

CONTRACTS OUTLINE

- I. Contracts Defined
 - A. Promise or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.
 - B. Except where special rules apply, formation of a contract requires a “bargain” to which the contracting parties give assent and a “consideration,” which can take the form of either a return promise or an actual performance (Restatement §17).
 - C. Seeking an *efficient outcome* – want the exchange to be beneficial to both parties.
 - D. Assumed common attributes for a bargain
 - i. Free will – no coercion
 - ii. Self-knowledge – one knows their own preferences
 - iii. Modicum of practical information – can distinguish among alternative goods and services
 - E. Types of Contracts
 - i. Express v. Implied Contract
 1. Express – Formed by language, oral or written. Able to find a deal was created solely by the words of the parties
 2. Implied – Formed by manifestations of assent other than oral or written language, i.e., by conduct. Looks to see whether parties are acting as if there is a deal.
 - ii. Quasi Contract
 1. Equitable remedy → concerned with doing what’s fair and what’s right. Constructed by courts to *avoid unjust enrichment* by permitting P to bring an action in restitution to recover the amount of the benefit conferred on D.
 2. Rules of contract law have no application to quasi-contracts
 3. Exam Strategy – if result is unfair, should include a paragraph on quasi-contract and available quasi-contract relief after applying contract law principles.
 - iii. Bilateral v. Unilateral Contracts
 1. Bilateral → exchange of mutual promises; ***promise for a promise***
 - a. Both parties are promisors and promisees.
 - b. Contract that results from an offer that is open as to how it can be accepted.
 - c. Promissory exchange – at instant of contracting, promises remain outstanding on both sides.
 - d. Can also have *Promissory Exchange by Implication* – If it is commonly understood in the market that a seller warrants the fitness of what he sells, a simple exchange without any express words relating to the condition, will give rise to an implied promise of warranty.
 2. Unilateral → Acceptance by performance; ***Promise for an action or forbearance.***
 - a. Contract in which the offer requested performance rather than a promise.

- b. Offeror-promisor promises to pay upon completion of the requested act by the promisee. Once act is completed, contract is said to be formed.
 - c. Only one promisor and one promisee.
 - d. *Unilateral contracts are revocable by the offeror at any time prior to completion of performance.*
 - e. **Restatement §45 – Option Contract Created by Part Performance or Tender:** treats commencement of the performance in response to a unilateral offer as an *option contract* on the offeree – a right to complete the performance he commenced if he chooses to do so. Offer is, therefore, treated as irrevocable once performance is commenced. However, offeree is not bound to complete the performance (which would in essence turn unilateral offer into a bilateral contract) – but if offeree abandons the undertaking, offeror is not required to compensate or perform his part in some other way.
- 3. Distinguishing between the two: Whether at the time the contract is formed, each party has a right and a duty (bilateral) or one party only has a right and the other party only has a duty (unilateral).
- iv. Executory Contract
 - 1. Deal has not yet been completed.
 - 2. People have not yet done what they have agreed to do.
 - v. Adhesion Contract
 - 1. Take it or leave it.
 - vi. Implied-in-Law
 - 1. “Silent” contract.
- F. Ways of creating a contract
- i. Signing of written memorial of agreement
 - ii. Could be contained in a series of correspondence or some other collection of interrelated documents
 - iii. Could be made orally with the intention of later drafting and signing a written memorial
 - iv. Partly written, partly oral
 - v. Entirely oral
- G. **Basic Legal Contract Principles**
- i. People have a right to contract – conduct is voluntary.
 - ii. Anything that takes away voluntariness is questionable, e.g., duress, economic duress, fraud, coercion.
 - iii. People have right to breach. But must place other party in the same position for which they contracted, so must pay them damages.
 - iv. If legal remedy does not work and P is entitled to be placed into performance, then must order specific performance. Specific performance is not punitive. Contract law does not provide punitive damages.

- v. Basic goal of damages – encourage contracting; don't want unknown penalties down the road that would deter parties from contracting in future.
 - vi. Do not want liquidated damages because parties are supposed to use those instead of going to court. Only problem is that we cannot have anything that looks punitive. If designed to coerce performance, it is really a penalty and do not want that in contract law. Instead, court will award damages.
 - 1. Criticism – parties negotiated it, and the purpose was to avoid litigation.
 - H. Major contract terms → *offer, acceptance, counteroffer, revocation, assent*
 - i. Sometimes playing a defeating role is *induced reliance*
 - I. Goals
 - i. Used to make commerce flow
 - ii. Force people to avoid self-help (revenge) → reflects societal values
 - iii. Memorialize a common understanding
 - J. Court Enforcement
 - i. Reasons a court may enforce: Consideration, Reliance
 - ii. Reasons a court may not enforce: Emotional state, Intent (Promise made jokingly), Coercion, Fraud, Promises to make gifts or donation (one-sided, no one injured, and thus no consideration).
 - K. What Governs Contract Law
 - i. Generally, common law governs contracts. Restatements are used to summarize view of what law is or should be.
 - ii. For sale of goods (things that are moveable, personal property), UCC Article 2 controls.
 - 1. UCC does not apply to contract for employment or services or real estate (only sale of goods).
 - iii. Mixed Contracts for Services and Goods – e.g., contract for service provider who has to purchase supplies in order to provide those services
 - 1. Must ask which is most important part of the deal.
 - 2. It's all or nothing – cannot divide application to contract between UCC and common law.
 - a. If services are more important, common law governs.
 - b. If goods are more important, UCC governs.
 - iv. Relationship Between UCC and Common Law
 - 1. Common law fills gaps in UCC Article 2.
 - 2. Where conflicting, UCC governs sale of goods.
 - L. Court Role
 - i. UCC §2-204 – Court should focus on the existence of agreement b/w parties, whether shown by words or conduct, and if agreement is apparent, the court should be concerned about technicalities but should do what I can to uphold and enforce the contract.
- II. Objective Theory
- A. Substantive Bases of Contractual Liability

- i. Private Autonomy – law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations
 - ii. Reliance – breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise would be fulfilled; court will adjudge *promissory estoppel*.
 - iii. Unjust Enrichment – Injustice results from breach of a promise relied on by the promisee is aggravated because not only has one party lost, but the other has gained; court will award *restitution*.
- B. Mutual Assent
- i. Basis of contract → *Intent to be bound*; each party must intend to enter the contract and must agree with the other to do so on mutually acceptable terms.
 - ii. A genuine subjective “meeting of the minds” is not required. Courts instead use an *objective measure*, by which each party is bound to the *apparent intention* that he manifested to the other. **Apparent Intent** determines *commitment*. **Actual Intent** determines *enforceability*.
 - 1. Objective test: Assent is legally sufficient if each party, by the deliberate use of words or conduct, manifested agreement to be contractually bound. *Does not look at secret intent*.
 - 2. Evidence of a party’s state of mind may sometimes be helpful in interpreting or giving a context to words or conduct, provided that the subjective evidence is credible and compatible with the overt behavior.
- C. Determining Manifestation of Assent
- i. Substantive Aspect – Objective and External
 - 1. Interpreted from the standpoint of a *reasonable person in the position of the party* to whom the manifestation was made → ask not what the words or actions *did mean* to either party, but how they *should have been understood* if interpreted reasonably in the context of the transaction, by a person with the knowledge and attributes of the party to whom they were directed.
 - 2. Concerned with the rational meaning that should have been placed on it by the agreeing party.
 - ii. Evidentiary Aspect
 - 1. Evidence of observable action is of principal relevance, and testimony of a party’s thoughts is, at best, marginally useful.
- D. If dispute centers on whether a contract was formed at all, inquiry is directed to fundamental question of whether they manifested intent to enter the relationship. If it is clear that they did make a contract, inquiry focuses on question of what terms were agreed upon. External standard is used because an inquiry into what each party had in mind is neither efficient nor fair, as it places too heavy an emphasis on unreliable evidence and fails to protect reasonable reliance on words or conduct.

Question 1: Is There a Deal?

III. Manifestation of Mutual Assent

- A. Real dispute between parties.
- B. Restatement §33 – Certainty
 - i. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
 - ii. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
 - iii. The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.
- C. **Ray v. William G. Eurice & Bros.** → *Absent fraud, duress, or mutual mistake, if the individual who reads and signs a written document has the capacity to understand it, or, who without reading it or having it read to him, signs it, he is legally bound by his signature.* The only intent of the parties to a contract which is essential, is an intent to say the words and do the acts which constitute their manifestation of assent. A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A “claimed intent” is immaterial where it is agreed upon in writing to a clearly expressed and unambiguous intent to the contrary. *Mistake of one party does not invalidate the contract.*
 - i. Restatement §70 – One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or its proper interpretation.
- D. **Park 100 Investors, Inc. v. Kartes** → *While a person relying on another’s representations must use ordinary care and diligence to guard against fraud, the requirement or reasonable prudence in business transactions is not carried to the extent that the law will ignore an intentional fraud practiced on the unwary.* Fraud negates the existence of a real agreement.
 - i. Nondisclosure v. Affirmative Representation – much easier to find fraud with an affirmative action than a nondisclosure.

IV. **Offer and Acceptance**

- A. Standard testing model for manifestation of mutual assent
- B. Restatement §24 – Offer Defined → 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.

Offer

C. **Elements**

- i. Must be communicated to the person to whom it is addressed
- ii. Must indicate a desire to enter into a contract – specifying performances to be exchanged and the terms that will govern the relationship
- iii. Must be directed at some person or group
- iv. Terms must be definite and certain

1. Basic inquiry – whether enough of the essential terms have been provided so that a contract including them would be *capable of being enforced*. Principle is that parties make their own contract; courts do not make it for them.
 2. “Essential” elements include:
 - a. *Identity of offeree* and the *subject matter*.
 - b. *Price* to be paid (in absence, UCC provides reasonable price)
 - c. *Time* of payment, delivery, or performance (in absence, UCC proves that reasonable time will be implied).
 - d. *Quantity* involved (for sale of goods – except req. contract)
 - e. *Nature of the work* to be performed

* In absence of any of these essential elements, the court may in certain circumstances attempt to supply the missing term(s).
In end, it is surrounding circumstances that matter most.
 - v. Must invite acceptance – may or may not indicate how and by what time
 1. **UCC §2-206: Offer and Acceptance in Formation of a contract:** Offer should be interpreted as inviting acceptance by any reasonable mode unless the offer or circumstances make it clear that the mode is restricted.
 - vi. Must create the reasonable understanding that upon acceptance, a contract will arise without any further approval being required from the offeror - *committed upon acceptance*.
 1. If proposal reserves to the proponent the final say on whether to be bound, it is not an offer but merely a *preliminary communication*.
- D. **Was there a Manifestation of Commitment?**
- i. Look at words or conduct to see if commitment was made and if words placed on the table were made to communicate that the offeror is committed to offer the deal.
 1. *Not looking for intention of commitment. Looking for a manifestation of that commitment.*
 - ii. **TO MAKE AN OFFER, YOU MUST REASONABLY BELIEVE YOU CAN CLOSE/CONCLUDE THE DEAL.**
 - iii. Key 1: CONTENT
 1. Offer must have definite terms and be directed at a specific person for offer to be accepted and a contract formed.
 2. Words such as “For Immediate Acceptance,” “I offer,” “I promise” – suggests commitment of offer; useful, but not necessary.
 3. Is communication complete?
 - a. Missing Terms – No requirement that communication contain all of the *material* terms in order to qualify as an offer – can have manifestation of commitment even if there are gaps.
 - b. Missing Price
 - i. Sale of Real Estate

1. Common law – price term and description of real estate are essential.
 2. UCC – communication can be an offer even though there is a missing price term. Court will infer reasonable price term and time for performance.
 - ii. Employment contracts
 1. Must specify the duration of the employment or else the contract is construed as employment at will.
 - c. Mistaken Assignment to Terms
 - i. *Peerless* case – there is assent but neither party knew or had reason to know of other party's intention – no "consensus ad item" – no agreement on the same thing. Thus, no contract. *Without consensus on the same thing, there is no agreement to which the parties could be bound.*
- iv. Key 2: AMBIGUOUS TERMS
1. Words such as "Fair," "reasonable," "appropriate" are considered ambiguous.
 - a. Anytime price or quantity is described in ambiguous terms, court will conclude that it is not a manifestation of commitment.
 2. "I quote," "I am asking \$30 for..." "I would consider selling for" is generally construed as contemplating an invitation to deal, preliminary negotiations, or "feelers," rather than an offer.
 3. ***Vague language will prove no intent to make a deal.***
 - a. Words used such as "fair price" and "reasonable price" are not yet a contract. Getting there, but not there yet.
 4. Exception: Requirements Contract
 - a. Situation involving sale of goods in which quantity is described in terms of buyer's needs (Exclusivity Agreement) → Valid despite fact that ambiguity and vagueness are generally considered fatal.
 - b. Artificial Ceiling – *Unreasonably Disproportionate*. Increase must be in proportion to previous demands.
 5. General Reasoning
 - a. Anytime someone tries to express a vital contract matter (price or quantity) ambiguously, court says that party is trying to work towards a commitment, but has not yet made one – not yet an offer.
 - b. *When a term is left out completely (aside from price requirement for real estate), court says that the party was willing to make a commitment and was willing to leave that term open.*
- v. Key 3: CONTEXT – What's the setting?

