

**Final Exam:** See Restatement § 1-90.

1. Offer
2. Acceptance
3. Consideration
  - a) Yes, contract.
  - b) No, look for:
    - I) Promissory Estoppel
      - A. Promise,
      - B. Foreseeable will rely,
      - C. Actual Reliance,
      - D. Injustice
    - II) Restitution
      - A.  $\Delta$  benefits,
      - B.  $\Delta$  knowledge,
      - C.  $\Delta$  retains benefits,
      - D. Injustice
    - III) Promissory Restitution
      - A.  $\Delta$  made promise regarding past inequity,
      - B. past benefit actually exists
    - IV) Did a party materially benefit? Yes, enforcement, No, unenforceable.

## 1.0 Classical Contract Theory

1.0.0 Definition: a Contract is a voluntary agreement between two or more parties to do something in the future. It is susceptible to legal enforcement.

1.0.1 Components of a Contract: Traditional Contracts Require Offer + Acceptance + Consideration.

### 1.1. Mutual Assent

1.1.0 The Mutual Assent needed for the formation of a Contract almost always takes place through an Offer and an Acceptance (**see R § 22**)

1.1.1 Objective Theory of Mutual Assent: Would a Reasonable Person think that the parties had agreed to the terms and intended to be bound?

- The test interpreting the offer or acceptance is not the parties' actual intent but what a Reasonable Person in the parties' position would have thought it meant. OBJECTIVE TEST.
- "20 Bishops" testifying that a person meant or thought something other than an offer or acceptance is insufficient to overcome the objective view of another actions.
- If the person "accepting" the "offer" knows that the offeror was joking, then there has not been an offer because the parties have not reached mutual assent.

1.1.2 A party is bound to the terms of a signed document which they read (or had the opportunity to read), absent fraud, duress, or mutual mistake. By signing a document, you have objectively manifested your assent.

**ASK: Is contract VOID? ("fraud in the factum" decided by judge) (R § 163)**

**Is it VOIDABLE? ("fraud in the inducement" decided by jury or arbitrator) (R § 164)**

*Eurice Bros.*

- D agrees to build  $\Pi$ 's house and later claims can't do work agreed price and specifications.
- D signed the K but claimed that he didn't know that  $\Pi$ 's specifications were part of agreement.
- D manifested his assent to the K by signing. This objectively looks like a meeting of the minds.
- D has a duty to be aware of what he is signing. Court notes D is a sophisticated businessman.
- A Reasonable Person would consider his signing the contract as Mutual Assent.

*Park 100*

- $\Pi$  approached  $\Delta$ , had them sign "lease papers" which were actually a personal guarantee on the lease.
- D called his representative and asked if their attorney had approved the lease.
- $\Pi$  remained silent during the phone call which was judged a fraudulent omission of a material fact.

- D used reasonable care and diligence. D believed they were signing a lease.
- D reasonably believed [ ] to their detriment. D signed contract. Contract was fraudulently induced.

## 1.2. Offer

1.2.0 Ask objectively: Was there an offer? Was there meeting of the minds? Offer is effective upon receipt.

### 1.2.1 Definitions of Offer

- **R § 24:** manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that assent to that bargain is invited and will conclude the bargain.
- For a communication to reach the level of an offer, it must objectively create in the mind of the offeree the understanding that the offeror has communicated a definite (i.e. all the terms are there) proposal for exchange, with sufficient commitment on the part of the offeror that no further assent is necessary in order to complete the bargain.
- Knapp: a direct, complete proposal that a K be entered into, providing for an exchange of desired performance.

### 1.2.2 Offeror is the Master of the Offer

- Offeror can establish all terms to the offer including the ability to have final assent before the other becomes binding: "but I have to check with my wife."
- Offer creates power of acceptance (unless otherwise noted by the offeror). Offeree has the power to accept if they accept in the manner prescribed by the offeror.

### 1.2.3 Requirements for an Offer

- Objective Manifestations of Intent to Enter into a Contract (**see R § 24, 26**)
- Definite Terms (quantity, time, identity of the parties, price, subject matter) (**see R § 33**)
- Note: Terms do not have to be exact for an offer.

QTIPS

### 1.2.4 Indications That No Offer Has Been Made

1. Lack of Definite Terms: courts have become more willing to supply a missing term (except quantity). If terms can be reasonably inferred the contract is otherwise **binding (see UCC §2-305 infra)**
2. Requirement of Future Manifestations of Assent: for an offer to exist, an immediate power of acceptance must be created in the offeree. If an offeror requires a further manifestation of assent, then a contract is not yet formed when the offeree accepts.
3. Advertisement or Form Letter (an invitation to an offer)  
*Loneragan* ("If you are really interested, you will have to decide fast.")
  - [ ] answered a newspaper ad regarding sale of land.
  - Δ's letter responded stating if [ ] wanted land, he must hurry because [ ] wanted to sell quickly.
  - Δ required further assent before he would be bound.
4. Preliminary Negotiations: a manifestation of willingness to enter 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 the bargain until he has made a future manifestation of assent. (**see R §26**)
5. Remember that the **use of the word "offer" does not necessarily create a legal offer.**
6. Words like "I'm asking" and "I'd consider" are typically words inviting negotiation, not offers.
7. An offer made by **an intoxicated or unstable** individual may not be a binding offer.
8. Offers **made in jest** may or may not be binding. Use the objective test: Would a Reasonable Person have believed that it was a serious offer? If not, there is no contract, even if there was acceptance
9. An **expression of future intent** is not an offer.

## 1.3. Acceptance

1.3.0 Ask Objectively: Has there been a Timely Acceptance? Was there a Meeting of the Minds by the parties?

### 1.3.1 Methods of Acceptance:

- Offeror can proscribe or limit the methods of acceptance: if an offeree is given 7 days to accept, the time period begins to run upon the receipt of the offer.

- If the method of acceptance is not specified, then acceptance by any reasonable means and within a reasonable time is valid.
- “Reasonable time” varies according to the circumstances (trade customs, nature, and subject matter of the offer). The means of communication are also relevant. Generally, an offer made in a face-to-face meeting lapses when the meeting is over. Similarly, a phone offer lapses at the end of the call.

1.3.2 **Mailbox Rule: (MBR)** an offer is deemed to be accepted at the time that the acceptance is posted.

- 1) Applies even if acceptance is lost in the mail and never received by the offeror. However, if the offeree misaddresses the acceptance, it is not valid.
- 2) Applies even if offeree is notified that offeror rejects after offeree mails acceptance but before the acceptance is received.
- 3) For the MBR to apply, mailing has to be an acceptable form of communication. Example: if you live next door to the offeror and everything has been communicated in person, the MBR may not apply.
- 4) Exceptions to the Mailbox Rule
  - a) Offeror is the master of their offer and can avoid application of the rule by specifying acceptance upon receipt instead of when mailed.
  - b) Acceptance for Option Contracts is valid only upon receipt (**see R §63(b)**).
- 5) Revocation is deemed to be valid only upon actual receipt of revocation.
- 6) Rationale: Courts use a uniform rule to avoid uncertainty as to when acceptance occurred. It is better to put the risk on the offeror because they can protect themselves against unknowing acceptance by specifying the method of acceptance.
- 7) **Restatement §40 and the Mailbox Rule**
  - a) If Rejection sent, then Acceptance sent, and the Rejection is received before the Acceptance, then there is No Offer. The Acceptance is a Counter-Offer.
  - b) If Rejection sent, then Acceptance sent, but the Acceptance is received before the Rejection, then there is a Contract because the Acceptance was received first.
  - c) If Acceptance sent, then Rejection sent, and the Rejection is received before the Acceptance, the courts are split as to whether a Contract exists. If they follow the Offeror’s Expectations, then there is No Contract because the rejection was received first. Other courts find a Contract unless the offeror relied on the rejection and contracted for the same transaction with someone else.
  - d) If Acceptance sent, then Rejection sent, and the Acceptance is received first, then there is a Contract.

1.3.3 Termination of the Offeree’s Power to Accept and Classical Theory (see R §36)

- 1) Offer can lapse by its own terms (Offeree fails to perform to Offeror’s terms of acceptance).
- 2) By Operation of Law: the Death or Incapacity of one of the Contracting Parties.
- 3) By Counter-Offer or Rejection of the Offer.
- 4) By Revocation: Under Traditional Contract Law, An Offeror May Freely Revoke An Offer At Any Time Before An Effective Acceptance Is Made, Even If The Offer Expressly States That It Is Irrevocable.

*Normille* (“You Snooze, You Lose”)

- When an offeree substantially alters key terms of the offer, their “acceptance” is effectively a rejection of the original offer and instead becomes a counter-offer. (**see R §39**). Only terms identified by the counter-offer are part of the new offer. (The counter-offer did not include a 5:00 p.m. deadline to keep the offer open, so the offer was open for a reasonable time.)
- $\Pi$  had constructive notice of the offeror’s revocation (“You snooze, you lose”) and therefore could not validly accept  $\Delta$ ’s counter-offer. (**see R §43**)
- Knapp: if the  $\Pi$  had mailed their acceptance the MBR would not have applied because of the nature of the negotiations.
- Another issue not addressed is whether dropping off acceptance with the Realtor would have been sufficient. Could the Realtor, by receiving acceptance before revocation bind  $\Delta$ ?
- If  $\Pi$  had accepted before constructive notice of revocation,  $\Delta$  would have been bound.

## 1.4. Unilateral Contract

1.4.0 Definition: The exchange of a promise in return for performance. (Distinguish from a Bilateral Contract that seeks a promise in return for a promise).

- The Offeror promises something in return for Offeree's acts. Only the Offeror is promising to do something. The Offeree is not bound and need not act.
- The Offeree accepts by performing. Under Common Law, Offeree must fully perform requested act in order to accept. Offeror can reject at any time while offeree is performing. (Brooklyn Bridge hypo)
- Offeree must give notice of acceptance within a reasonable time of the requested act if the Offeror will not know that the act has been completed—If acceptance is not apparent to Offeror.
- A Unilateral Contract is definitely sought in the context of a reward. A promise to find someone's lost pet for reward does not bind the parties. The contract becomes enforceable only when a person presents the pet to the Offeror. Also, see *Cook v. Coldwell Banker*, unilateral contract for sales performance, modern interpretation under **R § 45**.

### 1.4.1 Classical View of Unilateral Contracts

*Petterson* "I've come to pay off the mortgage"

- Δ offers to reduce interest on mortgage if Π pays it off early.
- Δ then sells the mortgage to someone else. Π brings money to Δ.
- Before Π can accept by performance (by handing over the envelope), Δ revokes offer.
- If Π had placed the envelope through the mail slot and Δ opened it, then Valid Acceptance.

1.4.2 Restatement and Unilateral Contracts: **R §45** rejects the harshness of this rule. When the Offeree *begins* to perform (not *prepares* to perform) an Option Contract is created and the Offeror loses the power to revoke. This is similar to Detrimental Reliance on the part of the Offeree.

### 1.4.3 Modern Approaches to Unilateral Contract

*Cook* (performance bonus)

- Δ promises bonus to Π if real estate sales goals are met.
- Π sells enough to qualify for bonus, but Δ says bonus will be paid next year.
- Π leaves before bonus is paid.
- Δ liable for bonus due to Π's Substantial Performance made an Option K that Δ could not revoke.

