Contracts - Aragaki - 2016-2017

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I. Elements of a Contract (§17)
- A contract is a **(1)** voluntary exchange that involves **(2)** at least one promise of future performance and is **(3)** legally binding/will be enforced by the machinery of the state
- Contract requires
  1. **A manifestation of mutual assent** and
     - An expression of an agreement between the parties.
  2. **Consideration**
     - If promise is supported by consideration, it is a legally enforceable promise (contract), if no exceptions apply.
- Conditional Gifts
  - To make a gift into a conditional gift, there must be a condition for the recipient to get the gift
  - "If you come to my car, I'll give you my skis".
  - Giver of gift gets no legal benefit, so it is not enforceable.

II. Models of Consideration
- **Legal Benefit/Detriment**
  - **Legal Detriment**
    - Doing or promising to do something (or not do something) that the promisee was under *no prior legal duty to do* (or not do)
    - **Detriment does not mean that party must suffer, just that they gave something up.**
  - **Legal Benefit**
    - Obtaining or being promised that which the promisor had no *prior legal right* to obtain
  - *Hamer v. Sidway:* Uncle makes a promise to nephew to pay 5k in exchange for the nephew refraining from drinking, using tobacco, or swearing until he becomes 21 years of age. Nephew does all that is asked of him and uncle fails to pay him.
    - Legal Detriment - Nephew gave up right to drink when he was legally entitled to do so.
      - Must have a legal right to have a detriment
        - If nephew was not 21 then it wouldn't be a legal detriment because he never had a right to drink.
    - Legal Benefit - Uncle obtained right to make his nephew not drink.
      - In general, a waiver of any legal right at the request of another party is sufficient consideration for a promise.
- **Bargain/ Reciprocal Inducement**
  - Must be a quid pro quo exchange.
  - *Pennsy v. American Ash*: Pennsy entered into a contract to pave driveways and a parking lot for a school. American Ash provided free AggRite for the project, and thereby avoided paying costs for the disposal of the AggRite. After a year, the pavement cracked due to the AggRite, and Pennsy was forced to replace it at their own expense. Pennsy requested that American Ash remove and dispose of the AggRite, but American Ash refused.
    - Legal Benefit to American Ash - Get their AggRite taken away for free.
    - Legal Detriment to Pennsy - Assumed duty to take the AggRite away and dispose of it or use it.
      - Court held that it is sufficient that American Ash's promise to provide the AggRite was reciprocal inducement for Pennsy's incurring the detriment of taking

the AggRite. Accordingly, there was consideration for the contract.

- **Invalid Consideration**
  1. Nominal Consideration
     - **Rule:** Nothing is consideration that is not regarded as such by both parties (Consideration in name is not sufficient).
       - *Dougherty v. Salt:* Aunt promised her nephew $3,000 paid upon her death via note that said "for value received".
         - The court held that the everyone involved understood this note to be a gift, and was not supported by consideration. Therefore the note was not an enforceable contract.
  2. Illusory Promises
     - **Rule**: A conditional promise is illusory (contains “if” or “unless”) .
       - Ex: I promise to sell my laptop to you for $100 if Elvis is found alive before the end of the year. This is illusory because there is obviously no intention to enter into a contract because the odds of Elvis being found alive are insanely thin.
     - *Dohrmann v. Swaney*: Mrs. Rogers would give Dohrmann $4 million in cash and her apartment upon her death, if Dohrmann changed the names of his minor children to incorporate Rogers’ name. Swaney, the executor of Mrs. Rogers' estate, is not just saying its an unfair contract, he’s saying it’s so unfair that it shocks the conscious = grossly unfair.
       - Dohrmann has an illusory promise because the children aren’t making a firm promise that they won’t change their name because there’s no language that binds them from not changing their name and removing Rogers from their name. Therefore the contract was not enforceable.
     - §77: An illusory promise is not consideration if the promisor reserves a choice of performances, unless:
       1. each alternative would have been consideration if alone, or
       2. one of the alternative performances would have been consideration if alone and there is or appears to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.
  3. Past Consideration
     - **Rule**: Past consideration doesn’t satisfy the inducement aspect of consideration.
       - *Plowman v. Indian Refining*: Plowman and others laid off, but were promised pension checks for the rest of their lives for past loyal employment. In order to receive their pension checks, the employees needed to pick them up from the main office. A year after promising the pension checks, Indian Refining discontinued the payments.
         - Court found that this was unenforceable because there was no consideration found because past employment is not consideration and the promise hadn’t been bargained for.
           - Going to the office to get the check was only a condition for the gift, not consideration

III. Promissory Estoppel

- A promise is legally enforceable, not because there was an exchange or quid-pro-quo, but because the promisee relied on the promise to her detriment.
  - Promissory estoppel only comes into play as a last resort when there is no consideration or where the legal remedies would be unjust or inadequate .
  - There is a difference between a promise supported by consideration and one supported by promissory estoppel. If the action by the promisee hasn't taken any steps to fulfill the promise, then it cannot be enforced by promissory estoppel. But if the promise was supported by

consideration, then it would be enforceable whether or not any steps had been taken in furtherance.

- §90 - Elements For Promissory Estoppel
  1. A promise
  2. Promisor should reasonably expect to induce act or forbearance
  3. Detrimental reliance by the promisee on the promise
  4. Injustice can be avoided only if the promise is enforced
- *Harvey v. Dow:* Parents helped daughter build her own home on their property. After, the parents refused to give her the deed to the property on which her newly built home sat.
  - This promise would not normally be considered enforceable, but because the parents helped her build the house, there was an implied promise that she would eventually get the land under her home. Because she built the house based on the promise that she would get the land under it and took out a loan, she acted to her detriment.
  - The court saw fit to enforce the promise to compensate her for relying on the promise to build her the home.
- *Katz v. Danny Dare*: P worked for D. Suffered an injury at work, and when he returned was unable to work effectively. D induced P to retire, promising him a pension, but stopped paying it after 3 years. Since P was employed at will, he had no legal right to employment. Therefore when he retired, he suffered no legal detriment, which means that there was no consideration.
  - Since P voluntarily retired out of reliance on D's promise to pay the pension, promissory estoppel enforces the pension promise even though there was no consideration given by P in return for the pension.
- *Aceves v. US Bank*: P obtained a home loan held by D, but filed for Chapter 7 bankruptcy later on. She was going to convert to Chapter 13 so that she could keep her house, but D persuaded her to forgo bankruptcy all together and promised that they would renegotiate her loan. D then scheduled for P's home to be put up for auction, and only contacted her the day before to renegotiate the loan, and gave her an unfair offer that as double what she was paying before. Court said that the P relied on D's promise and did not convert to Chapter 13, which would've saved her house.
  - **Rule**: Actual reliance on a promise can be either a commission or an omission, as long as the reliance is reasonable.

IV. Mutual Assent

- Mutual Assent = offer + acceptance
- There can be no contract unless the **minds of the parties have met** and mutually agreed upon some specific thing **(mutual assent)**.
- **Offer**
  - §24 (Offer) - An offer is the manifestation of willingness to enter into a bargain made in a way so that a reasonable person would understand that assent creates the contract.
    - **Rule**: The intention of the offer must be clear so that the other party knows that if he accepts, the contract will be formed.
      - *Lonergan v. Scolnick*: D placed an ad in the newspaper offering property for sale. P asked for further details and D wrote back describing the property. P wrote back asking for more info. D replied, giving directions to the property and indicating the lowest price he would accept. P replied, asking for legal description of the property and an escrow agent. D replied, including a legal description, approval of the escrow agent, and warning P that he expected to have a buyer soon. D sold the property to a 3rd party, but P had not yet received the letter stating that the property was about to sell and that he had to act fast.
        - Court held that D's first letter was an invitation to negotiate, not an offer. P made the first offer in his final letter, but that was after the house had already sold.
  - §26 (Invitation to Negotiate) - a manifestation of willingness to enter into a bargain is not an offer if the other party has reason to believe that the speaker doesn't want to conclude the bargain until

there is a further manifestation of assent.

- Advertisements are typically not offers, but rather invitations to negotiate.
    - **Rule**: A communication counts as an offer if a reasonable person would understand the communication as an expression of an offer, or if the advertiser had the specific intent to make an offer.
        - *Izadi v. Machado (GUS) Ford*: D put out an ad that stated prominently that one could buy a new Ford and get $3,000 trade in. P tried to take advantage of the offer, but D refused to honor it, referring to fine print in the ad that limited the cars that offer applied to. Court found that a reasonable person would've believed the ad to be an offer, so it had to be honored.
- Option Contract §87
    - An agreement to keep an offer open for a specific time period.
    - Even if the offeree rejects an option contract, the offeror still has to keep the offer open for the determined period.
    - 2 Elements
        1. A promise to keep the offer open for an agreed-upon time limit.
        2. That promise to keep the offer open must be supported by separate consideration.

- **Revocation**
    - **Rule**: §43 Just because you take an action inconsistent with the intention to enter into the original contract does not mean that your original offer with another party is no longer valid. The original offer needs to be revoked - i.e. communicated to the offeree either directly or indirectly.
        - 2 parts necessary to revoke an offer:
            1. Inconsistent Action AND
            2. Notice/Communication
    - **Rule**: An offer can be revoked at any time before acceptance, unless it's an option contract.
        - *Normile v. Miller*: D listed property for sale. P, assisted by a broker, made an offer that indicated that it would expire at a certain time. D made changes to the offer, and then initialed and returned it. P believed that this counteroffer was an option contract, and decided to wait rather than respond immediately. Later that day, P tried to accept the counteroffer, but the property had already been sold to a 3rd party. The court held that since D revoked his offer by selling the house, P could no longer accept, so therefore there was no enforceable contract.
- **Acceptance**
    - Once you get an offer, you can accept it, reject it, or give a counteroffer.
    - Acceptance: A manifestation of assent to the terms made by the offeree in a manner complying with the requirements of the offer.
    - Counteroffer: If the terms of an offer are changed or added, there is no "meeting of the minds", and therefore no contract.
    - Mirror Image Rule
        - Not an acceptance unless you accept exactly what was originally offered.
        - If you make any changes to the original offer, it is a counteroffer that be accepted by the other party to complete the contract.
    - Mailbox Rule
        - Acceptance of an offer is effective the moment that it is put in the mail.
        - Exception - when the offeree sends a rejection first and then tries to accept later, only the acceptance is effective when received, not when dispatched.
    - **Unilateral Contracts**
        - **Rule**: If an offer is vague regarding whether it needs to be accepted through actual acceptance or by performance, the offeree can choose either. If the offeree chooses to accept by performance, then the moment they start performing, the contract is created and the offer is now irrevocable by the either party. If the offer only provides for acceptance by

performance, then the offeree can abandon performance at any time. (This rule is distilled from the 3 following Restatement Sections)

- §32 - If the offer is ambiguous as to how to accept it, you can choose to accept a contract through accepting the promise or by performance.
- §45 - When an offeror invites the offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance. The offerors duty of performance is conditional on completion by the offeree. The offeree can abandon performance at any point and not be held liable.
    - Ex: If you collect rewards points, you are accepting the offer through performance, but you can decide to abandon the collection at any time and not be liable for anything.
    - Ex: Reward for Lost Dog - once someone starts looking for your dog, you can't revoke the offer to pay a reward if they find the dog, but the people looking can stop looking at any time.
- §62 - If you are given the option of the method of acceptance and choose to accept through performance, once you start performing, the contract is formed and is binding on both parties.
    - Ex: Once you set foot on the Brooklyn Bridge, the contract is formed.

