Contracts Outline – Fall 2007

Contracts Overvew:

Where does contract law come from?

1. Article 2 of the UCC – if the subject matter of the K is for the sale of goods
    a. Ask yourself if the K is for the sale of goods
        i. Tangible property that is not real estate
        ii. Eg: buying a car, buying a tv, buying a drink, when a corporation buys inventory for its stores
2. Case law (not statutory law) aka Common Law used for any other kind of a K – also use the Restatement
    a. Sale of real estate
        i. Loan of money
    b. Sale of services

> 2 parts to a Contract where you decide if it's not enforceable
> **1. Procedural:**
> - Who is the ∏?
> - Various levels of sophistication (capacity)
> - Circumstances
> - Contracts of Adhesion
>
> (*see sections – validity of the offer; beyond lack of consideration*)
> **2. Substantive**
> - Gross inadequacy of consideration
> - Ultimate bargain grossly unfair
> - Unconscionable, etc
>
> *(almost all under section – beyond lack of consideration)*
> **The more procedural inequality, the less you have to prove substantive inadequacy

I. Making Agreements
   a. Offer
      i. Bilateral v. Unilateral Contracts
      ii. Options Contracts
   b. Mutual Assent
      i. Objective intent
   c. Validity of the Offer – look out for
      i. Employee handbook cases
      ii. Indefinite offers → No meeting of the minds
         1. Vague essential terms
      iii. Lack of Mutuality
      iv. Certainty
      v. Price quotes
      vi. Solicitation of bids
      vii. Advertisement
      viii. Agreement to agree
      ix. Illusory Contracts
      x. Implied Contracts in Good Faith
      xi. Standardized Forms (and Adhesion Ks)
   d. Acceptance
      i. Who – only offeree can accept
      ii. How: terms of the offer
         1. Condition – must meet conditions [more on conditions later]
         2. Bilateral K – start of performance is acceptance
         3. Unilateral K – must complete performance to have accepted
      iii. When:
         1. Mailbox rule
         2. Buyer keeps goods (shrinkwrap cases)
   e. 4 possible things that can happen to revocable offers (not for options)
      i. Rejection or Doesn't meet MIRROR the K
         1. Direct Rejection
         2. Mirror-image rule & Counter-offers
         3. Conditional Acceptances

- ii. Offers die when people die
- iii. Lapse of time
- iv. Revocation

  **Additionally – when you fail to meet condition

f. 4 situations when offer <u>can't be revoked</u>
- i. Options contracts
- ii. Firm offer rule
- iii. Reliance on the contract
- iv. Response

II. Look for Consideration – if there isn't any, can Promissory Estoppel make up for it?

a. Consideration

b. Promissory Estoppel

III. Beyond lack of Consideration -- Is there any reason that agreement or promise shouldn't be enforced?

a. Capacity - Who made the deal?
- i. Age (Infancy doctrine)
- ii. Intoxication
- iii. Mental capacity

b. How did parties deal with each other? If you find any of these 4, no enforcement of K
- i. Duress (usually economic)
- ii. Undue influence
  1. Unfair persuasion
  2. Domination
- iii. Misrepresentation
- iv. Nondisclosure

c. What did the parties understand the facts to be?
- i. Mutual mistake
  1. Misrepresentation
  2. Mistake
- ii. Revisions (could make revisions b/c of unforeseen circumstances – but see impossibility section too)

d. Problems with substance of the deal (substantive)
- i. Ambiguity
- ii. Illegality
- iii. Public policy concerns
  1. Covenants not to compete
     - a. Employment contracts
     - b. Sale of a business
     - c. 3 part test
- iv. Unconscionability (can tie in Standardized Forms/K of Adhesion)

e. Statute of frauds

IV. What are the terms of the K?

a. Implied warranty of merchantability

b. Express warranty

c. Parol Evidence Rule

d. 3 Exceptions to PER (when you would allow parol evidence)

i. Admissible to explain ambiguous rule
ii. Additional term exception – if writing only partial (not fully integrated)
iii. As a defense

In the absence of fraud, generally can't allow rescinding of K except:
- **Conduct that takes away foundation/essence of K**
- **Utter failure of consideration**
- **Repudiation by party in breach**

~Worcester Heritage v. Trussell

V. Performance: *Was the K performed?*
a. Substantial Performance rule
b. Divisible or Severable Contracts
c. Perfect Tender Rule
    i. Goods must be exactly as contracted for
d. Conditions
    i. Express Conditions
    ii. Conditions of Satisfaction

VI. Defenses (excuses) for nonperformance – 4 things you can use
a. Other party breached
    i. Other party breached first
    ii. Not perfect tender
    iii. Material breach – did it go to the essence of the contract?
b. Anticipatory Repudiation = unambiguous/unequivocal statement that they'll breach
c. Unforeseen occurrence
    i. Impossibility
    ii. Frustration of purpose
    iii. Commercial impracticability
d. Language of express condition not complied with (only ok if material/significant)

VII. Damages/Remedies
a. Specific performance
b. Money damages
c. Restitution interest
d. Expectation Interest
e. Reliance interest
f. Limitations
    i. Certainty – damages must be proved with reasonable certainty
    ii. Avoidability – mitigation of damages
g. Foreseeability – consequences must have been foreseeable

I. **Making Agreements**

Is there an agreement? There are some key terms we will encounter to find this out:

a. Offer

→ *Mutual assent takes place through offer and then acceptance*

→ *One party proposes a bargain and the other party agrees to the proposed bargains*

→ **Offer =** *manifestation of willingness to enter into a bargain, so another person understands his assent to the bargain is invited and will conclude the bargain. An offer creates power in the offeree to enter into a contract*

→ *Offeror is the master of the offer*

- *Has the right to rescind the offer before the act happens*
- *But once the act is performed, then can't rescind*

- **Bilateral v. Unilateral Contracts:** (when in doubt, prefer bilateral)
  1. **Unilateral K** = A promise for an act; only one party promises to do something, and the other party is free to act or not as she wishes
     - **a. Eg:** I promise to pay you $1000 if you walk across bridge.
       - i. You're not obligated to walk across the bridge, but if you do, I am obligated to pay you (my promise is contingent on your act/performance)
       - ii. I can withdraw my promise to pay if it is before you perform
     - **b.** *Diamond Jim/fishing contest case* – it's not your intent that matters → once the act is completed, then promisor is bound
       - i. Relates to consideration too – The fact that a promise doesn't induce a performance or return promise doesn't prevent performance being consideration
       - ii. **In a unilateral K:**
         1. **Performance = consideration**
     - **c.** *Cobaugh v. Klick-Lewis* – ∏ was playing in a golf tournament and Δ left a sign up at a hold promising a car for a hole in one. The sign was left up from an earlier tournament.
       - i. An offer of a prize is a willingness to enter into a bargain, as long as the other person understands that his assent to the bargain is invited
       - *ii.* The consideration is the act performed – once the ∏ got the hole in 1, the Δ had to perform his part of the deal
       - *iii.* The ∏ not obligated to get hole in 1 – but if he did, the Δ obligated to pay
     - **d.** *Petterson v. Pattberg* (p. 378)
       - *i.* ∏ was promised a reduced rate on mortgage if he paid it off by April 25. When ∏ showed up on the 25th, Δ shut the door in his face, and said he withdrew the offer before ∏ performed. Court said ok because it was a unilateral K – ∏ didn't get reduced rate until he

performed (Δ's promise contingent on ∏'s performance).

1. In a unilateral K, offeror has the right to withdraw the promise before the act is completed → K is not binding until the act completed
2. Dissent: This was an options K and Δ should have waited until the date he promised (this is how you could argue against it) – and ∏ had begun to pay so Δ should not have withdrawn

2. **Bilateral =** Mutual promises b/w 2 parties – each party is a promisor and promisee (a promise for a promise – exchange of promises); most Ks are bilateral
   - **a. Eg:** I promise to pay you $1,000 on April 15 if you promise to walk across the Brooklyn Bridge on April 1.
     - i. Both parties have to agree to do something. The K isn't valid until we both agree to perform.
   - **b.** *Davis v. Jacoby* (p. 372) – compare w/*Brackenbury v. Hodgkin*
     - i. The niece and her husband promise to move to help her uncle take care of his wife, and uncle promised them would receive everything in the aunt's will if she died. But by the time they got to him, he had committed suicide. Uncle asked for reply to his promise, and there was acceptance through niece's reply, which made it a *bilateral* K, and it was binding.
     - ii. When an offer has indicated the mode and means of acceptance, then if the acceptance follows those methods, the offer is binding

- **Options Contracts**
  1. In most cases, offer doesn't create a K – there needs to be acceptance
  2. **But** different with options contracts:
     - **a.** Options K = not just an offer to contract, but a contract in which the offeror promises to keep the offer open for a certain time

Restatement of Contracts, Second § 87. Option Contract (pg. 395 & 408)

1. Offer is binding as an option K if:
   - **b.** It is in writing and signed by the offeror and recites a purported consideration [so doesn't actually have to be delivered] for making of the offer and proposes an exchange on fair terms w/in a reasonable time; or
   - **c.** Made irrevocable by statue
2. Action or forebearance is binding as an option K *to the extent necessary to avoid injustice*

***Restatement of Contracts, Second § 45. Option Contract Created by Part Performance or Tender* (pg. 384)**

- An option K is created when offeree tenders or begins the invited performance or tenders a beginning of it (could apply to *Petterson v. Pattberg*)

- The offeror's duty of performance under any option K so created is conditional on completion or tender of the invited performance in accordance w/ the terms of the offer

Other ways to make option contracts binding:

- Say it was a bilateral contract (you should get something in return for options contracts or it's revocable)
- Say it was relied upon
  1. Reliance can be a substitute for lack of consideration
     a. Promissory estoppel

Options Cases:

2. *Dickenson v. Dodds*
   a. Δ made offer to ∏ and it was supposed to stand until Friday. On Thursday, ∏ became aware that Δ was going to rescind the offer – court says at that point, the offer was officially withdrawn.
   b. **When an offer is made and offeror sells or contracts to sell to another person – if offeree gets reliable info of this fact before he has accepted, then the offer is revoked**. [See more under Acceptance section]
3. *Thomason v. Bescher*
   a. Δs paid with consideration of $1 to have the option that nobody else could exercise for a month.
   b. Even though the $1 was never paid, there was purported consideration – made the offer irrevocable

b. Mutual Assent: For a contract to be formed, both parties must intend to contract

- Not just about meeting of minds – don't have to intend the same thing
- Must agree on main terms of the deal
  1. Despite minor gaps or disagreements, the intent to contract is there
- Look at **objective intent** – NOT subjective
  1. *Embry v. Hargadine* (pg. 325)
     a. An employee who asked for a K to continue employment was told by his employer: "Go ahead, you're all right. Get your men out and don't let that worry you." Employee took that to mean there was K of re-employment.
     b. Court said: Yes, there was a contract
     c. If the words/acts can be seen by a reasonable person as an intention to agree, then it does not matter what an individual's actual intent is.

i. If party was joking but doesn't say it in a tone of voice where the other party could've known, then the K is on.

d. <u>**Ask**</u>**:** *According to a reasonable person, how would the words have been interpreted? Could we see an intent to K?*

2. **Allow court look at party's subjective intent, as long as the test for judgment is still an objective std**

a. *<u>Kabil Development v. Mignot</u>* (p. 329): Court said testimony where the party testifies to his own intent and understanding of the negotiations is allowed – as long as jury understands that their conclusions still depends on <u>objective test</u> – <u>not secret intentions. Base judgment on expressed, overt intentions.</u>

c. <u>**Validity of Offer**</u> – *look out for these*

- **Employee handbook cases:** <u>Must have effective disclaimers that show intent to contract (or not to contract)</u>

1. *McDonald v. Mobil Coal* (pg. 334)

a. An employee had assumed that the employee handbook's guidelines for disciplinary measures constituted a modification of the employment K.

b. The handbook had a disclaimer specifying that the handbook was not an employment K – but it <u>did not stand out and wasn't highlighted from the rest of the text</u>

c. Court says: <u>Even if the employer didn't intend for the handbook to be the basis of K formation – what did their actions and outward manifestations show?</u>

i. <u>There was sufficient, intentional, objective manifestations of contractual assent</u>

ii. <u>Created reasonable reliance of a K by the employee</u>

d. Dissent (what we would argue if we were the empoyer): There is a clear disclaimer – not more they could do.

