably foresee that the promisee will rely on his promise; it says nothing that the promisee needs to be reasonable in exercising reliance.

ii. Nonetheless, many courts require that reliance be reasonable.

1.

Brief Box 79: *Alden v. Presley (1982).*
[Presley promised P to pay her mortgage and for her divorce. P relied on the promise, but the divorce settlement was not final until approved by the courts. Presley died before honoring his promise, and his estate refused to perform. The agreement was not approved until after P was told D would not pay.]

Alden fails to show that she acted in detrimental reliance. It is well established in this State that settlement agreements between husband and wife that purport to settle the legal obligations of alimony and child support are not binding until approved by the Court. She knew or should have known the promise would not be honored before she incurred any debt. Alden's reliance on the promise after being informed that it would not be honored was unreasonable as a matter of law—she suffered no loss as a result of justifiable reliance.

2. I
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a promisor repudiates a promise before reliance has begun, then, almost certainly, any reliance is unreasonable—not to mention the fact that there is no longer any promise.

3. Some courts do not impose a reasonableness requirement on the part of the promisee.

i. **Injustice Limitation:**

i. Under the (Second) Restatement, P's damages are limited to the extent that justice requires.

Brief Box 80: *Cohen v. Cowles Media (1991).*
[D promised P that D would keep P's name anonymous. P informed D of trivial information about an opposing candidate. D published P's name.]
In regard to promissory estoppel, (1) there was a promise which was reasonably foreseeable would induce Cohen to rely on it, and (2) Cohen did rely on the promise in handing the documents over to the reporters. However, the third requirement of promissory estoppel—i.e., that injustice can only be avoided by enforcement of the promise—is problematic. In determining whether Cohen can recover under promissory estoppel, the question necessarily arises whether the Papers had a 1st Amendment protection to publish his name, notwithstanding their promise not to do so. A finding that enforcing the promise of confidentiality under a promissory estoppel theory would violate the Paper's 1st Amendment rights.

1. The US Supreme Court reversed, holding that since promissory estoppel is a general law—i.e., one not restricting the press specifically—the First Amendment does not offer any special protections to the media. The Supreme Court remanded the case for determination of the appropriate remedy for Cohen.

Brief Box 81: *Cohen v. Cowles Media (1992).*
The only question is whether the promise must be enforced to prevent an injustice—a question of law based on policy considerations. We agree that denying Cohen any remedy would be unjust. The record indicates that the Papers firmly believe they ought to keep their promises to their informants. The question, then, turns to damages. Damages are also limited as justice requires. We find the jury instruction adequate to compensate Cohen. There was adequate evidence to support the jury's award of $200,000, and we see no reason to remand this case for a new trial on damages.

ARTICLE V: PERFORMANCE, CONDITIONS AND BREACH:

I. Duty of Good Faith:

a. Parties to any contract must perform in good faith.

> **Brief Box 82**: *Stop & Shop, Inc. v. Ganem (1964).*
> [D promised P that it would give a percentage of its profits to P. D later closed the store and reopened it several miles away. The agreement did not specifically provide that D would operate a store at all times on the lot.]
>
> Since there is no basis for implying a covenant to continue to operate when the business judgment of the lessee compels the lessee to cease operations, we find no such covenant. We assume, without deciding, that there is an obligation not to discontinue the business for spite or infliction of harm. Parties must perform in good faith, but this does not require them to suffer a loss. If D acted in good faith, then D did not breach his agreement.

i. Parties cannot try to take unjust advantage of a contract; however, unless specifically specified to the contrary, parties can act to mitigate contractual loss in good faith.
ii. Posner defines good faith as only a promise not to misrepresent or take advantage of the other party by trying to dishonestly subvert the purpose of the contract.
    1. He denies there is an duty to act altruistically; there is only a duty not to exploit.
iii. **Restatement (Second) of Contracts, § 205—Duty of Good Faith and Fair Dealing**:
    Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.
iv. **UCC, § 1-203—Obligation of Good Faith**:
    Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.
    ("Good faith" in the case of a merchant means honesty in fact and the observance of reasonable standards of fair dealing in the trade).

II. WARRANTIES:

a. Implied Warranties—UCC:

i. Implied Warranty of Merchantability:
    1. Unless otherwise specified, there is an implied warranty of merchantability if and only if the seller is a merchant whose business it is, at least in part, to transact the goods.
        a. Essentially, goods must not be defective for their ordinary or usual purpose.
        b. The goods must pass as average in the market.
ii. **UCC, § 2-314—Implied Warranty; Merchantability; Usage of Trade**:
    1. Unless excluded or modified (by Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
    2. Goods to be merchantable must be at least as such as
        a. pass without objection in the trade under the contact description; and
        b. in the case of fungible goods, are of fair average quality within the description; and
        c. are fit for the ordinary purposes for which such goods are used; and

d. run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
e. are adequately contained, packaged, and labeled as the agreement may require; and
f. conform to the promises or affirmations of fact made on the container or label if any.

3. Unless excluded or modified (by Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

iii. Fitness For A Particular Purpose:
1. If the seller knows or has reason to know that the buyer is planning on using the goods for a particular purpose other than the usual purpose for the goods, then, if the buyer is relying on the seller's judgment, the goods must be fit for that purpose.
2. Essentially, fitness for a particular purpose requires:
a. that the seller has reason to know that the buyer has a special use for the goods contracted for.
b. that the seller has reason to know that the buyer is relying on the seller's judgment.
c. that the buyer actually rely on the seller's judgment or skill.
d. that there is no modification of the or exclusion of a particular warranty.

iv. **UCC, § 2-315—Implied Warranty: Fitness For a Particular Purpose**:
Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under next section an implied warranty that the goods shall be fit for such purpose.

v. Every implied warranty is subject to modification or exclusion by an express agreement between the parties, subject to §§ 2-314-2-316

vi. The general remedy for breach of any warranty is the expectation value, including incidental or consequential damages arising from the breach of warranty—UCC, § 2-714.

b. Express Warranties:

i. Parties are free to create express warranties for their products.

ii. To constituted an express warranty, the seller must:
1. make an affirmation of fact or promise
2. which becomes the basis of the bargain (reliance)
3. and relates to the goods actually sold.

iii. If the seller expresses a mere opinion as to the overall quality of the goods or if he praises the goods, then he does not create an express warranty.
1. If a seller tells the buyer that the goods are "of top quality" or if he says "she's a beaut" then he does not warrant the goods.
2. Merely complimenting goods as part of the puffery to sell them does not constitute a warranty.

iv. Even if the seller expresses a fact or promise relating to the goods, the buyer must rely on the warranty; the warranty must become part of the basis of the bargain; the warranty must not be ancillary to the contract.
1. The seller typically has the burden of showing that the alleged warranty was not part of the basis of the bargain.
2. In effect, the seller is forced to show that the buyer didn't rely in part on the promise—surely, the seller can't prove what was on the buyer's mind when he made the item.
3. The only way the seller could show that the buyer didn't rely on the warranty is if the buyer didn't know about the warranty at the time of the contract, but even then the implied warranties of merchantability and/or fitness for a particular purpose might exist.

a. E.g., I sell Pettit my car, and later tell him that there's a five-year battery; the battery dies one month later; held: the alleged warranty could not form the basis of the bargain because Pettit only learned of the promise or representation after he contracted to buy the car.
b. (Since I am not a merchant in used cars, there would be no implied warranty of merchantability).

4. If the seller and buyer have made many transactions over time, and the seller can show that the alleged breaches occurred and that the buyer knew they occurred, and the buyer continued to purchase the goods allegedly warranted, then the seller may be able to refute that the alleged warranties formed the basis of the bargain—again, very difficult to show.

v. Further, the affirmation of fact can only be a warranty if it concerns the goods actually sold.
1. Whether the alleged warranty relates to the thing sold is somewhat a discretionary finding in some cases.
a. Does consumption of gas constitute a statement about the car or the gasoline?
b. The answer probably lies in the fact that a specific statement about consumption of a particular supply does constitute a statement of fact about the good consuming the supply.
c. There may be room for argument in close cases.

Brief Box 83: *Royal Business Machines, Inc. v. Lorraine Corp. (1980).*
[D made various promises to P about copying machines, which P claimed did not live up to the promises.]

When the express warranty expresses a mere "seller's opinion," or describes a fact about goods other than those actually warranted, then the warranty is not an express warranty within the meaning of UCC § 2-313. When there is an otherwise valid warranty, the buyer must rely on the factual assertion of the seller as the "basis for the bargain" for the warranty to be controlling. The decisive test for whether a given representation is a warranty or merely an expression of the seller's opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment.

vi. **UCC, § 2-313—Express Warranties by Affirmation, Promise, Description, Sample:**
1. Express warranties by the seller are created as follows:
a. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
2. It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

c. Disclaimer of Warranties:

i. Words or conduct limiting or eliminating any express or implied warranties are permitted, so long as they are reasonable.

ii. There are no "magic words" to eliminate warranties, but "merchantability" must appear somewhere conspicuous when limiting or eliminating implied warranties, unless other words, such as "as is" or "without warranty" clearly indicate there is no warranty and the buyer had an opportunity to inspect the goods.

> **Brief Box 84**: Schneider v. Miller (1991).
> [P agreed to buy P's car from P's used car lot, but later sought to reform the contract on the ground of breach of warranty. The car dealer had specifically stated that the care was sold "as is."
>
> Schneider does not show that he accepted the vehicle on the reasonable assumption that its alleged nonconformity would be cured, nor has he shown that such nonconformity was induced by the difficulty of discovery before acceptance or by Miller's assurances. He is not entitle to revoke acceptance. Schneider ignores the fact that words indicating an exclusion of warranties, *especially* words like "as is," remove any implied warranties of fitness for a particular purpose. Furthermore, there was an integration clause, which prevents any claims for any implied warranties outside the four corners.

1. Note on Parol Evidence:
    a. The court in Schneider says that the integration clause prevents any claims for any implied warranties; however, Schneider could have made the argument that the parol evidence rule only prohibits external *agreements* inconsistent with the terms of the writing, not external *facts* pertaining to the meaning of the agreement.
2. Note on Public Policy:
    a. One can always attempt an argument that the disclaimer of warranty violates public policy.

iii. **UCC, § 2-316—Exclusion or Modification of Warranties**:

1. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other, but subject to the provisions of this Article on parol or extrinsic evidence negation or limitation is inoperative to the extent that such construction is unreasonable.
2. Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
3. Notwithstanding subsection (2)
    a. unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding call the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
    b. when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
    c. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

4. Remedies for breach of warranty can be limited accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

III. Contractual Conditions:

a. Definition:

i. A condition is any "if, then" provision in a contract.
   1. Conditions are those provisions that cover events that may or may not occur during the course of performance of the contract.
   2. If the condition occurs, then it gives rise to a duty or eliminates a duty of one or both of the parties.

ii. There are two types of conditions.
   1. Conditions Precedent to Duty of Immediate Performance:
      a. Essentially, a condition precedent (pronounced "pre-see-dent") is something that must happen before a duty of immediate performance (or elimination of a duty of performance) is required (or permitted).
         i. If X is not due until Y, then Y is a condition precedent for X.
         ii. E.g., a homeowner's policy: If a homeowner has a policy insuring him against fire damage, then fire damage is a condition precedent to the insurer's duty of immediate performance—i.e., to pay for the damage.
      b. The restatement only recognizes conditions precedent.
   2. Conditions Subsequent to Duty of Performance.
      a. Essentially, a condition subsequent is something that the obligee must do *after* the obligor has a duty of immediate performance.
         i. If X is due, but Y may alter or discharge X.
         ii. Typically "unless" designates a condition subsequent.
            1. X is due, unless Y, which means that X is no longer do. (However, the *non-existence* of Y may still be thought of as a condition precedent to X!)
            2. The obligee may claim X at any time, but if the obligee does Y before claiming X, then there is no duty to do X anymore.
            3. Conditions subsequent discharge duties of immediate performance.
         iii. Of course, one might argue that if X is due unless Y occurs then *not doing Y* is a condition precedent to actual recovery of X.
            1. One would have a strong argument.
            2. The distinction as to whether a condition is precedent or subsequent is logically hazy, and it rarely comes up.
            3. The restatement does not recognize conditions subsequent to a duty of immediate performance.
         iv. Perhaps cashing a check within 180 of the date therein is a true condition subsequent.
            1. There is an immediate duty on the part of the payor to pay the payee, but if the payee does not cash the check within 180 days, then the duty of the drawer is discharged.

b. Legal Effect of Conditions:

i. If something is a true condition precedent, then before a duty to perform arises there must be an occurrence of that condition.
ii. If the condition does not occur, then there is no duty of performance.

iii. The legal effect of a condition, then, is that certain events must happen before there is a duty on the part of one or both parties to do something for the other.

> **Brief Box 85**: *Inman v. Clyde Hall Drilling Co (1962).*
> [As part of an employment contract, P promised D that he would notify D of an intention to sue D within 30 days of being discharged from his employment. P did not notify D, but rather served D a copy of the suit. There was also an agreement not to file suit for 6 months after giving D written notice of an intention to sue.]
>
> We conclude that the condition precedent does not violate public policy [for various reasons]. Inman also argues that service was a sufficient "written notice" under the provision. Since he served Clyde on 14 April, his claim was served within 30 days. However, though service gave Clyde actual knowledge of the claim, it does not serve as an excuse for not giving the kind of written notice called for by the contract. Inman agreed that no suit would be instituted prior to six months *after the filing of the written notice of claim*, which means that the written notice must have come prior to any service or suit. Since he did not serve the written notice, Inman breached the employment contract, which precludes his recovery on the terms therein.

a. Ouch. Parties can typically contract around statutes of limitations in contract cases.
b. The effect of the condition in Inman's contract was that Inman lost his ability to claim a breach of contract by Clyde-Hall.
c. The court doesn't explicitly consider whether the agreement not to sue for 6 months and to serve written notice of intention to sue within 30 days is a condition precedent to recovery for breach of contract or really just a promise.

