**Contracts Outline**

1. **Contracts**
   1. What is a Promise?
      1. Contract - A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. §1
      2. Promise – A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. §2
         1. The person manifesting the intention is the promisor
         2. The person manifestation is being addressed is the promisee
      3. Promise Creation – A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct. §4
         1. Express Contract – parties expressly agree
         2. Implied in Law - Quasi-contracts – are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice.
            1. Benefit conferred, appreciation of benefit by recipient, inequitable to retain the benefit without payment
            2. Without reference to the intent or the agreement of the parties
            3. “last clear chance” prevents a non-bargained for benefit that was conferred by mistake

Recipient of the benefit is in the best position to prevent the mistake or error

* + - 1. Implied in fact – conduct of the parties implies agreement
  1. Four Basic Functions Rules and Doctrines of Contract Law Serve
     1. Sorting problem
        1. What behavior constitutes a promise?
     2. Gap-Filling
        1. Fill in part of the agreement that the parties do not expressly stipulate
     3. Meaning of the Promises
        1. Provides rules that enable the courts to determine what the parties meant
           1. Parole evidence rule

Prevents a party to a written contract from presenting extrinsic evidence that contradicts or adds to the written terms of the contract that appears to be whole. The supporting rationale is that since the contracting parties have reduced their agreement to a single and final writing, the extrinsic evidence of past agreements or terms should not be considered when interpreting that writing, as the parties had decided to ultimately leave them out of the contract.

* + - 1. Rules that govern the interpretation of language and of customary understandings
    1. Line-Drawing problem
       1. Ability of parties to alter the default rules
       2. Define the outer boundaries of acceptable bargaining behavior and outcomes, deny enforcement of agreements that fall outside of those bounds
  1. Elements of a Contract
     1. Promise §2
     2. Bargaining §17
        1. Manifestation of mutual assent
        2. “Meeting of the minds”
        3. An agreement to exchange promises or to exchange a promise for a performance or to exchange performances.
     3. Consideration §71
        1. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
           1. An act other than a promise
           2. Forbearance
           3. Creation, modification or destruction of a legal relation
  2. *Bailey v. West* (Lame race horse)
     1. Elements for a contract implied in fact:
        1. Mutual agreement on the intent of the parties
        2. Meeting of the minds
     2. Contract implied in law?
        1. Not an actual contract
        2. Benefit conferred to the D
        3. Appreciating the benefit
        4. Acceptance and retention
     3. Holding: There was no mutual agreement and “intent to promise” between the P and D. (no contract implied in fact)
        1. P cannot recover for a contract implied in law because he was a “volunteer”
  3. *Lucy v. Zehmer* (Zhemer jokingly sold his property while drunk)
     1. Written contract agreed to by Zhemer jokingly
     2. Holding: The written instrument should not be invalidated because Zehmer had internal reservations and the Ps are entitled to specific performance
        1. Zehmer’s actions contradicted his internal intentions
        2. There was bargaining
        3. Lucy was warranted in believing that the contract represented a serious business transaction and a good faith sale and purchase of the farm
     3. Manifestation of assent - outward objective manifestations without regard to the potentially conflicting subjective intent of the individual
  4. *Leonard v. Pepsico* (Pepsi points commercial promising a harrier jet)
     1. The Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a jet
     2. What would an objective**, reasonable person** understood the commercial to convey?