1. Bargaining History

- a. Was there past buying history or joking between parties?
 - i. Adds to argument that there is manifestation of commitment.
 - ii. Where statement is subjectively intended to be in jest but reasonably understood by the hearer to have been made seriously, the statement is an offer b/c it is interpreted objectively (i.e., according to reasonable person's expectations) despite D's "undisclosed intention" to regard doings as a joke. Responsibility for apparent misunderstanding is on D and as such, impossible to ignore element of relative fault – can insist either a constructive assent on promisor's part or that actual assent here is unnecessary.
- b. Method of communication – Use of broad media & Advertisements
 - i. General Rule – not an offer; usually construed as invitations to make an offer. *The broader the communicating media, more likely the court will view the communication as merely the solicitation of an offer.* Ads are designed to solicit purchase orders, and as such, order itself would constitute the offer, w/ purchaser playing role of offeror. NOTE: Orders are solicited subject to available stocks or to change of price without notice – in commercial usage, word "quotation" implied the reservation of a right on the supplier's part to accept or reject customers' orders more or less at will.
 - ii. Ads containing prices are seen as announcements of prices at which the seller is willing to receive offers.
 - iii. Exceptions
 1. Focus on whether advertisement is specific about how many advertised items are available and who can accept the advertisement.
 2. Other exceptions: Where language of ad can be construed as containing a promise, where the terms are certain and definite, and where the offeree(s) is clearly identified (e.g., "first come, first served"). Intentionally misleading ads may be punishable under local consumer protection statutes.

E. **Did the proposal die out? Was the offer terminated?**

- i. Restatement §36 – Methods of Termination of the Power of Acceptance
 1. An offeree's power of acceptance may be terminated by:

- a. Rejection or counteroffer by the offeree
 - i. Rejection is effective when *received* by the offeror.
 1. Revival of offer – if offer is rejected, offeror may restate the same offer and create a new power of acceptance (could also say it is a new offer, as opposed to revival of old one).
 - b. Lapse of time
 - c. Revocation by offeror
 - d. Death or incapacity of the offeror or offeree
 - e. Destruction of subject matter (Rest. §36)
 - f. Supervening legal prohibition of proposed contract
 2. In addition, an offeree’s power of acceptance is terminated by the nonoccurrence of any condition of acceptance under the terms of the offer.
- ii. Offer creates a **power of acceptance** in the offeree. Offeree can **reject** and make a **counteroffer**, which has the effect of terminating the original offer and reversing the process. Original offeror becomes the offeree with the power of acceptance.
 1. Distinguish Counteroffer from Mere Inquiry → Mere inquiries do not terminate the offer when it is consistent with the idea that the offeree is still keeping the original proposal under consideration.
 - a. Ex: “I am still thinking, but can give you an answer right away if you want to lower the price now.”
 - b. Test – whether a reasonable person would believe the original offer had been rejected.
 - c. *Even though the offeree suggests a time for performance in her acceptance of the offer, her otherwise valid acceptance is not converted into a counteroffer.*
- iii. Lapse of Time
 1. Even if no express time limit on offer, courts will impose a reasonable time limit.
 - a. When was the offer made?
 - b. How long of a gap existed until offer was responded to?
 - c. Good exam language: ***“This offer may have terminated through lapse of time; even if no express time limit, only good for reasonable amount of time.”***
 - d. Determined by asking what amount of time would be needed to receive, consider, and reply to the offer under all of the transaction’s circumstances.
 - e. Factors for determining reasonable time:
 - i. Nature of transaction
 - ii. Means of communication used
 - iii. Stability of the market
 - f. Late acceptance → could be a legally meaningless act, or create the reasonable understanding that it is a new offer by the former offeree.

- iv. Death or Insanity of either party → when offeror dies or is adjudicated insane, all offers on table from him are terminated. Does not have to be communicated to the other party.
- v. General Rule – Where marketable investment property is concerned (securities, real estate), no prospective buyer has a right to assume that he is the sole offeree or indeed that he is an offeree at all in legal contemplation.
 - 1. Thus the seller's final 'assent' rather than the buyer's tender would be the final and indispensable step in a concluded bargain.
- vi. Revocation of Offer – General Rule: Offeror may revoke offer at any time prior to its acceptance by the offeree, except when limited by doctrine of promissory estoppel and in some instances, by statute. 3 Keys:
 - 1. *How* is offer revoked
 - a. Look at words or conduct of offeror that was communicated to the offeree.
 - b. Two-player game: *Offeree must be aware of revocation*.
 - i. Direct communication – Requires receipt either by offeree or agent of offeree. If offer was made to multiple persons in publication, revocation published in the same way as the offer is effective. *Must use comparable means* (e.g., NY Times ad offer cannot be revoked in TV Guide).
 - ii. Indirect Communication – Occurs when offeror fails to give direct notice or something goes wrong with the communication. Revoked if offeree receives ALL of the following:
 - 1. Correct information
 - 2. from a reliable source
 - 3. of acts of the offeror that would indicate to a reasonable person that the offeror no longer wishes to make the offer (learns of *action clearly inconsistent* with the continued intent to contract).
 - 2. *When* is offer revoked
 - a. Must revoke the offer before it is accepted.
 - b. Revocation becomes effect **when it is received**.
 - i. Where revocation is by publication, it is effective **when published**.
 - c. Timing of Revocation – Williston: "If the offeror can say 'I revoke' before the offeree accepts, however brief the interval of time, there is no escape from the conclusion that the offer is terminated."
 - 3. Limitations on Offeror's Power to Revoke
 - a. Option
 - i. *Requirements: Both a promise not to revoke and consideration provided for that promise*. Without

- monetary compensation, option is merely a promise to keep offer open without consideration and unenforceable as an option contract.
- ii. ***Offers must be presumed to be revocable unless a fee or premium is paid to the offeror. Adding a deadline for acceptance means that the offer expires automatically on the date named, but nothing more.***
 - iii. **Restatement §87 – Option Contract** (allows for nominal consideration to keep offer open)
 - 1. An offer is binding as an option contract if it is (a) in writing and signed by offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within reasonable time; or (b) is made irrevocable by statute.
 - 2. An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
- b. **UCC 2-205 – Firm Offer Rule** (for sale of goods only) → requires (a) a sale of goods and (b) a writing signed by a merchant that *expressly promises that offer will not be revoked for a period of time*.
- i. Generally accepted that 3-month ceiling for the amount of time an option may remain open. (KF says this is ambiguous.) If option in contract expressly says longer than 3 months, it is only allowed to keep offer open for 3 months.
 - ii. *Merchant* defined – one who deals in the type of goods involved in the transaction, or who through his occupation has specialized knowledge of the business practices involved.
- c. **Detrimental Reliance** → Where the offeror could reasonably expect that the offeree would rely to her detriment on the offer, it will be held *irrevocable as an option contract for a reasonable length of time* (Construction contract typically). At the very least, offeree would be entitled to relief measured by the extent of any detrimental reliance.
- i. “Bid” listed in fact pattern is typically considered an offer.

- ii. General Rule – “Bid” makes offer irrevocable –
Two interpretation differences:
 - iii. ***James Baird Co. v. Gimbel Bros.*** → *Reliance does not make offer irrevocable.* Subcontractor’s offer could be revoked even after gen. contractor had submitted its own bid using sub’s price quote. Court said sub’s offer looked for an acceptance from offeree in the form of a return promise, not merely ‘reliance’ through the submission of a bid. While offeree based submission on offeror’s quote, that was not ‘the act’ by which offeror expected to be bound. Felt promissory estoppel was aimed at cases involving reliance on donative promises; but it had no application to offers that sought consideration in the form of an exchange.
 - iv. ***Drennan v. Star Paving Co.*** → *Irrevocable because of reliance.* Offer included a “subsidiary promise” not to revoke until P should have at least an opportunity to accept that offer after the general contract had been awarded to him. Though consideration was lacking, here the offeror’s aim was to induce the offeree to rely on the offer and to make commitments of its own on the basis of such reliance. Restatement §90 waives the requirement of consideration and turns the offer into a binding promise. Doctrine converted revocable offer into an option contract, ultimately allowing offeree to trump offeror’s hasty effort at withdrawal.
- d. Partial Performance pursuant to Unilateral Contract Offers
- i. Start of performance acts as acceptance to enter into unilateral contract, and forms an *option contract*, making the offer irrevocable for a reasonable time. Acts as if consideration had been paid for the option.
 - ii. Fact pattern: Offer to enter into a unilateral contract; offer requires performance to accept.
 - iii. *Once performance has begun in unilateral contracts, offer cannot be revoked.* Unilateral contract, however, will not be formed until the total act is complete. Once performance begins, offeree has a *reasonable time to complete performance*. Offeree is not bound to complete performance – she may withdraw at any time prior to completion.
 - iv. “Part performance” only commences when offeree embarks on performance. Does not apply when *preparing to perform*. However, preparations to

perform *may* constitute detrimental reliance sufficient to make offeror's promise binding (§90).

ACCEPTANCE

F. Was the deal or offer accepted?

- i. General Rule – only person to whom offer is addressed may accept. One may also have power of acceptance if she is a member of a class to which an offer has been directed. If offer is made to general public, anyone may qualify as an offeree. If offer requests performance from an unlimited number of persons, performance by anyone knowing of the offer will cut off power of everyone else to accept, provided that offeror desires only one performance and there is no indication that he is willing to pay more than once.
 1. Offeree's power of acceptance cannot be assigned. However, once contract is formed, contract rights can be assigned.
 2. Offerree must know of the offer at the time of acceptance.
 - a. Ex: Reward situation – a person who returns a lost dog without knowing there was a reward for its return is not contractually entitled to acceptance of the reward offer.
- ii. When a consumer orders a product via phone or orders from a catalog, it is said that consumer is the offeror and merchant is offeree or acceptor.