2. *Kari v. General Motors* (pg. 341) – compare to *McDonald*

a. Employer had disclaimer in handbook that was italicized, so court said it was clear that the handbook was <u>not a K</u>

- **Indefinite offers –** <u>**No meeting of the minds**</u> **→** *Parties must reach mutual assent on all of the essential terms of the K – there can't be <u>ambiguity</u>.*

1. **Ask if these essential terms are vague** (sometimes ok if missing, but usually want to specify these)**:**

a. Parties

b. Subject matter

c. Time for performance

d. Price

2. ***Restatement of Contracts, Second § 20*** *(p. 362-3)*
    a. ***There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and:***
        i. ***Neither party knows or has reason to know the meaning attached by the other; or***
        ii. ***Each party knows or each party has reason to know the meaning attached by the other.***
3. *Raffles v. Wickleshouse* – multiple ships were named Peerless
    a. Court said ambiguity of contract language is enough not to enforce K
    b. Disagreement on a material fact of the K renders it unenforceable- each party had materially different meanings in mind
        i. *Could offer parol evidence to say there wasn't disagreement if you wanted to enforce the K*
        ii. *Compare to Acme Mills, where a SPECIFIC good was promised*
    c. There are 3 main requirements:
        i. There has to be a term in the contract that has 2 reasonable meanings
        ii. Each party must have a different meaning in mind
        iii. Neither party has any reason to know that the other party has a different meaning in mind

- **Lack of mutuality**
    1. *Paul v. Rosen*
        a. Where one party reserves an absolute right to cancel or terminate the K at any time, there is no mutuality, so no K

    2. *Lima Locomotive v. National Steel Casings*
        a. Seller obligating buyer to buy all his steel casings for the rest of the year
        b. When a buyer is forbidden from buying from anyone else, there is no mutuality if the seller doesn't promise anything in return

- **Certainty** → *Even though there's manifestation of intent – cannot be accepted unless the terms of the K are reasonable certain*
    1. **Reasonable certainty =** the terms provide a basis for determining the existence of a breach and for appropriate remedy
        a. One or more terms cannot be left open

    → **Apply UCC:** *Things can be filled in later if there's good faith in the intention of a K – but quantity is important to include in making a valid offer*
        b. UCC § 2-204(3) – Even if one or more terms are left open, the K does not fail for indefiniteness if the parties intended to make a K

   c. **UCC § 2-206 – Offer and Acceptance in Formation of K**
   d. **UCC § 2-305 – price can be filled in later**
   e. **UCC § 2-310 – can leave time for payment open**
   f. **UCC § 2-306 – actual quantity not necessary to be stated if output contract** (but good faith effort to produce – see good faith & implied K)

- **<u>Price quotes</u>** → *There may not actually have been an offer if it was just a solicitation of bids*
   1. If there is no specified quantity, <u>unless it is an output K</u> (promising to buy all that is produced), then there is no valid offer
   2. Is the person who makes a price quote making an offer? Ask:
      a. *Was there a quantity specified?*
         i. If no – then not an offer
      b. *Was the price quote addressed to a particular person?*
         i. If no, then probably a general info mailing and not an offer intended for acceptance
      c. *Look at wording*
         i. Does it say: "We quote you this price" or does it say "I offer"? (in the 1st instance – prob not an offer)
   3. *Moulton v. Kershaw* (pg 343)
      a. Salt dealers sent letters out to people offering salt at a certain price and ∏s answered claiming they "accepted an offer"
      b. <u>This was merely a price quote: No specified quantity in the offer = No Contract</u>

- **<u>Advertisement</u>** → *Advertisements are generally not treated as an offer*
   1. "Incredible offer – Chevy cars on sale 50% off!" – this is <u>not</u> an offer
   2. <u>An advertisement CAN be an offer IF it is "clear, definite, and explicit and leaves nothing open for negotiation"</u>
      a. <u>Most advertisements don't say a number of goods they're offering at that price</u> (so you're not promised that you'll get the car if they run out of the cars on sale)
   3. *Fur coat case*: Man tries to buy fur coat he saw in ad but store says the "house rule" is to sell to women. Court says that's not allowed.
      a. An advertiser can't impose arbitrary exceptions that were not published – the man entitled to buy the coat
      b. If the ad says something like "Sale – only one left. First come, first served. At $25" – there could be a K because it was specific as to qty, price, and person to whom offer made (first come, first served)

- **<u>Agreement to Agree/Statement of Future intention</u>** → *An announcement of intent or letter of intent to contract in the future is not enforceable until the later K is made*
   1. *Delicatessen v. Schumacher* (p. 346)
      a. Parties agreed to set the price at a later date – court can't intervene because there's nothing that binds the parties

   b. Not a K for sale of goods, but can try to ask the court to adopt the UCC (§ 2-204[3])
2. *Empro Mfg v. Ball-Co* (p. 352)
   a. A letter of intent has no force because it is **subject to the execution of a later, formal K**
   b. Letters of agreements and agreements to agree don't do anything more than set the stage for negotiations on details and there is no promise that it will work out, so it's not enforceable or binding

- **Illusory Promises – lacking consideration if party doesn't promise**
  1. *Davis v. General Foods* – Betty Crocker case of plagiarism
     a. Woman offered to give her recipe and the Δ made it clear they had discretion of what they would compensate her if they used it.
     b. No unjust enrichment with an illusory K – if no promises made, there is no K
  2. *Ryan's Steakhouse*
     a. Not sufficient consideration if one party is agreeing to a K that allows the other party to change the terms – this means it's an illusory promise

- **Implied Promises if there is Good Faith** (UCC § 1-201 – Good faith defined)
  1. *Lady Duff Gordon*
     a. She gave her agent exclusive right to her endorsements but then she went behind his back and endorsed apparel w/o his knowledge
     b. Court says: agent promised reasonable efforts to perform in good faith = implied K
     c. Exclusive dealings – UCC § 2-306
  2. *Feld v. Henry S. Levy & Sons* – **OUTPUT K** (bread crumbs case)
     a. Output K based on good faith to produce – it is implied in the K that there should be a good faith effort to produce the output goods promised in the K
     b. Couldn't use commercial impracticability as an excuse to stop
  3. *Morone v. Morone*
     a. Can't have implied contracts about personal relationships (husband-wife does not = partnership K) – must be express K

- **Standard Forms → relate to bargaining power, public policy, unconsc.**
  1. Generally – standard forms hold up unless you show unconscionability because the term is buried in fine print and not freely negotiated
     a. But there is a duty to read – and inaction is a waiver of your privilege to object to the K
     b. Duty to read can depend on the circumstances and the bar/std can be raised/lowered/eliminated, based on circumstances

Restatement § 211 – Standardized Agreements (p. 537)
(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing
→ If party regularly uses standardized forms, then courts won't ask specifics of each signer's ability to understand the language – but see #3

(3): Where the other party has reason to believe that the party manifesting such an assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement
→ Can't purposely screw someone over

2. *Broemmer v. Abortion Services of Phoenix*
   - **a.** Girl unknowingly waived her right to jury trial and had to go to arbitration – and the arbitrators were ob-gyns (more sympathetic to doctors than her)
     - i. Evaluate circumstances (she didn't even know what arbitration meant) and it fell outside of her reasonable expectations
   - **b.** Unconscionable adhesion Ks are uneforceable
   - **c.** **ADHESION K = Standard Form + No Meaningful Choice**
     - i. If you have both – then you have a K of adhesion
     - ii. Offends our notions of fairness

3. *Mundy v. Lumberman*
   - **a.** Even a casual reading of the mailed material would've given adequate notice of the insurance policy – it was not buried

4. *Henningson v. Bloomfield Motors*
   - **a.** The car dealership said there was a disclaimer in the warranty that prevented them from liability when the new car spun out of control and caused an accident
   - **b.** There was an **adhesion K**: (some factors)
     - i. *Agreement was not understandingly made (no attn called to the disclaimer)*
     - ii. *Warranties meant to protect ordinary consumers, not limit maker's liability*
     - *iii. Consider public policy*
       1. Public policy of imposing liability on conduct that creates unreasonable risk of harm
       2. Versus public policy of freedom to contract
     - iv. *Look at bargaining power – did the consumer think that he had no other choice except to sign the K in order to get the car? YES*

Exam tip: *There is a life cycle to the agreement process – go through these steps:*

- Look at the first communication b/w the parties according to the facts. Ask yourself about this 1st communication – was this an offer?

General test for offers:

1. Manifestation of commitment
2. What was the content of communication? What does the fact pattern say about:
    a. What was said?
    b. What was written?
3. Watch for phrases that are unclear – Look for these 3 words in an exam fact pattern, and then conclude that it is not an offer bc its not certain so not enough to manifest a commitment
    a. Fair
    b. Appropriate
    c. Reasonable
4. Four magic words that do tell you that communication is an offer bc it's sufficiently certain – say this is a "requirements contract" [an offer to enter into a requirements K: eg – "I will buy solely from you"]
    a. Requirements
    b. All
    c. Only
    d. Solely
5. In situations involving sale of real estate - watch for:
    a. The first communication can't be an offer unless:
        i. It describes the real estate and
        ii. States a price
6. Look at circumstances
    a. Did the agreement occur in a law firm or noisy bar?

d. ACCEPTANCE

→ Acceptance = offeree's manifestation of *assent to the terms of the offer in the manner invited/required by the offeror*

→ An offer can only be accepted by person to whom offeror intended to create power of acceptance

UCC § 606: Acceptance of goods occurs when the buyer:

1) After a reasonable oppty to inspect the goods signifies to the seller that he will take them, in spite of nonconformity to the K, or

2) Fails to make an effective rejection [SILENCE]

- *See also: Anticipatory Repudiation and Perfect Tender Rule (must give seller the oppty to cure before K expires)*

- *Plateq v. Machlett Labs*
    1. Steel tanks were ordered and were willing to take the tanks despite knowing of minor defects
    2. Buyer has the burden of proof of establishing nonconformity, and if it's not established, and there's reasonable oppty to inspect the goods and you still signify willingness to take, despite defects

- *Allied Steel v. Ford Motor Co.*
  1. Allied and Ford had a K, and there was a clause attached to an amendment to the original K. The court said there didn't need to be an actual acceptance – the K said there "should" be an acceptance – so not an express condition of acceptance
  2. <u>Can accept an offer through words or CONDUCT – if 1 party agrees to do work w/consent of the other party, once the work is undertaken in a bilateral K, once performance has started, K is binding</u>

<u>There are 3 acceptance questions: Who, How, and When</u>

1. <u>Who</u>: Only person who can accept offer is the person to whom the offer was made
2. <u>How</u>: The terms of the offer can control the method of acceptance

Restatement § 69: Acceptance by Silence or Exercise of Dominion (p. 444)

1) If offeree fails to reply to an offer, <u>silence and inaction operate as acceptance in following cases:</u>

a) <u>Where offeree takes benefit of offered services with reasonable oppty to reject them and reason to know that they were offered w/expectation of compensation</u> [remember cop holding the cows case]

b) Where offeror stated or given offeree reason to understand that assent can be manifested by silence or inaction, and <u>offeree in remaining silent and inactive intends to accept the offer</u>

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

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

a. Hypo: You can accept this offer only by doing something (like performing; only by notifying me in writing that you have accepted) → C<u>ondition</u>
b. But many offers don't say how they can be accepted
   i. **<u>Default rule - anything reasonable will constitute an acceptance</u>**
   ii. **<u>§ 2-207 & § 2-606 & § 2-607</u>**
c. <u>Hypo</u>: I offer you $1000 to paint my house. There is no verbal response as an acceptance, but you start painting my house. There's an offer, no verbal acceptance, just straight to start of performance:
   i. There are 2 rules that govern this fact pattern (offer and then start of performance, no real acceptance):
      1. <u>Bilateral K Rule:</u> If it is an offer to enter into a bilateral K, the start of performance is an implied promise, so it's treated as an acceptance and creates a bilateral K

2. Unilateral K Rule: If the offer was an offer to enter into a unilateral K, then the start of performance is not enough – there is no acceptance, so we don't have a K

3. When:
   Restatement of Contracts, 2nd § 63. Time When Acceptance takes Place (pg. 444) → *"As soon as put out of offeree's possession, without regard to whether it ever reaches the offeror"*
   EXCEPTION: Options K – that is only accepted when it is "received by the offeror"

   a. Mailbox Rule/TIMING of Acceptance:
      i. An acceptance is effective it is sent, like dropped in mailbox, sent with UPS, left the fax (this is the only communication that is effective when sent, instead of received)
         1. *Morrison v. Thoelke* (Mailboxes case)
            a. Once the k is out of the offeree's hand, it is binding – the point of dispatch is when it becomes binding
            b. Limit's offeree's power to revoke
            c. Can overcome this by stating in K that acceptance works by some other method
      ii. Other communication b/w the parties, except in acceptance, any other communication b/w parties (eg – revocation) is effective when it's received

