

Answering a contracts question:

Who is the potential P?
Who is the potential D?
What is the cause of action?
What does P want?
Why is P entitled to it?
What are the defenses?
What are the counter-defenses?
What can be argued back and forth?

Elements of a Contract Analysis:

1. Intent
 - a. Does each party have intent to enter K?
 - b. Do parties have legal capacity?
2. Consideration
3. Offer
4. Acceptance
5. Breach
6. Remedy
 - a. Specific performance
 - b. Money damages

Interpretation – Determine the parties’ intent, as expressed by them in their contract or as inferred from surrounding evidence and reasonable expectations

PART I – WHAT PROMISES WILL COURTS ENFORCE?

- Promises with consideration
- Promissory estoppel
- Promissory restitution
- Seal
- (Nonpromissory restitution)

I. Introduction

- a. Duty to read: Generally binds those who manifest agreement to what they know is intended to be a contract, even if they later claim ignorance of its contents. (Can be overcome by lack of capacity, fraud, etc.)
- b. Requirements:
 - i. Each party must have intent to enter a contract
 1. Objectively measured: Shown by parties’ actions
 2. Reasonable interpretation of one’s words and acts as manifested by actions and words, not by private thoughts
 3. Objective manifestation of intent (what you signed vs. what you intended, what you subjectively thought)
 - ii. Mutual assent: Offer + Acceptance
 - iii. Consideration OR
 1. Seal
 2. Promises which induce substantial reliance
 3. Promises to pay for benefits received

II. Consideration

- a. Something of value (act, forbearance, return promise) received by a promisor in exchange for a promise.
- b. If _____ consideration is given (“If you do this”), then I promise that _____ .
- c. Must be recognized as consideration by both parties

- d. **Promisee must either act** (do something or promise to do something he is not legally obligated to do), **or forbear** (refrain from doing something or promise to refrain from doing something he is legally entitled to do).
- i. Pre-existing duty \neq consideration
 - ii. It means nothing if the promisee suffers a legal detriment unless the parties agree that it is the price of the promise
 - iii. Promisee must circumscribe his freedom in some way
- e. **Promisor must seek the act or forbearance in exchange for the promise.**
- i. Promisor does not have to receive any tangible or economic gain. Only has to bargain for the promise from the promisee. (Hamer v. Sidway)
 - ii. Altruistic pleasure not OK. "I believe that it is more blessed to give than to receive, and it would give me great Christian happiness to have you accept my gift." Donative promise.
 - iii. Promisor must be motivated in making the promise in part b/c he wishes to exchange his promise for promisee's detriment
- f. **The promise must be bargained for. Each promise must induce the other. Promises must be mutually induced.**
- i. Bargain = A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
 - ii. Parties don't actually have to "bargain" over the terms of the agreement.
 - iii. Promisor does not have to receive an economic benefit. Promise must have value to the promisor.
 - iv. Promisee's purpose must be to take advantage of the proposed exchange. Promisee must know of the promise.
 - v. Condition of a gift NOT consideration (I will give you my skis if you walk over to my car) (Kirksey v. Kirksey)
 - vi. Mutuality of obligation = both parties must be bound & must give consideration
- g. Detriment = relinquishment of a legal right
- h. Types of consideration:
- i. Return promise – I promise to deliver apples on 12/1. I promise to pay for apples on 12/1.
 - ii. Performance – Seller delivers apples, buyer promises to pay on 12/1.
- i. Courts will not look at the adequacy of consideration if it was bargained for. Inadequate consideration can be enforceable (Batsakis).
- j. However, sham/nominal consideration not enforceable if looks like a mere formality (see gift). "I will sell you my house for \$1."
- k. **Illusory promise not enforceable.** Promisor's performance entirely optional. Promisor not committed to anything. "I will buy your house if I feel like it."

III. Unconscionability

a. Elements:

- i. **Absence of meaningful choice**
 - ii. **Grossly unfavorable terms**
- b. Procedural – Absence of choice; defect in bargaining process. Take it or leave it.
 - c. Substantive – Grossly unreasonable terms.
 - d. Both usually required.
 - e. Cannot take advantage of condition, circumstances or necessity of other party.

IV. Gifts

- a. Not enforce purely gratuitous/donative promise b/c no consideration
- b. Not question validity of executed gift

V. CONSIDERATION SUBSTITUTES - NO ENFORCEABLE CONTRACT REQUIRED:

a. Promissory Estoppel/Section 90

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

1. Elements:

- a. **Promise**
 - b. **Promisor intends/expects/should know that promisee will rely**
 - c. **Promisee relies**
 - d. **Reliance is reasonable & foreseeable**
 - e. **Promisee suffers a detriment**
 - f. **Unjust not to enforce the promise**
- ii. No consideration (sometimes no bargain), but detrimental reliance by promisee
 - iii. Foreseeable, definite & substantial reliance
- iv. **Result**
1. Courts have a wide range of discretion
 2. Full contractual relief usually not necessarily an appropriate remedy
 3. Damages to put P in position he would have been in had he not acted in reliance on promise = expenses incurred in reliance on the promise
- v. Reliance must be foreseeable, and it must be foreseeable that promisee would rely in that way
- vi. Uses by courts:
1. Substitute for consideration, permitting recovery for detrimental reliance on a gratuitous promise
 2. Basis for holding an offer open despite the offeror's attempt to revoke
 3. Basis for enforcing an oral agreement within the statute of frauds despite the lack of a memorandum signed by D
 4. To afford relief for reliance on a promise that falls short of becoming contractual because of some defect or omission in the agreement formed by the parties

vii. EXAMPLES:

1. Charitable subscription – Used to enforce written promise to make contribution. Usually no detrimental reliance required by charitable org.
2. Pensions – If promise made after retirement (or made so that employee can retire now), bargain element waived.
 - a. If pension negotiated before retirement, OK b/c consideration. Pay pension – keep working.
 - b. Plowman – If employer had said, “We want you to come to pick up your checks b/c we want to encourage employee morale” = Valid consideration.

b. Nonpromissory restitution = quasi contract

i. Elements of a cause of action for a quasi contract:

1. **D received a benefit**
2. **At P’s expense**
3. **Under circumstances that would make it unjust for D to retain the benefit w/o paying for it**
4. **(P must not confer benefit gratuitously)**

ii. Cause of action = unjust enrichment. Remedy = restitution.

iii. Restitution = act of restoring something or its value.

iv. Uses:

1. Nonpromissory restitution applies if one party has received a benefit from another, but no promise was made (no K formed)
2. Restitution can be an alternative cause of action when a valid K has been breached

v. Purpose: A person who has been unjustly enriched at the expense of another is required to make restitution to the other

1. One who receives services, with the knowledge that the person furnishing them reasonably expects to be paid, will be liable for the reasonable value of those services. Services cannot be officiously or gratuitously performed = Quasi contract

vi. Restatement of Restitution 116:

1. If P supplies things or services to D w/o D’s knowledge or consent, P is entitled to restitution if:
 - a. P acted unofficiously and w/ intent to charge, AND
 - b. The things or services were necessary to prevent D from suffering serious bodily harm, AND
 - c. P had no reason to know that D would not consent, if mentally competent, AND
 - d. It was impossible for D to consent, or D’s consent would have been immaterial (e.g., youth or mental impairment)

vii. **Result:** Measured by D’s gain

1. Market value of property or services conferred (quantum meruit = “as much as deserved”) (preferred)

viii. Contract implied-in-law = quasi contract = not a true contract = restitution

1. Not based on finding an agreement b/n parties

2. Obligation created by law w/o regard to the parties' expression of assent by words or conduct
3. D has received something of value, but no express or implied-in-fact K
4. Can arise where parties do not interact
5. EXAMPLE: Subcontractor cases
 - a. Where sub is not paid for work completed, sub can only recover from owner on a quasi-contract theory (quantum meruit) when:
 - i. Sub has exhausted remedies against general
 - ii. Owner received benefit w/o paying anyone (if owner paid general, sub can't recover from owner)
6. Recovery = amount of D's gain = restitution

ix. Contract implied-in-fact = true contract

1. **Elements of a contract implied-in-fact:**
 - a. **D requested P to perform work**
 - b. **P expected D to pay for the work**
 - c. **D knew or should have known that P expected compensation**
2. Look at parties' conduct – usu. available when person who receives benefit requested it. Tacit promise. Unspoken agreement that must be interpreted. Based on their interaction.
3. When a person expressly asks another to perform services for him but they don't discuss compensation (**services performed officiously**)
 - a. Where P performs services in addition to express contract OR
 - b. Where P performs services w/o an express contract
4. When services are rendered by one person for another w/o express request, but with knowledge (as long as it is fair to presume that the parties intended for compensation to change hands)
5. Where P has acted to preserve things belonging to D
6. Can exist where D has received nothing of value.
7. Differs from express contract b/c terms of latter are expressed orally or in writing, while terms of former are inferred from parties' conduct
8. **Recovery** = amount parties intended as contract price (or reasonable market value of P's services = quantum meruit)

c. Promissory restitution: Promise to pay for benefit received

- i. A separate cause of action to enforce a promise that has no consideration
- ii. **Elements:**
 1. **D gets a benefit**
 2. **At P's expense**
 3. **It would be unjust not to have D pay for the benefit**
- iii. Can be based on receiving a material benefit, or having a moral obligation:

1. **Material benefit rule:** If a person receives a material benefit from another, other than gratuitously, a subsequent promise to compensate the person for rendering such benefit is enforceable (not followed by all courts).
2. “A **moral obligation** is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor”
- iv. D receives a material benefit and then makes a promise (in reliance, D makes a promise and then P relies on the promise)
 1. P suffers detriment → Promise = Promissory restitution
 2. Promise → P suffers detriment = Reliance
- v. Debtor’s promise to pay an earlier unenforceable debt (or acknowledgement of the debt) barred by a SOL or by bankruptcy is binding despite lack of fresh consideration (sometimes must be in writing)
- vi. Minor’s promise to pay a debt after reaching majority (or failure to disaffirm after reaching majority); exception: necessities
- vii. **Remedy:** measured by D’s gain/benefit, not P’s loss

PART II – WHEN DOES A CONTRACT EXIST?