Three Forms of Indirect Rejection

- iii. Counteroffer (Common law, UCC) kills the offer.
- iv. Conditional Acceptance (Common law, UCC) – *Kills offer because words do not connect. Changes the deal, thus no manifestation of mutual assent.*
 1. Ex: "I accept if...", "I accept but...", "I accept provided..."
 2. Can still have an implied contract even if words do not connect.
 - a. Ex: Conditional acceptance is greeted with no response. Acceptor acts in accordance with his conditional acceptance. There is manifestation of mutual assent even though words do not match up → Implied contract, rather than express as originally intended.
- v. Additional Terms Rule (Common law only – not UCC) – *Not an express contract as something has been added to the deal. Do not know if offeror has accepted that additional term or not.*
 1. "I accept and..."
 2. Common law: MIRROR IMAGE RULE
 - a. ***Acceptance cannot add anything to the offer.*** Acceptance must correspond with the offer, with only minor discrepancies tolerated today (response cannot make material changes in the transaction proposed in the offer). Response is not an acceptance if the offeree imposes conditions on the acceptance or seeks to change or qualify the terms of the offer. *Acceptance must express unconditional assent to all of the terms and conditions imposed by the offeror.*

- b. Sometimes a response may seem to add terms that are not expressed in the offer but that are *implicit in the offer* or would be incorporated into the offer by law or usage. If so, the response may appear to be a counteroffer, but in reality, it is an unqualified acceptance because it merely articulates what was inherent in the offer.
 - c. Different terms, or conditional acceptance (thus not mirror image), is treated as a counteroffer, which terminates original offer. Any subsequent effort by offeree to accept the original effort is ineffective (Restatement §39 – Counteroffer).
 - d. ***Princess Cruises v. G.E.*** → When predominant purpose of maritime or land-based contract is the rendering of services rather than the furnishing of goods, UCC is inapplicable, and courts must draw on common-law doctrines when interpreting the contract. Because common law guided this contract, court applied Mirror Image Rule, not UCC 2-207.
3. **UCC: RULE 2-207 (BATTLE OF FORMS)**
- a. UCC 2-207 governs routine merchandise transactions, supplanting mirror image rule which continues to reflect common law generally in all other contexts.
 - b. Adding a term is not a deal-breaker → Unless offeror (supplier) expressly conditions its acceptance on the purchaser's assent to supplier's terms, there is a contract of which the terms are those contained in the purchaser's offer. Consequently, neither purchaser nor supplier can afterwards refuse performance based on any discrepancies that had no economic significance at the time of the deal for either party.
 - c. ***Always conclude that there is an express contract.*** Under UCC, contract is created by "I accept and..."
 - d. ***"Seasonable expression of acceptance."*** → Adds, but does not require, an additional term.
 - i. If it: is a sale of good; is a proposal (not an insistence); has manifestation of mutual assent; and offer has not yet been terminated → Then if either party is not a merchant, then rule is that ***new term is just a proposal, not a part of the deal unless it is agreed by the other party.*** If not a merchant, additional term is viewed as only being a proposal.
 - ii. **If both parties are merchants:** rule says that it is a deal because of seasonable expression of acceptance. Suits are generally resolved in favor of purchaser-offeror, however, 2-207(2) confers one limited benefit on supplier-offeree – ***additional terms*** are not simply thrown out, but are considered

adopted by the purchaser unless (a) the offer limits acceptance to its own terms; (b) additional terms are objected to by the offeror; or (c) additional terms 'materially alter' the contract. If 'material,' they are *not* part of the deal unless the purchaser expressly agrees to be bound thereby (rare event). What is a material change is a question of fact, which can examine trade practice and other circumstances.

- iii. When parties have dealt with each other over a long period of time before dispute arises, conduct will proceed on assumption an enforceable agreement existed b/w them and 2-207(3) provides that the 'contract' shall consist of those terms on which the parties' writings do agree – neither form gaining primacy over the other – plus supplemental terms applied by the UCC.
- e. Knockout Rule: Only terms on which the parties agree are included in the contract.
- f. Big picture of 2-207: It is a *protect the buyer* statute. If you want a negative term of your contract included, you must negotiate it; can't slip it in on the other side. THIS RULE DOES AWAY WITH THE MIRROR IMAGE RULE, where you accepted by conduct everything. This changes where the mirror is placed essentially.
- g. Last Shot Rule: runs counter to 2-207 → treats seller/offeree's acknowledgement as a counteroffer rather than a proposal and thus gives the seller the last shot at imposing its own terms on the deal. Not applicable b/c if treated the seller's acknowledgement as a counteroffer, there was surely no express assent thereto on the buyer's part, merely silence. One party will get stuck with terms they did not expect or intend. *Not really a mirror image, just happen to be bound b/c you were not the last person to send the piece of paper.*
- h. Electronic Contracting: If you have a telephone order, that could be an offer or acceptance. Call catalog a negotiation (no terms and conditions). Call telephone order an offer. When comp is sent in a box, includes terms and conditions. This is called a counteroffer, not mirror image. No acceptance because additional term. Accepting the good by not sending it back = acceptance.

G. Did the other party agree to the deal?

i. Restatement §63 – Time When Acceptance Takes Effect

- 1. Unless the offer provides otherwise:

- a. An acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; BUT
 - b. An acceptance under an option contract is not operative until received by the offeror.
 - ii. Look at how offeree is accepting
 - 1. Offeror can control method of acceptance.
 - a. Most contracts don't have specified method of acceptance, but if it does, offer must be accepted in accordance with the offeror's terms.
 - iii. *Acceptance requires Intent of Parties to Contract and be Bound to Terms. Issue here is when did parties intend to be bound?*
 - 1. Numerous Issues: Makes a difference between the continuation of preliminary negotiations and the creation of a contract. Could conclude a deal without further negotiations, or have just agreed to a proposed agreement. Could have either a written memorial or "an agreement to agree." When reduced to writing, fact that it is unsigned shows no intent.
 - iv. Four Recurring Fact Patterns
 - 1. **Mailbox Rule** – When it is reasonable to respond to offer by mail or fax, that acceptance dates from the time acceptance was posted (when offeree relinquishes control of acceptance notice).
 - a. Timing of Revocation – offeror's revocation must be communicated to offeree before he relinquishes control of acceptance letter, and has thereby accepted.
 - 2. Offer is made and then in response to the offer, offeree starts performance. General Rule – *Start of performance viewed as a promise to perform – manifestation of mutual assent – and generally constitutes acceptance (viewed as implied promise to perform).* Typically the case in bilateral contracts.
 - a. Exception: Unilateral contract – where offer requires acceptance by performance. When there is an offer that *expressly* requires performance to accept – On exam write: ***"It does not create a contract, no deal yet."*** In unilateral contracts, performance is completion, not just start of it.
 - 3. Notice of Acceptance – Acceptance by promise has to be communicated to the offeror. Telling someone else that you accept by promise does not constitute acceptance – *must have manifestation of mutual assent.*
 - a. Acceptance by Performance – Whether facts are such that offeror would know that offeree has reasonably performed.
 - 4. Sale of goods question where fact pattern is that buyer offers to buy goods and seller sends wrong goods. Two consequences:
 - a. Creates a contract in breach – Sending of goods creates a contract as act of sending as acceptance. At same time,

sending of wrong goods breaches the contract it creates. Receiving party is not required to keep goods and deal has been created where party can sue for breach.

- i. Perfect Tender Rule – At common law, buyer of goods possessed a legal right to insist upon “perfect tender” by the seller. UCC 2-601 provides that a buyer may reject the goods supplied by his seller ‘if the goods or the tender of delivery fail in any respect to conform to the contract.’
- ii. UCC 2-602(1) – rejecting buyer must “seasonably” notify the seller of his intention to reject. Such notice having been given, UCC 2-508(1) provides that the seller may respond by notifying the buyer of his intention to *cure* and may then make a conforming delivery if the time for performance has not yet expired.
 1. Effect – protect the buyer from having defective merchandise dumped in his lap with no recourse other than a damage claim, while at the same time affording the seller a kind of second chance to meet his contract obligations.
- iii. UCC 2-608(1) – buyer who has accepted non-conforming goods may subsequently revoke his acceptance and reject the merchandise only if (a) the non-conformity substantially impairs its value to him; and (b) either he had reason to assume that the non-conformity would be cured by the seller (but it hasn’t been) or the defect could not have been discovered on an initial inspection (e.g., widgets looked good but shrank after washing). A buyer who decides to accept and use the non-conforming goods for some purpose cannot simply change his mind at a later date. Under UCC 2-608(2), revocation of acceptance must occur within a reasonable time after the defect was or should have been discovered and before any alteration occurs in the condition of the goods other than that resulting from their own defect.
- iv. SUMMARY: While a buyer is not bound by his acceptance of non-conforming goods, he can thereafter revoke only if the non-conformity is substantial, only if he accepted without knowledge of the defect or in expectation of a cure, and only if the revocation is prompt and timely. If goods are accepted, still retains contractual rights to damages

though. The terms of the contract (quantity, quality, function, etc.) constitute an “express warranty” on seller’s part that goods will conform to such terms in all respects – if not, then breach. Under UCC 2-714, buyer may recover difference in value b/w goods described in contract and goods delivered (damages equal to actual difference plus resulting incidental and consequential damages under 2-715).

Question 2: Assuming that we have a deal, is there any reason not to enforce the deal?

V. **Basic policy of contract law**

- A. Principle behind contracts is that you make it on your own. Thus it is difficult to establish duress, mistake, econ. duress – all have to do with the courts coming in and *policing the bargain*, which they attempt to avoid whenever possible.

VI. **CONSIDERATION**

- A. Offer and acceptance is used to determine whether or not there is a deal. Provided there was a deal, consideration is used to see if courts should enforce it.

B. **Elements**

- i. Promisee must give a return promise or perform (act, forbear).
- ii. Act or forbearance is to get promise (in exchange for the promise).
- iii. Promise was made to get act or forbearance (mutually induce).

C. **Definition**

- i. A performance and return performance must be bargained for and mutually induce each other. Performance is bargained for if it is sought by each party in exchange for the other’s promise. Bargain guides both of their actions.
- ii. Insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation.
- iii. Requires contractual promise be the product of a bargain → negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other.
- iv. If...(consideration is given)... then I promise that...”

D. **Restatement §79: Mutuality of Obligation**

- i. If the requirement of consideration is met, there is no additional requirement of:
 - 1. A gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee;
 - 2. Equivalence in the values exchanged; or
 - 3. “mutuality of obligation.”

E. **Restatement §81: Consideration as Motive or Inducing Cause**

- i. The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.

- ii. The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.
- F. **Presence of a promise** → *assurance that a thing will or will not be done.*
 - i. Exchange of promises must mutually induce one another.
 - ii. **Baehr v. Penn-O-Tex Oil Corp.** → *Consideration requires that a contractual promise be the product of a bargain.* Held that circumstantial evidence may support the inference of such an agreement to forbear. However, such an inference must rest upon something more than the mere failure to institute immediate suit.
- G. Expression of a bargain → In fact pattern - “seek,” “want,” “act is because of.”
- H. Courts will not question adequacy of consideration (the relative value of the exchange) unless it has the appearance of a **sham** or **token**.
 - i. Sham consideration – where parties recite that consideration was paid of \$1 or some other insignificant sum. Frequently, this recited sum was not in fact paid and was never intended to be paid. Most courts hold that evidence can be introduced to show that consideration was not paid and no other consideration was given in its place.
 - ii. Token consideration – Where consideration is only token (i.e., something entirely devoid of value), not usually legally sufficient. Court characterizes it as a gift and not a bargained-for exchange.
- I. Function of Consideration
 - i. Evidentiary – evidence of the existence and purport of the contract, in case of controversy.
 - ii. Cautionary – deterrent against inconsiderate action
 - iii. Channeling – mark or signal the enforceable promise
- J. **Four Step Exam Strategy Approach:**
 - i. What is the promise in question?
 - 1. Always one party arguing that his promise is not legally enforceable because there was no consideration.
 - ii. Who made that promise? Who is promisor (role of D) and promisee?
 - 1. Person who made promise is person who is going to be D. Arguing that it is not a deal that the law should enforce.
 - iii. What was person who made promise asking for in exchange for the promise?
 - 1. Performance (act other than a promise)
 - 2. Forbearance
 - 3. Promise to perform (creation, modification, or destruction of a legal relation)
 - iv. Was thing bargained for (in exchange) a detriment to promisee (P) or a benefit to promisor (D)?
 - 3 situations where detriment is relevant
 - 1. Past Consideration → *Must be bargained-for new benefit or bargained-for new detriment.* Services that were intended to be voluntary and gratuitous remain so as a matter of legal

presumption. Things that already happened cannot be bargained for.