- *Sateriale v. RJ Reynolds*: D told customers that their Camel Cash program was going to end soon, and that people should cash in their points, but had very little merchandise left for people to buy, so everything sold out quickly before most could cash in, leaving them with worthless points. D's offer (if you collect these points, we will give you free stuff) invited customers to take certain steps to redeem their points; the offer is inviting acceptance through an act (going out and buying stuff to get points).
    - P has adequately alleged that the Camel Cash advertisements constituted offers that P accepted by buying Camel cigarettes and accumulating the attached certificates for redemption. Based on the totality of the circumstances surrounding the Camel Cash program, D offered to enter into unilateral contracts that customers could accept by collecting and redeeming certificates.
    - This case represents an exception to the common law rule that advertisements are not offers
- *Cook v. Caldwell Banker*: D announced a bonus program. The program provided three levels of compensation based upon commissions earned for the year. At the end of the year, P was entitled to a bonus of over $17,000. In January 1992, P accepted a position with another company. D informed P that she would not receive her bonus for 1991.
    - The court found that D's promise to pay a bonus operated as an offer to enter into a unilateral contract. P’s performance is sufficient to establish substantial performance under the contract prior to D’s attempt to modify the offer.

V. Pre-Acceptance Reliance

- Like promissory estoppel, but for the offeror -> makes an offer irrevocable. If the offeree relied on the offer to their detriment.
- *Drennan v. Star Paving*: D gave P an offer as a subcontractor for paving work. P had the lowest subcontracting offer, so D included it into their winning bid for the project. When P informed D that they won the project, D claimed that they made a mistake and would not be able to do the work for the price they originally offered. The court said that D should have reasonably expected P to rely on its offer when making the bid for the project, and P did rely on the offer such that enforcement of the terms of D's offer is necessary to prevent injustice to P.
    - This reasonable reliance serves a substitute for the consideration ordinarily required to form a bilateral contract. It thus does not matter that P provided no consideration for the agreement between himself and D, as it was reasonably foreseeable for D that P would rely on its bid if it was the lowest bidder.

- **In determining whether there was pre-acceptance reliance, use the same 4 §90 elements from promissory estoppel.**

VI. Firm Offers

- Unlike a common law option contract, does not require additional consideration.
- UCC §2-205 - if the contract involves the sale of goods, use the UCC. If not, use the Restatements.
- Firm Offer Elements:
  1. An offer
  2. made by a merchant
  3. to buy or sell goods
  4. made in a signed writing
  5. which by its terms gives assurance it will be held open for the stated time (if not stated, then for a reasonable time) is irrevocable
  6. but the period cannot exceed 3 months
- §2-104(1): Merchant is someone who:
  1. Deals with goods
  2. or by his occupation holds himself as having knowledge or skill peculiar to the practices or goods involved in a transaction
  3. or to whom such knowledge can be attributed by employment of an agent.
- §2-105: A good is a movable existing thing
  - Animals included
  - IP excluded
  - Electricity is not a good either because even if movable it cannot be held
  - Homes are not included even if movable

VII. Contracts Analysis Structure (UCC v. Restatement)

- First thing you must consider in analyzing a contracts problem is whether **article 2 of the UCC** or **general common law principles (restatement)** govern that transaction.
- **Analysis**
  - If contract DOES NOT stipulate UCC or common law
    - Is it a **sale of goods**?
      - If yes- is there a specific UCC provision that applies to this particular issue?
        - If yes- UCC applies
      - If no- under 1-103, common law applies
    - Is it a provision of services?
      - Common law applies
  - If contract DOES stipulate UCC or common law
    - Chosen law applies
- **Generally**
  - Sale of goods= UCC
  - Services= restatement (common law)
  - Many contracts may be a mix of both sale of goods and provision of services, but the **predominant purpose** is what determines which governing law rules
    - Common law, UCC, or statutory provision
  - **Coakley Factors of analysis to determine nature of the contract**
    1. The language of the contract
    2. The nature of the business of the supplier
    3. The intrinsic worth of the materials

VIII. Battle of the Forms

- How to determine whether the UCC or common law should apply:
  - UCC = sale of goods
  - Common Law = Services (anything that is not a good)

- *Princess Cruises v. General Electric*: P wanted D to do an inspection and repairs of one of their ships. P sent D a purchase order that included a contract price, terms and conditions. D sent a final price quotation, which stated that the price was for "engineering services." The quote included a different price and terms and conditions. P gave D permission to start work and paid in full. P later discovered that D did not clean the rotor properly, which damaged the ship. Since the contract did explicitly reference services, and P already had most of the necessary supplies, the matter should be handled under common law, not UCC. A contract was formed once P paid and allowed D to proceed with repairs.
    - **Rule**: Performance on the contract, including paying, equals acceptance.

- Common Law Battle of the Forms
    - **Rule**: Mirror Image Rule - acceptance must be a mirror image of the offer = same exact terms.
        - Exception §59 Comment A: if the terms really don't materially alter the deal, then they can be different. The acceptance is still operative despite additional / different terms if the acceptance doesn't depend on assent to additional / different terms. Done at the discretion of he judge.
            - Additional/different terms are seen as proposals for modification of the contract
    - **Rule**: Last Shot Rule - a contracting party who makes no objection implicitly accepts any additional terms contained in the final counteroffer (Typically the last form sent between the parties).
- UCC Battle of the Forms
    1. §2-205 -> must meet merchant/goods elements
    2. §2-207 (1)-> Acceptance = definite and seasonable expression sent in a reasonable amount of time is acceptance, even if there is some difference in boiler plate terms unless there is an express condition that the different terms must be agreed upon to form the contract.
        - Definite and seasonable - qualifies as acceptance under common law, minus the mismatched boilerplate, and was done in a reasonable period of time.
    3. §2-207 (2)-> Additional terms
        - All additional terms are included (Only if both parties are merchants)unless:
            1. The offer expressly limits acceptance to the terms in the offer.
                - If the original offer or counteroffer specifically says that they will not accept any changes to their terms.
            2. They materially alter the terms.
                - Terms that would cause surprise or hardship or deviate from your expected role in the contract.
            3. Notification of objection to them has already been given or is given within a reasonable amount of time
                - If they said before, or within a reasonable amount of time that they wouldn't accept certain terms.
        - If one party is not a merchant, then the additional terms are just proposals and not included. It would not be included unless the opposing party expressly accepts it.
    4. Different Terms
        i. Approach 1: §2-207 (2) = treat if as if it was an additional term
        ii. Approach 2: Excluded unless expressly accepted by offeror
        iii. Approach 3: Knockout Rule - if there are different terms in the offer and acceptance, then the differing terms in both are kicked out of the agreement.
            - *Brown Machine v. Hercules*: Hercules requested a price quote for a piece of equipment, and Brown sent the quote. In response to the proposal, Hercules submitted a purchase order. The purchase order provided that acceptance of the order expressly limited the terms of the contract to the terms of the purchase order. The purchase order did not contain an indemnity provision. In response to the purchase order, Brown sent Hercules an order acknowledgment, which contained an indemnity provision. The equipment was shipped to Hercules and the agreed-upon purchase

price was paid. Sometime later, an employee of Hercules was injured by the equipment and sued Brown. Brown insisted that Hercules honor the indemnity provision, but Hercules refused.

- Hercules' purchase order constitutes the original offer. Because Brown's February 5 acknowledgment followed the purchase order, it was either an acceptance or counteroffer. Brown's acknowledgment included the indemnity provision as the additional term. However, it did not contain any language that made acceptance of the offer expressly conditional upon Hercules' acceptance of the indemnity provision. Therefore, Brown's acknowledgment is an acceptance of Hercules' offer.

5. If the contract was accepted via performance
    i. §2-207 (3) - After an exchange of forms, if one party accepts the counteroffer through performance, if there are additional or different terms, they will be knocked out of the final contract. Anything that is knocked out is filled in with the UCC generic language for that type of provision.

IX. Defenses to Contract Validity

- The existence of these defenses means that no valid contract was formed.

1. Minority and Incapacity

- §12(2) - A person cannot assent to a contract if they are:
    a. Under guardianship
    b. Minority
    c. Mentally ill
    d. Intoxication
- Minority
    - Voidability of Contract
        - **Traditional Rule**: Court decides whether or not the contract should be voided based on whether contract is a benefit or a burden to the minor.
        - **Modern Rule**: Minor decides at any age whether or not they want to void the contract, but then ratify it when they reach the age of majority.
    - Restitution for the Voided Contract
        - **Traditional Rule**
            - Minor returns the remaining benefit and gets paid back the price of what he paid.
            - Exception: if minor misrepresents age or willfully destroys property, then there should be full restitution.
        - **Modern Rule**
            a. If minor has actually paid for the item:
                i. Benefit Rule = traditional restitution + use value
                    - Use value is the cost of using the item over the period for which it was possessed, but it is very subjective and usually calculated by experts.
                ii. Depreciation Rule = traditional restitution + depreciation
                    - Depreciation is compensation for wear and tear on the item while it was possessed
                    - *Dodson v. Shrader*: P bought a truck from D, but didn't tell him he was 16. When the car broke down, P demanded a full refund from D. The court held that the contract should be voided, and P was entitled to get his money back for the value of the car minus the wear and tear that he put on it while in his possession.
                iii. Combo of Benefit and Depreciation Rules.
            b. If minor has not paid for the item = traditional restitution

- The court does not want to make a minor pay compensate for depreciation or use value if they did not pay for the item because the minor could go into debt.

c. Exceptions
   i. Minor misrepresents age or willfully destroys property = full restitution
   ii. Undue influence/overreaching by competent party = traditional restitution
   iii. If terms are unfair or unreasonable = traditional restitution

- Mental Illness
  - **Rule**: Contract is voidable if one party lacks the mental capacity to form a contract at the time the contract was entered into.
    - Cognitive test - didn't have the mental ability to understand what you were agreeing to.
    - Volitional test - can't control yourself from entering into the agreement.
    - *Sparrow v. Demonico*: During mediation to determine a settlement for ownership of what had been a family home, Demonico (D) broke down crying and had a meltdown, and authorized her attorney to execute a settlement on her behalf before leaving the session. Sparrow (P) sought an order to enforce the agreement, but D refused, claiming that she lacked the mental capacity during the mediation to enter into a contract, and that therefore it should be unenforceable.
      - Court held that D was aware that she was taking part in a mediation to settle on what do with her family's home, had competent counsel representing her, and there is no medical testimony that supports her claim that she was mentally incompetent. Without this medical evidence, there is no basis to conclude that D lacked the ability to contract in this case.
    - Restitution
      - Traditional: full restitution, the mentally ill must give back fair market value
      - §15(2) : Modern
        - Restitution as justice and equity requires
        - Full restitution not typically awarded if the competent party had knowledge of the illness
        - Necessaries: K can be voided, but the full market value must be restored.
          - Food, shelter, and clothing, but other things are content dependent
- Intoxication
  - **Rule**: If someone was under the influence of drugs or alcohol when the entered into a contract, then it can be voided if the other party knew, or had reason to know that they were under the influence.