I. Common law offer & acceptance

- a. Contract forms at time of offer & acceptance – manifestation of intent to be bound

b. OFFER

- i. Restatement 24: “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”
 1. If something truly is an offer, the communication following it (acceptance) can close the deal
 2. Would a reasonable person in the position of the purported offeree understand that the offeror intended to be bound?
- ii. Must demonstrate intent to enter into K: Test of true interpretation of an offer or acceptance is not what the party making it thought it meant or intended to mean, but what a reasonable person in the position of the parties would have thought it meant.
- iii. Must identify material terms
 1. Parties involved
 2. Subject matter
 3. Quantity
 4. Price
 5. Time for performance
 6. Gap-fillers available to supply some missing terms
- iv. Master of the Offer
 1. Method of acceptance can be controlled by offer
 2. If no method specified, assume that any reasonable method is acceptable

v. Ads and price quotes:

1. If no specific quantity \neq offer (even if contains a “per unit” price)
2. If not addressed to a specific person, or sent as part of a large mailing \neq offer
3. If language indicates that more than one party has received a quote for the same item \neq offer
4. Generally price quotes are not specific enough to be offers (if does not express sufficient specificity and a willingness to be bound)
5. Ads generally = invitations for offers \neq offer

a. Exceptions:

- i. Defines terms clearly & explicitly, no room for negotiation, acceptance of ad will complete K
- ii. Promise to sell a particular number of units or to sell in a particular manner

vi. Offer has an immediate and significant legal effect:

1. Confers upon offeree the power of acceptance
2. Offeree’s acceptance places parties in a contractual relationship
3. An offer is binding if it has consideration OR when it is accepted
4. An offer is revocable until it is accepted by the offeree, even if the offer itself expressly says that it cannot or will not be revoked (common law)

vii. Withdrawal of an offer:

1. May be revoked any time until the offer is accepted if no consideration given to keep offer open
2. Offeree must have notice when an offeror wants to revoke for the revocation to be valid
3. If offeree dies before acceptance, offer can be destroyed
4. Cannot be withdrawn if it has consideration = option
5. Some offers cannot be withdrawn due to reliance (bidder cases where general relies on sub’s bid in making a project bid)
6. Acceptance can happen before offeror actually knows (Mailbox Rule)
 - a. Offeror cannot legally revoke an offer after offeree has mailed acceptance, even if offeror has not yet received the acceptance
7. Under UCC, some offers cannot be revoked for lack of consideration (2-205)
8. **When is an offer revoked?**
 - a. It is revoked by the offeror AND
 - b. Offeror must notify offeree of the revocation

viii. EXAMPLES:

1. “If I should desire to purchase it” \neq offer

2. “Assuming the land in question is X, I will buy it for \$2,500” = offer
 - a. Yes, this is the land, you can have it for \$2,500 = acceptance
3. Ad: “I will sell my house for \$150,000” ≠ offer
 - a. B sends offer to purchase house for \$140,000 with place for S to sign to accept (offer – looks like S can close/accept w/o further action)
 - b. S signs and mails back = Acceptance valid as soon as it is dropped in mail = Mailbox rule = B is bound even though he doesn’t know it yet
 - c. If S gets an offer for \$160,000 two hours later and calls B to revoke – NOT OK

c. COUNTEROFFER

- i. **Mirror image rule** = If acceptance adds or changes any terms it is not an acceptance but a counteroffer (common law)
- ii. Effect of counteroffer:
 1. Rejection of original offer. Original offer ceases to exist.
 2. Original offeror becomes offeree and may accept or reject.
- iii. Under UCC, some different or additional terms can be included in contract as a result of a counteroffer. See UCC 2-207.
- iv. A rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror
- v. EXAMPLE:
 1. A potential buyer or real estate makes an offer to the owner/seller.
 2. Owner/seller makes a counteroffer (or changes the terms of the offer & sends it back). Original offer ceases to exist.
 3. Potential buyer does not accept the counteroffer.
 4. Counteroffer is revoked. (Seller enters into another contract).
 5. Potential buyer cannot go back and accept the counteroffer w/o further negotiation.

d. ACCEPTANCE

- i. An agreement, either by express act or by implication from conduct, to the terms of an offer so that a binding K is formed
- ii. An effective acceptance requires three things:
 1. A manifestation of assent by the offeree to the terms of the offer;
 2. The acceptance must be made in the manner invited or required by the offer; and
 3. The acceptance must occur while the offer is still open, i.e., if the offer has already been revoked, the acceptance is not effective to create a contract.
- iii. Acceptance only by person given power of acceptance by offeror
- iv. Acceptance by conduct allowable – last shot rule applies (common law)

1. **Last shot rule** = A party impliedly assents to and thereby accepts a counter-offer by conduct indicating lack of objection to it (e.g. not expressly objecting, accepting services performed, paying the price stated in the counter-offer). Usually tends to favor the seller (invoice terms = contract).
 2. Party accepts all terms in counteroffer by conduct
- v. **Mailbox Rule**: Acceptance by mail is considered binding as soon as offeree mails it, assuming offer does not specify otherwise.
- vi. Generally, silence is not sufficient form of acceptance
1. Exception: Course of dealing in the past has shown that it is acceptable = objective test
- vii. Pre-acceptance reliance (**Baird & Drennan**) – If an offeree relies on an offer before acceptance (incurs costs, substantially changes his position)
1. **Majority view (Drennan)** – Sub bound for a reasonable time to its bid.
 - a. Uses promissory estoppel to protect P/general: P relied on D's bid in forming its own overall bid
 - b. P had no reason to know that D's bid was a mistake
 - c. After winning the contract, general cannot delay acceptance in hope of finding an even lower bid
 2. **Baird**: Mere use by a general contractor of one particular sub's bid ≠ acceptance of that bid ≠ form a bilateral K binding on both parties
- e. An offer is always revocable until accepted if no consideration (common law only)

II. Bilateral contracts

- a. Two promisors & two promisees. One party makes a promise/commitment, and other party accepts by making a promise/commitment.
- b. Executory bilateral K = Exchange of promises to be performed is sufficient to form K
 - i. I promise to sell you wheat on December 15th, I promise to buy your wheat on December 15th (promise made in Nov.)
 - ii. I promise to sell my house, I promise to buy your house.
 1. No money has to exchange hands (earnest money deposits are available to give something to seller in case buyer backs out, but not required)
 2. K forms when offer & acceptance match and parties intend to be bound
- c. When does K form? During oral negotiations, if parties intend to be bound with a mere memorialization later, K forms.

III. Unilateral contracts – review Restatement 45 & common law theories

- a. Offeror offers to exchange his promise of a future performance (e.g., to pay money) only in return for the offeree's actual rendering of performance. Promisor seeks act as acceptance.
- b. Only one promisor. Promisor does not want a promise in return.
- c. Offeree's performance = acceptance AND consideration
- d. Classical theory – Offer is revocable until offeree fully performs the act called for in the promise. Can be revoked at any time before complete performance.
- e. Modern theory

- i. Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
- ii. Offeror may be bound by offeree's partial performance (makes offer temporarily irrevocable) = conditional K, where condition is full performance of K
 1. Offeror's duty does not come into being until the act has been started
- iii. Once offeree has started performance, offeror must allow either a reasonable time to finish, or a time specified in the offer
- iv. Once offeree has started to perform, offeror cannot change the terms
- v. Offeree must have knowledge of the offer (e.g. rewards), even if he fulfills the terms of it and then finds out about the award afterwards (no mutual assent)
- vi. Offeree usually does not have to give notice of intent to accept unilateral K
- vii. Offeree must give notice that he has performed, unless offeror has reason to know of performance

IV. **Offer & acceptance under UCC (SALE OF GOODS)**

a. **Firm offer under UCC 2-205**

- i. No consideration needed to validate an option (firm offer) IF:
 1. Offer
 2. By merchant (both parties do not have to be merchants)
 3. To buy or sell goods
 4. Signed writing
 5. Terms give assurance that it will be held open
 6. During the time stated or a reasonable time under three months ("For time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months") – **courts generally interpret this as 90 days max no matter what – know that this is an ambiguity**
 7. Term of assurance on a form supplied by offeree must be signed separately by offeror

b. **Qualified acceptance under UCC 2-207**

- i. Applies when one or both parties use written communications in the process of forming K for the sale of goods
- ii. K already formed but communications not mirror image
- iii. At common law, an acceptance that included any different or additional terms = counteroffer. In order to encourage commerce, UCC 2-207 allows some contracts to form even when the acceptance includes different or additional terms. Abolishes mirror image rule.
- iv. Big picture: What happens to different or additional terms in the communications?
 1. Any conflicting terms in the acceptance fall away and do not become part of K (with exceptions) – they become proposals
 2. If neither party is a merchant, any additional terms are considered proposals for incorporation into K that must be expressly accepted if they are going to be included