*Duldulao* (Employment Handbook)

- An Employee Handbook can form the basis of an Employment Contract if the traditional requirements for contract are present.
- Continuing to work under the terms of a contract can constitute acceptance of the offer.

#### ASK:

- What was negotiating party's intent?
- Was there an offer?
- Was it an oral agreement at the end of negotiations?
- Was there a time limit on the offer?
- Are there auto-termination provisions?
- Was there acceptance? (possibly, see MBR)
- Can the offer be revoked?
- Are the parties negotiating with delegated authority to enter the contract?

## 1.5. Consideration (see R § 71)

1.5.0 Ask Objectively: Is there Consideration? Has there been a Bargained For Exchange? Is the Consideration Reasonable?

1.6.0 Definition: Consideration is the abandonment of a legal right or a voluntary limit on the legal freedom to act in the future as an inducement for the promise of the other party.

### 1.6.1 Benefit/Detriment Test

- a) Did the Offeror derive some Legal Benefit, Interest, or Profit from their offer? **OR**
- b) Did the Offeree accrue some Legal Forbearance or Detriment by accepting the offer?

*Hamer v. Sidway* (rich uncle and virtuous nephew)

- Court defined Detriment as giving up of a Legal Right and therefore found consideration.
- Knapp: Uncle may have received a Benefit of a social gain by announcing at party that he was generously providing for his nephew. The uncle's promise induced the nephew to abstain (another benefit for uncle because he got what he wanted). Under Promissory Estoppel, the nephew may have succeeded because he detrimentally relied on his uncle's gratuitous promise.

1.6.2 **Bargained For Exchange**: for a Promise to be enforceable it must be the "product of a bargain" "a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance of another." In other words, each party views what they give as the price for what they get.

*Baehr* (gas station)

- Δ said company would send Π the money they were owed by a third party.
- Π argued that his consideration is his forbearance in suing.
- "I will sue."/"That's not a good idea. We're trying to work things out and don't want you to sue."/"If I hold off suit for four months, will you promise to pay me the debtor defaults?"/"Yes, we promise."
- Court disagrees: Forbearance from filing a lawsuit isn't consideration unless bargained for. (possible exception is to beat the statute of limitations).
- Court wants to see more than a promise and a change of behavior as a result.

1.6.3 Gratuitous Promises and Gifts are not enforceable contracts because there is no consideration.

*Dougherty* (rich aunt and ordinary nephew)

- Aunt gives nephew boilerplate promissory note.
- Court rules it is not an enforceable contract, despite language stating "for valuable consideration."
- Sham consideration is no consideration.
- It is argued gratuitous promises should not be enforced - problems of proof & because family members can change minds.
- This case differs from *Hamer* because nephew didn't have to do anything to receive the gift.

1.6.4 Adequacy of Consideration is Irrelevant

**R § 79**: If the requirement of consideration is met, there is no additional requirement of

- 1) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
- 2) equivalence in the values exchanged; or
- 3) "mutuality of obligation."

*Batsakis* (Greek woman borrows money)

- Π gave Δ Greek money worth US\$25 in return for Δ's signature on a note for US\$2000.
- Court held "that Δ got what she bargained for". Inadequacy of consideration will not void the contract.
- **But, gross inadequacy may signal fraud, duress, or mistake.**
- If there is a great disparity between the bargaining power of the parties, the court may invalidate the agreement.

1.6.5 Past Consideration is No Consideration

*Plowman v. Indian Refinery* (Where's our pension?)

- Δ refuses to pay pension to former worker.
- Π argues consideration based on:
  - 1) Past Performance ("long and faithful service"): Not consideration.
  - 2) Picking Up Their Checks: Not consideration. Conditions that enable recipient to receive gift do not constitute consideration.
  - 3) Moral Obligation: No, moral obligations are not consideration unless the moral duty is also a legal duty. (see also *Borelli* - Court ruled that a marriage contract supercedes a contract for care).
  - 4) Π's Did Not Look For Other Work: This argument was not considered by the court.
  - 5) This case is a good candidate for Promissory Estoppel.

- 1.6.6 Consideration does not have to be money; It can be something that is not of identifiable economic value.  
**R §71(4)** In a Unilateral Contract, the Performance of the act is the Acceptance and the Consideration, and Performance/Promise may be given by promisee or 3<sup>rd</sup> party to promisor or 3<sup>rd</sup> party.

## 2.0 Alternative Basis for Relief in Absence of a Contract

2.0.0 In some situations, courts will grant relief even if elements of classical contract are missing.

### 2.0.1 Types of Contracts

- 1) **Express Contract:** the Classical Contract.
- 2) **Implied In Fact:** the circumstances give rise to a contract. Formed by manifestations of assent through conduct (not by oral or written communication). Mutual Assent and Consideration must be present but are inferred from the conduct of the parties. Example: Man takes shirts to the dry cleaners and puts them on the counter. Cleaner says, "Pick them up on Thursday." There is a contract.
- 3) **Implied In Law: a Quasi-Contract**, not a real contract. The court constructs it in order to achieve an Equitable Result and to avoid Unjust Enrichment.
- 4) **Quantum Meruit:** "as much as he deserved" – recovery for SERVICES in an action of assumpsit on the basis of an implied-in-law contract to pay for what was received based on justice to avoid "unjust enrichment."
- 5) **Quantum Valebant:** "as much as they were worth" – recovery for GOODS, same as in #4 above.

### 2.1. Restitution in the Absence of a Promise

2.1.0 Definition: Restitution is an applied-in-law remedy. A court will infer a quasi-contract and give restitution to avoid unjust enrichment.

#### 2.1.1 Elements of Restitution

- 1) There has been no express promise.
- 2) Π conferred measurable benefits or something of value to the Δ, and Δ should be forced to pay or else Δ will be unjustly enriched.
- 3) Π must prove their actions were not intended to be gratuitous.

*Glenn v. Savage* ("I saved your lumber. Now pay me for it.")

- Δ was not held liable for the costs associated with recovering his lumber because he neither requested help, not promised to pay afterwards.
- Under the Common Law, there was no recovery for voluntary acts. "The court will never permit an act of kindness to be converted into a pecuniary interest."

### 2.2. Restatement §117 Restitution (preservation of another's things)

A person can receive restitution when:

- Π is in lawful possession of the chattels; **and**
- It was reasonably necessary for Π to act to preserve Δ's property; **and**
- There was no reason to believe that owner would refuse to pay; **and**
- Π intended to charge or keep the items; **and**
- The owner re-took the goods.

### 2.3. Restatement §116 Restitution (preservation of another's life or health)

A person is entitled to restitution if they supplied things and/or services to another even without consent and/or knowledge on the other's part if:

- It was an unofficious act (non-gratuitous intent to charge); **and**
- Service was reasonably necessary to prevent the harm; **and**
- There was no reason to expect that the person, if given the choice, would not consent; **and**
- It is impossible for the person to consent because it is an emergency.

*In re Crisan* (unconscious patient treated by hospital)

- Court allowed hospital to recover costs of treating unconscious woman because they are in the business of charging for emergency services.

- **Rationale:** In an emergency situation, we want to encourage health care providers to get involved; therefore, we will pay them for their services

## 2.4. Restitution based solely on an Unjust Enrichment theory

### 2.4.1 Analysis of *Flooring Systems v. Radison*

- Π subcontractor recovered from Δ owner when contractor hired by Δ never paid.
- Δ never paid contractor for contractor's unfinished work, but Π finished work for Δ + was not paid.
- Normally, a subcontractor can only collect from the general contractor, but because Δ had not paid the general contractor, the Δ was liable for their own unjust enrichment.
- Courts are split on issue of owner liability for subcontractors when owner didn't payoff the contractor.

### 2.4.2 Analysis of *Watts v. Watts*

- Unmarried cohabitants that hold themselves out as married usually have no express or implied-in-fact agreement. Instead, the court can construct a quasi-contract to avoid unjust enrichment.
- Π gave up her job before moving in with Δ.
- Π provided domestic services for Δ.
- In this case, Δ would be unjustly enriched for not getting married.
- Court was also willing to let Π sue on a theory of Implied-in-Fact Contract.
- Words + Conduct + Consideration = Implied-in-Fact Contract

## 3.0 Promissory Restitution (see R § 370 – 377)

3.0.0 **Definition:** A court can use Promissory Restitution to enforce promises made after a benefit has been received where past consideration would be considered no consideration. This supplants the classical contract rule that moral obligations are not enforceable. Now courts will sometimes enforce them.

3.0.1 **Material Benefit Rule (see R §86):** "If a person receives a material benefit from another, other than gratuitously, a subsequent promise to compensate the person for rendering such a benefit is enforceable. The Material Benefit Rule is not universally followed.

### 3.1. Analysis of *Mills v. Wyman* (Thank you for caring for my son)

- Court did not enforce a father's promise to pay for the care of his son.
- Promise was based on past consideration (no consideration) and given out of temporary gratitude.
- Courts won't uphold all promises regardless of immorality of failing to honor a serious promise.
- Court lists examples of moral obligations that can give rise to a legal obligation:
  - 1) Voluntarily revived debt after the statute of limitations has expired.
  - 2) Voluntarily revived debt discharged in bankruptcy. **THAT IS OLD LAW:** current law is not legally binding, per Bankruptcy Reform Act of 1978, only promises that were made in the bankruptcy proceeding itself are enforceable.
  - 3) Debt of minors if they confirm the debt when they reach the age of majority.

### 3.2. Analysis of *Webb v. McGowin* (falling block of wood)

- Court found that estate had a moral obligation to continue to pay Π.
- Π conferred material benefit on Δ by saving his life and incurred substantial detriment to himself.
- Court assumes that decedent would have bargained for his rescue if given the opportunity.
- Paying Π throughout Π's life, proves that he considered himself bound.

## 4.0 Promissory Estoppel: Familial, Charitable, Commercial

4.0.0 **Definition (R §90):** A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third party and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of that promise. (Action is not needed for charitable promises)

4.1.0 **Operation:** Promisor induces reliance by promise and is estopped from later denying the existence of a contract, though, in fact, a classic contract has not been made. No bargain is involved. In some cases, promissory estoppel will act as an alternative to consideration. Promissory estoppel is an "equitable" doctrine - it is used when good conscience requires it.

4.1.1 **Rationale:** Promissory Estoppel protects unbargained for reliance; it is used in lieu of consideration to enforce a promise.

#### 4.1. Elements of Promissory Estoppel

4.1.1 **Promise:** the promise can be implied.

4.1.2 **Foreseeability** of Reliance:

- Promisor must reasonably have expected the promise to induce reliance.
- Promisor would reasonably expect the promisee to act or abstain from acting due to promise.
- Promisor foresaw or intended the promisee to rely on it.

4.1.3 **Actual Reliance:** Promisee detrimentally relied on the promise. **Reliance** = action/forbearance, change of position, out of pocket expenditures, improvement efforts taken that assume fulfillment of promise.

4.1.4 **Injustice:** Enforcement of the Promise is necessary to avoid Injustice.

#### 4.2. Family Issues and Promissory Estoppel

4.2.0 **Rationale:** Courts tend to make these types of promises binding because family members do not bargain with each other in a business context and may make promises out of affection/altruism.