2. Duress

- 3 Elements under §175(1)
  1. Improper threat
     - Anything morally or legally improper
  2. By the other party
     - The threat must substantially contribute to the assent, but not necessary that the threat was the sole cause for entering into the agreement.
  3. No reasonable alternative under the circumstances
     - Depends on the facts what is considered reasonable.
- *Totem Marine v. Alyeska*: P entered into a contract with D whereby it agreed to transport pipeline construction materials from Texas to Alaska. P chartered a barge in order to perform under the contract. Due to delays, P terminated the contract, but D still demanded some payment for the barge rental costs. D knew that P was in financial trouble, and used that knowledge as leverage to

force a settlement for a lower amount. The court held that P entered into the settlement under duress, and therefore it should be voided.
    i. Because D knew that P was struggling financially, they used this to force a settlement and release = if you don't sign this, you won't get your money in time to pay off your debts.
    ii. They would not have entered into the settlement had D not pressured them.
    iii. P had to take the lesser sum of money, or face bankruptcy.
- It has to be more than taking advantage of someone's tough situation to constitute duress.

3. Undue Influence

- 3 Factors under §177
    1. Unfair persuasion of a party who is
    2. Under domination of the party exercising the persuasion, OR
    3. By virtue of their relationship is justified in assuming the persuader is not acting in a manner inconsistent with his general welfare
- *Odorizzi v. Bloomfield School District*: D was arrested for being gay, and forced to sign a letter resigning from the school, after being convinced by school officials that it was in his best interest. The criminal charges were later dropped, but the school refused to reinstate him.
    - *Odorizzi* Factors:
        a. Discussion at an inappropriate time
        b. Unusual place
        c. Insistent demand
        d. Extreme emphasis on consequences of delay
        e. Use of multiple persuaders
        f. Absence of 3rd party advisors
        g. Statements that there is no time to consult financial advisors or an attorney
- §175(2) & §177(2)- A 3rd party's influence or duress can void a contract between 2 other parties if the party in power knew about the 3rd party's influence. If they did not know, or have reason to know, then it would not be voidable.

4. Unconscionability

- **Rule**: The absence of meaningful choice and terms that are unreasonably favorable to one party.
- *Williams v. Walker-Thomas*: Once you buy one item on credit, if you buy any others and default, D is allowed to repossess all of the items bought previously even if they were partially paid off. Court held there were unconscionable terms because P had a 3rd grade education level and did not understand what the contract she was signing meant and she lacked a meaningful choice.
- *Higgins v. Superior Court of LA County*: Foster family used orphaned kids to get onto Extreme Makeover, and then kicked the kids out after the home was built. While signing the paperwork for the show, P signed an arbitration clause, but claimed it was unconscionable and that therefore the case should be tried in court. The court decided that due to the Severability Doctrine, the arbitration clause could be separated from the rest of the contract, and therefore whether or not the clause was unconscionable could be heard by the court instead of an arbitrator.
- The court looks at both procedural and substantive unconscionability factors. Using a sliding scale, if there is a lot of one type, there can be less of the other. In CA, you have to have at least a little of each.
    - Procedural Unconscionability factors
        1. Relating to the contract
            a. Boiler plate terms or legalese that most people don't read or understand or would cause an unfair surprise.
            b. Adhesion Contracts ("Take it or Leave it")
            c. Preprinted/standard form contract
        2. Relating to the parties or bargaining process
            a. Indigent Party
            b. No real opportunity to read or understand the contract
            c. Little or no leverage to bargain or negotiate
            d. Gross inequality in bargaining power

- Substantive Unconscionability Factors
    - Bargain is such that no man in his sense and not under delusion would make, and that no honest and fair man would accept.
        - Terms that shock the conscious, giving up constitutional rights, ect…
        - Disparity in consideration or unfairness of a deal is not enough.
- Remedies for Unconscionability
    - The court has discretion to:
        - Refuse to enforce
            - Either the whole contract, or just the unfair portions
        - Refuse or limit remedies
            - Award restitution instead of damages
        - Rewrite the unconscionable clauses in the contract

5. Misrepresentation

- §164: If a party's manifestation of assent is (1) induced by either a (2) fraudulent or material (3) misrepresentation by the other party upon which the recipient is (4) justified in relying, the contract is voidable by recipient.
    - 4 Misrepresentation Elements
        1. Induced Assent
        2. Fraudulent or material
            - Fraudulent or material means that the misrepresentation has to be either fraudulent (intentional) or material (didn't know statement was false but a reasonable person should have known/been more diligent and it pertains to a material fact; i.e., honest mistake about a trivial fact is not actionable).
        3. Misrepresentation
            - Misrepresentation means to say something that is not actually true (does not have to be intentional).
        4. Justified Reliance
            - Reliance must be reasonable (objective standard, but the standard is relatively low).
- **Statements of Opinion v. Fact**
    - This diamond ring is worth $10,000 = opinion
    - This diamond ring was previously bought for $10,000 = fact
    - It is my opinion that this is a genuine signature = could be a fact if it's what I believe to be true; or might be an opinion
    - §169: Opinion generally not sufficient for misrepresentation unless recipient:
        a. Reasonably believed that opinion maker has special skill, judgment, or objectivity re: subject matter, OR
        b. Stand in relation of trust/confidence with opinion maker, OR
        c. Is particularly susceptible to the type of misrepresentation involved
    - §168: Opinion won't be a misrepresentation if:
        a. Facts known to the opinion maker are not incompatible with his opinion
        b. The opinion maker knows facts sufficient to justify forming the opinion
- *Syster v. Banta*: Dance studio kept telling elderly woman she could become a professional dancer if she took classes with them, so she bought thousands of dollars worth of classes even though she had no shot at being a professional dancer. Court found that she was fraudulently induced into signing a release and she was justified in relying due to her loneliness from being a widow and skilled salesmanship.
- Types of Misrepresentation
    - **Affirmative Misrepresentation**

- Requires affirmative statement that is at least misleading.
- Can be fraudulent, negligent, or innocent.

- **Concealment**
  - Requires an affirmative act that it at least misleading.
  - Can be fraudulent, negligent, or innocent.
- **Nondisclosure**
  - Requires a duty to speak, and you make no affirmative statement or act in spite of that duty.
  - Can only be fraudulent.
    - Cannot have a "negligent" or "innocent" nondisclosure as a basis for rescinding the contract
    - It's hard to disclose something you don't know, so it's hard to place the blame
  - §161: Criteria for Duty - A persons nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist if:
    a. Disclosure is necessary to prevent a previous assertion from being a misrepresentation, OR
    b. Disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making a contract, and nondisclosure amounts to a failure to act in good faith, OR
    c. The other person is entitled to know the fact because of a relation of trust and confidence between them.

- Misrepresentation can be either:
  - Fraudulent (Intentional)
    - According to the Rest. 2d, if it is a fraudulent (intentional) misrepresentation, doesn't need to be made about a material fact
      - But most states' rules do quires materiality even in cases concerning intentional misrepresentation
  - Negligent
    - Must have been a misrepresentation about a material fact
    - Not that you know that the statement is false or misleading, but that a reasonable person would have known
  - Innocent
    - Also a basis for rescission
    - Not a basis for an action in tort, unless a statute provides for innocent misrepresentation
- *Stechschulte v. Jennings*: D had extensive leaking in his house and decided to caulk them instead of a more permanent & expensive fix. When D sold the house, he signed a disclosure form and said that the leaks were minor and completely fixed, which was false. The form also said that buyers had to do their own due diligence into anything listed on the form. A few weeks after buying the home it rained and the leaks opened up. Court found the following:
  - Affirmative Misrepresentation because D said the leaking was "completely repaired"
  - Concealment because he covered the water spots with paint
  - Nondisclosure when he didn't turn over the receipts for the repairs when he was required to
- **Fraud in the inducement v. Fraud in the execution**
  - **Fraud in the inducement = voidable**
    - Where the party knows that he is signing but does so as the result of misrepresentations
    - Injured party knows they're entering into a contract, just don't know all the correct facts
  - **Fraud in the execution = void**

- Where the party is deceived as to the nature of the writing
- Injured party doesn't know what contract they're entering into or even that they're entering into a contract

- *Park 100 v. Kartes*: Lawyer induced P into signing a "lease agreement" that was actually a personal guaranty by catching them in the parking lot as they were leaving for a wedding.
  - **Fraud in the execution** uses the §164 analysis:
    1. Kartes was induced to sign the document by the misrepresentation
    2. Fraudulent because the document wasn't actually what Park 100 said it was
    3. Misrepresentation because it was titled "lease agreement" but was actually a personal guaranty
    4. Court held Kartes was justified in relying despite not reading the document carefully at that moment due to the pervious understanding and rushed context.
       - Justified in relying is not difficult to meet -> don't have to do what a perfect legal mind would do, just act in good faith
       - Even where the party could've taken other reasonable steps but did not, courts tend to find misrepresentation.