1. **Enforcement**
   1. Consideration Doctrine §71
      1. The essential function of consideration is determine the types of promises that should not be enforced
      2. The promise which does not purport to exact an exchange is singled out by consideration doctrine.
      3. General rule – contracts that lack consideration are not enforceable
      4. Consideration means that a party abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise
      5. Consideration signals a bargained-for-exchange
      6. No longer sine qua non for enforcement of promises
      7. Benefit Detriment test
         1. Certain promises are enforced, even without consideration, if made in recognition of a prior material benefit conferred by the promisee on the promisor
   2. Estoppel §90
   3. Material Benefit Test §86
      1. A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
      2. A promise is not binding under Subsection (1)
         1. if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
         2. to the extent that its value is disproportionate to the benefit.
   4. Gift Doctrine
      1. Requires the intention to give and actual delivery
   5. *Hamer v. Sidway* (Story promised his nephew $5k for not drinking, using tobacco, etc...)
      1. Refraining from using tobacco and drinking signified a **legal detriment** that is sufficient as consideration for a contract
      2. Consideration may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment or loss or responsibility given, suffered, or undertaken by others
      3. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.
   6. *Kirksey v. Kirksey* (Brother in law promises to take care of sister in law on his property)
      1. The promise was a gratuity on the part of the brother in law, not a reliant contract
      2. Promises to give gifts are not enforceable
      3. Price v. Condition
         1. An inquiry whether the happening of the condition will be a benefit to the promisor
            1. If yes, it counts as consideration and is a legally enforceable promise
            2. If no, then it is not consideration and it is considered a gratuitous gift
   7. *St. Peter v. Pioneer Theatre Corp*. (Theatre held a raffle where the Ps won but did not receive the prize)
      1. In a unilateral contract, only one party makes a promise. If that promise is made contingent upon the other party doing some act, which he is not under legal obligation to do, or forbearing an action which he has a legal right to take, then such affirmative act or forbearance constitutes the consideration for an acceptance of the promise
      2. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement.
      3. Holding: The theater’s request to put St. Peter’s name in the raffle was bargained for and represents a unilateral contract.
      4. The act might have no monetary value and yet constitute a legal consideration.
      5. If the P did the acts called for by that promise, Ds cannot complain of the adequacy of the consideration.
      6. Time of formation is important in a unilateral contract
      7. Bargain for exchange that brings a peripheral benefit to the theater – increased chance of business – the theatre thought it was a benefit since they offered something in exchange
      8. Legal detriment for St. Peter’s = their time spent outside the theatre
   8. *In Re Green* (P had a claim against the bankrupt’s estate for promises made during an adulterous relationship)
      1. The law is that a promise to pay a woman on account of cohabitation which has ceased is void, not for illegality, but for want of consideration
      2. Past illicit intercourse is not consideration
      3. A seal is no longer required for consideration – it is only presumptive evidence of consideration
      4. Even if the parties intended to make a legally binding contract, if it lacks consideration it is unenforceable
      5. $1 consideration is nominal – essentially fraud
   9. *Blake v. Blake* §79 – Adequacy Doctrine
      1. If inadequacy is so gross as to create a presumption of fraud, the contract founded thereon would not be enforced
   10. *Klein v. Pepsico, Inc* (P sued for specific performance of a used jet)
       1. Court denied specific performance because the jet was not unique (other jets were available on the market) + monetary damages were sufficient
       2. UCC §2-716
          1. Specific performance may be decreed where the goods are unique or if after reasonable effort damages are not sufficient
   11. Why Specific Performance Isn’t Generally Available Essay
       1. Which party has the advantage in acquiring substitute goods in an imperfect market?
       2. efficient breach theorists believe that the remedy of specific performance raises transaction costs since the promisor must buy her way out of the original contract
          1. however, negotiations over sharing the spoils of breach are likely to be more complex than negotiations over the readily ascertainable contract-market differential
       3. False assumption = only the buyer can purchase substitute goods in the market
          1. But the seller can purchase goods on the open market as well
          2. The good must be fungible
       4. Once the regret contingency has occurred, the promisor has two options
          1. Perform and lose
          2. Breach and pay
   12. *Batsakis v. Demotsis* (D borrowed from P in Greece due to Nazi invasion) (Adequacy Doctrine)
       1. Inadequacy of consideration will not void a contract
   13. *Wolford v. Powers* (D promised to pay $10,000 to the P if P named his son after D)
       1. Naming the child and the various services rendered to the D by the P was adequate consideration
       2. Where there is no fraud, and a party gets all the consideration he contracts for, the contract will be upheld. (p142)
   14. Adequacy Doctrine
       1. Pollock
          1. Subjective value
          2. Courts never do interfere upon the sole ground of inadequacy of consideration, to do so would force courts to implement arbitrary rules substituting their own judgment for that of the promisor
       2. §79
          1. Courts ought to honor the values that parties have places on their respective performances – free to fix their own valuations
   15. Nominality Doctrine
       1. Disparity in value sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense
       2. Sham consideration
   16. Options Contract
       1. RST §87
          1. (1) an offer is an options contract if it
             1. (a)  is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
             2. (b) is made irrevocable by statute.
          2. (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
       2. UCC §2-205
          1. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.
       3. Small consideration is ok if the transaction is fair
2. **Performance**
   1. *Jacob & Youngs v. Kent* (P built a home and expected for his home to use a “Reading” manufactured pipe. He sued D for damages to repair)
      1. Holding: The omission by the D was trivial – the pipes were so similar that the P can be said to have fulfilled the contract (substantial performance)
         1. No license to install whatever the contractor wants, but the question is one of degree
         2. An omission, both trivial and innocent will not always be the breach of a condition to be followed by forfeiture.
         3. Promises may not be treated as dependent to the extent of their uttermost minutiae without sacrifice of justice…they must also not be treated without a perversion of intention.
         4. Parties are free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery.
      2. Dissent: The D explicitly said he wanted Reading Pipes + had the right to it +entitled to it
         1. Doesn’t matter if the difference between the pipes were small
         2. Question of substantial performance depends on the good faith of the contractor
      3. If the pipes were equivalent, why is Kent holding up?
         1. Opportunistically trying not to pay?
         2. Interest in the company
         3. Puts obscure clauses in the contract to trip up the other side
         4. Personal preference – Reading = Dependable
      4. How do we calculate damages?
         1. Difference in value
         2. Default position is cost of completion
         3. Unfairly out of proportion
         4. Frustration of purpose
   2. Dependent v. Independent Promises & Promises v. Conditions
      1. Independent promises mean that the conditions do not depend on each other
      2. Dependent conditions will be viewed as independent when the departure is insignificant
      3. Strict standard v. liberal standard
      4. In most cases, the cost of replacement is the measure for damages – but in this case where the difference in value is nominal or nothing, the owner is entitled to the money which will permit him to complete the project – unless completion is so far out of proportion to the good to be attained.
   3. *Smith v. Brady*
      1. “To hold a different doctrine [that the originator of the contract has a right to whatever he wants in the contract] would be giving to parties an enormous encouragement to violate their engagements, which the just policy of the law does not permit.”
   4. Default rules for Performance
      1. Perfect tender – applicable to sale of goods – provide the promise a clear and definitive yardstick
      2. Substantial performance – service and construction contracts – general standard that allows a party to withhold performance only when the defect materially impairs the essence of what was contracted for.
      3. What would the parties have bargained for had they foreseen the need for a term and bargained over its content?
   5. *Stees v. Leonard* (D entered into a sealed contract with P to construct building on P’s lot that was situated on quicksand)
      1. A party cannot refuse to fulfill a contract even if there was an error in fact in the contract.
      2. The party must perform his end of the contract despite whatever hindrance may arise.
      3. The P contracted D to erect the building – whatever was necessary to do that, they were bound by contract to do – they agreed to do everything necessary – the expense falls on the Ds
      4. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by an act of God, the law, or the other party to the contract. (p73) – no difficulty short of absolute impossibility will excuse him
      5. “Where a party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”
      6. A sealed contract may be modified by a subsequent parol agreement, if the latter has been executed, or has been so acted on the enforcing of the original contract would be inequitable
      7. D bares the risk of the contract because he agreed to build at that location – should have put contingencies into the contract
   6. *Paradine v. Jane* (D leased a house from P, the area was invaded and D stopped paying rent)
      1. Judge found for the P because the D needed to limit liability through the contract
      2. The contract was not dependent on the lessee’s possession of the house
      3. Destruction of the house excuses the D, but not invasion
   7. Spearin Doctrine (p78)
      1. The contractor is required to follow the specifications of the promisor and cannot be held responsible for the consequences of defects in the plans and specifications
      2. There was an “implied warranty” that following the specifications would maintain adequate completion of the job
   8. Incomplete Contracts