- a. Limitation 1: Dr. giving emergency treatment to accident victim – assumed to be responding to victim’s request and can, therefore, recover the fair market value of the benefit rec’d.
 - b. Limitation 2: Where beneficiary subsequently *promises* to compensate the volunteer for the value of the benefit received.
 - c. ***Mills v. Wyman*** (woman takes in man’s sailor son when sick) → when son died, P wrote son’s father and asked for medical reimbursement payments, to which father initially agreed and then changed his mind. Court held for D on grounds that there was no consideration for D’s promise since D never asked P to care for his son (services were volunteered). Having rec’d nothing from P, D’s promise was gratuitous, a promise to make a gift, and thus unenforceable.
 - d. ***Plowman v. Indian Refining Co.*** (paycheck pickup) → P’s willingness to pick up checks at office was not legal consideration; simply a condition imposed upon them in obtaining gratuitous pensions – didn’t satisfy req. for bargained-for exchange. *Acts were benefits to P’s and not detriments, and detriments to employer (D) and not benefits* → thus, no consideration. In absence of valid agreement to make payment for rest lives, arrangement was revocable by D, and thus merely a gratuitous arrangement w/o consideration and void as contract.
 - i. *Appreciation of past services or pleasure afforded is not sufficient consideration.*
2. **Pre-Existing Legal Duty Rule** → When party does something he is already legally entitled to do, there is no consideration for a promise to pay that party money to do it. Binding only to the extent it is necessary to prevent injustice (Restatement §86 – Promises for Benefit Rec’d).
 - a. Rule of law that courts do not inquire into the adequacy or amount of consideration *unless it is a sham* – “One *peppercorn* is consideration.” Just look for the existence of a bargain; view it as a matter of private judgment of the parties.
 3. **Part-Payment of Debt** → *Part payment of a debt that is due and undisputed is NOT consideration of a release.*

K. Promises to Make a Gift

- i. **General Rule** – promise to make a gift in the future is ***not enforceable***.
 1. Exceptions:
 - a. Bargain was struck

- b. Promisee has made commitments in reliance on promisor's good faith → When a donee, relying in good faith on donor's promise, is led thereby to spend money, incur debts, or take some other costly and irreversible step, donor may be *estopped* on grounds of equity and fairness from asserting "want of consideration" and "no bargain." *May be no element of exchange, but there can be foreseeable reliance, justifying enforcement.*
 - i. Case where promisor's objective is reasonably clear at the time promise is made.
 - ii. When there is intentional influence to alter position for the worse on the faith of the promisor → would be grossly inequitable to resist on ground that it was given without consideration.
- ii. ***Hamer v. Sidway*** → Uncle bargained for return performance, which was a forbearance. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first. *Promise for a promise is consideration.*
- iii. Three Categories into which Courts may Classify Gifts
 - 1. Bargains – will likely be enforced
 - 2. Inducement – will likely be enforced
 - 3. Gratuity – will not be enforced
 - a. ***Kirksey v. Kirksey*** (widow & kids move in w/ bro-in-law) – held as a gratuity but facts pointed towards an induced move by the widow to brother-in-law's property. Consideration didn't exist - as gratuity, no breach.
- iv. ***Dougherty v. Salt*** (aunt promise – value rec'd) → Promise was not supported by any consideration b/c it was no more than the promise of an "executory gift" (gift to be performed in future). No value rec'd by aunt for her promise, and the mere recital of value wouldn't suffice, where it was evidence that none had in fact been given. Not a promise for which court can provide a remedy. *Enforcement of purely donative promise seems unnecessary where promise has not been substantially relied on by the promisee.*
 - 1. Donative promises are highly insecure → *ingratitude* and *improvident*.
- v. In past, a seal was used for gift promises b/c seals were viewed as binding. No longer binding though.
- vi. Gifts Today → More common to transfer to a trust; regarded as a present gift completed when the property is transferred to the trustee – question of consideration does not arise.

VII. **Mutuality of Promises**
 A. **Illusory Promise**

- i. Consideration must exist on both sides of the contract – promises must be mutually obligatory. Where there is an agreement in which one party has become bound but the other has not, such agreements lack mutuality; one of those promises is *illusory*. Consideration fails.
- ii. Where buyer has no obligation to buy from seller but could buy from some other seller if the price of widgets dropped – *buyer’s promise to buy as many widgets as he chooses is not really a promise at all*, and as such, unenforceable.
 - 1. If, however, buyer promises to buy exclusively or a range of an amount, then having set a limitation on his future action or having obligated himself to buy some quantity from seller, buyer’s promise would constitute consideration.
- iii. Appears in cases where there is an agreement in which one party makes a “*flexible commitment to the other.*”
 - 1. Ex: to use “*best efforts.*” → unspecific; leaves the level of commitment up to the promisor himself; may lack “mutuality of obligation.”
- iv. Exceptions
 - 1. Requirements and Output Contracts - promises to “buy all that I require” and “sell all that I manufacture,” respectively, are enforceable. Consideration exists, as the seller is suffering a legal detriment by limiting his freedom to buy from another seller (UCC 2-306).

B. Conditional Promises

- i. Enforceable, no matter how remote the contingency, *unless* the “condition” is entirely within the **promisor’s control**.
 - 1. Promise Conditioned on Satisfaction: A promise to buy if satisfied with goods is *not illusory* since one cannot reject them unless dissatisfied. Common law & UCC assume exercise of good faith.
- C. Best Efforts Implied – court may find implied promise furnishing mutuality in appropriate circumstances (such as exclusive marketing agreements). Courts will generally find an implied promise to use best efforts and sustain agreements that might otherwise appear illusory.
 - i. ***Wood v. Lucy Lady Duff Gordon*** – Lady Duff Gordon entered agreement with agent over exclusive rights. Court said it would imply obligation to use reasonable efforts. When issue becomes terms of contract and gap, want to explain implied terms under Lady Duff case.

VIII. RELIANCE & PROMISSORY ESTOPPEL (Substitutes for Consideration)

A. Restatement §90 – Promise Reasonably Inducing Action or Forbearance

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

- ii. A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
- B. **Elements** – If all present, *MAY* be enforceable.
 - i. There must be a promise in question.
 - ii. Promisor intended, expected, or should have known that the promisee would rely?
 - 1. Should promisor have anticipated this action? Was it foreseeable when he made the promise?
 - a. This is a fact question – important legal issue.
 - iii. Promisee did rely on the promise.
 - 1. What did the promisee do after the promise was made in reliance on the promise?
 - 2. Was this thing that promisee did caused by the promise? Was it directly related? This will determine whether we are dealing with consideration or promissory estoppel. Key is whether the person who made the promise asked for something in return.
 - a. ***For promissory estoppel, the promisee does something caused by the promise but not asked for in the promise.*** If asked for in the promise, then it is consideration.
 - iv. It was reasonable for the promisee to rely on the promise.
 - v. Promisee is detrimented.
 - vi. Injustice can only be avoided by the enforcement of the promise.
- C. Applies ***subjective*** evaluation of detriment and injustice.
- D. Designed to protect those to whom a promise is made which is not legally enforceable until the requirements of the doctrine are met. Promisee acting in reliance can obtain enforcement even though consideration of the promise is lacking.
- E. Used to enforce promise in a commercial context where mutual assent is absent or incomplete.
- F. Applied to:
 - i. Charitable subscriptions
 - ii. Cases involving gratuitous bailments
 - iii. Oral promises to convey land on which the promisee then enters and makes improvements
 - iv. Occasionally to family gifts
 - v. Court is divided on application to retirement benefit payments
- G. **KEY:** *Must determine if there has been a communication that qualifies as a promise.*
- H. ***King v. Trustees of Boston Univ.*** → actions taken by BU to index papers went beyond their obligations to attend to the papers with scrupulous care and thus constituted reliance or consideration of King’s promise that they would be the ultimate possessors of the papers. ***Charitable subscriptions often serve the public interest by making possible projects which otherwise would never come about – where subscription is unequivocal, pledgor should be held to his word.***

- I. **Katz v. Danny Dare** (induced retirement w/ pension case) → change of position – that though it was financially beneficial – was sufficient to invoke promissory estoppel even though the conduct didn't involve an expenditure of funds. Elements were present: Promise of pension; his detrimental reliance thereon; and injustice can only be avoided by enforcing that promise.
 - J. **Moral Obligation Exception** (allowed despite bar on past consideration) – situation in which worker injures himself saving someone's life. No bargained-for legal detriment, but saved party promises to pay. Though the benefit was previously conferred, some courts will see a moral obligation to enforce the promise.
 - i. **Webb v. McGowin** (construction rescue) → rescued comp. President promised to compensate rescuer until he died, but executors refused further payments. Though D's promise was gratuitous as P's action was voluntary, D had realized a material benefit and felt moral obligation to P. While he could have ignored it, he chose instead to *affirm and ratify* that obligation by promising to pay. **“Material benefit” plus “moral obligation” added up to “valuable consideration,” and hence promise was enforceable even though made after the event.**
 - 1. *Moral obligation may support a promise in the absence of trad'l consideration, but only if the promisor has been personally benefited or enriched by the promisee's sacrifice and there is, as a consequence, a just and reasonable claim for compensation.*
 - K. **Defense of Equitable Estoppel**
 - i. Requires an act or statement of fact; and then an act or statement by D contrary to that.
 - ii. Elements:
 - 1. Induced reliance by act or statement
 - 2. Detriment
 - 3. Unjust not to enforce
- IX. **Unconscionability / Use of Standard Forms**
- A. **Elements**
 - i. **Lack of meaningful choice (Inequality in bargaining power)** – creates a kind of duress to swallow the boilerplate contract terms
 - ii. **Grossly unfavorable terms**
 - B. Always decided by the judge (never the jury), but highly fact-driven.
 - C. **General Rule re: Standard Forms** – standard form contract forms are non-negotiable → offered on a take it or leave it basis.
 - D. **UCC 2-302 – Unconscionable Contract or Clause**
 - i. If contract or any clause is found to be unconscionable at time it was entered into, court could: (a) refuse to enforce the contract; (2) void the unconscionable clause and enforce the remainder; or (3) limit the application of any unconscionable clause so as to avoid any unconscionable result.
 - ii. When it is claimed or appears to the court that a contract or any clause thereof may be unconscionable, the parties are permitted to present

evidence as to its commercial setting, purpose, and effect to aid the court in making a determination.

E. **Issues**

i. Procedural Unconscionability → *Adhesion Contract*

1. Disparity/absence in bargaining power; hidden terms; clearly express terms → must look at bargaining process and all its flaws

ii. Substantive Unconscionability → *Oppressive Terms*

1. Problems with the terms themselves

F. *Williams v. Walker-Thomas Furniture Co.* → *Absence of meaningful choice* on the part of one of the parties together with contract terms which are *unreasonably favorable* to the other party.

i. Determining if a *meaningful choice* is present made by consideration of all the circumstances surrounding the transaction. In many cases, the meaningfulness of the choice is negated by a gross inequality of bargaining power.

ii. When in fine print, etc., and where contract terms were found to be “commercially unreasonable” and “so unfair,” contract is nonenforceable.

G. Main question becomes *substantive fairness* → consumers are almost always free to seek relief by asserting they did not “*knowingly assent*” to those terms when the contract was entered into – courts must then look at defects in bargaining process to determine if there is substantive fairness.

X. **Capacity**

A. Individuals in certain protected classes are legally incapable of incurring binding contractual obligations. Timely assertion of this defense by a promisor makes the contract *voidable* at his election.

B. Three groups – Legal Right to Disaffirm

i. Infants – depends on statutory law (varies state by state) – most states say 18.

1. Only requirement is age. Doesn’t have a right to consent

2. Contract b/w adult and infant – binding on adult and voidable by infant.

3. Implied affirmation – person enters into agreement when he’s 17 (doesn’t have capacity, not enforceable), but by continuing to retain benefits of contract after gaining capacity, its like you have agreed all over again with capacity – takes effect of new deal. Allows once after you have capacity.

4. Exceptions to where infant cannot choose to avoid the contract he entered:

a. Necessities – bound to pay the reasonable value of necessities (determining a necessity depends on infant’s station in life). *Viewed as a quasi-contract obligation, consistent with quasi-contract “fair and appropriate” standard.*

b. Statutory Exceptions – usually incl. insurance contracts & student loans.

- ii. Intoxicated
- iii. Mentally incompetent
 - 1. Incapable of understanding the nature and significance (or consequences) of a contract → contract is **voidable**.
 - 2. Exception
 - a. Necessities
 - b. Where contract is made on fair terms, and other party does not know of mental illness or defect, general power of avoidance terminates when the contract has been so performed in whole or in part, or a change in circumstances has occurred, that would make avoidance unjust. Court may grant relief as justice requires.
- C. Key word that must appear – **disaffirm**. Person has ability to get out of agreements he has made.