6. Public Policy

- When is PP defense triggered?
  - If there's legislation or some other court precedent, PP makes contract unenforceable on its face
    - General unenforceable
  - But if no clear legislation or case law, courts need to determine is there a PP that's against it
    - Court uses **§178 factors** to determine if unenforceable
- §178: When agreements in general are unenforceable as contrary to PP
  - A promise or other term of an agreement is unenforceable on grounds of public policy if:
    a. **Legislation** provides that it is unenforceable, OR
    b. The interest in its enforcement is clearly outweighed in the circumstances by a **public policy** against the enforcement of such terms
  - Factors in favoring enforcement of contract
    a. The parties justified expectations (Freedom of contract between parties)
    b. Any forfeiture that would result if enforcement were denied (Money already paid that can't be recovered), and
    c. Public interest in favor of enforcement
  - Factors opposing enforcement of contract
    a. The strength of that policy as manifested by legislation or judicial decisions
    b. The likelihood that a refusal to enforce the term will further that policy
    c. The seriousness of misconduct involved and the extent to which it was deliberate
    d. The directness of the connection between that misconduct and the contract term
  - *In re Baby*: Surrogate mother agreed to give baby to adoptive parents upon its birth. Tennessee passed law that biological mothers cannot relinquish rights to their child before birth. Court found that surrogacy contracts do not offend public policy per se, but a biological birth mother, including a surrogate, may not use a contract to avoid attaining the status of a legal parent or to negate parental status prior to childbirth.
    - **Rule**: You cannot contract around a statute.
- §188: When ancillary non-compete agreements are unenforceable as contrary to PP
  - A standalone non-compete agreement (like a price-fixing agreement between companies) is contrary to public policy, so the only time one can be enforced is if it is ancillary to an otherwise valid contract (like an employment agreement).
  - Non-competes can be consistent with public policy, as long as they are reasonable.
    - When a non-compete interferes with the public's interest, it is likely unenforceable.

- California does not recognize non-compete agreements.
- A non-compete clause is unenforceable if:
  a. The restraint is greater than is needed to protect the promisee's legitimate interest, OR
     i. Scope of activities limited
     ii. Duration of restriction
     iii. Geographic area restricted
  b. The promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
     i. Professions involved (i.e. doctors)
     ii. Covenant only furthers employer's desire to stifle competition (as opposed to protecting their legitimate business interests)
     iii. Other public interests compromised
- Examples of valid uses of non-compete clauses:
  - A promise by the seller of a business to not compete with the buyer in such a way as to injure the value of the business sold
  - A promise by an employee or other agent not to compete with his employer or other principal
  - A promise by a partner not to compete with the partnership
- *Valley Medical Specialists v. Farber*: D signed a non-compete with VMS as part of his partnership agreement. Court held that:
  i. the scope of the non-compete was greater than needed because it covered all types of medicine, not just HIV medicine which was all VMS did
  ii. It covered too wide a geographical area than necessary
  iii. and it lasted for 3 years.
- **Blue pencil rule**
  - If there is a piece of a non-compete that is unfair, courts can rewrite it to make it more reasonable

7. Mistake

- A mistake is a belief about a fact that is not in accord with the facts that is in existence ***at the time of contract formation.***
- **Mutual Mistake**
  - §152: When mistake of both parties make a contract voidable
    - Where a mistake of
      1. **Both parties** at the time a contract was made
      2. As to a **basic assumption** on which the contract was made has
         - Basic Assumption = if you would've known about it, you wouldn't have entered into the contract in the first place.
         - Rule: Mistake about value or future value tend not to count as a basic assumption (we don't want to give relief to people who just make bad deals)
      3. A **material effect** on the agreed exchange of performances
      4. The contract is voidable by the adversely affect party *unless* he **bares the risk of mistake under §154**
         - If the mistaken party bore the risk of mistake- implicitly assumed the risk or expressly did in the contract- then there is no defense of mistake
  - §154: When a party bears the risk of a mistake
    - A party bears the risk of mistake when:
      a. The risk is allocated to him by agreement of the parties **(explicit Assumption of Risk (AOR))**

b. He is **aware** at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, OR **(implicit AOR)**
c. The risk is allocated to him by the court on the ground that it is reasonable in circumstances to do so **(balancing of equities by courts)**

- Always look for allocation of risk in a contract
  - Often times written into contract terms
- If you are negligent you can still invoke mistake, but not if you acted recklessly; but negligence isn't irrelevant b/c of the equitable balancing done by the court

- *Lenawee v. Messerly*: D sold P a tract of land which had a septic tank in violation of health code. Board of Health condemned the property, so P couldn't use the property for rentals to generate income. While both parties were under an innocent mistake of fact (that the apartment was suitable for rental), rescission of the contract cannot be granted to P because the risk of loss should be allocated to the purchasers.
  - A mistake affecting the value of the transaction is not enough, virtually any mistake as to a basic assumption affects the value
  - *Barren Cow Case*: Farmer sold a cow for cheap because they thought it was infertile, but in reality it was fertile. Therefore, there was a mistake about what was being sold (i.e. a breeding cow v. a meat cow), not just a valuation mistake. The court held that if both parties thought the cow was infertile, the contract was voidable on grounds of mutual mistake. Because both parties were mistaken, the consideration failed for the cow as she actually was a breeding cow, not a meat cow.
- Hypo: Jones, farmer, found a stone. Smith, jeweler, though it was a ruby. Jones sold it to Smith for $200 (how Smith valued it). Stone turned out to be an uncut diamond worth $3000. On trial, it was proved that Smith did not know the stone was a diamond when he brought it.
  - [1] Mutual Mistake about a [2] basic assumption (mistake about the stone itself -> thought it was a ruby)
  - [3] Material effect -> $200 vs. $3000
  - [4] Implied assumption of risk -> conscious awareness on both sides that they don't really know what it is, but it's probably a ruby; aware that they're taking a risk
  - So, while there was a mutual mistake in law, it doesn't make out the defense because it fails on prong [4]

○ **Unilateral Mistake**

- §153: When mistake of one party makes a contract voidable
  - Where mistake of
    1. **One party** at the time the contract was made
    2. As to a **basic assumption** on which he made the contract has
    3. **A material effect** on the agreed exchange of performances that is **adverse to him**
    4. The contract is voidable by him If he does not bear **the risk of mistake** under **§154**, *and:*
       a. The effect of mistake is such that enforcement of the contract would be **unconscionable**, OR
       b. The **other party had reason to know of the mistake** or that party's fault caused the mistake (equitable factors)
- *DePrince v. Starboard Cruises*: P bought a diamond on D's cruise ship. D misstated the diamond's price and returned P's money since they wanted to rescind. P sued to enforce the contract. Court found that the mistake was a miscommunication about the seller's price for the diamond, not a mistake in value of the diamond. Therefore, this was a unilateral mistake and could be rescinded by D.

X. Defenses to Enforceability

- There is a valid contract, but the question is, is one party's obligations under the contract unenforceable, usually due to fairness.

1. Impracticability
    - Similar to mistake, but the only difference is with mistake, it had to have existed at the time of contract formation. With impracticability and frustration there's a supervening event that occurs.
        - Difficult standard to meet.
    - A mere increase in difficulty is not enough for impracticability-> don't want to give a party an out just because it'll be more expensive/ difficult to fulfill their side of the deal.
        - There is a difference between "I can't do it" and "nobody can do it." The latter is impracticability.
    - The party trying to claim impracticability needs to show that they did everything reasonably possible to fulfill their side of the deal.
    - §261: Discharge by supervening impracticability
        - Where after a contract is made, a party's performance is:
            1. Made **impracticable**
                - It's not just that the party under the contract claiming the defense can't do it/is impracticable, it's that it's impracticable for anyone in their situation to do it
                    - Did the party do everything possible that they could have done to perform? If not, can't use the defense
                - Examples:
                    - Supervening death or incapacity
                    - Destruction of thing necessary for performance
                    - Supervening prohibition or prevention by law
            2. **Without his fault** by the occurrence of an event
            3. The nonoccurrence of which was a **basic assumption** on which the contract was made, his duty to render that performance is discharged
                - Nonoccurrence…basic assumption = both parties assumed that the event would not occur
            4. Unless the language or the circumstances indicate the contrary
    - *Waddy v. Riggleman*: P entered into a contract to buy land from D. The agreement required D to convey the land free of liens. D's attorney put this process off, and was unable to release the liens before closing because of his delay. After closing passed without the liens being cleared, D backed out of the deal, claiming impracticability. Since it was the responsibility of D to get the releases and they failed to do so, they failed prong #2 because it was their fault. Additionally, just because the closing date had passed doesn't mean the deal was impracticable, it would just take longer.

2. Frustration
    - §265: Discharge by supervening frustration
        - Remaining duties to render performance are discharged if:
            1. **a party's principal purpose is substantially frustrated**
                - If some serviceable use still exists, then this element is not satisfied
            2. **Without his fault** by the occurrence of an event
            3. The nonoccurrence of which was a **basic assumption** on which the contract was made
                - Nonoccurrence…basic assumption = both parties assumed that the event would not occur
            4. Unless the language or the circumstances indicate the contrary
    - *Mel Frank v. Di-Chem*: D was leasing a warehouse from P to store chemicals, including some hazardous materials. The city changed regulations and told D that they couldn't continue to store hazardous materials without making safety improvements. D's performance obligation was to pay rent, so this purpose was not rendered impracticable by the change in regulation; this is why D argued frustration of purpose. D vacated and stopped paying rent to P because they could no

longer use the warehouse to store hazardous materials like they wanted to. Court found that since D could still store non-hazardous materials, building still could be used for storage, and therefore their purpose wasn't substantially frustrated.

- The one party has to know or have reason to know about the other party's principle purpose.
- **Difference between impracticability and frustration of purpose**
  - **Impracticability-** unable to perform
  - **Frustration of purpose**- benefit that was contemplated from the contract is now frustrated
- **Difference between impracticability/frustration (post formation) from mistake (pre formation)**
  - Essential differences:
    - Mistake happens during the bargaining process**, BEFORE** the contract is formed
    - Impracticability/frustration deals with a supervening event **AFTER** contract formation

3. Statute of Frauds ("SoF")

- General Rule: Subject to some exceptions, a (valid) oral contract that "falls w/in" the statute is unenforceable unless it is evidenced by a written memorandum signed by the party against whom enforcement is sought.
- Purpose: to prevent fraud by requiring that certain categories of contracts be reduced to writing.
- There is a valid contract, the question is, can it be enforced
  1. Does the Contract "fall within" the statute of frauds?
  2. If so, is there sufficient writing to satisfy the statute?
  3. If not, do any exceptions to the statute apply?