2. So, if something is a condition precedent to some duty, then the lack of its occurrence will mean there is no duty.
    a. However, how do we know what is really a condition and what is really just a mere promise?

c. Special Conditions of Satisfaction:

i. One type of common condition is the so-called "express condition of satisfaction."
    1. An express condition of satisfaction predicates continued acceptance or contractual relationship on one party's good-faith appraisal of the other party's performance.
        a. Notice that without the good-faith requirement, there might be no consideration, for then one party could choose to terminate the contract on its whim.
            i. However, as is the case with requirements contracts (and all other contracts, for that matter), there is a requirement of good-faith, which means that the party who judges cannot claim dissatisfaction if he is really satisfied.
        b. Express conditions of satisfaction concern the "personal judgment, taste, or satisfaction," which means that the judging party need not be reasonable in rejecting the performance of the performing party, so long as he legitimately judges the performance unsound, his palate is offended, or he is unsatisfied.
        c. The effect of a express condition of satisfaction is that if the judging party does is legitimately unsatisfied—i.e., unsatisfied in good-faith—then he is no longer obligated to do something (or is allowed to take some action, such as firing the performing party).
        d. If the judging party is unsatisfied, then he cannot usually recover damages, unless the performing party acted unreasonably.

e. Evidence of the quality of performance can go to show that the judging party could not possibly have been unsatisfied, but the evidence should not overcome the personal tastes.
    i. As long as the jury believes that the judging party actually was unsatisfied, then the judging party did not breach the contract.

Brief Box 86: *Fursmidt v. Hotel Abbey Holding Corp. (1960).*
[D promised to let P operate a laundry in D's hotel, so long as D was satisfied with his customer's reaction to the laundry.]

A literal construction of the "satisfaction" provisions is made where the agreements provide for performance involving fancy taste, sensibility, or judgment of the party for whose benefit it was made. We find that the provision here was involved the personal taste or sensibility of the Hotel, as determined by the purpose of the agreement. The purpose of the agreement was to give the Hotel complete control—in prices, disputes, hours of operation, uniforms, employees, and billing—over Fursmidt's operations. Evidence of Fursmidt's performance is indicative of Hotel Abbey's good faith or lack thereof. The charge of the trial court may be correct as to whether Hotel Abbey can collect damages from Fursmidt as opposed to simply reneging the contract; Hotel Abbey must show more than mere dissatisfaction to recover anything from Fursmidt.

ii. Note that in contracts relating to operative fitness, utility or marketability, the provision is construed imposes only a requirement of reasonable satisfaction. Express conditions of satisfaction only come into play when there is an express agreement predicating the condition on the personal taste of the judging party.
    1. Products are not subject to conditional satisfaction, unless the buyer and seller so agree.
    2. Implied warranties of merchantability are not conditioned on personal satisfaction, only on their ability to pass as reasonable for like goods in the marketplace.

d. Conditions vs. Promises:
- i. Constructing Conditions:
    1. How can one tell if a contractual provision is a condition vis-à-vis a promise?
    2. Where there is an ambiguity as to whether something is a condition or a promise, courts typically favor promises.
        a. As we've seen, conditions precedent to a duty of immediate performance mean that one party forfeits a contractual right upon non-occurrence of a condition.
        b. This may mean that a party loses the right to recover for an otherwise legally recognized claim.
        c. Forfeitures are a constant problem with conditions precedent.
            i. The law privileges freedom of contract only slightly higher than not allowing forfeitures, and in some cases may even exercise its equity powers to excuse the non-occurrence of a condition.
    3. However, if the obligee to the condition precedent is in direct control of the occurrence of the condition, or if the obligee assumes the risk of the non-occurrence of the condition, then the provision may be construed as a condition rather than a promise.
- ii. Restatement (Second) of Contracts, § 227—Standards of Preference with Regard to Conditions:
    1. In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will

reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicated that he has assumed the risk.

2. Unless the contract is of a type under which only party generally undertakes duties, if the obligee was in control of the condition, then there is a condition when it is doubtful whether
    a. a duty is imposed on an obligee that an event occur, or
    b. the event is made a condition of the obligor's duty, or
    c. the event is made a condition of the obligor's duty and a duty is imposed on the obligee that the event occur,

Brief Box 87: *Howard v. Federal Crop Insurance Corp. (1976).*
[P agreed not to plow under his stalks in the event his crop was damaged to allow D to inspect for the true extent of the damage. P plowed his stalks before D could inspect them, and D refused to honor the policy.]
General legal policy disfavors outright forfeiture. Insurance policies are generally construed most strongly against the insurer. When it is doubtful whether words create a promise or a condition precedent, they will be construed as creating a promise. In the instant contract, the term "condition precedent" is not used in the provision prohibiting premature plowing of the stalks. While a contract need not contain "magic words" to create a condition precedent, the fact that the FCIC included the term "condition precedent" in another provision implies that the FCIC did not create a condition precedent. P merely promised to not plow the stalks, and P is liable for any damage P caused by making it more difficult on D to determine P's claim.

3. A little help please? How can you tell whether something is a promise or condition by looking at the language of the agreement?
    a. First, certain words indicate conditions, just as certain words indicate promises:
        i. "unless, if, then, but if, in the event that, etc." indicate conditions.
        ii. "promises, shall not, will not, will, shall, cannot, etc." indicate promises.
        iii. There are no magic words that create a condition, but, in light of the preference for promises, one ought to use certain words to clearly indicate a condition is created lest the court find a promise.
    b. Second, and more theoretically, promises are abstract statements about what will occur, while conditions designate specific obligations upon the occurrence of specified events.
        i. If the obligee shall not X, then there is probably a promise: the language doesn't say, "if the promisee does X, then some forfeiture Y."
        ii. If the obligee shall be entitled to X, unless Y, then there probably is a condition: the language doesn't state a promise because it doesn't speak in abstract terms as to what will occur at the behest of the parties.
    c. Third, and again more theoretically, conditions often concern the party whom a duty is owed to (vis-à-vis the party owing the duty).
        i. If X, then the *obligee* shall inform the *obligor* of X within 2 days: the provision imposes a duty of performance or forbearance from the obligee, not the obligor.
        ii. X shall not do Y: concerns only X and not Y; applies only to one party in an abstract form.
    d. Third, often the language of conditions mentions the duties of both parties if something happens.
        i. If X, then obligor shall have no duty unless the obligee informs the obligor of X within 20 days.

ii. Should X not happen, then the obligor shall have no duty to perform for the obligee.
iii. In the event that X, then obligee shall Y—more abstract; more likely a promise.

e. Finally, a lot depends on the particular construction of the provision—the consequences of the provision if it's a condition vis-à-vis a promise, etc.
i. Courts will look to other parts of the agreement. If conditions appear more clearly elsewhere, then the court may decide, in light of the language used in other provisions, that a particular provision was a promise, even though by itself the provision looks like a condition. (Extra provision arguments abound).

e. Condition, Promise, or Neither?

i. Some provisions in contracts are neither promises nor conditions.
1. For instance, if A and B contract whereby A promise B that he will deliver goods on or about the time when C pays A, B can still sue A for breach of contract if C does not deliver.
a. A's promise to deliver goods to B on or about the time when C pays does not mean that A's duty is contingent on C's payment—the reference to C's payment provides merely the *timing* of A's duty to B.
b. However, if A and B contracted whereby A promised to deliver goods to B if and only if C delivered certain goods to A, then there is a condition in the A-B contract where A's duty arises only after C performs the condition.
2. The moral: Just because something looks like its contingent, it does not follow that it is. Words to the effect of "when, at the time of, or on the day that X" do not mean that if X never occurs there is no duty, unless the duty of performance is actually contingent on X occurring.
3. Ultimately, whether a particular provision constitutes a promise, condition, both, or neither is dependent on the intention of the parties when they formed the contract.
a. Essentially, imagine separating the parties and asking them: If contingency X occurs or fails to occur, what happens?
i. If both parties agree that both parties would still be bound, then there is no condition (and the parties have a promise as between themselves).
ii. If, however, one party would say that there is no duty of performance, should X occur or not occur, then X's occurrence may be a condition after all.
iii. Of course, if both parties agree that that X is a condition, then, despite whatever language, the court will conclude that X's occurrence is a condition (unless X serves as the consideration in the agreement—see waiver of conditions).
b. While there are no magic words that create conditions, courts will look to the manifest language of the agreement. Certain words more clearly indicate that X is a condition, words such as "if, then, provided that, contingent, unless, but, etc."

Brief Box 88: *Chirichella v. Erwin (1973).*
[D contracted with P to sell P D's house "on or about the time when his new house was completed." D did not accept his new house, and P sued for specific performance.]

A condition precedent has been defined as "a fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate pefromance of a promise arises." The question whether a stipulation in a contract constitutes a condition precedent is one dependent on the intent of the parties to be gathered from the words they have employed and, in case of ambiuity, after resort to the other permissible aids to interpretation. Words such as "if, provided that, as soon as, when, after, subject to,"

indicate a condition, though they are not required. Words that merely set a date or time in which settlement must occur do not condition settlement on whatever was supposed to happen on that date setting the time.

ii. If the parties wish to create a condition, they must clearly intend to do so by means of the language in the agreement.
    1. The law does not like conditions as much as promises, so ambiguity is typically resolved in favor of promises.
    2. It follows that between interpreting a provision as nothing or a condition, Courts may favor finding the provision was neither a condition nor a promise rather than creating conditions where it is less than clear they were intended by the parties at the time of contract formation.

f. Waiver of Conditions:

i. There are basically three ways courts can break up purported conditions. Courts can either: (1) find that the purported condition was not really a condition at all; (2) find that the promisor waived his right to non-performance upon non-occurrence of the condition; and (3) excuse the promisee for not performing the condition (by allowing promisee more time).

ii. The second of these ways—waiver of condition—occurs when the promisor voluntarily and intentionally, at least theoretically, renounces his right to non-performance upon non-occurrence of the condition.
    1. Essentially, the promisor promises to perform his contingent duty irrespective of whether the condition occurs.
    2. Reliance on the renouncement is not required, but frequently occurs.
    3. Further, additional consideration is not required, assuming the parties are not modifying the contract (more below).

iii. **Restatement (Second) of Contracts, §84**—Promise to Perform a Duty in Spite of Non-Occurrence of a Condition.
    1. Except as state in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless
        a. Occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or
        b. Uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.
    2. If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if
        a. The notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and
        b. Reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and
        c. The promise is not binding apart from the rule state in Subsection (1).

iv. **UCC, § 2-209**—Modification, Rescission and Waiver:
    1. An agreement modifying a contract within this Article needs no consideration to be binding.
    2. A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such as requirement on a form supplied by the merchant must be separately signed by the other party.

3. The requirements of the statute of frauds section of this Article (2-201) must be satisfied if the contact as modified is within its provisions.
4. Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
5. A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other part that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Brief Box 89: *Clark v. West (1908).*
[P promised D that P would write books for D and D agreed to pay P $2 per page if P did not drink while writing or $6 per page if P did drink while writing. P alleged waiver in his complaint to recover the additional $4 per page.]
P's agreement not to drink was a condition. The subject-matter of the contract was the writing of books. P's agreement not to drink was the means to the end consideration. When viewed in this light, the provision whereby Clark was to be paid less for drinking while writing is a condition, not a modification based on an altering of the consideration. If West waived Clark's forfeiture, then West cannot insist upon the forfeiture which his waiver was intended to annihilate. A waiver is the intentional relinquishment of a known contractual right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon. The law of waiver concerns defeating forfeitures; it requires no consideration, nor reliance, nor detriment. The facts as alleged state that long before Clark completed the manuscript of the first book West had full knowledge of Clark's drinking, and that with such knowledge West repeatedly avowed and represented that Clark would receive $6 per page.

v. Liquidated Damages Clause?
   1. Is the purported condition in West really a liquidated damages clause?
      a. Is West really saying that if Clark drank than its damages would be about $4 per page?
      b. If so, and Clark would want to make the argument, then the clause is subject to the law of liquidated damages, which requires (1) uncertainty of harm in the event of breach and (2) a reasonable estimation of anticipated damages in light of the uncertainty of harm in the event of breach.
   2. West seems to satisfy the uncertainty requirement, but what about the reasonable estimation requirement?
      a. West is requiring Clark to give up $4 per page for drinking during the course of performance, which is more than 50% of the total contract value.
      b. Further, and more importantly, the $4 loss per page occurs if Clark has a mere sip of alcohol during the course of performance.
         i. Recall Kemble v. Farren, where the Court held that the fact that a performer's failure to show up to a single performance over 12 months of daily performances could have cost him the entire contents of the liquidated damages clause rendered the clause unreasonable.
   3. Regardless, when considering conditions, always see if you can turn them into liquidated damages clauses and attack them as unreasonable or as penalty clauses in disguise.

vi. Means and Ends:
   1. Conditions can be waived. Consideration cannot be waived.
      a. If something is the end of the bargain, that is, it serves the basis of the bargain or the reason why the parties contracted in the first place, then it is consideration (as an end of the contract) and not a condition (as a means to the end of the contract.)

b. Parties can waive the particular means to the end of the contract without additional consideration, but they cannot alter the end of the contract without additional consideration.
    i. If it were otherwise, then parties could get around the consideration requirement altogether, simply by waiving their right to receive consideration.
c. It is therefore essential to distinguish between the ends and means of the consideration when considering whether the alleged waiver was something that could be waived.
d. If the end has not been breached either way, then the provision was a condition and not consideration—the conditioned means, though perhaps important, was subject to waiver.

vii. Voluntariness requirement.
1. Technically, the doctrine of waiver requires that the promisor intend to discharge his right to non-performance upon non-occurrence of the promisee's breach.
2. However, in practice, many courts will call a waiver that which the promisor should have known better than to represent to the promisee.
    a. If the promisor thorough words or conduct reasonably should have known that the promisee would have believed he did not have to perform the condition, then the courts may find a waiver.
    b. Of course, if the promisee relied on the promisor's manifestations as saying that the promisee need not perform the condition to receive compensation, then the promisee could always sue under a theory of estoppel.
    c. The essential difference between waiver and estoppel is that waiver requires voluntariness but not reliance, while estoppel does not require voluntariness but does require reliance.

viii. Permanence of Waivers:
1. At Common Law, once a promisor waived his right of non-performance in the event of non-occurrence, the promisor could not repudiate his waiver no matter what—waivers were permanent.
2. Today, the Restatement and the UCC recognize that waivers may be repudiated, thereby reinstating the condition, provided certain conditions are adhered to.
    a. To repudiate a waiver under the Restatement, the promisor must notify the promisee that he requires the occurrence of the condition such that the condition could still reasonably occur before the promisor's duty of performance would be due.
        i. Essentially, the promisor cannot waive a condition, then insist on its occurrence unless the condition could occur within a reasonable time of the time when the promisor's duty of performance would be due.
        ii. Further, if the promisee substantially relies on not having to have the condition occur to receive the promisor's performance, then the promisor cannot repudiate his waiver.
    b. Under the UCC, the promisor can repudiate his waiver if he can retract it within a reasonable time of the condition's required satisfaction and only if repudiation of the waiver is not unjust.

g. Excuse of Condition:

i. The final way courts will sometimes prevent forfeitures upon non-occurrence of conditions is to excuse the forfeiture by invoking its equity powers.
ii. For an excuse, the promisee must argue that he would suffer a disproportionate forfeiture compared to his fault for non-occurrence of the condition and that the promisor would not be prejudiced by an extension to perform the condition.

iii. **Restatement (Second) of Contracts, §229**—Excuse of a Condition to Avoid Forfeiture: To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

Brief Box 90: *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc. (1977).*
[D was assigned a lease and did not realize that his option expired if not renewed six months prior to the termination of the original lease. D did not notify P of acceptance within the required time but wished to renew the lease.]

