Prof David Hoffman using Contracts by Randy E Barnett

Introduction to Contract Law

1. Assumpsit - an express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another; also, a common-law action for breach of executory harm
2. *Shaheen v. Knight*
    a. F: man contracts with Dr. for vasectomy, but has child. Sues for damages of rearing & educating
    b. Not entitled to damages, because, Shaheen wants to keep child w/ all fun, joy and affection that comes w/ it. Benefits outweigh the harm, so no damage. Awarding damages is against public policy, if damages awarded for normal healthy birth, more damages would be sought.
    c. Dr. and patient can contract for a particular result; if not obtained patient has cause of action
        i. Normally doctors can't warranty care, but this is a special contract cuz it was expressed.3
        ii. Warranty: promise that a proposition of fact is true; a garauntee
        iii. Court says this is a breach, it is in assumpsit
3. R.2d of Contracts
    a. §1: contract: promise or set of promises, the breach of which the law gives remedy
    b. §2: promise: intention to act/not act, made in a way so promisee would feel commitment made
    c. §3: agreement: manifestation of mutual assent between parties
        i. Bargain: an agreement to exchange promises or performances or a combination of the 2
    d. §4: promise made by stated orally or written, or may be inferred wholly or partly from conduct
4. *In re Baby M*
    a. F: family contracted with surrogate to have child because wife had MS, which pregnancy Exacerbates
    b. Best interests will be served by placing baby in father's custody
    c. Stated contract would have been enforceable and surrogate breached by not giving up the child or surrendering her parental rights. Regardless of contract, must follow child's best interests
    d. Parens Patriae: court has a duty to protect the child not the contract.
5. *In re Baby M 2*- surrogacy contracts are illegal and invalid unless otherwise addressed by legislature
    a. Against pub. Policy: kid should be brought up by both parents; the right of natural parrents are equal but contract destroy's mom's rights; money can't buy labor, love or live, evil to do so
    b. Can't contract out of public law (Payment after child surrendered, so not for service.)
6. Justice Holmes: contract is a promise to pay damages or perform
    a. Breach isn't bad, its just exercising an option you always have to pay damages.

Damages for Breach

7. *Hawkins v. McGee* - hairy hand case

a. F: Hawkins had severe burn on hand from wire 9 years prior. McGee sought out Hawkins for opportunity to try skin grafting, said "I guarantee to make the hand 100% perfect"

b. Judge plaintiffs external conduct, not internal. Any doubts defendant had are immaterial if he said he guaranteed a perfect result and the plaintiff relied on that promise.

8. R.2d of Contracts §347: Measure of Damages in General:

a. An injured party has a right to damages based on his expectation interest as measured by:

i. Loss in value from other party's failure to perform or deficient performance, plus

ii. Any other loss, including incidental or consequential loss, caused by the breach, less

iii. Any cost or other loss he avoided by not having to perform.

iv. Damages = Loss in Value + Other Losses - Costs Associated - Loss Avoided

9. Fuller & Purdue

a. Damages

i. Expectation: getting the benefit of the bargain (benefit - cost), normal measure of contract damages

1. *Nurse v. Barns* - rent only 10l, but damages 500l because of stock laid in and expected profits

2. *Injured party is put in position they would have been if contract had been perfromed*

ii. Reliance: what injured party did relying on the contract & changing position, but D not enriched

1. Reimburse costs incurred to put promisee back in position if promise hadn't been made

iii. Restitution: when the defendant is unjustly enriched, the plaintiff gets back what was given.

b. Wholly executory agreement - neither party has acted, but there has been a breach

i. Need a way to recover because most contracts don't have provision for damages or specify remedies - encourages people to enter into future contracts

ii. To protect reliance (hard to quantify) dispense with proof and give expectation as remedy

iii. By entering into contract you agree to allow coercive power of the state to enforce

10. UCC §1-103. Supplementary General Principles of Contract Law Applicable

Unless contracted out of, the following are defaults: the law merchant and law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause.

11. §2-102. Scope; Certain Security and Other Transactions Excluded from this Article

Unless the context otherwise requires, the Article applies to transactions in goods; it doesn't apply to a contract intended to operate only as a security transaction nor does it impair or repeal any statute regulating sales to consumers, farmers or other specified buyer classes.

12. §2-105. Definition of Goods

a. Goods: means all things that are movable other than the money to be paid, investment securities, and things in actions; Including things attached to realty as described in goods to be severed from realty (§2-107; ie crops, cattle)

b. What if contract mixed? look at predominant purpose (based on parties intent, monetary value)

13. §2-106. Definitions

a. Unless context otherwise requires, contract and agreement are limited to those relating to the present and future sale of goods.

b. Contract for sale: includes both present sale of sale of goods and contract to sell goods in future

c. Sale: consists in the passing of title from the seller to the buyer for a price

d. Present sale: a sale which is accomplished by the making of a contract

14. *Tongish v. Thomas* - Tongish agreed to sell seeds to Coop;price doubled,Tongish breached to sell to Thomas

a. Trial court follows UCC §1-106(put injured party in as good of a position if no breach) and awards $455.51, 82,820lbs x $0.55/hundred weight handling fee

b. Appellate court follows UCC § 2-713(difference between contract price and market price at the time buyer learned of breach, plus any incidental/consequencial damages, less expenses saved)

c. Supreme Court:Upholds appellate court decision

i. When two statutes conflict, they should be harmonized if possible.

1. If can't harmonize, the specific statute controls the general statute, unless it appears the Legislature intended the general statute to be controlling

ii. Tongish sold hope of market going up to Coop and in exchange got security (price floor)

1. Can only get security or hope, not both. He shouldn't be permitted to back out

iii. Sometimes, via damages, a party is in a better position than if contract was performed

1. Fits in with preventing unjust enrichment of the promisor.

15. UCC §2-712: Cover; Buyer's Procurement of Substitute Goods

a. After a breach a buyer may reasonably purchase or contract to purchase goods in substitute for those due from the seller.

b. Buyer may recover the difference between the contract price and the cover cost plus any incidental/consequential damages (§2-715) less any expenses saved because of seller's breach

c. Failure to effect cover does not bar buyer from other remedy

16. §2-715: Buyers Incidental and Consequential Damages

a. Incidental damages: damages reasonably incurred in inspection, receipt, transportation, and care and custody of rejected goods, cover expenses, and other expense incident to the breach

b. Consequential Damages:

i. a) any loss resulting from requirements and needs which seller had reason to know of at the time of contract, which couldn't be reasonably prevented by cover or otherwise; and

ii. b)injury to person or property proximately resulting from any breach of warranty

17. §2-717: after notifying seller, buyer may deduct all or any part of damages from the price still due

Limitations on damages: Remoteness or Foreseeability of Harm

18. *Hadley v. Baxendale* - plaintiff was delayed when courier negligently delayed delivery of crankshaft
    a. Hadley Rule: Breaching party is liable for damages reasonably foreseeable when contracting
        i. Here not objectively foreseeable: Numerous other scenarios possible and defendant not specifically told mill couldn't operate until a new rod was received.
        ii. This is a default rule, but can be contracted out of.
19. *Hector Martinez v So. Pac. Trans. Co*.- shipped dragline to TX. Delivered 1mo late, damaged en route
    a. Machines have intrinsic value (use) and interest values (sale) both of which harmed by damage
    b. Doesn't have to be "the most foreseeable end", just has to be "a foreseeable end"
20. R.2d of Contracts §351: Unforseeability and Related Limitations on Damages
    a. Damages are not recoverable for unforeseeable losses at time contract is made
    b. A loss is foreseeable if it occurs in the ordinary course of events or as a result of special circumstances that a breaching party had reason to know
    c. Courts may limit damages for foreseeable loss to avoid disproportionate compensation
21. *Morrow v. 1st Nat'l Bank* - coin collectors promised they'd be notified when boxes were available
    a. Tacit agreement rule (only in Arkansas) : if it is not reasonable to assume that the party would implicitly agreed to be bound by more than ordinary damages, then no agreement was made.

Limitations on damages: Certainty of Harm

22. *Chi. Coliseum Club v. Dempsey* - contract w/ Dempsey to fight Wills, Dempsey Repudiated
    a. To be liable for damages, damages must be reasonably foreseeable and reasonably certain
    b. When can't determine profit, can't determine expectation, so use reliance (more concrete)
23. *Winston Cigarettes* - fear of jury randomness, juries may have undue bias toward one party.
24. R.2d of Contracts
    a. §346: Availability of Damages
        i. An injured party has a right to damages for a breach by a party against who the contract is enforeceable unless the claim has been suspended or discharged
        ii. If the breach caused no loss or the loss cannot be proved, nominal damages are awarded
    b. §349: Damages based on Reliance Interest.
        i. An injured party has a right to reliance damages including expenditures in preparation for performance or in performance, less any loss that would occur if contract was performed
    c. §352: damages can't be recovered beyond what evidence establishes as reasonably certain
25. *Anglia Television v. Reed* -TV play's lead actor repudiates at last minute; production must be abandoned
    a. Awards pre-contract expenditure damages citing reasonable contemplation creates liability

i. Def: The breaching individual would be reasonably aware of prior expenditure and could have reasonably seen that such expenditures would be wasted by breach

26. Kelly's Phantom Reliance - treat expectation as everyone breaks even ($0), then show people would either make or lose money

27. *Mistletoe Express v Locke* - start-up bought trucks and built ramp in reliance on 1 yr delivery contract

a. If breaching party doesn't prove non-breaching party loses money, award damages as if no loss

Limitations on damages: Avoidability of Harm

28. *Rockingham County v Luten Bridge* - Co board repudiated, notified Luten who built bridge anyway

a. Non-breaching party's remedy upon notice is to sue for damages from breach, not increase the penalty for the breaching party.