XI. **Duress**

- A. Promises extorted by violence or threat of violence are not enforceable. Purpose is to rescind the contract – not entered into voluntarily.
- B. Elements:
 - i. Fear of Confinement or Bodily Injury
 - ii. Influence over the person to enter into contract
- C. Contracts entered into under duress are **voidable** and may be rescinded as long as not affirmed. Duress will usually **not** be found, however, where one party takes economic advantage of the other's pressing need to enter the contract. But once contract is made, duress will be considered if one party tries to unilaterally modify the contract.
- D. **Economic Duress** – Standard is Improper Threat.
 - i. Elements:
 - 1. Wrongful act (threat made)
 - 2. Other party has no choice but to enter into contract thrust in front of them (no reasonable alternative but to enter contract)
 - ii. Ex: Threat to discharge an employee; likely to be regarded as voidable at the victim's option rather than void at its inception.
- E. Common fact patterns:
 - i. **Modification in Contracts**
 - 1. Apply Pre-Existing Duty Rule – occurs where A promises a performance to B and before performance is completed, A demands that B change the terms, to which B obliges b/c he wants A's performance; *Performance of an act which the promisee is already bound by contract to perform is not "valid consideration" for the change that the promisor has apparently agreed to.*
 - a. Should not be applied automatically though, because there may be some reason for the proposed modification in order to involve frustrating the parties' initial purpose, i.e., not anticipated by the parties when the contract was made. If not allowed, could be difficult to carry on cooperative

relations b/w the parties in the future. *Where the modification entails something of value for each of the parties, then as a technical matter, there's consideration on both sides and new promises are mutually enforceable. But if modification runs in favor of one party only, a strict application of the consideration requirement would prevent enforcement even though the change is reasonable and acceptable to the promisor.*

- b. Market changes (such as sharply rising labor and material costs) confronting a contracting party with the prospect of substantial losses may provide a good faith reason for original promisor to seek modification, even though failure to perform will constitute an actionable breach. In effect, *promisor regards it as less costly to pay damages than to meet its contractual obligations unless terms are modified.*
 - c. Where P attempts to get more money from D w/ no competing offer and no market change that would explain or legitimate an effort for more compensation, P is trying to deprive D of its free will by maximizing D's vulnerability, leaving it no real choice but to consent to P's demands.
 - d. **Dilemma** – distinguishing b/w a “*commercially understandable renegotiation*” and an “*exercise of duress*”
→ TEST – whether behavior was strictly “*opportunistic*.”
- ii. Litigation Settlement – where P settled for less than she had earlier acknowledged she was owed.

XII. **Coercion / Undue Influence** – Standard is Unfairness.

- A. Elements
 - i. Heightened bargaining power
 - ii. Inappropriate bargaining power
 - iii. Weakened State
- B. Must prove that D was under the *domination* of P.
- C. Compared with Economic Duress – D is much weaker and vulnerable under undue influence.
- D. Contract entered into under coercion are *voidable* and may be rescinded as long as not affirmed.
- E. *Unconscionability is a little easier to prove than economic duress.*

XIII. **Misrepresentation**

- A. Elements:
 - i. There was a *material misrepresentation* (asserting of information that party knows to be untrue).
 - ii. That misrepresentation was *relied upon* by P.
- B. If identity or the character of the property being bought or sold is overtly misrepresented by one of the contracting parties, then the other party's assent is obviously less than meaningful and any agreement that results is *voidable if*

justifiably relied upon. This is the case *even if there is no specific intent to defraud*. Representations of fact, at least if material and if relied upon in good faith, constitute an “inducement” to the receiving party for which the representing party is deemed responsible.

- C. A misrepresentation is material if:
 - i. the information asserted would induce a reasonable person to agree, OR
 - ii. the maker of the misrepresentation knew the info asserted would cause a particular person to agree.
- D. Bare Nondisclosure – e.g., not telling a prospective homebuyer there are termites in the house, but never being placed in a position to lie either → **creates no liability** – court felt this was too idealistic to function in the marketplace; thus buyers and sellers in the marketplace must each look out for themselves. Works contrary to “American mores.”
 - i. Restatement §161 disapproves of the bare nondisclosure clause, treating nondisclosure as misrepresentation where the undisclosed fact concerns a “basic assumption” made by the other contractual party and where the non-disclosure amounts to a failure to act in good faith.

XIV. **Mistake**

Mutual Mistake

A. Elements

- i. ***Mistake must be mutual.***
- ii. Mistake was regarding a ***basic, material fact.***
 - 1. Parties who made the deal did not understand the surrounding facts.

B. Exceptions - Assumption of Risk

- i. Mutual mistake is not a defense where adversely affected party bore the risk that the assumption was mistake. Commonly occurs where parties knew that their assumption was doubtful (i.e., where parties were consciously aware of their ignorance).
 - 1. Mistake in value is generally *not* a defense. Both parties usually assume the same risk that their assumption as to value is wrong. When expert is sought out to determine something’s true value, shows intention to not assume the risk as to its value.

- C. ***Sherwood v. Walker*** (barren cow case) → seller thought that the cow was barren. Mistake was not over the mere quality, but instead was over the “whole substance” and “very nature” of the thing. Mistake affected the substance of the whole consideration. The thing sold and bought had, in fact, no existence.

- i. Contract cannot be enforced where:
 - 1. Very nature of thing is different from that which parties bargained for; and,
 - 2. Mistaken identification is mutual; and,
 - 3. Dollar consequences to the disadvantaged party is significant.

- D. If allowed for mistake to stand, one party would receive a windfall, while the other would suffer a penalty. ***Cases of mutual mistake lead to voidable***

contracts, unless the adversely affected party assumed the risk of the mistake under a reasonable view of the circumstances.

- E. Expert Mistake
- i. *Experts dealing with non-experts cannot make “mistakes” as to the intrinsic value of the property being sold.*
 - ii. When there are two experts dealing with each other, neither can be more “at fault” than the other and neither bore the greater burden of risk. Presumably, an expert purchaser should be expected to exhaust the available means of inspection and authentication before crying “mistake” (as opposed to fraud or misrepresentation, for which experts also have protection), whether his seller is an expert or an amateur.
- F. Exam Strategy – If mistake is about “nature of what it is,” then it is a basic and material fact. If mistake is about “what it’s worth,” then fact is not basic and material, and not a ground for mistake.

Unilateral Mistake

- G. Where only one of the parties is mistaken about facts relating to the agreement, the mistake will **not prevent** formation of a contract. However, if the nonmistaken party **knew or had reason to know of the mistake** made by the other party, he will not be permitted to snap up the offer.
- i. Numerous courts have found that contracts with errors such as *mistakes in computation* may be canceled in equity assuming that the nonmistaken party has **not relied** on the contract. Also, if mistake is so extreme that it outweighs the other party’s expectations under the agreement, it will be a ground for cancellation of the contract.
- H. General Rule where buying party has info about subject that selling party doesn’t:
- i. Do not allow contract rules (and certainly not modest doctrine of mistake) to reduce or eliminate the rewards claimed by those who invest in information gathering. Info should be protected as *purchaser’s property*, and as such, is entitled to same protection as seller’s property.

Latent Ambiguity Mistakes – Mutual Understanding

- I. Uses *subjective test* to see what each party was thinking at time of contracting.
- J. Occurs where the express of the parties’ agreement appears perfect clear at the time the contract is formed, but because of subsequently discovered facts, the express may be reasonably interpreted in either of two ways.
- i. Neither party aware of ambiguity – **no contract**
 1. E.g., *Peerless* case – apparent relationship did not exist and never did. Formation of a contract presupposes mutual assent, so that if each party assents to a different proposition, there is nothing to enforce and the contract is void. In most cases, minds meet at a some level (though misguided) so that at least conceptually, there was a contract. However, fact that parties erred in making a basic assumption about the character of the transaction obviously raises doubts whether such a contract merits enforcement.
 - ii. Both parties aware of ambiguity – **no contract**
 - iii. One party aware of ambiguity – **contract created**

1. E.g., collector purchasing Picasso painting from gallery where collector thought gallery only owned one and he thought he was contracting for that one, while gallery owned two, but thought it was contracting for other one.

XV. **Statute of Frauds**

- A. Resolves lack of writing (oral contracts) for certain types of contracts to avoid fraudulent claims and questionable subject matter; court wants more evidence than the oral 'he said/she said.' Every jurisdiction has a different SOF.
- B. While SOF does not negate oral agreements from being effective, it does make enforcement difficult.
- C. **Exam Strategy:** Whenever see "oral contract," should apply SOF to see if all terms are included.
- D. Key Phrase: ***Within the Statute of Frauds*** → means SOF applies
- E. **Limited Categories where SOF applies:**
 - i. Sale of goods and purchase price of \$500 or greater
 - ii. Personal services contracts that are *not capable of being performed within one year*. Does not look at how long it is likely to take.
 1. If not time specific, but task specific → then *not within SOF*. Rationale is anything within unlimited resources is capable of being finished within one year.
 - iii. Transfer of real estate regardless of dollar amount – must have term of duration more than one year.
 1. If apartment lease is for exactly one year, SOF is not required.
 - iv. When taking on someone else's debt
 - v. Commission
 - vi. Marriage
- F. ***Statute of frauds is only applicable when something is missing in signature, etc.***
Most employment at will is oral, would typically require a statute of frauds. On the other hand, where contracts have been worked out at arm's length, SOF not likely necessary (but not definite).
- G. **Requirements for Satisfying the SOF** → A writing which must include:
 - i. ***All material facts must be in the writing.*** Must contain:
 1. Who are the contracting parties?
 2. What did each party agree to do?
 * Unless it is a sale of goods (all other categories this is applicable) – only thing that must be in writing is the quantity term. Don't need the parties named.
 - ii. Who signed the writing? ***D must have signed the writing.***
 1. In order to satisfy SOF, only D must have signed the writing if its not for a sale of goods.
 - a. Special Rule – UCC 2-201 – if it is a sale of goods for over \$500 or more, all that is necessary is writing signed by P. Applicable where *both parties are merchants*, and P says he rec'd contract but never responded. *If a party does not answer, it is assumed he has accepted the terms.*

2. **Crabtree Rule** – If SOF applies, you need writing signed by D with all of the terms.
 - a. Court says that to satisfy SOF, can use two separate written documents (here, signed paycheck and unsigned memo) as long as they discuss same subject matter and define all the terms. To hook up two pieces of paper with one signature, there must be express referral to other piece of paper or subject matter of the dispute.

Question 3: What is the deal? What was agreed to?

XVI. **Parol Evidence Rule**

- A. Designed to keep evidence from getting to the jury. Concerned with the superiority and maintaining the integrity of written agreement – impact that writing has on earlier agreements
 - B. Renders unenforceable oral agreements entered into prior to the adoption of a written contract.
 - C. Policy consideration is that courts want people to rely upon final agreement and not other documents and materials.
 - D. Answers question – “what’s in and what’s out?”
 - E. Assumes that formal writing reflects the parties’ minds at a point of maximum resolution and hence, that duties and restrictions that do not appear in the written document, even though apparently accepted at an earlier stage, were not intended by the parties to survive.
- A. **Four Key Phrases**
- i. Parol (Earlier) Evidence – evidence of some agreement made prior to this writing; parol does not necessarily mean oral – can have letter before agreement as well.
 - ii. Integrated Agreement
 1. **final, written document**
 2. **intended to be fully integrated expression of agreement**
 * *Where you have a written agreement, parol evidence can never contradict it.*
 - iii. Complete v. Partial Integration
 1. Complete
 - a. writing is final and complete
 - b. represents full and final embodiment of the parties’ understanding
 - c. effectively discharged any prior agreement that falls within its scope
 - d. Consequence: Proof of alleged partial agreement is inadmissible → Judge himself makes first and critical determination (w/o jury) as to whether written contract is in fact, an integrated agreement – if it is, evidence of any prior agreement is excluded for lack of relevance.
 - i. oral testimony is barred

2. Partial – written, and final as to what it covers, but it *may not be complete*. *If partial, Rule can permit evidence of additional terms, so long as they don't contradict integrated agreement. Even if it is a complete integration, parol evidence can be used to explain ambiguous terms.* What is and is not ambiguous is a judgment call.
 - iv. Merger Clause
 1. often included in agreements to state that contract embodies complete understanding of the parties, and thus is *fully integrated*.
- F. **Elements:**
- i. need a contract (which needs consideration, capacity, and offer and acceptance)
 - ii. formal
 - iii. final
 - iv. complete
 - v. intended to be the final expression of the parties' agreement
 - vi. ***If all elements fulfilled, then any evidence (written or oral (parol)) that comes prior to or contemporaneous with the signing of the document is inadmissible to vary or contradict the terms of the writing.***
- G. Rule permits admission in evidence of an oral agreement made prior to the adoption of a written contract only if:
- i. Such oral agreement is ***collateral*** in form (i.e., capable of being expressed in a separate agreement) and ***does not contradict*** the terms of the written contract, AND
 - ii. The written contract ***fails to fully integrate*** and embody the parties' understanding, thus it is a partially integrated agreement.
 - iii. Prior or Contemporaneous Evidence admitted to ***resolve ambiguity***, prove a ***condition that has not been met*** (b/c w/o condition being met, contract may not have come into being yet and thus parol evidence still admissible), or establish an element of ***fraud***.
 1. Elements of fraud: (a) Misstatement of material fact; (b) Intent for person to rely on that material fact; and (c) Person does rely.
- H. Strict Application of the Rule → ***prior oral agreements are enforceable only if they entail separate consideration on the part of the promisee***; that is, a promise to pay additionally for some further service. If not, written contract is nearly always decisive of the parties' obligations.
- I. ***Evidence that shows the parties' true intent is sometimes allowed by courts.*** It is necessary to look not only to the written instrument, but to the circumstances surrounding its execution.
- J. Rule Does Not Apply To:
- i. oral agreements made ***subsequent to the execution of a written contract***.
 - ii. Evidence of ***“usage and trade”*** or prior ***“course of dealing”*** either or both of which may be drawn upon to ***“explain or supplement”*** the written contract – these are *interpretive* elements to understanding *true intent*, rather than additional terms. But where trade usage and course of dealing are inconsistent with express terms, express terms “control.”