4.2.1 Analysis of *Kirksey* (1800's sister-in-law case)

- Δ writes Π telling her to come live on his land.
- Π leaves her property behind and goes to live and work on Δ's land. Δ later evicts Π.
- Court holds that because Π's move was a condition of the gift of tenancy (like picking up a check in *Plowman*), there was **No Benefit to the Promisor** and **No Consideration**.
- **Knapp:** find Consideration by using Benefit/Detriment Test. Π incurred a detriment by moving.
- Δ gained a benefit in seeing Π and in knowing that she and the kids were safe.
- Π assisted in tending to Δ's land. These could constitute a Bargained For Exchange.

4.2.2 Analysis of *Ricketts* ("No granddaughter of mine is gonna work")

- The classic Promissory Estoppel case.
- Π relies on Δ's promise to pay her \$2000 so that she does not need to work.
- Court reasoned there was No Consideration, but found Promissory Estoppel because Δ made a promise which he expected to induce Π's reliance to her "detriment."
- **Knapp:** possible Bargained For Exchange. Quitting work might have been Consideration. Although Δ did not force Π to quit working (she continued at another job), Δ knew that the best way to compel Π to stop working was to suggest it but not require it. Bargains between family members are not usually overt.

4.2.3 Analysis of *Greiner* (disowned Son moves onto Mama's land)

- Δ tells Π that she will give him land for a house, but never executes the deed.
- Π moves and builds his house on the promised land.
- **Court:** this was not a Bargained For Exchange even though Π and Δ negotiated over whether Δ would give Π money instead of land.
- Court ruled for Π on theory of Promissory Estoppel/Detrimental Reliance (compare with *Kirksey*).
- **Knapp:** Δ bargained for Π's return because she felt responsible for him being left out of the will.

#### 4.3 Donative Promises/Charitable Subscriptions and Promissory Estoppel

4.3.1 Creative Use of Consideration Doctrine to Enforce Donative Promise

If gift depends on small Condition, some courts find Consideration and enforceable Bilateral Contract.

Analysis of *Allegheny College* (scholarship)

- Δ promises to give money to Π to establish a scholarship in her name.
- Cardozo's discussion of Promissory Estoppel is dicta. He sees a Bargained for Exchange.
- Consideration was Π's naming the scholarship after Δ.
- The Π would have trouble proving Promissory Estoppel because they did not Detrimentally Rely on the promise because they had not spent the money or contracted with it.

- Dissent: this is at best a Unilateral Contract which could never be performed because the offer would be revoked at Δ's death and the college could not perform until after her death.

4.3.2 If a charity allocates funds and commits to how the donation is to be spent, courts have said this is Detrimental Reliance.

- **R §90**: a Charitable Subscription is binding under Promissory Estoppel doctrine without proof that the promise induced action or forbearance. (but Πs still try to find some action or forbearance)

Analysis of *King v. Trustees of Boston University*

- Because the Δ archived/catalogued the files for research, the Π could not recover the papers.
- Δ's relied on MLK's promise to their detriment.

#### 4.4 Commercial Use of Promissory Estoppel

4.4.0 Rationale: Modern Courts are extending promissory estoppel to commercial contexts. Previously, promissory estoppel was limited to Employee Benefit and Pension cases.

4.4.1 Analysis of *Katz* (man chases thief and gets hit on the head – now needs to retire)

- Δ wants Π to retire. Π does not want to retire, but agrees after Δ offers him \$13,000 pension.
- Δ later cuts off pension, and Π sues.
- Court found a clear Promise which Δ could foresee Π would rely on.
- Π is worse off if Δ breaks promise because he lost several years of wages.
- This case can work in a Bargained For Exchange context. Δ bargained for his retirement and was able to get an increase in the amount of his pension.
- Can be argued in a unilateral contract mode: main difference is the extent of detrimental reliance.
- Δ unsuccessfully argues that there was no Detrimental Reliance because they were going to fire Π if he did not accept. This might have worked if Π had first been told that he was being fired or forced to retire, but that Δ was giving Π a pension for his years of hard work. (see *Plowman*)

4.4.2 Analysis of *Universal Computers* ("Pick up my bid at the Airport")

- Π's low bid was not picked up at the airport as Δ had promised.
- Court rules for Π based on Detrimental Reliance.
- Regulation prohibiting Δ's promise was not a valid defense because Court felt that a Reasonable Person in Π's position would not have been aware the specific regulation existed. (no evidence that Δ attached a copy of the regulations to the bidding instructions)
- Π may not have prevailed without being the lowest bidder and thus likely to be awarded contract.

Contract Analysis of *Universal Computers* (arguable)

- Offer: Would you pick up our bid?
- Acceptance: Yes.
- Consideration: Offeree benefits from having more bids to consider.

Restitution Analysis of *Universal Computers* (colorable)

- Requires that there is no express promise, but here Δ made a promise to Π.
- Π did not confer measurable benefits/something of value to Δ which Δ needed to pay to avoid unjust enrichment.
- Requirement that actions were not intended to be gratuitous does not really apply.

Promissory Restitution Analysis of *Universal Computers* (R §86) (colorable)

- There was no promise made in recognition of a benefit already received.
- The benefit was not received as a gift. (it was never received)
- The value was not disproportionate. (no benefit → no value)

Promissory Estoppel Analysis of *Universal Computers* (R §90) (workable)

- Promise: Yes, Δ assured Π that they would pick up the bid.
- Reasonable (Foreseeable) Reliance:
  - Promisor must reasonably have expected the Promise to induce Reliance.

Consider: Would a Reasonable Businessperson have relied on the company to pick up their bid at the airport?

- b) Promisor would reasonably expect the Promisee to act/abstain from acting based on the promise.
  - c) Promisor foresaw/intended the Promisee to rely on the Promise.
- 3) Actual Reliance: Court found that Promisee Detrimentally Relied on Promise.
  - 4) Injustice:  $\Pi$  would have won "but for" the inaction of the  $\Delta$ .

#### 4.4.3 Analysis of *Hoffman* (Bakery owner gets strung along by Corporation)

- Where damages are awarded for Promissory Estoppel instead of Specific Performance, the damages only need to be at a level to avoid injustice.
- Knapp: this could be seen as  $\Delta$  not bargaining with  $\Pi$  in good faith.

## 5.0 Limiting the Offeror's Power to Revoke

### 5.1. Pre-Acceptance Reliance

Knapp, "Sometimes an Offeree who has not specifically sought the protection of a purchased option will expend resources or substantially change their position believing that the Offer will remain open for them to accept, only to have the Offeror revoke his offer before Offeree has accepted."

### 5.2. Inferring an Option Contract

In a commercial context, courts are willing to enforce performance when a subcontractor has submitted a bid to a general contractor who then relies on it in submitting their own overall bid. The subcontractor's bid is usually held to be irrevocable for at least the time necessary for the general contractor to obtain the job and then accept the subcontractor's bid.

#### 5.2.1 Traditional View of Option Contracts: *Baird*

- $\Delta$  realizes its bid to  $\Pi$  was a mistake and notifies  $\Pi$ .
- $\Pi$  had previously sent his project bid and refuses to withdraw it.
- $\Pi$  is awarded contract and sues  $\Delta$  for specific performance.
- Judge Learned Hand rules that the subcontract bid is not enforceable. There is an Offer but No Acceptance or Consideration. Incorporating the bid into the submission by the general contractor is Not Acceptance. Hand says No Acceptance until  $\Delta$  is awarded the Contract and accepts  $\Pi$ 's bid.
- Hand argues sophisticated businessmen can form Option Contracts to protect themselves if they so choose. He rejects the notion that  $\Delta$ 's bid created an Option Contract, saying that  $\Delta$  did not intend to create a "one-sided obligation."
- Hand would not apply Promissory Estoppel either. He distinguishes a Promise from an Offer.  $\Delta$  offered to deliver in exchange for  $\Pi$ 's Acceptance not for  $\Pi$ 's bid. The Offer becomes a Promise only when  $\Delta$  accepts  $\Pi$ 's offer. A Promise is the Commitment part of an Offer and is waiting on Consideration for Acceptance.
- "[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves."
- Hand thought that Business should conform to the Law if they wanted the Protection of the Law.

#### 5.2.2 Modern View of Option Contracts: *Drennan*

- $\Pi$  uses  $\Delta$  subcontractor's bid to win a Contract.  $\Delta$  later informs  $\Pi$  that the bid was a mistake.
- $\Pi$  sues  $\Delta$  to hold them to the price of their bid.

Traynor applies Promissory Estoppel

- 1) *Promise*: the Bid was a Promise.
- 2) *Foreseeable Reliance*:  $\Delta$  contemplated that  $\Pi$  would compute its bid based on  $\Delta$ 's bid.
- 3) *Actual Reliance*:  $\Pi$  did so rely.
- 4) *Injustice*: Justice requires that  $\Pi$  be awarded the difference between  $\Delta$ 's bid and replacement bid.

- Traynor disagrees with Hand. He argues that there is an Implicit Promise to keep the bid open for a Reasonable Time to allow Π to Accept.
- Traynor notes that had Δ expressly stated that the Offer was revocable, Δ would not be bound.
- Under *Drennan*, the Subcontractor will be bound for a Reasonable Time to its bid, while the General Contractor will incur no liability if instead it chooses to shop around.

### 5.3 Creating an Option Contract

5.3.0 Traditionally, the Promisee had to provide Actual Consideration in order to hold open an Option Contract.

5.3.1 Analysis of *Berryman* (purchase of horse)

- Π signs a writing that seems like Option Contract but doesn't pay Δ \$10 stated in the Contract.
- Π sells to someone else and sues to have the Contract with Δ declared null.
- Court adheres to Classical Contract law and holds that since Π never paid Actual Consideration, there was No Option Contract, and Π was free to revoke at anytime.
- Had Δ accepted before Π revoked, there would have been a Valid Contract.
- Court rejects Δ's argument that bringing in investors was Consideration. Writing does not evidence that such activities were the price of keeping the Option open.
- Court rejects Promissory Estoppel because Δ was a sophisticated businessman who knew that he had not paid for the Option, and therefore should not have relied on its existence. *Knapp* believes an argument can be made either way. It was nominal consideration anyway.
- **RULE:** An option contract not supported by consideration is a mere offer to sell which may be withdrawn at any time prior to acceptance by writing, oral revocation, or notice to offeree through recording or other reliable information.
- **R §87(2)** has not been widely used outside of the contractor bidding world, but it might apply here.
- Most courts will uphold an Option Contract when a small amount of money is given as compensation: i.e. Π could not have argued that Δ's Consideration was not sufficient to keep the Option open. Some courts will uphold an Option Contract even if no money is exchanged provided it is in writing stating that Consideration has been given. (**see R §87(1)**; i.e. "For nominal consideration, will hold open...")

### 5.4 Firm Offer and the UCC

5.4.0 **General Principles of the UCC and of Option Contracts**

- The UCC governs the sale of goods. Article 2 attempts to bring laws governing the sale of goods in line with the realistic expectations of business people.
- UCC: "the principles of law and equity [common law]...shall supplement it's provisions."
- The UCC does NOT only apply to merchants: **ASK** – does it involve a sale of goods?
- The UCC is State not Federal law. Each state enacts its own version, but all are basically the same.
- Under **UCC §1-103**, Common Law principles of estoppel, etc. could not be used as a separate claim in support of enforcing an Option Contract.
- Price Quotations are not Firm Offers.
- When an Offer expires, the Offer is not automatically revoked, instead the Offeror gets back the Power to Revoke.