   → Exam tip: Watch for fact pattern where the 2 people making the agreement are not in the same place – that's when you know to use the mailbox rule
      iii. So there may be a delay in receipt of communication
      iv. And there are inconsistent/conflicting communications (where as soon as the offer is sent, one party changes his mind doesn't want the K and the other party still wants the K)

   b. Contract is formed when buyer rcvs goods and KEEPS THEM
      i. *ProCD v. Zeindenberg*[shrinkwrap case]
         1. Transactions in which exchange of money precedes communication of detailed K terms are OK. If the buyer has the option of returning the goods (to signify he doesn't agree to the K), then keeping them signals acceptance
         2. **UCC § 2-206(a) and (b):**
            a. Had a reasonable oppty to inspect the goods (and see the K that was shrinkwrapped inside) – and didn't make a rejection
      ii. *Hobbs v. Massasoit* – Eel skins case
         1. There is a duty to speak if you rcv goods and the offeror is accepting payment – you can't just keep the goods but say you didn't think you had to pay → Implied you've agreed to pay the value

→ 4 things could happen after offer – **only apply to revocable offers, not option contracts, which are irrevocable** (*Restatement § 36)*:

1. Rejection or counter-offer by the offeree
    a. *Rejection*
    b. *Counter-offer*
    c. *Mirror Image Rule*
2. Offers die when people die or incapacitated
3. Lapse of time: Offers expire after a reasonable time
4. Revocation: After the offer was made, offeror changes his mind

**Additionally – Could fail to meet condition in the offer

- **Rejection or counter-offer by the offeree**
    1. Direct rejection: If there's a direct and clear rejection (clear "no"), then you've killed the offer – you said no so it's off the table
        a. Offeree says never mind, I don't want this anymore
        b. Can't come back later and say I want to accept it now

    2. Indirect rejection – MIRROR IMAGE RULE & CONDITIONS
        a. **Mirror image rule:** The lease that is signed isn't a mirror image of the one that was offered
            1. The response, in order to be an acceptance, must mirror (look exactly like) the offer
            2. Not for sale of goods (allowed to add provisions)

        Counteroffers [Prevent acceptance from mirroring the offer]
        → If the offeree makes a counter offer, then he's rejected the original offer, unless either party indicates otherwise
            ii. *Livingstone v. Evans* ("Mirror" case)
                1. There was a counter-offer, and then a renewal
                2. A counter-offer is a rejection of the original contract, so K no longer binding

                3. But if, after a counter-offer, the offeror replies with a renewal of the original offer, then the original K back open for acceptance and if offeree accepts, it's binding

                4. Counter-offer = K no longer mirroring the original offer, so original K nullified [See mirror-image rule]

            iii. Eg: A offers property to B for $5,000 and B says I'll give you $4,800. → rejection b/c counter-offer
            iv. But – if B says: I'll give you $4,800 but if not, please let me think about your $5,000 → not nec. a rejection

1. ***Can argue that counter-offer is just an inquiry, so courts must decide the difference – <u>no hard rule</u>***

v. Hypo – I offer you my car for $1000 and you respond that you'll give me $800. That's a counteroffer. But if you respond that you'll give me $800:
1. You <u>reject</u> my original offer of $1000
2. But you have made a <u>new offer</u> that replaces the old one, of $800

vi. <u>Counteroffer kills the original offer:</u> You can't call back later and say you accept the $1000 offer – you already killed that offer with your counteroffer!

<u>This does not apply to sale of goods</u>

1. *Idaho Power Co. v. Westinghouse*
   a. Court said it was ok to add provisions – didn't nullify the original K, esp because the ∏ was silent on the K with provisions [this signified his acceptance]

→ So if there is a sale of goods under this issue, must see <u>UCC 2-207</u>, which answers 2 questions

2. <u>Is there a K</u> when the response to the offer has additional terms?
   a. <u>Rule:</u> In a sale of goods situation, there is <u>no mirror image rule</u>

b. **<u>Conditional Acceptances</u>** [See also – Conditions, under Performance]

i. Hypo: I offer you my car and you say that you'll buy it if I replace it with new tires. [AKA: I will accept but there needs to be new tires on the car]
1. You're basically saying that you reject my original offer
2. Will accept it <u>on the condition that</u> there are new tires
3. This is an <u>indirect rejection</u> – kills the original offer and starting over
4. What are **words that show "on condition that"** (bc won't write "condition" on exam)
   a. *<u>If ; Provided that ; But ; So long as</u>*

ii. Does apply to sale of goods
1. Hypo: I offer to sell you my car for $3K and you respond "I accept if you deliver the car by Saturday"
   a. This is a conditional acceptance – so it's an indirect rejection
2. Hypo: I offer you my car for $1K and you respond "I accept. Please deliver on Saturday"

a. There is a K – there is no conditional acceptance. There is just an additional term (delivery will be on Saturday) – and since I'm selling a good, then it doesn't fall under "additional terms" – so there's no indirect rejection
b. **UCC 2-207** – as long as there is no language of condition (that this addition doesn't insist on this addition – aka you say you won't buy unless there's this condition)

- **Offers die when people die or incapacitated**
  1. The deal is off
  2. In *Davis v. Jacoby, the acceptance occurred before the death, so it didn't cancel the K*

- **Lapse of time**
  1. If there is a delay
  2. **Offers expire after a reasonable time**
  3. Watch for whether more than a reasonable time has elapsed on the exam – they'll give you dates

- **Revocation:** After the offer was made, the guy that made the offer changes his mind – see pg. 4 (*Petterson v. Pattberg)*
  1. Revocation of an offer (Will likely use this on the exam)
     a. The only person that can revoke the offer is the person that made the offer (the offeror)
  2. Exam trick – Revocation requires offeree awareness – even though the person who makes the offer is the only one that can revoke, the other party must know of offeror's intent to revoke – must be aware of offeror's words or conduct that show he is going to change his mind
     a. Revocation can be by words/statement or conduct that is inconsistent with the offer – as long as the offeree is aware
  3. *Dickenson v. Dodds*
     a. Δ made offer to ∏ and it was supposed to stand until Friday. On Thursday, ∏ became aware that Δ was going to rescind the offer – court says at that point, the offer was officially withdrawn.
     b. **When an offer is made and offeror sells or contracts to sell to another person – if offeree gets reliable info of this fact before he has accepted, then the offer is revoked.**

- There are 4 situations when offer cannot be revoked
  1. **Option**: Was an offer but 2 more facts in the 1st communication that show option: (doesn't have to be in writing)
     a. An additional promise to hold the offer open

b. Some payment (consideration) for that promise
c. Hypo: I offer to sell you my car for $1K and you say you'd like a week to think about that, and I say that if you give me $10 now, I'll hold this offer for a week → not revocable offer

2. **Firm offer rule** (only applies to sales of goods, so UCC applies)
   a. Requires:
      i. Sale of goods
      ii. The offer must promise not to revoke (express promise not to revoke)
      iii. Must be in writing
      iv. Must be by a merchant of goods
   b. What is the difference b/w option and firm offer rule?
      i. Firm offer rule only applies when there is a sale of goods, while option can apply @ any time
      ii. Firm offer rule only applies if the fact pattern says the promise was put in writing, while option has no writing requirement
      iii. Firm offer rule doesn't require payment, while option rule requires some payment for promise not to revoke

3. **Reliance**: Where the offer has been relied on in a way that is reasonable and foreseeable [PROMISORRY ESTOPPEL]
   a. Hypo: I'm a general contractor and I build hotels and I'm trying to get the contract to build a new hotel so I am coming to you as my elevator subcontractor and asking for a price that you would charge me to put in elevators
      i. I rely on that cost to put in my bid
      ii. You can't later change your mind and say you are going to charge a higher price
      iii. You made an offer to me and I relied on your offer in a way that is reasonable and foreseeable, so your offer is irrevocable

4. **Part performance of a unilateral K:** Where there's an offer to enter into a unilateral K and performance has begun
   a. A unilateral K results from an offer that requires performance as the only possible method of acceptance
   b. Eg – I offer you a job to paint my house and say the only way you can accept is by showing up and painting, then it is a unilateral K
   c. The offer expressly requires performance for you to be able to accept; So once you've started performance, you have accepted, so can't revoke it

- Response: Then you next ask yourself: was the response an acceptance?

II. **Look for consideration, and if not, can Promissory Estoppel make up for it?**

- **CONSIDERATION**: A bargained for **exchange**
  § 71. Requirement of Exchange/types of exchange (pg. 208)
  1. Promise must be bargained for
  2. Bargained for = there is an exchange
  3. Performance can be:
     a. Act other than a promise
     b. Or can be forbearance (not doing something you were requested not to do)
     c. Creation, modification, or destruction of a legal relation
  4. Performance or return promise can be given to promisor or some other person and can be given by promisee or someone else

ABOUT CONSIDERATION – different categories below

- In a unilateral K, the performance = consideration

- Bargained for- can't be volunteered
  1. *Whitten v. Greeley-Shaw* – affair case
     a. Man and woman in affair and court said initial K was legally unenforceable because of lack of consideration. The woman promised not to call the man in exchange for everything he gave her during the affair (like money and jewelry).
     b. Court said that if condition is not bargained for, it isn't consideration (woman volunteered to not call him)
  2. *Martin v. Little, Brown & Co* – Tattletales/Book plagiarism case
     a. ∏ offered his services, so there was no consideration

- Can't be illegal
     a. Also – consideration can't be illegal – *Affair Case:* her "services" would have been prostitution, so that couldn't have been consideration
     b. *Duncan v. Black* – cotton allotments
        i. The consideration for forbearance was illegal, so it didn't count – no valid K

- Forbearance as consideration
  1. Forbearing from something you have a legal right to do
        i. *Hamer v. Sidway* – uncle promised money to nephew for nephew not smoking, drinking, gambling

- Adequacy of consideration: Problem about the amount of consideration
     a. Amount of consideration is irrelevant – **courts don't weigh consideration**
        i. *Batsakis v. Domotsis – Greek case*
           1. Plea of lack of consideration doesn't work – Δ knew of the risks when contracting, and courts won't weigh consideration.

- Gifts/Gratuitous Promises are NOT consideration – Reliance doesn't matter
    a. *Synagogue case* - an old man made an oral promise to gift $25K to synagogue.
        i. A gift takes effect when given, or if written in will. Since the old man didn't get anything in return (no exchange) then no consideration
        ii. Doesn't matter that the synagogue built it into his budget

    b. *Kirksey v. Kirksey* – Talladega nights/ surviving bro takes bro's widow
        i. Surviving bro promised bro's widow that he'd take care of her and her kids. She moved all of her belongings in reliance of this promise.
        ii. Bro argued it was just a gift and court agrees: promise was mere gratuity and he didn't get anything in return, so no consideration

    c. Reliance on gift does not matter – not sufficient enough to overcome absence of consideration

- Past consideration situation – If benefit rcvd earlier, then the promise is not consideration
    a. *Mills v. Wyman*: Drunk sailor case
        i. If the consideration happened in the past, then making a promise on past consideration means there is no valid K

        ii. Valid K only when the party making the promise gains something, or the person to whom he's making the promise loses something

- 2nd contract must rest on new and independent consideration
    a. *Levine v. Blumenthal*
        i. A promise to do what the promisor is already legally bound to do is not acceptable consideration

        ii. The other side may try to argue UCC § 2-209 – the 2nd K is just a modification of the 1st , so no new consideration needed

    b. Hypo: In which I say: because you were nice enough to mow my yard last week, I promise I will take out your garbage all of this week. But I don't take it out, so you sue me. But I say you can't sue me because there was no consideration for my act – mowing my yard is in the past so it doesn't count.
    c. **Statute of limitations/past consideration**
        i. If statute of lmtns runs on debt, courts recognize it can still be paid on good faith if it's reaffirmed
            1. It's grounded by good consideration
    d. **3 categories where this is NOT applicable (even though they're past acts)**
        i. Time-barred debt
        ii. Debts of infants
        iii. Discharged

iv. See below – Good Samaritan cases could also count

- Even if benefit conferred without request, there could be consideration
  a. *Webb v. McGowan* – loyal employee case
    i. Employee prevented employer's injury by incurring it himself so employer going to care for him for life.
    ii. Because an actual benefit occurred, this was enough to make K valid

    iii. When promisee cares for, improves, and preserves the property of the promisor, even w/o his request – this is sufficient consideration for promisor's later agreement to pay for that service

- Contract modification
  a. Hypo: In which I agree to paint your house for $1,000 and we later modify the K saying you actually agree to pay me $1,200 instead of $1,000. Now I paint the house and you don't pay me the $1,200. That's not legally enforceable. I did not provide any new consideration for the $1,200 to make it legally enforceable.
  b. Use the phrase "preexisting legal duty"- if all that a person does is what she is legally obligated to do, then there is no consideration for the K modification
    i. In the hypo, I was already legally obligated to pay your house under the original K so I didn't provide any new consideration for the higher amount (if I had added on some performance requirements – like I agree to also paint an extra room, then that might be new consideration)

b. PROMISSORY ESTOPPEL

- Restatement of Contracts 2nd § 90: Promise reasonably inducing action or forbearance → pg. 280
  1. Promise which the promisor should reasonably expect to induce action or forbearance, and it does induce such action or forbearance
     a. Injustice can only be avoided by enforcing the promise
     b. Remedy granted for breach may be limited as justice requires [*could get reliance damages*]
  2. A charitable subscription or marriage settlement is binding under the above without proof that the promise induced action or forbearance
  3. Damages can't put promisee in a better position than the promises put him

- CHECKLIST FOR PROMISSORY ESTOPPEL
  1. There must be a promise
  2. It must be relied on, in a way that is reasonable and foreseeable
  3. It must be a situation in which it would be unjust not to enforce the promise

  → Must be able to see the difference b/w promissory estoppel and consideration
  - Hypo: The landlord tells tenant that he promises not to raise tenant's rent for the next 2 years. Hearing that promise, the tenant goes out and completely

repaints the apartment. And landlord later says he is raising the rent. The landlord says he didn't get consideration for his promise, so not enforceable.