29. *Shirley Maclaine Parker v. 20th Cent. Fox* - bloomer girl got cancelled, offered role in western instead

a. Must mitigate damages by accepting comparable employment; not required to seek different or inferior employment to mitigate damages

i. Majority: since defendant didn't prove western wasn't different or inferior, find for Plaintiff

30. Posner -

a. Offers economist view of liquidated damages

i. Pros: don't sue each other when you know what damages are; pareto efficient: no party is worse off if the liquidated damages is enforced, one may be better off

ii. Cons: could over deter breach, but Coase says parties will work out an agreement that gets the most effienct outcome no matter what (will bargain around liquidated damages)

b. As long as people can negotiate without costs, they will negotiate

i. If transaction costs are high, they won't bargain.

c. Penalty clauses are good between sophisticated parties because it shows that the parties are committed to the contracts

31. Prof Hoffman - liquidated damages is the only way to recover for loss of reputation

32. R.2d of Contracts § 350: Avoidability as a Limitation on Damages

a. Damages aren't recoverable if loss could've been avoided without undue risk, burden, or humiliation, except if the injured party made reasonable but unsuccessful effort to avoid loss

33. UCC §2-708: Seller's Damages for Non-Acceptance

a. Damages for non-acceptance or repudiation by the buyer is difference between market price at the time and place for tender and the unpaid contract price plus incidental damages less expenses saved in consequence of buyer's breach

b. If the above measure is inadequate, then the measure is profit from full performance plus incidental damages, allowance for costs reasonably incurred, and credit for resale proceeds

34. §2-710: Seller's incidental damages include any reasonable charges, expenses or commissions incurred in connection with return or resale of the goods resulting from the breach

35. §2-718: Liquidation or Limitation of Damages

a. A liquidated damages clause must be reasonable in light of the anticipated or actual harm of the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility

of otherwise obtaining an adequate remedy. Unreasonably large liquidated damages are void as a penalty.

b. When the seller rightfully withholds delivery of goods because of buyer's breach, buyer may get restitution for the amount his payments exceed a) the amount the seller is entitled to by a liquidated damages clause or b) 20% of the total value of buyer's contractually obligated performance or $500, whichever is smaller

c. If seller received payment in goods, their reasonable value or proceeds from resale shall be treated as payment for the above purposes. If seller has notice of breach before resale, his resale is subject to conditions in §2-706

36. §2-719: Contractual modification or Limitation of Remedy

a. Subject to subsections 2 and 3 and the proceeding section on liquidation and limitation of damages

i. Agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable (such as repairing or replacing non-conforming goods, or limiting remedies for return of goods)

ii. Resort to the provided remedy is optional unless it is expressly agreed to be exclusive

b. If situation causes exclusive remedy to fail its essential purpose, remedy provided under this act

c. Consequential damages may be limited or excluded unless it would be unconscionable; such limitation is prima facie unconscionable regarding consumer goods, but not commercial goods.

Contracting Around the Default Rules of Damages: Liquidated Damages, Penalty Clauses & Arbitration

37. *Wassenaar v Towne Hotel* - Wassenaar had a contract w/ liquidated damages provision that gives him his salary for the unexpired term of the contract; terminated 21 before contract expiration

a. Met the reasonableness test (clause is reasonable in totality of circumstances).

i. See UCC §2-718 & R.2d 356

b. Avoidability/mitigation of damages was contracted out of with liquidated damages clause

38. R.2d of Contracts §355: punitive damages aren't recoverable for breach of contract unless breach is also a tort for which punitive damages are recoverable

39. §356: Liquidated Damages and Penalties

a. Damages may be liquidated only to the amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. An unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

b. A term in a bond providing for a penalty for non-occurrence of the condition of the bond is unenforceable on public policy grounds to the extent the amount exceeds the loss.

40. *Lake River Corp v. Carborundum* - don't want penalty clause because it discourages efficient breach

a. Posner also says that's paternalistic

41. *Garrity v. Lyle Stewart, Inc.*- author went to arbitration, got punitive award for publisher intimidation

a. Arbitrator can't give punitive award because punitive awards are only given when a public right has been determined violated by the courts, because coercion is a State controlled power
    i. Can't have explicit punitive damages via arbitration clause

42. *Willoughby Roofing v Kajima International* - Federal Arbitration Act §2 withdrew the prohibition on arbitrator awarded punitive damages if the parties expressly confer such power on the arbitrator
    a. If Fed. Arbitration Act applies, arbitrators get as many remedies as possible

Other Remedies and Causes of Action

Specific Performance and Injunctions

43. *Loveless v. Diehl* - renters have option to buy land, but can't afford it. Agree with 3rd party to pay for the land so they can recoup some of their improvements, but the current owner interferes
    a. Specific performance is default for land contracts - discourages breach, reducing contract costs

44. *Cumbest v. Harris* - uses sound system as collateral, but debtor evades when trying to repay loan
    a. Remedy at law (money) would be insufficient, so orders remedy at equity (specific performance)
    b. Specific performance when:
        i. No adequate remedy at law
        ii. Articles or property are of peculiar, sentimental or unique value
        iii. Where the item is scarce or not readily attain able

45. UCC §2-716. Buyer's right to Specific Performance or Replevin
    a. Specific performance may be ordered when the goods are unique
    b. Decree for specific performance may include terms and conditions the court deems just

46. Schwartz responds to Posner's claim that post breach negotiations reduce risk of breach
    a. In paying money damages, there is a risk of undercompensation because of opportunity cost, lack of proper substitutes, and early obsolescence.
    b. Says you don't negotiate when cover costs are the same. Award specific perfromance to avoid negotiation and deadweight loss when costs aren't the same.
        i. Promisee unlikely to require specific performance unless money damages are actually inadequate because of the increased cost of litigation, burden of supervision, and probability of substandard performance
        ii. Promisee knows more about his transaction than the court does

Remedies for Breaching Employment Contracts

47. *Case of Mary Clark* - black woman wants to breach voluntary contract to be servant for 20 years
    a. Court says its slavery to be forced to perform a labor contract, even if equal bargaining power

48. *Ford v Jermon* - actress refuses to perform. Ford wants to bar her from acting at other theaters
    a. Can't bar an actress from acting elsewhere , she could make money in other endeavors, so we would have to bar her from all work. That would be slavery
    b. Performances rendered grudgingly do not fully embrace the art and therefore undesirable.

49. *Duff v. Russell* - opera singer quits mid season and goes to work for competitor; says tights unhealthy
    a. it is difficult to replace an employee with special skills and uniqueness, so have special rule of injunction against these people going to work elsewhere
        i. Lay people think free labor exists, can quit and go work where, so have to contract around it to include this special rule
50. *Dallas Cowboys Football Club v. Harris* - football player retired after 1yr contract up, contract had a clause to renew after 1yr even if retired and returned. Assigned contract to other team who sued
    a. Employer can obtain injunction against an employee who has unique skills that are difficult or impossible to replace
        i. Injunctions must be reasonable in time, scope, and type of work being barred
        ii. California didn't enforce restrictive covenant, so people could move between companies
            1. Very successful in silicon valley
51. *Bailey v. Alabama* - Bailey enters employment contract $15 advance, $10.75/mo. Quits after 5 weeks
    a. It is unconstitutional to impose service or labor to liquidate damages for breach of contract

Restitution For Breach of Contract

52. *Bush v. Canfield* -defendant won't deliver & kept $5k advance, claims P would have sustained loss
    a. Restitution sometimes available to discourage ill gotten gains and demotivate inefficient breach
        i. Similar to Tongish: if we reward breachers they're not going to perform in the future
53. R.2d of Contracts
    a. §371: Restitution awards may be determined by the cost to the unjustly enriched party to obtain what he received elsewhere or increase in value of his property or interests increased
    b. §373: An injured party is entitled to restitution for any benefit he conferred on the breaching party by way of part performance or reliance.
        i. If fully performed and the breaching party's remaining performance is to pay a definite sum of money, then the injured party has no right to restitution.
54. *Britton v. Turner* - 1yr employment contract for $120, only works 8.5 mos. and sues for portion completed
    a. Immutable rule: get paid for portion of service provided by employee & accepted by employer
        i. Immutable because clause stating you work the full time specified or get nothing is penalty clause & don't want involuntary servitude
55. *Martin v. Little, Brown, and Co.* - found plagiarism and notified publisher, offered to and sent in book
    a. When a service is requested, it is implied the requestor will pay unless otherwise indicated
        i. When service is voluntarily given, an intention to pay cannot be inferred
            1. It doesn't seem fair to be required to pay when you didn't ask
            2. Floodgates

3. Monetizing it might undermine it because people wouldn't help if can't get paid
4. Might be held liable to assisted people because you would be compensated
5. People might get stuck in contracts they don't expect

MUTUAL ASSENT

Reaching Mutual Assent

Reaching an Agreement

56. *Embry v. Hargadine, McKittrick Dry Goods* - Embry badgered boss about contract renewal
    a. Expressed words and actions used trump internal intentions as to whether a contract is made
    b. If a person's conduct is such that a reasonable person would understand it as assent to the terms proposed by the other party, and that other party so believes, then contract is made
57. *Lucy v. Zehmer* - drunk wrote contract on back of receipt, claimed it was a joke; court enforced it
    a. The appearance of the writing, the terms included, and circumstances surrounding its creation suggest it was a serious transaction; Zehmer warranted in believing it was a serious contract
58. R.2d of Contracts:
    a. §17 - a bargain in which there is manifestation of mutual assent to the exchange and a consideration is required for contract formation unless special rules in §§82-94 apply
    b. §18: manifestation of mutual assent requires each party make a promise or begin performance
    c. §19: Conduct at manifestation of assent
        i. May be made wholly or partly by written or spoken words or by acts or failure to act
        ii. Conduct is not manifestation of assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer his assent from his conduct
        iii. Conduct may manifest assent even though no assent is given. The contract may be voidable if assent given because of fraud, duress, mistake, or other invalidating cause
59. *Nebraska Seed v. Harsh* - Harsh sent letter "had about 1800 bushels"; Seed Co accepted but got none
    a. An invitation to make an offer to proposer, is not an offer turned into agreement by acceptance
    b. Be careful not to construe letter, intended to be only preliminary negotiation, as an agreement.
        i. Case predates UCC, but if decided under it, different outcome in this case
            1. UCC intended to replicate the existing commercial practice of merchants entering into contract with indefiniteness that they thought were binding until court case
            2. UCC turned actual merchant practice into legal rules, rejected common law rule