5.4.1 **UCC §2-205: Option Contracts in the Absence of Consideration**

"An Offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will held open is not revocable, for lack of consideration, during the time stated or, if no event time is stated, for a reasonable time, but in no event may such period of irrevocability exceed **3 months**; but any term of assurance on a form supplied by the Offeree must be separately signed by the Offeror."

- Offer:** the UCC assumes Common Law interpretation of an Offer instead of a separate definition.
- Merchant:** a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent. (**UCC §2-104**)
- Goods:** all things (including specialty manufactured goods) which are movable at the time of the identification to the Contract. (**UCC §2-105**)
  - Animals are considered goods, Money (including securities) is Not a Good.

- ii. This Provision of the UCC does not apply to Services, Real Property, or Intangibles like stocks (instead Common Law and the Restatement apply).
- (d) **Writing:** printing, typewritten, or any other intentional reduction to tangible form.
- (e) **Signed:** means symbols executed/ adopted by a party with present intention to authenticate writing.
- (f) **Firm:** assurances that the Contract will be held open.
- (g) **Time Period:** As applied to this section, the language regarding 3 months means that an Option Contract without Consideration will be irrevocable for 3 months only despite language to the contrary in the Contract.
- (h) **Additional Signature:** prevents inadvertent signing that leads to an unconscionable result. Formality which shows that the reader is aware of the irrevocability of the Option for 3 months or until a stated event occurs, whichever comes first. **Note:** in certain circumstances where the Irrevocability Clause of the Contract is the Contract, a separate signing may not be necessary assuming the document was signed. An additional signature is not needed if the Offeror supplies the form and/or it can be shown that the agreement was hand-tailored by the parties (instead of a boilerplate form that may/may not be read in its entirety).

#### 5.4.1.1 Four Approaches to Option Contracts: (see R § 87 and UCC § 2-205)

- 1) An offer can be revoked unless something (reliance) happens to prevent it.
- 2) An offer with consideration keeps a contract alive.
- 3) *Drennan* (see R § 87(2)) says if offer was relied on where offeree thought a contract existed, then offeror is bound if injustice can only be avoided by contract enforcement.
- 4) Formality rule in R § 87(1)(a) where a signed writing with (purported consideration, proposal for fair exchange within a reasonable time or is made irrevocable by statute) is in contract. (UCC 2-205 directed at merchants)

#### 5.4.2 Analysis of *Shoney's*

- Preliminary Proposal provided that Π would notify Δ 45 days in advance if there was a price increase.
- 4 months later, Π notifies Δ of a price increase. Δ and Π negotiate for a smaller price increase.
- Δ buys from Π at the new price for several months noting on the invoice that the new price is not correct because they did not have 45 days notice of the price increase.
- Δ pays all invoices at the higher price except the last one; instead Δ offsets last invoice by the amount they allege they were overcharged by Π.
- Court ruled that the Original Proposal was at best a Firm Offer which expired 90 days later. Because the price increase occurred 4 months later, it was outside the scope of the Firm Offer.
- Δ had the right to buy from other suppliers; therefore, each Invoice was a new Contract, the terms of which could be renegotiated at any time.

### 5.5 Battle of the Forms: Qualified Acceptance

#### 5.5.1 Common Law View: Mirror Image Rule and the Last Shot Problem

**Mirror Image Rule:** In order for an Acceptance to be valid, it must exactly mirror the offer. If it does not mirror the offer, then it is considered a counter-offer. UCC 2-207 alters the mirror image rule.

**Last Shot Problem:** If both parties have begun to perform and a dispute arises later, the Seller can argue that their form expressed the terms of the Contract because it was sent last and the Buyer accepted the terms when they accepted the goods.

#### 5.5.2 Analysis of *Poel* (sale of 12 tons of rubber)

- At what point did Offer and Acceptance occur?
- Π's (Poel, seller) first letter to the Δ (Brunswick, buyer) was not an offer because it required an additional manifestation of assent.
- Π's second letter was considered the Offer.
- Δ's Purchase Order was considered a Counter-Offer because it stated additional terms.
- Δ required Π to acknowledge the P.O., which Π never did. Therefore, No Contract was formed.
- This case illustrates why the Mirror Image Rule is problematic. Most courts are not sympathetic to a Δ who attempts to get out of Contract unless differences between the forms are substantial.

- **RULE:** Written contracts must be acknowledged in writing by all parties where negotiations have not completely defined terms of contract or if important terms are missing. (when not Mirror Image Rule)

### 5.5.3 **UCC §2-207 Additional Terms in Acceptance or Confirmation** (also see chart below...)

- 1) Is there an Offer? Remember that the terms must be definite and it must be objectively clear that the Offeror has manifested an Intent to Be Bound upon Acceptance.
- 2) Is there an Acceptance? Assent within a reasonable time, even if terms are different, can be an expression of acceptance. Forms that have terms that differ slightly may still create a Valid Contract under the UCC **but**
  - (a) The expression of Acceptance must be in Writing.
  - (b) It must be sent within a Reasonable Time.
  - (c) The additional terms will be construed as proposals to the Contract and be considered part of the Contract unless:
    - (i.) The Offer specifically states that the Contract cannot be changed/modified in any way.
    - (ii.) The additional terms materially alter the Contract:
      - Would the additional terms cause surprise and hardship to the Offeror?
      - Example: a clause that negates a standard warranty.
      - A term that slightly expands the Seller's exemption from performing due to supervening causes (earthquake, fire, etc.)
      - Note: in the Shoe Problem, Seller stated that they were exempt from performing for any reason—this would materially alter the Contract.
    - (iii.) The Offeror expressly objects to the additional terms within a Reasonable Time.
      - If a clause on the Buyer's form is in direct conflict with a clause on the Seller's form, the court assumes that each side has objected to the other party's clause and neither term becomes part of the Contract (i.e. conflicts about indemnification)
- 3) If Acceptance is expressly made conditional upon acknowledgement of the other party, the response is considered a Counter-Offer, Not an Acceptance.
  - (a) If the Offeror agrees to the conditions expressed on the Counter-Offer then they are bound by the terms of that agreement.
  - (b) If the Offeror does not expressly agree or acknowledge the Counter-Offer and the parties continue to perform as though they had created a Contract (i.e. the Seller delivers and the Buyer pays), the courts will infer a Contract.
  - (c) This Inferred Contract will consist of all terms previously agreed upon. The court will then look at the terms on which the parties disagree and apply other portions of the UCC (see 2-306, for example) to reach an equitable outcome (see **UCC §2-207(3)**).

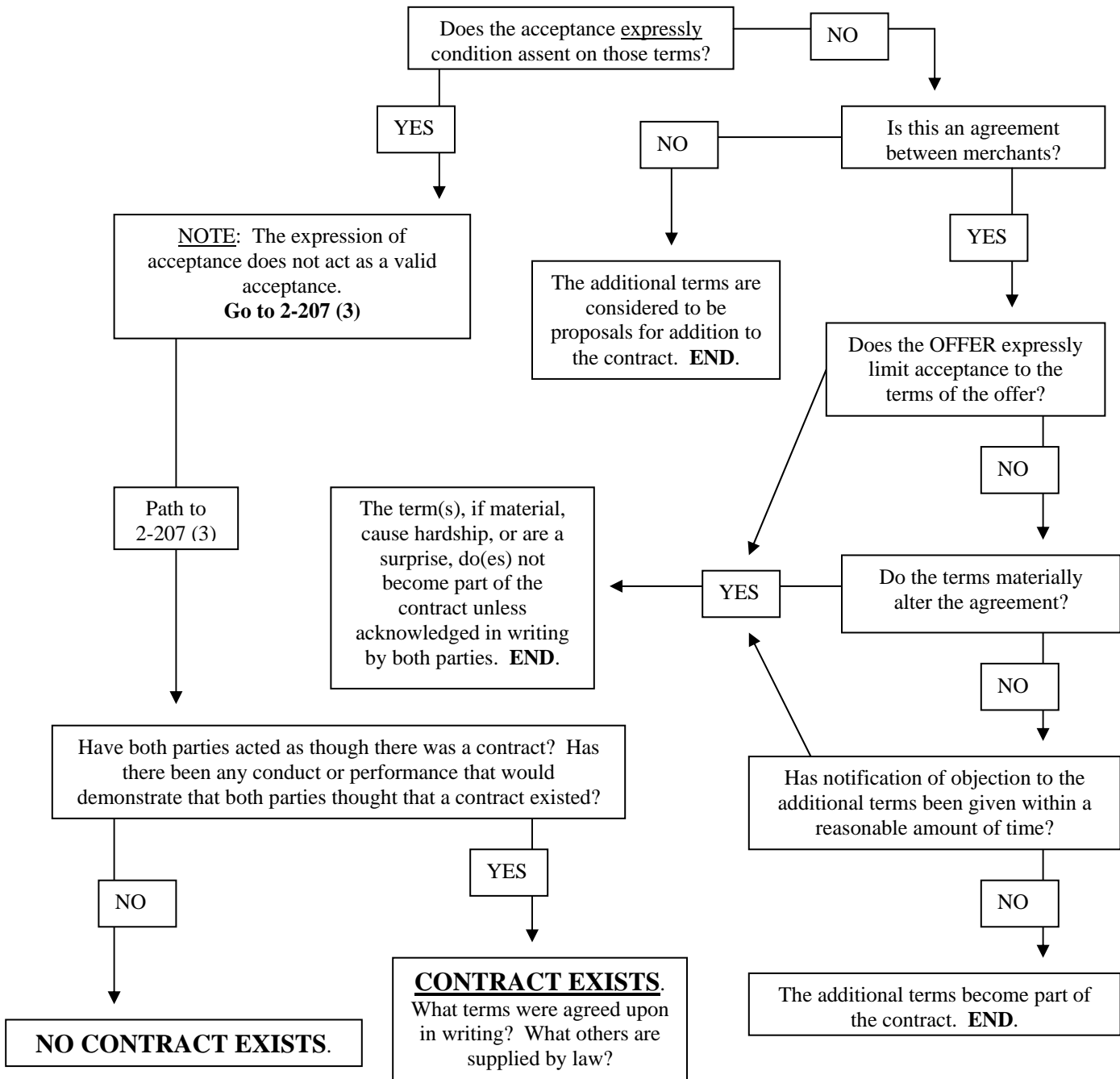
### 5.5.4 Analysis of *Brown Machine* (Cool Whip bowl-making machines)

- Proposal sent by the Seller contained an indemnification clause.
- Buyer's P.O. lacked an indemnification clause and required that the Seller acknowledge the P.O.
- Instead, Seller sent their own Acknowledgment which again contained an indemnification clause.
- Court ruled that the Seller's Proposal, even if it was an Offer, expired before Acceptance.
- Thus, the Buyer's P.O. is the Offer.
- The Acceptance was the Seller's Acknowledgment. It was not a Counter-Offer because they did not expressly condition that the Buyer agree to the new terms or express an unwillingness to proceed without express agreement to their terms.
- The Court applied UCC §2-207 and determined that the indemnification clause would materially alter the Contract; therefore, the indemnification clause was held invalid.