- o We're concerned with landlord – not doing something he agreed to do. Is there some reason the K isn't enforceable?
- o Why is the tenant's painting of apartment <u>not</u> consideration?
  - o What was landlord asking for in exchange for not raising the rent?
  - o Because landlord <u>didn't ask</u> the tenant to paint the apartment in exchange the rent
  - o It is not enough that it was a detriment to the tenant to pain the apartment and a benefit to landlord
  - o <u>Consideration is a bargained for exchange – it is a story in which people are doing this they were asked to do</u>
- o But it <u>could be promissory estoppel</u>
  - o <u>If it could have been reasonable and foreseeable that the tenant would've painted the apartment then the court could find it was promissory estoppel – and it would be unjust not to enforce the promise</u>

- PROMISSORY ESTOPPEL CASES→ UNBARGAINED-FOR RELIANCE

1. <u>Reasonable and foreseeable reliability on Precontractual Obligations</u>
   → Actual reliance and foreseeability

   a. *Goodman v. Dicker* (promise of franchise) and *Wheeler v. White* (promise of a loan)
      1. <u>Courts generally allow for promissory estoppel when there was promise of a franchise or loan, even if the deal falls through</u>
      2. <u>Get reliance damages – reasonable and foreseeable reliance that caused detriment</u>
      3. <u>But no damages on speculative lost profits</u>

   - o *Hoffman v. Red Owl* – promise of Red Owl franchise
     - i. <u>When parties have preliminary negotiations and one party assures the other that there will be a binding agreement, then reliance on this assurance that leads to detriment can be used to invoke prom estoppel for precontractual obligations</u>
     - ii. So it doesn't matter if there is no official K – give reliance damages based on detriment to ∏s

2. <u>Acceptance of a charitable gift/Gratuitous promises</u>
   a. <u>Oral promises don't count</u> (*Synagogue case*)
   b. *Allegheny College*
      i. Cardozo uses prom. estoppel in dicta - Found consideration in the promise to woman to name a scholarship after her in exchange for donation

ii. Use promissory estoppel to enforce charitable gifts, even though there's no bargained for exchange, and thus no consideration

c. Don't need reliance for charitable donations (§ 90(2))
d. Courts divided on enforcing donation by letter
   i. Some say donation by pledge is enforceable – charities can rely on a pledge w/o having to show to the court that there was reliance
   ii. Others say a gift isn't binding til it's actually given/transferred

3. Solicitation of bids
   a. Sometimes contractors use bids from subcontractors when putting together their bid for a job.
   b. *Baird v. Gimbel* (pg. 395 – Class 15)
      i. The ∏ used Δ's incorrect bid and got a job – ∏ was stuck in a contract with an incorrect subcontractor's bid.
      ii. Court says: *If a bid is withdrawn before acceptance, then there is no valid contract*
      iii. CAN'T USE PROMISSORY ESTOPPEL IN BIDS if:
         1. The contractor shouldn't have relied on the bid in the first place **if there is no consideration. ∏ never promised to take the subcontractor (Δ's) bid and pay for it. Usage of a bid in a proposal doesn't make an official contract.**

   c. Compare with *Drennan v. Star Paving*
      i. ∏ relied on Δ's bid inn making his contracting bid – the Δ was assumed to have been awarded the bid before the ∏ put together his contracting bid. Unlike *Baird* – in that case, the Δ didn't actually have any reason to assume he was awarded the bid.

      ii. Reasonable reliance can be a substitute for lack of consideration

4. Statute of Frauds and Promissory Estoppel

→ Trumps statute of frauds in oral promises to convey land: reasonable reliance
   a. *Seavey v. Drake* – Son improves dad's gifted land
      i. Dad orally promised son part of his land and son made improvements on the land with father's knowledge.

      ii. Can use promissory estoppel to say there was reasonable reliance and assent of the promisor – and this can substitute for compliance with statute of frauds

→ Does NOT trump statute of frauds in oral employment Ks
   a. *Forrer v. Sears* and *Sterns v. Emery-Waterhouse*

      i. Can't promise permanent employment and expect to have it covered by promissory estoppel

iii. Permanent employment K is terminable at will – and a mere detriment to the employee isn't enough to invoke promissory estoppel for oral promise of permanent employment

II. **Is there any reason that this agreement should not be enforced?** Look at fact pattern for possible reasons.

- Who made the deal? Look at parties themselves (capacity)
- How the parties dealt with each other (duress, undue influence, misrepresentation, nondisclosure)
- What the parties understood the facts to be @ time of deal (mutual mistake, revisions)
- Terms of the deal (illegality, ambiguity, public policy, unconscionability)
- Statute of frauds [most frequently tested!!] (writing or other way to satisfy the statute of frauds, like part performance)

a. **Capacity**: In order for an agreement to be enforceable, each party must have legal capacity. 3 categories: Age, intoxication, mental incapacity

2. Age category: People under 18 yrs don't have the capacity to K so agreements w/ them aren't enforceable → most likely on the exam
3. Intoxication: They lack the ability to understand the agreement
4. Mental incapacity: Knowing right from wrong and not understanding consequences

A person who lacks capacity has the right to disaffirm the K (has the right to get out of the deal)

Halbman v. Lemke

- Infancy doctrine – Minor has absolute right to disaffirm the K for purchase of items which are not necessities
- Not an issue if the minor is the offeror and the other side tries to walk away

Hypo: Assume that you hire Harry Potter (16 yrs old) to lecture on torts. It's not that the K has no effect, it's that the K can't be enforced against Harry Potter – HP can get out of the K w/o repercussions.

a. Remember though – for young people, they can't get out of "necessaries" – like food, clothing, shelter, medical care
b. An agreement to pay for necessaries is legally enforceable, even w/people who don't have capacity
    i. But that liability to pay for necessaries isn't a K liability – not an obligation to pay agreed upon amount. Is quasi contract liability:
        1. So that person must pay value of the benefit conferred

b. How did the parties deal with each other? 4 things – if we find any of these 4, we've found a reason not to enforce the deal

i. Duress – unable to exercise free will

1. Typically physical duress (probably won't see it) – like held at gunpoint
2. Watch for economic duress

a. A contract is voidable on the ground of duress when it is est that the party making the claim was forced to agree to it by means of a wrongful threat, precluding the exercise of his free will.
b. Look for 2 facts in a fact pattern
   i. One of the 2 people must have made an improper threat or demand to the other
   ii. There is no reasonable alternative

c. Cases under Econ Duress:
   1. *Austin Instruments v. Loral*
      a. Said you must consent to substantial price increases or we won't deliver, and the ∏ needed that delivery in order to perform his work on a Navy contract → similar to how she talks about movers in class raising the price on you right when they're outside your apt)

   2. *Alaska Packers v. Domenico* – Holey nets case
      a. The fishermen claimed there were holey nets that made their jobs harder – but they were just seen as imposing economic duress by saying they wouldn't work unless they got higher wages (invoke *Levine v. Blumenthal* – legal obligation to perform what was already promised)

   3. *Hackley v. Headley* (court says NO econ duress)
      a. The ∏ was poor and says he agreed to a settlement under economic duress – he was forced to collect what the Δ was offered because ∏ couldn't sue

      b. There is no economic duress in situations where the party's financial duress already exists – unless the other party actually created the economic duress, they can't be liable for it

ii. **Undue influence** – looking for 2 things (Look at *Odorizzi* case – the schoolteacher who was forced to resign but says there was undue influence – *unfair persuasion* with threat of taking his sex charges public and domination by his bosses)
   1. Unfair persuasion
   2. Domination
   3. Additional factors:
      i. Discussion of transaction at unusual/inappropriate time
      ii. Consummation of transaction in unusual place
      iii. Insistent demand that the business be finished at once
      iv. Extreme emphasis on untoward consequences of delay
      v. Use of multiple persuaders by the dominant side agst single party
      vi. Saying there's no time to consult financial advisors/attnys

Comparing Duress and Undue Influence:
In both – there's a weak or vulnerable person
- Duress - there's no reasonable alternative and improper threat

- Undue influence – persuasion is coercive and use of excessive pressure to persuade someone vulnerable

On exam – If there is a bad guy and a weak and vulnerable guy then discuss both:
→ Courts more likely to use *econ duress* for business purposes
→ More likely to use *undue influence* for individual people

iii. **Misrepresentation**
1. Doesn't have to be intentional, fraudulent, can be perfectly honest and innocent
2. **Misrepresentation** = one guy told the other guy something
    a. All about what one person said or told the other
3. Was it **material**?
    a. Hypo: Seller of the house tells the buyer that there are no termites in the house and honestly believes that there are no termites in the house. But it turns out that there are termites in the house – so this is a material misrepresentation
    b. If it is a material misrepresentation then it's enough to rescind the K

iv. **Nondisclosure**
1. See *Weintraub case* – seller of the house knew that there were cockroaches but left the lights off when she was showing the home so the roaches wouldn't come out. When the buyer bought the house, he discovered the roaches but the seller claimed that he didn't lie. Court found this to be nondisclosure.
2. Difficult for the other party to discover on his own, but you know – reason for agreement not to be enforced

v. **Constructive Fraud** [vs. Actual fraud=actual misrepresentation]
    a. When a confidential relationship where one party, having gained the trust and confidence of another, exercises extraordinary influence over the other, is a prerequisite to proving constructive fraud
        i. Not present in an employee/employer relationship (*Odirizzi)*

Look for these 2 things:
    b. Confidential relationship or Fiduciary relationship
        i. Reliance on one party by the other (even more for fiduciary relationships)
        ii. Confidential relationships not a legal status, but it does mean an unusual trust/confidence (like married, neighbors, relatives)
        iii. *So even if you have an idea that you may be taking advtg of the other person, there's no duty to say anything unless there's a relationship*
    c. Inadequacy of consideration – necessary in constructive fraud

Cases:
    d. *Jackson v. Seymour*
        i. Sister/widow, relies on her brother and sells him land for really cheap, trusting him for advice/judgment of her business affairs

ii. Court says: <u>This was constructive fraud – he paid a grossly inadequate amount for the land, took advantage of confidential relationship (even though he claimed not to know – that's why it's not actual fraud, because it was a mutual mistake), and inadequacy of consideration (problem with substance of deal)</u>

c. <u>What did the parties understand the facts to be at the time of the deal?</u>

i. **<u>(Mutual) Mistake</u>** – Difference b/w a misrepresentation and a mistake – learn the difference!