When a tenant in possession under an existing lease has neglected to exercise an option to renew, he might suffer a forfeiture if he has made valuable improvements on the property. Since Chelsea invested $55,000 during its tenancy, it would suffer a considerable loss. There would be a forfeiture and the gravity of the loss is certainly out of all proportion to the gravity of the fault. Nonetheless, if JNA would be prejudiced by allowing an extension of the option period, then equity would not allow such an extension. If there were evidence that Chelsea tried to exploit a fluctuating market and then sought to invoke the equity powers of the courts to mitigate its speculation, then the court would not grant equitable relief.

1. The dissenting opinion in Chelsea found that options cannot be extended by courts of equity, even if the failure to accept the option caused a forfeiture. For the dissent, Courts ought to favor a bright-line rule whereby acceptance of an option is a strict liability affair, especially for sophisticated contractors such as defendants in J.N.A.
2. The court remanded on the issue of whether J.N.A would suffer prejudice by an extension of the option contract.
    a. When considering whether to excuse the non-occurrence of a condition, the court will look to the impact on the promisor.
    b. That is, the unfairness to the promisor is compared with the degree of forfeiture suffered by the promisee.

IV. Breach:

a. Anticipatory Repudiation:

i. Sometimes parties know that they will be unable to tender a performance at the time performance is due.
    1. When one party notifies the other that it will be unable or unwilling to perform, that party gives the other party an anticipatory repudiation.
    2. The party anticipates non-performance whenever contract performance is due.
    3. Whether or not an anticipatory repudiation allows the other party to cancel the contract entirely depends on whether the anticipatory repudiation materially breaches their agreement or if there is a constructive condition that, but for what is anticipatorily repudiated, the other party does not have a duty perform his side of the arrangement.
        a. When a party can cancel a contract is discussed in more detail below.

b. For now, remember that anticipatory repudiation does not necessarily mean the other party can cancel the contract.

ii. If a party notifies the other party that it will be unable or unwilling to tender a performance when performance is due, then the other party need not wait to sue—he can immediately sue the anticipating party.

Brief Box 91: *Albert Hochster v. Edgar De La Tour (1853).*
[P and D contracted whereby P would serve D on a tour. D told P ahead of time that D did not require P's services. P subsequently acquired employment with another party that started one month later than his employment with D was supposed to start. P sought to sue D prior to the actual date of employment.]

There is a relationship between the parties upon the execution of a contract for a future performance; the parties *impliedly promise* that in the meantime neither will do anything to the prejudice of the other inconsistent with their relation to one another. More importantly, if the plaintiff has no remedy for breach unless he treats the contract as in force, then until the date of performance the plaintiff must honor the agreement, which means that, even though the defendant repudiated, the plaintiff would be liable for breach if he was unable to tender a performance because he relied on the anticipatory repudiation. The plaintiff should be at liberty to mitigate his damages rather than remain idle and even prepare for a contract he knows will not be honored. If the defendant renounces the contract, then he cannot object that faith is given to his assertions.

1. The holding in Albert denotes three important reasons why anticipatory repudiation allows the other party to sue.
    a. First, the court finds an implied promise not to act inconsistently with the agreement so as not to be able to perform on the date of performance.
        i. In a sense, the party suing for breach of this implied promise to prepare for performance.
        ii. A notice of future breach is a breach of an implied obligation between the parties to perform because performance requires preparation.
    b. Second, the court finds that if the other party cannot claim breach after receiving notice of future breach, then the other party must remain ready, willing, and able to tender performance when the performance is due.
        i. If the other party must remain able to tender a performance, then he must prepare to perform or not act inconsistent with performance, even though he knows the other side is simply going to breach.
            1. What if the repudiating side cannot satisfy a judgment?
            2. What if the other party wants to secure alternative employment?
            3. The other party has a duty to mitigate damages—can he satisfy this duty by standing still?
    c. Finally, the court recognizes the public policy in allowing another party to secure alternative arrangements rather than sit idle and waste his time.

iii. Finer points of anticipatory repudiation:
    1. The aggrieved party need not conform to the anticipatory repudiation.
        a. The aggrieved party can ignore the repudiation and await performance.
        b. If there is no chance that the other party would perform, then it seems difficult to determine why the aggrieved party would choose to wait, but if the other party merely doubts its performance and the aggrieved party wishes to see if performance is actually possible, then the aggrieved party may wish to wait and see and sue later. Almost all of the time, performance is preferable to breach.

c. The UCC still allows the aggrieved party to completely ignore anticipatory repudiation.
d. Further, for purposes of the statute of limitations, the aggrieved party need not sue until his claim arises, which is on the date of performance.

2. The repudiating party can retract his repudiation in some circumstances, but not all.
   a. Generally, if the repudiating party can withdraw his repudiation without hindering the other party, who may have relied on his repudiation, then the repudiating party can do so.
   b. If, however, the aggrieved party has materially changed his position such that he is no longer able to perform or performance would require an unjust burden on the him, then the repudiating party cannot withdraw his repudiation.
   c. The idea is that we do not want one party to take advantage of the other party by claiming breach, then withdrawing repudiating, then suing the other party because the other party relied on his very repudiation.

iv. A Special Note on Tender:
   1. Generally, P must show that he was ready, able and willing to tender a performance of his side of the agreement to guarantee a breach if the other party does not perform.
      a. However, if promises are completely independent, then P does not have to show a tender—either party can sue the other without respect to his own performance.
      b. The tender rule exists to protect non-breaching parties from the other side saying that neither party was able to perform, that is, that both parties breached the contract.
   2. Demand: Show me the money!
      a. A demand for tender shows tender and ready and to prevent unnecessary litigation.
      b. Generally, a party must demand performance from the other party prior to claiming breach.
         i. If it were otherwise, the breaching party may only have forgotten about a contractual obligation, even though he was completely willing to perform it.
         ii. Of course, if it is so obvious that the other party is unable to perform, the non-breaching party need not make a demand for performance.

v. **UCC, § 2-610—Anticipatory Repudiation**:
   When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
      a. for a commercially reasonable time await performance by the repudiating party, or
      b. resort to any remedy for breach (section 2-703 or section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
      c. in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

vi. **UCC, § 2-611—Retraction of Anticipatory Repudiation**:
   1. Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.
   2. Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

3. Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

b. Adequate Assurances of Performance:

i. Of course, sometimes the party anticipating a breach is the party who is worried about the other party's performance.
   1. If the doctrine of anticipatory breach stood alone, a soon-to-be aggrieved party would have no recourse against a soon-to-be breaching party if the breaching party did not inform the non-breaching party that it anticipated breaching.
   2. Accordingly, sometimes if one party suspects the other party will not be able to perform his contract, then that party can make a request for assurance of performance.
   3. If the potentially aggrieving party does not respond with an adequate assurance of performance, then the suspecting party can suspend his performance, unless he has already received the agreed return.

ii. Adequate assurances of performance are a useful tool, but also a risky one.
   1. If one party makes an illegitimate request for assurance, receives no assurance, and then stops his own performance, he himself is liable for breach!
   2. The trick with adequate assurances of performance requests is to make sure that you have a good reason for doubting the other party.
   3. The reason for doubting the other party need not come from the party itself—in fact, it rarely does.

iii. Requirements:
   1. Adequate assurance of performance requests require that the party requesting an assurance:
      a. Have reasonable grounds for insecurity.
         i. What constitutes reasonable grounds for insecurity is a question of fact.
         ii. Between merchants, usage of trade, course of dealings, and course of performance typically determine what constitutes reasonable ground.
      b. Make a *written* request for assurance.
      c. Make a request that specifically identifies the performance he is worried about, although he need not inform the other party of the source of his doubt.
      d. Does not seek to modify the contract as a condition for assurance—he cannot require the other party to speed up performance, pay before payment is due, etc.
   2. A failure to respect the requirements for adequate assurance requests means that the request is invalid, and if the requesting party relies on a lack of response in stopping its own performance, then the requesting party is in fact in breach!

Brief Box 92: *Scott v. Crown (1988).*
[P and D agreed to buy and sell wheat, respectively. D learned that P had some past financial problems, so D became concerned that P would not be able to pay for the wheat. D made a request for assurance of performance, which P refused to accommodate. The request was unwritten, did not specify what D was concerned about, and required P to pay for wheat before the contract required him to. Both P and D suspended performance.]

Whether Scott had reasonable grounds for insecurity is a question of fact. The trial court was not clearly erroneous in finding Scott was reasonably insecure about Crown's performance. However, there are serious problems with the timing, form, and content of

Scott's demand for assurances of performance within the meaning of UCC 2-609. First, UCC § 2-609 requires a written demand, which Scott did not issue. Moreover, the content of the alleged demand is deficient: Scott merely told Crown that he needed to "settle some issues"; he did not inform Crown that he demanded assurance based on his outside information. Finally, a demand for performance cannot be used to force a modification of a contract; payment was not due until after the completed performance.

3. That is, do not suspend performance, or tell the other party that you are going to suspend performance unless he meets your demand, unless you're absolutely sure that your demand is in writing, clear, and requests only performance of the contract as written!
4. Further, if one party has already received his return performance, he cannot suspend his return performance.
    a. This applies to contracts done in multiple stages.
    b. If A and B contract for two stages, and B performs stage-1, then A must pay for stage-1. A cannot refuse to pay B for stage-1, but, assuming he has reason to doubt stage-2, A can request assurance and suspend performance for stage-2.

iv. **UCC, § 2-609—Right to Adequate Assurance of Performance**:
1. A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
2. Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
3. Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
4. After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

c. Constructive Conditions and Breach:

i. Sometimes parties do not expressly contract for conditions, but the court will imply a condition if the one party does not perform its obligation.
1. The court constructs a condition as implied in law.
2. The effect of the condition is the same as a condition precedent—that is, one party's performance is a condition precedent to the other party's duty of immediate performance.
3. Of course, parties are always free to specify conditions, and courts will honor them if clear language is used. These are conditions in fact.
4. However, parties do not always use conditions, and when one party breaches, most people take it for granted that they do not have to perform their side of the bargain. Sometimes, they don't. The question is when.

ii. Constructive Conditions discharge a non-breaching party of a duty to perform when the other party has breached its agreement.
1. There are three types of conditions:
    a. Conditions precedent—where one party's duty of immediate performance does not arise until the occurrence of some event, usually one the other party performs.
    b. Conditions subsequent—where one party has a duty of immediate performance, but the occurrence of some event discharges that duty.

c. Conditions concurrent—where both parties have a duty of immediate performance at the same time; a mutual exchange.

2. Pertaining to concurrent conditions, if one party fails to perform its side of the bargain, then the other party is discharged from having to perform its own side, and the non-breaching party can sue the breaching party for damages.
3. At common law, performances were considered independent—that is, even if one party breached its side of the contract, the other party still had to perform (and it could sue the other side for damages later).
4. However, modern contract law is the opposite—promises are not considered independent, but dependent unless the language clearly indicates that regardless of the other party's performance there is still a duty to perform.

Brief Box 93: *Kingston v. Preston (1773).*
[P promised D that he would obtain financing to secure his purchase of D's business. P failed to secure such financing, and D refused to sell his business to P. P claimed that the duty to secure financing was independent, and that D's remedy was whatever damages there were for P's failure to secure finances, but that D must still sell his business.]

There are three kinds of covenants: (1) mutual and independent, where either party may recover damages from the other, irrespective of whether the one seeking damages has breached the contract; (2) conditional and dependent covenants, where one party's performance is not due until the other party performs; and (3) mutual conditions to be performed at the same time, where if one party tenders performance but the other does not, then the tendering party need not perform and can sue the non-tendering party. Whether a covenant is dependent or independent depends on the intent of the parties as to when their respective performances are due—either previously or simultaneously. In this case, it would be the greatest injustice if Kingston should prevail, for the essence of the agreement was that Preston should have security for the payment of the money due to him prior to surrendering his business. The order of performance for this contract mirrors (2): Preston's duty of performance did not arise until Kingston provided the relevant securities.

a. Accordingly, the court will sometimes find a condition precedent because it is obvious that the parties intended that one did not have a duty to perform unless the other also performed.
b. The default rule is that when the parties do not specify whether one's duty to perform is predicated on the other's duty to perform, then one party's duty is discharged if the other fails to tender its performance.
c. There is an implied dependency of conditions whenever performances are simultaneous, and if performances are not simultaneous and one party's performance takes time, then that party's duty of performance must occur first.
    i. A requirement that the parties perform simultaneously where their performances are to be exchanged under an exchange of promises offers both parties maximum security against disappointment of their expectations of a subsequent exchange of performances by allowing each party to defer his own performance until he has been assured that the other will perform—see §238.

iii. **Restatement (Second) of Contracts, § 234**—Order of Performance:

1. Where all or part of the performances to be exchanged under an exchange of promises *can be* rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.

2. Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

iv. **Restatement (Second) of Contracts, § 238**—Effect on Other's Duties on Failure to Perform:

Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.

d. Doctrine of Substantial Performance:

i. Some breaches discharge the other party's duty to perform; others do not.
   1. The question is which types of breaches allow the non-breaching party to not perform.
   2. The answer depends on whether the breach is under the UCC or the Restatement.
      a. For contracts not involving the transaction of goods, a breach by one party only discharges the duty of the other if that breach was material or substantial.
         i. Conversely, if one party performs substantially, but fails to render complete performance, then the other party's duty of performance is not discharged.
         ii. The question turns to what the damages for the non-breaching party are, but the non-breaching party must still perform.
         iii. The Restatement does not apply the perfect tender rule; rather, it applies the substantial performance rule.
      b. For contracts involving the transactions of goods, one party must make a perfect tender of the goods contracted-for, and an imperfect tender discharges the other's duty to accept the goods in some cases. (The UCC is discussed below.)

ii. If one party substantially performs, the law will not imply a condition precedent to the other party's duty to perform, even if the one party breached.
   1. That is, if A and B contract where A will build B a house using specific materials, but A uses nominally different materials, the B cannot say he has no duty to pay A. Rather, B must pay A less either (1) the cost of completion, or (2) the diminution in value to A.
   2. The law will not construct a condition that will result in an inappropriate forfeiture, so if one substantially performs, the other must perform as well but he can seek damages.