**UCC 2-207 Decision Tree:**

**START:** Is there an offer? If NO, then stop. If YES, then...ask

Has there been some manifestation of assent? If NO, then either have rejection, inquiry, or counter-offer. If YES, then...ask



## 5.6 Agreeing to Agree: Postponed Bargaining

5.6.0 Occasionally, parties appear to have completed their bargaining or to have at least reached an agreement. There are no conflicting forms, no additional terms, yet the Contract is still not as complete as the court would like for enforcement of its terms.

5.6.1 When Parties Bargain in Good Faith, they may agree to allow the agreement to be enforced. Sometimes the parties view each side as free to revoke, bound unless there is a substantial excuse, or “committed to the deal”: bound to make a Good Faith effort to reach agreement on the terms of the agreement.

### 5.6.2 Agreements to Agree – Two Categories:

1. Agreement to Agree: the parties have reached agreement on a number of matters but have left some terms for future negotiation.
2. Formal Contract Contemplated: the parties have reached agreement in principle on major provisions of their agreement but they contemplate the execution of a formal written contract. This is usually supported by a letter of intent outlining the major points already agreed upon and that will be included in the final writing.
3. A Formal Contract Contemplated, in the presence of the factors below, may be non-binding and allow the parties to legally avoid being bound if:
  - a) The subject matter requires a formal writing due to the statute of frauds;
  - b) There are numerous details that require specificity;
  - c) The contract is for extremely large sums of money;
  - d) The contract is an unusual one needing more than simple, standard forms.
  - e) The parties are unwilling to proceed unless the formal final document is completed.
4. Alternatively, a Formal Contract Contemplated reduced to a letter of intent may bind the parties if:
  - a) No independent legal policy requires a writing, or if it does, the parties have exchanged letters, emails, telegrams and the like which provide the major contract provisions clearly;
  - b) The contract appears relatively simple or has no long-term obligations;
  - c) The formal contract can be a standard form;
  - d) The parties have proceeded to perform – binding themselves through conduct;
5. Finally, a Formal contract contemplated may involve:
  - a) Other decisionmakers or authority figures to firmly bind the companies;
  - b) Experts such as lawyers, accountants, or anyone with special knowledge;
  - c) IF these secondary parties raise substantive issues, the initially agreeing parties may feel justified in withdrawing from any prior agreements.

### 5.6.2 Analysis of *Walker* (Renewal Option on Lease)

- Court held that the Renewal Option was not enforceable because the clause did not provide sufficient means to determine how the new rent should be calculated.
- This agreement could have been enforceable if the clause contained a method to calculate the rent or to allow a third party to determine the rental value. Courts will imply reasonable terms when there is an otherwise enforceable Contract.
- Knapp: the details regarding the lease and the parties' intent are important in determining whether the court could set a reasonable rent.
- Using Promissory Estoppel, the  $\square$  could argue that they relied on the Renewal Option as a basis for the bargain. Therefore, the  $\Delta$  should be estopped from agreeing to the Renewal Option on paper with no intent to reach an agreement on the future price.
- **UCC §2-305 is in complete disagreement with the result reached in *Walker*.**
  - (i.) The UCC provides that an open price item in a Contract will not prevent enforcement of a Contract for sale if the parties intend to be bound by their agreement....**BUT, *Walker* was a lease, not a sale.**
  - (ii.) **R §33 cmt (e)** appears to endorse the notion that this principle could be applied in situations other than the sale of goods, but if there is no way to determine what the remedy would be, there can be No Contract.

### 5.6.3 Analysis of *Pennsylvania* (Buying railroad stock)

- Court denied  $\Delta$  summary judgment because  $\square$  may be able to show that  $\Delta$  intended to be bound.

- This case looks like the parties had reached a binding agreement that merely needed to be signed, but maybe they could not reach an agreement as to how the company would be run.
- There could be a Good Faith disagreement.
- **You can have an Agreement to Bargain in Good Faith before you reach the intended Agreement under certain circumstances.**

#### 5.7.1 Analysis of *Quake Construction v. American Airlines* (unfinished airport cafeteria)

- Main issue is whether the letter of intent from Jones to Quake is an enforceable contract such that Quake has a cause of action.
- Absence of certain terms in the letter indicates parties did not intend to be bound.
- Letters back and forth were too ambiguous.
- Both the UCC and the Restatement are in agreement on the court's decision in *Quake* that whether a contract is formed by an *agreement to agree* or a *formal contract contemplated* turns on whether the parties intended to be bound when they agreed in principle or only if further negotiations should prove successful.

See also Excuses (mistake), U.S. Arbitration Act (end of outline), Defenses,

### APPROXIMATE MIDTERM FALL 2000

## 6.0 Statute of Frauds

6.00 Definition: Certain types of contracts must be in writing to be legally enforced

6.1 Policies behind the Statute of Frauds

6.1.1 **Evidentiary**: to provide evidence of the existence and terms of the contract; to avoid fraud and perjury; to avoid reliance on memory; to distinguish between preliminary negotiations and binding agreements

6.1.2 **Cautionary**: to encourage deliberation before entering a contract

6.1.3 **Channeling**: to provide a form or format for specific transactions (i.e. sale of real property)

6.2 Does the Contract fall within the Statute of Frauds? §110

6.2.1 An agreement that by its terms cannot be completed within **1 year** from the date of making

6.2.2 An agreement for the transfer or **sale of land** or an interest in land; leases for a longer period than 1 year

6.2.3 A promise to be a **surety** or guarantor for another's debt or duty

6.2.4 An contract for the sale of **goods totaling \$500** or more

6.2.5 A contract made upon consideration of **marriage**

6.3 Does the Writing satisfy the Statute of Frauds? §131

6.3.1 Reasonably **identifies the subject matter** of the contract

6.3.2 Sufficiently **identifies the parties** that have made a contract

6.3.3 With reasonable certainty **states the essential terms** of the unperformed promises of the contract

6.4 Are there other factors which might invoke an exception to the Statute of Frauds? (II still needs to win on the merits after getting around SOF)

6.4.1 **Part Performance**

6.4.2 **Detrimental Reliance**

Promissory Estoppel §139

(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 limited as justice requires.

(2) Factors to consider

- availability of other remedies, i.e. cancellation and restitution
- definite and substantial character of the action in relation to the remedy
- extent to which action corroborates evidence of the making of the promise
- reasonableness of the action
- foreseeability of the action

6.5 Analysis of *Crabtree v. Elizabeth Arden*

- II was able to satisfy the writing requirement by piecing the agreement together with several connected writings (§132)

- 6.6 Analysis of *Winternitz*
- Π was unable to use part performance to gain money damages in an action governed by the SOF (only equitable relief)
  - Π relied on the oral agreement to renew the lease in assigning the lease to the purchaser of his pharmacy
  - Without a writing, a lease of more than 1 year is an at will interest
- 6.6 Analysis of *McIntosh v. Murphy*
- Dispute over alleged employment contract (Π says 1 year; Δ claims at will and 1+ year)
  - Part performance or Equitable Estoppel are exceptions to the SOF
  - Court: policy behind the SOF is to prevent fraud; application here would have been unjust
- 6.7 Requirements of UCC §2-201
- 6.7.1 **Signature**
- 6.7.2 **Quantity**
- 6.7.3 **Writing** that provides a basis for believing that the offered oral evidence rests on a real transaction
- 6.8 The UCC approach believes that the purpose of the SOF is not to create a formal barrier to obligation but rather to prevent certain types of fraud
- 6.9 Analysis of *Cohn v. Fisher* (sailboat)
- the check contains enough material terms to satisfy the SOF
  - Δ's admission of the contract may allow performance
  - payment and acceptance of the check may constitute part performance
  - "The SOF was not designed to protect a party who made an oral contract, but rather to aid a party who did not make a contract, though one is claimed to have been made oral with him."
- 6.10 Analysis of *Barak* (merchant's exception)
- If one party signs and sends a confirmation sufficient to enforcement against the sender, and the other party doesn't promptly object to it in writing, the SOF will not be a bar to enforcement
  - Dissent: writing was only an offer, not a confirmation of a contract

## 7.0 Interpretation

- 7.1 Principles of Interpretation (Corbin and R2d)  
Whose meaning controls the interpretation of the contract?  
What was that party's meaning?
- 7.2 Maxims of Interpretation
- An interpretation that makes a contract valid is preferred to one that renders the contract invalid
  - Contracts are interpreted against the drafter
  - Contracts are interpreted as a whole. Terms are considered within the context of the whole
- 7.3 Modern Modified Objective Approach to Contract Interpretation  
The subjective intent of both parties is considered. A contract cannot have a different interpretation for a term than that of either party. (Williston's rigid objective approach which borders on the absurd)
- 7.4 **Whose Meaning Prevails? §201**
- 7.4.1 When both parties attach the same meaning to a term, that meaning will govern (even if a reasonable person would interpret the term differently)
- 7.4.2 When both parties attach different meanings to a term, but one party knows of the other party's meaning, the contract will be interpreted against the party with knowledge
- 7.4.3 If neither party knows of the other's different meaning, there is not mutual assent (last resort by courts)
- 7.5 **Rules in Aid of Interpretation §202**
- 7.5.1 If the intent and purpose of the parties is ascertainable, then it is given great weight. Words and conduct go to interpreting the parties' intent
- 7.5.2 A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together
- 7.5.3 Unless a different intention is manifested,  
(a) a word's prevailing meaning will be adopted  
(b) a technical term will be given its technical meaning when used in a transaction within that technical field
- 7.5.4 Course of Performance is given great weight when the parties have performed repeatedly
- 7.5.5 Wherever reasonable, terms are to be interpreted as consistent with each other, with course of performance, course of dealing, or trade usage
- 7.6 **Standards of Preference in Interpretation §203**

- 7.6.1 A reasonable, lawful, and effective meaning is preferred to one that is unreasonable, unlawful, or of no effect
- 7.6.2 **Hierarchy of Interpretation**
1. Express Terms
  2. Course of Performance
  3. Course of Dealing
  4. Trade Usage
- 7.6.3 Specific Terms are given greater weight than General Terms
- 7.6.4 Separately Negotiated or Added Terms are given greater weight than Standardized Terms
- 7.7 **Supplying an Essential Omitted Term §204**
- Where the parties have a contract but have not agreed on an essential term to the contract, a reasonable term is supplied by the court
- 7.8 Analysis of *Joyner*
- Π contends that Δ failed to properly develop the property and thus, is subject to a rent escalation clause  
 Δ contends that he did sufficiently “develop” the property as that word is used in the local real estate market  
 Court declares that Π can prevail only if the trial court concludes that the Δ knew or had reason to know of the meaning she intended while she did not know (or have reason to know) of the meaning he intended
- 7.9 Analysis of *Frigalement* (chickens)
- Π ordered a large quantity of “chicken” from Δ, intending to buy young chicken suitable for broiling and frying
  - Δ believed that based on the weights ordered at the prices fixed by the parties that the order could be filled with older chickens, only suitable for stewing, that the Δ termed “fowl”
  - The party seeking to interpret a contract term in a sense narrower than its everyday use bears the burden of persuasion
- Methods of Interpretation Used by the Court
1. The contract itself
  2. Trade Usage (conflicting witnesses)
  3. Negotiation of the parties to the contract (“any kind of chickens”)
  4. Extrinsic Evidence at the time the contract was made (market rate)
  5. Course of Performance (Π allowed second shipment)
  6. Definitions for other resources (USDA)
- 7.10 Rules for Conditions of Satisfaction
- Party to the Contract
- For Functional or Mechanical Utility, use an objective standard of reasonableness
  - For Aesthetics, use a good faith subjective standard
- Third Party to the Contract
- For Functional, Mechanical Utility, or Aesthetics, use a good faith subjective standard
  - Rationale: a third party is less likely to be unreasonable
- 7.11 Analysis of *Morin* (Posner’s take on the GM plant)
- GM corporation refused to approve aluminum siding installed by Π  
 §228 sets a reasonable person standard  
 §229 seeks to avoid forfeiture
- 7.12 Analysis of *C&J Fertilizer Inc. v. Allied Insurance* (What is Burglary?)
- D Doctrine of Reasonable Expectations  
 Insurance contract allows recovery for burglary  
 Since there was no damage to the interior door, Δ didn’t pay  
 Δ claims that their definition of burglary prevents recovery for “inside jobs”  
 The court says an insurance contract cannot contravene the reasonable expectations of the insured  
 A party is not to be bound to unknown terms which are beyond the range of reasonable expectation
- 7.13 **Requirements to Trigger Reasonable Expectation Doctrine**
- 7.13.1 Adhesion Contract
- 7.13.2 Unequal Bargaining Power
- 7.13.3 Lack of Negotiation
- If these are met, an element of the contract that contradicts the adhering party’s reasonable expectation may be removed from the contract
  - Fine print cannot contradict the agreed terms of the contract
- 7.14 **Parol Evidence Rule**