1. **<u>Mistake</u>** – person, on his own, somehow got a mistaken idea as to what the facts were (vs. misrepresentation = what 1 guy told the other)

a. <u>Erred on his own</u>

Elsinore Union Elm. School v. Kastoroff

1. Contractor had an honest clerical error in his bid and promptly rescinded – so K not binding
2. <u>When there is an honest mistake and prompt attempt to correct/rescind, then the K is not binding</u>

b. <u>Mutual mistake</u>

Sherwood v. Walker – The case about the cow – where both parties thought it was a barren cow.

i. <u>Where there is a mutual mistake as to the substance of the thing bargained for (it is material/goes to the essence of the K) this is a reason not to enforce the deal</u>

ii. Based on a <u>misunderstanding of the facts – NOT a misstatement (like misrepresentation)</u>

iii. A mistake is material if it goes to the essence of the K – mistakes about what something is, not a mistake about what something is worth

a. Doesn't matter if there's a difference in quality (it's not as good as you thought it would be), then it's still binding K

ii. <u>Revisions to the Contract</u> [See **UCC § 2-209**]

a. *Brian Constr v. Brighenti*

i. Δ was supposed to do some excavation work but while working discovered substantial debris – unanticipated by both parties. Court said a subsequent oral K obligated the Δ to perform the work.

ii. When a party agrees to form an obligation to someone to whom a duty is already owed, then the 2nd K isn't valid

1. *See Consideration – no new consideration for the 2nd K*

iii. <u>BUT – if there is an additional burden not previously assumed (like add'l work for add'l money), then there's supporting consideration, and **subsequent oral K is allowed**</u>

iv. <u>Unforeseen circumstances act as a waiver of requiring a subsequent written K – if you get a promise of new benefits for doing add'l work beyond scope of original K</u>

→ **See also: Unforeseen circumstances and impossibility**

b. *Universal Builders v. Moon Motor*
    i. There was an oral subsequent K that required written authorization of any subsequent Ks – court said it was ok to deviate from requirement that all subsequent Ks must be in writing – since many changes (provisions) were requested and happening with the other party's knowledge, since the other party did not object, there was an implied promise

    ii. Courts frequently hold that owners must pay for extra work done at their oral direction

d. Problems with the substance of the deal
  i. **Ambiguity**
    1. See *Raffles v. Wickleshouse* – the Peerless ships case – remember that multiple ships were named Peerless
        a. Court said ambiguity of contract language is enough not to enforce K
        b. There are 3 main requirements:
            i. There has to be a term in the contract that has 2 reasonable meanings
            ii. Each party must have a different meaning in mind
            iii. Neither party has any reason to know that the other party has a different meaning in mind
  ii. Usually hard to test on so probably won't be on it (usually on MC or short answer question)

  iii. **Illegality** – is the subject matter of the K illegal?
    1. Eg – a law against price fixing; so a K can't be on price fixing

  iv. Public policy concerns
    1. When a reward is offered to the public, it can be claimed by any person who performs the act except agents, employees, and public officials who are acting w/in the scope of their official duties (*Denney v. Reppert*, p. 598)
    2. Covenants not to compete: Can't get specific performance for this unless you alter it til it's reasonable

        a. Employment contracts: An employee promises that after the K, she won't go work for a competitor
            i. *Corenswat v. Amana Refrigeration* & *Sheets v. Teddy's Frosted Foods*
                1. Can't misuse superior bargaining power – public policy can modify terms for an employment K and have wrongful termination

                2. In *Sheets* – the employee shouldn't have had to choose b/w risking breaking the law and keeping his job

b. <u>Sale of a business:</u> the seller of the business promises that for a limited time, he won't open a competing business
c. Concern is – balance b/w freedom of K and unfair restraint of trade → <u>Meet the balance with a 3 part test:</u>
    i. Is there a reasonable business need for the protection?
    ii. Is the geographic scope of the covenant reasonable?
        1. One thing not to open competition in neighborhood vs. entire country or state
    iii. Is the time limitation reasonable?

v. **<u>Unconscionability</u>** - [See also: Contract of Adhesion in *Standardized Forms*]
1. Even though it's in **§ UCC 2-302**, it applies in <u>all</u> contracts
2. Always tested <u>as of the time of the contract</u> – as of the time of the K, were the terms oppressive?
    a. If it's a long-term K, and at the time of the K, it wasn't oppressive but it is now – then it is <u>not</u> unconscionable
3. The court can find the <u>entire K</u> unconscionable or can find <u>just part of the K is unconscionable</u> – and can decide not to enforce just a limited part of the deal
4. **<u>Unconscionability = absence of meaningful choice of one of the parties + unreasonably favorable terms to the other party</u>** (*Walker-Thomas Furniture* – the single mom signing the K had few other choices and didn't really know what she was signing)
5. *Cases:*
<u>Relation to Adhesion Ks:</u> Brower v. Gateway – was not a K of adhesion because consumer had take-it or leave-it option. But it *could* be unconscionable because of an arbitration clause that forces them to a forum in France (court said inconvenience of forum <u>doesn't</u> mean uncons) – but <u>excessive costs could = unconsc</u>
    1. <u>Even if it's not a K of adhesion, could be considered unconscionable K</u>
    2. If unconsc – then none of these met: (<u>Ask – was one party "surprised"??]</u>
        a. *Did 1 party lack meaningful choice in entering Ks?*
        b. *What are alternatives?*
        c. *Look at setting of tranxn*
        d. *Experience and education of party claiming uncons*
        e. *Did the K have fine print?*
        f. *Did seller use high-pressured tactics?*
        g. *Disparity in bargaining power? Disparity in econ strength of parties?*

Woollums v. Henry: old businessman takes advantage of old, unknowledgeable man and makes a deal
    1. <u>Courts of equity won't order specific performance if the K was unconscionable – there is a harsh bargain here</u>
    2. <u>Ask – was it:</u> (if unconsc – then none of these met)
    h. Equitable?
    i. Reasonable?

j. Grounded in sufficient consideration?

Waters v. Min Ltd: girl's boyfriend owed money to drug dealers and they use her bf as the agent – he gets his debts relieved and benefits from the contract he tells her she should make deal with Δs

1. If there is oppression and unfair surprise to disadvantaged party (not JUST superior bargaining power) then it's enough to rescind.

2. Look for gross disparity in the K:
   - *i. Lack of legal aid*
   - *ii. Unusual circumstances*
   - *iii. Gross disparity in value of what's received vs what the party gets (are they ripping you off?)*
   - *iv. Undue influence*
   - *v. Δs assumed no risk and ∏ didn't gain any value*

e. **Statute of Frauds** – mechanical and objective

- i. Statute of frauds definition
  1. Concerned that people will come to court & falsely say there was a K
  2. Requires special proof that there really was a contract

- ii. Vocabulary - must use 2 phrases to do well on the exam
  1. "Within the statute"
     - a. We have a fact pattern that is covered by the statute of frauds
     - b. Means you're in one of the 6 situations covered by the statute of frauds – so your problems are just beginning
     - c. "You've got to mess with the statute of frauds" – so means you have to show proof (like in writing) that the K exists
  2. "Satisfying the statute"
     - a. Once you've identified that K falls w/in the statute of frauds, you need to "satisfy it" by showing proof that there is a K – there's 2 ways to show that you've satisfied statute:
       - i. Must be in writing – on exam, prof may take 3 ways:
         1. Facts will say there was oral agreement, so we say the K is w/in statute of frauds and statute not satisfied
         2. If facts tell us there was a written agreement, then don't even bring up the statute of frauds

         3. Sufficiency of written agreement: If facts tell us about the way the K was written, then it may not be sufficiently in writing. Look for:
            - a. Who signed the written agreement?
              - i. In order for the written agreement to be effective, it has to have been signed by the Δ
            - b. Contents of the agreement
              - i. Is an all material terms test

ii. Which means we have to be able to answer from the writing, who is making the agreement and what each person is agreeing to do
iii. It can't just say "I accept your offer"
iv. Can say "The Boston Red Sox agree to employ Joe Smith for one year for $20 million" – then it answers who and what

ii. <u>Performance pursuant to the agreement</u> (w/oral K)
  1. <u>Real estate contract</u> - an oral agreement will suffice if it meets these 3:
     a. <u>Part payment by the land</u>
     b. <u>Buyer's possession of the land</u>
     c. <u>Improvement to the land by the buyer</u>
  2. **<u>Services contract</u>** – eg: an oral agreement to work for 13 months:
     a. **<u>Part performance is never enough to satisfy the statute of frauds</u>** (even if the person worked for 7 months)
     b. The person could recover under quantum meruit

iii. Ask if oral K meets one of these:
  1. <u>If it is a sale of goods for $500+</u>, we are within the statute
     a. $500 is enough to put you within the statute
     b. This is the only UCC provision that has a $500 threshold amount – the only place the $500 figure is important is for statute of frauds
  2. **<u>Services contracts not capable of being performed w/in a year of the date of the contract</u>**
     a. Anytime you have a K for a fixed period of time for more than a year [eg – someone agreeing to work for 2 years] then it's within the statute of frauds
     b. <u>Different than a lifetime deal – never within the statute of frauds, because you could die tomorrow</u>
     c. So you look for a <u>fixed period</u>
     d. <u>Anytime you have an employment of K that is based on completion of a task instead of a particular time period, then it is **never** a statute of frauds problem</u>
        i. Because of the way law interprets the word "capable" – sees it as theoretically possible w/unlimited resources. So any task, if you had unlimited resources, is capable of being performed w/in one year
     e. <u>When you're given:</u>
        i. <u>Contract date and</u>
        ii. <u>Contract requires performance on a certain date</u>
        iii. Hypo: Oct. 2004 is the date the K was signed and I agree to perform on Nov. 30, 2005. <u>Within statute of frauds</u>

iv. Not possible to complete performance w/in a year of agreement - because performance meant to be completed after a year

3. Promises to answer for the debts of another
4. Promises in consideration of marriage(prenups, etc)
5. Promises by estate representative to pay debts of estate

f. Absence of **consideration** or a consideration substitute

Exam tip: How do you deal with consideration in an exam setting?

1. Will get a fact pattern in which someone is not doing something he agreed to do. That person is contending I don't have to do what I agreed to do because I didn't get any consideration for my promise. Consideration is always going to be person-specific and promise-specific. Was there consideration for this particular promise that this person is now refusing to perform?
   a. **First**:
      i. Did the person ask for anything in exchange for the promise? Focus on the Δ who is refusing to perform and ask what he got for the promise.

   b. **Second**:
      i. Look at ∏ - did he give up a requested detriment? What did the ∏ give in exchange for the promise?

III. **What are the terms of the deal?** (What's in the agreement?)

a. Implied warranty of merchantability: If there's a dispute over the terms of the K, ask if this is a K for the sale of goods → If yes, see Implied warranty of merchantability in UCC § 2-313

- *Hinson v. Jefferson*
  1. ∏ bought land from Δs and was told she could only use it for residential purposes, but neither party knew that it wouldn't support a septic system. Court said that she can get her money back.
  2. There was an implied warranty:
     - An implied warranty falls short of an absolute guarantee. Can't hold an implied warranty to defects that should be visible to the reasonable buyer (but in this case, there was an implied warranty with defects that were not visible to reasonable buyer)
- Hypo: you go to a restaurant and eat their takeout. If you get horribly sick, there is a breach of K
  1. Why? Automatically, by operation of law, that the food was from the restaurant that is in the business of selling food.
  2. The food must be fit for ordinary purposes
- Hypo: you buy food at a church dinner and you get sick. No breach of K
  1. Church not in the business of selling food
- Critical fact – is the seller in the business of selling goods of that kind? If yes, then you apply implied warranty of merchantability
  1. Eg - if you're selling pet food, you imply it's fit for your *pet* to eat

b. Express Warranty
- If you clearly say that there is nothing wrong, then you are responsible for misrepresentations and *caveat emptor* (buyer beware) not applicable. Only if you don't say anything that the buyer should beware.
- *Johnson v. Healy*
  1. Builder who claimed the house made of the best material responsible for his statements that the house was suitable for living – because his statement induced reliance.

- *Kirby* – Clorox case (husband hears wife lying)
  1. There is an affirmative duty to speak if you hear a false statement that can mislead the buyer – enough to make a case for actionable fraud

c. Parol Evidence Rule – look for a written version of the deal?