Brief Box 94: *Jacob & Youngs v. Kent (1921).*
[P contracted with D whereby P would build a house for D using a particular name-brand of pipe. P inadvertently used a nominally different type of pipe. Replacing the pipe would require destroying the house and building a new.]

Courts never say that one who makes a contract fills the measure of his duty by less than full performance, but a trivial and innocent omission will not subject a party to forfeiture. Justice and the intention of the breaching party instruct us which class to place implied conditions in; there is no bright-line rule for the administration of justice. Of course, we will not tolerate substitution if it frustrates the purpose of the contract, since there is no general license to substitute. When deciding whether to imply an independent condition, we consider the purpose of the contract, the desires to be gratified, the excuse for deviation, and the cruelty of strict adherence. Of course, parties are free to expressly provide that provisions are conditions precedent to recovery. However, where they have not so expressly provided, we will not imply a condition resulting in a disproportionate

forfeiture, unless the deviation was willful. On damages for construction contracts, the owner is entitled to recover the cost of completion, unless the cost of completion is grossly disproportionate to the diminution in value. Here we find that the difference between the pipe contracted for and the pipe used does not justify tearing down an entire building.

3. However, the court will typically enforce true conditions—conditions where the parties have made it clear that one party's performance is contingent on another's.
    a. Parties are generally free to make hard conditions.
    b. Whether something is construed as a condition or not depends on the language of the covenant, the specified order of performances, and any relevant policy implications.
        i. If the language is abstract, then there probably isn't a condition.
            1. "A shall do X. B shall do Y."
                a. This covenant does not talk about the relationship between the parties upon the non-occurrence of X or Y.
                b. The language is abstract. We do not know what happens if A does not do X or B does not do Y.
                c. The court would imply that if B does not do Y then A does not have to do X, but that's an implied condition.
            2. "A shall do X, and if A fails to do X, then B shall not have to do Y."
                a. this covenant talks about the relationship between the parties upon the non-occurrence of X, and it specifies that B does not have to do Y if not-X.
                b. The language is not abstract.
                c. Here the court would not need to imply anything.
        ii. If the covenant is a condition, but is a hidden liquidated damages clause, then the court may not enforce it as a condition (with a forfeiture upon non-occurrence).
            1. "A shall lay 1000 feet of pipe, and if A lays 999 feet or less, then B shall have no duty to pay A anything."
                a. This is clearly a liquidated damages clause in disguise, an invalid one at that because it is a penalty clause.
                b. Accordingly, the court may not construe it as a true condition. B will probably be limited to his damages for the one foot of pipe not laid.
            2. "A shall lay 1000 feet of pipe, and if A lays 200 or less feet, then B has no duty to pay A anything."
                a. A court is much more likely to uphold this condition because it does not seem like a forfeiture.
                b. Perhaps anything less than 200 feet is completely useless to B and will require starting over completely.
                c. This is not a penalty clause, all things being equal.
        iii. One can always argue that construing language as a condition violates public policy.
        iv. One can try to make a claim for restitution off the contract, even if the contract had a condition specifying a forfeiture.
            1. "A shall lay 100 feet of pipe, and if A lays 99 feet or less, then B shall have no duty to pay A anything."

2. Assuming the condition does not violate public policy, A could still argue that A would be unjustly enriched if allowed to keep 99 feet of pipe for nothing.
3. Courts split on whether parties can make a restitution claim off the contract if their claim was conditioned on the contract.
    a. Some courts hold that even if a party suffers a forfeiture due to the non-occurrence of some event, the party can still claim unjust enrichment and recover the reasonable value of his performance.
    b. Other courts find no such unjust enrichment, finding that the forfeiting party assumed the risk of forfeiture on the contract.

4. Generally, courts will not allow the doctrine of substantial performance to protect a breaching party who willfully breaches the contract.
    a. Willful probably means more than intentional; willful probably means something like "dishonestly, fraudulently, or manipulatively."
    b. That is, if A breaches to take advantage of B, thereby making B worse off, then, even if A substantially performed despite his breach, A will be made to render a perfect tender before B has any duty to pay him.
5. Damages: Recall Restatement (Second) of Contracts, § 348: In construction contracts, when performance is substantial but incomplete, then the remedy for damages is the cost of completion, unless the cost of completion grossly outweighs the probable difference in value, in which case the proper remedy is the diminution in value.

e. Material Breach:

i. Material breaches are all those breaches which are not insubstantial breaches.
    1. That is, the breach is so significant as to warrant the non-breaching party to cancel his performance and sue the breaching party for damages.
    2. If the breach is not material, then the other party must still perform and sue for damages later.
        a. There is always some risk in stopping performance—one can never be sure that the court will interpret the other party's breach as being material.
        b. If you stop performance and the other party's breach is immaterial, then your breach may be material, and your own ass may be on the line.
        c. Parties can theoretically contract for what constitutes a material breach by creating careful conditions—which the court then reviews!
        d. If one party breaches and it is unclear as to whether the breach is material, the non-breaching party can sue for a declaratory judgment before stopping its performance.
    3. Whether a breach is material depends on various factors.

ii. Restatement (Second) of Contracts, § 241—Circumstances In Determining Whether Breach is Significant (Material):
    1. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
        a. the extent to which the injured party will be deprived of the benefit which he reasonably expected;
        b. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
        c. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

d. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
e. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Brief Box 95: *Lane Enterprises v. L. B. Foster (1979).*
[P promised to coat bridge components for D in two stages. After significant problems in Stage-1, D refused to pay P 5% of the total contract price unless P issued an assurance of performance for Stage-2. P refused to issue such a performance unless D paid for Stage-1. D did not pay P what was owed him—i.e., the remaining 5% unpaid price for Stage-1.]

Contracts remain effective even in the face of non-material breaches. Whether a breach is material is a question of degree to be decided by weighing the consequences in the actual custom of men in the performance of contracts similar to the one that is involved in the specific case. In this case, Foster withheld only 5% of the contract price. The ratio of performance to breach is essential; the greater the performance, the more a party must breach. Foster's breach was thus immaterial. However, Foster relied on Lane to complete the Lane Agreement lest Foster breach the Hammond Agreement. Foster had reasonable ground for insecurity, and Lane materially breached by not responding to his request for assurance. Hence, Lane is liable to Foster for not rendering a complete performance.

2. In Lane, D breached its contract to pay P, but that breach was not material, so P still had a duty to perform the rest of the contract.
    a. Since P still had a duty to perform the rest of the contract, and since D had reasonable grounds to demand assurance, P had to issue assurance within a reasonable time.
    b. Since P did not issue assurance within a reasonable time, P materially breached the agreement with D—a failure to respond to a legitimate demand for assurance constitutes a material breach.
    c. Hence, P owed D the cost of cover less the cost of D's immaterial breach.

iii. Special Note on Installment Contracts:
1. An installment contract is one where performance is divided up within an agreement itself. Often, parties refer to the parts as "stages."
2. In their purest form, installment contracts are explicit; however, sometimes courts will divide up a contract in order to prevent a forfeiture.
3. In an installment contract, breach as to one of the parts constitutes grounds for material breach as to the whole contract—i.e., the remaining parts—if and only if the particular installment breached was a material stage when compared to the aggregate of all installments.
    a. That is, in an installment contract, a breach of one installment must be material in light of the whole contract in order to discharge the other party's duty to perform the remaining stages.

f. The UCC and the Perfect Tender Rule:

i. In contracts for the transition of goods, the rules are slightly different.
1. The vendor or seller of the goods must make an perfect tender of the goods, or the buyer does not have to accept and pay for them.
    a. If the buyer accepts such goods, then the buyer can only revoke acceptance if a defect substantially impairs the value of the good transacted for.

i. In that case, the buyer must notify the seller within a reasonable time of discovering the defect, and must allow the seller a chance to replace the defective good.
ii. If the goods are only moderately damaged, or slightly defective, then the buyer cannot revoke acceptance. The buyer's remedy is to sue for the difference in value.

2. If the buyer refuses to accept goods on the ground that they are defective for any reason, then the buyer's obligation is not automatically cancelled.
   a. The buyer must give the seller an opportunity to repair the damaged goods.
      i. If the seller's duty of performance has not lapsed, then the seller has an unqualified right to make the goods perfect yet. This is because the goods are not due yet under the contract.
      ii. If the seller's duty of performance has lapsed, then the seller may have an opportunity to repair the goods—i.e., an opportunity to cure the goods. A limited opportunity to cure the goods arises when:
         1. If the seller's time to perform has lapsed, and
         2. the seller reasonably thought the buyer would have accepted the goods, but the buyer didn't then
         3. the seller has a reasonable opportunity to cure the defects, which makes the buyer liable to pay for them if cured.
   b. Whether the goods are accepted or not, the buyer usually has the burden of proving the defect.
      i. Once a defect is established, the burden shifts to the defendant to prove that the goods were effectively cured.
      ii. If the seller cannot prove that he cured the goods so as to make a perfect tender, then the buyer may cancel the contract.
         1. Canceling a contract is akin to rescinding or nullifying the contract.

Brief Box 96: *Ramirez v. Autosport (1983).*
[P and D contracted for the purchase and sale of a motorhome. P did not accept the motorhome because there were various minor defect, including scratches. After some time, the motorhome was not repaired, and P sought rescission of the contract and damages.]

A consumer may reject non-conforming goods, for the seller is under a duty to make a perfect tender of the goods contracted for. The UCC mitigates the harshness of the perfect tender rule thorough its provisions for revocation of acceptance and cure. If the seller rejects the goods before acceptance, then the seller is afforded a chance to make the goods perfectly conforming; the fact that goods are nonconforming is not enough for the buyer to cancel. Revocation of acceptance is intended to provide the same relief as rescission, but that buyer can only cancel after rejection if seller does not make the goods perfectly conforming within a reasonable time. Once a buyer accepts goods, he has the burden of showing nonconformity. However, when the buyer rejects goods on ground of nonconformity, then the seller must prove he corrected the non-conformity. Should the seller fail to cure a defect after rejection, whether substantial or not, the balance shifts in favor of the buyer, who gains the right to cancel and seek damages.

3. The UCC maintains the perfect tender rule because:
   a. Unlike services, goods can be resold if the initial buyer does not accept them because of minor defects. That is, goods are not lost upon rejection.

b. Unlike services, requiring a perfect tender will not result in forfeiture and unjust enrichment—the seller can resell, and the buyer does not get anything of value if he rejects the goods (though he can sue for damages).

4. Yet, the UCC mitigates the harshness of the perfect tender rule further:
   a. Sellers are afforded a second chance to make a perfect tender before losing the sale.
   b. Once the buyer accepts the goods, he can only cancel the contract upon discovery of a defect that substantially impairs the value to him.

ii. **UCC, § 2-508—Cure by Seller of Improper Tender or Delivery; Replacement**:
   1. Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming deliver.
   2. Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

iii. **UCC, § 2-601—Buyer's Rights on Improper Delivery**:
Subject to the provision of this Article on breach in installment contracts (§ 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (§ 2-718 and § 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
   a. reject the whole; or
   b. accept the whole; or
   c. accept any commercial unit or units and reject the rest.

iv. **UCC, § 2-602—Manner and Effect of Rightful Rejection**:
   1. Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
   2. Subject to the provisions of the two following sections on rejected goods (§ 2-603 and § 2-604),
      a. after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
      b. if the buyer has before rejection taken physical possession of goods win which he does not have a security interest, he is under a duty after rejection to hold them with reasonable care a the seller's disposition for a time sufficient to permit the seller to remove them; but
      c. the buyer has no further obligations with regard to goods rightfully rejected.
   3. The seller's rights with respect to goods wrongfully rejected are governed y the provisions of this Article on Seller's remedies in general (§ 2-703).

v. **UCC, § 2-606—What Constitutes Acceptance of Goods**:
   1. Acceptance of goods occurs when the buyer
      a. after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
      b. fails to make an effective rejection under § 2-602, but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them or
      c. does any act inconsistent with the seller's ownership, but if such act is wrongful as against the seller it is an acceptance only if rarified by the seller.
   2. Acceptance of a party of any commercial nits is acceptance of that entire unit (but not, by itself, acceptance of any other units).

vi. **UCC, § 2-607—Effect of Acceptance; Notice of reach; Burden of Establishing Breach After Acceptance**:
   1. The buyer must pay at the contract rate for any goods accepted.
   2. Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.
   3. Where a tender has been accepted
      a. the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
   4. The burden is on the buyer to establish any breach with respect to the goods accepted.

vii. **UCC, § 2-608—Revocation of Acceptance in Whole or In Part**:
   1. The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:
      a. on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
      b. without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
   2. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
   3. A buyer who so revokes has the same rights and duties with regard to the goods as if he had rejected them.

viii. **UCC, § 2-711—Buyer's Remedies in General**:
   1. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiable revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract, the 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 for non-delivery as provided in § 2-712; or
      b. recover damages for non-delivery as provided in § 2-713.
   2. Where the seller fails to deliver or repudiates the buyer may also,
      a. if the goods have been identified recover them as provided in this Article (§ 2-502); or
      b. in a proper case obtain specific performance or replevy the goods as provided in this Article (§ 2-716).

ARTICLE VI: DEFENSES TO CONTRACTUAL OBLIGATIONS:

I. LACK OF CAPACITY:

a. Mental Incompetence:

i. Who can rescind?
   1. An adult who lacks the requisite mental capacity to contract can move to rescind the contract on the grounds of lack of capacity.
   2. An adult who possesses the minimum mental capacity to contract cannot move to rescind a contract, even if he contracts with a person who could otherwise rescind the contract on the ground of lack of capacity.
   3. Children, theoretically, could rescind on lack of mental capacity, but the law presumes minors not to have the capacity to contract.

ii. What is a lack of mental competence?
   1. A lack of mental capacity paradigmatically exists when an adult party did not understand his own actions or lacked the judgment to understand that he was contracting.
      a. That is, if a person is so mentally ill so as to not even understand that he is contracting, then that party can rescind the contract, provided that he did not ratify it after regaining his sanity.
      b. In modern times, however, it is rare to find a person so mentally disturbed that he does not understand what he is doing. Modern psychology focuses primarily on the motivations of behavior—a person can understand what he is doing, but be doing it out of concession to a mental illness.
   2. Accordingly, a lack of mental capacity may exist when a person is induced by a mental illness to enter into a contract that he would not have entered into "but for" his illness, even if he understood what he was doing and possessed the requisite judgment.
      a. Most jurisdictions recognize an rescission grounded on mental incompetence if the party can show that his illness "caused" (that is, induced) his contracting.
      b. Even though the person knew what they were doing, they would never have done it but for their illness.
         i. For example, suppose a person contracts to purchase 1000 lbs. of chocolate because she is convinced she is going to die the next day and wants to go out in some kind of chocolate orgy. As it turns out, she recently developed post-traumatic stress disorder after a car accident that took the life of her husband. She has no reason to think she will die, but she is convinced she will anyhow.
         ii. Provided that no chocolate has been delivered and that the seller knew of her condition, a court would likely allow her to void the contract. Of course, a court would also allow her to enforce the contract.
         iii. In the above example, the woman knew what she was doing—i.e., contracting for 100 lbs. of chocolate. She knew she would have to pay for the chocolate, and she knew that she normally could never each such a quantity of chocolate. She had the requisite judgment.
         iv. Nonetheless, her post-traumatic stress disorder compelled her to purchase the chocolate. She is not insane, but "but for" her illness, she never would have purchased the chocolate.

c. However, the defense of Mental Incompetence Notwithstanding Knowledge of Actions ("MINKA") is much more limited than is the defense of complete lack of judgment.