60. *Leonard v. Pepsico* - an advertisement is an invitation to make an offer to the advertiser
    a. When its definite can be offer (fixed amount of items, price,date/time,"first come, first served")
    b. Rule: you are presumptively reliable unless you prove it is funny
61. R.2d of Contracts
    a. §22: manifestation of mutual assent normally takes the form of offer by one party followed by acceptance by the other(s), and may be made even though neither offer nor acceptance can be identified and even though moment of formation cannot be determined.
    b. §24: offer - manifestation of willingness to enter a bargain, made to justify to another person in understanding that his assent to that bargain is invited and will conclude it.
    c. §26: Preliminary negotiations- manifestation of willingness to enter into a bargain is not an offer when the recipient knows or has reason to know the person making it doesn't intend to conclude a bargain until he has made further manifestation of assent
    d. §29: To whom an offer is addressed
        i. The manifested intention of the offeror determines who has the power of acceptance
        ii. An offer may create a power of acceptance in a specific person, group, or class, or in anyone or everyone who makes a specified promise or renders a specified performance.
    e. §33: Certainty
        i. Even if manifestion of intention is intended to be understood as an off, it cannot be accepted to form a contract unless the terms of the contract are reasonably certain
        ii. Terms are reasonably certain if a basis for determining breach and remedy is provided
        iii. The fact that one or more terms are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or acceptance
62. UCC
    a. §2-204:Formation in General
        i. A contract for a sale of goods may be made in any manner sufficient to show agreement
        ii. An agreement sufficient to make a contract may be found even if the moment of its creation is undetermined
        iii. Even if terms are left open, a contract for sale doesn't fail for indefiniteness if the parties intended to make a contract & there is a reasonably certain basis for appropriate remedy
    b. §2-206: Offer and Acceptance in Formation of a contract
        i. Unless otherwise unambiguously indicated by the language or circumstances
            1. An offer shall be construed as inviting acceptance in any manner and by any manner reasonable in the circumstances
            2. An order to buy goods for prompt or current shipment invites acceptance by a prompt promise to ship or by prompt shipment of conforming or non-conforming goods, but a shipment of non-conforming goods doesn't constitute acceptance if the seller tells the buyer the shipment is only an accommodation to the buyer
        ii. Where the beginning of performance is a reasonable mode of acceptance, an offeror not notified within a reasonable time may treat the offer as having lapsed before acceptance

c. §2-305: Open Price Term
    i. If the parties so intend, a contract can be concluded without a fixed price, and the price is a reasonable price at the time of delivery if 1)nothing is said as to price; 2)the price is left to be agreed and the parties fail to agree; 3) the price is fixed to a market or standard
    ii. A price to be fixed by a seller or buyer is meant to be fixed in good faith
    iii. When a price fails to be fixed through one party's fault, the other may fix a reasonable price or treat the contract as cancelled
    iv. When parties intend not to be bound unless the price is fixed, and its not fixed, there is no contract. In such case, the buyer must return any goods or their reasonable value and the seller must return any portion of the price paid on account

d. §2-308: unless otherwise agreed the place for delivery is the seller's place of business or, if he has none, his residence but if the parties know the goods are in some other place, that place is the place for delivery. Title documents may be delivered through customary banking channels

e. §2-309: Absence of Specific Time Provisions; Notice of Termination
    i. Time of shipment, delivery, or other action, if not agreed upon shall be a reasonable time
    ii. When a contract provides for successive performance but indefinite in duration, it is valid for a reasonable time; unless otherwise agreed, either party may terminate at any time
    iii. Except if an agreed event happens, the other party must receive reasonable notification of termination; agreement dispensing with notification is invalid if its unconscionable

f. §2-310: Open time for payment or running of credit; Authority to ship under reservation
    i. Unless otherwise agreed
        1. Payment is due at the time and place at which the buyer is to receive the goods
        2. If the seller is authorized to send the goods ship them under reservation and tender documents of title, but buyer may inspect the goods after arrival before payment is due, unless such inspection is inconsistent with the contract terms
        3. If delivery is authorized and made by way of documents of title otherwise than subsection (b), then payment due at time and place buyer receives the documents
        4. When seller is required or authorized to ship goods on credit, the credit period runs from time of shipment, post-dating the invoice or delaying it will delay the start of the credit period

63. *Empro v. Ball-Co* -both signed asset purchase agreement,but Ball-Co attny noted clarifications needed
    a. Easterbrook rule: letter of intent not binding unless objective ev. the parties wished it to be
        i. Good for economy to have non-binding preliminary negotiations
            1. Check facts (make sure machines work and assets properly valued)
            2. Seller may want confidentiality agreement incase buyer doesn't go through

64. Knapp: at some point parties have a duty to go forward with negotiations in good faith.

Revoking an Offer

65. *Dickinson v Dodds* - told property was sold to someone else,so rushed to RR but Dodds said too late
    a. Need consideration to keep the offer open, without consideration there is no contract
    b. If offeree receives information about sale to another from a reliable source, then it's revocation
    c. Offeror can always determine the way in which the offer must be accepted
66. R.2d of Contracts
    a. §25: an option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer
    b. §35: an offer gives the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer. Such power is terminated by way listed in §36
    c. §36: An offeree's power of acceptance may be terminated by
        i. Rejection or counter-offer by the offeree
        ii. Lapse of time
        iii. Revocation by the offeror
        iv. Death or incapacity of the offeror or offeree
        v. Non-occurance of any condition of acceptance under the terms of the offer
    d. §37: the power of acceptance under an option contract is not terminated by rejection or counter-offer, revocation or death or incapacity, unless requirements for the discharge of a contractual duty are met.
    e. §43: power of acceptance is terminated when offeree acquires reliable information that the offeror has taken definite action inconsistent with an intention to enter into the contract
67. UCC §2-205: an offer by a merchant to buy or sell goods in a signed writing with terms assuring it will be held open is not revocable, for lack of consideration, during the time stated or, if not time is stated, a reasonable time not to exceed 3 months.

What is an Acceptance

68. *Ardente v. Horan* - Horan offered to sell house, Ardente sent letter accepting but wanted furniture
    a. Conditional acceptances by offeree is not sufficient to seal the deal for a contract. Offerors cannot be bound by conditional acceptances.
    b. Mirror Image Rule: mode of acceptance has to reflect mode of offer
69. R.2d of Contracts §61: an acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the change or addition

Acceptance by Performance or Unilateral Contracts

70. *Carlill v Carbollic Smoke Ball* - ad offering a reward if performance and certain result occurred
    a. When an offer is made to all the world, contracts are made w people who perform in faith of ad
    b. When offering a reward to people who perform certain conditions, notification is not needed until all the conditions are performed.
71. R.2d of Contracts
    a. §54: Acceptance by Performance; Necessity of Notification to Offeror
        i. If an offer invites acceptance by rendering a performance, no notification is needed

ii. If an offeree who accepts by performing has reason to know the offeror has no means of reasonably learning of the performance, offeror's contractual duty is discharged unless:
1. The offeree notifies the offeror of acceptance
2. The offeror learns of the performance within a reasonable time
3. The offer indicates the notification of acceptance is not required

b. §30: An offer may invite or require acceptance to be made by an affirmative answer in words, by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance. Unless otherwise indicated by the language or circumstances, an offer invites acceptance in any manner or medium reasonable

c. §32: When in doubt, an offer is interpreted as inviting acceptance by promising to perform or by rendering performance, as the offeree chooses.

72. *Petterson v Pattberg* - offered reduce amount for early repayment, went to pay but wouldn't accept

a. Created a non-offer (cuz Pattberg didn't possess the loan anymore) which cannot be accepted

b. Unilateral contract may be withdrawn up until the very last act is performed
i. Money isn't a payment until it is accepted

73. R.2d of Contracts

a. §45: Option Contract Created by Part Performance or Tender
i. When an offer invites acceptance by rendering a performance and doesn't invite promissory acceptance, an option contract is created when performance begins
ii. The offeror's duty of performance under any such option contract is conditioned on completion of the invited performance in accordance with the offer terms.

b. §62: if offer invites the choice of acceptance by promise or performance, beginning the invited performance is an acceptance, which operates as a promise to render complete performance

Acceptance by Silence

74. *Hobbs v Massasoit Whip* - last shipment of eelskins kept until ruined, no notice of intent not to accept

a. Since preexisting continuing contract, silence coupled with retention indicates accepted

75. R.2d of Contracts §69: Acceptance by Silence of Exercise of Dominion

a. Silence or Inaction by an offerees operates as acceptance in the following cases only:
i. Offeree takes the benefits of offered services with reasonable time to reject them and reason to know compensation was expected
ii. Offeror stated or gave reason that assent may be manifested through silence or inaction, and offeree intends to accept through silence or inaction
iii. If previous dealings or otherwise make it reasonable that notice be given if not accepting

b. If offeree acts inconsistently with the offeror's ownership of offered property, offeree is bound by the terms of the offer unless they are manifestly unreasonable.

E-Commerce and Mutual Assent

76. *Specht v Netscape* - license on screen below download button, unless scroll down wouldn't know it

a. An offeree is not bound by inconspicuous contractual provisions of which he is not aware.

77. Register v. Verio - Verio used bot to query information that included restrictions of use; violated rest.
    a. When an offeree takes a benefit with knowledge of terms, taking of benefit equals acceptance

Discerning the Agreement

Interpreting the Meaning of Terms

78. *Raffels v Wichelhaus* - two boats called "Peerless" sail from Bombay; contract for cotton on "Peerless"
    a. Since there is not meeting of the minds as to which ship, so no mutual assent and no contract
    b. Restatement: party that knows of multiple meanings and the other party's meaning must disclose what meaning the knowing party wants
        i. Otherwise party that knew only one meaning gets their meaning
    c. Simpson: cotton is not unique, which ship it was on was just a condition.

79. R.2d of Contracts:
    a. §201: Whose meaning prevails in interpretation of a promise or agreement
        i. If the parties attached the same meaning, it is interpreted accordingly
        ii. If different meaning attached, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made:
            1. That party didn't know of any other meaning attached by the other party, and the other party knew of the meaning attached by the first party
            2. That party had no reason to know of any different meaning attached by the other party, and the other had reason to know of the meaning attached by the first
        iii. Except as stated above, neither party is bound by the meaning attached by the other
    b. §202: Rules in Aid of Interpretation
        i. Words and conduct are interpreted in light of all circumstances and if the principal purpose of the parties is ascertainable, it is given great weight
        ii. A writing is interpreted as a whole, all writings in one transaction interpreted together
        iii. Unless a different intention is manifested,
            1. If language has a generally prevailing meaning, it is interpreted accordingly
            2. Technical terms and words of art are given technical meaning when used in transaction within their technical field
        iv. If an agreement involves repeated performance by either party with knowledge and opportunity to object by the other, any acceptance or acquiescence is given great weight
        v. If reasonable, parties' manifestations of intent are interpreted consistently w/ each other