      1. Transactions Costs
         1. Negotiating, writing, and agreeing to every possible risk is time consuming and costly
         2. Formulation error (a clause in the contract is unclear) may lead to costly litigation
         3. Burden of adequately identifying in advance all possible contingencies
            1. Uncertainty and Complexity
         4. Court usually uses gap filling default rules if the contract isn’t explicit
            1. But this rests on the critical assumption that courts are capable of devising useful default rules better than letting the parties themselves
      2. Asymmetric Information
         1. When the conditions of private or hidden information exist, one party cannot either observe or verify whether the actions of events specified in the contract took place
         2. Otherwise, parties would have to disclose private info or enforce facts that one or both could not observe or verify
   9. *Taylor v. Caldwell* (D let P use music hall which subsequently burned down)
      1. Doctrine of impossibility: There is an implied existence of the music hall which excuses both parties
      2. No express stipulation regarding a fire and/or destruction of the music hall
      3. The only grounds where parties can be excused from the consequences of a breach of contract is when the in the nature of the contract there is an implied condition of the continued existence of the life of the contractor. (p86)
      4. Foreseeable risks associated with performance are assigned by default to the promisor and thus nonperformance will not be excused
   10. *Hall v. Wright*
       1. Where a contract depends upon a personal skill, and an act of god renders it impossible (painter goes blind), the performance may be excused
   11. *Coggs v. Bernard*
       1. In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance
   12. *RNJ Interstate corp v. US* (RNJ contracted to renovate a government building which was subsequently destroyed by a fire)
       1. Court rejected the claimed of excuse – The Contractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire work.
       2. The default rule in Caldwell does not apply where the parties have agreed by the terms of the contract, to a different allocation of risks
   13. §45 – Option Contract Created by Part Performance or Tender
       1. Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, anoption contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
       2. The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
3. **Promissory Estoppel**
   1. Promises based on reliance – promises may be enforced if the promise has incurred costs or conferred benefits on the reasonable expectation that the promise would be fulfilled
   2. §90 - A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
   3. Promissory estoppel and the consideration doctrine are complimentary, not incompatible
      1. It would cut up the doctrine of consideration by the roots, if a promise could make a gratuitous promise binding by subsequently acting on it.
   4. Cohen
      1. If a promisor makes a promise, then between the date of the gratuitous promise and that of repudiation, the promise will have modified his habits in expectation of the future wealth = **detrimental reliance**
   5. Promises Made in Intrafamilial Contexts
      1. The argument is that information from a promisor will induce reliance whenever the promise attaches any positive probability to the promised performance. – impractical
      2. And despite the reliance principle – gratuitous promises unsupported by consideration remain presumptively unenforceable to this day
   6. *Haase v. Cardoza* (AT brought action to recover $10k for an alleged oral promise made by the respondent)
      1. The respondent’s statement to pay a lump sum to the appellant did not constitute consideration
      2. An informal promise is never enforceable if it stands utterly alone
      3. No evidence that the appellant relied on the promise
      4. There needs to either be evidence of consideration or of detrimental reliance for there to be an enforceable contract
      5. Promise was made while the woman was ill
   7. *Ricketts v. Scothorn* (P wrote a promissory note to pay his granddaughter if she stopped working)
      1. There was equitable estoppel on the part of the granddaughter because Ricketts intended for Scothorn to quit her job and he intentionally influenced her to do it
      2. Inequitable to deny the promise
      3. Estoppel = a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged
      4. Intentions of the promisor – possible difference from Haase
   8. Bargain v. Donative Contexts
      1. Bargain context – an environment in which the bargain took place was such that they could have negotiated had they wanted to
      2. Donative context – situations in which the idea of negotiating terms of an agreement is in fact antithetical to the social context
         1. Presumption of nonenforcement of donative promises
            1. It takes more than just reliance by the promise to render a donative promise enforceable
         2. Intrafamilial promises are usually made out of love, loyalty or moral obligation and hence are not intended to be legally enforceable
   9. *Feinberg v. Pfeiffer Co*. (P worked for D and it was proposed that P retire whenever she wanted and get paid $200 a month for life)
      1. Feinberg retired 2.5 years after the promise
      2. There was no mutuality of obligation which is essential to the validity of a contract
   10. *Hayes v. Plantations Steel Co*. (P was an employee of the D, and received payments from D for 3 years)
       1. P was going to retire a week before he was offered the pension
       2. There was no inducement of estoppel because the P planned on retiring well before the alleged promise was made, therefore no reliance was made on the promise
       3. For promissory estoppel to apply, the promise must induce the promisee’s action or forbearance
       4. Consideration is a test of the enforceability of executor promises, and has no legal effect when rendered in the past and apart from an alleged exchange in the present.
       5. Majority of courts have rejected claims of oral representations of job security made by employers
   11. Consideration, Promissory Estoppel, and the Expanded Bargain Theory
       1. Every promise will induce some expectation of reliance, but not all promises are legally enforceable
       2. Bargain theory of consideration supports enforcement of promises made as a result of actual bargains but could be made to support promises made in a bargaining context
          1. If the promise could have bargained for the promise, whether or not she did in fact, the promise is more likely to be enforced. If the promise could not easily have been bargained for the promise, because soliciting a promise would have been appropriate given the social context, the promise is less likely to be enforced.
       3. Promises are enforced when promisors clearly indicate an intention to be legally bound by their promises and refuses to enforce promises when promisors clearly indicate an intention not to be bound by their promises
       4. The bargain theory constitutes the promissory enforcement default rule for contract law.
          1. The doctrines of consideration and promissory estoppel enforce only those promises made by promisors who are likely to have intended their promises to be legally enforceable.
       5. In non-bargain contexts, the promise lacks the leverage necessary to induce the promisor to make legally enforceable promise – limits the promisee’s leverage
          1. Promises made in this context are nonreciprocal, meaning the promisor has less reason to make his promise legally enforceable
       6. Justification for Default rules
          1. Social benefits
          2. Maximize beneficial reliance on promises but also increase the negative consequences of breaking a promise – increases the quality of future promises
4. **Offer**
   1. Subjective and Objective Tests of Mutual Assent
      1. § 17 - before contractual obligations can be created, both parties to a contract must agree to the terms – result of offers made and acceptances given
      2. Tests for determining mutual assent
         1. Actual intent (subjective)
            1. Required a meeting of the minds between parties to a contract before a contract was legally binding
         2. Objective test
            1. Relies on the outward manifestations of a party’s intent: contractual obligation is imposed based on what a party reasonably believed was said and done rather than what was intended
            2. Puts liability on that party with the comparative advantage in preventing or minimizing the risk – given the background assumption that there are widely prevalent norms for signaling assent – A should have reason to know that B would interpret the nod of the head and the handshake as a manifestation of assent
   2. RST § 24
      1. An offer is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract. An acceptance is the exercise of the power conferred by the performance of some act or acts. Both the offer and acceptance must be acts expressing assent.
      2. An offer is a specific kind of promise, one that is conditioned explicitly (or by implication) on a specified return.
      3. Manifestation of **present** intent
   3. *Dyno Construction Co. v. McWane, Inc* (P sued D alleging breach of contract for a defective iron pipe)
      1. Holding: The facts before the district court furnished a sufficient basis for it to conclude as a matter of law that the contract was formed when the P signed the fax from the D rather when the P ordered the materials a week before.
      2. Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract (p207)
         1. The price quotations did not contain words indicating to the P that an offer was made.
         2. The words “estimate” and “please call” are indicative of an invitation to engage in future negotiations
         3. Missing terms on the place of delivery, time of performance, and terms of payment
         4. The P’s action of signing the fax demonstrated he understood that a binding contract had not already been formed
      3. To constitute an offer, a price quotation must “be under circumstances evidencing the express or implied intent of the offeror that’s its acceptance shall constitute a binding contract (subjective test)(p207)
   4. *Interstate Industries Inc v. Barclay Industries Inc*
      1. Use of the term “price quotation,” lack of language indicating that an offer was being made, and absence of terms regarding quantity, time of delivery, or payment of terms established that the letter was not intended as an offer
   5. *Bergquist v. Sunroc Corp*.
      1. Whether a price quotation is an offer is a question of fact for the jury
   6. *Leftkowitz v. Great Minneapolis Surplus Store, Inc* (D refused to sell a fur piece to the P which was offered in a newspaper ad)
      1. Holding: The newspaper ad was a binding offer for the sale of the fur piece
         1. There was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.
         2. The offer by the D was clear, definite, and explicit, and left nothing open for negotiation.
         3. The advertisement contained no such restriction to the house rule of selling only to women
      2. Where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. (p210)
      3. While an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. (p211)