- Concept: The written version of the deal is more reliable than anything that came before it – **Assume that the written version reflects the parties' intent and earlier duties/restrictions that were agreed upon but don't appear are not valid**

  → Extrinsic evidence that contradicts the written K is NOT allowed

  → **Cannot introduce extrinsic evidence that's prior to or contemporaneous to an integrated written agreement**

- Use 3 separate phrases:
  1. Integration/Integrated agreement
     - Describes a written agreement of the deal that the court concludes is the final version of the deal
     - No writing, no parol evidence rule – The fact pattern must tell you there was a written version of the deal before you can even invoke parol evidence
       i. So in your fact pattern, look for "written K"

  2. Partial integration
     - Yes, the written version seems to be the final version of the deal but it's really not covering anything because it's really short, not sure everything is there (vs. court can find writing was complete and it covers everything)

  3. Parol evidence
     - A statement by one or both of the parties made before they entered into the integrated agreement
     - Says – this final written agreement is the most reliable so they may not admit parol evidence (if integrated agreement)
       i. Statute of frauds based on distrust of oral evidence – and oral agreements made AFTER the written K may fall under a statutes of frauds clause

- But sometimes they conclude there is a partial integration and they should admit statements to help them understand the parties' full intent – this is when you invoke the exceptions to the PE Rule

- Three exceptions to the PE Rule (when you would allow parol evidence)
  1. Parol evidence is always admissible to explain an ambiguous rule
     - Hypo – we have a contract about chickens
       i. What do we mean by chickens? Do we mean a specific type?
     - Can allow PE to help explain ambiguous terms

     - Can NOT be allowed if it would be INCONSISTENT with written terms of the lease
       i. Look at the "4 corners rule" – if it's within the 4 corners (the integrated written K), then inadmissible

  2. Additional term exception
     - If the contract in writing is only partial integration, then allow PE

     - *Mitchell v. Lath*
       i. The parties' intent that the ice house should be removed was important enough that we should expect it to be in the written K – so the oral evidence is inadmissible
       ii. An oral agreement that can be allowed is one that would NOT be expected to be **naturally contained in the written K**
           1. Would not expect it to be "part and parcel" of the written K – not closely related enough

     - *Hatley v. Stafford*
       i. The lease was handwritten and not carefully prepared, with no legal counsel – so court could see how this was a partial integration – parties didn't intend written to embody all the terms.
       ii. Admit evidence of consistent additional terms if there is substantial evidence that the parties did not intend the writing to embody the entire written K
           1. But remember – doesn't mean the case is decided – just means fact-finder has more info to work with

     - Hypo – the chicken contract doesn't say anything about how chickens are to be wrapped

i. Court concludes that the K is incomplete because it doesn't say anything about how the chickens are to be wrapped

3. <u>Defense Exception – Extrinsic evidence can show circumstances</u>
   - Under PE Rule – can't introduce earlier statements that contradict this written term of 1000 chickens/wk
   - But you <u>can</u> use PE to establish a <u>defense to enforceability</u> of this K
   - What the seller told the buyer doesn't actually change the terms, but the buyer can use that statement to get out of the contract (to invoke misrepresentation)

   - *Hoffman v. Chapman*
     i. <u>Can admit PE if it's to reform a mistake – even if falls w/in Statue of Frauds</u>

     ii. <u>**Can reform a written K to make it conform to the real intentions, when the evidence is so clear, strong, and convincing as to leave no reasonable doubt that a mutual mistake was made"**</u>

     iii. Doesn't excuse carelessness or negligence in signing K, but only if mutual mistake

     iv. Court will <u>never add a term or provision to the K which hadn't been agreed upon</u>

   - *Pacific Gas* and *Long Island Trust*
     i. <u>Though extrinsic evidence can't vary the terms of the written K, can consider credible, **subjective extrinsic evidence** to prove the intention of the parties and the circumstances surrounding the making of the K – so court can decide, in light of all the circumstances, what the K is saying</u>

     ii. **UCC § 2-202**

   - *Trident*
     i. Court disagrees with *Pacific Gas* but must apply it, so, based on *Pacific:* <u>Contractual obligations flow from the intent of the parties, not words of the K</u>

     ii. But this court (Judge Kozinski) believes that written Ks are the final word, and you shouldn't be able to intro evidence that contradicts it

   - *Lipsit v. Leonard*

i. Court is disinclined to allow parol evidence for employment contracts

- *Hoffman v. Chapman*
  i. Can admit parol evidence to reform a MISTAKE

- *LaFazia v. Howe* (tax evading deli owners)
  i. Before the K was signed, the Π was skeptical after reviewing the deli's financial records- but the Δs said it was a great business ("wink"). Written K had clauseK had clause- we've turned over all information- interpreting it is up to your own judgment. ∏ wants the "wink wink" admitted into parol evidence- court says NO
  ii. Specific disclaimer preventing the Πs from relying on previous statements, and the Π's had an attorney look over the records- this evidence would *contradict the language of the agreement* and cannot be let in
  iii. **P.E. can't contradict the written K**

- Hypo – K says in writing that 1000 chickens/wk will be delivered. Seller told buyer before the K was signed – don't worry about what it says but I will get you as many chickens as you want. → Could intro if it doesn't contract the written K

IV. Was the contract performed?

a. Substantial Performance

- If the performance meets the essential peurpose of the K, then it's been substantially performed. Every detail does not need to be in strict compliance with the specifications unless all details are stated in the K as part of the essence of the K
  1. *Plante v. Jacobs*
  2. *Britton v. Turner*
  3. *Pinches v. Swedish Evangelical Church*

b. Divisible or Severable Contracts

- *Tipton v. Feitner* – live hogs and dressed hogs case
  1. Failure to pay on the first shipment doesn't mean that the seller can withhold the 2nd shipment
  2. Sometimes, a K can be split up and you can have part performance on each separate part of the K, and each separate part treated like its own K
     - **Restatement § 240 – Part Performance as Agreed Equivalents**
       i. *If performances to be exchanged under a K can be apportioned into part performances, so that each part performance is an agreed equivalent, then failure to*

perform on 1 doesn't necessarily have an effect on the other party's duty to perform the 2nd (Class 28; p. 852)

c. Perfect Tender Rule

- Only use for sale of goods – **UCC § 2-601**
  1. *Excludes § UCC 2-612 (Installment Ks)*
- The goods must be exactly as contracted for
- *Oshinsky v. Lorraine Mfg* – shirtings case
  1. A purchaser is not bound to accept and pay for goods unless they are delivered or tendered on the day specified in the K
     - o In this case –date was a condition (time was of the essence)

- Must give seller the Right to Cure (also tie in with *anticipatory repudiation and conditions – below – about seeking a cure)*
  1. *Bartus v. Riccardi* – hearing aids case
     - o A seller can cure a non-conforming delivery before the K expires
     - o **UCC § 2-508 – Even though a buyer rejects or revokes acceptance because seller didn't meet the K, seller still may have reasonable add'l time to meet the terms of the K by substituting delivery of conforming goods (the replacement must conform to the K** – remember RV case, where cure didn't conform, so court said it's not allowed)
     - o **Other UCC PROVISIONS**
       - i. **UCC § 2-608-** Revocation of Acceptance
       - ii. **UCC § 2-708 –** Msr of seller's damages if buyer repudiates
       - iii. **UCC § 602** – Buyer can reject goods after reasonable time of Acceptance (look to UCC § 2-606 for Acceptance)

d. CONDITIONS:

3 types of promises:

1. Mutual and independent
   → *Nichols v. Raynbred* – either party can recover damages from the other (no excuse for Δ to allege breach on the other's part)

2. **Conditions** and dependent
   → K is dependent on you fulfilling this condition

3. Mutual conditions to be performed @ same time
   → Condition precedent that exists only when parties are to exchange performances at the same time
   → Concurrent performances

Ziehen v. Smith: If K calls for concurrent performance, the party who is suing the other side for breach **must show that he was ready to perform and performance wasn't waived by the other party** (tie in with *Anticipatory Repudiation)*

- Condition = an event not certain to occur, but which must occur in order for contract to be valid (usually event or fact)

    1. Generally don't make time a condition, but you can make it one by writing "time is of the essence" clause

    2. But can end up waiving conditions through your words/conduct

CONSTRUCTIVE CONDITIONS
- When performances dependent on each other

EXPRESS CONDITIONS
- Part of the parties' intent and is clearly in the K (if it doesn't happen, the K goes poof)
    - Courts follow strictly and won't change the K
    - But courts, if in doubt, may prefer promises (stumpage/crops/insurance case) so they don't automatically have to get rid of the K
- Language of express condition in K means you must fulfill

- **If there is a condition that is breached, then ask 2 things:**
    - **Shouldn't they have sought a cure first?** (*Tie in with anticipatory repudiation – before you anticipatorily repudiate a K, you must be able to prove that, w/o a doubt, the other party would breach and couldn't cure)*

        - *Cohen v. Kranz* (case with the fence defects – couldn't reject in advance and demand return of deposit if the other side could cure- the cure wasn't impossible): Before you try to breach in anticipation of the other side breaching, you need to give them a chance to cure the condition

    - **Proportionality – is it fair to breach if a small part of express condition is violated?**

- Courts are hesitant to enforce nonexistent conditions (if it's just a promise, then it's not enforced as a condition) – want to reduce ability to forfeit payment/performance based on "condition"

- **Restatement § 227: Standards of Preference w/Regard to Conditions**
    1. *In resolving doubts as to whether an event is made a condition of an obliger's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the*

event is within the obligee's control or the circumstances indicate that he has assumed the risk (p. 732)

- **Restatement § 238*:*** *If the other party can't render performance, you're excused* (p. 783)
- **§ 234:** *If simultaneous performance can be given, unless otherwise stated, court assumes performance should happen at the same time*

Exam Tips for Condition

- Hypo: Mortgage company agrees to make a loan if the owner has it appraised at $125K or more. So the loan is conditional on the fact of this appraisal.
  1. This is an express condition
- Look for these words to show there's an express condition:
  1. On the condition that
  2. Provided
  3. If or Only if
  4. So long as
- 5 things to remember
  1. If this condition is not met, then the other party's performance obligation is excused – unless the express condition is unreasonable or unless it is just a promise and not expressly stated (see insured crops – *Howard* and drunk law prof – *Clark v. West*)

  2. A condition simply limits a duty. A condition is different from a duty – does not create any new liability.
     - It exposes nobody to liability if it wasn't met
     - Hypo: Under the mortgage company hypo above (where mortgage company requires house to be appraised), if the house is not appraised at $125K, the owner won't get the mortgage, but the mortgage company can't sue the owner because it's not appraised at $125K – there's no breach and there was no promise that it would be appraised at $125K. This appraisal amount just limited mortgage company's duty to give the loan (that it's not obligated to give unless this condition is met).

  3. Language of express condition must be strictly complied with
     - Can be express condition either by agreement of the parties explicitly, or implied through the parties' conduct
       i. Eg: *Conley v. Pitney Bowles* (∏'s employer can't deny him of benefits when they didn't tell him the procedures of appealing benefits decisions)
          1. In bilateral Ks for agreed exchange of performances, if 1 party's performance is meant to come before the other, then it's a condition precedent, even if not expressly stated

- Hypo: Remember Redding pipe example and court said it was ok to use a different manufacturer's pipes. If you change the facts so that the K stated: Payment for your work is expressly conditioned on your using Redding pipe. [Aka – I will only pay if you use Redding pipe or Payment provided that you use Redding pipe]
    i. Now, the payment is expressly conditioned use of Redding pipe
    ii. It's so specified, thus it must be strictly complied with
    iii. The builder can't substitute anything for this express performance condition

- Hypo 2: You offer to buy my car. Your buying my car is conditioned upon an appraiser finding it's worth $1K. The appraiser finds that it's worth $950.
    i. Even if that amount is close enough to $1K – you are not required to buy my car because now there's an excuse not to buy it – the express condition was not strictly complied with

4. <u>Constructive Conditions</u>
    - Doesn't necessarily have to be expressly stated, but

5. <u>Conditions of Satisfaction</u>
    - <u>2 types of Ks that need satisfaction of the parties</u>
        i. **Satisfaction of the Reasonable Man → Objective**
            1. Any knowledgeable person can judge:
                a. Commercial quality
                b. Operative Fitness
                c. Mechanical Utility
            → Like short lawyer and architects certificate cases

        ii. **Satisfaction of Rcvg Party → Subjective**
            1. Personal aesthetics
            2. Personal fancy, taste, judgment, etc
            → Like special tomatoes case and father/son valet service in hotel and vealskins

<u>Topics & Cases about Condition</u>

<u>Conditions of Satisfaction – depends on case</u>

- *Nolan v. Whitney*
    - Architect certification needed – and architect used an *objective* standard to decide it wasn't good enough – court says this behavior is not in good faith & unacceptable
    - **<u>Party must perform the K but performance doesn't have to be literal and exact in all cases – if the condition isn't met but the K is still performed substantially and in good</u>**

- **faith, then recovery for work allowed** (but if you need to get someone to come in and fix what wasn't exactly within K, then you could get compensated)
  - Can't have subjective condition of satisfaction unless in good faith

- *Vealskins case*
  - Brokers refused to accept the vealskins because they honestly felt it didn't meet the standards
  - Court said it was ok – the ∏ could go elsewhere and sell their vealskins because it didn't meet Δ's good faith condition of satisfaction

- *Furschmidt v. Hotel Abbey* – father/son valet services
  - It was ok for hotel to dismiss their valet services because they were held to hotel's standards – not an objective one – this hotel may have had high-end stds that were subjective

- *Breslow v. Gotham* – short lawyer case
  - Can't say your lawyer didn't hold up to previous lawyer's std of service
  - As long as the work is done, you can't hold the other party to a vague higher standard