> **Brief Box 97**: *Faber v. Sweet-Style Manufacturing Corp. (1963).*
> [P had bipolar disorder, which caused him to enter into numerous land contracts. In particular, P insisted on near unprecedented rapidity in the erection of a drugstore. P was later institutionalize and wife tried to rescind the contract on his behalf.]
>
> If (1) the status quo cannot be restored, (2) the other party was unaware of the incompetence, and (3) the contract is fair and reasonable, then the court will not order a rescission. The only question is whether Faber was mentally incompetent. The law recognizes that a lack of understanding is not the only ground for lack of contractual capacity. In deciding whether a particular person meets such a standard, courts will consider (1) testimony from the person himself and psychologists, as well as (2) the objective behavior of the person. Because psychologists frequently disagree with each other, courts typically weigh the objective behavior of the person claiming incompetence more heavily. Applying this standard, it is clear that Faber understood what he was doing. However, the rapidity with which Faber obtained an architect, plans, laborers, and began digging on the Drugstore Lot prior to obtaining title to it, coupled with the rapidity of Faber's other real estate purchases and his complaint about his wife to his doctor, this court finds that "but for" Faber's illness, he would not have contracted to buy the Drugstore Lot.

d. In Faber, the court held that incompetence to contract also exists when a contract is entered into under the compulsion of a mental disease or disorder "but-for" which the contract would not have been made.
    i. The Restatement approach adopts this view of MINKA, but limits rescission to cases where the other party had reason to know of the person's mental illness.

iii. Basic Steps For Remedying Contract:
1. Assuming that there is a mental incompetence of some kind, and assuming that there is no legal difference between types of incompetence courts will still not always grant a rescission.
    a. If the other party can be returned to the status quo, then the court will probably grant a rescission.
    b. If the other party cannot be restored to the status quo, then the court will look at whether the other party knew of the person's incompetence.
        i. If the other party new of the person's incompetence, then the court will probably grant a rescission.
        ii. If the other party did not know of the person's incompetence, then the court will look at the contract itself.
        iii. If the contract is unfair in any way, then the court will probably order a rescission.
        iv. If the contract is fair, then the court will probably not order a rescission.
2. Accordingly, the court will probably order a rescission if (1) the other party can be restored to the status quo; or (2) the other party knew of the person's incompetence; or (3) the contract is unfair.
3. Conversely, the court will probably not order a rescission if (1) the other party cannot be restored to the status quo; and (2) the other party did not have knowledge of the person's incompetence; and (3) the contract is fair.

4. However, the Restatement approach ostensibly distinguishes between the types of mental incompetence, affording greater protection to a lack of judgment vis-à-vis an inducement by mental illness.

iv. **Restatement (Second) of Contracts, § 12—Capacity Required to Contract**:
   1. No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.
   2. A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is:
      a. Under guardianship, or
      b. an infant,
      c. or mentally ill or defective, or
      d. intoxicated.

v. **Restatement (Second) of Contracts, § 15—Mental Illness or Defect**:
   1. A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
      a. he is unable to understand in a reasonable nature and consequences of the transaction, or
      b. he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
   2. Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case, a court may grant relief as justice requires.

vi. <u>The Restatement Approach?</u>
   1. Under the Restatement approach, if a person lacks the requisite judgment so as to not understand the nature of a contract, then that person can unequivocally rescind the contract if the other party can be restored to the status quo (before contract formation).
      a. If the other party did not know about the person's incompetence, and if the contract was objectively fair, then the remedy for rescission is limited as justice requires.
      b. This is so because courts do not want to unjustly enrich an incompetent person at the expense of an innocent party.
      c. The Restatement approach to lack of knowledge or understanding mirrors the traditional common law approach.
   2. However, under the Restatement approach, a person can void a contract under MINKA only if (1) the other party had reason to know of the person's illness and (2) the person acted in an unreasonable manner.
      a. That is, if the other party did not have *reason* to know of the illness, then it appear that MINKA will not work to rescind the contract.
      b. However, it seems as if § 15(2) is a status quo test: can the other party be restored to its position prior to contract formation. If not, then the remedy is limited.
      c. Yet a strict reading of § 15(2) states that subsection (2) is contingent on the existence of a remedy in subsection (1) and subsection (1) allows a complete MINKA defense only if the other party had knowledge.
         i. Accordingly, the Restatement approach appears to adopt the view that in the absence of knowledge by the other party, a person cannot claim MINKA as a defense.
         ii. There is some room to argue under subsection (1) that a person traditionally asserting a MINKA defense acted "unreasonably," but it seems as if subsection (1) applies to the complete lack of knowledge standard, not MINKA.

3. Ultimately, the Restatement is unclear as to whether a person can claim MINKA as a full defense when the other party does not have knowledge of his illness.
    a. It is difficult, however, to see why the remedy for MINKA would differ from the remedy for a complete lack of knowledge or judgment.
    b. Nonetheless, some courts do hold that MINKA is not a defense if the other party does not have knowledge of the person's illness.

> **Brief Box 98**: *Ortelere v. Teachers' Retirement Board (1969).*
> [P's wife worked for 40 years in the school system. She designated him as the beneficiary of the remainder of her retirement account. P suffered a mental breakdown and went into a depression. She retired and changed her plan so as to get more money during her life and nothing after she died. P died 2 months later.]
>
> The Restatement recognizes that the old tests no longer explain the results. The avoidance of duties under an agreement entered into by those who have done so by reason of mental illness, but who have understanding, depends on balancing competing policy considerations. There must be stability in contractual relations and protection of the expectations of parties who bargain in good faith, but there must also be protection for persons who may understand the nature of their actions but who, due to mental illness, cannot control their conduct. Accordingly, there *should be relief only if the other party knew or was put on notice as to the contractor's mental illness*.

    c. The Ortelere court ostensibly limits the MINKA defense to cases where the other party had knowledge of the person's incompetence.

vii. Burdens of Proof:
1. The burden of proving incompetence is on the person claiming incompetence.
2. Once incompetence has been shown, however, the burden shifts to the other party to show that it was unaware of the illness and that the contract was still fair.

viii. Evidence:
1. Persons invoking the mental incompetence defense usually present three types of evidence.
    a. First, they present testimony from the allegedly incompetent person—if such evidence is available.
    b. Second, they present expert testimony that helps the court diagnose the person's illness, if any.
    c. Third, and most importantly, the court considers the person's objective behavior, especially the behavior surrounding the contract.

ix. Ratification:
1. Assuming a person lacks the capacity to contract because of mental incompetence, if the person later ratifies the contract after regaining legal competence, then the contract is no longer voidable.
2. Essentially, the person assents to the contract after the fact.

b. Infancy:

i. With a few exceptions, the law imputes to minors only the ability to incur voidable contractual duties.
1. The age of majority varies from jurisdiction to jurisdiction, though at common law it was 20-years-old.
2. Today, most jurisdictions hold that persons under the age of 18 do not have the ability to legally bind themselves.
3. Minors do have a limited ability to contract, for non-minors are bound by their contracts with minors. It is more precise to say that minors have the ability to contract but retain an ability to disaffirm their contracts.

ii. If an adult contracts with a minor, then the minor has a right to disaffirm the contract, regardless of whether the adult can be returned to the status quo, and regardless of whether the adult knew the minor was in fact a minor.
    1. Of course, if the minor commits an intentional tort of fraud, perhaps by lying about his age or producing fake ID, then the adult can seek damages for that tort, which compensates the adult with the possibility of punitive damages.
    2. If the minor is negligent with respect to goods or services, then the adult bears the entire loss—adults contract with minors at their own peril.
    3. Since the minor disaffirms the contract, the minor is put in the position he would have been in had the contract never been formed—i.e., he gets his money back, even if he consumed the goods or services.
    4. The law protects minors more so than those lacking mental competence—rescission for want of mental competence turns in part on whether the other party can be returned to the status quo.
    5. Even if the child's parent enters into a contract for the minor, the minor can disaffirm the contract upon reaching the age of majority.

iii. One exception to allowing a minor to disaffirm a contract is if the contract was for a necessity.
    1. What constitutes a necessity is usually a question of fact depending on the circumstances and the particular individual.
    2. If the adult can show that the minor contracted for a necessity, then the law allows the adult to enforce the contract, notwithstanding the minor's age.
        a. The courts reason that because the item is a true necessity, we want to encourage adults—or at least not discourage them—to provide it for the minors.
        b. By enforcing contracts for necessities, the minor has greater access to what he needs.

> **Brief Box 99**: *Webster Street Partnership v. Sheridan (1985).*
> [Webster contracted with Sheridan and his friend to rent an apartment to the boys in exchange for rent. The boys paid a deposit and the first month's rent, but did not pay the second month's rent. The boys could have moved back home, but wanted to see if they could make it on their own.]
>
> As a general rule, an infant does not have the capacity to contract, for public policy forbids allowing him to contract and adults to contract with him. However, the privilege of infancy will not enable an infant to escape liability for, *inter alia*, necessities; his contract is implied in law, and does not lie in his capacity to contract. The meaning of the term "necessaries" cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact. Here, the apartment, was not a necessary because the tenants both had the liberty of returning home at any time. The wisdom of the necessary rule is apparent when one considers that adults will refuse to contract with infants if they do so at their own peril. Because the parties stand as if no contract had been formed, the infants can recover everything they paid the other party (without suffering a loss due to damage, use, depreciation, or other diminution in value).

iv. **Restatement (Second) of Contracts, § 14—Infants**:
Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.

v. Sword vs. Shield:
    1. The details of whether a minor can disaffirm a contract vary widely from jurisdiction to jurisdiction.

2. Jurisdictions split on whether the lack of capacity due to minor status is only a defense (shield) or a ground for bringing an action (sword).
    a. All jurisdictions allow minors to use the defense as a shield—i.e., to ward off a suit for damages arising from a breach.
    b. Some jurisdictions do not allow minors to bring an action in their own right to recover the contract price for a good consumed.
        i. For instance, if A, a minor, contracts with B, a credit-card company, to pay for things purchased on his credit-card, then almost all courts will allow the minor out of the debt.
        ii. However, if A, a minor, pays B, an adult, for services, some courts will not allow the minor to consume the services and then sue B to get his money back.
3. The difference between using the infancy doctrine as a defense vis-à-vis a sword is that allowing a minor to sue the doctrine as a sword would technically allow all minors to recover the cost of everything they purchased until the age of majority.
    a. Can I see some ID for that watermelon? On policy grounds, courts do not want to require minors to have their parents buy everything for them, which is what allowing minors to recover for everything they purchased and consumed would do.
    b. Merchants do not want to lose kids a their customer base, and parents do not want to have to constantly escort their kids to the candy store, so to speak.
4. Accordingly, some jurisdictions limit a minor's ability to recover what he has already paid in an action grounded on lack of capacity. At common law, the doctrines of duress, misrepresentation, fraud, mistake, and infancy were swords as much as they were shields.

vi. The UCC adopts the common law rules for infancy, as well as for fraud, duress, estoppel, etc—§ 1-103.

vii. Ratification:
1. A person of the age of majority can ratify the contracts he made as a minor once he reaches the age of majority.
2. In some states, if the minor fails to give notices of disaffirmance within a reasonable time of having reached the age of majority, then the minor is deemed to have affirmed the contract.

viii. Exceptions in Statutes:
1. Of course, the infancy doctrine is subject to statutory revision.
2. If the legislature creates a right not recognized at common law, then the legislature is free to specify whether a parent can bind a child to that law.

> **Brief Box 100**: *Brooke Shields v. Gross (1983).*
> [Brooke Shield's mother consented to photographs of her daughter while nude in a tub. Brooke, aged 17, sought an injunction prohibiting the use of the photographs. A New York law created a right of privacy in photographs not recognized at common law, but limited that right such that if a parent consented to the photographing of a child, the child could not disaffirm the consent.]
> The legislature enacted the New Law, which recognize an action for invasion of privacy. The statute acts to restrict an advertiser's prior unrestrained common-law right to use another's photograph. While at common law an infant could disaffirm his written consent or the consent executed by another on his behalf, it is clear that the legislature may abrogate an infant's common-law right to disaffirm. The statute here is a derogation of the common law.

3. Essentially, the legislature is free to create rights and/or modify common law rights, an the courts will defer to the legislature.

II. Misrepresentation:

a. Innocent Misrepresentation:

i. Misrepresentation of fact is a defense to a contractual obligation, for which the claimant can seek rescission of the contract or, if intentionally made, damages.
   1. If innocently made, misrepresentation only allows for rescission; the claimant cannot seek damages for the innocent misrepresentation in most jurisdictions.
      a. Sometimes innocent misrepresentations are called "constructive frauds."
   2. However, if fraudulent—i.e., if intentionally made despite being known to be false—then the claimant can seek rescission of the contract or can affirm the contract and seek damages in tort for deceit.

ii. If a party makes a representation of fact, such that the party should reasonably expect the representation to induce the assent of the other party, then that representation, if later proved false, can constitute ground for rescission of the contract.
   1. The Elements:
      a. The party made a statement of fact; and
      b. The statement of fact was known to the party to induce the acceptance of the other party, and did in fact induce the other party; and
      c. The statement of fact later turned out to be incorrect, even though the party did not know it at the time it was made; and
      d. The other party was justified in relying on the statement of fact.
   2. Alternatively, when a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud or material misrepresentation, then the transaction is voidable as against the latter.
   3. The assertion must be material, in that it would likely induce a party to assent to the contract. Essentially, the misrepresentation must be substantial, not incidental or trivial.
   4. Some jurisdictions impose a duty to disclose known material defects, a rejection of the common law doctrine of caveat emptor.
      a. At Common Law, a party had no duty to disclose known defects to a buyer, provided that the buyer didn't ask whether the defects existed. That is, when the party was asked, it had to disclose, but the party did not have to offer up information.
      b. Today, some jurisdictions require a disclosure of material defects, even if the buyer never inquired as to their existence.

iii. There are few differences between a breach of warranty claim and a claim for misrepresentation, but there are some:
   1. A breach of warranty claim allows for expectation damages, but an intentional misrepresentation claim generally is a defense, which allows for rescission of the contract.
   2. A breach of warranty claim may concern future situations—i.e., the party making the warranty warrants the goods to last for a certain amount of time.
      a. However, a misrepresentation claim concerns a statement of fact about the goods only at the time the alleged statement was made.
      b. That is, a misrepresentation claim does not concern the future status of the world.
      c. There could be a misrepresentation of fact even if there is a disclaimer of all warranties: A could say to B that X is in perfect working order, but disclaim any warranties. If X was in fact in working order at the time A made the claim, then B cannot claim misrepresentation.

iv. The parol evidence rule does not prohibit evidence of fraud.
   1. Normally the parol evidence rule does not cover mere facts, but only covers agreements.
   2. That's true with merger clauses concerning fraud or misrepresentation claims too, but there is also a general exception to the parol evidence rule prohibiting evidence of fraud.