80. UCC
    a. §1-205: Course of Dealing and Usage of Trade
        i. A course of dealing is prior conduct between the parties that is to be regarded as establishing a common basis for interpreting their expression and other conduct

ii. A usage of trade is any practice or method of dealing regularly used in a place, vocation, or trade and such that it is expected to be observed by the transaction in question.
iii. A course of dealing and any usage of trade the parties are engaged in or of which they are or should be aware, gives meaning to and supplements or qualifies terms of agreement
iv. Express terms and applicable usage of trade or course of dealings shall be construed consistently whenever reasonable; when unreasonable express terms control
v. Applicable usage of trade in a place any part of performance will occur shall be used to interpret that performance
vi. Evidence of usage of trade offered by one party is inadmissible unless he has given the other party notice the court finds sufficient to prevent unfair surprise to the latter

b. §2-208: Course of Performance or Practical Construction
i. When a contract involves repeat performance by one party and opportunity for objection by the other, any performance accepted is relevant to determining agreement meaning
ii. Express terms and course of performance, plus any course of dealing or usage of trade, will be construed consistently; if such construction is unreasonable, express terms control the course of performance, which controls both course of dealing and usage of trade

81. *Frigaliment Importing Co v. B.N.S. Int'l Sales Corp* - does chicken mean fryer/broiler or stewing
a. When a word can have multiple meanings, and the contract doesn't specify which meaning is used, the court must apply the reasonable meaning
b. If there is trade usage of a term, and you're unaware of it, it is not relevant to you
c. Judge weighs evidence, gives heirarachy (strongest on top)
i. Dictionaries that define the term
ii. Negotiations between the parties
iii. Communication (< negotiation cuz parties could be gaming to create litigation record)
iv. Usage of trade custom (little weight when one party isn't part of trade)

Filling the Gaps in Terms

82. *Sun Printing v Remington Paper* - 1k ton of paper/mo, didn't specify time or price after 3rd month
a. Defendant makes contract and breaches, Cardozo lets them get away with it by holding no contract was made because the price and term were not stated (traditional common law)
b. Crane's dissent (similar to Knapp): parties wanted to be bound and court could fill in gaps to make the contract the parties really wanted

83. R.2d of Contracts
a. §34: Certainty and Choice of Terms; Effect of Performance or Reliance
i. Contract terms may be reasonably certain yet allow term selection during performance
ii. Part performance may remove uncertainty and establish an enforceable contract

iii. Action in reliance may make a remedy appropriate although uncertainty still exists

b. §204: when parties to a bargain sufficiently defined as a contract haven't agreed to an essential term, a term which is reasonable in the circumstances is supplied by the court

84. *Eastern Air v Gulf Oil* - Eastern agrees to buy any fuel it needs from Gulf (Requirements contract)

a. Gulf: the contract isn't binding because there terms aren't definite; court: UCC 2-306 fills gaps

b. UCC 2-306(1) - actual output or requirements contracts are acceptable, except if the quantity is disproportionate to any stated estimate or, in absence of such, any normal or prior output or req

85. *Wood v. Lucy, Lady Duff-Gordon* - gave Wood exclusive agency to give her endorsement and sell designs

a. Common law's modern approach: we can infer or imply terms

i. Because he gets 50% of profits + manages intellectual property, can infer best efforts term

ii. Best efforts is the default rule in common law

86. UCC § 2-306 Output, Requirements and Exclusive Dealings

a. actual output or requirements contracts are acceptable, except if the quantity is disproportionate to any stated estimate or, in absence of such, any normal or prior output or requirement

b. An agreement for exclusive dealings imposes, unless otherwise agreed, an obligation by the seller to use best efforts to supply the good and by the buyer to use best efforts to promote their sale

Identifying the Terms of the Agreement

87. *Carnival Cruise Lines v Shute* - ticket has forum selection clause and ticket said non-refundable

a. Majority: clause good because it avoids confusion about where suits should be decided and saves the cruise line money which it passes along to the customers. Fair cuz not set to discourage claims

b. Dissent: average passenger will risk filing suit over cancelling without a refund. Public policy rule that clauses which limit where an action may be brought are unenforceable unless freely entered.

88. R.2d §211: Standardized Agreements

a. When a party signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used for this type of agreement, he adopts the writing as an integrated agreement with respect to the terms included in the writing

b. Such a writing is interpreted as treating a like all those similarly situated, without regard to their knowledge or understanding of the terms of the writing.

c. If the other party has reason to believe the party manifesting assent wouldn't assent if he knew the writing contained a particular term, that term isn't part of the agreement

89. Rakoff: need to protect individuals from invisible/unexpected terms by only enforcing visible/expected

Which terms were agreed to

90. Three tests for whether there is a counter offer

a. The party accepting materially changes the terms in a way that hurts the offeror

b. Magic (legally satisfactory) words are used (ie "these terms and no other will govern")

c. There is conduct demonstrating an unwillingness to proceed (apparent after the fact)

91. *Step-Saver -* ordered software over the phone repeatedly, when arrived it had box-top terms: no warranty
    a. UCC 2-207 rejects the last shot rule, if writing materially alters the offer, it's not part of the contract
        i. Default rule: there is a warranty, unless expressed
        ii. In foot note, step-saver says with conditional acceptance, you get whatever you agree plus UCC default rules for whatever you don't agree on.
            1. However, this doesn't actually appear in UCC 2-207
92. UCC § 2-207: additional terms in acceptance or confirmation
    a. Expression of acceptance or written confirmation sent within a reasonable time operates as acceptance even though it state terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
    b. If both parties are merchants, the additional terms become part of the contract unless
        i. The offer expressly limits acceptance to the terms of the offer
        ii. They materially alter it
        iii. Notice of objection to the terms has already been given or is given w/in reasonable time
    c. Conduct by both parties which recognizes a contract sufficiently establishes a contract even if the writings don't. the terms consist of whatever is in writing, supplemented with other UCC provisions
93. UCC §2-316: Exclusion of Modification of warranties
    a. Words or conduct relevant to the creation of an express warranty and words or conduct that negates or limits warranty will be construed as consistent with each other when reasonable; but subject to §2-202 provisions on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such constructions is unreasonable
    b. To exclude or modify the implied warranty of merchantibility, the language must mention merchantability and, if in writing, must be conspicuous; to exclude or modify any implied warranty of fitness it must be in writing and conspicuous. To exclude all warranties of fitness, need to only say there are no warranties beyond those described here.
94. *Union Carbide* - oscar meyer told Carbide competitor stopped charging sales tax, Carbide stops too
    a. Offeree may add additional terms to the contract only if the offeror would be unlikely to object to them because they fill out the contract and do not materially alter it; can't presume consent
        i. Accepting taxes on an invoice is not material, open ended back taxes are material

Terms that Follow Later

95. *ProCD* - Z buys software that says terms enclosed; terms say by using your agree,but can return for refund
    a. Court holds new draft of UCC 2-203 doesn't invalidate shrink-wrap licenses
        i. Transactions in which money precedes terms occur all the time (insurance, plane tickets)
    b. UCC 2-204 allows vendors to invite acceptance by conduct and limit what conduct = acceptance. Buyer accepts by performing the acts the vendor proposes to treat as acceptance
    c. UCC 2-206: if buyer fails to reject the license, the buyer accepts.

i. In this case, the buyer could have rejected and returned the product if he didn't agree

96. *Hill v Gateway* - computer came with terms in the box that weren't read over the phone. Kept >30 days
   a. Federal Arbitration Act doesn't require the clause be prominent
   b. Terms don't need to be read over the phone, it would be burdensome and demotivates sales
   c. ProCD applies because it deals with the formation of the contract
   d. 2-207 is irrelevant, as there is only one form here and in ProCD.
   e. Merchant deals in goods of the kind or presents himself as having knowledge and skill peculiar to the transaction, which Zeidenberg was not.

97. *Klocek v. Gateway* - kept PC > 5 days then claimed false promises and breach of contract and warranty
   a. Typically in consumer transaction, the buyer is the offeror and the vendor the offeree.
   b. Rejects Hill and ProCd that 2-207 is irrelevant; 2-207 doesn't require a second form to be effective
   c. Under 2-207, the terms constitute either expression of acceptance or written confirmation
      i. acceptance wasn't made conditional, and Klocek not merchant,so klocek must expressly agree

Written Manifestations of Asset

Interpreting a Writing - The Parole Evidence Rule

98. *Thompson v. Libbey* -written contract was used to buy logs in Mississippi. Libbey claimed verbal warranty
   a. Parol evidence is inadmissible to modify or add to the terms; it can't be used to prove omission
      i. If the contract appears to be a complete expression of the whole agreement, it is to be assumed that all material terms were included in it. R.2d §210

99. *Brown v. Oliver* - written contract for sale of land where hotel was; furniture was discussed prior to writing
   a. Court relies on Wigmore (scholar): whether a writing was intended to cover a subject of negotiation
      i. Did the parties intend for a particular subject to be embodied in a writing
      ii. Based on the conduct and language of the parties and the surrounding circumstances, was the transaction intended to be covered by the writing? (provisionally hear parole evidence)
      iii. Does the particular alleged extrinsic element of negotiation appear in the writing?
         1. If it is at all mentioned or covered, the writing is presumed to cover the element.

100. R.2d of Contracts
   a. §209 Integrated Agreements
      i. An integrated agreement is a writing(s) constituting a final expression of one or more terms
      ii. A court determines if an integrated agreement exists before determining any question of interpretation or application of the parole evidence rule

iii. If a writing's completeness and specificity, makes it reasonably appears to be a complete agreement, it's an integrated agreement unless other evidence shows it not a final expression

b. §210 Completely and Partially Integrated Agreements
   i. A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement
   ii. partially integrated agreement is an integ. agreement other than a completely integrated one
   iii. Whether an agreement is completely or partially integrated is to be determined by the court prior to determining the question of interpretation or application of the parole evidence rule

c. §213 Effect of Integrated Agreement on Prior Agreements (Parole Evidence Rule)
   i. A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them
   ii. A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope
   iii. An integrated agreement that isn't binding or is avoided, doesn't discharge a prior agreement. Although not binding, an integrated agreement may render inoperatie a term which would have been part of the agreement if it had not been integrated.

d. §214 Evidence of Prior or Contemporaneous Agreements and Negotiations
   i. Agreements and negotiations prior to or contemporaenous with the adoption of a writing are admissible in evidence to establish:
      1. That the writing is or is not an integrated agreement
      2. Whether the integrated agreement is completely or partially integrated
      3. The meaning of the writing, whether or not integrated
      4. Illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause
      5. Ground for granting or denying rescission, reformation, specific performance, or other remedy.

e. §216 Consistent Additional Terms
   i. Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated
   ii. It is not completely integrated if the writing omits a consistent additional term which is
      1. Agreed to for separate consideration
      2. Such a term as in the circumstances might naturally be omitted from the writing.