1. Does the Contract "fall within" the statute of frauds?
   - Restatement
     - §110: Classes of Contracts covered
       - the following classes of contracts are subject to SoF, forbidding enforcement unless there is a written memorandum or an applicable exception:
         a. Interests in land
            - Sale or purchase of land (not rent), though long term-leases could qualify (a year or more)
            - Mortgage contracts; easements
         b. Contracts that can't be performed in 1 year
            - A test of logical possibility -> whether or not it can be logically performed within 1 year
            - 1 year starts from the time the contract is formed, not when performance begins
            - Where any promise in a contract cannot be fully performed within 1 year, all promises in the contract are within the statute of frauds.
         c. Suretyship Contracts
            - Original promise of indebtedness between creditor and debtor -> Suretyship contract between creditor and surety to promise to pay IF debtor fails to pay
            - Creditor must first exhaust remedies against debtor before going to the surety
            - Ex: Contracts by executors / administrators to answer for debts of a decedent
         d. Marriage Contracts
            - Prenuptial agreements, transfers of property upon marriage, ect…
   - UCC
     - §2-201
       - requires contracts for the sale of goods **in excess of $500** to be evidenced in writing, **signed by the party against whom enforcement is sought,** unless some

exception to the statute applies.

2. Is the writing sufficient?
    - Contracts falling within the SoF must be:
        a. Evidenced by written memorandum that is,
        b. Signed by the party against whom enforcement is sought
    - In order for the writing to be sufficient, must satisfy §§131, 134, and 133:
        - §131: Requirements re: Content
            - Identifies the parties and basic nature of the exchange
            - States with reasonable certainty the essential terms of the contract
            - Is sufficient to indicate a contract was made between the parties
        - §134: Requirements re: Signature
            - Signature must evince an intention to assent
            - Must be signed by, or on behalf of, the party against whom enforcement is sought
        - §133: Requirements re: Form
            - Almost anything in any form can constitute a written agreement
            - Anything reduced to a physical form is sufficient -> Can be a text, an email, voice recording, etc.
    - *Crabtree v. Elizabeth Arden*: Oral agreement between P and D regarding a 2 year employment contract with salary increases. There were 3 pieces of written evidence for the agreement. There was a written memo which stated the salary, the parties' names, and the job to be offered, but did not include duration and was not signed. There was also a payroll charge card outlining the salary arrangement and it was initialed by D. Finally, there was another payroll charge card detailing the salary arrangement, signed by D's comptroller. When D refused to approve the salary increases, P quit and filed suit.
        - None of these 3 writings were enough individually, but the link between them can be found through oral testimony and a clear showing that the writings refer to the same contract.
        - Rule: Multiple documents taken together may constitute a signed writing sufficient to fulfill the statute of frauds if all documents refer to the same transaction and at least one is signed by the party to be charged with the contractual obligations.
    - UCC
        - Must be signed by the party against whom enforcement is sought
        - Must specify a quantity of goods
        - §2-201(2)
            - [1] Between merchants if [2] within a reasonable time a writing in confirmation of the contract and [3] sufficient against sender is received and [4] the party receiving it has reason to know its content, it satisfies the writing requirement against such party, unless [5] written notice of objection to its content is given within 10 days after it is received.
            - i.e. When between merchants for a sale of goods over $500, if the sender signs it, and the receiver has reason to know of its content, doesn't matter if the receiver doesn't sign it. It is in force, unless sufficient written objection is given within 10 days.
            - Its ok to incorrectly state the quantity, but if you breach, you can only recover what you put in the contact
                - i.e., if you verbally agree on 200 cases, but the contract only states 100 cases, then you can only recover 100. If you verbally agree on 100, but the contract says 200, then you can introduce evidence to show the verbal amount is actually right.
3. Do any exceptions to the statute apply?

- Restatement
  - **Exception to the 1 year provision
    - If there is full performance by one party, the other party can't use statute of frauds to not comply with the agreement.
  - §139: Justifiable Reliance Exception (exactly the same as §90 Promissory Estoppel)
    a. A promise which the
    b. Promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and
    c. Which does induce the action or forbearance is enforceable notwithstanding the SOF if
    d. Injustice can be avoided only by enforcement of the promise.
    - While §139 is the same test as promissory estoppel, there can be consideration and a contract.
    - The remedy granted for breach is to be limited as justice requires.
    - *Alaska Democratic Party v. Rice*: D told P that she would have a job in AK, but when she quit her previous job and moved out there they said they couldn't hire her. There was no written contract offer, so D claimed P couldn't recover. Court applied §139 and found that she relied to her detriment by quitting her job and paying to move to AK.
- UCC
  - §2-201(1)
    a. Partial Performance
      - If there is partial performance then the contract is still enforceable as to the part that has been performed, even if it wasn't in writing.
    b. Specially Manufacture Goods
      - Goods not suitable for sale to others in ordinary course of seller's business because they were made for a specific buyer and the seller began manufacturing before receiving any repudiation from the buyer.
    c. Admissions or Declarations in Court
      - Once you've declared under oath that a contract in fact existed, you cannot then be able to invoke SoF defense.
      - Many courts say oral testimony is not sufficient
      - But the UCC says oral and written statements are sufficient
    d. Justifiable Reliance
  - *Buffaloe v. Hart*: P offered to buy 5 barns from D for $20k in 4 $5k installments. P gave D a check for the first installment. D learned they could get more money for the barns, so they ripped up P's first check, saying that their sale contract was void since there was no writing supporting it. Is a personal check for partial payment sufficient writing?
    - D didn't endorse the check, so it was missing the requirement for the writing to be signed by the party against which enforcement is sought. However, the partial performance exception applies. Part performance exempts compliance with the SoF -> since D held the check for 5 days, it is perfectly rational for the jury to decide that this constituted sufficient acceptance of the deal. Court enforced the contract for the sale of all 5 barns because of the partial performance.
  - *Songbird Jet v. Amax*: Buyer made a $200k down payment on a $1M jet. The seller tried to withdraw after receiving this down payment. The down payment is partial performance sufficient for the entire plane since the plane is an indivisible whole, not just part of the plane. If the plane was divisible, the court would've only enforced the proportion that was paid for. Additionally, if it was for multiple planes, the court would only enforce the same proportion of the planes as the proportion of performance.

- Hypo: During a telephone conversation, Natasha agrees to sell Dan 200 bottles of wine from her cellar. Natasha typed on a blank piece of her letterhead: "I promise to sell Dan 100 bottle at $25 each." Natasha did not sign her name. If Natasha breaches contract, can Dan enforce it?
    - Ok to misstate the quantity, but can only enforce up to the number misstated in the writing; The writing is only good for the 100 bottles, so Dan couldn't sue for 200.
    - Natasha didn't actually sign, but it is on her letterhead, so some courts might find that sufficient as an intent to authenticate the writing.
    - If Dan instead breeches (like if he refuses to pay) Natasha would likely not be able to enforce the contract against him because Dan didn't sign, and they aren't merchants, so no UCC §2-202(2) argument.

Contract Interpretation & Construction

XI. Interpretation

- Deals with answering the question "What is the meaning of the contract?"
- Mistake concerns exterior circumstances, while Interpretation has to do with the meaning of a term.
- **3 Theories**
    1. Subjective (What the Party Actually Meant)
        - If each party had a different meaning in mind then that suggests that there was no real meeting of the minds and therefore a contract was not formed (no contract).
        - Even if a reasonable person would not have interpreted it this way, if that's the way these parties did than it is enforceable despite how unreasonable it is.
    2. Objective (What a Reasonable Person Would Mean)
        - What is the objective manifestation of a party's intention?
        - Don't care what parties individually meant, it is more important what a reasonable person would understand when reading a contract.
        - It is possible that a court might interpret a contract in a way that neither party intended which seems to defeat the entire premise of contract law.
    3. Modified Objective Theory - R.2d §201 (Look at Relative Fault of Parties)
        1. If A and B have attached the same meaning to a promise or term, it is interpreted in accordance with that meaning.
        2. If A and B have each subjectively attached different meanings, the meaning attached by A will control if:
            a. A did not know of any different meaning attached by B, AND B knew of the meaning attached by A; OR
            b. A did not have reason to know of any different meaning attached by B, AND B had reason to know of the meaning attached by A.
- *Joyner v. Adams*: Contract between P and D for D to develop P's land. If by a certain date the lots weren't "developed," then an escalation clause came into effect where D had to pay extra rent. D thought "developed" = starting to work on the lots by adding water and electrical. P thought "developed" = actually starting to build the buildings. Court applied the modified objective approach.
- **Maxims of Interpretation**
    - Rest. 2d §202 (2), (3), (5)
        - Interpret contract as a whole
            - Have to read a term in the context of the larger purpose of the contract
        - Words should be given ordinary, common sense meaning
        - Technical terms given their technical meaning
        - Interpret terms consistent with other terms and with context
    - Rest. 2d §203 (a), (c), (d)
        - Favor interpretation that:

        - Make contract terms effective vs. ineffective
        - Make contract reasonable vs. unreasonable
        - Make contract lawful vs. unlawful
    - In case of conflict,
        - Prefer specific terms over general language
        - Prefer separately negotiated terms over standardized terms
    - *Ejusdem generis*
        - Where there are specific and general terms together, the general terms will only be interpreted in light of the specific
        - Ex. In a contract to sell farm "together with cattle, hogs, and other animals" the specific terms are cattle and hog, and "other animals" is the more generic term. What does other animals include? Could mean anything, incl. the pet fish, but it the contract is specifying cattle and hogs, more likely that "other animals" refers to other farm animals.
- **Other Maxims**
    - *Expressiso unius est exclusion alterius*
        - If specific terms are listed without general or inclusive terms, it suggests that only those specific terms were meant, everything else was excluded
    - Prefer handwritten provisions over typed provisions
    - Prefer words over figures
        - Ex: On a check, if the words and digits don't match, the back will do with what is written out.
    - *Contra proferentem*
        - Where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording
- <u>Hierarchy of Evidence used in Interpretation</u>
    1. **Express terms/plain language of contract**
    2. **Negotiation history**
        - Exchange of drafting contracts
        - What terms were discussed throughout the process even if they weren't included
    3. **Course of performance**
        - How have the parties conducted themselves previously? -> if earlier occasions of performance and opportunity to object existed, but no objection was made, anything accepted or acquiesced is given weight.
        - Ex. Always paying rent check between 1 and 5 days after first of the month, even though the lease says by the 1st of the month. Landlord cannot come after you for late rent after failing to object for so many prior months.
    4. **Course of (prior) dealing (see UCC §1-205)**
        - Prior relationship that the parties *may* have had *before* this particular contract
            - Ex. dealer always ships coffin by UPS via overnight delivery, so if a later contract does not discuss delivery, then delivery in that later contract should be interpreted as UPS overnight because that's how it usually is.
    5. **Usage of trade**
        - If there is a particular kind of usage that is the norm in a particular place or vocation or trade, then that usage will control
            - This usage has to have a certain regularity of observance so as to justify that it would be observed under this transaction
- *Frigaliment v. BNS*: P entered into a contract to buy chickens from D. The negotiations were primarily in German, but P used the English word "chicken" to denote smaller broilers, as opposed to older fowl. D interpreted it to mean any type of chicken, and therefore shipped primarily fowl to P in the first

shipment. P complained, but allowed D to make a second shipment. P sued for breach of warranty. The court used the modified objective theory, finding that each side had a subjectively different interpretation of "chicken," and P did not do enough to prove its narrower interpretation. Court says D's interpretation is more reasonable; D did not have reason to know of P's unreasonable/bizarre interpretation, and P had reason to know of the meaning attached by D, given that D's interpretation is more reasonable.