3. That is, the parol evidence rule cannot rule out evidence of fraud or misrepresentation, even if the parties "agreed" there was no defect in writing.

v. **Restatement (Second) of Contracts, § 159**—Misrepresentation Defined:
A misrepresentation is an assertion that is not in accord with the facts.

vi. **Restatement (Second) of Contracts, § 162**—When a Misrepresentation is Fraudulent or Material:
   1. A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
      a. Knows or believes that the confidence that he states or implies in the fact, or
      b. does not have the confidence that he states or implies in the truth of the assertion, or
      c. knows that he does not have the basis that he state or implies for the assertion.
   2. A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

vii. **Restatement (Second) of Contracts, § 164**—When a Misrepresentation makes a Contract Voidable:
   1. If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
   2. If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives values or relies materially on the transaction.

Brief Box 101: *Halpert v. Rosenthal (1970).*
[D was interested in buying P's house. D asked if there were any termites. P said "no." D contracted for the house, but later refused to accept it because termites were found.]

The distinction between a claim for damages for intentional deceit and a claim for rescission is well defined. Deceit is a tort action, and it requires some degree of culpability on the misrepresenter's part. A suit to rescind an agreement induced by fraud sounds in contract. It is this latter aspect of fraud that we are concerned with in this case. The majority of jurisdictions recognize that even an innocent misrepresentation constitutes grounds for rescission if the misrepresentation was material. A misrepresentation may be innocent, negligent, or known to be false. A misrepresentation becomes material when it becomes likely to affect the conduct of a reasonable man with reference to a transaction with another person. As between the speaker and the one who relies on his speech, the speaker must bear the loss—he is strictly liable for his words.

b. Misrepresentation of Opinion by Authority:

i. In general, misrepresentations about one's mere opinion are not misrepresentations of fact. A person cannot generally claim that another's assertion of opinion induced him to contract, for mere opinions are mere puffs, and not objective statements of fact about the real world.
   1. Nonetheless, there are some manifestations of opinions that count as misrepresentations.
   2. If the superior person's opinion is unqualified, it may constitute a misrepresentation whether it intentionally or unintentionally induces the other party to rely on it.

a. If the misrepresenting party is in a fiduciary relationship—i.e., lawyer/client, doctor/patient, trustee/beneficiary, etc.—with the person claiming misrepresentation, then even an opinion may count as a misrepresentation if the other person is justified in relying on it.

ii. **Restatement (Second) of Contracts, § 168**—Reliance on Assertions of Opinions:
   1. An assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity, or similar matters.
   2. If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion
      a. that the facts known to that person are not incompatible with his opinion, or
      b. that he knows facts sufficient to justify him in forming it.

iii. **Restatement (Second) of Contracts, § 169**—When Reliance on an Assertion of Opinion is Not Justified:
   To the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient:
      a. stands in such a relation of trust and confidence to the person whose opinion is asserted that the recipient is reasonable in relying on it, or
      b. reasonable believes that, as compared with himself, the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter, or
      c. is for some other special reason particularly susceptible to a misrepresentation of the type involved.

Brief Box 102: *Vokes v. Arthur Murray, Inc. (1968).*
[Davenport and his associates constantly assured Vokes that she had grace and poise; that she was rapidly improving and developing in her dancing skill; that the additional lessons would make her a beautiful dancer, capable of dancing with the most accomplished dancers; that she was rapidly progressing in the development of her dancing skill and gracefulness; etc. She was given aptitude tests for the ostensible purpose of determining the number of remaining hours of instructions needed by her from time to time. Davenport induced Vokes to buy over 2,000 hours of dance instruction. In fact, Vokes had never demonstrated any talent, and she could not even hear the beat.]

It is generally true that a misrepresentation must be one of fact rather than opinion to be actionable. However, when there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the parties do not in general deal at "arm's length" as we understand the phrase, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented, then rescission may be in order. It could be reasonably supposed that Davenport had superior knowledge as to whether plaintiff had dance potential and as to whether she was noticeably improving. Further, a jury could conclude that the flowery was to induce further lessons and was not honest or realistic. Even if defendants had no duty to disclose the truth, once they made a representation, they had an obligation to disclose the whole truth.

III. Duress:

a. In general:

i. A party who contracts with another party due to some improper threat can rescind the contract he was forced into.
   1. In general, duress involves a voluntary action that is considered involuntary because the actor was threatened by another party through no fault of its own.
   2. The easy cases of duress involve illegal threats of physical violence.
      a. If someone puts a gun to your head and tells you to deed your house to them, then there is no question you can rescind the deed.
      b. However, threats giving rise to a duress claim are not limited to threats to do illegal harms to the assenting party.
   3. According to the Restatement, an improper threat that causes a party to reluctantly agree to a contract allows that party to rescind the contract.
      a. The difficult question is what constitutes an improper threat.

ii. **Restatement (Second) of Contracts, § 174**—When Duress by Physical Compulsion Prevents Formation of a Contract:

   If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.

iii. **Restatement (Second) of Contracts, § 175**—When Duress by Threat Makes a Contract Voidable:
   1. If a party's manifestation of assent is induced by an improper threat by the other party that leave the victim no reasonable alternative, the contract is voidable by the victim.
   2. If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

iv. **Restatement (Second) of Contracts, § 176**—When a Threat is Improper:
   1. A threat is improper if:
      a. what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
      b. what is threatened is a criminal prosecution,
      c. what is threatened is the use of civil process and the threat is made in bad faith, or
      d. the threat s a breach of the duty of good faith and fair dealing under the contract with the recipient.
   2. A threat is improper if the resulting exchange is not on fair terms, and
      a. the threatened act would harm the recipient and would not significantly benefit the party making the threat.
      b. The effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
      c. what is threatened is otherwise a use of power for illegitimate ends.

b. Economic Duress—Preexisting Duty Rule Revisited:

i. In the discussion concerning consideration, we noted that additional contractual duties requires additional consideration.
   1. That is, if A and B contract to do X and A promises to B to do X and Y, then B must make a return promise inducing A to do Y, lest A not be legally bound to do Y.
      a. Of course, if B actually does Y, then B cannot get Y back—once something is delivered, it's transferred.

i. What's most important is that the party claiming duress can recover money already paid or any other performance rendered prior to the action in duress.
ii. Unlike the pre-existing duty rule, a claim for duress allows for rescission of the contract, which restores the parties to their original positions.
iii. Duress is a sword and a shield—you can raise it to rescind a contract and recover performance, or you can raise it as a defense to a action by the other party for breach.

b. Further, additional consideration is not required by the UCC, so unfair modifications in transactions in goods are handled exclusively by duress.

2. Many modern courts do not like the pre-existing duty rule because it is over inclusive—i.e., it prohibits some modifications we want to allow—and it is under inclusive—i.e., it does not prevent all modifications we do not want to allow.
   a. Some courts have abandoned the pre-existing duty rule in favor of relying on the theory of economic duress as a defense to additional contractual duties.
   b. Posner, for instance, thinks that all claims for want of consideration base on the pre-existing duty rule should be cases involving economic duress.
   c. The pre-existing duty rule muddles the concept of consideration and economic duress achieves the same end, albeit overtly.
3. Under the UCC, there is no pre-existing duty rule, but sometimes parties can get out of increased contractual obligations.
   a. The UCC uses the common law rules for duress, and almost all courts recognize a defense of economic duress.

ii. A claim for economic duress is a claim that:
1. The other party sought to impose an additional contractual duty,
2. the other party threatened to cancel or modify the contract unless the threatened party agreed to the modification;
3. the threatened party was forced to agree because it had an immediate need for the goods or services and could not effect cover in time; and
4. the threatened party's remedies at law were inadequate.

iii. There must be some special harm caused by the threat of breach, lest the threatened party be limited to an action for damages.
1. If A and B contract for the sale of a car at $5000, and B refuses to deliver the car unless A pays him an additional $100, then A can sue B for damages if A can buy another car.
   a. If there are no more cars like the one A contracted for, then A might get replevin for the particular car at the agreed upon price.
   b. If A agrees to pay the $100, then A can only claim economic duress if:
      i. A faced some irreparable harm from not paying the $100.
      ii. A had an immediate need for the car.
      iii. And, A could not effect cover to meet his immediate need.
   c. Essentially, we shouldn't expect to see to many successful claims for economic duress involving cars because there are relatively few cases involving irreparable harm and fungible goods.
2. If the party can effect cover in time, the party must effect cover in time; if the party consents to an increased price or some other obligation, then he cannot claim economic duress if he could have just sued for damages and recovered his loss.

Brief Box 103: *Austin Instruments v. Loral Corp. (1971).*
[P subcontracted with D to make radar parts. D had a contract with the government. P was not awarded a second contract, so P told D that D must pay P more money for the parts. D contacted 10 other manufacturers and could not effect cover. D reluctantly agreed, but did not pay P at the end. P sued for the increased money. D defended on ground of economic duress.]

Generally, a mere threat by one party to breach the contract by not delivering the required items is insufficient to establish economic duress. The threatened party must also not be able to effect cover in time and cannot have an adequate remedy at law. Loral feared losing its good-standing with the Government. Loral was unable to determine when other companies would be able to produce the components, so Loral was unsure as to how long an extension it required. Loral made sufficient efforts to effect cover in contacting 10 manufacturers it knew to produce satisfactory work. Loral's damages were inadequate at law because Loral lost its reputation as a reliable contractor.

3. The dissent in Austin claims that whether there was duress is a question of fact that the jury should be left to determine.
    a. Since the jury found that Loral could have effected cover, then Loral should lose.
4. The irreparable harm Loral claimed was its loss of reputation of being a good government contractor. If Loral did not deliver in time, then it would lose future contracts, and Loral could not have effected cover in time.
    a. Thus, Loral:
        i. responded to a threat of economic harm,
        ii. possessed an immediate need for the goods, the lack of which would result in
        iii. irreparable harm.
    b. The only problem with the majority's analysis is that it suggests Loral was entitled to a defense of duress as a matter of law when the jury seemed to think that it either could have effected cover or that Austin acted in good faith.

iv. Again, a mere threat to breach the contract unless there is an increased payment does not constitute economic duress if the threatened party could have recovered damages at law or if the threatened party could effect cover and sue later.

IV. Undue Influence:

a. In general:

i. A claim for undue influence is a claim that some other party interfered with the rational thought processes of the other person in such a way as to deprive that person of their rational judgment.
   1. There is no threat of harm from the party unduly influencing per se, but there is an increased pressure to assent to a contract.
   2. A claim for undue influence is not necessarily based on hostile pressure either—a person may assent to a will, for example, because she trusts the person asking her to sign.
   3. Undue influence does not involve a threat to do something wrongful, per se, but it often involves a threat of untoward consequences.
      a. The party unduly influencing the assenting party is not outside his legal rights, but threatens legal consequences and insists on assent to prevent them.

ii. Undue influence involves a *sliding scale*—the weakness of the assenting party is inversely proportional to the strength of the party persuading the other to sign.
   1. That is, the weaker the party assenting to the contract was, the less strong the influencing party must be to constitute undue influence.
   2. Conversely, the stronger the influencing party is, the less weak the party claiming undue influence needs to be.
   3. Most cases of undue influence involve a combination of the two, though it is theoretically possible to have someone so strong as to be able to unduly influence anyone or someone so weak so as to be unduly influenced by anyone.

iii. Undue influence is overpersuasion—normal persuasion, even high pressure sales, does not constitute undue influence.
   1. There is a danger with allowing any claim for undue influence, for the party claiming undue influence may merely be regretting the fact he assented to a bad deal.
   2. Courts are reluctant to let a party get out of a contract on ground of undue influence because a rescission on such grounds threatens all future contract.
   3. Accordingly, most claims for undue influence involve extreme cases, most of which have several or many of the following elements:
      a. discussion of the transaction at an **unusual or inappropriate time**;
      b. consummation of the transaction in an **unusual place**;
      c. insistent demand that the business be **finished at once**;
      d. extreme emphasis on **untoward consequences of delay**;
      e. the use of **multiple persuaders** by the dominant side against a single servient party;
      f. **absence of third-party advisers** to the servient party;
      g. statements that there is **no time to consult financial advisers or attorneys**.
   4. Undue influence is a problem with the contractual process, not necessarily a problem with the substance of the contract.
      a. That is, courts are not concerned with whether the contract was really good for the party claiming undue influence—autonomy of contract.
      b. Even if the party was made better off by the deal, courts will not allow a person to defend that the deal was better for person claiming undue influence
   5. There is such a thing as third-party undue influence: A can unduly influence B to contract with C.

a. However, provided C did not know of the undue influence, B can only rescind his agreement with C if C has not materially relied on the agreement.

iv. **Restatement (Second) of Contracts, § 177**—When Undue Influence Makes A Contract Voidable:

1. Undue influence is unfair persuasion of a party who is under the domination of the person exercise the persuasion or who by virtue of the relation between them is justified in assuming that such person will not act in a manner inconsistent with his welfare.
2. If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.
3. If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

Brief Box 104: *Odorizzi v. Bloomfield School District (1966).*
[P was arrested for homosexual activity. P's employer presented P with a resignation form, telling him that if he did not sign they would be forced to publicize the incident and he would never work again. P had just been released from jail, had spent 40 hours without sleep, and was presented with the resignation agreement the very day after his arrest.]