3. Between merchants, the additional terms are proposals which can become part of K unless they materially alter the K
 4. If you want to add a negative term in your contract, you have to negotiate it.
- v. **2-207(1):** A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
1. Not an acceptance if:
 - a. Not definite expression of acceptance
 - b. Sent after offer has lapsed (not seasonable)
 - c. Expressly states that acceptance is conditional on assent to new terms (“I’m not going to deal with you unless you accept my terms”)
 - i. Acceptor can’t then go ahead w/ K and try to get K by conduct
 2. If acceptance includes different or additional terms (proposals), and offeror proceeds with performance of transaction, these terms are not included in K unless:
 - a. Offeror is aware of new terms
 - b. Offeror manifests assent to the new terms
 3. **Knockout rule:** If clauses on confirming forms sent by both parties conflict, objection is assumed and the conflicting terms are not included in the contract. K includes:
 - a. Terms originally expressly agreed to
 - b. Terms on which the confirmations agree
 - c. Terms supplied by UCC
- vi. **2-207(2):**
1. Only applies if response to offer = acceptance
 - a. If performance occurs, go to 2-207(3)
 2. Additional terms become proposals
 3. If both parties are merchants, additional terms become part of K unless:
 - a. Offer expressly limits acceptance to the terms of the offer
 - b. Additional terms materially alter the agreement
 - i. Evaluated by surprise and hardship & interpreted in context of K
 - ii. Material alterations are excluded from K, and K exists w/o the material alterations unless the terms are expressly agreed to
 - iii. Examples of common material alterations:
 1. Disclaimer of warranty
 2. Requirement of 90-100% deliveries where usage of the trade allows greater quantity leeways
 3. Clause reserving to seller the power to cancel upon buyer’s failure to meet any invoice when due
 4. Clause requiring that complaints be made in a time materially shorter than customary or reasonable

- iv. In general, anything that falls within customary trade practice ≠ material alteration
- 4. If the terms do not materially alter the bargain, they will be incorporated unless recipient of new terms objects to them and notifies the other party of his objection.
- vii. **2-207(3):** Even if no K exists from the writings, any conduct by the parties which recognizes the existence of a K is sufficient to establish a K for the sale of goods (applies to merchants and non-merchants)
 - 1. K = Terms on which the writings agree + supplementary terms under UCC
 - 2. Abolishes last-shot rule
 - a. If a contract is recognized by mutual performance, it is not formed based on the last communication, but on the agreed-upon terms.
 - b. Any other terms fall away and are replaced by UCC terms
 - c. Prevents sellers from slipping in unfavorable terms w/o buyer's knowledge
 - 3. In many cases where an item is shipped, accepted and paid for, the only question is what terms are included in the contract. Governed by subsection 3.
 - 4. Reminder: Under common law, buyer's conduct in proceeding with the transaction would imply acceptance of seller's counteroffer on seller's terms.
- viii. Common UCC 2-207 examples:
 - 1. Agreement reached by informal correspondence or orally
 - a. One or both parties send a written memorandum with agreed-upon terms and additional terms not discussed
 - 2. Exchange of printed purchase order and acceptance forms
 - a. Terms often do not correspond b/c each written to favor writer
 - 3. In either situation, the parties proceed with the transaction

V. Electronic contracting

- a. Looks at enforceability of contract terms disclosed to purchaser after purchaser has ordered the product (the terms come with the product)
- b. Two theories:
 - i. If seller = offeror (*ProCD* and *Hill*, enforcing Standard Terms)
 - 1. As master of the offer, seller can propose method of acceptance ("By keeping this product beyond 30 days, you accept our terms")
 - 2. Offer = Seller ships goods
 - 3. Acceptance = Buyer opens & uses goods, forming K
 - 4. If purchaser doesn't agree to terms, he can reject by sending product back to seller
 - 5. *Hill* court declines to apply 2-207 b/c only one form (but 2-207 does not require two forms)
 - 6. Policy: Would be too time-consuming for clerks, sellers to read all K terms at time of purchase; customers have opportunity/duty to research terms b/f ordering
 - 7. Facts supporting this position:
 - a. Purchaser knew that box would include some important terms, but did not seek to learn them before shipment
 - b. Seller's ads state that their products come with limited warranties & lifetime support

- ii. Buyer = offeror
 - 1. Offer = Purchaser makes offer to purchase computer
 - 2. Acceptance = Seller completes the sales transaction and/or shipping the goods (a “definite & seasonable expression of acceptance”)
 - 3. Contract forms at time of purchase
 - 4. Under 2-207(2), additional terms sent by seller are merely proposals, when one party is not a merchant. Do not become part of K unless offeror (purchaser) expressly agrees to them. Must be negotiated.
 - 5. Form acts as confirmation and arbitration clause is material addition
 - 6. Facts that support this position:
 - a. Gateway (offeree) did not notify buyer (offeror) that it was unwilling to proceed with the transaction unless buyer assented to its terms
 - b. Act of keeping computer for five days is not sufficient to demonstrate assent to seller’s additional terms

c. “Clickthrough contracts”

- i. One court has held that consumers are bound when they click “I Agree” when making an online purchase
 - 1. Consumers had opportunity to review contract provisions

PART III – WHAT ARE THE TERMS OF A CONTRACT, AND TO WHOM DO THEY APPLY?

I. Statute of frauds

- a. Triggered by an oral contract
- b. Purpose: To avoid fraudulent introduction of K; to prevent a person from enforcing a falsely alleged contract through perjured testimony
- c. Contract is “within” or “without” the statute of frauds
- d. If within SOF, requires certain types of contracts to be in writing to be effective
- e. Compliance w/ statute of frauds will not by itself make a promise enforceable, even if it is supported by consideration
- f. If no consideration, compliance w/ SOF will not make it enforceable
- g. SOF analysis:
 - i. Is the contract at issue one of the types to which the SOF applies, so that a signed memorandum will be required for its enforcement?
 - 1. If no, SOF does not apply. P free to prove K in other ways.
 - 2. If yes, is the SOF satisfied (three requirements)?
 - a. Written statement
 - i. Can be in more than one writing
 - 1. Crabtree rule: All writings must refer to same subject matter
 - a. Oral evidence can be admitted to connect the docs and show assent to the unsigned doc
 - 2. Alternative rule: All writings must refer to each other (unsigned doc must expressly refer to signed doc)
 - ii. Can come into existence after execution of K

- iii. Writings do not have to be created to evidence K
 - 1. Sufficient if they were signed to authenticate the information within and if they do evidence K
 - 2. Sometimes meeting minutes, letters, etc. might be OK (e-mail, voicemail, IM?)
 - b. Signed by D
 - c. Contains all material terms
 - 3. Are there other factors, such as performance or reliance by P, that might invoke an exception?
 - a. Courts have used promissory estoppel where D promised P a signed writing but never produced it.
 - ii. Existence of a signed writing is proof that K formed, but not conclusive proof
 - iii. Signed and unsigned writings can be read together, as long as they clearly refer to the same subject matter or transaction. Parol evidence can be admitted to clarify. OK if writings come after execution of K.
- h. Types of Ks that fall w/in SOF:
 - i. Ks not to be performed w/in one year from date K is formed (generally, not “terminated” b/c any K can be terminated by breach at any time)
 - 1. Not within SOF if it is possible to be performed w/in one year, even if unlikely or improbable
 - 2. At-will, indefinite duration K is not w/in SOF b/c can be performed w/in one year (if P dies)
 - 3. Employment K for two years = within SOF (won’t be completed w/in one year)
 - 4. On January 1, 2003, A makes contract to sing in an opera on Jan 4, 2004 – must be in writing
 - 5. On July 1, 2003, A makes a contract to rent a hotel room July 4 weekend, 2004
 - 6. Generally, if terms of K show that it could not be performed w/in one year – must be in writing
 - ii. Contracts for commissions, finder’s fees
 - iii. Real property (sale, lease)
 - iv. Prenuptial agreements
 - v. Promise to pay another person’s debts (either alive-surety or dead-executor) made to the creditor
 - vi. Sale of goods over \$500 (UCC)
- i. Promissory estoppel can be used to overcome SOF (reliance on the promise of a writing)
 - i. Or, where P has rendered partial performance, some courts will grant a remedy in restitution to compensate for the reasonable value of that part performance = avoiding unjust enrichment rather than enforcing K
- j. Result: Usually noncompliance makes the contract unenforceable
 - i. If K is found to be unenforceable, restitution is available

II. Interpretation & Ambiguity

- a. Indefiniteness can be divided into three general categories:
 - i. The parties purport to agree on a material term but leave it too indefinite(vague).
 - ii. The purported agreement is silent on a material term.
 - iii. The parties agree to later agree on a material term.