XII. Parol Evidence

- What evidence should be excluded from consideration by a jury?
- <u>When does it apply?</u>
  - Applies only when you are using the parol evidence for purposes of proving the terms of the agreement, not to contradict terms or add new inconsistent terms
  - Applies only if there is a writing
    - Usually a contract, but can be a fragment of a contract
  - Applies only to prior/contemporaneous statements
- <u>First determine if the writing is integrated: Full/complete v. partial integration</u>
  - **Full integration**
    - Document contains the final terms of the entire subject matter
    - Intended to be final and exclusive expression of the agreement of parties. Can look to merger clause
  - **Partial integration**
    - Covers only some subjects related to the transaction
    - Intended to be final but not complete because it deals with some but not all aspects of a transactions between parties
  - **<u>Approaches to determine:</u>**
    - **Williston "Four Corners"(formalist) Minority approach**
      - Look only at the contract to determine if the contract is integrated
      - Merger clause = sufficient but not necessary to prove integration
    -
    - **(contextualist) Majority approach**
      - Can look to extrinsic/parol evidence to determine if contract is integrated
      - Merger clause = probative but not conclusive re integration
      - Allow parties to take testimony that might contradict the merger clause to argue still not integrated
  - §209: Integrated Agreements
    i. An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement
    ii. Integration is question for the court to decide, not the jury
    iii. Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression
  - *Thompson v. Libby*: P bought logs from D. There was a written contract for the sale, but no mention of a warranty, yet P claimed that there was an oral agreement for said warranty. Court said that the oral testimony about the warranty couldn't be included. When there is a writing, we privilege it and assume it is the best evidence of the actual agreement, and it was intended to displace any collateral or earlier agreements.
  - *Taylor v. State Farm*: P sued State Farm for bad faith settlement. The issue was whether a court needs to determine if writing needs to be ambiguous for parol evidence to be introduced. Supreme Court in AZ held that ambiguity was required for the Willistonian approach, but is not required under the Corbin approach.

- The Corbin rule is that you can look at parol evidence (outside the 4 corners) to determine if the term is ambiguous to begin with
    - Willistonian approach - the first inquiry has to be whether the term objectively ambiguous.
    - Corbin approach - can look at parol evidence first (so don't need to do an ambiguity analysis at all)
- §210: Completely and Partially Integrated Agreements
    - (1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive [=full] statement of the terms of the agreement.
    - (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
- §215: Contradiction of Integrated Terms
    - Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of [1] prior or contemporaneous agreements or negotiations is not admissible in evidence to [2] contradict a term of the writing.
- §216: Consistent Additional Terms
    - (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
    - (2) An agreement is not fully integrated (only partially integrated) if it omits a consistent additional term which is
        - (a) agreed to for separate consideration or
        - (b) such a term as in the circumstances might naturally be omitted from the writing
    - A partially integrated agreement does not bar consistent additional terms
- §214, 217: Exceptions (meaning you can admit oral evidence)
    - Agreements and negotiations prior to or contemporaneous with the writing are admissible to establish:
        - Whether there is integration
        - Whether it is complete/full or partial integration
        - Meaning of writing
        - Defenses (contrary to PP, fraud misrep, mistake, etc.)
        - Misc. (clerical mistake)

- Analysis Steps
    1. Is there a writing?
    2. Is this an integrated agreement (encompasses entire arrangement b/t parties)?
        - Two different approaches -> Williston and Corbin
    3. § 215; prior to, contemporaneous, contradicts
        - If a contemporaneous writing, than it's not barred
        - If it's a prior contemporaneous oral statement, then its barred
        - If it's a prior writing statement, it is also barred
    4. If doesn’t contradict, could be a consistent additional term
    5. Inquire into partial or full integration
        - If fully integrated, even a consistent term is barred.
    6. Exceptions?
        - Ambiguity?
            - Willistonian, first have to do objective analysis of whether the terms on their face seems ambiguous
            - In a Corbin approach, this is not necessary

XIII. Implied Terms

- Implied terms can be implied-in-fact, or implied-in-law.

- Implied-in-fact terms --> Any term that the court finds to be implicit in the parties words or conduct even though not literally expressed in the contract.
- Implied-in-law terms --> Court says that a certain term should be implied as a matter of law; not because the parties intended it but because they would have if they could foresee the pickle they are in; what a reasonable person in this situation might have done.

- Courts can step in and add terms that can be implied by law, even if the parties never actually agreed to the terms.

1. Reasonable Termination Notice
   - *Leibel v. Raynor Manufacturing Co.*
     - P orally agreed to be the distributor of garage doors manufactured by D. The agreement didn't specify a contract length. 2 years later, D notified P that they were terminating the agreement effective immediately. UCC applies because this distributorship agreement is a contract for the sale of goods (P buys D's doors and resells them). Under UCC §2-309(3), reasonable notice should be implied. The court emphasized the greater risk P had since he had to buy the doors and resell them to make a profit.
       - A reasonable period is one where the distributor can recoup his profit or make alternative arrangements.
   - UCC § 2-309(3)
     - Termination of a contract by one party, except on the happening of an agreed event requires that:
       1. reasonable notification be received by the other party and
       2. terminating the agreement would not be unconscionable.
     - NOT limited to exclusive dealing contracts like UCC § 2-306
2. Implied Covenant of Good Faith
   - You breach the implied covenant if you frustrate the "spirit" or "common purpose" of the contract.
   - Reasonable Efforts
     - *Wood v. Lucy, Lady Duff-Gordon*
       - P had an exclusive right to place endorsements and market D's designs, and D would receive half of the profits. This arrangement was beneficial to both parties since P is doing the majority of the legwork, but gets to benefit from increasing sales from D's status and endorsement. D breached the contract by placing her endorsement on other clothing without P's permission and withheld those profits from him. In the contract there was nothing that specified how many sales P had to make to satisfy the agreement, so D argued the contract wasn't enforceable.
         - Despite not providing explicit terms, P's agreement to place endorsements and market D's designs implies he would promise to use sufficient, reasonable efforts. Once successfully implied, that promise may constitute sufficient consideration to create a valid and enforceable contract.
     - UCC §2-306 (2)
       1. A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes
       2. unless otherwise agreed upon,
       3. an obligation by the seller to use best efforts to supply the goods, and by the buyer to use best efforts to promote the sale.
       - No obligation to use actual "best effort," just a reasonable effort.
       - Limited to exclusive dealing contracts.
     - Once you have a specific agreement about the specific efforts required (such as # of goods need to sell), no longer need to have the reasonable efforts safeguard.
   - §205
     - Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.

- UCC § 1-203
    - Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.
        - UCC § 1-201(19): “Good faith” means honesty in fact in the conduct or transaction concerned.
            - Subjective standard
        - UCC § 2-103(1)(b): "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standard as fair dealing in the trade.
            - Objective standard and subjective standard
- Duty of good faith applies, not to the process of negotiating the contract (exceptions: pre-existing relationship, fiduciary relationship…), but rather, good faith covenant is a rule about contract construction.
    - When we interpret a contract, no matter what it literally says, we’re going to interpret it as if it has a duty on both sides to perform/execute their side of the promise.
- *Seidenberg v. Summit Bank*
    - Ps sold their company to D. D promised to keep them on following the deal and work together to formulate a joint marketing plan. Ps are abruptly terminated by D. P claims that D failed to allow for time to develop opportunity and never actually intended to work with them. While D did not violate any explicit contract terms, he violated the spirit of the agreement. Court implied a covenant of good faith in the contract, and D breached it by terminating Ps and not trying to fulfill their marketing plan.
        - P wanted to introduce parol evidence (oral conversations) to show the spirit of the agreement. This was allowed because P was not trying to add a term, just trying to make explicit what was already there. This falls under the explanatory exception for allowing parol evidence.
- Factors to Consider
    a. Relative bargaining power
    b. Reasonable expectations of the parties
    c. Purpose for which contract was made
    d. Existence of bad faith
    e. Whether conduct violates community standards of decency
- Limitations
    - May not override express terms of contract
    - Mere unjust/unfair results is not enough
- Common Good Faith Fact Patterns
    - Contract fails to provide term necessary to fulfill parties’ expectations (*Wood v. Lucy, Lady Duff*)
    - Using the literal terms that legally allow you to do something in a way that is in bad faith
    - Unlimited discretion to one party (*Wood v. Lucy, Lady Duff*)

Breach and Unjust Enrichment

XIV. Breach

- Breach = unexcused failure to perform
    - Entitles non breaching party to remedies
    - Discharge excuses performance

A. Express and Constructive Conditions

- *enXco v. Northern States Power*
    - P and D entered into an agreement to develop a wind power plant. There was an express termination clause that if P did not get certification by a certain date, then the agreement could be voided. P failed to obtain the certification, so D terminated the agreement. Court

found that getting the certification was only a condition, so D doesn't have to honor their part of the bargain that came from that condition.

- Promise
  - Undertaking to do/not do something.
  - Failure to perform a promise is a breach.
- Condition
  - Event that we are uncertain has or will occur.
  - This is similar to a conditional gift - If you come with me to my car, I will give you skis. If you decide to not come to my car, then you aren't in breach, you just don't get skis.
  - Conditions can be:
    - **Express**
      - Must comply completely or contract is breached.
        - Substantial performance is not sufficient to comply with an express condition.
      - These are conditions that are explicitly stated in the contract.
      - Exceptions to the general rule that express conditions must be strictly complied with:
        1. Avoid forfeiture
           - Denial of compensation that results when a party loses rights to a business arrangement after they have substantially relied.
        2. Waiver/Estoppel
        3. Bad faith
      - Usually uses words like "if" and "unless"
    - **Implied-in-fact**
      - Often arise when issue is whether a term fixing the time/method of performance is an implied condition
    - **Constructive** (implied-in-law - §237)
      - Substantial performance is sufficient to avoid a breach.
      - *Jacob & Youngs v. Kent*
        - D hired P to build a home. They agreed that all pipe in the home would be from Reading, PA. When the home was almost complete, D notices there was Non-Reading pipe used. It was just a mistake by P (not willful or fraudulent). While the pipe used was of the same standard as Reading pipe, D refused to pay.
        - Court held that using the Reading pipe was not an express condition of the contract. Rather, it is a constructive condition. Because it was only a constructive condition, only substantial performance was required by P. Therefore, D is in breach for not paying P even though P did not follow a constructive condition.
          - Not using Reading pipes is indeed a breach…but still need to figure out if it is a MATERIAL breach.
            - Just because the language is in the contract does not make it material, only that there is a breach.
  - § 237
    - It is a constructive condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.