XVII. **Contract Interpretation**

- A. Course of Performance
 - i. Most persuasive – what these very people have already done under the deal.
- B. Course of Dealing
 - i. Influential and persuasive (but not as good as course of performance) – What these very people have already done under earlier, similar (but different) deals.
- C. Custom and Usage
 - i. What different people have done under similar deals.
- D. ***Frigalment Imporing Co. v. BNS Int'l Sales Corp.*** (Chicken case) → Both parties meant something different by term “chicken.” Because of failure of consensus, neither party should have a claim based on ‘contract.’ Applying *Peerless* doctrine, effect is to nullify any outstanding obligations, no breach should be held and no duty to accept and pay for undelivered merchandise. *No contract, and thus law provides no remedy.*
- E. Court will not enforce an “agreement to agree,” however, there is a tendency for it to find an understanding by reasonable reference to custom or to the parties’ previous conduct.
 - i. In chicken case, there had been no prior course of deal b/w parties and trade usage was too varied to be relied upon.

XVIII. **Gap Filling Requirements**

- A. Examples where common: Exclusive dealing arrangements and requirements/outputs contracts → intentionally omit to specify *quantity* of the goods to be purchased or delivered or the extent of the services to be performed.
 - i. Typically refers to “best efforts” or “reasonable efforts” to generate high volume of activity.
- B. Issues:
 - i. ***Whether the fully committed party – manufacturer – has received a return promise that properly qualifies as “consideration,” OR***
 - ii. ***Whether the good faith promise to use “good faith efforts” has been breached.***
- C. Case law – implied duty of good faith
 - i. ***Wood v. Lucy Lady Duff Gordon*** – obligation to use reasonable efforts; “A promise may be lacking, and yet the whole writing may be *instinct with an obligation* imperfectly expressed.
 - 1. A promise, express or implied, to use “reasonable efforts” or “best efforts” to merchandise products or pursue some other business objective creates an obligation that is substantial and legally enforceable against the promisor.
 - ii. ***Locke v. Warner Bros., Inc.*** (Eastwood case) → In the agreement was an implied covenant of good faith and fair dealing that neither party would frustrate the other party’s right to receive the benefits of the contract. *Fraudulent intent must often be established by circumstantial evidence,*

and may be inferred from such circumstances as D's failure to even attempt performance.

- iii. **Morin Building Products Co. v. Baystone Construction, Inc.** (Warehouse siding case) → Either the obligor's declaration of dissatisfaction will be judged by a standard of reasonableness, or at minimum he will be held to the standard of "honest" dissatisfaction. *The "objective" standard has been traditionally employed in cases where "commercial quality, operative fitness, or mechanical utility" are in question, while the "subjective" standard is likely to be employed where "personal aesthetics or fancy" are at issue.*

D. UCC Gap Fillers

- i. Governed by UCC 2-306(2).
- ii. Implied Obligation of Good Faith – made part of any sale of goods contract (UCC §1-203).
- iii. Implied Warranty of Merchantability – Merchant, here, is not normal businessperson. Person who regularly sells goods of that kind and it turns out to be defective.
 - 1. E.g., Anytime jewelry store sells jewelry, it has to mean that you are ok to use goods of that kind. **UCC adds term that goods must be fit for ordinary purposes.** *If someone other than used car dealer sells you used car, then this gap filler does not apply.*

XIX. **Requirements/Outputs Contracts**

- A. Frequently provide for max and min limitations on the quantity of goods entitled to be required or produced, either in specific terms or by reference to stated estimates based on prior experience.
 - i. UCC 2-306(1) – when contractual limits are not expressed, UCC says an agreement which measures quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably or disproportionate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
- B. Essentially subject to the same enforcement standards as conventional contracts in which quantity is a fixed rather than a flexible term.
 - i. Flexible quantity deals consider contract obligations satisfied if the quantity tendered and demanded falls within an expectable range, with upper and lower limits being determined on the basis of what was **reasonably anticipated** at the time the agreement was entered into.
 - 1. *While the requirements-buyer or outputs-seller can reduce or even discontinue its participation as part of a general withdrawal from the business itself, it can't escape the contract by diverting the same materials or facilities to a more profitable use. Elasticity exists, but its stretch is limited by the overall obligation of good faith.*
- C. Exclusive Dealing Arrangements – best to be considered as co-venturers for the purpose of analysis.

- i. Quantity term is assumed to be *definable within limits and the conventional framework of obligation applies.*

Question 4: Did Anyone Not Do What He Agreed to do?

Yes. If no one didn't do what he had agreed to do, there would be no contract question.

Question 5: Is There any Legally Recognized Excuse for not Doing what Agreed to do?

XX. **Possible Excuses for Not Doing What You Contracted to Do**

- A. Situation in which there is an unmet condition of performance.
 - i. Exam Strategy: Must carefully read fact pattern to see whether there is an express condition → *Whether the words of deal condition performance.*
 - ii. Language – “on condition that,” “if,” “provided that,” “so long as” → if exam language is short of “on condition that,” want to add statement: **“If any doubt or ambiguity that contract language is not language of condition (that that is preferred by courts), then err in favor of no condition. If you determine that there is language of condition, general test for condition is that conditions must be strictly complied with.”**
- B. Breach by other party as excuse for nonperformance.
 - i. UCC – Perfect Tender Standard
 - 1. Any time seller of goods is less than perfect – not exactly what buyer wants – buyer is excused from paying because of seller's mistake. *Anything less than perfect tender, buyer is excused from performing.* Subject to 2 Exceptions:
 - a. Cure – in limited situations, because standard is so high to be correct every time, buyer gets second chance provided the deadline has not yet expired.
 - i. Exam Strategy: Exam must have delivery deadline and tell us that wrong stuff got there early.
 - b. Installment Sale Contract – parties agree there will be deliveries in several separate installments. If agreement itself provides for several separate installments, then problem with one installment – so long as it is not a substantial problem – will not excuse payments. Buyer still has to pay. Rationale is any problem with one installment can be fixed in future installments.
 - ii. Common law - Material Breach Rule (total screw up doctrine)
 - 1. Exception: Divisible contract exception – material breach is not applicable. Since divisible contract, one party performed X percent of the contract. *Not a material breach of that portion.* Requirements - must be possible to apportion the performances of the parties into corresponding pairs of part performances; must be proper to treat these pairs of part performances as “agreed equivalents.”
- C. Anticipatory Repudiation

- i. Excuse of nonperformance; gives right to stop performance and sue immediately.
- D. Later Agreement – 2 forms:
 - i. Novation
 - ii. Accord and Satisfaction
- E. Impossibility (UCC: Impracticability) – Frustration of Purpose

XXI. **Conditions**

- A. Condition defined → “promise modifier;” Promisor may insert conditions on his promise to prevent an immediate duty of performance from arising until the conditions are met. Failure of a contractual provision that is only a condition is *not a breach of contract*, but it discharges the liability of the promisor whose obligations on the conditional promise never mature.
- B. Conditions must be fulfilled (or waived) before contract can come into existence. ***To receive the benefit of a condition, you must put the condition into motion.***
- C. Interpretation of Provision as Promise or Condition → looks at ***intent of the parties***; takes into consideration:
 - i. Words of agreement
 - ii. Prior practices
 - iii. Custom
 - iv. 3rd-party performance
 - v. *Courts prefer promise in doubtful situations, to preserve the expectancy of the parties.*
 - 1. Preference for making the condition a promise is most significant where there has been **substantial performance**, because if the provision is treated as a *condition*, the nonbreaching party is completely discharged from her obligation; whereas if the provision is treated as a *promise*, the nonbreaching party must perform, although she may recover for the damage she has suffered as a result of the breach.
- D. ***Jacobs & Young v. Kent*** (Reading pipe case) → Where misused pipe was identical in quality and virtually indistinguishable from proscribed pipe and was not discovered until the house is completed, court held that replacement of the pipe would require substantial destruction of the house. Court awarded remedy because of *substantial performance* with defects of trivial or inappreciable importance. To tear down the whole house and rebuild at that point would be **economic waste**.
 - i. Courts generally recognize that an omission of a contract, both trivial and innocent, will sometimes be atoned for by the allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. While court recognized no general license for builder to substitute something ‘just as good,’ it recognized innocence here and said it is a question of degree to be answered by trier of fact if doubt persists.
 - ii. Factors for Consideration: ***Purpose to be served, desire to be gratified, excuse for deviation from the letter, cruelty of enforced adherence. Only then can it be determined if literal fulfillment is to be implied by law as a***

condition. In most cases, measure is the cost of replacement. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.

- E. What is reasonable expectation of the parties?
 - i. Determine whether the performance of the stipulation goes to the “**very root**” of the contract’s consideration. *If so, it is probably a condition rather than a promise.*
- F. Consequences of a Valid Breach:
 - i. Injured party may be entitled to regard her own performance obligations (if not yet completed) as discharged and suspended, AND
 - ii. Injured party would have a right to money damages based on the value of her contractual expectations now impaired or destroyed.

Classification of Conditions

- G. Express Condition – expressed in the contract; places the risk of the nonoccurrence of the critical event on one party rather than the other.
 - i. Language of expression – “if and only if,” “unless and until,” “if then.”
 - ii. Restatement §227 – in case of uncertainty w/ respect to intended effect of a condition, “*preferred*” interpretation is one that will reduce the risk of “*foreiture*.”
- H. Implied Condition – fairly inferred from evidence of the parties’ intention; i.e., their existence is determined by the process of contract interpretation. Usually referred to as “*implied-in-fact*.”
- I. Condition Precedent – condition that must occur ***before*** an absolute duty of immediate performance arises in the other party. Its failure to occur discharges the promisor from her own performance obligations but creates no claim for damages against the other party. *Burden is on P to prove b/c he claims duty hasn’t been performed.*
 - i. If the contract involves mechanical fitness, utility or marketability (e.g., a construction or manufacturing contract), the party’s performance is judged objectively, and thus must satisfy ***reasonable person standard***.
 - ii. If the contract involves personal taste or judgment (e.g., painting of a portrait), party’s performance is judged subjectively, and thus it must satisfy the ***particular party*** receiving performance, which requires a decision that is ***honest*** and in ***good faith***.
 - 1. Ex: Party’s Satisfaction as Condition Precedent → Painting made with a satisfaction guarantee. Providing perfect satisfaction is a condition which promisee has to meet, or “cause to occur” before promisor would be obligated to pay. Painter-promisee had no “duty” to provide perfect satisfactory to the purchaser-promisor and would not have been subject to a counterclaim for having failed to do so.
- J. Condition Subsequent – *cuts off* an already existing absolute duty of performance
 - i. Ex: A sells painting to B with condition subsequent that after the exchange A may borrow painting back to display for month provided that it is

properly protected (condition subsequent per B). B finds out its not protected, which violates condition subsequent – cuts off B’s obligation to allow A to retain the painting. *Burden is on D to prove b/c he claims duty that existed no longer exists.*

- K. Promise – If event is referred to is a *promise* and not a *condition precedent*, failure constitutes a breach. While the injured party then has a claim for damages, its own performance obligations are not discharged unless the breach is **material** and the party in breach makes no reasonable attempt to “**cure**” in a timely fashion. Where a timely cure is effected, the injured party may have damages, but its performance is due despite the initial breach.
- i. Ex: Seller who originally delivers wrong merchandise to buyer promptly substitutes right merchandise after being notified of its default. Seller’s breach is cured, buyer is obligated to pay for the merchandise, although buyer may recover damages for any loss occasioned by seller’s delay.
- L. Promissory Condition → term may be both a promise and a condition for the same party.
- i. Elements:
 1. *Requires good faith to put into practice.* Implicit duty to not hinder performing of condition. If not a good faith effort, then condition is “excused” – lack of good faith makes the condition unimportant; condition will drop out and party will be bound → now have an unconditional contract.
 2. *Totally out of anyone’s control.* Has nothing to do with good faith, but instead, protects against contingency that is beyond party’s control.
 - ii. Ex: A’s agreement to buy B’s house if he obtains sufficient financing.
 1. Condition – to obtain financing first
 2. Promise – to reasonably attempt to secure financing (good faith)
 3. If reasonable efforts are used, failure to obtain financing discharges any further duty on either side of the contract.
 - iii. Ex: Rental contract giving option to renew *if* you provide written notice.