- b. **Interpretation** = Used when the parties attach different meaning to the language; court determines the meaning that the parties attributed to the language; usually a jury question
 - i. Based on the objective meaning of the language in an agreement, viewed in its context
 - ii. When parties have different meanings, the one with the more reasonable meaning wins
 - iii. When parties attach the same meaning, but their meaning is different than the “reasonable, objective” meaning, their mutual understanding prevails
 - iv. Sources used to interpret language:
 1. Express language and conduct of parties in forming agreement
 2. Conduct in performing the contract after it formed (course of performance)
 3. Conduct in prior comparable transactions with each other (course of dealing)
 4. Customs and usages of the market in which they are dealing with each other (trade usage)
 - a. Is the term widely used?
 - b. Are both parties members of the trade?
 - c. Is the usage compatible with the terms of the agreement?
 5. Experts
 6. Statute
 7. Subjective evidence (what one party thought or meant) is only marginally relevant
 - v. **Issue:** Did one party know or have reason to know of the meaning the other party attached to the language?
 1. If the parties attach different meaning to language, some courts will use the innocent party’s meaning if the other party knew or had reason to know what the innocent party believed.
 2. If parties attach different meaning to language, but neither party is aware of other party’s meaning = term not included in K b/c no mutual assent or “meeting of the minds”
 - a. If the disputed term is material and little or no performance = court can find no K
 - b. If the disputed term is material and performance has occurred and rescission is not appropriate = court can supply a term that is reasonable under the circumstances
 - c. Courts generally will break a tie by finding against the drafting party (General contract principle)
 3. Factors to consider:
 - a. Does it look like an adhesion K?
 - b. Are both parties engaged in the same industry or trade?
 - c. Did they negotiate extensively?
 - d. Was bargaining power equal on each side?

- vi. Courts usually state that the plain meaning of the language should govern, and extrinsic evidence only can be admitted if the court concludes that the term is ambiguous (under PER, extrinsic evidence cannot be admitted to alter or vary K terms)
- vii. Review p. 358 for interpretation principles
- c. Construction = What the parties probably would have meant; implied in law
 - i. Gap fillers = standard terms supplied by law
 - 1. Used when parties obviously intended a contract, but they failed to provide adequately or at all for the question in issue
 - 2. Can supply general duties, e.g. Obligation to make best efforts to achieve the contract's purpose
 - 3. Can supply more specific duties, e.g. Minimum warranties regarding title to and quality of goods, imposed by UCC
 - ii. Mandatory implied terms = parties cannot expressly agree to exclude these terms
 - 1. Obligation of both parties to perform the contract reasonably and in good faith

VI. Postponed Bargaining + "Agreement to Agree"

- a. If a material term is omitted, no K, even if parties agree to agree on that term at a later time. Leaving a term for future determination, without providing a method for their determination, renders the agreement unenforceable for uncertainty.
- b. Or, no K comes into being if a material aspect of the agreement is left indefinite by the parties and the uncertainty cannot be resolved by the process of interpretation or construction
 - i. Generally, under common law the parties must:
 - 1. Negotiate a specific price OR
 - 2. Decide on a method to determine price
 - a. Exception: Courts have enforced lease-renewal option agreements despite failure of parties to agree on a rental figure in advance
 - b. Some courts have concluded that "reasonable rent" or "rent based on business conditions" are not specific enough to enforce
 - 3. Enforceability is measured by the degree of certainty in the term
 - 4. If parties cannot agree on a price, court will impose a "reasonable price."
 - ii. Under UCC 2-305, an "open price term" will not prevent enforcement of a K for sale, if parties intended to be bound
 - 1. Exception: If parties did not intend to be bound unless the price was fixed by agreement, courts generally will not enforce
- c. Parties may undertake to continue negotiations in good faith (no promise that K will eventually form, though)
 - i. Some courts will enforce this,
 - ii. Others consider it too vague
- d. Parties may be bound contractually when they have reached an agreement in principle, even though they contemplate:
 - i. Further negotiations (agreement to agree) OR
 - ii. A formal written contract (review p.286)

- iii. Based on whether the parties intended to be bound when they reached the agreement, or whether they contemplated further successful negotiations before forming K
 - iv. As long as evidence indicates that parties intended a contract, and there is some means of resolving an uncertain term, the court will tolerate some indefiniteness
- e. Letters of intent: **Did the parties intend to be bound?**
- i. May be enforceable if parties intend them to be binding
 - 1. Did the parties intend to be bound only when they entered a formal written K?
 - 2. Does the letter discuss all material terms?
- f. Contract to bargain in good faith can be enforced
- i. Parties not required to reach an agreement
- d. If a party relies on promise (e.g. in a letter of intent), she may be able to recover on a promissory estoppel basis

III. Parol Evidence Rule

- a. Triggered by a formal written document that is a contract, signed by both parties, intended to be their final & complete expression of agreement
- i. Is the writing in question intended to be a final expression of agreement?
 - 1. Question of law
 - 2. Most courts determine from the “four corners of the document”
 - 3. Some Ks will have a merger clause, stating that the writing is intended to be final and complete – dispositive in some J’s but not in all
 - ii. If so, is it a complete or partial statement of K terms?
 - 1. Complete integration: Writing intended to be a final & exclusive expression of the agreement
 - a. All terms fully & completely expressed, no vagueness or ambiguity, possibly a merger clause
 - b. No parol evidence admitted
 - c. No contradictory terms or consistent additional terms allowed
 - 2. Partial integration: Writing that is intended to be final but not complete b/c it deals w/ some but not all aspects of the transaction
 - a. Some terms clearly & fully expressed, other terms not included at all, or are not in final and comprehensive form
 - b. Parol evidence admissible to supplement or explain missing or incomplete terms, but cannot contradict them. Parol evidence cannot supplement final terms.
 - c. No contradictory terms; consistent additional terms may be admitted
 - 3. Ambiguous term
 - a. Parol evidence admissible to explain the uncertainty or to establish the correct meaning of the ambiguity. Evidence must be reconcilable with what has been written.
 - iii. Requirements:
 - 1. Written document
 - 2. Signed by both parties
 - 3. Formal, final, complete, intended to be final expression of agreement
 - 4. Consideration
 - 5. Capacity

6. Offer & acceptance
 7. **If all conditions met, then any evidence (written or oral) prior to or contemporaneous with the signing is inadmissible to contradict or vary the terms of the writing**
- b. What is excluded?
 - i. Prior (or contemporaneous) oral or written agreements
 - ii. Evidence of a term agreed upon before (or at same time as) the execution of K that was not included, whether consistent or not
 - iii. Evidence that alters or varies the written terms
 - c. Courts generally have refused to use promissory estoppel to get around the PER
 - d. Exceptions (these types of parol evidence are allowed):
 - i. Ambiguity: Evidence offered to explain the meaning of the agreement can be admitted (e.g. “chickens,” “winters of 1882 and 1883,” “boom scale”)
 1. Modern courts tend to admit evidence if a term has a special meaning
 2. Evidence must be consistent and not contradictory with what is written down
 - ii. Oral or written agreements made after the execution of the writing
 - iii. Evidence of a prior oral condition precedent (e.g. securing financing)
 1. Makes sense because if there was a condition precedent that was not met, then the K never formed in the first place
 - iv. Evidence offered to show that the agreement is invalid for any reason re: fraud, duress, undue influence, etc.
 1. Fraud in execution – A misrepresents what he is asking B to sign
 2. Fraud in inducement – A misrepresents facts that induces B to enter into the contract; sometimes courts will not allow parol evidence if it directly contradicts a term in the writing
 3. Only applies when the alleged fraud does not related directly to the subject of K
 4. Generally a merger clause cannot protect D against a claim of fraud
 5. However, some courts hold that a party cannot base a claim of fraud on something that is expressly disclaimed in the writing (Sherrod)
 - v. Evidence offered to establish a right to an equitable remedy, such as reformation
 1. E.g. If there has been a mistake in drafting, and something that the parties intended has been left out
 2. Parties must show by clear & convincing evidence that they really did intend the term in question to be included
 - vi. Evidence introduced to establish a collateral agreement b/n the parties
 1. Must be a subject distinct from what the writing relates
 2. Would it have been rational and expected for the parties to agree to the term outside of the writing?
 - e. Purpose is to keep some kinds of evidence from the jury – evidence that would contradict or vary terms of written agreement

IV. Implied terms and obligations

- a. Implied obligation to use reasonable efforts (Lucy)

- b. Gap fillers under the UCC
 - i. Gap fillers: Implied as a matter of law unless otherwise expressly agreed to by the parties
 - ii. Some UCC implied terms are mandatory and may not be contracted otherwise by the parties (i.e. obligation of good faith)
- c. Distributorship agreements: Can be problematic under common law. If terms are indefinite (obligations of dealer, duration), can be unenforceable for lack of consideration or lack of mutual obligation
- d. Implied obligation of good faith (common law and UCC 1-203)
 - i. Generally protects the bargain that the parties have made against later attempts by one party to undermine it
 - ii. Protects the parties' ability to receive the fruits of the contract
 - iii. Can mean subjective honesty in fact or objectively reasonable commercial behavior
 - iv. Cannot be extended to impose obligations not contemplated in K or to vary express terms
 - v. I promise to buy your house if I get financing
 - 1. Implied obligation of good faith to get financing
 - 2. If promisor does not make a good-faith effort, will still have to buy the house
 - 3. Condition exists to protect the buyer; if buyer doesn't make a good faith effort to fulfill the condition, the condition is "excused" and buyer has to purchase the house

PART IV – IS THERE A BREACH?