B. Minor, Material, and Total Breach

- Minor Breach (= Substantial Performance)

- Substantial Performance Doctrine
    - If A substantially performs, constructive conditions to B's performance is satisfied.
        - Therefore,
            - B must perform
            - But B can still sue for the minor breach cause by substantial (i.e., not full) performance
- What constitutes substantial performance?
    - Compare to what D did in *Kent…*
    - Totality of the circumstances- to see if one party substantially performed
        a. Purpose to be served by the provision
        b. The desire to be gratified
        c. The excuse for deviation from the letter
        d. The cruelty of enforced adherence
        e. Magnitude of the defects in performance
        f. Language and circumstances indicating how important the omitted performance was

○ Material Breach

- Material Breach Doctrine
    - If A does not substantially perform, constructive conditions to B's performance is not satisfied (see §237)
        - Therefore,
            - B need not perform – he can suspend his performance temporarily AND
            - B may sue for breach
- §241: In **determining whether a failure to render or to offer performance is material**, the following circumstances are significant: (not an exhaustive list, but the more you have the more likely it is to find a material breach)
    a. The extent to which the injured party will be deprived of the benefit which he reasonably expected;
    b. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
    c. The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
    d. The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
    e. The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing
- *Sackett v. Spindler*
    - D agreed to sell shares of newspaper company to P. P agreed to pay in installments. P paid the first installment on time, but thereafter fell behind on payments and his final check bounced. After multiple warnings, D pulled out of the deal. P failed to successfully ague that he substantially preformed, and instead, the court agreed with D that there had been a total breach. Therefore D is excused from performance.

○ Total Breach

- Total Breach Doctrine
    - If there is a material breach and at least one § 242 factor satisfied,
        - B is completely discharged from performing
        - B may sue A for breach
- § 242: In **determining the time after which a party's uncured material failure to render or offer performance discharges the other party's remaining duties to render performance**, the following circumstances are significant:

a. Those stated in §241
b. The extend to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute agreements;
c. The extent to which the agreement & circumstances provide for performance without delay

- Analysis
  - First, look at what the contract says -> is there an explicit or constructive condition?
  - Minor (substantial performance) or Material Breach? -> Look to 241 to evaluate.
  - Assuming there is a material breach, is there a total breach under 242?
    - If yes, then duty to perform is discharged.
- Breach Overview
  - If the breach is *total and materia*l- the promisee may:
    - Withhold performance
    - Terminate
    - Claim full damages for breach
  - If the breach is *material but not total*- the promisee may:
    - Suspend performance
    - Await cure
    - Claim compensation for any loss suffered
  - If the breach is not material -> substantial performance, the promisee may:
    - Claim compensation for any loss suffered

C. Anticipatory Repudiation & Adequate Assurances

- *Truman v. Schupf*
  - P entered into an agreement to buy land from D for an asphalt plant, contingent on P's ability to get approval to re-zone the land. There was strong opposition to the re-zoning, so P made a new offer to D with a lower price since it could no longer be used for asphalt. D rejected the lower price. P then said that the original price would be ok, but D said the contract was already voided because P's second offer was a repudiation. Court held that P did not do enough to repudiate. Rather, P indicated his continuing interest in the deal, but wanted to change the price. This is not a clean, unambiguous repudiation as required by §250.
- §250 - **Repudiation** is:
  i. A statement by the obligor to the oblige indicating that the obligor will commit a breach that would of itself give the oblige a claim for total breach under **§243** OR
  ii. A voluntary affirmative act which renders the obligator unable or apparently unable to perform without such a breach
    - The statement of intent to repudiate must come from A and be directly communicated to B (as opposed to coming from a 3rd party)
- §253 - **Effect of Repudiation**:
  - Where an obligor repudiates a duty before he has committed a breach by nonperformance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
    - An ambiguous statement, a suggestion of price change, or financial difficulty are not enough for anticipatory repudiation.
- §256 - **Retraction**:
  - The effect of a statement constituting a repudiation under §250 or basis for repudiation under §251 is nullified by a retraction of the statement if notification comes to the attention of the injured party before he:
    1. materially changes his position in reliance on the repudiation, OR
    2. indicates to the other party that he considers the repudiation to be final.

- An indication would be filing a lawsuit or another public showing (no internal memos)

- UCC §2-611
  1. Until the repudiating party's next performance is due **he can retract his repudiation *unless* the aggrieved party has since the repudiation [1] cancelled or materially changed his position or [2] otherwise indicated that he considered the repudiation final.**
  2. Retraction may be any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of 2-609.
- UCC §2-610
  - When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, **the aggrieved party may:**
    - For a commercially reasonable time **await performance by the repudiating party**; OR
    - **Resort to any remedy for breach… even though he has notified the repudiating party that he would await the latter's performance** and has urged retraction; AND
    - **In either case, suspend his own performance.**

Act	By Whom	Effect
Substantial Performance (=Minor Breach)	By A	•Allows B to sue for damages •Does not discharge B
Material Breach (=insubstantial performance)	By A	•Allows B to sue for damages •Suspends B's performance (R2d 241) •Discharges B if breach becomes total (R2d 242)
Total Breach (=continued, uncured insubstantial performance)	By A	•Allows B to sue for damages •Suspends B's performance (R2d 241) •Discharges B if breach becomes total (R2d 242)
Anticipatory Repudiation	By A	•A type of total breach •Allows B to sue for damages & suspend performance •B can treat itself as discharged or wait/negotiate until performance comes due (UCC 2-610; same result implied in common law)

- Adequate Assurances
  1. Must have reasonable grounds to request
  2. Assurances requested must be reasonable
  3. Assurance received must be "adequate in the circumstances"
  - *Hornell Brewing Co. v. Spry*
    - P and D entered into an agreement for D to distribute P's Arizona Iced Tea in Canada. D was having issues paying P on time, and P heard an rumor that D didn't even have staff in his warehouse. P then sent D a letter with new terms because of the pattern of insecurity surrounding D. This letter was a request for adequate assurances. Since D did not respond in a timely fashion to the request for adequate assurance, P was allowed to sever the contract.
  - Rule: Failure to provide adequate assurances = anticipatory repudiation.
  - UCC §2-609
    1. When [1]reasonable grounds for insecurity arise with respect to the performance of either party, the other may [2] in writing demand adequate assurance of due performance and until he receives such assurance may [3] if commercially reasonable suspend any performance for which he has not already received the agreed return.
    4. After [1] receipt of justified demand, failure to provide [2] within a reasonable time **not exceeding 30 days** such assurance of due performance as is [3] adequate under the circumstances of the particular case **is a repudiation of the contract**

        - The request has to be in writing, but the response only has to be in writing under UCC.
    - § 251 – Adequate Assurances
        1. Where [1] reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the oblige a claim for damages for total breach under §243, the oblige may [2] demand adequate assurance of due performance and [3] may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance
        2. The oblige may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

A. Unjust Enrichment

- Normal Rule for Unjust Enrichment
    - Unjust enrichment occurs where A confers an economic benefit to B under <u>circumstances which it would be unfair</u> for B to retain the benefit without paying for it
        - "Circumstances which it would be unfair" (3 elements)
            1. Benefit was not forced/no "officious intermeddling"
            2. Benefit accepted with knowledge of receiving party
                - R1 §116 -> danger to life exception (see *Pelo*)
                - R1 §117 -> danger to property exception
            3. Person rendering service of value expects compensation
- Claim based on conferral of benefits, not a promise or a contract
    - Its not that a promise was made, rather, one party got a benefit that it would be unjust, under the circumstances, for them to retain.
- *Credit Bureau Enters. v. Pelo*
    - D was hospitalized against his will for mental illness. When D got to the hospital, he refuse to sign forms saying he would pay, but the hospital rendered treatment anyways. P argued D was unjustly enriched because he received treatment without paying.
        - Normally D saying he didn't want treatment would defeat unjust enrichment, but there is an exception for mentally ill refusing medical treatment when they need it.
    - R1 §116 - Danger to Life and Health
        - A person who has supplied things or services to another, <u>although acting without the other's knowledge or consent</u>, is entitled to restitution therefore from the other if
            a. He acted <u>unofficiously</u> and with <u>intent to charge</u> therefore, and
            b. The things or services were <u>necessary</u> to prevent the other from suffering serious bodily harm or pain, and
            c. The person supplying them had <u>no reason to know</u> that the other would not consent to receiving them, if mentally competent; and
            d. It was <u>impossible for the other to give consent</u>, or because of extreme youth or mental impairment, the others consent would have been immaterial.
    - R1 §117 - Danger to Property
        - A person who, <u>although acting without the other's knowledge or consent</u>, has preserved things belonging to another from damage or destruction, is entitled to restitution for services rendered or expenditures incurred therein, if
            a. He was in lawful possession or custody of the things, or if he <u>lawfully took possession</u> thereof, and the services or expenses were not made necessary by his breach of duty to the other, and
            b. It was reasonably <u>necessary</u> that the services should be rendered, or the expenditures incurred, <u>before it was possible to communicate</u> with the owner by reasonable means, and
            c. He had <u>no reason to believe</u> that the owner did not desire him so to act, and

d. He <u>intended to charge</u> for such services or to retain the things as his own if the identity of the owner were not discovered or if the owner should disclaim, and
e. The things have been <u>accepted</u> by the owner

- *Commerce Partnership v. Equity*
  - D did some improvements on P's building but once the improvements were finished, P said they would not pay until some repairs were made. D claimed unjust enrichment because [1] the benefit was not forced, [2] it was accepted with knowledge because P was always supervising, [3] D is a contractor who expects to be paid. D has to sue for unjust enrichment because they are a subcontractor, so they have no contractual relationship with P. Court held that D can recover if they have exhausted all their remedies against the contractor and P had not yet paid anyone else for D's work (case was remanded to determine if P had paid).
  - If both parties are equally blameless, how to break that tie?
    - <u>Maloney Rule</u>:
      - D can recover if they have exhausted all their remedies against the contractor; and
      - P had not yet paid anyone else for D's work