      4. §26, comment b – most ads are not usually offers
   7. Degrees of Certainty
      1. Continuum of complete uncertainty to absolute certainty
      2. Invitations to negotiate fall on the former poll while offers fall on the latter
      3. Risk averse parties would prefer nonenforcement of preliminary promises
      4. Comparative advantage – most bargainers would prefer to walk away when the prospects of a deal are uncertain
   8. *Audio Visual Assoc. v. Sharp Electronics Corp.*
      1. The mere act of providing a price does not independently create an offer
   9. *Barker v. Allied Supermarket*
      1. There was an implied warranty for goods on display between the period a shopper picks the good off the shelf and before payment
   10. UCC – gap fillers
       1. §2-305 – Price – parties can conclude a contract even if the price isn’t settled
       2. §2-308 – Place – unless otherwise agreed, delivery is seller’s place of business
       3. §2-309 – Duration -
       4. §2-310 – Payment – unless otherwise agreed, payment is due at time of delivery
5. **Acceptance**
   1. Acceptance Doctrine §50
      1. Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
         1. There must be commitment which is not conditional
         2. Common law rule – mirror image rule – commitment must be on the terms proposed without variation.
      2. Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.
      3. Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.
      4. §32 – Invitation of Promise of Performance - In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.
      5. §62 – (1)Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance. (2) Such an acceptance operates as a promise to render complete performance.
         1. Is there the expectation of an options contract?
      6. Breach – Once one begins performance, they cannot breach without incurring liability.
      7. Offers that cross each other in the mail do not create a contract even if they have identical terms
   2. *Ever-Tite Roofing Corp. v. Green* (P sued D for breach of a written contract for re-roofing. Contract contract said it would be binding by written acceptance of the principal or authorized officer *or upon commencing performance of the work)*
      1. Holding: The D did not withdraw the offer in a reasonable amount of time
         1. The contract did not specify the amount of time between when the offer was made and when acceptance was needed
         2. The D did not inform the P that he was withdrawing the offer in a reasonable amount of time
         3. The contract was accepted by the P by commencement of the performance which began with the loading of the trucks
      2. An offer proposed may be withdrawn before its acceptance and that no obligation is incurred thereby – but there is an exception:
         1. The power to create a contract by acceptance of an offer terminates the time specified in the offer, or, if not time is specified, at the end of a reasonable time. (p217)
   3. Communication of Acceptance
      1. Bilateral Contract – promise for a promise
         1. In a bilateral contract, acceptance of the offer generally has to be communicated to the offeror
      2. Unilateral Contract – promise for performance
         1. According to the Restatement acceptance of an offer for a unilateral contract does not have to be communicated to the offeror, the performance just needs to be completed
         2. Promisor can revoke prior to beginning of performance
         3. Promisee can quit prior to finishing performance
         4. In a commercial setting, a promisee **must** finish performance once they begin.
   4. Accommodations
      1. *Corinthian Pharmaceutical Systems, Inc v. Lederle Laboratories*
         1. Price list was not an offer but rather an invitation for an offer
         2. An acceptance need not be the mirror image of the offer, but the offeree must do some act that manifests the intention to accept the offer
         3. Accommodation is akin to a gift
   5. Settlement Offers
      1. Settlement agreements need not always be in writing in order to be enforced
      2. *Reich v. Best Built Homes, Inc*
         1. Attorneys representing both parties indicated their assent in a conference call with the judge handling the case
   6. Offer and Acceptance in Preliminary Agreements §§24 & 26
      1. Leval Test
         1. Ordinarily, where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract
         2. Full binding preliminary agreement – when the parties agree on all the points that require negotiation but agree to memorialize their agreement in a more formal document.
            1. Preliminary only in form
            2. A party may demand performance of the transaction even though the parties fail to produce the formalization
         3. Binding preliminary agreement – created when the parties agree on certain major terms, but leave other terms open for further negotiation
            1. Mutual commitment to continue negotiations in good faith
            2. Parties may abandon the transaction as long as it is done in good faith
         4. If the preliminary writing was not intended to be binding on the parties but was just a proposal, neither party has an obligation to negotiate
         5. Competing Interests
            1. Trapping parties in surprise contractual obligations that they never intended
            2. Enforce and preserve agreements that intended to be binding, despite need for further documentation or further negotiation
   7. Silence or Dominion as Acceptance
      1. §69
         1. (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
            1. (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
            2. (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
            3. (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
         2. (2)  An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.
      2. Only under special circumstances will silence or an act of dominion constitute acceptance
         1. Those where the offeree silently takes benefits
         2. One party relies on the other party’s manifestation of intention
         3. When the recipient knows or has reason to know that the services being rendered with an exception of compensation
      3. Negative option offers
         1. Unilateral negative option
            1. Occurs without the consent of the recipient
            2. Service will be provided unless the customer specifically rejects it
         2. Contracted negative option
            1. Occurs after a contractual relationship has been established
      4. *ProCD* – Customers had an opportunity to read the terms and conditions and could have returned the software
         1. Zeidenberg exercised dominion over the software
   8. Mailbox rule
      1. Acceptance of an offer by mail takes effect as soon as the acceptance is mailed, whether or not it ever reaches the offeror
      2. Must be properly addressed
      3. *University of Emergency Medicine Foundation v. Rapier Investments*
         1. Termination noticed was mailed within the contractually specified notification period but it was incorrectly addressed and went undelivered.
         2. A secondary mailing went out after the notification deadline
         3. Had the contract not specifically mentioned termination by mail, the letters would not have taken effect until receipt
   9. Revocation of Offers
      1. Once an offer is made, it remains open for a reasonable amount of time to give the offeree time to respond
      2. The offeror may revoke his offer without incurring liability, providing the offeree has not already manifested acceptance
      3. If the offeror specifies that the offer is open for a specified period of time, it remains open for the specified period unless it is explicitly revoke
      4. Unilateral contract
         1. Once the offeree has begun the requested performance, the offer may not be withdrawn until the offeree has a reasonable opportunity to complete performance
      5. Revocation of an offer does not become effective until the offeree actually receives the letter communicating withdrawal (receipt rule)
   10. Irrevocable Offers
       1. Option contracts and certain firm offers and construction bids
       2. When the sale of goods is involved, a merchant’s firm offer is treated as the equivalent of an option contract
   11. UCC
       1. §2-206(1)(b) – an offer to buy goods for prompt or current shipment can be accepted either by notice (promise) or actual shipment.
6. **Counteroffer**
   1. §38 - Reject the first offer & extend your own offer
      1. An inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer is not ordinarily a rejection of the original offer.
   2. §39 – You can say something isn’t a counteroffer, but it can still be one
   3. *Dataserv Equipment Inc. v. Technology Finance Leasing Corp.* (AT and AE engaged in offers and counteroffers to purchase computer equipment)
      1. Holding: Dataserv rejected Technology’s October 1st counteroffer. Dataserv responded to the counteroffer by agreeing to delete two of the three objectionable clauses but insisting a third one be included (Indepth clause). In effect, Dataserv rejected the counteroffer and no contract was formed.
      2. A party’s rejection terminates its power of acceptance. Once rejected, an offer is terminated and cannot be subsequently accepted without ratification by the other party.
      3. Why doesn’t UCC apply?
         1. No actual transfer of goods
         2. No acceptance
   4. Common Law View
      1. Mirror Image Rule
         1. An offer could only be accepted if the offeree agreed precisely and completely to the terms offered.
         2. If the terms of the acceptance varied in any way from the original offer, it was considered a counteroffer
         3. Parties could agree to hold an offer open despite disagreement on terms. Unless explicit provisions were made to hold the offer open, the mirror image rule applied
         4. Provides certainty – took deliberate action to form a contract.
         5. Courts still generally hold that a counteroffer serves to reject the initial offer and such rejections extinguish the initial offer
         6. *Ardente v. Horan*
            1. By placing conditions upon acceptance, the P’s letter functioned as a counteroffer
      2. Last Shot Doctrine
         1. When performance of some contract terms occurred in the absence of an exact agreement on all terms of the contract
         2. Both parties are bound to the terms of the last offer (or counteroffer) before the commencement of performance
   5. UCC Section §2-207
      1. A written contract is acceptance even with new terms before the comma (no mirror image rule)
         1. After the comma: If acceptance is expressly conditional on assent – you go to Section 2-207(3)
         2. If there is assent – No UCC
         3. If there is no assent – No UCC
         4. If there is no discussion but performance – UCC applies
      2. Terms of contract if 1 before the comma
         1. If there is at least one non-merchant then the rest of (2) doesn’t apply (proposals)
         2. Between two merchants you get (a), (b), and (c) – Comment 6
         3. (c) conflicting forms is taken as an objection – neither become part of the deal (knockout rule)
      3. Performance is a contract (should be before the comma)
         1. Terms = knockout rule
         2. O makes offer -> A accepts with new terms
            1. (1) after the comma -> 2