I. Conditions & Promises

- a. Important to distinguish promises from conditions
 - i. **Promise** = undertaking to act or forbear in a specified way at some future time
 - 1. I promise to buy your house
 - 2. I promise to sell my house
 - 3. If a pure promise is broken, that party is liable for breach
 - ii. **Condition** = even that is not certain to occur
 - 1. Parties can agree that performance is contingent on the occurrence of the uncertain event (past or future)
 - 2. If performance is subject to a condition, it does not fall due unless that condition is satisfied ("I will buy your house if it rains tomorrow")
 - a. If a pure condition does not occur, performance obligation falls away and there is no basis for claiming breach of contract
 - 3. Passage of time \neq condition
 - 4. If parties do not intend for performance to be contingent upon the event, it should not be treated as a condition
 - 5. If a condition is not fulfilled, there are major consequences (K does not come into being or K is materially breached) – if you want something crucial to happen, you label it a condition

6. If a condition is intended to relate only to the performance of one of the parties, that party can choose to perform despite its non-occurrence and may fully enforce the K against the other
 - a. I will buy your land if the rezoning is approved.
 - b. If rezoning is not approved, Buyer (who is protected by the condition) can elect to waive the condition and proceed with the transaction

iii. Promissory condition

1. Applied if one party has some control over the outcome (e.g. if Buyer has to submit the rezoning application)
 2. If a promissory condition does not occur (Buyer does not submit the rezoning application), other party is entitled to withhold performance + seek a remedy for breach
- iv. **Condition precedent** – Must occur before performance is due
1. A performance that takes a longer time usu. must be rendered first (e.g. building a house – other performance (payment) due after house is built)
- v. **Concurrent condition** – If performances are capable of being rendered simultaneously, they are due at the same time
- vi. **Condition subsequent** – Terminates a duty that came into existence when K formed
1. If one party does not show up at the designated performance time, the other party is excused from performing and may sue for breach

b. **Express condition**

- i. **Purpose:** Parties expressly agree that some event must take place before a party has an obligation to perform = Condition precedent to a party's duty to perform.
 1. Something that is very important to the parties; important enough that if it does not happen, there are major consequences (“on the condition that, subject to, provided that, if and only if, unless and until”)
 - a. E.g. I will pay you for a house if and only if the pipe is from Reading.
 - b. Parties may or may not have control over the event = pure condition
- ii. **Evidence:** Apparent from the language of the contract itself.
- iii. **Legal effect:** Courts usually require strict compliance. Freedom of contracting.
- iv. If an express condition is not fulfilled, the nonoccurrence of the condition discharges the duties of the party protected by the condition = material breach
 1. If builder doesn't use Reading pipe, owner is discharged from his obligation to pay for the house
- v. However, express conditions can be waived (by word or conduct) – see waiver below.
 1. In contracts to renew leases, sometimes courts will excuse the lessee's failure to renew according to an express condition if the result would be forfeiture, esp. if P has invested in the property and forfeiture would result from enforcing the express condition. (JNA

v. Chelsea, tenant who failed to renew in time and had made improvements to the property allowed equitable relief)

vi. Substantial performance generally does not apply to express conditions

c. Conditions implied in fact

- i. No express language creating a condition. Based on contextual evidence supporting the inference that the parties intended a performance to be conditional
- ii. Established by contract & contextual evidence, not from face of contract
- iii. PER may preclude evidence that alters or varies the writing, but evidence to show that the contract as a whole was subject to a condition precedent may be admissible

e. Constructive conditions (implied in law)

- i. Construed as a matter of law, based on what the parties reasonably must have intended
- ii. Applies to conditions that are not express, but still are very important
- iii. Substantial performance is sufficient (strict compliance is not appropriate)
 1. Contract to build an apartment building
 2. If payment one day late is a serious violation of K:
 - a. Builder can withhold performance and rescind K and claim expectation damages
 3. If payment one day late is not a serious violation of K
 - a. Builder must perform and can claim compensation (money) for a loss caused by the late payment
- iv. Example:
 1. I promise to buy your land if the rezoning application is approved.
 - a. Express condition = If the rezoning app is approved
 - b. Constructive conditions = Buyer's promise to pay conditional upon Seller conveying the land; Seller's promise to convey the land conditional upon Buyer paying

d. Condition of satisfaction:

- iv. Generally, two standards are employed by courts:
 1. Subjective standard of honest satisfaction asserted in good faith
 - a. Artistic, aesthetic, personal taste
 - b. Any rejection is not a material breach if the parties have contracted for a condition that one party be subjectively satisfied with respect to the other party's performance
 - c. Is the party's dissatisfaction honest and genuine?
 - d. If not, the condition of satisfaction is deemed fulfilled, and the refusal of performance (payment) is a breach
 2. Or, objective standard of reasonableness
 - a. Technical or commercial quality, operative fitness, mechanical utility
 - b. Would a reasonable person have been satisfied?

e. Excuse of conditions

- i. Party favored by condition wrongfully prevents or hinders its fulfillment
 - 1. Failure to make reasonable good faith effort (e.g. to obtain financing)
 - 2. Obligation of fair dealing – not to obstruct fulfillment of condition (e.g. not to persuade a neighbor to file an objection to the rezoning application) – anything that undermines the contract
- ii. **Estoppel or waiver:** After K is entered into, the party whose performance is conditional indicates by words or conduct that he will perform even if the condition does not occur
 - 1. **Estoppel:** If the beneficiary of the condition induces the other party to act to his detriment by causing him to believe either that the condition has been satisfied or that compliance with it will not be waived, the first party cannot later claim its non-fulfillment
 - a. One party indicates that compliance is no longer required
 - b. Other party justifiably relies to his detriment
 - 2. **Waiver:** After K has formed, the beneficiary of the condition agrees to perform even if the condition is not satisfied = voluntary abandonment of a contractual right
 - a. Usually used if no reliance by other party can be shown
 - b. Common law:
 - i. A party can only waive a non-material right intended for his own benefit = unilateral = no consideration required
 - ii. Because not supported by consideration, a waiver made before time performance is due can be retracted
 - iii. If the right given up is material to the contract, cannot be validly relinquished by a unilateral waiver – must be a modification
 - iv. Modification is a contract in itself & has consideration
 - c. UCC:
 - i. Consideration not required for modification
 - ii. Waiver of a material party of the exchange is valid despite lack of consideration
- f. **Nonpromissory condition: Keeps K from forming if condition not met. Condition precedent to formation of K.**
 - i. Buyer is subject to an obligation to make a good faith effort, but does not make a promise. Condition must be out of either party's control.
 - ii. If event fails to occur, the promise generally goes away. (Assuming that is what the parties intended)
 - 1. If party made a good-faith effort = does not have to perform
 - 2. If buyer did not make a good-faith effort to secure financing = the condition is "excused" (still has to buy the house)
 - a. Usually the condition is designed for one party's benefit; if that party doesn't make a good faith effort to fulfill the condition, he has to perform K
 - 3. EXAMPLES:
 - a. I'll buy your house if I get financing
 - b. I'll buy your house if it rains tomorrow.
 - c. I'll buy your house if it passes inspection.
 - d. I promise to buy your house if the zoning is changed.
 - e. I promise to buy wheat from you if we don't have a drought this summer.

iii. **Parol evidence rule and conditions:**

1. Falls under an exception to the PER
2. Evidence to show that a condition did not occur is admissible
 - a. PER triggered by a final K
 - b. If a condition is not met, no K exists
 - c. Evidence showing condition not met (therefore no K exists) not designed to alter or vary K

V. **Material breach** (see p.759)

- a. One party fails to perform, or renders incomplete, defective, or untimely performance

b. Material breach = failure of a condition

- i. Promisee can:
 1. Suspend performance
 2. Terminate
 3. Claim full damages for breach
- c. If you do not use the word condition (immaterial breach, substantial performance, promise) – consequences are not as severe
- d. “Nowhere will change be tolerated if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract”
- e. Materiality is a fact question, based on factors such as:
 - i. Effect on the value of the contract
 - ii. Deprivation suffered by the promisee
 - iii. Hardship that will be imposed on promisor if K is terminated
 - iv. Breacher’s willfulness or innocence
- f. **Result:** Discharges nonbreaching party from obligation to perform contract. Breacher forfeits all rights under the contract and has no contractual claim to enforce.
- g. Damages:
 - i. Actual damages accrued as a result of the breach PLUS
 - ii. Future damages that will reasonably flow from the breach
- h. Breacher can claim restitution on the theory of unjust enrichment if she has conferred some benefit on the other party (but must subtract any damages owed to the nonbreaching party)
- i. Material breach under UCC (2-601): Buyer’s Rights on Improper Delivery
 - i. If goods or tender of delivery fail in any respect to conform to K, buyer may:
 1. Reject the whole
 2. Accept the whole
 3. Accept any commercial unit or units and reject the rest
 4. E.g. seller delivers a sofa that is 6” too short
 - ii. Changes the common law: Under UCC, everything is a material breach. No substantial performance if seller fails to conform to K in delivery.