101. UCC 2-202: Final Written Expression: Parol or Extrinsic Evidence

a. Terms with respect to which the confirmatory memoranda of the parties agree or which are in a writing the parties intended to be a final expression of their agreement may not be contradicted by any prior agreement or a contemporaneous oral agreement but may be explained or supplemented
   i. By course of dealing or usage of trade (§1-205) or by course of performance (§2-208)
   ii. By evidence of consistent additional terms unless the court finds the writing was intended to be a complete and exclusive statement of the terms of the agreement.

102. Farnsworth Article
    a. Use extrinsic evidence when there is vagueness or ambiguity of a term that context can't resolve
103. *PG&E v Thomas Drayage* - indemnity clause could be read as standard third party or all encompassing
    a. Rule: doesn't matter that the words have a plain meaning, what matters is if the extrinsic evidence goes toward the intentions of the party
    b. Words aren't magic (magic words irrelevant), some words don't necessarily indicate intent
        i. Corbin citied: words don't have one true objective meaning, must be considered in context
104. Trident v. Conn. Gen. Life Ins. - debt agremn said couldn't prepay years 1-12;however 10% prepay if default
    a. Court interprets PG&E that there is no parol evidence rule in California
        i. Says PG&E chips away at the foundation of our legal system (language may meaningfully constrain public and private conduct)
    b. Burden is on the parties to articulate in writing every term they intend.

Statue of Frauds

105. R.2d 110: Classes of Contracts Covered
    a. The following classes of contracts are subject to a statute forbidding enforcement unless there is a written memorandum or an applicable exception
        i. A contract of an executor or administrator to answer for a duty of his decedent
            1. The executor-administrator clause
        ii. A contract to answer for the duty of another (the suretyship provision)
        iii. A contract made upon consideration of marriage (the marriage provision)
        iv. A contract for a sale of interest in land (the land contract provision)
        v. A contract that is not to be performed within one year from the making (one year provision)
    b. The following classes of contract are now governed by the UCC Statute of Frauds provisions
        i. A contract for the sale of goods for the price of $500 or more (UCC 2-201)
        ii. A contract for the sale of securities (UCC 8-319)
    c. The UCC requires a writing signed by the debtor for any security interest in personal property or fixtures not in the possession of the secured party.
    d. Most states' statutes proved that no acknowledgement or promise is sufficient evidence of a new or continuing contract to take a case out of the operation of a statute of limitations unless made in some writing signed by the party to be charged, but that the statute doesn't alter the effect of any payment of principal or interest.
    e. In many states other classes of contracts are subject to a requirement of a writing
106. *Boone v. Coe* - left business in Ky. to go to Tex on Coes promise of farmland and dwelling; K for land>1 yr
    a. Statute of Fraud forbids enforcement for certain contract classes unless defendant benefits
        i. Quantum Meruit (law implies promise to pay): provides for unjust enrichment
    b. Proponents of this case's rule says it will encourage contracts
    c. Critcs of statute of frauds say its an escape of a contract or liability for breach thereof
        i. It may appear that way in some cases, but there are thousands of undisputed cases of fraud

107. R.2d
   a. 125: Contract to transfer, buy, or pay for an interest in land
      i. A promise to buy or transfer, to anyone, any interest in land is within the statute of frauds
      ii. When a transfer of an interest in land has been made, a promise to pay the price is no longer within the statute of frauds unless the price is itself in whole or in part an interest in land
      iii. Statutes in most states except from the land contract and one-year provisions of the SOF short-term leases and contracts to lease, usually for a term not longer than one year.
   b. 129: Action in reliance; specific performance
      i. A contract for the transfer of an interest in land may be specifically enforceed inspite of its noncompliance with the Statute of Frauds, only if its established that the party seeking performance, in reasonable reliance and on the continuing assent of the defendant, has so changed his position that injustice can be avoided only by specific performance
   c. 130: contract not to be performed within a year
      i. Where any promise can't be fully performed within a year from the time of its making, all promises in the contract are within the SOF until one party completes his performance
      ii. When one party completes performance, the one year provision doesn't prevent enforcement of the promises of other parties.

108. *Riley v. Capital Airlines* - P purchases equipment to produce special fuel blend; claims 5 year contract
   a. Each batch was made for each order and fully sold, thus a fully executed portion outside of SOF
      i. Unexecuted portion of 5 yr K within SOF; part performance doesn't take it out of SOF bounds
   b. Court grants recovery for equip purchased in good faith of assume K to prevent under enforcement

109. UCC 2-201: formal Requirements, statue of Frauds
   a. Contracts for the sale of goods over $500 are invalid unless in some sufficient writing and signed by the defendant or his authorized agent. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable beyond the quantity of goods written
   b. If a sufficient written confirmation is received within a reasonable time, and the recipient has reason to know its contents, it satisfies subsection 1's requirements against the recipient unless the recipient gives written notice of objection to its contents within 10 days **after** it is received.
   c. A contract that doesn't satisfy subsection 1 requirements but is valid in other respects is enforceable
      i. If the goods are to be specially manufactured for the buyer and are not suitable for the sale to others in the ordinary course of seller's business and the seller, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the buyer, has substantially begun their manufacture or made commitments for their procurement; or

ii. If the defendant admits in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

iii. With respect to which payment has been made and accepted or which have been received and accepted (2-606)

110. R.2d of Contracts

a. 139 Enforcement by virtue of Action in Reliance

i. A promise which the promisor should reasonably expect to, and does, induce action or forbearance is enforceable in spite of the SOF if injustice can only be avoided by enforcement. The remedy granted for breach is to be limited as justice requires.

ii. These circumstances are significant in determining if injustice can only be avoided by enforce.

1. availability and adequacy of other remedies, particularly cancellation and restitution

2. The definite and substantial character of the action/forbearance in relation to remedy

3. Extent to which action/forbearance corroborates evidence of the making and terms of the promise, or the making and terms are established by clear and convincing evidence

4. The reasonableness of the action or forbearance

5. The extent to which the action or forbearance was foreseeable by the promisor

b. 143 Unenforceable contract as evidence

i. The statute of frauds doesn't make an unenforceable contract inadmissible in evidence for any purpose other than its enforcement in violation of the statute.

111. *Schwedes v. Romain* - S offered to pay R's attny full price of property, attny said no need. R sold prop to V

a. No consideration was given by Swedes to Romain, so no contractual obligation

i. A valid contract is required to award specific performance

b. Offer was in writing, but acceptance was via phone, so no written contract

c. Acts done in contemplation of performance are not part-performance, so doesn't take K out of SOF

d. When a case is clearly within SOF, promissory estoppel is inapplicable (cuz it would repeal statute)

112. Leonard v. PepsiCo - commercial isn't a writing, order form not signed by defendant

a. Signed writing relied on must establish by itself the parties' contractual relationship

b. Unsigned writing must on its face refer to the same transaction as the signed writing.

113. R.2d of Contracts

a. 131: General Requisites of a Memorandum

i. Unless otherwise required by the particular statute, a contract within the statute of frauds is enforceable if it is in writing and signed, by or on behalf of the defendant, which

1. Reasonably identifies the subject matter of the contact,

2. Sufficiently indicates that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and

3. States with reasonable certainty the essential terms of the unperformed promises

b. 133: memorandum not made as such
    i. The Statute of Frauds may be satisfied by a signed writing not made as a memorandum of a contract, except in the case of a writing evidencing a contract upon consideration of marriage.

ENFORCEABILITY

The Doctrine of Consideration

Distinguishing bargains from gratuitous promises

114. Consideration - a bargained for exchange; a promise given in exchange for a promise
115. Adam Smith: bargains are important because we get what we want
    a. K are about self-interest (reward selfishness by enforcing), although gratuitous K not enforceable.
116. Fuller - its hard to figure out if there is a bargain (promise with a consideration)
    a. Consideration has a bunch of functions
        i. Evidentiary - proves there was a K; bargains shows they intended to enter agreement and what agreement is; makes it cheap to figure out if person is serious about K - consideration used to be a seal, no as clear when there is consideration when formality is gone
        ii. Cautionary -cautioned that the agreement is enforceable, whether or not a bad deal (Lucy)
        iii. Channeling -legal sys looks at K in a formal and consistent way; wants parties to engage in a certain type of behavior; good because then it is legally binding (bargains benefit public, gifts are suspicious, channels people into self interested behavior, shouldn't be compensated for something your doing for free unless you bargain for it - Martin v. Little, Brown & co)
            1. Bigger the exchange, few formailities needed
    b. Do we want private decision making (autonomy)
        i. Pros: individuals know whats best for them better than gov; avoid distributional inequality; state might make mistakes; people should be self protective; state represents the majority; gov can be captured; can't barain out of state rules
        ii. Cons: more promises are enforced; less opting out; individuals are like private gov or dictators
117. *Johnson v. Otterbein* - promised to give gift of $100, but would be refunded if not used to pay Univ's debt
    a. Agreeing to refund if not used to pay debt isn't consideration; still using it for University advantage
    b. Default rule: not bound by it unless the contract shows that it is binding (nominal consideration)
118. Hamer v. Sidway - nephew stops drinking, smoking, and playing pool or cards on uncle's $5k promise
    a. Agreeing to abstain from doing something you have a right to is consideration to the other party
        i. It is irrelevant if the performance benefits the promisor
    b. Estate has a legal duty to maximize the wealth of the estate

Moral Consideration

119. Mills v. Wyman - Mills cared for a sick (dead) son. Father agrees to pay for care but later decides not to

a. Moral obligation is sufficient consideration for an express promise only when the promisor benefits
    i. The law won't enforce purely conscience driven activities, which are behavioral tools

120. Webb v. McGowin - Webb jumps to divert block from falling on McG, Webb crippled, McG agrees to pay
a. If promisor materially benefits from promisee, contract is valid and enforceable.
    i. Moral obligation is sufficient consideration when promisor receives material benefit
    ii. Injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay
b. Life and preservation of the body have material, pecuniary values (ev by insurance, medicine, tort)
c. Fuller would say the ev of the agreement (8 years payments) shows promisor agreed to be bound

121. Webb v. McGowin 2 - if the benefit was material and to the person, and not his estate, the promisor has the privilege of recognizing and compensating either by executed payment or executory promise to pay

122. R.2d §86 Promise for Benefit Received
a. A promise made in recognition of a benefit the promisor previously received is binding to the extent necessary to prevent injustice
b. A promise is not binding under subsection 1
    i. If the promisee conferred the benefit as a girt or for other reasons the promisor has not been unjustly enriched; or
    ii. To the extent that its value is disproportionate to the benefit.