Undue influence is shorthand for persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment. The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. That is, the part charged took an unfair advantage of another's weakness of mind, or took a grossly oppressive and unfair advantage of another's necessities or distress. Further, undue influence may involve an application of excessive strength by a dominant subject against a servient object. Whether a person of subnormal capacities has been subjected to ordinary force or a person of normal capacities subjected to extraordinary force, the match is equally out of balance. If will has been overcome against judgment, consent may be rescinded. The difficulty lies in determining when the forces of persuasion have overflowed their normal banks and become oppressive flood waters. Mere second thoughts do not constitute grounds for rescission. The difference between legitimate persuasion and excessive pressure rests to a considerable extent in the manner in which the parties go about their business.

V. Unconscionability:

a. In General:

i. **Unconscionability** is an ***affirmative defense*** to a contractual obligation—defendants claim a contract is unconscionable, which requires an adequate pleading of facts to establish such a defense. Unconscionability is a claim that a contract is unenforceable because it is **extremely unreasonable** and the person assenting to it did not make a **meaningful assent** to the terms. In general, unconscionability is available only to **persons**, *not business entities*, and only in ***commercial transactions***. Business entities are presumed to not enter into unconscionable agreements.

ii. The idea behind the doctrine of unconscionability is to spare judges from mutilating other contractual doctrines just to prevent enforcement of an extremely unfair contract. Essentially, the judge is candid about the fact that he does not want to enforce the agreement because it violates justice, not because it violates some obscure part of a formalistic rule. The doctrine suggests an **ultimate judicial approval is required for contractual enforcement**. Nonetheless, such requirement, if indeed present, rarely presents a significant burden to those seeking to enforce a contract—**unconscionability defenses rarely work.**

b. Elements:

i. There are **two elements** to unconscionability, both of which the defendant must plead and prove. These two elements are "**procedural unconscionability**" and "**substantive unconscionability**."

1. ***Procedural unconscionability*** is where a defendant claims that he/she assented to the contract in an *extremely unfair way*—i.e., there was something wrong with contract formation. That is, the defendant assented to the contract due to some "**unfair surprise**" as to what was in the contract or an "**extreme unequal** bargaining power coupled with **extreme susceptibility**."

2. ***Substantive unconscionability*** is where a defendant claims that the contract is extremely unreasonable so as to create ***oppression*** of one party in the favor of the other party. There is an ***extreme unequal bargain***. In general, Courts do not consider the adequacy of consideration, so a defendant claiming substantive unconscionability needs to show why his/her assent was also improper—a mere bad deal, even an extremely bad deal, is insufficient to make out a defense of unconscionability.

3. In practice, unconscionability is a "catchall" defense that the court can use to ***invalidate a whole contract, or part of the contract***. When successful, the defense *doesn't conform well to rigid elements* because the idea behind unconscionability is *far* ***more equitable than legal***. There is nothing wrong with the contract per se—there was an offer, acceptance, and consideration—nonetheless, the court is refusing to enforce it on ground of unfairness.

ii. The **Restatement** and **UCC** both **recognize** unconscionability as a defense, but they do ***not provide specific elements*** or ***definitions***. In a sense, rigid elements would eliminate the purpose of the doctrine, for contracts that offended the judges sense of

justice that did not conform to the elements would result in the torturing of other contractual doctrines—the very purpose of unconscionability is to prevent such mutilations.

1. **Restatement (Second) of Contracts, § 208**—Unconscionable Contract or Term:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

2. **UCC, § 2-302—**Unconscionable Contract or Clause:
   (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may o limit the application of any unconscionable clause as to avoid an unconscionable result.
   (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

c. Example:

Brief Box 105: *Williams v. Walker-Thomas Furniture (1995).*
[P contracted with D to purchase various items of furniture over the years. P was on welfare when she purchased a stereo from D. The stereo contract contained an obscure clause, the effect of which was to allow D to repossess all items of furniture purchased over the years upon default until all such pieces had been completely paid for.]

Unconscionability has generally been recognized to include (1) an absence of meaningful choice on the part of one party together with (2) contract terms that are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. While one who signs an agreement assumes the risk of its terms, when a party of little bargaining power signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.

VI. Standardized Agreements:

a. In General:

i. A **standardized agreement** is a common agreement a merchant uses with many consumers. For example, the terms and conditions between a computer software manufacturer and a consumer form a standardized agreement, just as the terms and conditions on an airline ticket form one.

ii. **Standardized agreements** are **generally enforceable**, but they present some specialized problems of their own. Nonetheless, if an agreement was **(1) reasonably fair in light of the circumstances, (2) reasonably made aware to the customer, and (3) did not violate any overriding statutes or common law doctrines,** then the agreement is probably enforceable. To be sure, there is no "standardized agreement defense." **Contracts never need to be custom-tailored to be binding**. Ultimately, what's at stake is the form and substance of the agreement.

iii. **The mere fact that a party does not have a chance to bargain for the terms in the standardized agreement is immaterial**—many contracts are on a "take it or leave it basis."

b. Forum Selection Clauses:

i. One consequence of International Shoe was to greatly expand the number of jurisdictions a defendant was amenable to suit in. Prior to International Shoe, the defendant had to either consent to suit or be physically present in the state lest the court have no personal jurisdiction over the defendant. After International Shoe, many large companies that were foreseeably amenable to suit in many jurisdictions inserted forum selection clauses, which limited the number of forums it could be sued in by express agreement. **The clauses are generally enforceable**.

ii. The ultimate inquiry is probably whether the forum selection clause was **reasonable**--**will it effectively deny most people** of a legal remedy, ***did the company have some reason for limiting its amenability to suit*** other than trying to dodge suit altogether, etc.

Brief Box 106: *Carnival Cruise Lines v. Shute (1991).*
[P was injured on D's ship. On the ticket was a notice that all suits would be held, if at all, in Florida, where D was based. P lived in Washington and could not travel to Florida due to her injury on D's boat.]

Common sense indicates that the Forum Selection Clause was not negotiable and that an individual purchasing the ticket will not have bargaining parity with Carnival. However, we must account for the realities of form passage contracts. We do not accept that a form ticket is never enforceable simply because it is not the subject of bargaining. The cruise line has a special interest in (1) controlling the number of jurisdictions it is subject to suit in, (2) thus saving the parties and courts any expense as to determining where claims arising from the contract would be litigated. Finally, (3) the passengers pay less for the ticket as a result of a single forum for litigation. True, forum-selection clauses are subject to judicial scrutiny for *fundamental fairness*, but Carnival did not set Florida as the forum to discourage passengers from suing: Carnival has its principal place of business in Florida and serves many passengers from Florida.

c. Modern Consumerism:

i. Unfortunately, most contract doctrines of offer and acceptance were promulgated at a time when writing a letter was a significant technological achievement. Today, these doctrines present difficult problems in light of the new technologies modern industrialized societies have embraced.

ii. Suppose A, a consumer, calls B, a computer manufacturer, and orders a computer. B ships A the computer along with some terms contained in the box. The terms provide that A has 30-days to return the computer if he does not accept the terms. A opens the box and sees the terms but disregards them. Do the terms bind A and B? If so, when?

1. **Whether or not the terms bind A or B turns on whether the A-B contract was formed when (1)** *A placed the order with B over the telephone*, **(2)** A *received the box and noticed the terms*, or **(3)** *the expiration period for A to reject the terms lapsed*. There is a potential **"battle of the forms"** in the above problem.

2. Recall that **UCC § 2-207** provides that terms sent along with acceptance of an offer are "proposals," hence not part of an agreement between a merchant and a consumer. Section 2-207 applies to two types of battles of the forms: (1) where the parties use two different forms; (2) where one party makes an offer and the other accepts with additional or different terms. In both situations, courts are frequently turning to the "knockout rule," which simply eliminates terms inconsistent with the initial agreement or offer automatically. **Outside the UCC, additional terms serve as rejection of the offer and as counteroffers.**

3. Some courts find that if there is an **order** made over the telephone, the **offer** is the sending of the product and the **acceptance occurs upon receipt** of the product **and acceptance or rejection of the terms**—there is a battle of the forms because acceptance was sent with other terms. Other courts find that the offer and acceptance are made on the phone, so additional terms are irrelevant. Still other courts will find no battle of the forms because the order is not an offer, but an invitation for the company to make an offer (which it does with the terms when it ships the product), though this seems the least plausible interpretation under traditional doctrines.

4. The solution most-likely lies in some form of **statutory consumer la**w. In their purest form, traditional common law doctrines of offer and acceptance seem to suggest that there is a contract on the telephone. However, saying that the offer occurs on the phone would force manufacturers and consumers to explain the terms of the agreement over the telephone prior to shipment, which slows down contracts and provides for much unnecessary waste. Indeed, there have been several attempts to promulgate a new doctrine for such transactions—consider UCITA. Courts are reluctant to impose heavy burdens on internet and telephonic commerce, leading many to conclude that contracts are not formed until receipt and acceptance of the product. **Commercial necessity** influences some courts to stretch the limits of contract doctrines.

Brief Box 107: *Hill v. Gateway 2000 (1997).*
[P ordered a computer from D over the telephone. D shipped the computer, along with several terms and conditions. P was free to reject the terms and conditions and return the product within 30 of receipt. P refused to do so. One of the terms was an arbitration clause, which D sought to enforce.]
Easterbrook, J.:
Although purchasing is one way to contract, it is not the only way. A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. Cashiers cannot be expected to read legal documents to customers before ringing up sales. Writing the terms and including the writing in the shipping materials makes sense for both parties. This is not a battle-of-the-forms because there was only one form: there was no prior agreement with subsequent terms added to it. Shoppers have a way to discover the warranties, if any, on a product before purchasing, and the law requires Gateway to disclose its warranties to a customer upon request and prior to purchase.

VII. Mistake:

a. Bilateral Mistake:

i. **Bilateral mistake** is an ***affirmative defense*** where one party claims that **at the time of contract formation both parties made a mistake** contrary to some **basic assumption** on which the contract was made. If successfully proved, a bilateral mistake excuses **both** parties from performance. Mistakes differ from misunderstandings: Misunderstandings (as illustrated by the "Peerless" case) concern a failure of the parties to refer to the same thing when contracting—two different ships; however, mistakes concern a failure of both parties to recognize some aspect of the same thing—one ship, but with three, not four masts. **Bilateral mistake** allows for replevin, for **it undoes** even a **completed transaction**.

ii. **Traditionally, only mistakes that went to the subject-matter of the contract constituted grounds for rescission.** If a mistake *only* went to the **quality** or **accident** of the thing contracted for, then the mistake did *not* justify rescission. *Distinguishing* between a *quality* of the same thing and a completely different subject-matter involves metaphysical analysis, which is inherently difficult. Is a stone that thought to be a Topaz that was really a diamond of a different quality or does a Topaz for an entirely different subject-matter of the contract?

1. Nonetheless, courts often used the subject-matter/mere-quality distinction.

Brief Box 108: *Sherwood v. Walker (1887).*
[P and D contracted for "Rose the 2nd of Aberlone," thinking she was barren and could only be used for meat. It later turned out that Rose was in fact pregnant. Her value was thus about 10 times what the parties thought at the time of formation.

It is well settled that a party who has assented to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement. Of

course, when there is only a difference in some quality or accident, even though the mistake was the motivating factor to one of the parties, the contract remains binding. In this case, the parties would not have made the contract if the cow were a breeder, for her value was nearly ten times that of a non-breeder. A barren cow is of a sufficiently different quality than a breeder.

2. Even the dissent thought that a barren cow was of a different subject-matter than a cow for beef. The dissent argued, however, that P disagreed with D that the cow would not breed. A mere disagreement as to the true subject matter does not constitute ground for rescission if one party turns out to be right.

Brief Box 109: *Wood v. Boynton (1885).*
[P found a small stone. P took the stone to D's jewelry shop. D told P he did not know what it was, but offered to buy it from P. P sold the stone to D, admitting she did not know what it was.]

The only question in this case is whether there was anything in the contract that entitled the vendor to rescind the sale and so revest the title in her. There are only two reasons admitting of such a rescission: (1) where the vendee was guilty of some fraud in procuring a sale to be made to him, and (2) where there was a mistake by the vendor in delivering something other than the thing actually sold. In this case, there is no evidence of fraud, for Boynton was not an expert in uncut diamonds. Further, there is no evidence that there was a mistake as to the identity of the thing sold—the thing sold was delivered to the vendee when the purchase price was paid.
At the time the stone was sold, neither party knew its intrinsic value, and both supposed that the price paid was adequate. There was no suppression of knowledge. She chose to sell it without further investigation as to its intrinsic value, she cannot repudiate simply because it later turned out to be quite valuable. We must ask whether Boynton could have rescinded if he paid a lot of money for it and it turned out to be worthless. Surely he could not.

3. Note that why a stone thought to be a topaz but really a diamond is a mistake in quality is anyone's guess. Fortunately, however, the court in Wood does not raise the issue. Rather, Wood can be thought of as illustrating the principle of assumption of the risk: That the stone was relatively worthless was not a basic assumption of the contract; Wood assumed the risk that the stone was valuable because she admittedly did not know what the stone was. That is, she did not think it to be a topaz.

4. One thing the traditional common-law approach had in common with the more modern approach is that **generally a person cannot take advantage of another person's mistake**. If A knows that B is making a mistake, A cannot sit back and let B act to his detriment. You can't "snap-up" someone else's mistake.

iii. Recognizing the metaphysical quandaries in distinguishing between a different subject-matter and a mere difference in quality, **modern courts** ask whether the mistake (**1**) was contrary to a **basic assumption** on which the contract was made; (**2**) has a **material effect** adverse to the party seeking rescission; and (**3**) was **assumed** by the party seeking rescission?

iv. In determining whether the risk of a mistake was **assumed** by the party seeking rescission, the court will ask whether (**1**) the parties **allocated the risk** by **express** agreement; (**2**) one of the parties was **consciously ignorant** of some fact relating to the mistake; or (**3**) whether the **court should allocate** the risk to one party upon consideration of the purpose of the parties and the general dealings of humans in bargain transactions.

1. **Restatement (Second) of Contracts, § 152—**When Mistake of Both Parties Makes a Contract voidable.
   - **i.** Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
   - **ii.** In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

2. **Restatement (Second) of Contracts, § 154**—When a Party Bears the Risk of a Mistake:

   A party bears the risk of mistake when:
   - **a.** the risk is allocated to him by agreement of the parties, or
   - **b.** he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
   - **c.** the risk allocated to him by the court on the ground that t is reasonable in the circumstance to do so.