VI. **Immaterial (partial) breach**

- a. Breach of a mere promise, rather than a condition

- b. Does not discharge nonbreaching party from performance obligation – must continue to perform
- c. Damages: Only for the actual harm that has resulted to date (no future harm) = cost to repair, diminution in value = something designed to fix/compensate for the problem
 - i. Puts the promisee in the position he would have been in had the performance been in full compliance w/ K
 - ii. Cost to fix or repair
 - iii. Difference in value b/n what was promised and what was performed
 - iv. Measure depends on whether the noncompliance was innocent or deliberate
 - v. **Economic waste:** When cost of rectifying the noncompliance far exceeds the actual damage to the promisee and it would be unfair to force the promisor to completely redo or forfeit the contract price (Jacob & Youngs)
 - 1. Or, when the cost of repair exceeds the value to be restored by the repair, the injured party may get not the cost of repair but the difference in value between what they were promised and what they got
- d. **Substantial performance** (Jacob & Youngs)
 - i. Minor or immaterial deviations do not release other party from obligation to perform
 - ii. When is performance substantial?
 - 1. Magnitude of defects compared to total value of contract
 - 2. Finished product can still be used as intended
 - 3. Defects can be remedied without great expense
 - 4. Inconsiderable
 - 5. Willfulness and good/bad faith of party considered
 - iii. **Immaterial breach** (part you haven't done) + **substantial performance** (part you have done) = **full performance of K**
- e. **Expectation damages under immaterial breach**
 - i. P gets what he expected to get under the K; presumably no consequential damages
 - ii. Neither party discharged

VII. Comparing material & immaterial breach

- a. Effect of material vs. immaterial breach:
 - i. Determines effect of breach on nonbreaching party's performance obligation
 - ii. Measures damages
- b. Jacob & Youngs v. Kent
 - i. Immaterial breach arguments:
 - 1. Defect was insignificant in its relation to the project = not a condition
 - 2. Substitution of pipe not made in bad faith
 - 3. Substituted pipe was almost identical to pipe called for in K
 - 4. Compare the purpose of the condition with the result of forfeiture
 - 5. **Substantial performance**
 - 6. Damages: Difference in value
 - ii. Material breach arguments:
 - 1. Reading pipe was called for specifically in K = condition

2. D has a right to contract for what he wants, and to pay for it only if he gets what he wants – his reasons are unimportant
3. Damages: Cost of replacement (puts P as if K had been performed)

VIII. Anticipatory repudiation & adequate assurances of performance (Common law = UCC)

- a. 2-609: “Right to Adequate Assurance of Performance” (uncertainty)
- b. 2-610: “Anticipatory Repudiation” (breaching party clearly repudiates K)

c. Anticipatory repudiation

- i. Occurs before performance is due
- ii. Requires a clear, voluntary and unequivocal manifestation of an intent not to perform the contract on the date of performance – can be conduct or words (objectively measured – the way in which the promisee should reasonably have understood the conduct or words))
 1. Doubtful and indefinite statements not enough
 2. Suggestion for modification probably does not amount to a repudiation
- iii. When a party clearly repudiates a material promise in advance, the other party may:
 1. Treat it as a breach and seek relief for the breach without delay (promisee does not have to wait until the contractual time for performance)
 - a. If the repudiation would be a material breach, victim can treat it as such
 - b. If promisor indicates that he is going to deviate in a minor way from the promised performance, termination is too harsh
 2. Delay responding to see if the repudiating party retracts
 - a. Possible breacher may change mind at any time before retraction and accept the repudiation
 - b. However, the non-repudiating party is subject to a duty to mitigate
 - c. Non-repudiating party can specify a window of time for retraction
 - d. If non-repudiating party accepts the repudiation (by giving express notice or by relying on the repudiation), it cannot be retracted
 - e. Promisee is entitled to act on the repudiation w/o further communication
- iv. Repudiation occurs before performance is due (if after performance is due = breach)
- v. Retraction of a repudiation is possible if retraction comes to the attention of the injured party before he has acted on it:
 1. Materially changes his position in reliance on the repudiation or
 2. Indicates to the other party that he considers the repudiation to be final (common law)

d. Adequate assurances of performance:

- i. Everything happens before performance is due. One party is concerned that the other is not going to perform, and demands reasonable assurances. If no reasonable assurances given, the concerned party can consider K breached and recover damages.
- ii. You can sue before performance is due, as long as it is clear that it is not going to be performed
 1. If the sofa arrives 6” to short, you are no longer insecure – you know they are wrong.
2-601.

2. If the furniture store calls you and says, “We don’t have the exact sofa you want ready to deliver on time. You can either take one that is 6” too short or you can wait four extra weeks for the one you want. Not a breach. Buyer is not discharged.
- iii. A party who has “reasonable grounds for insecurity” can do three things:
1. Demand adequate assurance
 - a. Must arise based on circumstances occurring after formation of K (not circumstances known at time K forms)
 - b. Fact specific – custom, verbal guarantee, posting of bond; written demands mandatory or optional depending on J.
 - c. Issue: Is the demand sufficient to put the other party on notice that assurances are required?
 - d. If sale of goods, demand must be in writing
 - e. Reasonableness based on commercial standards
 - i. Where buyer can use defective goods, promise by trustworthy seller that he is working on the problem and that it won’t happen again
 - f. Time allowed for assurances
 - i. UCC: Demanding party must wait a maximum of 30 days
 - ii. Restatement: “Reasonable time”; no maximum
 2. Suspend performance while waiting for assurances
 - a. If grounds for feeling insecure are not really reasonable, the party can be liable for breach for suspending performance
 3. Are the assurances adequate?
 - a. Treat the K as broken if his reasonable grounds for security are not cleared up within a reasonable time
 - b. Failure to give assurances = anticipatory repudiation of k
- iv. Issue: Does the requesting party have reasonable grounds for insecurity?
1. Based on commercial practice
 - a. Significant financial difficulties
 - b. Failure to perform important obligations under K (or related K’s)
 - c. Accounts not in good standing
 - d. Buyer requires precision parts that must be used immediately upon receipt learns that seller is making deliveries to other buyers
 - i. Unless buyer has assumed risk of paying before inspection
 - e. Dealer has exclusive franchise agreement w/ mfr; mfr delivers goods but violates the exclusivity agreement

IX. Efficient breach

- a. Right to breach a contract

- b. Breaching party must pay damages to put nonbreaching party in same position as if K had been performed. Assumes that nonbreaching party will not be worse off.
- c. A contracts with B for \$100. B then gets an offer for a contract for \$1000. B can breach, pay A \$100.

PART V – WHAT REMEDIES ARE AVAILABLE?

I. Three interests as the basis for awarding damages

- a. Expectation
- b. Reliance
- c. Restitution
- d. Other types of damages
 - i. Equity: Specific performance
 - ii. Liquidated damages (agreed remedies)

II. Expectation Damages: Measurement

- a. Purpose: To put non-breaching party in position he would have been in if K had been performed; not to deter commerce; give the non-breaching party the “**benefit of the bargain**” had the agreement been fully performed
- b. **Result of a material or immaterial breach**
- c. Two categories of expectation damages:
 - i. General damages: Damages that naturally arise from the face of K (Hadley) **Always contemplated, always recoverable**
 - 1. Direct: (always inside the circle)
 - a. Diff b/n what was promised in K (\$4.5 million) and what was received (\$2 million)
 - b. Includes profits that can be proven would have been made from K.
 - c. Subtract any mitigation
 - d. Subtract any savings b/c don't have to perform
 - 2. Incidental damages: Always recoverable b/c always contemplated at the time of contracting.
 - 3. Diminution in value (Jacob & Youngs)
 - a. Result of immaterial (small) breach
 - b. Where substantial performance has occurred with omissions of “trivial” importance
 - c. Where the performance was incidental to the true purpose of K
 - d. Court will consider economic waste = cost of completing performance is out of proportion to benefit to property
 - e. Contractor must have acted in good faith
 - 4. In usual case of contractor's defective performance, direct damages = cost to complete
 - ii. Consequential damages: Only available if contemplated at the time K formed. **Sometimes recoverable.**
 - 1. Three requirements:

- a. Were the damages in the contemplation of the parties at the time they made the contract? (not at the time of the breach)
 - i. How much contemplation you actually need is not entirely clear
 - ii. Was D aware that P would lose business (selling flour, taking customers on the cruise?)
 - b. P has to prove & measure the loss with reasonable certainty
 - c. Loss must be caused by the breach
2. Arise outside of the arrows
- a. Injury to person or property caused by failure to comply with contractual warranties
 - b. **Lost profits from collateral Ks.** Recoverable if:
 - i. Loss is within contemplation of parties at time of K
 - ii. Loss flows directly from breach (loss is caused by breach)
 - iii. Loss is capable of reasonably accurate measurement
 - iv. P must show with reasonable certainty that profits would have been made had K not been breached (can't be too speculative)
 - v. **P can only recover net (not gross) profits**
 - vi. New businesses or ventures often cannot recover for lost profits
- iii. Examples of damages:
- 1. Lending K: Borrower will claim that the lender's breach caused it to lose:
 - a. Favorable interest rate = **direct**
 - b. Profits from transactions that were prevented b/c funds from loan were unavailable = **consequential**
 - i. Courts will allow these consequential damages if requirements of mitigation, foreseeability and certainty have been met
 - 2. Employment K:
 - a. **Direct:** What the employee would have earned under K (**direct**) minus amount of wages she could have earned from comparable employment found through reasonable efforts (**mitigation**)
 - i. Employee signs two-year K for \$100,000/year
 - ii. Employer breaches after one year
 - iii. Employee finds a job for \$90,000/year (mitigation)
 - iv. Direct damages = \$10,000
 - v. P can recover incidental damages (travel for interviews, copies, etc.)
 - b. **Consequential:** Harm to the employee's reputation (acting, media)
 - 3. For builders, the value of general damages is usually the value of the expected net profit on the entire contract plus builder's unreimbursed expenses at the time of breach
 - 4. In real estate, seller usually entitled to the difference between the contract price and the fair market value of the property at the time of the breach
 - a. K to sell house for \$75,000. Buyer breaches. Seller sells one year later for \$76,000. No direct damages.