Contract Modification and the Preexisting Duty Rule

123. Alaska Packers v. Domenico - sailors demand more money; short season, so can't replace them, P gave in
a. Modification not binding if there is no additional consideration.
b. Fuller: wants evidence that a bargain exists

124. R.2d §89 Modification of executory contract
a. A promise modifying a duty under a contract not fully performed on either side is binding
    i. If it is fair and equitable in view of circumstances unanticipated when the contract was made;
    ii. To the extent provided by statute; or
    iii. As justice requires enforcement due to a material change of position in reliance on promise

125. UCC 2-209 Modification, Rescission and Waiver
a. An agreement modifying a contract within this article needs no consideration to be binding, but must meet the test of good faith.

Nominal Consideration

126. Schnell v. Nell - husband agrees to pay $200 each to 3 people in exchange for 1 cent
a. Purpose of consideration is to show a compromise is genuinely reached and agreed by the parties
    i. Nominal consideration, such that one value given is objectively disproportionate to the value the other party gives, is not sufficient consideration
        1. Converse to peppercorn's subjective value

ii. Past consideration (wife being industrious) is not legitimate
iii. Surrendering right to frivolous lawsuit not consideration (don't want to encourage friv. suits)
iv. Love of his wife not sufficient (emotions are a separate sphere from the legal sphere)

127. R.2d §87 Option Contract
a. An offer is binding as an option contract if it's in writing and signed by the offeror, recites a purported consideration for the offer, and proposes an exchange on fair terms in reasonable time
b. An offer which the offeror should reasonably expect to, and does, induce action or forebearance of a substantial character by the offeree before acceptance, is binding as necessary to avoid injustice

Recitals

128. Smith v. Wheeler -option writing cites $1 given in consideration, receipt acknowledge; $1 never given
a. Option is binding if it is in writing and recites consideration
i. recital makes it easier and cheaper to enter into contracts, which is good
1. We want more options contracts, believe people entering them are sophisticated
ii. If we think a type of bargain should be enforced require less consideration
b. UCC: if in writing and less than $500, we don't need extra consideration
i. Less worried about merchants because they can protect themselvves

129. R.2d §88 Guaranty
a. A promise to be surety for the performance of a contractual obligation, made to obligee is binding if the promise is in writing, signed by the promisor, and recites a purported consideration

Doctrine of Promissory Estoppel

Family Promises

130. *Ricketts v. Scothorn* - grandfather says none of his grandchild has to work, give note for $2k with 6%/year
a. If donor can reasonably foresee reliance such that donee would suffer loss or injury if the note is not paid, the donor is estopped from pleading lack of consideration.
i. Here Scothorn relied on the promise and changed her life circumstances

Charitable Subscriptions

131. *Allegheny College* - woman pledges $5k for scholarship in her name, gives $1k, repudiates, dies
a. Cardozo: rules that posthumous rememberance has a value and therefore consideration
i. Promissory estoppel is the equivalent of consideration within law of charitable subscriptions
b. Dissent: forget consideration, there was no offer and acceptance; there was no quid pro quo
i. The donation wouldn't be made, and thus couldn't be accepted, until the donor's death, but upon the donor's death, her offer was withdrawn

Construction Bids

Promissory estoppel history and over view see day 22

132. *Drennan v. Star Paving Co. - D bid over phone, repeated; when P went to accept offer withdrawn*

a. Promissory estoppel usually limited to consideration; extends here for failure in offer/acceptance
    i. Reasonable reliance resulting in a detrimental change in position holds the offer. R.2d 90
b. Defendant had reason to know if bid was lowest would be used by plaintiff
    i. It induced "action…of a definite and substantial character on the part of the promisee" R.2 90
    ii. D wanted P to rely on bid because if P's bid was accepted D very likely to get subcontract

133. *James Baird v. Gimbel Bros.* - subcontract sent offer, withdrew, and made new off before acceptance
a. Was a written offer, but is still retracted (cuz Learned Hand doesn't want to enforce).
    i. Hand had a different sense and application of reliance (didn't see P.E. applying to reliance)

Promissory Estoppel as an alternative to Breach of Contract

134. *Hoffman v. Red Owl* - repeatedly assured he would get grocery store, but then telling him more money
a. Not fraud because no evidence that promisor possessed present intent not to perform
    i. So adopt promissory estoppel, which provides needed tool to prevent injustice
b. Conditions a promise needs to meet to be enforced by promissory estoppel
    i. Promisor should reasonably expect to induce action or forbearance
    ii. Promise induced such action or forbearance
    iii. Only by enforcement of the promise can injustice be avoided
c. Justice doesn't require that damages awarded exceed loss sustained between sale and market price

135. Grant Gilmore "Death of a Contract" - says promissory estoppel has increased substantially over time
a. Will eventually swallow up contracts and create contorts

136. R.2d 90 Promise Reasonably Inducing Action or Forbearance
a. A promise which the promisor should reasonably expect to, and does, induce action or forbearance on the part of the promisee or a third person is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
b. A charitable subscription or a marriage settlement is binding under Sub(1) without proof of inducing

137. R.2d 90: Prof. Hoffman's key perspective
a. Not that the promisee reasonably relied, but that the promisor saw the reliance occuring

138. R.2d of Torts
a. 526 Conditions under which Misrepresentation is Fraudulent
    i. A misrepresentation is fraudulent if the maker
        1. Knows or believes that the matter is not as he represents it to be,
        2. Doesn't have confidence in the accuracy of his stated or implied representations, or
        3. Knows that he doesn't have the have the basis for his stated or implied representation
b. 530 Misrepresentation of Intention

i. A representation of the maker's own intention to do or not do a particular thing is fraudulent if he doesn't have that intention
ii. A representation of the intentions of a third person is fraudulent under §526

Establishing the Elements of Promissory Estoppel: Promise

139. *Blatt v. USC* - sued because told he would be eligible for order of the coif if in top 10% of graduating class
   a. Promise wasn't that he would be elected only that he would be eligible; which he was & considered
   b. Blatt loses because the promise didn't induce an action of specific or substantial character
      i. Sacrificing something to do well in school isn't definite and substantial action
      ii. He was going to do it anyway, didn't lose anything
140. *Ypsilanti 1* - GM made statements that jobs would be created or retained because of abatement; so given
   a. Court says there is no contract made under section 198 of Michigan law
   b. Uses legal rhetoric to say promissory estoppel is use when existing law didn't provide justice
141. Ypsilanti 2 - holds GM's statements were puffery and there was no promise made
   a. There was nothing clear and definite; GM used hyperbole noone should believe (like Pepsi)
   b. Some people didn't believe statements, felt there was no promise/commitment, and wanted one before the abatement was granted
   c. Even if there was a promise, shouldn't rely on GM cuz they're a corporation, w/ allegiance to stocks

PERFORMANCE AND BREACH

Conditions

The Effect of a Condition

142. *Internatio-Rotterdam* - shipments to 2 different cities in december;never got 1 city's instruction,rescinded
   a. Court says that the notice is a condition precedent to the performance
      i. The non-occurrence of which entitled RB to rescind
   b. It's unreasonable to give IR option contract, which could injur RB, who had no reciprocal option
   c. Key: Because the contract permits delivery to two different places, and you deliver to one, doesn't mean you give up your condition on the other.

What events are Conditions: Is the event a condition, a promise, or both?

143. *Howard v. FCIC* - tobacco crop damaged by rain, plowed over for cover crop before adjuster came
   a. Insurance policies are generally construed strongly against the insurer
   b. When it's doubtful whether words create a promise or condition precedent, they will be construed as creating a promise (which doesn't bar recovery).
      i. A provision will not be construed as a condition precedent in the absence of language plainly requiring such construction.
         1. People can be more careful to draft it as a condition if they want it
         2. Conditions a very powerful (can forfeit performance) so wee need to be wary)

3. Under promises, if you don't perform, I still have to perform; I can just sue you

c. Key: presumption against conditions

144. R.2d 227 Standards of Preference with Regard to Conditions

a. In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation that will reduce obligee's risk of forfeiture is preferred, unless the event is within obligee's control or circumstances indicate he has assumed the risk

b. Unless the contract is a kind which only one party generally undertakes duties, when it's doubtful if

i. A duty is imposed on an obligee that an event occur, or

ii. The event is made a condition of the obligor's duty, or

iii. The event is made a condition of the obligor's duty and a duty is imposed on the obligee that the event occur,

the first interpretation is preferred if the event is within the obligee's control.

Avoiding Conditions Waiver and Estoppel

145. *Clark v. West* - West knew Clark was intoxicated, but told him he would still get $4 more; thus waiver

a. Not a contract to keep Clark sober, but contract stipulating he will stay sober to write good books

i. Thus stipulation isn't consideration but a condition

b. In light of the situation it is found West knew of intoxication well before the book was complete and with such knowledge said Clark would receive the $6 rate, which Clark believed and relied on

i. Waiver: knowledge and statements that lead a reasonable person to believe condition waived

c. Key: presumption for waiver

146. R.2d 84: Promise to Perform a Duty in Spite of Non-occurrence of a Condition

a. Except under Sub(2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

i. Occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

ii. uncertainty of occurrence of the condition was an element of risk assumed by the promisor

b. If such a promise is made before the time for the occurrence of the condition has expired and the promisee or beneficiary can control the condition, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

i. The notification is received while there is still reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

ii. Reinstatement of the requirement of the condition is not unjust because of a material chane of position by the promisee or beneficiary; and

iii. The promise is not binding apart from the rule state in subsection 1

147. UCC 2-209 Modification, Rescission and Waiver

a. An agreement modifying a contract within this article needs no consideration to be binding

b. A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but, except as between merchants, such a requirement on a merchant supplied form must be seperately signed by the other party.
c. The requirements of the statute of frauds section must be satisfied if the contract as modified is within its provisions.
d. Althought attempted modification or waiver doesn't satisfy (2) or (3), it can operate as a waiver
e. A party who waived an executory portion of the contract may retract the waiver by reasonable notification to the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver

Excuse to Prevent Forfeiture

148. *J.N.A v Cross Bay Chelsea* - landlord would send notices of important date, didn't notify of renewal
a. Exercising an option is ineffective if not within the time specified; time is always of the K's essence
i. Equitable relief is not awarded because such default usually doesn't result in a forfeiture because the option usually doesn't create any interest in the property
ii. Here the forfeiture of the value of improvements disproportionate to the gravity of the fault
b. Dissent: equitable relief is awarded not for mere negligence, but an excuse such as fraud, mistake, or accident. Tenant investment alone doesn't justify intervention (improvements not enough)

Breach

Constructive Conditions

149. *Jacob & Youngs v Kent* - pipe of Reading manufacture wasn't used, Kent withheld final payment
a. Cardozo says the default rule is: if cost of enforcement is really high, wouldn't want to enforce
i. Cardozo only looking at external value, the difference in the market value of the house
b. Kent has a kind of Hadley issue, of not informing Jacob & Youngs of the pipe's importance
i. Although condition in K, Cardozo says if it was really wanted, would have given more reasons
c. Cardozo: substantial performance absolves forfeiture from breach
i. Substantial performance is performing the essence of the agreement

Prospective Nonperformance: Material Breach

150. R.2d 251
a. Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach, the obligee may demand adequate assurance of due performance
b. The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurances of due performance as is adequate in the circumstances of the particular case.