M. **Oral Modification and Waiver of Condition**

- i. General Rule – contracting parties are free by later oral agreement to modify or terminate their existing obligations and adopt different terms that better suit their present interests. However, questions of duress, statute of frauds, and consideration may later be raised regarding this oral agreement.
 1. ***Parol evidence rule does not apply to oral agreements made after the written agreement, only before.***
- ii. Contractual requirement that change orders be in writing could be orally waived from time to time by the promisor’s agent; in the alternative, the parties could authorize the extras by oral agreements separate from their written agreement.

XXII. **Problems of Performance**

A. Three kinds of Covenants

- i. *Mutual and Independent* – either party may recover damages from the other for the injury he may have rec'd by breach of covenants in his favor and where it is no excuse for the defendant to allege a breach of covenants on the part of the plaintiff.
 - ii. *Conditions and Dependant* – performance of one depends on prior perf of another and therefore til this prior condition is performed, the other party is not liable to an action on his covenant.
 - iii. *Mutual conditions to be performed at the same time* – if one party was ready and offered to perform his part, and the other neglected or refused, he who was ready and offered has fulfilled his engagement and may maintain no action for the default of the other.
- B. Issue – whether such performance meets or falls short of the contractual standard
 - i. Significant & material grounds for nonperformance v. Trivial or merely formalistic grounds
- C. Constructive Conditions of Exchange (Condition and Promise) → Bilateral contracts are divided into 2 subclasses:
 - i. Contracts that contemplate a simultaneous exchange of performances. If performances can be rendered simultaneously, there are due at the same time.
 - ii. Contracts that assume a performance by one party in advance of, and as a condition to, performance by the other. *The performance of party's performance that under contract requires a period of time is due at an earlier time than that of the other party, unless contract or circumstances indicate to the contrary (Restatement §234(2)).* Suing party must show that she has at least tendered performance on her part, in order to maintain an action for breach against the other party.
 - 1. Ex: Employer-Employee Relationship → Where A and B contract for a service. A's rendering of a service on a certain date is a promise, and A's performance of that promise is a condition on B's duty to pay.
- D. When does a duty of immediate performance with respect to a conditional promise becomes **absolute**?
 - i. When the condition has been *performed*.
 - ii. When the condition has been *legally excused*.
- E. Substantial Performance – Results from immaterial breach. Distinction b/w conditions that go “to the essence” and conditions that appear to be “trivial and incidental” → in the latter, damages are given for “unsubstantial omissions.” Even a minor deviation will give the other party a right to recover damages for its nonperformance, but those damages may be negligible.
 - i. Where cost of replacement would be substantial (e.g., tearing down house in *Jacobs & Young*) → Difference in Value used as measurement of damages (sometimes ends up being nominal as in Reading pipe case)
 - ii. Though there may be dissatisfaction, that dissatisfaction is outweighed by the **economic waste** that would result. The pipe in *Jacobs v. Young* thus fell under the **diminished value rule**, where the market value of the overall contracted subject remains the same despite the error → *measure*

can only be applied where the contractor's breach was unintentional and constituted substantial performance in good faith.

- iii. **Where substantial performance does not apply** → advertising and brand-name preference are basic to the choices that consumers make, and whether prompted by real or imagined distinctions among competing products, such preferences obviously cannot be set aside in the name of substantial performance.

- 1. **Willful transgressor** – Cardozo argued that the willful transgressor will not be entitled to recover under the substantial performance doctrine. Restatement §241(e) says otherwise: A willful breach does not automatically bar recovery, but the motive of the breaching party is a factor to be considered in determining whether performance was substantial.

- F. **Constructive Conditions** – Created by court for reasons of justice. Notion of dependent promises, which are also conditions → conditions *read into* the contract by the court without regard to or even despite the parties' intention. Designed to achieve just results where one party's failure to perform (or even to tender performance) seemed to the court to constitute a sufficient justification for the other party's withholding of its performance in return. Goal – to ensure that both parties receive the performance for which they bargained. Usually referred to as *implied-in-law* conditions.

- i. **Constructive just means that court is going to construe the condition as if it was express.**
- ii. Conditions found as a matter of interpretation are *implied in fact*, while conditions found as a matter of construction are *implied in law*.

XXIII. Material Breach

- A. When performance of a duty under a contract is due, **any** nonperformance by the obligor is to be regarded as a **breach**. ***If material – nonperformance becomes very important; nonperformance of duty is a nonperformance of an EXPRESS OR CONSTRUCTIVE CONDITION***, which discharges the nonprotected party. ***Anything that is a material breach must have been a promissory condition.***
 - i. If the obligor's failure to perform is not "material" in character – a minor departure from plan-specifications by a builder, for example – the injured party is required to continue performance but may claim damages for whatever loss has been sustained.
- B. If the failure **is material**, the injured party may treat the failure as equivalent to the non-occurrence of a condition and, depending on the circumstances, either suspend her own performance or regard herself as having been discharged in full.
 - i. If it is reasonable to expect that the party failing to perform will "cure" her failure in a timely fashion, the injured party's duty to perform will be suspended until a cure takes place → **partial breach**, entitling injured party to damages for any loss incurred by reason of obligor's delay in effecting a cure.
 - 1. ***With immaterial breach, it is not a condition that it is breached, it is a mere promise.***

- ii. But if no cure is possible, or none is effected, then at last, the injured party may regard her obligations as discharged and is entitled to damages for **total (material) breach**.
- C. Questions to Ask in Determining Nature of Breach:
 - i. What constitutes a material breach as opposed to a nonmaterial failure to perform?
 - ii. When is the injured party justified in considering her own performance duties discharged rather than merely suspended?
 - iii. What happens if a party claims material breach and then turns out to be found otherwise by the court (i.e., partial breach)?
 - 1. If party accusing material breach suspends her own performance and courts finds that the breach was only partial, then it will be the accusing party who will have committed the first breach, and the other party will have a claim for contract damages.
 - a. The injured party's determination that there has been a material breach, justifying its own repudiation is fraught with peril.
- D. **Sackett v. Spindler** (Sale of Stocks case) → Whether a breach is total or partial depends on its materiality.
- E. **Total v. Partial Breach**
 - i. Total → breach is sufficiently serious to justify discharging the nonbreaching party from her obligation to perform the contract.
 - ii. Partial → does not discharge nonbreaching party, who must continue to perform his obligations under the contract.
 - iii. Difference → after a total breach, injured party is entitled to recover not only actual damages accrued as a result of the breach but also any future damages that will reasonably flow from the breach. A partial breach produces a right to damages only for the actual harm that has resulted to date, not for future harm.
- F. **Four-Factor Test for Materiality (employed by some fed courts)**
 - i. Whether the breach operated to defeat the bargained-for objective of the parties.
 - ii. Whether the breach caused disproportionate prejudice to the nonbreaching party
 - iii. Whether custom and usage consider such a breach material
 - iv. Whether the allowance of reciprocal nonperformance will result in the accrual of an unreasonable and unfair advantage.
- G. **Immaterial Breach Cost Measurement** – Diminution in value or cost to complete.

XXIV. **Anticipatory Repudiation**

- A. Observed by both UCC and Common Law.
- B. Occurs when one party clearly indicates that he will not perform *in advance* of the time performance is due (repudiating his contractual obligations), in effect, advising promisee that no such performance will be forthcoming.

- i. Could be expressed orally, in writing, or by conduct showing an unwillingness to perform.
 - ii. Even if the party does not actually repudiate his obligations, circumstances might give the second party reasonable grounds for “insecurity” about the ability of the first party to perform on time (e.g., financial difficulty or shortage of materials).
- C. **Repudiation must be manifested clearly and unequivocally.**
- D. Repudiation is **nullified by a retraction of the statement** if notification of the retraction comes to the attention of the injured party **before he materially changes his position in reliance** on the repudiation or indicates to the other party that **he considers the repudiation to be final.**
- E. Anticipatory repudiation of a promise to perform, no less than a failure to perform at the time performance is due, may constitute a total breach. Injured party has a claim for damages and *may assume that her own performance obligations have been discharged*, if repudiation is certain.
- F. Only applies to a bilateral contract with **executory (unperformed) duties on both sides.**
- G. Can occur as a conscious choice by D – **efficient breach** – where cost of performing would exceed damages costs. It is more efficient to breach contract.
- H. **Demand for Assurance**
 - i. Repudiation may be inferred from the promisor’s conduct even if no statement is made.
 - ii. UCC 2-609 (and Common Law) – promisee who has reasonable grounds for believing that the contract will be breached may “demand adequate assurance of due performance” from the promisor and suspend his own performance until such assurance is received. Failure to provide adequate assurance may be considered by the promisee to be the equivalent of a repudiation, in which event the promisee may sue for damages and regard her duties under the contract as discharged.
 - iii. A **seller** who has reasonable grounds for feeling insecure about the buyer’s ability to pay is entitled under UCC 2-609 to demand assurance, usually in the form of a letter from the buyer’s bank or an updated credit report, and to regard the buyer as having repudiated the contract if such assurance is not forthcoming.
 - 1. Party asking for credit must be doing so in good faith – can’t simply have changed its mind about extending credit to the buyer and wishing it not to go forward without additional security. Would otherwise be viewed as a back-door attempt to rewrite the terms of the original agreement. Thus, must be done in good faith – such as learning about other parties’ inability to pay in such a situation.
- I. Stems from the words or conduct of the promisor **unequivocally** indicating that he **cannot or will not perform when the time comes.** Statement must be positive.
 - i. *Mere expressions of doubt or fear will not suffice*, although they may establish prospective inability to perform, which allows the innocent party to suspend further performance on her side until she receives **adequate**

assurances that performance will be forthcoming. If she fails to obtain adequate assurances, she may be excused from her own performance and may treat the failure to provide assurances as repudiation.

- J. **Effect of Anticipatory Repudiation** – Nonrepudiating party has four alternatives:
- i. Treat the anticipatory repudiation as total and sue immediately.
 - ii. Suspend performance and wait to sue until the performance date.
 - iii. Treat repudiation as an offer to rescind and treat the contract as discharged.
 - iv. Ignore the repudiation and urge the promisor to perform (by urging promisor to perform, nonrepudiating party is not waiving the repudiation – can still sue for breach and is excused from performing unless the promisor retracts the repudiation).
- XXV. **Impossibility (UCC: Impracticability)**
- A. Exterior event that lies beyond either party’s direct control makes contractual duties impossible to perform → nonperforming party admits his nonperformance but argues that facts or events not known to him at the time the agreement was entered into, or that took place afterwards, made performance impossible or impracticable both actually and as a matter of law.
 - B. Assumes that an element of demonstrable fault is lacking.
 - C. Elements
 - i. Nonoccurrence of the event was a *basic assumption* of the parties in making the contract
 - ii. *Neither party* has expressly or impliedly *assumed the risk* of the event occurring
 - iii. If two elements fulfilled, then contractual duties are discharged. Either party may sue for rescission and receive restitution of any goods delivered, payments made, etc.
 - D. Exam Strategy – watch for time sequence → Questions to Ask:
 - i. Deal was made and later after deal, something happened
 - ii. What happened was totally unexpected
 - iii. If either party assumed the risk, then that is determinative. Under this excuse though, no one should have assumed the risk – totally unexpected.
 1. Analytical key is going to be understanding effect of post-contract occurrence on performance.
 - iv. What is relationship b/w unforeseen occurrence and occurrence?
 1. Is it impossible to rebuild a house that was 90% built when it burned down? Will be expensive, but that is not impossibility nor is it commercial impracticability.
 2. *If all that happens is that a later unforeseen occurrence makes performance more expensive, it is called the **tough luck rule***. Not legally excusable. Doesn’t have right relationship to performance, just makes it more expensive – not impossibility.
 - E. General Rule – Post-contractual change in market price of promised goods or services is generally an expected element in any forward exchange. The odds that

the buyer or the seller will turn out to be the advantaged party must be assumed equal, with the contract price representing something like a midpoint b/w the foreseeable high and low. Future events that “merely” affect the market value of the thing promised would almost always be presumed to have been anticipated by the parties when they settled on their terms initially, even if the particular event is both unexpected and impracticable or frustrating.