<u>Remedies</u>

XV. Types or Remedies

- Direct
  - Expectation Damages - compensates breaking promises
  - Reliance Damages – compensate detrimental reliance
- Indirect
  - Consequential
  - Incidental
  - Nominal
- Restitution – compensates unjust enrichment due to conferral of benefits
- Injunctive/Equitable Relief

A. Expectation Damages

- Seeks to put the non-breaching party in the same position they would've been in had there been no breach.
- Aragaki Formula = What you expected to get - what you actually got
- *Crabby's v. Hamilton*
  - D agreed to buy P's restaurant. There was an express condition in the contract that required D to provide loan documentation by the effective date. D had not provided the loan documentation by the effective date, but had later dealings with P that showed an intention to move forward anyways. D then pulled out of the deal just before closing, claiming that they voided the contract because they never provided the loan documentation. Court said both parties had waived this requirement by their actions, so D breached by pulling out of the contract.
- 2 Formulas
  - **Expectation Formula**: What you were expecting to get - FMV of your property
    - P and D originally agreed to sell the property for $290k
    - P actually sold it (to a 3rd party) for $235k
    - $290k - $235k = **$55k**
  - **Farnsworth Formula**: Loss in value + other loss - cost avoided - loss avoided (See casebook p. 856 for example)
    - Loss in value=
      - Expected - actual value received
    - Other loss=

        - Incidental + consequential damages
    - Cost avoided=
        - Costs avoided by P not having to perform
    - Loss avoided=
        - Mitigation of damages
    -

Crabby's
Loss in Value = 290k - 0 = 290k
+ Other Loss = 0
- Costs Avoided = 0
- Loss Avoided = 235k (FMV @ sale 11 months later)
Expectation Damages = 55k

- *Handicapped Bd. v. Lukaszewski*
    - D signed a contract with P to be a special ed teacher. D found a better job closer to her home, so wanted to get out of her contract with P. When P refused to release D, D became ill and get a Dr.'s note saying she had to work closer to home. P then had to find a new teacher to replace D. There was only 1 applicant, and since she was over qualified, they had to pay her more than they were paying D. P sued, seeking expenses related to finding and hiring the replacement teacher.
        Loss in value -> $11,786.64 (new teacher salary) - $10,760 (D's salary) = $1,026.64
        + other loss -> $222.50 (cost to advertise)
        – costs & losses avoided-> $0
        = **$1,249.14**
- *Hadley v. Baxendale*

B. Direct v. Consequential damages

- **Consequential**
    - Reasonably foreseeable
    - Other ancillary losses that are traceable to the breach
    - **Have to be either reasonably foreseeable to most people or have to have been specifically communicated to the defendant**
    - **Examples:**
        - Lost profits/opportunity
        - Damage to person/property cause by goods that fail to comply with contractual warranties
    - **Lost profits** are recoverable so long as they are 1) foreseeable when the contract was made; 2) they directly or proximately result from the breach and 3) they are capable of accurate estimation
    - Lost profits from third party collateral contracts are recoverable if such damages are properly proved
        - Lost profits generally represent fulfillment of the non breaching party's expectation interest and it often closely approximates the goal of placing the innocent party in the same position as if the contract had been fully performed
    - **can measure in either expectation or reliance
- **Direct**
    - Directly flow from the contract
    - Can measure in expectation or reliance
- **Special v. General damages**
    - **Special damages= consequential**
        - Damages that most people would not reasonably contemplate
        - Unusual- specific to the situation

- Cannot be held to reasonable foresee, however, if you are specifically told about them, you are then on notice that your breach may have this consequence
- **General damages= direct**
  - Damages that reasonable follow from an event
  - Plaintiff need not make any special showing to recover general damages

C. Limitations on damages

- **Foreseeability and certainty**
  - Loss ***reasonably contemplated*** by both parties at time of contract formation because they were:
    - Foreseeable OR
    - Specially communicated to breaching party
  - Loss ***caused by breach*** of contract
  - Loss capable of **reasonably certain measurement**
    - I.e. non speculative
    - Absolute certainty not required, some uncertainty ok
  - The damages to which a nonbreaching party is entitled are those **arising naturally from the breach itself** (direct) or those that are in the **reasonable contemplation of the parties *at the time of contracting***
    - **The recoverability of consequential damages** depends on whether such damages were in the contemplation of the parties at the time they made the contract
      - Only necessary that the type of loss be foreseeable, not the manner in which the loss occurs
    - Focus of foreseeability is on the breaching party
      - The breaching party is liable for losses which it had reason to know
    - Loss must be foreseeable as a probably result of the breach
  - **§351: Unforeseeablity and related limitations on damages**
    1. Damages are not recoverable for loss that the party in breach *did not have reason to foresee as a probably result of the breach when the contract was made*
    2. Loss may be foreseeable as a probable result of a breach cause it follow from the breach
       a. In the ordinary course of events, or (general)
       b. As a result of special circumstances, beyond the ordinary course of events, that the party in breach *had reason to know* (specific)
    3. A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise, if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation
  - **§352**
    - Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty
- **Mitigation**
  - Plaintiff must mitigate damages
    - Plaintiff may not recover for consequences of the defendants breach that the plaintiff herself could by reasonable action have avoided
    - Example:
      - After an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance
      - Plaintiff cannot hold a defendant liable for damages which need not have been incurred; plaintiff must, so far as she can without loss to herself, mitigate the

damages caused by the defendants wrongful act

- Defendant has burden to prove mitigation
    - How does the breaching party show that the nonbreaching party did not act in good faith and sufficiently mitigate?
        - Market studies (look what kind of openings are around)
        - Expert testimony
- Mitigation need only be reasonable
    - Lower hurdle in employment context (good faith)
- Must be a suitable alternative
    - Suitable employment is that which is substantially equivalent to the position lost and suitable to a persons background and experience
    - Just because you don't like the job or there are small differences don't make it unsuitable
- Any actual salvage/mitigation= loss avoided
- **§350**
    - 1) Except as stated in subsection 2, damages are not recoverable for loss that the injured party ***could have avoided*** **without undue risk, burden or humiliation**
    - 2) The injured party is not precluded from recovery by the rule stated in subsection 1 to the extent that he has made **reasonable but unsuccessful efforts to avoid loss**

- **Reliance Damages**
    - **Goal is to put the plaintiff in the situation she was in before contract formed/benefit conferred**
    - **Formula:**
        - Out of pocket expenses after contract formed
        - + Lost opportunities
        - - Loss avoided (mitigation)
    - **Limitation** - damages are reduced by any lost profit on contract
    - Includes lost opportunities and preparation costs but NOT losses incurred before contract formation
        - Lost opportunity costs are the opportunities P gave up in reliance on the contract
    - Used when expectation damages are incalculable or too vague
- **Restitution**
    - Don't need an actual contract
        - Can get it even if there isn't a valid contract
    - Unlike reliance or expectation damages, **it is available to both the breaching party and the non breaching party**
    - Can get restitution as an alternative to damages
    - Comes out of unjust enrichment
    - **Limitation**
        - If you are the breaching party and it is possible to measure you benefit in two different ways, *meirut* and *valebat*, and they are different amounts, you as the defendant only get the lesser of the two amounts
    - **Goal is to put the plaintiff back in situation she was in before contract formed/benefit conferred**
        - Measuring the benefit you conferred on the other party
        - Market value of goods/services
    - **Situations where restitution is at work**
        1. Restitution as a remedy for breach
            - **allows a nonbreaching party to elect recovery of restitution rather than expectation damages for breach of contract
        2. Possibility of restitution in favor of a party who is herself in breach

3. Role of restitution where the contract has been rendered unenforceable

- **How to calculate**
  - *Quantum meruit/valebat*
    - Market value of either services or the goods that have been conferred as a benefit on the other party
    - *Meruit*= services
      - Standard for measuring the reasonable value of the services rendered is the amount for which such services could have been purchased from one in the plaintiffs position at the time and place the services were rendered
    - *Valebat*= goods
- Unlike reliance damages, recovery **not** reduced by any expected loss on contract
  - Even if the plaintiff would have lost money if the contract had been fully performed, the plaintiff can sue in restitution and that restitution is not going to be offset by any expected lost
- **§373: Restitution when other party is in breach**
  - (1) subject to the rule stated in subsection 2, on a **breach by nonperformance** that gives rise to a claim for damages for total breach or on a repudiation, **the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of *part performance or reliance***
  - (2) the injured party has **no right to restitution if:** he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance
- **§374: Restitution in Favor of Party in Breach**
  - (1) if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other parties breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excuse of the loss that he has caused by his own breach
  - (2) to the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of performance as liquidated damages is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss

- **Specific Performance**
  - An act fulfilling the promise, rather than for money
    - Best measure of the expectation value, doing exactly what you promised to do
  - Equitable remedy
  - What merits specific performance?
    - **Inadequacy of the remedy at law**
      - Remedies at law: Restitution, reliance, expectation
      - **If you cant measure the expectation or reliance damages with reasonable certainty** → good situation to give specific performance
      - **Where money damages are unable to be estimated with reasonable certainty**
    - No suitable equivalent → therefore money damages(remedy at law) are inadequate
      - Things that are so unique that it transcends the market value they currently represent and cannot be captured in money
        - Sentimental value
      - Real estate is entitled to specific performance because it is deemed unique
  - **Subject to equitable and practical considerations**
    - Balance hardship between plaintiff and defendant, how long did plaintiff wait to enforce contract, is there unreasonable hardship to third parties, do parties have unclean hands, is it too hard to supervise specific performance?

- Only type of remedy that doesn't involve the payment of money
  - Enforcing the promise
- **§364**: Effect of Unfairness
  - (1) Specific performance or an injunction will be refused if such relief would be unfair because
    - a. The contract was induced by mistake or by unfair practices,
    - b. The relief would cause unreasonable hardship or loss to the party in breach or to third persons, or
    - c. the exchange is grossly inadequate or the terms of the contract are otherwise unfair
  - (2) Specific performance or an injunction will be granted in spite of a term of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons
- **Equitable considerations** (trying to prevent specific performance in cases where it would be unfair or P has "unclean hands"
  - mistake or unfair practice
  - grossly inadequate or unfair
  - unreasonable hardship to party or third parties
  - doctrine of latches- where P waits too long to enforce contract which makes it unreasonable to enforce
    - unreasonably delaying your right is kind of inequitable conduct which may then deprive you of specific performance
- **Practical Considerations**
  - difficulty of supervision
  - further negotiation/agreements required

UCC §2-716: Buyers right to specific performance or replevin

- (1) Specific performance may be decree where the **goods** are unique or in other proper circumstances
- (2) the decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just
- (3) the **buyer** has a right of replevin for **goods** identified to the **contract** if after reasonable effort he is unable to effectively cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.