            2. 2(a) new terms
         3. O expresses your acceptance to the terms of the offer – A accepts expressed to the terms of the offer – 1 after the comma -> 3
      4. Three additional ways a contract can be created when additional terms are present in a counteroffer or acknowledgement
         1. First
            1. (1) Clause 1 – an acceptance operates just as it would were there no additional terms and absent an objection those terms are part of the contract
            2. (2) – Additional terms that do not materially alter the deal are to be added to the contract absent an objection those terms are part of the contract
            3. Section 2-207(2)(a) - parties can limit contractual terms to those put forth in the offer by including such an express provision in the contract
            4. Section 2-207(2)(b) - additional terms which “materially alter” a contract will not be included in a contract
            5. Section 2-207(2)(c) - a party can reject additional terms by notifying the other party of his objection
         2. Second
            1. Section 2-207(1), clause 2 – a contract is formed when an offer is tendered, an expressly conditional acceptance is given, and the offeror expressly agrees to the additional terms
         3. Third
            1. Section 2-207(3) – the conduct of the parties may establish a contract
      5. Offeror makes an offer with expressly limited terms. Offeree gives an acceptance with expressly limited terms. The offeror’s offer is what is used as the basis for acceptance.
      6. If the Offeror makes an offer with expressed limitations and the Offeree accepts with expressed limitations – it goes to the knockout rule
      7. If the Offeror makes an offer with expressed limitations, the Offeree needs to reject that offer (not accept) and make a counter-offer
      8. UCC seeks to make contracts, common law seeks to keep people not bound
   6. *Ionics Inc v. Elmwood Sensors Inc* (P sent an acceptance form, D sent an acknowledgement form with a warranty – different terms and conditions)
      1. Holding: Consistent with section 2-207 and Official Comment 6, that where the terms in two forms are contradictory, each party is assumed to object to the other party’s conflicting clause. The contract is governed by section 2-207(3) (knockout clause) – incompatible clauses are knocked out.
         1. Acceptance of delivery was conditional on assent by the buyer to the new terms and therefore constituted a counter offer rather than an acceptance
         2. Overrule *Roto-Lith*
      2. Comment 6
         1. No answer in a reasonable amount of time means we can assume assent
         2. The requirement that there be a notice of objection is satisfied and the conflicting terms do not become part of the contract
         3. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this act
   7. *Roto-Lith*
      1. Widely criticized because it revived the “last-shot” technique available to an offeree under the common-law mirror-image rule
      2. Subverts the purpose of section 2-207 by binding an offeror to the terms contained in his offeree’s counteroffer when the offeror takes delivery of the goods and performs his part of the bargain
   8. *Step-Saver Data Systems Inc v. Wyse Technology Inc* (D sold software programs to the P and all the programs contained boxtop licenses which stated that opening the package was an acceptance of terms, including a disclaimer of warranties.)
      1. Holding: The addition of the boxtop license did not indicate additional conditional acceptance on the part of the P. The disclaimer of warranty contradicted the warranty in the original contract causing it to materially alter the agreement. (changes the distribution of risk)
      2. TSL did not clearly express its unwillingness to proceed with the transactions unless its additional terms were incorporated into the parties’ agreement. The box-top license did not constitute a conditional acceptance under UCC 2-207(1)
      3. Adding the disclaimer of warranty and limitation of remedies provisions from the box-top license would, as a matter of law, substantially alter the distribution risk between the P and D
      4. Section 2-207 establishes that proceeding with a contract after receiving a writing that purports to define the terms of the parties’ contract is not sufficient to establish the party’s consent to the terms of the writing to the extent that the terms of the writing either add to or differ from, the terms detailed in the parties’ earlier writings or discussions. (p264)
      5. In the absence of express assent to the additional or different terms of writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed.
      6. When a disclaimer is not expressed until after the contract is formed it is not incorporated into the parties’ agreement. (p267)
      7. Under Section 2-207, an additional term will not be incorporated if the term’s addition to the contract would materially alter the parties’ agreement.
      8. Not the majority approach
   9. *Hill v. Gateway 2000, Inc* (P ordered a pc over the phone, D sent the pc with a list of terms unless P returns within 30 days)
      1. Holding: By keeping the computer beyond 30 days, the P accepted the D’s offer.
      2. Judge assumes that Gateway made the offer – the P accepted by opening the box (terms were inside the box)
7. **Indefiniteness**
   1. Contractual Relationships and Conduct
      1. Complete contingent contract – a contract in which all of the possible contingencies that might affect performance of their respective promises are identified explicitly, together with a specification of consequences in each case
      2. A lot of uncertainty in contracts regarding exogenous events – allowing flexibility (or discretion) in such “relational” contracts saves parties the transaction costs from continually having to update or renegotiate price and quantity in light of changed external circumstance. Permits parties to smooth the bumps in inevitable variations in supply and demand.
      3. Clear and definitive contract terms reduce disputes and transactions costs. Flexible contract terms can increase disputes.
      4. Holdup problem – each party bears the full cost of her own investments in the contract but must share the resulting contractual benefits. – moral hazard problem.
   2. Coping with Uncertainty: Preliminary Negotiations and Preliminary Agreements
      1. Preliminary Negotiations
         1. Relational exchange typically proceeds instead through an extended process of negotiation prior to reaching any binding agreement.
         2. According to traditional contract doctrine, promises made during negotiations are generally held to be unenforceable
         3. In general, courts will not grant recovery for “early reliance” unless the parties, by agreeing on something significant, have indicated their intention to be bound
         4. Baseline for promissory estoppel – clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made, an injury sustained by the party asserting the estoppel by reason of his reliance
   3. *Coley v. Lang* (Lang sued Coley for specific performance of the purchase of L’s stock)
      1. Holding: The “letter agreement” entered into by the parties was not an agreement upon which specific performance can be based as a matter of law.
      2. It is essential to the enforcements of such an informal contract that the minds of the parties meet upon all the terms – if anything is left open for future consideration, the informal paper cannot form the basis of a binding contract
      3. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms
      4. There was no fraud or misrepresentation or deliberate conduct designed to consciously and unfairly mislead Lang.
   4. *Hoffman v. Red Owl Stores* (P relied on D’s promise to make him manager of a franchise)
      1. Holding: Ample evidence to sustain the answers of the jury to questions of the verdict with respect to promissory representatives made by Red Owl. Hoffman’s reliance and his fulfillment of the conditions required of him by the terms of the negotiations
         1. Injustice would result if the Ps were not granted some relief
         2. A number of promises and assurances were given to the P by Lukowitz which the P relied and acted upon to their detriment
         3. Quasi-contract – P conferred a benefit to D
         4. Not the majority rule, courts usually follow *Coley*.
   5. *Varney v. Ditmars* (P brought action against D for promise to share in the profits)
      1. Holding: The statement alleged to have been made by the D about giving the P and designer a fair share of the profits is vague, indefinite and uncertain
         1. Minds of the parties never met and the contract was never consummated
         2. Whether the words “fair” and “reasonable” have a definite and enforceable meaning when used in business transactions is dependent upon the intention of the parties in the use of such words and upon the subject matter to which they refer.
      2. For the validity of a contract, the promise of the parties to it must be certain and explicit and that their full intention may be ascertained to a reasonable degree of certainty
      3. Cardozo – the promise must appear to have been made with contractual intent – the quarrel over the amount could be adjusted by custom
   6. Common Law Indefiniteness Doctrine – Grounded in the presumed intentions of the parties
      1. If intention are unclear, the common law presumes a failure to reach an agreement in material terms
      2. Quantm meruit – an equitable remedy to provide restitution to a person who has rendered services in a quasi-contractual relationship
      3. “fair” and “reasonable” have a definite and enforceable meaning depending on the subject matter of the agreement \*usually synonymous with market value
   7. §33 – Certainty
      1. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
      2. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
      3. The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.
8. **Output, Requirements, and Exclusive Dealings Arrangements**
   1. *Eastern Air Lines v. Gulf Oil Corp*. (P & D were involved in the buying and selling of oil. Oil shortage caused prices to go much higher)
      1. Holding: The document is a binding and enforceable requirements contract. However, Eastern's performance under the contract does not constitute a breach of its agreement with Gulf and is consistent with good faith and established commercial practices as required by UCC 2-306.
         1. It has been known to Gulf for years that prices can swing and Gulf took that into account in their fuel contracts
         2. Fuel freighting is an established industry practice, inherent in the nature of the business, as well as, between Gulf and Eastern
         3. UCC §2-208 - the parties themselves knew best what they have meant by their words of agreement
      2. Requirement contracts could be binding where the purchaser had an operating business – the lack of mutuality or indefiniteness of it were resolved since the court could determine the volume of goods objectively necessary to run a business
      3. UCC §2-306(1):
         1. a contract for output or requirements is not too indefinite because it is held to mean the good faith output or requirements of a particular party [to operate their business]
         2. Does not lack a mutuality of obligation since the party that determines quantity is acting in good faith so that his requirements is a reasonably foreseeable figure