III. Duty to Mitigate

- a. Mitigation subtracted from direct damages

- b. P may not recover for consequences of D's breach that P could by reasonable action have avoided
- c. Once P receives notice of a breach, it is his duty to do nothing to increase the flow of damages resulting from the breach
 - i. In case where P built bridge, P obligated to stop building when he learned of the breach. P's work done after he learned of the breach not recoverable.
 - ii. P could sue for the value of the profit which he would have realized had the contract been fully performed, plus any other uncompensated losses he suffered (labor + materials) prior to the breach

IV. **Nonrecoverable damages**

- a. Attorney's fees (usually)
- b. Punitive damages
- c. Emotional distress
- d. Pain & suffering

V. **Reliance damages (alternative to expectation damages; usually a fallback)**

- a. Purpose: To put non-breaching party he would have been in if promise never had been made.
- b. Available where cause of action is breach of K, but for some reason P can't get expectation damages (e.g. can't prove expectation damages to a reasonable certainty) (can't get both)
- c. Can never exceed expectation damages
- d. Measurement:
 - i. Where breach has prevented an anticipated gain:
 - 1. Cost incurred (e.g. out of pocket costs) up until P was aware of the breach b/c P relied on K and spent money that he would not have had there been no K
 - 2. Courts may not allow P to recover costs incurred before K formed
 - ii. Where a net loss is anticipated (usu. proven by D):
 - 1. Subtract any losses that would have occurred (D can prove that the promisee would have lost if the K had been performed)
 - 2. Thus, D does not have to pay reliance damages if he can prove there would have been a loss
- e. Note: Where cause of action is promissory estoppel (b/c no consideration given for promise), courts generally have treated damages in two ways:
 - i. Amount of reliance (detriment) OR
 - ii. Once you substitute PE for consideration, you can get expectation damages (Katz – using reliance to get his pension payments)

VI. **Restitutionary Damages (alternative to expectation damages)**

- a. Purpose: Restores to non-breaching party any benefit conferred on breaching party under the breached contract. Prevents unjust enrichment.
- b. Often available to a breaching party (assuming breach is not willful or deliberate)
- c. Measurement: Amount of D's gain (or market value of services)

- d. Restitution
 - i. **Cause of action** caused by material breach – alternative cause of action when K’s fail
 - 1. D’s gain
 - 2. P’s loss
 - 3. Unjust for D to keep the gain
 - ii. Remedy for breach of K
- e. Many courts will allow a breaching contractor to recover in restitution (quantum meruit) for the value of work performed, if substantial performance has not occurred

VII. Specific performance – IS THE LEGAL REMEDY INADEQUATE?

- a. Not a punishment, enforcing K
- b. SP is not the ideal remedy b/c difficult for the court to force D to perform
- c. Court will hold someone in contempt to enforce K
- d. Prefers a legal remedy of money
- e. Courts will not grant specific performance of services contracts
- f. Not available if damage to D is greater than benefit to P
- g. Court will examine possible impact on third parties
- h. Usually not available for breach of employment K

VIII. Agreed (liquidated) damages

- a. **IS IT A PENALTY?**
 - i. Too large (disproportionate) = penalty = unenforceable
 - ii. Is it designed to coerce performance?
 - 1. E.g. K to sell car for \$4,000. Liquidated damages clause says that P has to pay \$3,000 if doesn’t buy car. Looks like coercion.
- b. Intended to be used instead of going to court
- c. Where a fixed or determinable sum of money has been specified in advance as the remedy for a particular type of breach
- d. Reasonable forecasts of the actual damage to be anticipated from breach = enforced
- e. Reasonableness is evaluated either at the time of formation or the time of breach
- f. Too small = unconscionable = unenforceable
- g. Judicial test for evaluating if a liquidated damages clause is reasonable:
 - i. Damages to be anticipated from the breach must be uncertain or difficult to prove
 - ii. Amount set in the agreement must be a reasonable forecast of just compensation for harm flowing from breach
 - iii. Parties must not have intended clause to act as a penalty (this not used often)
- h. If no loss or harm occurs, even if the forecasted damages in the clause were reasonable, some courts will not enforce clause

IX. EXAMPLES:

- a. Standard measure of damages in breach of employment contract:

- i. Contract amount (direct damages) + expenses of seeking other employment (incidental damages) – earnings received from other employment (mitigation)

PART VI – WHAT BREACHES ARE EXCUSED?

I. Incapacity

- a. Both parties must have capacity to voluntarily enter an agreement

b. Minority

- i. Contract made with a minor is voidable
- ii. Benefit Rule: If disaffirmed by minor, the minor gets his consideration (money) back, but must pay for:
 1. Value of use (benefit) and/or depreciation while the article was in his possession
 2. Negligent or willful damage to the article purchased
- iii. Exception:
 1. Minor is liable for the reasonable cost of “necessaries” (food, clothing, shelter) – based on quasi-contractual relief rather than enforcement of the actual K
 2. Minor’s ability to disaffirm might be limited if he misrepresents his age or willfully destroys the goods
 3. If minor does not disaffirm within a reasonable time after reaching majority, she is bound to the contract
 4. Minor can expressly affirm after reaching majority
 5. If any fraud or imposition on the part of the seller or if seller has taken unfair advantage of the minor, then the Benefit Rule does not apply
- iv. Policy:
 1. Protecting minors - who might not have good judgment - in the marketplace
 2. Protecting a businessperson who dealt with the minor in good faith

c. Mental incompetence

- i. Law presumes that a party is mentally competent until satisfactory evidence to the contrary is presented (by party seeking to void K)
- ii. An incompetent person’s transactions are voidable
- iii. Many courts recognize a right to bring a cause of action to rescind a contract based on lack of mental competency at the time of contracting
- iv. **Test: Did the person making the contract have sufficient mental ability to know what he or she was doing and the nature of the consequences of the transaction?**
- v. Majority rule is that mental incompetence of one party does not automatically make a contract voidable, especially if the parties cannot be restored to their original positions. Contract must be made in good faith, for a fair consideration and without knowledge of the incompetence.
- vi. In Hauer, the court did not make Hauer pay back the loan money (which she no longer had), in part because it found that the bank did not deal with her in good faith (it may have known of her incompetence and financial situation)

- vii. Intoxication: Contract is voidable if a party has reason to know that because of intoxication the other person is unable to understand the transaction or to act in a reasonable manner

d. Difference b/n minority and mental incompetence:

- i. Minor generally can disaffirm, even if he cannot make restoration
- ii. Mentally incompetent person is required to make restoration to the other party unless special circumstances are present (e.g. bad faith, other party aware of status)
- iii. Reasoning: Mental incompetence covers a wide range of conditions & different degrees of competence, whereas minors are protected because the law presumes that minors always need to be protected

II. Economic duress, duress, undue influence

a. **Economic duress**

- i. Economic coercion which forces a person to involuntarily enter into a particular transaction
- ii. Elements:

1. Wrongful act

- a. "Party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat"
- b. Knowing that money is owed and refusing to pay it, knowing that the other party has no choice but to take a lesser amount
- c. Heightened bargaining power

2. No reasonable alternative

- a. Party seeking to rescind had no choice but to enter into the contract or face serious financial hardship
- b. "Such act or threat must be one which deprives the victim of his unfettered will"
- c. Was the victim induced by the threat? (subjective test)
- d. No choice = lack of alternatives
 - i. Possible alternatives
 - 1. Legal or equitable action
 - 2. Alternative sources of goods, services, or funds
 - 3. Depends on the facts of the case
 - ii. Alternative not adequate where it would cause an immediate & irreparable damage to P's economic or business interest
- e. Victim suffers from financial hardship
 - i. Some courts hold that financial hardship must be caused by D, others do not**
- f. Withholding payment of a debt, threatening to breach
- g. Merely because P is a victim of a wrongful act does not necessarily = economic duress
- h. Even if the threat is wrongful, the resulting agreement is enforceable unless the party who submitted to the agreement had no reasonable alternative but to accept the agreement

- 3. **Result:** Contract made under economic duress is voidable and binding unless disaffirmed

- a. Duress is a defense to liability for nonperformance of what would otherwise be an enforceable K

- iii. Traditional duress

- 1. Confinement
- 2. Threat of bodily injury

- iv. Policy considerations:

- 1. Protecting freedom of contract
- 2. Enforcing private contracts (economic duress usually a defense to a modification or a settlement agreement)
- 3. Correcting unequal exchanges between parties with unequal bargaining power
- 4. Avoiding coercive circumstances

b. Undue influence

- i. **Over-persuasion/excessive pressure**

- ii. **Weakened state**

- iii. Over-persuasion:

- 1. Discussion of transaction at unusual or inappropriate time
- 2. Consummation of transaction in an unusual place
- 3. Insistent demand that the transaction be completed at once
- 4. Extreme emphasis on consequences of delay
- 5. Use of multiple persuaders against a single party
- 6. Absence of third-party advisers to subservient party
- 7. Statements that there is no time to consult advisors or attorneys

- iv. Taking unfair advantage of another's weakness of mind or distress

- v. "Overpowering the will without convincing the judgment"

- vi. Using excessive pressure to persuade one vulnerable to such pressure

- vii. Prevents the vulnerable party from acting according to his own wish or judgment

- viii. If parties have a special relationship, the court is especially likely to find undue influence

- ix. **Result:** Usually makes a contract voidable

III. Misrepresentation + nondisclosure

- a. Exception to PER allows evidence showing that the contract was fraudulently induced

- b. Remedy for misrepresentation:

- i. Damages in tort
- ii. Rescission – putting the parties where they were before K; each party has to return what it has received from the other party

IV. Unconscionability

- a. **Lack of meaningful choice**

- b. **Grossly unfavorable terms**

- c. Used when the drafting party takes advantage of another party's dependence, economic distress or urgency, ignorance, inexperience or lack of bargaining power
- d. Procedural unconscionability – Defect in the bargaining process
 - i. Lack of understanding of terms:
 - 1. Inconspicuous print
 - 2. Use of complex, legalistic language
 - 3. Disparity in sophistication of parties
 - 4. Lack of opportunity to study K and inquire about the terms
 - ii. Lack of voluntariness in contract of adhesion:
 - 1. Imbalance in bargaining power
 - 2. Stronger party's terms are nonnegotiable
 - 3. Weaker party is prevented by market factors, timing or other pressures from being able to contract w/ another party for better terms or to refrain from contracting at all
 - 4. Common elements:
 - a. Use of standard forms
 - b. Presentation of demands on a "take it or leave it" basis
- e. Substantive unconscionability
 - i. An oppressive or objectionable clause
 - ii. Terms of K must be so oppressive as to be unconscionable
 - iii. One-sided agreements
 - iv. Left w/o a remedy for another party's non-performance or breach
 - v. Large difference b/n cost and price; price far above market value
- f. Legal remedies:
 - i. Refuse to enforce the agreement
 - ii. Enforce K without unconscionable clause/terms
 - iii. Limit application of unconscionable clause
 - iv. Reform the contract
- g. Burden of proof on adversely affected party
- h. Proving unconscionability:
 - i. Were unfair terms hidden?
 - ii. Did the signing party have an opportunity to understand the terms?
 - iii. Was bargaining power balanced?
- i. **Result:** Court can either avoid the entire contract, or cut out the unconscionable part but keep the contract intact

V. Violation of public policy

- i.