- F. Test for Impracticability – Party to perform has encountered:
 - i. ***Extreme and unreasonable difficulty and/or expense***; and
 - ii. This difficulty was ***not anticipated***.
- G. When impracticability works, society will likely be deprived of resources.
- H. ***Transatlantic Financing Corp. v. U.S.*** (Suez Canal case) → Canal was closed after war broke out in Europe, and made original contracted ship’s route impossible; ship had to go longer way, incurring add’l costs – gov’t rejected add’l cost and won suit. ***Court held for impossibility doctrine to be applied, there needed to be: (1) an unexpected occurrence; (2) a failure to have allocated risk of that occurrence by agreement or by custom; and (3) commercial impracticability with respect to performance of P’s obligations.*** Court said both parties knew there was a chance of a shutdown, but only P, as an experienced shipping company was in position to estimate the added cost of performing by alternate routes. Cost difference was 15%, which court considered nominal and thus not “commercially impracticable” from a purely financial standpoint.
 - i. Case is mostly viewed as a market-value case, and not impossibility → opposite of each other.
- I. ***Claim of impossibility is all or nothing.*** *Either the contract should be treated as wholly discharged (and a quantum meruit rate would be paid), or the contract should be viewed as binding and P should be limited to the contract price for its services.*

XXVI. Frustration of Purpose

- A. Occurs when both parties knew purpose of the deal and something happens after the deal that doesn’t necessarily affect ability to perform, but does affect *reason to perform*. Doesn’t make performance impossible, but *purpose has become valueless* by virtue of some *supervening event not the fault of the party seeking discharge*. Common law, no UCC provision.
- B. Elements
 - i. There is some ***supervening act*** or event leading to the frustration.
 - ii. At the time of entering into the contract, the parties ***did not reasonably foresee*** the act or event occurring.
 - iii. The ***purpose*** of the contract has been completely or almost completely ***destroyed*** by this act or event.
 - iv. The purpose of the contract was realized by ***both parties*** at the time of making the contract.
- C. ***Krell v. Henry*** (coronation parade case) → undebatable purpose of the agreement was to provide a view of the procession, but goal was frustrated by king’s illness, and thus contract’s foundation was eliminated. Performance effectively became impossible, hence, the contract was discharged.

- i. Court created a constructive condition stating that the rental was contingent on the staging of the parade.
- D. Once determining whether case is *impossibility* or *frustration of purpose*, still must decide which of the parties was intended to bear the risk that performance would, in fact, be rendered impossible by the particular event.
 - i. Ask *ex ante*, “How would the parties have decided to deal with the contingency in question if it had been discussed b/w them at the time they entered into the agreement?”

Question 6: Is anyone other than the two people who made the deal have legal rights because of the deal?

XXVII. Third Party Beneficiaries

- A. Contract b/w two people, both of whom intent at that very time that a 3rd party will benefit from the contract.
 - i. Ex: Life insurance contract
- B. Key Terms
 - i. 3rd Party Beneficiary – person who didn’t make contract who was intended to be benefited
 - ii. Promisor – party who has promised benefits to 3rd party beneficiary
 - iii. Promisee – other 3rd party
- C. Who can sue who?
 - i. Not all 3rd party beneficiaries can bring suit (thus recover). Intended 3rd party beneficiary can always bring suit against the promisor and/or someone who is not in contract. Otherwise, 3rd party beneficiary cannot sue.
- D. When there is a middle-man, two parties on the ends *do not have privity of contract*.

XXVIII. Assignment / Delegation

- A. *Everyone has a right to receive and a duty to perform under contract law*. You have a right to delegate your duties but you are always still responsible for it.

Assignment

- B. Situation in which two people make a deal, and later one of them transfers benefits of deal to someone else.
- C. Parties Involved:
 - i. Assignor – person who makes contract and later assigns rights
 - ii. Assignee – person who didn’t make contract but has right to sue
 - iii. Obligor – provides benefit
- D. Effect of assignment → assignee can enforce promise against obligor
- E. Major common law limitation – *cannot make assignment that substantially changes duties of obligor*.

Delegation

- F. Start with just contract between two people and then one party delegates his duties to third party. What are consequences if 3rd party does not do work?
 - i. First party can still sue party with whom he contracted.

- G. General Rule – *Delegations do not excuse; delegating party is still liable.*
- H. Limitations – While most duties are delegable, some duties are not.
 - i. If contract *explicitly says not delegable.*
 - ii. Subject matter of contract – if duty requires *special skills.*

Question 7: If there was a deal, how can the court enforce the deal?

XXIX. Promissory Restitution

- A. Resolves *unjust enrichment.*
- B. Elements:
 - i. Defendant-Promisor receives a material benefit from promisee.
 - ii. Benefit was at Plaintiff-promisee's expense.
 - iii. Promisor then makes a promise after benefit was received.
 - iv. Unjust not to enforce the promise (D would then be unjustly enriched).
- C. 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.

XXX. Specific Performance (Equitable Doctrine)

- A. Court orders someone to do what she agreed to do. Specific performance is an *equitable remedy*. On exam, must ask: *Is legal remedy adequate? Here, the answer is No.*
- B. *Employed only where legal remedies are proven inadequate.* Monetary damages are not sufficient alone when specific performance is ordered. Addresses the equity issue.
 - i. Real estate deals are best example of where monetary damage isn't sufficient – requires specific performance.
- C. Only if goods are unique will remedy be specific performance.
 - i. Art
 - ii. Antique
 - iii. Custom-made
- D. *Never do specific performance in employment or services contracts.*
 - i. Exception: Negative Specific Performance – where someone has agreed to work with you and perform the contract. Can prevent her from working for one of her competitors – injunctive specific performance.

XXXI. Money Damages

- A. There are no punitive damages awarded in contract law (neither under UCC nor Common Law).
- B. *Damages will either arise naturally or be created in contemplation of both parties at time of contracting (Hadley v. Baxendale Rule).*
- C. Liquidated damages (agreed damages) – Contract provision that tries to fix or set way of fixing damages. *General rule is that liquidated rules are recognized as valid way of fixing damages, so long as they are not hidden punitive damages.*

- i. Parties cannot by agreement set out amount of damages that would be a penalty because no punitive damages allowed. If they are hidden punitive damages, it is not allowed.
 - ii. **Exam Strategy:** If see damages agreed upon in the contract, must ask, “*Is it a penalty?*”
- D. **Expectation Damages** – general standard for damages.
- i. Goal – make the world as it would have been had the contract been properly performed; not trying to punish anyone.
 - ii. 1) arising naturally from breach itself – usual course of things (always contemplated) OR 2) reasonably supposed to have been in the contemplation – special circumstances must have been communicated.
 - iii. **Calculation: Expectation Damages = Direct + Incidental + Consequential (Special) Damages**
 - 1. Direct – arrive always on the face of the contract – lost profits, direct costs, etc.
 - 2. Indirect – costs associated w/ mitigating damages (e.g., when losing job, such costs incl. headhunter, resume mailing, etc.
 - a. Direct and indirect are always contemplated – consequential, though, are not always so.
 - 3. Consequential (Special) - Things that are consequence of the breach. Not in the contract but D knew or should have known were included in the contract.
 - iv. Either do expectation damages or reliance damages, but not both.
 - 1. Reliance damages are costs you incurred before the breach. You had incurred these costs because you were relying on the existence of a contract. *Goal of reliance damages is to put P in the place he would have been had there never been a contract.*
 - 2. Why would you not get reliance plus consequential damages? Expectation damages would have covered reliance damages.
 - v. **Three Steps for Calculating Expectation Damages:**
 - 1. What would P now have if contract had been properly performed? What were legitimate expectations?
 - 2. What does P actively have?
 - 3. What does it take to get P from what he now has to what he would have had if contract had been performed?
 - vi. In service contracts – can obtain damages for *cost incurred for materials and labor, etc.* prior to instruction to stop or breach plus full profit they calculated beforehand.
 - vii. **Limitations** on Expectation Damages:
 - 1. Rule re: Avoidable Damages – avoidable damages are not recoverable. *Obligation to mitigate damages, whenever possible.* Can also have economic waste of resources of people – obligation to mitigate damages. Fact patterns:
 - a. Agreement followed by a breach, followed by continuing performance by the non-breaching party. Contract to build bridge, breach by bridge-owner – “stop building bridge, im

- canceling contract, I'm breaching. I'm not going to pay you." Builder continues. How much can be recovered?
- i. Was that breach clear and unambiguous? Is it unequivocal and certain?
 - ii. Is this a situation in which it can be fairly argued that continuing to perform doesn't increase damages but decreases damages?
- b. Employment contract context – argument isn't that P ran up damages, but argument is that P could have gotten a comparable job. Prof. under contract for \$100K with law school. Wrongfully fired.
- i. Is it *comparable* employment to reduce damages?
 1. Shirley Maclaine – had agreement to star in musical and was offered a different play instead when production postponed. Was this comparable?
2. **Rule of Consequential (Special) Damages** – damages that don't arise in every situation – something else bad happened that deserves damages; consequential damages are *recoverable only if foreseeable by both parties at time of contract (or in contemplation of contract)*.
- a. *Hadley v. Baxendale* → Breach of contract by transport company. Fixing of mill took too long – mill was closed and lost profits. Foreseeable damages must be communicated – damages are special to situation. *Because you breached contract, something else bad happened. Can recover only if in contemplation of both parties at time of contract.* This is an exception or limitation of expectation damages – involves some special aspect, had to be in contemplation of parties.
 - b. Parties themselves set rules for conduct. Opportunity of choice – when one party breaches, the other party can only be liable for that risk assumed in the bargain, not for some unknown risk outside the negotiation.
3. **Economic Waste Exception** – difference in market value v. cost of doing the deal
- a. Diminution of value – economic waste of the type that calls for application of this rule generally entails defects in construction which are irremediable or which may not be required without a substantial tearing down of the structure.
 - b. Work done on land – when this is over, I'll restore the land. Unrestored land has same market value as restored land. Deal was when I leave, land will be completely restored. Real estate appraiser says if land had been restored, would now be worth 100. Not restored yet – only worth 80. D argues that difference is diminution in value. P says I was

expecting land to be restored. It will cost me 75 to restore my land. Sure my value will only increase a few dollars, but I contracted for land to be restored. Is it difference in market value or cost of doing the deal?

XXXII. **Overall Exam Approach**

Issue Spotting

- A. Who is plaintiff?
- B. Who is potential defendant?
- C. What is cause of action?
- D. What does plaintiff want?
- E. What is plaintiff entitled to it?
- F. What might be counter-actions or defenses?
- G. What ought to be argued back and forth so that one side can win and the other side can win?
 - i. Never was even a contract – no meeting of minds.
 - ii. No promise was made. No consideration for promise.
 - 1. If promise was made, then offer expired.
 - iii. No evidence of contract under SOF.

Intent of Parties

- H. What was intent of the parties? Was there an intent to be bound?
- I. When was the contract formed?
 - i. Three requisite elements to Contract
 - 1. Was there offer and acceptance?
 - 2. Did parties have capacity?
 - 3. Does contract have consideration?
 - a. If not, is there reliance on the contract, even in the absence of consideration, i.e., Promissory estoppel?
- J. Was contract formed before written? Mere memorialization coming later?
- K. Does SOF apply?

Damages

- L. If injury, what are damages?
 - i. Expectation
 - ii. Reliance
 - iii. Restitution
 - iv. Specific Performance
 - v. Liquidated Damages