#### 7.14.0 Rationale

- attempt to control fraud
- provide certainty in contract
- force parties to pay attention to the terms of the written agreement
- alternatively, may allow one party to take advantage of another ignorant one
- give final writings priority over earlier writings and oral agreements

#### 7.14.1 Chart

|                              | <b>Explain</b> | <b>Supplement</b> | <b>Contradict</b> |
|------------------------------|----------------|-------------------|-------------------|
| <b>Not integrated</b>        | Yes            | Yes               | Yes               |
| <b>Partially integrated</b>  | Yes            | Yes               | No                |
| <b>Completely integrated</b> | Yes            | No                | No                |

#### 7.14.2 Methodology for Issue Spotting Parol Evidence

**Is one party attempting to vary or add to the terms of the final writing by the use of extrinsic evidence?**

(these alleged terms may reflect prior writings or prior/contemporaneous oral understandings)

If yes, this touches the Parol Evidence Rule

Otherwise, Interpretation, Subsequent Modification, Fraud, Reformation, Oral Condition Precedent, or Collateral Contract might be at issue

**Is the final writing a partial integration or a complete integration?**

A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement §210

#### 7.14.3 Partial vs. Complete Integration

- 1) Williston: look only to the “four corners” of the document; a rigid approach based in classical contract law
- 2) Corbin (Restatements): look at the parties’ intent (beyond the four corners); a merger clause is not conclusive, merely evidence of intent

#### 7.14.4 Dealing with Partially Integrated Documents

Courts look to extrinsic evidence to the extent it does not contradict or change the terms of the contract

Extrinsic evidence can only supplement the contract

Majority: a term contradicts a writing when it renders it invalid

Minority: a term contradicts a writing when it varies the writing or is not in complete harmony with it

#### 7.14.5 Exceptions to the Parol Evidence Rule

- duress
- undue influence
- agreements made after the writing (PER doesn’t prevent proof of later agreements)
- oral condition precedent
- fraud
- in UCC cases, you can use trade usage, course of dealing, and course of performance as extrinsic evidence

#### 7.14.6 Merger Clause: a statement in the contract that the writing is intended to be final and complete

(attempt to control the past)

Three Views on Merger Clauses

- 1) conclusive of parties’ intent- completely enforceable
- 2) adhesion contract- not enforceable
- 3) mere evidence of the parties’ intent

#### 7.14.7 No Oral Modifications Clause §2-209(2)

(attempt to control the future)

#### 7.15 Analysis of *Thompson* (logs)

Court ruled that the contract was complete on its face so parol evidence was inadmissible to vary the terms (recall Williston’s “four corners”)

#### 7.16 Analysis of *Hershon* (release of “any and all claims”)

- trial court says that “any and all claims” does not apply to the mortgages
- appellate court says “any and all claims” is final
- PER bars extrinsic evidence which explains the parties’ intent when the terms of the contract have a plain and unambiguous meaning

- 7.17 Analysis of *Nanakuli* (asphalt business in Hawaii)  
 2 previous times, Δ had covered [] from price increases  
 UCC §1-201 provides different definitions of “agreement” and “contract”  
 contract is the total legal obligation  
 agreement is broader than contract; includes “language or implication”  
 UCC §2-305(2) good faith provision for prices  
 UCC §2-202 (Code’s PER) allows course of dealing and trade usage  
 If a party wants to insist on the full terms, their actions had better be consistent with the writings

## 8.0 Implied Terms

- 8.1 Rationale: the contract may be broader than the agreed upon terms  
 Courts look for desires + conduct + intentions + contractual context
- 8.2 Analysis of *Wood v. Lady Duff-Gordon* (seal of approval)
- a promise to promote the sale of the manufacturer’s product or a bona fide effort to pursue the contract is sufficient consideration for an exclusive distributorship contract
  - an express promise was lacking, but there was an implied promise, imperfectly expressed in the contract
- 8.3 Code Provisions that act as “Gap Fillers”
- §2-305: if price is left open, the court will imply a reasonable price  
 §2-306: duty of good faith in output/requirements/exclusive dealings contracts  
 §2-307: delivery in single or several lots  
 §2-308: place of delivery is the seller’s place of business if not otherwise specified  
 §2-309: requiring reasonable time and reasonable notice  
 §2-310: payment within a reasonable time  
 §2-311: assortment of goods is at the buyer’s option; shipment is at the seller’s option
- 8.3 **Implied Obligation of Good Faith**  
 Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement §205/§1-203 (silent on good faith in negotiations)  
 Summer’s view that good faith is an “excluder” for a wide range of “bad faith” conduct
- 8.4 Analysis of *Eastern Air Lines v. Gulf Oil* (Requirements contract)  
 Gulf tried to get out of its requirements contract with Eastern when the government started rationing oil  
 Gulf didn’t protect themselves contractually and was not doing so badly  
 The agreement to not buy from others (even if only in specified cities) serves as sufficient consideration
- 8.5 Analysis of *Thompson v. St. Regis* (Employment contract)  
 [] alleges wrongful termination after he “stepped on someone’s toes”  
 possible action if firing is against public policy
- 8.5 **Express Warranties** §2-313  
How to Create an Express Warranty
- 8.5.1 State a fact or make a promise. Now the goods have to conform to it.  
 8.5.2 Describe the goods. Now the goods have to conform to that description.  
 8.5.3 Show a sample or a model. Now all of the goods have to conform to it.  
 D these actions all have to be the part of the basis for the bargain
- 8.6 **Implied Warranties**: not based on an agreement between the parties, but imposed by law on the seller to protect the buyer UCC §§2-312 - 316
- 8.6.1 **Implied Warranty of Merchantability**: goods “are fit for the ordinary purposes for which such goods are used” §2-314
- 8.6.2 **Implied Warranty of Fitness for a Particular Purpose**: where the seller knows the buyer’s purpose for buying, and the buyer relies on the seller’s skill or judgment to select suitable goods, there is an implied warranty that the goods will be fit for that purpose
- 8.6.3 **Exclusion or Modification of Warranty** (Disclaimer)  
 Expressions like “as is” or “with all faults” will disclaim implied warranties  
 Because disclaimers are generally disfavored, specific, conspicuous written language is required
- 8.7 Analysis of *McDonald v. Mianeki* (house built with non-potable well)  
 D court found an implied warranty of habitability for new homes  
 factors to look at
1. reliance by purchaser
  2. unequal bargaining power; standardized contracts

3. better position to prevent damage
4. expectation of the parties

8.8 Analysis of *Doe v. Travenol* (blood bank case)

- $\square$  who contracted HIV from blood transfusion unable to circumvent blood shield laws
- blood transfusions are services not goods
- courts have been willing to hold *commercial* providers for services liable for breach of implied warranty
- courts have been unwilling to hold providers of *professional* services liable

## 9.0 Defenses

9.1 **Minority:** contracts with minors are voidable at the election of the minor R §14

- A minor may use this as a personal defense to disaffirm the **entire** contract
- Once attaining majority, the minor must expressly affirm contracts. If the minor fails to disaffirm the contract within a reasonable time, they will be estopped from doing so later

9.1.1 Exceptions

1. minor misrepresents his age (most states)
2. minor is emancipated (some states)
3. minor willfully destroys the property
4. minor is purchasing necessities (reasonable cost of food, clothing, shelter)
5. statutory (i.e. student loans)

9.1.2 Majority Rule: if minor disaffirms the contract, the goods or proceeds must be returned to the other party

9.1.3 Minority Rules (Protecting the Rights of Innocent Merchants)

Benefit Rule: upon rescission, recovery of the full purchase price is subject to a deduction for the minor's use of the merchandise

Other View (adopted in *Dodson v. Shrader*): upon rescission, recovery is subject to a deduction for use, "depreciation," or "deterioration"

9.2 **Incapacity**

- contracts made by people who are totally incapacitated are void
- contracts made by people suffering from a partial lack of capacity are voidable
- a subjective test is made to determine mental incapacity (intoxication, illness, etc...)
- Does the other party know of the incapacity and take advantage of it?

9.2.1 Analysis of *McGovern v. State Employees Retirement Board* (toll taker)

$\square$  argues that his father's choice of retirement package was not only bad, but proof of incompetency contract is not void unless the party was incapacitated at the time of the bargain

9.2.2 Cognitive test (traditional): person lacks capacity to contract if they are unable to understand the transaction

9.2.3 Volitional test (R §15): person is unable to contract if they are unable to act in a reasonable manner in the transaction and the other party has reason to know of the condition

9.3 **Duress:** Agreements made when one party was imprisoned or under threat of physical harm are unenforceable. Party must have no reasonable alternative.