         3. Good Faith Test
            1. Honesty in fact and the observance of reasonable commercial standards of fair dealing
         4. If customer's demands under a requirements contract become excessive, then the UCC protects the seller and would allow him to refuse to deliver unreasonable amounts demanded without eliminating his contractual obligation
         5. The case here is one where the established courses of performance and dealing between the parties, the established usages of the trade, and the basic contract itself all show that the matters complained of for the first time by Gulf after commencement of this litigation are the fundamental given ingredients of the aviation fuel trade to which the parties have accommodated themselves successfully and without dispute over the years.
         6. Unreasonably Disproportionate Demands
            1. The amount by which the requirements exceeds the contract estimate
            2. Whether the seller had any reasonable basis on which to forecast or anticipate the requested increase
            3. The amount, if any, by which the market price of the goods in question exceeded the contract price
            4. Whether such an increase in market price was itself fortuitous
            5. The reason for the increase in requirements
   2. *Empire Gas Corp. v. American Bakeries Co*. (P distributes petroleum. D ordered 3000 units but then canceled the order)
      1. Holding: A diversity contract is essentially a buyer's option, entitling him to purchase all he needs of the good in question on the terms set forth in the contract, but leaving him free to purchase none if he wishes provided that he does not purchase the good from anyone else and is not acting out of ill will towards the seller
         1. “We conclude that the Illinois courts would allow a buyer to reduce his requirements to zero if he was acting in good faith, even though the contract contained an estimate of those requirements.”
         2. There was no breach of this obligation – if the obligation were not just to refrain from buying a competitor's goods but to buy approximately the state estimate, the contract would be more burdensome to the buyer
         3. If no reason at all need be given for scaling back one's requirements even to zero, thena requirements contract is from the buyer's standpoint just an option to purchase up to the stated estimate on the terms specified in the contract, except that the buyer cannot refuse to exercise the option because someone offer him better terms
   3. Output and Requirements Contracts: Explanation and Comparison
      1. Output contract – the buyer agrees to take **everything** that is produced by the seller
      2. Requirements contract – the quantity is determined not by the seller’s production but by the buyer’s needs
   4. Challenges of Designing Relational Contracts
      1. A contract is relational to the extent that the parties are unable to reduce important terms of the arrangement to well-defined obligations.
      2. Relational contracts are separate from traditional contract doctrine (bargaining model) since it is based on indefinite and unknowable quantities – the future
      3. Parties want to write an optimal ex ante contract – at the time of contracting encourages each party to invest in the contractual relationship so as too maximize the anticipated joint benefits from contracting
      4. Also want an optimal ex post contract – one that still produce joint value after all future uncertainties have been resolved
   5. *Wood v. Lucy* (P was to have exclusive right to D’s likeness for products)
      1. The implication of a promise here finds support in that the D gave the P exclusive privilege – the D was not allowed to make her own endorsements or market her own products without approval of the P
      2. P made a promise to use reasonable efforts to bring profits and revenues into existence
   6. Optimal Output in Relational Contracts
      1. Relational contracts share two characteristics: (1) they are ongoing contracts for the supply of goods or services rather than agreements for a single discrete exchange; and (2) the parties to them are incapable of reducing important features of their bargain to well-defined obligations
      2. “Best Efforts” closely parallels the implicit requirement of good faith
      3. Alternative definition of best efforts – more than good faith but not necessarily an obligation to maximize the joint value of the contract of both parties – rather it requires an exercise of due diligence and ordinary business prudence
      4. Best efforts clauses can be seen as an explicit allocation of all risks created by potential blunders of the party promising his best efforts – diligence insurance
      5. Best efforts clauses are ripe with moral hazard
         1. Both parties have an incentive going into the deal to shape a system of controls – or checks and balances – designed to make their arrangement work at an optimal level
      6. Termination privilege – gives the manufacturer-promisee the right to dismiss the distributor-promisor under certain conditions
         1. Means of bonding the distributor to the interests of the supplier
9. **Modification of Existing Agreements**
   1. Parties’ attempts to modify or renegotiate an existing executory or partially executed contract.
      1. Common Law rule = pre-existing duty rule
         1. Modifications require consideration
      2. UCC has altered the rule by permitting “good faith” modification without a requirement of additional consideration (UCC §2-209)
   2. *Alaska Packers’ Ass’n v. Domenico* (Ps signed a contract to be fisherman on D’s boat but attempted to change the contract while the P had no other option)
      1. Holding: There was not sufficient consideration for the alleged coerced contract. Consent to the demands of the libelants under such circumstances was without consideration, for the reason that it was based solely upon the libelants’ agreement to render the exact services, and none other, that they were already under contract to render.
         1. It cannot be justly held that there was any voluntary waiver on the part of the appellant of the breach of the original contract
         2. “The party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party.”
   3. Pre-Existing Duty Rule §89
      1. (1) promisor to do or promise to do something in addition to her existing obligation and (2) to rescind the first contract before entering into the second
         1. RST rule - an executory agreement may be modified by the parties without any new consideration other than mutual assent
      2. UCC §2-209 eliminates the pre-existing duty rule in sales contracts
   4. *Wolf v. Marlton Corp*. (Ps instituted an action for recovery of deposit. Ps threatened D that they would sell to undesirable person if they were forced to take the house)
      1. Holding: If the threats were in fact made and if the defendant actually believed that they would be carried out, and Field’s will was thereby overborne, defendant was justified in treating the contract as breached and is entitled to recover whatever damages resulted therefrom.
         1. A threat may be wrongful even though the act threatened is lawful
         2. Although reselling a home to an “undesirable purchaser” is a legal act – if it is done with purely malicious and unconscionable motives – for the sole purpose of injuring the builder’s business – fairness requires to deem his conduct as wrongful
      2. Restatement - Acts may be wrongful within the meaning of this rule [duress] though they are not criminal or tortious or in violation of a contractual duty.
      3. *Hochman v. Zigler* – if the threat is made to induce the opposite party to do only what is reasonable, the “threatened” action is not wrongful. But if the threat is made for an outrageous purpose, a more critical standard is applied.
      4. Where one party to a contract, by prevention or hindrance, makes it impossible for the other to carry out the terms thereof, the latter may regard the contract as breached and recover his damages thereunder from the first party
      5. If the performance is prevented by physical threats, the threatened party may desist from performing.
      6. Duress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim.
   5. *Austin Instruments, Inc. v. Loral Corp* (D seeks to recover payment for goods delivered under a contract which it had with P on that it was forced to agree to an increase in price under economic duress.)
      1. Holding: The contract made under duress was invalid. Austin’s threat to stop deliveries unless prices were increased deprived Loral of free will
         1. Because of its production schedule, Loral had delivery requirements and was liable for the goods it contracted for and failure to deliver to the government would jeopardize Loral’s chances for future contracts
   6. Duress Doctrine
      1. Duress Rules
         1. A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will. The existence of economic duress or business compulsion is demonstrated by proof that “immediate possession of needful goods is threatened.
         2. Proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand.
         3. Economic duress – it must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate.
      2. §175 – When Duress makes a contract voidable
         1. (1)  If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
         2. (2)  If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.
         3. Three essential elements to a duress defense:
            1. An “improper” threat made to the promisor
            2. Inducement of the promise by the threat
            3. Reasonable inducement
      3. §176 – When a Threat is Improper
      4. Duress Doctrine
         1. Would a reasonable person been induced into the promise under the same type of threat?
         2. Strong economic duress, by itself, was insufficient to vitiate the consent given to an otherwise valid contract
         3. A duress claim must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim
         4. A crucial element to economic duress is: a wrongful act by the defendants to create and take advantage of an untenable situation
         5. Counter – If “hard-bargains won’t be enforced, then maybe bargains won’t be made at all
   7. Fraud Doctrine
      1. Promises induced by inaccurate or incomplete information attributable to the promisee’s wrongful conduct
      2. Only promises made by informed individuals are enforced
         1. The law seeks to insure that the bargaining process did not impair the promisor’s ability to acquire the relevant information
         2. Contract law begins with “caveat emptor” – But when a contracting party takes affirmative measures that she knew, or should have known, would lead the other to reach the erroneous conclusions regarding material issues bearing on the transaction
         3. Fraudulent behavior serves no socially productive purpose and undermines autonomy and efficiency of transactions
   8. *Dannan Realty Corp. v. Harris* (P alleges it was induced to enter into a contract of sale of a lease of a building held by Ds because of oral representations, falsely made by Ds, as to the operating expenses of the building and the profits to be derived from the investment. P seeks damages for fraud)
      1. Holding: The P does not have a cause of action for fraud because the specific provision in the contract contradicts the alleged oral representations made.