Distinguish between PROMISE v. CONDITION

- *Howard v. Federal Crop Insurance* (damaged crops & insurance)
  - Court said there was a promise to retain crops to get insurance – the K didn't establish a condition
  - Unless specific words like "shall not be payable unless" – there is no express condition

Time and Waiver of Conditions Through Words/Conduct

- *Porter v. Harrington*
  - K had a clause that said payments must be made on time – they accepted late payments though, so court said the party relaxed the strict terms of K – once you waive, hard to take back, even with notice

  - Parties have the right to make a stated time for performance in K and it is binding **unless waived** by either words or conduct

Conditions that don't affect the heart of the K are still enforceable

- *Clark v. West* – drunk law professor
  - Prof said he agreed to totally abstain from the use of intoxicating liquors while writing. Court said the books were written satisfactorily and met the terms of the K, so can't withhold payment just because of a condition that did not go to the heart of the K and that publishers accepted knowing the condition was violated

    - If you impose a condition that doesn't affect the essence of the K, it may not necessarily be enforced, especially if you accept performance knowing that there was a violation of the condition

- *Aetna v. Murphy*
    - Insurance company saying the insured guy didn't follow the terms of the policy so they won't give him recovery because of delay in notification. Court said because there was no material prejudice from delay, it doesn't matter.
    - If it can be shown that the party doesn't suffer material prejudice from a delay, then nonoccurrence of condition of timely notice is excused → not material part of exchange

Conditions SUBSEQUENT

- *Gray v. Gardner* - Sperm oil case
    - Promissory note due only if there isn't a higher qty later (meaning price drops) – was a condition subsequent
    - Dependent on later activity occurring to get payment (vs completing an activity as part of the K being valid)

Payment from a Specific Fund

- *Parsons v. Bristol*
    - When payment of money is to be made from a specific fund, and not otherwise, the failure of such a fund will defeat your right to recovery (and can't invoke estoppel or waiver of condition)

Pay-when-paid vs. Pay-if-paid

- *Mascioni v. IB Mille*
    - A contractor said he would pay the subcontractor if he was paid: "Payments to be made as rcvd from the Owner" – so this was a *timing* feature (which made it pay-when-paid)
    - Pay-when-paid = you're eventually required to pay, even if you don't get paid, but NOT a condition
    - Pay-**if**-paid = is a CONDITION PRECEDENT – you only pay if you get paid, and if you don't get paid, you DON'T OWE

Excused from Condition if incapacitated

- *Royal-Globe Ins v. Craven*
    - Woman suffers injuries and in the hospital – court said that she was NOT excused from the condition of giving notice 24 hrs w/in accident – she was given some extra time to meet the condition – the 24 hr condition thrown out the window, but she needed to give prompt/timely notice to her insurer once she was out of hospital – waiting 4 months was unreasonable

- Once a condition is excused, the exact provision is out the window, but you are still required to, with some reasonable/ seasonable (timely) degree, fulfill the basic condition

Impossible Condition

- *Grenier v. Compratt* – Needed city engineer certification but got attny instead
  - Condition was impossible, so excused
- *Price v. Van Lint* – deed coming from Netherlands
  - Even though they agreed that ∏ would give deed as security deposit on a loan, both parties knew it was coming from overseas, so hard for simultaneous performance
  - Simultaneous performance can be excused if both parties are aware that it may not happen

PAYMENT

- *Stewart v. Newbury*
  - **Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded** (not perfect performance)

V. **Is there any excuse for nonperformance?**

a. There are 4 excuses for nonperformance

1. **Excuse because of the other party's breach –** *Can also tie into conditions (that they didn't meet conditions – or idea that simultaneous performance didn't happen)*
   - The other party breached first
   - If it is a sale of goods, the seller is held to the perfect tender standard, so if it's not a perfect tender, then the buyer is excused from not performing
   - **Material breach**: For all other contracts (services, real estate, etc) – use material breach rule
     - i. Hypo: I hire a painter to paint my house white, but he paints it purple. I don't have to pay because that was a material breach.
       1. I'm excused from performing (for paying) because the other party had a material breach
     - ii. Hypo: I hire a painter to paint my house white, and he does, but misses a couple of spots.
       1. I'm not excused from performing (paying) because the painter didn't have a material breach
     - iii. See *Jacobs v. Young* – all the pipes had to be Redding pipes but the builder used a different brand. The court said this wasn't a material breach because the different brand was just as good, so owner of the house still had to pay the builder.

2. **<u>Anticipatory Repudiation:</u>** Excuse because of the other party's statement
   - The other party stated he wouldn't perform
   - Hypo – I hire you to paint my house and I tell you that I'll pay you $2K when you're done. You're painting and I say you're a great painter but I'm not going to pay you when you're done.
     i. Ok for you to stop painting once I tell you I won't pay
     ii. Though it's not time for me to pay you, you know that I won't pay
     iii. **<u>Must be unambiguous, unequivocal, and absolute statement through words or conduct</u>** (*Wholesale Sand & Gravel v. Decker*)
   - <u>In order for it to be anticipatory repudiation, it must be an unambiguous/unequivocal statement</u> (*Ziehen v. Smith*)

     i. <u>It's not enough to say that there's going to be a breach by the other side, so you breached in anticipation of the other side's breach</u>

     ii. <u>Must show you were willing to perform and the other party was going to breach</u>

   - Compare to *Hathaway v. Sabin*- the musicians performing
     i. <u>Even if there's apparent impossibility, and you breach thinking the other side can't fulfill their promises, you are liable for damages if they end up performing</u>
     ii. Must show you're willing to perform and other side doesn't – can't just assume they won't perform

   - **<u>Failure to Give Assurance could be treated as repudiation</u>**
     i. **Restatement § 251** (p. 850)
     ii. **UCC § 2-609**
        1. *Cherwell-Ralli v. Rytman*- tried to demand assurance based on rumors at truck stand
           a. <u>Can't breach saying the other party didn't give assurance –</u> **<u>seller only obligated to give assurance if the buyer had reasonable grounds to be insecure about delivery</u>**

   - Hypo 2: While you're painting my house, I say it's going to be hard to come up with that $2K since times are tough. After I say that, you stop paying my house. But my statement wasn't unambiguous and unequivocal, so by stopping painting, YOU are the party that breached. Can't invoke anticipatory repudiation.

3. Excuse because of an **<u>unforeseen occurrence</u>**

- *See also: Revisions (Mutual Mistake)* – If there's a 2nd K with add'l consideration, then if there's unforeseen circumstances, but you promised to go ahead with the work, then this subsequent oral K could be binding

- **Impossibility**:
  - Very narrow – destruction of thing/person excuses performance
    - Really depends on the facts and parties' intent
  - Sometimes can substitute goods to overcome "impossibility"
  - Frustration of purpose (king's coronation case) – if the foundation of the K is frustrated, then it's an implied condition upon which the K was based, and you could say K is void
    - **Frustration – need 2 things to show K is impossible*:**
      - *Frustration not reasonably foreseeable*
      - *No value to counterperformance*

      **Lloyd v. Murphy* lists these (WW2 cars case)
  - Can't use commercial impracticability
    - Burdensome does NOT equal impossibility – must still perform (*Suez*)
    - Saying there's commercial impracticability does NOT work simply because it got more expensive (*Suez*)
  - Hypo: I contract with you to dig a well for you but the county board says no more wells can be dug in the county. My performance of digging the well is excused because a later occurrence makes performance impossible.

Taylor v. Caldwell (music hall case)– contract to lease the concert hall to a promoter. Before the concert, the hall burned down. Court said the nonperformance excused because of impossibility

i. The essence of the K was implied on the condition that the rental hall would be in existence
ii. Could also argue that it's not truly unforeseeable (could say property owners should provide for *force majeure* – like Acts of God)

Kel Kim v. Central Markets (Roller rink case) – the leasee had to make sure there was public liability insurance and they said they should be excused from performance because it was hard to get the insurance, and made efforts, but failed

i. Impossibility didn't work here
ii. If unforeseen circumstances make performance burdensome, it doesn't matter – the party must perform or respond to damages for its failure to perform
iii. *Force majeure* clause only applies if it states the specific event that actually occurred

Bunge Corp v. Recker – soybeans case, where nothing in the K said the farmer had to deliver beans that *he* grew, so he was liable for breach of K.

i. Farmer assumed the risks that his crops wouldn't grow, so he was liable if he didn't deliver the beans (could have substituted beans [**UCC § 2-714(2)]**

ii. Other side should argue to intro parol evidence to prove that the K meant that farmer was supposed to deliver *his* beans (but court didn't buy this argument in this case)

iii. Damages: § 2-713 – didn't become a breach until delivery date

- Hypo: I promise to paint your house but the house burned down. I am released from the K because your house burned down so it's impossible to paint your house.

- Hypo 2: I promise to build your house and while I'm ¾ of the way done, your house burns down. I still must build your house because it's not impossible for me to build it (and rebuild what I've done).
  - i. It is not enough that it just becomes more expensive because of unforeseen circumstances
  - ii. But – damages (see *Carroll v. Bowersock*)
    1. If the owner of the house gets a benefit from what I constructed, then I'm entitled to partial performance (because owner can get back that higher value of home from his insurance)
       - a. I wouldn't get recovery for materials/tools left on the site that were burned down

- **Frustration of Purpose**: See *Krell v. Henry* – man willing to pay an inflated rental rate of an apartment to be able to see king's coronation parade. But the parade got cancelled b/c of king's sickness and the renter wanted out of the K and court said ok.
  - i. Court couldn't use impossibility because renter could still rent the apartment
  - ii. But in this case, there was a later unforeseen occurrence that still makes it possible to perform the contract, but the mutually understood purpose of the contract is now gone (frustrated)

- **Commercial Impracticability**: See *Lloyd v. Murphy* – basically the same as hypo below, except it's about how the gvt stopped the sale of new cars during WW2. Court said in

this case, there was no <u>commercial frustration (=inability to make a profit)</u> since risk of war was <u>foreseeable</u> and <u>sale of cars wasn't made impossible, so there was some value to counterperformance</u> (could've sold cars somewhere else)

- Hypo: I contract with you to dig a well for you and you tell me that the whole reason you want the well dug is to have a superior microbrewery from that well water. Before I dig the well, the state passes a law that says you can't use well water in microbreweries. Performance is not impossible, but now there is frustration of performance. So even though I can legally dig the well, the mutually understood purpose has been eliminated by this new law, so my performance is excused (and your payment is excused)

See also: *Suez Canal case* (*American Trading v. Shell)* – when Suez Canal was closed and court said performance wasn't impossible because performance just became more expensive, but that doesn't allow the shipper out of the contract simply because they would incur a loss from a different route

a. Possible defenses:
   i. *Impossibility*: didn't work – wasn't impossible
   ii. *Commercial impracticability* (everyone understood that the Suez was route and it was <u>impracticable</u> to do it on the terms they'd agreed on – court said no, <u>increase in expense doesn't make it impracticable)</u>
   iii. *Frustration of purpose* – doesn't work

4. **<u>Language of express condition must be strictly complied with</u>** *See "Conditions" under –Performance*

VI. Remedies – what are the consequences of a person not performing a K?

Rules for Damages:

- Try to start with <u>Expectation</u> – want to give benefit of the bargain
- Usually go for monetary compensation
- Alternative measures:
  - Sometimes easier to look @ <u>reliance</u> damages b/c we can't figure out how to compensate under expectation (like *Sullivan* – too hard to decide what she expected from a good nose – hard to decide worth)
    - Reliance = incurred on reliance on promise
  - Then could say there could be <u>restitution</u>
    - Restitution = taking something of value that moved unjustly from 1 party to another – restore that value back to the correct party
- Don't <u>overcompensate ∏</u> (Nursing home case) - only compensate for breach (and undercompensating encourages breach) → no damages = no award
- <u>Measure damages at value of good at **time of delivery**</u> (*Missouri Furnace)*
- <u>Anticipatory breach</u> = <u>Still measure damages **from when performance is due**</u> (even though you breached before performance) (*Reliance v. Treat*) – **<u>UCC § 2-713</u>**

- <u>But</u> – **<u>UCC § 2-712</u>** requires buyer to "cover" – aka buy substitute goods w/o reasonable delay (and if he doesn't cover w/in a <u>reasonable amt of time if reasonable substitution is available, then damages could be based on price @ end of that reasonable time after buyer learned of repudiation, not when performance is due</u>)