151. *Lane Enterprises v Foster* - coating metal, couldn't meet requirments; requested assurances & withheld $

a. Withholding the money would have been a breach had it been more, but here it is immaterial
    i. Substantial performance: paid 126k out of 133k (paid about 94.7%)
b. Because of the letter and past failure, Foster had reasonable grounds to demand assurances

152. UCC
a. 2-106 Definition: Cancellation
    i. Cancellation occurs when a party ends the contract for breach by the other, with the same effect as termination except that the cancelling party retains remedy for breach of the whole contract or any unperformed balance
b. 2-508 Cure by seller of improper tender or delivery; replacement
    i. Where any tender or deliver is rejected because of nonconformance and time fore peformance hasn't expired, seller may reasonably notify buyer of his intention to cure and may then, within the contract time, make a conforming delivery
    ii. Where the buyer rejects non-conforming tender, which the seller reasonably believed would be acceptable, with or without money allowance, seller may have reasonable time to substitute a conforming tender, if he seasonably notifies the buyer.
c. 2-601 Buyer's right on improper delivery
    i. Subject to the provisions of this article on installment contract breach (2-612) and unless otherwise agreed under section on contractual limitations of remedy (2-718 & 2-719), if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may
        1. Reject the whole; or
        2. Accept the whole; or
        3. Accept any commercial unit(s) and reject the rest.
d. 2-602 Manner and effect of rightful rejection
    i. goods must be rejected w/in a reasonable time after delivery/tender, otherwise ineffective
    ii. Subject to sections 2-603 and 2-604 on rejected goods
        1. After rejection, any exercise of ownership by buyer is wrongful against the seller
        2. Prior to rejection, if the buy took physical possesion of goods, in which he had no security interest under 2-711, he has a duty after rejection to hold them with reasonable care for a time sufficient for the seller to remove them
        3. The buyer has no further obligations with regard to goods rightfully rejected
    iii. The seller's rights with respect to goods wrongfully rejected are governed by 2-703
e. 2-606 What constitutes acceptance of goods
    i. Acceptance of goods occurs when the buyer
        1. After a reasonable time to inspect the goods, signifies to the seller the goods are conforming, or that he will take/retain them in spite of their nonconformity
        2. Fails to make an effective rejection (2-602(1)) after reasonable time to inspect
        3. Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller, it is an acceptance only if ratified by him

ii. Acceptance of any part of any commercial unit is acceptance of that entire unit.

f. 2-607 Effect of acceptance; notice of breach; burden of est breach after acceptance; notice of claim
   i. Buyer must pay contract rate for any goods accepted
   ii. Acceptance of goods by the buyer precludes rejection of such goods and if made with knowledge of non-conformity, cannot be revoked because of it unless accepted on the reasonable assumption that the non-conformity could be reasonably cured. Acceptance does not of itself impair any other remedy provided by this article for non-conformity
   iii. Where a tender has been accepted
      1. The buyer must notify the seller, within a reasonable time after he discovers or should have discovered any breach, or be barred from any remedy
      2. If the buyer is sued as a result of infringement (2-312) he must notify seller within a reasonable time of receiving notice of the litigation or be barred from recover from laibl
   iv. The burden is on the buyer to establish any breach with respect to the goods accepted
   v. Where the buyer is sued for breach of warranty or other obligation the seller is answerable
      1. Buyer may give is seller written notice of the litigation. If the notice states the seller may come and defend himself, and if, after reasonable receipt of notice), he doesn't he will be bound by any action against him by his buyer by any common fact determined
      2. If the claim is for infringment the seller may demand, in writing, that his buyer turn over control of the litigation, including settlement, or be barred from remedy

g. 2-608 Revocation of Acceptance in Whole or In Part
   i. The buyer may revoke his acceptance of a lot or commercial unit, whose non-conformity substantially impairs its value to him if he has accepted it
      1. On the reasonable asusmption that its non-conformity would be cured and it hasn't
      2. Without discovery of such non-conformity, if his acceptance was induced by difficulty of of discovery before acceptance or by the seller's assurances
   ii. Revocation must occur within a reasonable time after the buyer discovers or should have discovered the ground for it, and before any substantial change in condition of the goods which isn't cause by their defects. It is not effective until buyer notifies the seller of it.
   iii. A buyer who so revokes has the same rights and duties to the goods, as if he rejected them

h. 2-709 Action for the price
   i. When the buyer fails to pay the price when due, the seller may recover, together with any incidental damages, the price
      1. Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer
      2. Of goods identified to the contract if the seller is unable, after reasonable effort, to resell them at a reasonable price, or the circumstances reasonably indicate such effort would be unavailing

ii. During a suit, the seller must hold for the buyer any goods identified to the contract and still in seller's control, except if resell becomes possible prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer, payment of judgement entitles the buyer to any goods not resold.

iii. After the buyer wrongfully rejected or revoked acceptance of goods or has failed to make a payment due or has repudiated, a seller held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

i. 2-711 Buyer's remedies in general; buyer's security interest in rejected goods

i. Where the seller fails to make delivery or repudiates, or the buyer rightfully rejects or revokes, then with respect to any good involved or the whole contract, the buyer may cancel and may, in addition to recovering so much of the price as has been paid,

1. "cover" and have damages under the next section as to all goods affected, whether or not they have been identified to the contract
2. Recover damages for non-delivery as provided in 2-713

ii. Where the seller fails to deliver or repudiates, the buyer may also

1. If the goods have been identified, recover them as provided in 2-205; or
2. In a proper case obtain specific performance or replevy the goods as provided in 2-716

iii. On rightful rejection or justifiable revocation of acceptance, the buyer has a security interest in any goods in his possession or control for any payments made and expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (2-706)

Cost of Completion v. Diminution in Value: The expectation interest revisited

153. *Peeveyhouse v. Garland* - farm stripmined with promise of restorative work,

a. Normally damages should be the cost of the work

i. Here the economic benefit for the performance is disproportionate to the value added to land

b. Dissent says this is a bad faith breach, coal company has motive to save money by not doing it

i. Good rule: generally reward unsophisticated people who bargained for what they want

154. R.2d 348 Alternatives to loss in value of performance

a. If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, the injured party may recover damages based on

i. The diminution in the market price of the property cause by the breach, or

ii. The reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss of value to him.

DEFENSES TO CONTRACTUAL OBLIGATIONS

Obtaining Assent by Improper Means

Misrepresentation

155. Misrepresentation triggers

a. If its fraudulent (person making the statement knows its false

b. If its material (person hearing it thinks that its true) - Halpert
c. If its based on an opinion when the person making it has special knowledge - Vokes Case

156. *Halpert v Rosenthal* - asked three times about termites, told there were none; later found out there were
a. Reasonable to believe real estate agent because was told no termites 3 times and gave pro opinion
i. Key lead to believe there were no termites
b. Misrepresentation allows rescission because of public policy issue
i. If people can make false statement, it would be very expensive to check every detail, such that it would be prohibitive to people making contracts (which we want people to make)
c. Restatement doesn't distinguish between fraudulent and innocent misrepresentation
i. No valid reason a merger clause allowing rescission under fraudulent misrepresentation, wouldn't allow rescission under innocent misrepresentation

157. R.2d of Contracts
a. 159 Misrepresentation: an assertion that is not in accord with the facts
b. 162 When a misrepresentation is fraudulent or material
i. A misrepresentation is fraudulent if the maker intends to induce assent and the maker
1. Knows or believes that the assertion is not in accord with the facts; or
2. Does not have the confidence that he states or implies the truth of the assertion; or
3. Know he does not have the basis that he states or implies for the assertion
ii. A misrepresentation is material if it is likely to induce assent in a reasonable person, or the maker knows that it would be likely to induce the recipient to do so.
c. 164 When misrepresentation make a contract voidable
i. If a party's manifestation of assent is induced by either fraudulent or material misrepresentation by the other party, and recipient reasonably relied, voidable by recipient
ii. If a party's manifestation of assent is induced by fraudulent or material misrepresentation by one not party to the transaction, upon which the recipient justifiably relied, the contract is voidable by the recipient, unless the other party in good faith or without reason to know of the misprepresentation either gives value or relies materially on the transaction.
d. 167: misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent

158. *Vokes v. Arthur Muray* - woman takes dance classes. Told she had skill & grace to induce her to buy more
a. Generally, actionable misrepresentation must be of fact and not an opinion
i. Not applicable when there is a fiduciary relationship (one party has "superior knowledge)
b. Even if a party has not duty to disclose fact within his knowledge or answer inquiries about such fact, if he decides to do so, he must disclose the whole truth.