9.3.1 R§174: Duress by physical compulsion voids contracts

9.3.2 R§175: Duress by improper threat (see §176) makes contracts voidable

9.3.3 Economic Duress

if  $\Delta$  is not responsible for the business conditions, not voidable

financial distress must be caused by the other party

based on the principle of preventing excessive gain resulting from impaired bargaining power

9.3.4 Analysis of *Totem Marine* (tugboats)

$\square$  claimed that  $\Delta$  used economic duress to get them to sign a binding release of all claims against it

9.4 **Undue Influence:** "persuasion which overcomes the will without convincing judgment" R§177

Characteristics of overpersuasion

1. unusual or inappropriate time
2. unusual place
3. insistent demand to finish now
4. emphasizing risks of delay
5. multiple persuaders on the dominant side
6. absence of advisors on the subservient side
7. statements that there is no time for consultation

9.4.1 Analysis of *Odorizzi* (Gay teacher forced to resign)

“Taking an unfair advantage of another’s weakness of mind is undue influence, and the law will not permit the retention of an advantage thus obtained”

Court found that Δs “secured Π’s signature but not his consent”

9.4.2 Duress and Undue Influence Distinguished

Duress: you have no alternative

Undue Influence: you think you have no alternative

9.4.3 Analysis of *Syester* (Dancing Widow)

Π’s release in contract does not prevent her fraud claim in tort

9.5 **Misrepresentation**

either a tort for damages or a contract claim for rescission §164

Elements

1. active representation of a falsity
2. either fraudulent (tort) or material (contract); even an innocent misrepresentation will allow for rescission if material
3. scienter/intent (intent to defraud is not necessary in contract)
4. harm or damage (ignored in R)

9.5.1 **Material Misrepresentation:** likely to induce a reasonable person to manifest assent; made by a person who knew or should have known that it was likely to induce the person to assent to the bargain

9.5.2 Fraudulent Misrepresentation

1. made with intention to induce the other party’s reliance
2. with the knowledge of the falsity OR
3. with the knowledge that the party did not have the factual basis asserted

9.5.3 Other Facts about Misrepresentation

- no basis for reliance on a non-factual opinion
- an expression of opinion by one who possesses or appears to possess superior knowledge may induce justifiable reliance
- opinions of a fiduciary may induce justifiable reliance in the other party
- statements of future intention **do not** provide a basis for reasonable reliance

9.6 **Nondisclosure:** concealment of information constitutes misrepresentation where there is some legal basis for imposing a duty to disclose the fact concealed

Factors to Consider

9.6.1 Difference in Intelligence between the parties

9.6.2 Relationship between the parties (not necessarily fiduciary)

**When is there a Duty to Disclose?**

1. When there is a relationship of trust between the parties
2. When it is imposed by the situation
3. When it is necessary to correct a previous assertion which, although not misleading when made, has become inaccurate due to a change in circumstances
4. When a party knows that the other party is operating under a mistake of fact as to a basic assumption

9.6.3 The Manner in which Information was Acquired

9.6.4 The Nature of the Fact not disclosed (§161 when non disclosure is equivalent to an assertion)

9.6.5 The Nature of the Contract itself

9.6.6 The Importance of the Fact not disclosed

9.6.7 Affirmative Acts of Concealment

(Supreme Court failed to find a duty to disclose in *Laidlaw*, but there the information was public knowledge)

9.6.8 Analysis of *Hill v. Jones* (No Termites Trouble Here)

- Court imposed a duty on the seller to disclose facts materially affecting the value of the property which are not readily observable and are not known to the buyer

9.7 **Fiduciary Duty:** if a fiduciary makes a contract with their beneficiary relating to matters within the scope of the fiduciary relationship, the contract is voidable by the beneficiary unless 1) it is on fair terms and 2) all interested parties manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know. R§173 (*Miller v. Sears*)

9.8 **Unconscionability:** a grossly unfair bargain too repulsive to enforce (UCC §2-302)

Elements

- 9.8.1 Absence of Meaningful Choice for one of the parties
- 9.8.2 Contract terms that are Unreasonably Favorable to one party
- 9.8.3 Hidden Terms
- 9.8.4 Divergence from Usual Business Practices
  
- 9.8.5 **Procedural Unconscionability:** how the bargain was obtained
  - defective bargaining process
  - inconspicuous print
  - inability of one party to ask questions about the terms of the contract
  - lack of voluntariness arising from great disparity of bargaining power
- 9.8.6 **Substantive Unconscionability:** the unfairness of the bargain
  - oppressive or overly harsh or unfair contracts or contract terms
  - must be unconscionable at the time of the contract (CA will retroactively examine)
  - depriving one party of the benefit of the bargain or leaving them without remedy for the other's non performance
  - provisions which bear no reasonable relation to the business risk involved
  - excessively large disparity between the cost and the selling price of the subject matter of the contract
  
- 9.8.7 Analysis of *Williams v. Walker-Thomas Furniture Co.* (add-on clause)  
cross collateral clause is unconscionable because  $\Delta$  lacked other meaningful choices and the terms were unreasonably favorable to the  $\Pi$
- 9.8.8 Analysis of *Ahern v. Knecht* (air conditioner)  
Court found a gross disparity of bargaining position which resulted in a contract unreasonably favorable to the stronger party
- 9.8.9 Analysis of *Zapatha v. Dairy Mart* (franchise agreement terminated without cause)
  
- 9.9 **Public Policy:** contracts properly formed but in violation of public policy will not be enforced  
Questions to Ask
  1. Should the entire contract be enforced?
  2. Is the whole contract unenforceable or only part of it?
  3. Should the objectionable term be excised altogether or modified (broad or narrow view of "blue-pencilling")
  4. Should there be restitution or should the parties be left as they stand?
- 9.9.1 *Derico v. Duncan* (builder operating as a mortgage lender)
  - failure to obtain a license prior to making loans makes a contract for loans unenforceable
  - the purpose of the law was consumer protection not revenue raising
- 9.9.2 *Karlin v. Weinberg* (agreement not to compete)  
Who's Interests are at stake?
  - Employer
  - Employee
  - Public

§187 Non-Ancillary Restraints on Competition is an unreasonable restraint of trade.  
§188 Ancillary Restraints on Competition not allowed if

  - a) restraint is greater than needed to protect the promisee's legitimate interest
  - b) promisee's need is outweighed by the hardship to the promisor and the likely injury to the public
- 9.9.3 *In re Baby M* (surrogacy case)

## 10.0 Excuses

- 10.1 **Mistake:** a belief that is not in accord with the facts
- 10.1.1 **Unilateral Mistake:** a mistake made by only one party to the contract  
R §153 "When a mistake of one party at the time the contract was made as to a basic assumption on which he made the contract has a **material effect** on the agreed exchange of performances, the contract is voidable by him if he does not bear the risk of mistake...and,
  - 1) the effect of the mistake would be unconscionable
  - 2) the other party had reason to know of the mistake or his fault caused the mistake
- 10.1.2 **Mutual Mistake:** mistake made by both parties to the contract

R §152 “Where a mistake of both parties at the time the 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 mistake

10.1.2 Analysis of *Lenawee County v. Messerly* (raw sewage leak)

Since no one knew of the condition, the court refused to rescind the contract

Court limits *Sherwood v. Walker* (the barren cow case) to its facts

Who should properly bear the risk?

10.1.3 Analysis of *Wil-Fred’s v. Metropolitan Sanitary District* (error in calculation)

- Court excused contractor for performance of its bid when its subcontractor made an error in calculation that made its bid price too low
- Unilateral mistakes that are so large that the other party should know that they are mistaken can be the basis for rescission
- You can’t snap up a bargain that is too good to be true (no windfalls)

10.1.4 **Allocation of Risk** R§154

“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 is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.”

10.2 **Changed Circumstances**

10.2.1 **Impossibility:** Performance is excused when it becomes objectively impossible

- destruction or other unavailability of the subject matter of the contract §263
- failure of the agreed upon method of performance
- death or incapacity of a party §262
- prevention by governmental regulation or order §264

10.2.2 **Impracticability**

Requirements

1. the occurrence of an event which has made performance impracticable
2. the event occurred without the fault of the party who seeks relief
3. non-occurrence of the event must have been a basic assumption upon which the contract was made
4. the party did not agree to assume the risk of the event

D Force Majeure clauses are written into contracts to protect sellers from delay or default in delivery that is beyond their control

10.2.3 **Frustration of Purpose:** 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 circumstance indicate the contrary R§265

10.2.4 Analysis of *Karl Wendt Farm Equipment* (IH sells the business)

performance not excused when a foreseeable market downturn renders a contract unprofitable

10.2.5 Analysis of *International Minerals v. Llano* (requirements contract for natural gas)

∏ not excused because it did not give Δ the adequate notice required to trigger the force majeure clause

Courts are generally more willing to grant relief when impracticability rests on some government action

10.3 **Modification**

- One-sided modifications of existing contracts are regarded as presumptively improper and are enforced only in exceptional cases
- A contract modification which has the effect of altering the obligation of only one of the parties is ordinarily deemed unenforceable unless supported by new consideration
- UCC §2-209 allows for modification without separate consideration

10.3.1 **Pre-existing duty rule:** a promise to perform an existing legal duty under a binding contract is not sufficient consideration to support the other party’s promise to do something more or to pay more R§73

Exceptions

1. Implied agreement of rescission of pre-existing contract followed by the formation of a new agreement (*Schwartzreich*)
2. When one party has already breached, and the additional promise by the other party is to secure performance instead of suing for damages (this is new consideration)
3. If the modified agreement was made after **unanticipated and unforeseen and substantial difficulties** were encountered which were not known or anticipated when the contract was entered into and which

cause an additional burden on one party's performance (if unforeseen circumstances would excuse performance, then the pre-existing duty rule doesn't apply) R§89

4. economic duress (good faith not coercion)
5. avoiding breach of contract (most courts don't enforce such consideration)
6. statutory R§89
7. the modification will induce a material change of position, so that injustice will result if enforcement is not forthcoming R§89

#### 10.3.2 Analysis of *Alaska Packers* (greedy seamen)

- a promise to pay an employee for doing what is already their contractual duty to do is without consideration

#### 10.3.3 Analysis of *Swartzreich* (modify employment contract)

- When an existing contract is terminated by the consent of **both** parties and a new one immediately executed in its place, the mutual promises to rescind the original contract constitute sufficient consideration to support the new contract

#### 10.3.4 Analysis of *U.S. ex rel. Crane Co.* (Crane case)

- Δ agreed to a higher price for Π's equipment then attempted to get out of the modification by claiming that the contract modification was invalid
- Under §2-209, the modification of the contract price for the sale of goods is enforceable where the seller's costs have increased and the seller is unaware of the buyer's limited avenues of supply

## 11.0 Justifications

### 11.00 Definitions

**Condition:** an event, not certain to occur, which must occur, unless its nonperformance is excused, before performance of a contract becomes due. R§224

**Implied Condition** (Implied-in-fact): an event which is not expressly made a condition by the language of the contract but which the parties necessarily contemplated as part of their agreement

**Condition Precedent:** a condition that must occur before an absolute duty of immediate performance arises in the other party. The burden of proof is on the person to whom duty is owed to show that the condition occurred

**Condition Subsequent:** an event that operates by agreement of the parties to discharge a duty of performance that already exists. The burden of proof is on the person who owes the duty to show that the condition has occurred

**Concurrent Condition:** a condition which only exists when the parties to a contract are to perform at the same time. In effect, each is a condition precedent to the other

D remember Lord Mansfield set this up in *Kingston v. Preston*

### 11.1 Express Conditions: courts usually require strict compliance with express conditions unless

1. interpretation of the intent of the parties suggests otherwise
2. public policy
3. unconscionability
4. estoppel: whenever a party indicates that they are waiving a condition before it is to happen, and the other party detrimentally relies, the party is estopped
5. waiver §§246-248: **the knowing relinquishment of a right**
6. forfeiture §229: courts avoid strict compliance of an express condition that will result in a forfeiture unless it was within the party's control or the party assumed the risk
7. materiality: academics posit that express conditions not related in substance to the contract asserted solely for the purpose of defeating a claim should be ignored
8. prevention (bad faith): condition is excused if the promisor wrongfully hinders or prevents the condition from occurring
9. impossibility/impracticability/frustration: if the condition fails to occur because its occurrence is impossible through no fault of either party, then its non-occurrence is excused only if it was an express condition that was not a material part of the transaction