VI. Changed circumstances: Mistake, impossibility, impracticability and frustration of purpose

- a. Exchange b/n parties turns out to be very different than what they expected
- b. May be raised at different times for different purposes:

- i. Before performance is due: To excuse the prospective performance
 - ii. After performance has been rendered: As a defense to a claim that the performance fell short of that called for by K
- c. Can result in termination of K or adjustment of K terms
- d. Considerations:
 - i. Materiality: How fundamental is the discrepancy between the expected and the actual exchange
 - ii. Risk: Which party should be made to bear the consequences?

e. Mistake

- i. Serious factual error made by one or both parties at the time of contracting, so that the contract is premised on incorrect information
- ii. Causes one or both parties to manifest assent that would not have been given had the true facts been known
- iii. Different from fraud, duress, etc. because the defect in assent is caused by misinformation, not by deception, improper pressure, etc.
- iv. Remember: When parties think they intend the same meaning of a term, but they actually do not, the most common judicial response is to choose one of the intended meanings and apply it in enforcing the contract. However, court can hold that no binding K exists.
- v. Based on errors of fact, about some thing that actually occurred or existed, and can be ascertained by objective evidence
- vi. Ignorance of the law is a mistake of fact (e.g. not knowing zoning requirements)

vii. Mutual mistake

1. Mutual misapprehension of fact
2. A mistake made by both parties before K is signed, but discovered after K forms, renders the contract voidable
3. Essence or value of the consideration?
 - a. Material mistake – Affects the essence of the consideration = relief available in some cases
 - i. Available when mistaken belief relates to a basic assumption of the parties upon which K is made, and which materially affects the agreed performance of the parties
 - ii. Barren cow
 - iii. Income-generating rental property turned out to be useless b/c of bad septic system (but P didn't win b/c of "as is" clause)
 - b. Collateral mistake – Affects the value of the consideration = relief not available
 - i. Value or property
 - ii. Value of a painting
 - iii. Must distinguish from a bad deal or a mistake in judgment
 - c. Note: If parties have allocated the risk between themselves, court should use this to make its decision

4. Elements:
 - a. At the time of contracting, the parties must have shared an erroneous belief concerning a fact
 - b. The erroneous fact was a basic assumption on which K was made
 - i. They would not have made the K at all or on the present terms had they known the truth
 - c. Mistake must have a material effect on the agreed exchange of performances
 - i. Does the error create an overall imbalance between the parties by making the exchange less desirable to the adversely affected party and more advantageous to the other
 - d. Adversely affected party must not have borne the risk of the mistake
 - i. Often the dispositive issue in mistake cases

5. Remedies:
 - a. When a mutual mistake is caused by an error in the writing (e.g. clerical error) = **Reformation** of K to express parties' mutual intent
 - b. All other mutual mistakes = Rescission + restitution (if appropriate)

viii. Unilateral mistake

1. Mistake of one party can permit avoidance of K IF:
 - a. One party had reason to know of, or caused, the mistake
 - b. Mistake is such that enforcement of K would be unconscionable
2. Absent fraud, etc. a unilateral mistake can be enforceable (I didn't know what I was signing)
3. Typo in an ad can be subject to rescission on grounds of unilateral mistake
4. Result: Can make K voidable (or not – Eurice)

ix. Common examples:

1. Errors in the nature of the transaction,
2. Identity of the parties,
3. Identity of things to which K relates,
4. Occurrence of collateral happenings

f. Impracticability & frustration of purpose are very similar:

- i. Arise when there is no false premise at the time of contracting, but events change drastically enough after formation to belie the original expectation of the parties
- ii. Concerned with the impact of supervening events on the transaction (not on a defect at the time of contracting)
- iii. Based on a fully consensual contract
- iv. Disadvantaged party must show:
 1. Substantial reduction of the value of K
 2. Because of the occurrence of an event, the nonoccurrence of which was a basic assumption of K
 3. Without the party's fault

4. Party seeking relief does not bear the risk of that occurrence of the event either under the language of the contract or the surrounding circumstances
- v. Example: House burning down 15 days before closing – could be either
 1. Frustration of purpose: Assuming Buyer’s main purpose for buying the house was to get the house and not the land on which it sat, this would sufficiently frustrate Buyer’s purpose for buying the house
 2. Impracticability: Destruction of the house would have made Buyer’s performance impracticable, through no fault of his own, because the destruction of the house was “an event the non-occurrence of which was a basic assumption on which the contract was made,” discharging Buyer absent contrary language in the contract.

g. Impracticability:

- i. Elements:
 1. After K formed, an event occurred, the non-occurrence of which was a basic assumption of K
 - a. Occurrences external to K (war, natural disaster, strike)
 - b. Change in law or government regulation
 - c. Change in market conditions (almost never works)
 - d. Mere change in increased wages, prices of raw materials not enough (unless well beyond the normal range)
 2. Effect of the event is to render the party’s performance impracticable (unduly burdensome)
 - a. The change must be extreme or very burdensome
 - b. Mere lack of profit is not enough
 3. The party seeking relief was not at fault in causing the occurrence
 4. The party seeking relief must not have borne the risk of the event occurring
 - a. Often the dispositive issue in impracticability cases
- ii. Neither market shifts nor financial inability of one party changes the basic assumptions of the K such that it may be excused under impracticability
- iii. Available as a defense to the party who is adversely affected by the circumstances

iv. Relief:

1. Complete defense to a party’s failure to perform, relieving him of the duty of performance and liability for damages
 - a. Release of that party also discharges the contractual duties of the other party
 - b. Restitution available if parties had exchanged performance prior to the finding of impracticability
2. Or, court can adjust the terms of K, excuse a portion of performance, or permit a delay in performance

h. Frustration of purpose

- i. Only real difference from impracticability is that one makes the party’s performance unduly burdensome, while the other makes a party’s performance pointless

- ii. Requirements:
 1. Frustrating event destroys the purpose of K
 2. Frustration should be substantial
 - a. Burdensome or unattractive not enough
 - b. So severe that it cannot be fairly assumed that it was within the risk that the party undertook in K
 - c. Performance rendered virtually worthless
 - d. Principal purpose of K substantially undermined
 3. Frustrating event should have been a basic assumption of K
- iii. EXAMPLES:
 1. Natural disaster & war usually not grounds for either defense
 2. Death or incapacity of a particular person necessary for performance can be grounds
 3. Governmental action can be grounds
- iv. Under Restatement, decided by law (not by jury)

VII. Modification

- a. Modification is a contract in itself
- b. At common law, modification requires consideration
 - i. Neither party can unilaterally modify K by sending a writing with new terms to the other
 - ii. Promising to perform an existing obligation not enough, there must be some change in duty (Alaska Packers')
 1. In Alaska Packers', the request for more money wouldn't get it for the fisherman, since they already had a duty to work
 2. They could try a cause of action in restitution to get more money for their work
 - iii. Modification usually must be supported by new consideration on both sides, even if minimal or slight
 - iv. Reliance on a promised modification can be used to enforce an agreement despite the absence of fresh consideration
 - v. Parties can modify based on unanticipated difficulties in performance
 - vi. Mutual release: Parties can tear up an old K and form a new one, as long as the rescission is mutual and not done under duress
- c. Under UCC, a modification of a pre-existing K may be made if both parties voluntarily agree to a modification that contains no additional consideration. Requirements:
 - i. Arises from unforeseen circumstances
 - ii. Occurs prior to completion of performance by either party
 - iii. Fair and equitable to both parties and made in good faith
 - iv. There has to be agreement: Does not mean that one party can unilaterally change a term (raise price)
 - v. If one party agrees to the change under protest, must make it clear that he is protesting. Can't agree to the change and then sue.
- d. Whether or not the original K fell within the statute of frauds, if the contract as modified is within the statute, the modification must be recorded in a writing sufficient to satisfy it

PART VII – RIGHTS AND DUES OF THIRD PARTIES

- I. Third-party beneficiaries
- II. Assignment
 - a. You can assign a contractual right to someone else (e.g. You buy a car on credit. Seller can assign the right to receive your monthly payments to someone else)
 - b. Once the right is assigned, the original party no longer has rights
 - c. Assignees usually can bring suit to enforce their rights
- III. Delegation
 - a. Contractual duties cannot be delegated
 - b. If A delegates a duty to B, A is still liable if B fails to perform