3. **Restatement (Second) of Contracts, § 157**—Effect of Fault of Party Seeking Relief:

   A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

b. Unilateral Mistake:

i. **Unilateral mistake** is a claim that the **party seeking rescission made a mistake where the other party did not**, and that such a one-sided mistake still warrants rescission. Generally, unilateral mistakes are **far more difficult to prove**: **In addition to** the conditions allowing for rescission on ground of **bilateral mistake**, the party seeking rescission must show either that the other party **caused** the mistake or was **at least negligent** as to the other party's awareness of the mistake. **Alternatively**, a person claiming rescission on ground of unilateral mistake can also argue that enforcement is **unconscionable** (in addition to proving the elements of bilateral mistake).

ii. When considering a claim for unilateral mistake, the court will consider whether (**1**) the **mistake** was made as to a **basic assumption** of the contract; (**2**) the mistake had a **material effect adversely affecting** the person seeking rescission; (**3**) the party seeking rescission did ***not bear the risk*** of mistake. Additionally, (**4**) whether enforcement of the promise is **unconscionable**; ***OR*** (**5**) the **other party** had **reason to know** of the

adversely affected **person's mistake *OR*** (**6**) the **other party** was otherwise at **fault** for the adversely affected **person's mistake**.

VIII. Impossibility/Impracticability:

a. In general:

i. **Impossibility/impracticability** is an ***affirmative defense*** whereby the defendant claims that, while there was an otherwise legally enforceable agreement, its breach is ***excused*** because **performance** became considerably **excessively burdensome than originally anticipated** due to some **unforeseen** event ***after*** contract ***formation***. Impossibility/impracticability is **distinguished** from ***frustration of purpose***, which is a claim that the **value** of the other party's performance has dissipated, thereby making the **benefit** of the bargain worthless vis-à-vis the anticipated benefit. A defense of ***impossibility/impracticability*** does ***not*** contest the **value** of the return consideration, but rather the **unanticipated**, **extreme increase** in the **cost of performance**.

ii. Today, most courts use the term **impracticability**, since impossibility sounds in logical or physical impossibility, which the doctrine no longer requires. At common law, however, often the contract had to be impossible to perform before the court would all an excuse.

iii. The common law **distinguished** between laws **imposed** on **people** and the laws **people imposed on themselves**, namely **contracts**. If a person was **disabled** from performing some **external law**, then the law would **allow** a defense of impossibility. However, if the party **voluntarily entered** into a contract, then the contract would be **enforced**, **despite unanticipated difficulty**, for the party was always free to **contract around** the contingency. This was ***especially*** true with **leases**, a distinction the law **continues** to draw.

> **Brief Box 110:** *Paradine v. Jane (1647).* ***
> [P leased a parcel of land to D. An invading army ousted D from the land. P sued to recover rent. D defended on ground that his enjoyment of the property was useless.]
>
> Where a contract creates a duty in a person and that person is disabled to perform it without any fault, then the law will excuse him. However, where the person creates a duty upon himself, he is bound to make it good, notwithstanding any accident, for he might have provided against such duty in the contract. If a lessee covenant to repair a house, so he must repair it if it is burnt by lightning or by enemies. The lessee has the advantage of casual profits, so too he must run the hazard of casual losses. The lessor shall have his whole rent.

1. Paradine v. Jane ostensibly is a case for the modern doctrine of frustration of purpose, at least on the facts. Jane could presumably still pay rent the same as he could before his property was invaded; it's just that Paradine's return performance—i.e., legal possession of the land—was worthless to him.

b. Modern Doctrine:

i. Courts now allow for a limited impossibility/ impracticability defense. Courts sometimes find an **implied condition precedent** that some event will not occur after contract formation and before performance is due. Thus, if P and D contract whereby D will use a

building and the building burns down **after formation**, the law will sometimes imply a **condition precedent** that the building be standing at the time performance is due prior to the either party's duty to perform. The parties cannot rescind the agreement per se, for there is **no duty to perform** (effect of a condition precedent).

Brief Box 111: *Taylor v. Caldwell (1863).* ***
[Taylor contracted with Caldwell whereby Taylor would have a license to use Caldwell's theater for the purpose of putting on four music concerts. The building subsequently burned to the ground before any of the performances. Taylor sought his reliance interest for expenses in advertising and promoting the events.]

We think there was an implied condition that the building remain standing prior to either party's duty of performance. This implied promise best construes the true intentions of the parties at the time of contract formation, for most men would say there was such a condition implied in the agreement. Indeed, there is a class of contracts in which a person binds himself to do something which requires to be performed by him in person, and if he should die, his executors are not liable for his promises. In such cases there must be an implied condition, lest the dead promisor's obligations remain binding on his estate. The principle, though traditionally applied to persons, extends to things in some cases.

1. Modern Courts do ***not always*** imply a condition precedent when allowing an impossibility/impracticability defense.
2. Of course, Taylor involved a **license** instead of a **lease**, and the law imposes ***more risk*** on **lessees** than on licensees. Further, note that if the building had burned down prior to formation but unbeknownst to the parties, then there would be a bilateral **mistake** and either party could rescind the contract.

ii. The essential test for impracticability is that the contract was (**1**) **formed** (**2**) with a **basic assumption** that some **contingency** would **not** occur prior to performance, and the (**3**) **occurrence** of that **contingency** was **unforeseeable** and (**4**) **not** the **fault** of the party**,** thereby (5) leading to an **extreme increase** in the **cost of performance**. Sheer **impossibility** ***automatically*** satisfies the **increase in cost condition**, for the costs of doing the impossible are infinite. A mere increase in cost, if not excessive or unreasonably burdensome, is insufficient to warrant impracticability.

1. **Restatement (Second) of Contracts, § 261—**Discharge by Supervening Impracticability**:**
   > Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate to the contrary.

2. **Restatement (Second) of Contracts, § 263—**Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance:
   > 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 contract was made.

3. **UCC, § 2-613**—Casualty to Identified Goods:
   > Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without the fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term then

> **a**. if the loss is total the contract is avoided; and
> **b**. if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

iii. The UCC test for impracticability is **substantially similar** to the Restatement test. Essentially, in a sales contract, the party seeking to discharge the contract on ground of commercial impracticability ***must*** show that (**1**) ***after*** **formation** (**2**) an **unforeseeable** (**3**) **contingency** occurred that was contrary to (**4**) a **basic assumption** on which the contract was made (**5**) through **no fault of the party**. The UCC also provides a scheme for **dividing up** a shortage of goods among buyers, which requires a (**6**) **reasonable distribution** of the **shortage** and (**7**) a **reasonable notification** to the buyers.

iv. A **mere increase in costs is never enough**; the increase must alter performance **extremely**. A **severe shortage** of **raw materials** ***may*** be enough if truly **unforeseeable**. The burden must not be the fault of the party.

1. UCC, § 2-615—Excuse by Failure of Presupposed Conditions:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> **a**. Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> **b**. Where the causes mentioned in paragraph (a) affect only apart of the seller's capacity to perform, he must allocate the production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> **c**. The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Brief Box 112: *Eastern Air Lines v. Gulf Oil Corp* (1975).
[P contracted with D whereby D would supply all of P's fuel requirements. D breached, citing an Oil Crisis as giving rise to a defense of impracticability.]

U.C.C., § 2-615 establishes the modern doctrine of commercial impracticability. Gulf alleges that crude oil prices have risen substantially. However, we cannot determine how much it costs Gulf to produce a gallon of jet fuel for sale to Eastern. Gulf did show that the costs of crude oil have increased dramatically, but Gulf includes intra-company profits in the distribution of that crude oil. Even if Gulf had established great hardship under § 2-615, Gulf would not prevail because the events associated with the Crisis were reasonably foreseeable at the time the contract was formed. If a contingency is foreseeable. We all know of the volatility

of the Middle East situation.

IX. Frustration of Purpose:

a. In General:

i. A claim for **frustration of purpose** is essentially the **opposite** of a claim for impossibility. Rather than claim that one's **own performance** is made more **difficult**, the plaintiff claims that the **other party's performance** is made **significantly less valuable**.

ii. There are some **important differences**, however. Generally speaking, the **loss of value** in the **other party's performance** must be ***total*** or ***near total*** before the defense will work. A mere **loss** in **expected profit is insufficient**. Furthermore, if the other party has **relied** on the contract, then an excuse is **less likely**, at least in **practice**. As is the case with impossibility, a claim for frustration of purpose in a **lease** generally requires **even more loss**, for the party is said to have **assumed** most of the risks involved in land. **Both parties** must be **aware** of the **purpose** of the contract and the **centrality** of that **purpose**; if the other party is **unaware** of the **purpose** of the contract, then there is ***no*** **frustration of purpose**.

iii. The **remedy** for frustration differs as well. In impracticability, the remedy is a cancellation of the contract, which means that any reliance to by the other party is not recoverable. In cases of **frustration of purpose**, ***most*** courts **allow restitution** of any **deposits**, which are ***not*** subject to offset by the expenditures of the other party. Thus, if P contracts with D to make a dress for D and D puts down a deposit, if D can show frustration of purpose, then D will get his deposit back in most jurisdictions. ***Some*** jurisdictions do ***not*** allow for **restitution** of **deposits** anymore than they allow for enforcement of the performance—the **Rule of Chandler v. Webster**. ***Some*** courts split the difference, allowing for **restitution** of deposits ***subject to offset*** by the other party's **expenditures**. Thus, in the seamstress case, the dressmaker would get to keep the portion of the deposit representing her **actual costs**.

Brief Box 113: *Krell v. Henry (1903).*
[P advertised his apartment as having a view of the King's procession. D licensed the apartment, but the procession was cancelled. D did not pay the charge for the room.]

If the substance of the contract assumes the existence of a particular state of things, then if the contract becomes impossible of performance by reason of the non-existence of the state of things. Each case must be judged by its own circumstances. One must ask: (1) what was the foundation (or purpose) of the contract; (2) was the performance of the contract prevented by some external event; and (3) was the event giving rise to the impossibility reasonably foreseeable? There is no problem of parol evidence here (for defendant does not seek to admit evidence of additional terms but only evidence as to the purpose of the contract, which most courts allow).

iv. Restatement (Second) of Contracts, § 265—Discharge by Supervening Frustration:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate to the contrary.

v. The common law still holds **lessees** to **assume more risks** than mere licensees. Most modern courts recognize that **frustration of purpose *can*** exist in a **lease contract**, but the loss of the value of the land must be **damn near total if not complete**. Since land is almost always able to be used for some purpose, **defenses** on ground of **frustration** of **purpose** in **lease** contracts are **rarely successful**.

> **Brief Box 114:** *Lloyd v. Murphy (1944).*
> [In the wake of the start of WWII, P leased a parcel of land to D exclusively for selling new cars. The sale of new cars was severely restricted afterwards, but not completely prohibited. After D complained, P allowed D to use the land for any other purpose or to assign the lease to someone else, and P even agreed to a decrease in rent. D abandoned the premises.]
>
> The question is whether the equities require placing the risk of disruption or complete destruction of purpose on the lessor or lessee, and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the lessee, has made performance vitally different from what was reasonably expected. Further, the doctrine of frustration has been limited to cases of extreme hardship so that businessmen can rely with certainty on their contracts. Further still, the event giving rise to the frustration must not have been foreseeable to the lessee. Mere unprofitability or difficulty or expense does not excuse the duty to perform. In this case, at the time of the lease the government had already authorized the President to allocate material and mobilize the war effort; the automotive industry was in the process of conversion to supply the needs of our growing mechanized army. Even assuming that the regulation was not foreseeable, Murphy has not shown that the value of the lease was destroyed. The land remained useable as a service-station, and in light of the lease amendments could be put to other uses or even subleased to another tenant.

vi. **All courts are reluctant to extend the doctrine of frustration of purpose.** Courts reason that if a party can get out of a contract on mere unprofitability, then ***every*** contract is **suspect**, which makes ***reliance*** on contracts ***risky***, thereby creating a **negative economic incentive**. Only an extreme or total loss counts. Even then, the party claiming frustration of purpose must show that the other party **knew** of the **purpose** of the contract, that **neither** party contemplated the **risk** giving rise to the frustration. Further, in **practice**, most courts seem to **care** about whether the **other party** has relied on the contract. A **wholly executory** contract is ***more likely*** to be found **discharged** on ground of frustration of purpose; a **partially or completely executed** contract is ***less likely*** to be **discharged** on such grounds.

X. Reformation of Long-term Contracts:

a. Relational Theory:

i. One species of contract theory pays particular attention to the fact that many agreements do not represent one-time transactions between the parties. Rather, the majority of commercial agreements represent a long-term relationship between two parties. One-time agreements are referred to as discrete agreements; relational agreements are sometimes called intertwined agreements.

ii. Intertwined agreements function more like constitutions between two parties rather than contracts. While most scholars accept the distinction between intertwined agreements and discrete agreements, not all agree about the implications of the distinction. Some argue that the law should enforce intertwined agreements as rigidly as discrete contracts; others believe that the law should allow for the agreement to evolve over time based on course of dealings, usage of trade, and course of performance.

b. Long-term Agreements:

i. Theoretically speaking, reformation of a long-term agreement is possible to preserve the parties' intentions. Courts are reluctant to reform a contract (with the exception of a mistake in integrations) because reformation seems to undermine the principles of contract. Proponents of reformation argue that parties will not enter into intertwined contracts at all unless there is something the courts can do in the event of a catastrophic change in the anticipated course of events.

Brief Box 115: *ALCOA v. Essex, Inc. (1980)*
[P contracted with D to supply D with aluminum for 16 years. P was to be paid according to a price index. The price index immensely failed to reflect the true cost of P's performance because of an unforeseen rise in the costs of energy. P sought reformation.]

We find that unforeseeability is not a necessary condition to establish impracticability. The spirit of the Code is that decisions regarding commercial transactions are derived from courts sensitive to the practices of the commercial world. While this case does not fall within reformation as a traditional head of equity jurisprudence, it does fall within the more general rules of equitable restitution. To grant ALCOA complete rescission would be to grant it a windfall at the expense of Essex. Unlike cases involving rescission (which is predicated on commercial senselessness), modifying the contract here is highly appropriate, for modification will better preserve the expectations of the parties. Before modifying the contract, however, we must frame a remedy that is suitable to the expectations and to the original agreement of the parties. A price fixed at the contract ceiling could rebound to ALCOA's great profit if the price of energy falls before the contract expires. Thus, we reform ALCOA's price such that the *lesser* price as between A and B, where A is the maximum price in the contract and B is the greater of the contract price as written and a $0.01 cent net profit for ALCOA.

ii. Note that the court in ALCOA did not think that unforeseeability was a necessary condition to impracticability or frustration of purpose under UCC § 2-615.

iii. Thanks to you for all the good times….