#### 11.1.1 Analysis of *Inman* (30 days to file a claim)

not unfair or unconscionable, so the express condition is upheld

#### 11.1.2 Analysis of *Jones Associates v. Eastside* (condition or promise?)

- a contract term will not be considered a condition precedent unless the party charged with its fulfillment can said to have assumed the risk of forfeiture

#### 11.1.3 Analysis of *US Fidelity v. Bimco* (burglars damage building)

- remember to construe language against the insurance company and look for waiver

- 11.1.4 **Analysis of JNA Realty** (negligent failure to renew lease option)
- equity protected tenant from forfeiting their renewal option
- 11.1.5 **Analysis for Express Conditions**
1. Was there an express condition?
  2. Was there strict compliance?
  3. If not, is there an excuse?
- 11.2 **Material Breach:** Where it is found that 1) the promisor is under an absolute duty to perform, and 2) this absolute duty of performance has not been discharged, then the failure to perform in accordance with the contract terms will amount to a breach of the contract
- 11.2.1 **Determining Whether a Breach is Material** R §241
1. Amount of Benefit Received: where the obligee does not receive the substantial benefit of their bargain
  2. Extent of part Performance: breaching party cannot correct or fails to cure the breach within a reasonable period of time
  3. Adequacy of Damages: the extent to which the injured party may be adequately compensated in damages
  4. Hardship to Breaching Party: look to the extent of hardship upon the breaching party should the contract be terminated; the greater the extent, the less material the breach
  5. Negligent or Willful Behavior: the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing
- 11.2.2 Total Breach: entitles non-breaching party to be released from their obligations under the contract
- 11.2.3 Partial Breach: where the obligee gains the substantial benefit of their bargain despite the obligor's defective performance; does not discharge the non-breaching party of their obligations. **They cannot rescind.** The other party's duty may be suspended but is not excused
- 11.2.4 Analysis of *Sackett* (sale of newspaper stock)
- a material breach of a contract constitutes a total breach thereof and is sufficient to permit the non-breaching party to lawfully repudiate the same
  - There is a substantial risk involved for the non-breaching party who chooses to treat the other party's non-performance as a material/total breach because if a court finds that the breaching party rendered substantial performance, then the non-performing party will have a cause of action against the non-breaching party for stopping their performance
- 11.2.5 Analysis of *Jacob & Youngs v. Kent* (forgot that pipe)
- an innocent and trivial omission will be atoned by the allowance of resulting damage, not by a forfeiture
  - for damages in a construction contract, the owner is entitled to merely the difference between the value of the structure if built to specifications and the value as it was constructed
- 11.3 **Anticipatory Repudiation:** a definite and unequivocal manifestation of intent to repudiate along with conduct that indicates that performance is a practical impossibility. It can be retracted as long as the other party has not yet treated it as final and has not relied on the repudiation
- 11.3.1 Definition: A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would itself give the obligor a claim for damages for total breach under §243, or (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach R§250
- 11.3.2 Asking for Adequate Assurances R§251
- 11.3.3 Analysis of *Harrell v. Sea Colony* (do I want to buy a condo?)  
court says that evidence that Π was seeking agreement was evidence contrary to anticipatory repudiation  
a mere request to cancel does not constitute anticipatory breach
- 11.3.4 *PDM Steel v. Brookhaven* (water tank)  
Π breached by anticipatory repudiation; Δ gets money for foundation  
Π did not have reasonable concern's about Δ's ability to perform  
Π was trying to get what it had bargained away

## 12.0 Expectation Damages

- 12.00 General Principles
- Expectation damages put the Π in as good of a position as Π would have occupied had Δ performed its promise
  - Give Π the "benefit of the bargain"
  - Courts have a strong preference for expectation damages

- Aim is adequate compensation and not over-compensation; make the non-breaching party whole without punishing the breaching party

## 12.1 Calculating Expectation Damages (Farnsworth) R2d §347

**Expectation Injury** = **Loss in Value** to the [] because of the other party's non-performance  
 + **Other Loss**  
 - **Cost Avoided**: the money that the [] would not have to expend  
 - **Loss Avoided**

simplest case, one side has completely performed §2-709 "action for the price"  
 Some courts use Unpaid K price – Cost of Completion

### 12.1.1 *Kemp v. Gannett*

Trial court awarded difference between unpaid contract price and market price  
 the Market price was found to be the resale price after the breach  
 Appellate court added utilities because they were needed to sell  
 Cover Price §2-712 (term not used to discuss land contracts)

### 12.1.2 *Handicapped Children's Education Board v. Lukaszewski*

- trial court said Δ was responsible for the difference between her salary and the salary of her replacement even though [] got a better employee with more experience

### 12.1.3 *American Standard v. Schectman* (damage to land)

- Δ claims value of damages should be diminution of value not cost of completion
- only where cost of completion entails unreasonable economic waste will the measure of damages for breach of construction be diminution of value
- cannot get specific performance for employment contracts

### 12.1.4 American Rule v. English Rule

When the seller is in breach, some courts use the English rule restricting the buyer to restitution of any part of the purchase price already paid, unless the buyer can demonstrate bad faith on the part of the seller  
 The American rule awards expectation damages for any unexcused failure of the seller to convey property regardless of the intention of the seller

### 12.1.5 Interest

generally, from date of judgment  
 exception, from date of breach if the agreement calls for the payment of a fixed sum of money or if the claim is for a liquidated sum or a readily ascertainable sum

### 12.1.6 **General v. Specific Damages**

#### General

- arise naturally from breach and are implied or assumed at law
  - reasonably foreseeable so no specific notice or agreement is required for recovery
- Specific- usually refers to lost profits §2-715 Buyer's Incidental and Consequential Damages
- consequential, special, or unusual damages within the contemplation of the parties when the contract was made
  - not reasonably foreseeable
  - breaching party must have notice of the special circumstance
  - some courts have required implied or express consent to bear the risk of these damages

### 12.2 **Foreseeability: Were the Damages Foreseeable?**

If the consequences of breach are foreseeable, the party that breaches will be liable for the lost profits or expectation damages. If there is an assumption of risk, the seller or carrier must necessarily be aware of the circumstances. **Special circumstances must be communicated.**

### 12.2.1 *Hadley v. Baxendale* (trouble at the mill)

Damages are of two types: those that arise naturally in the usual course of events from the breach of the contract of the type in question (general damages), and those that arise due to special facts and circumstances existing in this particular case (special or consequential damages)

### 12.2.2 Unforeseeability & Related Limitations on Damages R §351

- 1) damages are not recoverable for loss that the breaching party had no reason to foresee
- 2) loss may be foreseeable because it follows from the breach
  - a) in the usual course of events
  - b) as a result of special circumstances, that the party in breach had reason to know
- 3) court may limit damages as justice requires

### 12.2.3 *Native Alaskan* [] didn't loan money and the enterprise failed

- 12.3 **Certainty:** Damages can only be recovered if their amount can be computed with reasonable certainty  
 Where the amount is not reasonably certain, [] can only recover nominal damages  
 Modern trend is to not cut off damages on the ground of uncertainty  
 Existing businesses: not usually speculative  
 New businesses: generally speculative but today the trend is to examine on a case by case basis to determine profits with reasonable certainty by looking at similar area businesses
- 12.3.1 Uncertainty as a Limitation on Damages R §352  
 Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty. Questions resolved against the breacher
- 12.4 **Causation**
- 12.5 **Mitigation of Damages**  
 Δ need not compensate [] for injurious consequences that [] could have avoided by reasonable action  
 Expenses occurred in mitigation are recoverable  
 R §350 Duty to mitigate exists only when it can be accomplished without undue risk, burden, or humiliation.  
 Injured party not precluded from recovery if reasonable efforts to mitigate fail
- 12.5.1 *Stewart*  
 to prove a terminated employee did not mitigate damages, a former employer must prove  
 1. comparable work existed  
 2. the E unreasonably failed to seek it  
 3. it was likely E would have secured the position
- 12.5.2 *Parker v. 20<sup>th</sup> Century*  
 Court distinguished roles for Shirley McLaine as not comparable  
  
 D is it a mitigating contract or an additional contract?
- 12.6 **Nonrecoverable Damages**
- 12.6.1 Attorney's Fees: generally non-recoverable in the absence of a statute or enforceable contract providing for them
- 12.6.2 *Bunnett v. Smallwood*  
 Concept (rejected by the court): when defending against a breach of contract not to sue, suing is precisely the harm that the contract was intended to prevent
- 12.6.3 Loss Due to Emotional Disturbance R §353  
 excluded unless the breach also cause bodily harm or is such a kind that serious emotional disturbance was likely to result  
 Was the breach wanton, reckless, causing bodily harm?  
 Was the contract not concerned with trade, commerce, and profit  
 Were the benefits not pecuniary?  
 Were the benefits contracted for related to dignity, mental concern, solicitude
- 12.6.4 *Gagliardi v. Denny's*  
 contracts are economic in nature and not meant to secure protection of personal interests
- 12.6.5 Punitives §355  
 not unless also a tort  
 Freeman & Mills overturned Seaman's
- 12.7 Efficient Breach Theory: if breaching party is better off by breaching the k and paying damages, then he should be able to do so without being further penalized or punished

## 13.0 Other Remedies

- 13.1 Reliance Damages  
 13.2 Restitutionary Damages  
 13.3 Specific Performance  
 13.4 Agreed Remedies

## 14.0 Rights and Duties of Third Parties

- 14.1 **Third Party Beneficiaries:** a person not a party to the contract who is to receive at least a substantial performance from the contract
- 14.2 **Assignment:** the transfer of contract rights (benefits) to another party after the contract has been signed R§318; there is a presumption that assignment is permissible unless otherwise stated or the party has a “substantial interest” in having the original party benefit
- 14.3 **Delegation:** the transfer of contract duties to another party after the contract has been signed
- 14.4 *Lawrence v. Fox*  
 A= Lawrence: creditor beneficiary  
 B= Holly: promisee  
 C= Fox: (promisor)  
 Both A + B are promissors and promisees  
 Lawrence can directly pursue an action against Fox because he is the beneficiary of the promise and had a quasi-trust relationship
- 14.5 *Seaver v. Ransom*  
 A= Seaver (donee beneficiary)  
 B= Mrs. Beman  
 C= Ransom
- 14.6 R2d distinguishes between intended and incidental beneficiaries
- 14.7 *Guy v. Liederbach* (will invalidated because witness was beneficiary)  
 A= Guy  
 B= Kent  
 C= Liederbach
- 14.8 **There is a fundamental difference between assignment and delegation. Delegation does not relieve the person of their obligation unless otherwise agreed to**
- 14.9 *Herzog v. Irace*  
 Court doesn't follow R2d and does not allow Jones to rescind the claim  
 Once you know of the assignment, if you pay the assignor and not the assignee, you're liable
- 14.10 *Sally Beauty* (is a contract personal?)  
 you have to buy the right to terminate if people leave an entity

**United States Arbitration Act** (Title 43, U.S.C., updated in Title 9, Chapter 1, § 1-14 U.S.C.)

- § 2: Arbitration agreements are “valid, irrevocable, and enforceable, save upon grounds that exist at law or equity for the revocation of any contract.”
- § 3: Suits regarding contract issues where contract includes arbitration provision shall be stayed until arbitration has been had “in accordance with the terms of the agreement.”
- § 4: “If the making of the arbitration agreement ...shall be at issue, the court will proceed summarily to the trial thereof.”