3 interests protected by standard K remedies**:**

a. **Expectation interest:**
   - Interest of a party in realizing the value of the expectancy that was created by the other's promise
   - **Give injured party the <u>Benefit of the Bargain</u>**
     1. <u>About putting the nonbreaching party in the same economic position as if there had been a contract and performance without breach</u> (as if it were performed in accordance w/the terms)
     2. So basically, a contract is free to either perform or not, as long as the one who breaches can give money damages
     3. *Acme Mills*
        - <u>Measure of damages is the difference b/w the contract price and the market price of the property at the place and time of deliver (UCC § 2-713)</u>
     4. *Price v. Van Lint*
        - <u>Generally, no damages allowed from breach of K to loan money, unless some injury results from loss of use of $$</u>
     5. Entitled to:
        - VALUE LOST + ADD'L EXPENSES
        - The value he has lost by reason of the other party's default PLUS any additional expenditures he has made to carry out his own obligations under the K (like lost profit)
          i. Eg: A agrees to build a house for B for $100 and knows he will only spend $80, so will get a $20 profit.
             1. If A spent $50 already and B repudiates, A entitled to $70 because of the $50 for what's already spent + $20 for lost profit
             2. If A is the one who repudiates, then B is entitled to the difference b/w the K price and cost (if greater amount) for another contractor to do the work: if A spent $50 already but it will cost another contractor $55 to finish the work, then B has to pay a total of $105 to get the house done, and is entitled to $5 of damages from A
   - <u>*Groves v. Wunder*</u>
     i. Case involving K damages, but could see it as a problem in <u>restitution damages</u> – if you assume that Groves "paid" for the grading work in advance, then he is entitled under Restatement § 370 & 373 to the reasonable value ($60K) of the benefit it had "conferred" on Wunder by reason of prepayment

→ **Issue: Was he entitled to benefit of the bargain** (cost of completion) or **cost of damages/diminution in value?**
→ Court says give damages based on cost of completion

- Damages are designed to protect our expectation interests
    1. But doesn't mean what someone actually expected
- Hypo: Homeowner says she will pay a painter $500 when he is finished painting the house. Painter breaches and doesn't paint the house. The homeowner has to pay someone else $600 to pay someone else to paint the house. What are the damages?
    1. $600-500 = $100 → The higher amount minus the amount she would've had to pay originally to get the home painted. So, you're putting her in the position she would've been in had the original K never been breached (she would've spent $500)
- *Hawkins v. McGee* [Hairy Hand]
    1. Dr. McGee performed skin grafting operation w/little experience and Δ claims he guaranteed to make the hand better, but the boy ended up with a hairy hand instead.
    2. **Expectation damages:** Determined ∏'s damage was diff b/w the value to him of a perfect/good hand (what jury found Δ promised him) and its present condition. **Realizes the value of what was expected from the K.**

b. Restitution interest

- Party's interest in recovering values conferred on the other party through efforts to perform a contract → The breacher is trying to recover for the work that was performed before the breach [because breacher can't recover on the contract, only on quantum meruit]
- If Δ gained something out of ∏'s performance, then you give that benefit back to the ∏
    1. Unjust enrichment – so say you're entitled to Quantum meruit
        - Usually the breacher asking to recover for the work already done
        - Purest form of restitution → move any benefits transferred to Δ back to ∏
        - *Boone v. Coe* – ∏s agree to go from KY to TX to work on Δ's farm. ∏s got loss but Δ rcvd no beneft, so no recovery on quantum meruit
            i. There must be benefit transferred to Δ for ∏ to recover on quantum meruit
            ii. Often involves implied K, not legal K
        - *Martin v. Little, Brown & Co.* – Tattletales/book plagiarism case
            i. ∏ pleaded unjust enrichment – court says no because he volunteered his services
            ii. Volunteers have no right to restitution

- *Collins v. Lewis* – cop holding the cows case
    i. If you take advantage of someone when they tell you that you're expected to pay, then must pay the reasonable cost of services/benefit – there can't be unjust enrichment.
    ii. Cop told Δ by letter that he was expected to pay for cop keeping the cows. Δ couldn't take the cows and then sell them without paying the cop for his services, because then Δ unfairly benefits from the sale of cows (and never paid for their upkeep – cop did) → there was unjust enrichment, so court said cop recovers on quantum meruit

c. Reliance interest

- Party's interest in recovering losses suffered by virtue of reliance on a contract
- Putting the ∏ (nonbreaching party) in the same position if there had never been a contract
- Hypo: I enter into a K to open a McD's franchise for $100K. In reliance on that K, I spend $7K building a golden arch around my building but then McD's breaches. So I sue McD's for breach of K and want the $7K that I spent building this arch.
    1. I want McD's to put me in the same position as if there was no contract (I wouldn't have spent that $7K)
- *Dempsey:* Profits were purely speculative, so you can't recover on loss of profits that you "relied" on
    1. *Reliance only reasonable after making/signing of K*
- *Sullivan v. O'Conner* [Bad Nose Job]
    1. Patient's suit agst surgeon for plastic surgery giving her a bad nose – not the one she expected
    2. **Reliance damages**: ∏ fine with simply reliance damages (recovering based on reliance on K) – so she gets $ that she paid to dr. and trouble she went through getting corrective surgery
    3. Expectation damages: ∏ did **not** get this, but it would have been the value of a "good nose" – hard to figure that out.
    4. **Difference b/w reliance and expected damages:**
        - **Reliance** includes fee paid to dr, hospital expenses, worsening of ∏'s physical and mental condition **due to K breach** (not from operation itself), and pain/suffering/ mental distress from corrective surgery
        - **Expected** includes what was expected from operation itself

d. Remedies: Damages or Equitable relief

1. Compare money damages with equitable relief to decide best one
    - **Equitable relief = Specific Performance**
2. Downside to equitable relief:
    - Inefficient for courts to enforce – to oversee spec. perf.
3. Costs avoided and Overhead

- Subtract the costs avoided by an injured party (who now doesn't have to avoid work) because of other party's breach
- But, question of whether those costs avoided include overhead costs
    - **i.** UCC 2-708(2) – Measure of damages is profit (including reasonable overhead) which seller would have made from full performance of buyer

- **Specific Performance** (Courts of Equity)
    1. Requiring a person to do what she agreed to do
    2. Courts are reluctant to order specific performance, for historical reasons
        - There was a law court and a court of equity in
        - The relationship b/w equity system and law system was such: Equity system available when law remedies (damages) not adequate.
            - i. Use equity system when money damages are not adequate
        - Modern trend – specific performance is an available alternative unless there's problems of judicial administration in making sure that the party will perform as required by the remedy (in making sure specific performance occurs)
    3. 3 types of situations
        - Rule for real estate deals
            - i. In contracts for the sale of real estate (commercial or personal) where the seller breaches, the buyer can always get specific performance (because every piece of land is unique so money damages never adequate)
        - Rule for services contracts
            - i. Contract to perform services is never enforceable through specific performance
                1. *Anna Nicole Smith case* – where the court said that the woman can't be forced to take care of the old man because it's a K for services.
            - ii. You could get injunctive relief (opposite of specific performance) – could order to prevent him from playing for any other team
                1. See *Dempsey v. Chicago*
        - If sale of goods –get specific performance if unique goods
            - i. Unique – works of art, antiques, custom-made
- Money damages
    1. Under UCC § 2-713→ Damages measured from time when performance is due, and not from the time the buyer learns of the breach

    2. Vocabulary
        - Punitive damages (don't punish for breach)
            - i. Not recoverable for breach of contract

- Liquidated damages [ALSO – see liquidated dgs under Limitations section below]
    - i. A contract says what damages are going to be – attempts to fix the measure of damages before the damages occur
        1. Must ask if it is compensating or punishing
    - ii. If we encounter this type of fact pattern, it's going to be about whether the liquidated damages provision is valid
    - iii. Possible relationship b/w punitive damages and liquidated damages
        1. To determine the validity of liquidated damages, ask: Is the liquidated damages clause meant to be punitive or to compensate the party?
            - a. It should not be punitive, should just be compensatory
    - iv. Punitive type of damages - If the liquidated damages is just one set sum, we should think – that doesn't sound right, because one price doesn't fit all the things that could go wrong
    - v. On the other hand, if it provides for eg: $1K for each day of delay, then that makes more sense and is probably compensatory

e. **Limitations on Expectation Damages**

1. If the damages are higher than what they would've gotten from the actual contract, then no damages → Can't make money off damages
- **i.** *Acme Mills:* If the measure of damages will cause benefit – then don't award
- **ii.** *Caroline Nursing Home*: They hired another contractor to do the job that Δ breached on – can't say it results in a worse quality home, and they're cheaper – nursing home can't make $ off a breach

2. Avoidability and Mitigation of Damages
- An injured promisee cannot recover damages for losses that, with reasonable effort, he could have avoided after the promisor's breach became known
- *Luten Bridge* – Bridge maker had to stop building once they got notice. That was their duty to mitigate damages.
- *Parker v. 20th Century Fox* – Shirley MacLaine didn't have a duty to mitigate damages
    - **i.** Minimizing loss through mitigation easier when the subject-matter of K are fungible goods, but that wasn't the case in *Parker*

3. Lost volume seller exception
- Under UCC 2-706 – When a buyer of goods repudiates or wrongfully refuses to accept delivery, the seller's damages are

measured by the diff b/w the K price and the market value (assume lower) [K price-resale price]
- But what if the seller could have done better?
- UCC 2-708 (2) has exception for "lost volume sellers"
  - **i.** If standard damage msr is inadequate to put seller in as good a position as performance would have done, because the buyer's breach entails loss of a profitable sale, then damages are the profit (including reasonable overhead) that the seller would have made from full performance by the buyer.
- *Neri v. Retail Marine Corp.*
  - **i.** NY Ct of Appeals assumed that disappointed seller, in ordinary course of business, could have expanded its inventory more or less at will and was prepared to sell to as many buyers as might care to buy.
  - **ii.** The Δs could have obtained sufficient inventory to supply all available customers and would've had 2 sales instead of 1 if ∏ hadn't breached
  - **iii. Under UCC 2-708(2) - Seller entitled to profit because the [K price – Resale price] measure of damages doesn't put the seller in as good a position as performance would have done.**

Foreseeability

- In order to recover for consequential damages, the consequences must have been foreseeable by the Δ (Restatement § 351)
- And if foreseeable - here is a duty to mitigate damages b4 K signed

Hadley v. Baxendale

- Δs not liable for the very sizeable losses that resulted from the 5-day shut-down of the mill
- **Damages are not recoverable for loss that was not known to or reasonably foreseeable by the party in breach at the time of contracting**
- Can also see this as another way – why didn't ∏s have extra millshafts while the other was in for repair? Encourages promisee to behave in efficient and cost-saving manner *before* the promisor breaches.
  - **i.** Aka: duty to mitigate damages b4 K signed
  - **ii.** Can also see this as another way – why didn't ∏s have extra millshafts while the other was in for repair? Encourages promisee to behave in efficient and cost-saving manner *before* the promisor breaches.

- Think of them as unique/special damages that are unique to that particular ∏ - in *Hadley*, they only had a mill with just one millshaft
  1. Because there was a special situation (the mill was closed and it was really important), then the ∏ should've informed the Δ for his special circumstances
  2. The ∏ has some loss that is special to that particular ∏ - so it's consequential and it's only recoverable if foreseeable.

- Hypo – I own a beach house and I'm renting it out for $1K on Sunday for a wedding. The renter says he'll only rent it if it's repainted by Sunday. I go to a painter and say I need the house painted by Sunday and I'll pay $400 and say it's important to have it done by Sunday or I lose $1K
    1. If the painter breaches, can I recover that $1K? Yes, because I made it clear of the consequences of his breach – it was foreseeable to him what would happen if he didn't paint it by Sunday.
    2. Unlike *Hadley v. Baxendale*, I made the damages foreseeable
- Key for exam – remember the word "special" – is the ∏ trying to get damages that wouldn't be foreseeable by the rest of the public?
    1. Then only recoverable if he let the Δ know about them

<u>Liquidated Damages</u>

- Restatement § 356: Can't fix unreasonably large liquidate damages in anticipation of loss. Because then that basically penalize the breacher.
    - *City of Rye case* → Grossly disproportionate amount to the anticipated probable harm, or no anticipated harm, so liquidated damages provision not enforced
    - *Vines v. Orchard Hills* → enforce liquidated damages if they're the industry standard

<u>Certainty</u>

- **<u>Damages for breach are recoverable only to the extent that the injured party's loss can be est. w/reasonable certainty</u>**
- Damages must be proved by nonbreaching party with reasonable certainty
    → See: *<u>Hawkins v. McGee</u>* – how do you decide with reasonable certainty what a perfect hand is worth? Can't prove damages with reasonable certainty