159. R.2d of Contracts
a. 168 Reliance on an assertion of opinion

i. Assertion of opinion: expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity, or similar matters

ii. If it is reasonable to do so, the recipient of an assertion of a person's opinion as to the facts not disclosed and not otherwise known to the recipient may properly interpret is as assertion

1. That the facts known to that person are not incompatible with his opinion, or

2. That he knows facts sufficient to justify him in forming it.

b. 169 When reliance on an assertion of opinion is not justified

i. To the extent that an assertion is only one of opinion, the recipient is not justified in relying on it unless the recipient

1. Stands in a relation of trust and confidence to the person whose opinion is asserted

ii. Reasonably believes that the person whose opinion is asserted has special skill, judgment, or objectivity, with respect to the subject matter, greater than the recipients

iii. Is for some other special reason particularly susceptible to a misrep of the type involved

Duress

160. R.2d 174: if it appears manifestation of assent was physically compelled by duress, it is ineffective

161. Contract recognizes that duress isn't just threat of physical harm

a. Threaten to be prosecuted, although wrongfully, unless you do something

b. Threat of civil litigation (although only in certain circumstances)

c. Economic duress (people almost never win economic duress cuz people have free will)

i. Reasonable person must feel compelled and threatening party knows they'll compel other

162. *Hackley v. Headley* - owed $6k but told take $4k or sue me; needed the money so took $4k

a. Defendant only didn't pay the debt when due, didn't put Headley in poor economic condition

b. Court can't accept doctrine that would invalidate receipt because of dire economic need

i. If accepted, noone would know if they made a valid contract with one professing great need

c. Different from Vyne v Glen, where defendant was keeping other moneys owed to plaintiff(see brief)

163. Austin v Loral - austin threatened to stop deliveries unless paid incresed price; no alternatives so its paid

a. Economic duress is proved when immediate possession of needful goods is threatened or that one party has threatened to breach by withholding goods unless other party agrees to further demands

b. Loral couldn't get parts elsewhere in time and couldn't get an extension on delivery schedule.

i. Given Austin's past conduct, delaying demand for refund until after last delivery reasonable

164. R.2d of Contracts

a. 175 When duress by threat makes a contract voidable

i. If party's assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim
ii. If manifestation of assent is induced by one who is not party to the transaction, the contract is voidable by the victim unless the other party to the transaction, in good faith and without reason to know of the duress, either gives value or relies materially on the transaction

b. 176 When a threat is improper
i. A threat is improper if
1. What is threatened is a crime or a tort, or the threat itself would be a crime or tort if it resulted in obtaining property
2. What is threatened is a criminal prosecution
3. What is threatened is the use of civil process and the threat is made in bad faith
4. The threat is a breach of the duty of good faith and fair dealing under the contract
ii. A threat is improper if the resulting exchange is not on fair terms, and
1. The threatened act would harm the recipient and not significantly benefit the maker
2. The effectiveness of the threat is signif increased by prior unfair dealing by the maker
3. What is threatened is otherwise a use of power for illegitimate ends

Undue Influence

165. *Odorizzi* - teacher arrested for homosexual activity; prinicipal & superintendant came over for resignation

a. Undue influence: excessive pressure on a susceptible person to adopt dominant party's will
b. First element is a lessened capacity of the object to make a free contract
i. Lack of vigor due to age, physical condition, emotional anguish,or combination of such factors
c. 2nd element: application of excessive strength. If a number of these elements present, excessive:
i. Discussion of the transaction at an unusual or inappropriate time
ii. Consummation of the transaction in an unusual place
iii. Insistent demand that the business be finished at once
iv. Extreme emphasis on untoward consequences of delay
v. The use of multiple persuaders by the dominant side against a single servient party
vi. Absence of third-party advisers to the servient party
vii. Statements that there is no time to consult financial advisors or attorneys

166. R.2d 177: When undue influence makes a contract voidable

a. Undue influence is unfair persuasion of a party under the domination of the party exercising the persuasion or who by virtue of the relation between them is justified in assuming the person will not act in a manner inconsistent with his welfare
b. If manifestation of assent is induced by undue influence, the contract is voidable by the victim
c. If manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and

without reason to know of the undue influence either gives value or relies materially on the transaction.

Unconscionability

167. Walker-Thomas Furniture - balance due was maintained on all furniture until whole account paid
    a. If the terms are "extreme as to appear unscionable according to the mores and business practices of the time and place," then there is no meaningful choice upon entering the contract
    b. Dissent: to outlaw such contracts may deter some businesses from allowing installment, which would make it harder for poor people to buy furniture
168. Epstein: a catch all that isn't covered by fraud, duress, undue influence, etc; as such ought to be rare
    a. Procedural unconscionability: something when wrong in the bargaining, contract procedurally bad
        i. In Walker-Thomas, the terms and conditions were hard to understand, clause wasn't clear
    b. Substantive unconscionability: something is wrong with the outcome
169. UCC 2-302 Unconscionable Contract or Clause
    a. If the court finds as a matter of law, the contract or any of its clauses to have been unconscionable at the time it was made, the court may refuse to enforce the contract or the unconscionable clause, or it may limit the application of the unconscionable clause to avoid any unconscionable result.
    b. When a contract or clause is claim or appears to be unconscionable, the parties shall have reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
170. R.2 208: Unconscionable Contract Harm
    a. If a contract or term thereof is unconscionable at the time of contracting, the court may refuse to enforce contract or unconscionable term, or may limit the application of any unconscionable term to avoid any unconscionable result.
171. *Gatton v. T-Mobile* -
    a. Adhesion contract is enough to meet minimum requirements for procedural unconscionability
        i. Market choice doesn't negate oppression
    b. It is substantially unconscionable because it is oneside(carriers wouldn't get together as a class) and noone gets a remedy (because the amount is to low for an individual to go to court over)
        i. Against Pub Pol for contracts to exempt one from responsibility for own fraud or willful injury
    c. Dissent: an adhesion contract is not per se procedurally uncoscionable

<u>Failure of a Basic Assumption</u>

Mistakes of Present Existing Facts

172. *Sherwood v. Walker* - cow thought to be barren, turns out to be breeder; seller won't sell for same price
    a. A party that has consented to a contract may refuse to execute it or avoid it after it has been completed, if the assent to the contract was based on a mistake of material fact.
        i. The test of mistake: a difference in the substance of the thing bargained for

b. Mistake: A breeder cow wasn't what the seller wanted to sell, nor what the buyer intended to buy
    i. Both parties thought the cow was barren

173. Wood v Boynton - wood had a stone, previously told it was topaz; boynton said it might be, offered her $1
a. Not fraud because defendant doesn't make any affirmative statements as to the stone
b. Only two reasons for rescinding the sale and revesting the title in the vendor
    i. The vendee was guilty of some fraud in procuring a sale to be made to him
    ii. There was a mistake made by the vendor in delivering an article which was not the article sold
        1. Not really rescission as the thing delivered wasn't the thing sold, so title never passed

174. Synthesis of these two cases: court leaves the title with whoever possesed the title to the item at the time mistake is discovered.

175. R.2d of Contracts
a. 151 Mistake: a belief that it is not in accord with the facts
b. 152 When Mistake of Both Parties Makes a contract Voidable
    i. Where both parties make a mistake at the time of contracting as to a basic assumption that has a material effect on the agreed exchange of performances, the contract is voidable by the adversely effected party unless he bears the risk of mistake under §154
    ii. Account is taken of relief by reformation, restitution, or otherwise in determining whether a mistake has a material effect on the agreed exchange of promises
c. 153 When a mistake of one party makes a contract voidable
    i. When a mistake of one party as to a basic assumption has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he doesn't bear the risk of the mistake under §154 and
    ii. The effect of the mistake is such that enforcing the contract would be unconscionable
    iii. The other party had reason to know of the mistake or his fault cause the mistake.
d. 154 When a party bears the risk of a mistake
    i. A party bears the risk of mistake when
        1. The risk is allocated to him by the agreement
        2. He is aware, at time of contracting, that he has only limited knowledge with respect to the facts to which the mistake relates but treats limited knowledge as sufficient
        3. The court feels it is reasonable in the circumstances to allocate risk to the party
e. 157 Effect of Fault of Party Seeking Relief
    i. Failing to know or discover the facts before contracting doesn't bar a party from avoidance or reformation unless his fault amounts to a failure to act in good faith and fair dealing standards
f. 158 Relief including restitution
    i. Either party may have a claim for relief including restitution under §§ 240 and 376
g. 160 When An Action is Equivalent to an Assertion (Concealment)

i. An action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact doesn't exist.

h. 161 When non-disclosure is equivalent to an assertion

i. Non disclosure of a known fact is equivalent to an assertion the fact doesn't exist only:

1. Where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material

2. If he knows that disclosure of the fact would correct a mistake of the other party and if non-disclosure amounts to a failure to act in good faith and fair dealing standards

3. if he knows disclosure would correct a mistake of the other party as to the contents or effect of a writing, evidenceing or embodying the agreement in whole or in part

4. If the other partyis entitled to know the fact because of trust & confidence relationship

Changed Circumstances: Impossibility and Impracticability

176. Taylor v. Caldwell - contract to have concert series in a music hall, before series starts hall burns down

a. Normally, unforseen events that make performance unexpectedly burden some or impossible doesn't exempt the contractor from performance or paying damages

b. However, that rules doesn't apply when the contract is subject to an express or implied condition

i. Default rule: If a condition is implied that a person or thing, the continued existence of which is the basis of the contract, perishes, performance is excused

177. R.2d of Contracts

a. 261 Discharge by Supervening Impracticability

i. When, after contracting, a party's peformance is made impracticable, without his fault, by the occurrence of an event, the non-occurrence of which was a basic assumption , his duty to perform is discharged, unless language or circumstances indicate to the contrary

b. 263 Destruction, Deterioration or failure to come into existence of thing necessary for performance

i. If a specific thing is necessary to perform a duty,its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event whose non-occurrence was a basic assumption on which the contract was made.

178. UCC 2-613 Casualty to Identified Goods

a. When a contract identifies specific goods for performance and the goods suffer casualty without either party's fault before the risk passes to the buyer, or if theres a "no arrival, no sale term", then

i. If the loss is total the contract is avoided; and

ii. If the loss is partial or the goods have so deteriorated as no longer to conform, the buyer may demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price but without further right against the seller.

179. *CNA v Phoenix* - actor dies during film production from coke OD; co. insuring production subrogates

a. Traditional rule: as a default, death excuses peformance under a personal services contract

Frustration of Purposes

180. Frustration is a future development; mistake is not knowing about something presently true

181. *Krell v. Henry* - defendant rents windows for king's parade, makes deposit; dates changed

a. If the substance of a contract needs the existence of a particular state of things,no breach occurs if performance is impossible because of the non-existence of the state of things both parties assumed

182. R.2d §265 Discharge by Supervening Frustration

a. If after contracting, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event,the non occurrence of which was a basic assumption, his remaining duties to render performance are discharged, unless the language or circumstances indicate to the contrary

Allocation of Risk in Long-Term Contracts

183. *Alcoa v Essex* - indexing system for pricing couldn't account for unexpected rise in electric cost

a. Alcoa made a deliberate attempt at avoiding abnormal risk by using the conversion index

b. Reformation is normally only use to correct writings which don't reflect the agrement cuz of mistake

i. Allowed here because of the general rules of equitable restitution

ii. Can't decree rescission cuz that would give Alcoa windfall; Alcoa was allocated the risk

184. UCC 2-615 Excuse by failure of presupposed conditions

a. Except so far as a seller may have assumed a greater obligation

i. Delayed delivery or non-delivery in whoe or in party by a seller who complies with paragraphs (b) and (c) is not a breach if performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not it later proves to be invalid

ii. Where the causes mentioned in paragraph (a) only affect a part of the seller's capacity to perform, he must allocate production and deliveries among his customers, but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

iii. The seller must reasonably notifey the buyer of any delay or non-delivery and, when allocation is required, of the estimated quata thus made available for the buyer.