      2. Where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud – either in the inducement or in the execution – despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made.
      3. Specific disclaimer is a material distinction (vs. a general disclaimer)
      4. Where a person has read and understood the disclaimer of representation clause, he is bound to it
      5. To say that no language could estop a party from claiming that he entered the contract because of fraudulent representations, would say that it is impossible for two businessman dealing at arm’s length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact
      6. Fraud Rules:
         1. Fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing a contract would then be dispositive of the issue.
         2. If the facts represented are not matters peculiarly within the party’s knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. (p419)
      7. Dissent (Fuld)
         1. The rule is firmly established that it does not matter how the exculpatory language in the instrument is phrased
         2. Dishonest transactions ought not to receive judicial protection
      8. Duty to read
   9. Disclosure and Concealment
      1. The law of disclosure and concealment covers cases in which the promisee (or a third party) does not make any affirmative representation at all. Instead, that party takes affirmative steps to prevent the promisor from discovering a material fact, knowingly fails to disabuse the promisor of a mistaken belief about a material fact, or fails to apprise the promisor of a material fact of which he knows the promisor is ignorant.
   10. *Obde v. Schlemeyer* (Ps brought action for alleged fraudulent concealment of termite infestation in a house they purchased)
       1. Holding; Ps were entitled to damages on the theory of fraudulent concealment
          1. Where there are concealed defects that are dangerous to the property, health or life of the tenant and which are known to the landlord but unknown to the tenant – which a careful examination on the tenant’s part would not disclose the defect – the landlord has a duty to disclose to the tenant before leasing – failure to do so is fraud
          2. If either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent
       2. Fraud Rules:
          1. Since the action of fraud or deceit in inducing the entering into a contract or procuring its execution is not based upon the contract – it is a general rule that a vendee is entitled to maintain an action against the vendor for fraud or deceit in the transaction even though he has not complied with all the duties imposed upon him by the contract.
   11. *Reed v. King* (P sues for rescission and damages because D failed to disclose murders that took place in the home he purchased)
       1. Holding: D had duty to disclose because the knowledge affects the marketability of the property
       2. Rules – Elements of Fraud
          1. A false representation or concealment of a material fact
          2. Made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation
          3. With the intent to induce the person to whom it is made to act upon it
          4. Act in reliance
          5. To his damage
       3. A seller of real property has a duty to disclose: “where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under duty to disclose to the buyer
       4. RST §161 – trend toward a limited duty to disclose
          1. Where the person knows that disclosure of the fact is necessary to prevent a previous assertion from being a misrepresentation or fraudulent
          2. Where the person knows disclosure would correct a mistake and if non-disclosure of the fact would be a failure to act in good faith
          3. Disclosure would correct a mistake of the other party as to the contents or effect of a writing, etc..
          4. Where the other person is entitled to know the fact
       5. Misrepresentation test
          1. Need a false representation of a past or existing material fact susceptible of knowledge (not an opinion)
          2. Knowing the representation is false or without knowing it is false, stating its true
          3. With the intention to induce or such that it will reasonably induce the person to detriment
       6. RST §160 – concealment to an assertion
          1. Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact is untrue.
       7. RST §164 – when a misrepresentation makes a contract voidable
          1. (1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.
          2. (2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.
10. **Unconscionability** 
    1. RST §208 – Agreements whose process defects do not rise to the level of actionable fraud or duress
       1. If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
    2. UCC §2-302
       1. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances at the time of making the contract.
    3. Unconscionability Doctrine
       1. *Seabrook v. Commuter Housing Co*. (P was unaware of a provision in the lease that delayed commencement of possession)
          1. Holding: The principles set forth in § 2-302 of the UCC should be extended to govern the lease before the court.
             1. The lessees are usually occasional customers, not acquainted with the carefully drafted legal terms put into leases
             2. Landlord is fully cognizant of the fact that the other party has not read or bargained for many incidental terms – non-negotiable
          2. The official comment to § 2-302 of the code states that the purpose of the section is to prevent suppression and unfair surprise by avoiding enforcement of unconscionable contracts made by parties who lacked equal bargaining power
          3. The doctrine of unconscionability is used by the courts to protect those who are unable to protect themselves and to prevent injustice, both in consumer and nonconsumer areas
          4. Extension of the commencement clause was invalidated because the landlord has superior knowledge.
       2. UCC § 2-104
          1. The Code defines merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”
       3. *Henningsen v. Bloomfield Motors, Inc.* (P bought a Plymouth from D with a pre-printed purchase form which had a provision which limited warranties)
          1. Holding: Chrysler’s attempted disclaimer of an **implied warranty of merchantability** and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.
             1. Warranties originated in the law to safeguard the buyer and not to limit the liability of the seller or manufacturer.
             2. The gross inequality of bargaining position occupied by the consumer in the automobile industry is apparent since all of the manufacturers use the same warranty – no competition
             3. Because the capacity of the buyer for bargaining is so grossly unequal, in essence, he is not permitted to bargain at all
          2. Public policy has imposed an implied warranty of merchantability
          3. Unconscionability Rules:
             1. In the absence of fraud, one who does not choose to read a contract before signing it, cannot later relieve himself of its burdens. – cannot be applied on a strict, doctrinal basis
             2. There is sufficient flexibility in the concepts of fraud, duress, misrepresentation and undue influence, not to mention differences in economic bargaining “power” to enable to courts to avoid enforcement of unconscionable provisions in long printed standardized contracts
          4. §2-314 – Implied Warranty of Merchantability
       4. Procedural v. Substantial Unconscionability
          1. Procedurally unconscionable – the bargaining process that produced it is defective
             1. Duress, fraud, and incapacity doctrines
          2. Substantive unconscionability – to void an agreement based solely on its content – terms are inherently unfair or oppressive
       5. Henningsen and the Relationship Between Procedural and Substantive Unconscionability
          1. The court in Seabrook left room for the possibility that the commencement extension clauses in the lease might have been enforceable if the lessee had read and understood it.
       6. *Williams v. Walker-Thomas Furniture Co. I* (AT purchased goods on store credit, defaulted)
          1. DC Court of Appeals – AT had a duty to read.
             1. It is as much the duty of a person who cannot read language in which a contract is written to have someone read it to him before he signs it, as it is the duty of one who can read to peruse it himself before signing it
             2. Appellant’s assent was not obtained by fraud or misrepresentation
          2. US Court of Appeals
             1. Congress adopted the UCC which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made
             2. Unconscionability includes an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party
             3. When a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent was ever given to all the term
          3. Law of Secured Transactions (Article 9 of the UCC)
             1. If a debtor gives a seller a security interest in goods purchased, the seller has the right to repossess the goods upon default
             2. The effect of a cross-collateral clause is to ensure that the secured party will be as fully secured as possible. It does not entitle the secured party to retain any goods or money above the amount of security
11. **Statute of Frauds**
    1. Statute of Frauds Doctrine
       1. The contract must be in **writing** to prohibit fraud and perjury in disputes over the enforceability of oral contracts
          1. Writing requirements
             1. Signature of the party to be charged
             2. Quantity of goods involved
             3. If a contract could possibly be performed within one year, writing is not required
       2. Intent of the statute is to limit the enforceability of certain kinds of oral contracts, especially contracts for the sale of land and goods, suretyship contracts, and those obligations whose performance requires more than one year
       3. Intended to coerce promise makers into memorializing their contracts – creating reliable evidence and reducing the possibility of enforcing fraudulent contracts
       4. Statute of Frauds may operate to nullify the bargained-for allocation of risks in an otherwise valid agreement
       5. UCC §2-201
          1. (1) - Except as otherwise provided in this section **a contract for the sale of goods for the price of $500 or more** is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
          2. A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable:
             1. (a) if the goods are to be specially manufactured for the buyer and are not suitable forsale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
             2. (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
             3. (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606)
    2. Cases
       1. *McIntosh v. Murphy* (P went to Hawaii to start employment only to be fired 2.5 months later)
          1. Holding: The P can maintain an action on the alleged oral employment contract in light of the prohibition of the Statute of Frauds making unenforceable an oral contract that is not to be performed within one year. P’s reliance was such that injustice could only be avoided by enforcement of the contract.
             1. Based on Estoppel Doctrine (Monarco v. Lo Greco)

Doctrine of estoppel: to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances; would result in unconscionable injury; a party has been induced by the other seriously to change his position in reliance of the contract

* + - 1. Retention of the Statute of Frauds is justified on at least three grounds:
         1. Serves an evidentiary function (lessening the danger of perjured testimony)
         2. The requirement of a writing has a cautionary effect which causes reflection by the parties on the importance of the agreement
         3. The writing is an easy way to distinguish enforceable contracts from those which are not.
      2. RST §217A
         1. A promise which the promisor should reasonably expect to induce action or forbearance and which does induce the action or forbearance is enforceable not-withstanding the SoF if injustice can be avoided only by enforcement. The remedy for breach must be limited as justice requires
         2. The following circumstances must be met:

The availability and adequacy of other remedies

The definite and substantial character of the action or forbearance in relation to the remedy sought

The extent to which the action or forbearance corroborates evidence of the making and terms of the promise

The reasonableness of the action or forbearance

The extent to which the action or forbearance was foreseeably by the promisor

* + - 1. One year criterion
         1. The one year period does not run from the making of the contract to the proof of the making but from the making of the contract to the completion of performance
         2. The one year period does not run from the commencement of performance to the completion of performance, but from the making of the contract to the completion of performance
    1. *Schwedes v. Romain* (Ps alleged breach of contract over the sale of land)
       1. Holding: No enforceable contract between the parties existed; there was no basis upon which the District Court could have granted specific performance; and even if a contract existed, there was no part performance, nor estoppel.
          1. On the issue of partial performance, Appellants failed to distinguish between acts undertaken in contemplation of eventual performance, and acts which truly constitute part performance of a contract
       2. A contract for the sale of real estate is invalid unless it, or some note of memorandum thereof is in writing subscribed by the parties to be charged
       3. The acts relied upon as part performance to remove a parol agreement for the sale of lands from the operation of the Statute of Frauds must have been performed by the parties seeking to enforce the agreement
    2. *Monetti SPA v. Anchor Hocking Corp*. (P alleged he had an agreement with D for D to be sole distributor of P’s food service products for 10 years; sent a memo that indicated an agreement)
       1. Holding: A memo made before the contract is formed satisfies the Statute of Frauds
          1. The writing needs to “express the substance of the contract with reasonable certainty”
       2. Partial Performance Exception: the UCC does not treat partial delivery by the party seeking to enforce an oral contract as a partial performance of the entire contract, allowing him to enforce the contract with respect to the undelivered goods.
          1. Protects the first party to act
          2. Partial performance took the contract out of the Statute of Frauds
          3. The partial performance here consisted no of delivery of goods alleged to be part of a larger order but the turning over of an entire business
          4. That kind of partial performance is evidence of an oral contract and shows that that this is not the pure sale of goods to which the UCC’s statute of frauds was intended to apply

Sale of goods v. transaction of goods

* + - 1. Predominant Purpose Test
         1. The predominant purpose test applies the UCC to transactions if their predominant purpose is to sell goods, but applies the common law of contracts if their predominant purpose is to sell services