***INTRODUCTION***

1. **CONTRACT AND RELATED OBLIGATION**
   1. The Noncommercial Specially Drafted Agreement
      1. White v. Benkowski
         1. For sale of goods < $500, enforceable contract can be oral.
         2. No punitive damages
      2. General/Consequential Damages (pizzeria buys stove for $1000 but delay 6 mo.)
         1. General – Market/contract differential due to delay ($1200-$1000) = $200
         2. Consequential – Lost profits
   2. Other Basic Types of Agreements
      1. Commercial specially drafted agreements
      2. Standard form agreements
         1. Probably > 99% of all contracts (receipts, purchase slips, deeds, etc.)
         2. Why? Necessity, mass production society enforces order
      3. Oral agreements
      4. Informal agreements
   3. Relational Exchange – Difference between discrete & relational exchanges are key for planning.
2. **GENERAL THEORIES OF OBLIGATION AND REMEDIES**
   1. Theories of Obligation
      1. Consideration, PE, UR, promise for benefit received, tort, “form”, and warranty
      2. Each obligation has a series of remedies (sometimes very different).
   2. Remedies
      1. 3 common monetary remedies are: expectancy, reliance, and value of benefit conferred.
      2. Problem 1-1
         1. Theory behind Grainseller is agreement with consideration.
         2. Any time agreement involves sale of goods, statutory law applies (U.C.C.).
         3. U.C.C. § 1-305(a) – Remedies to be liberally administered giving *expectancy damages*, but neither consequential nor special damages nor penal damages unless specifically, statutorily provided.
         4. Expectancy damages – $6500 (new cost including new truck) – $4050 (old cost)
      3. Sullivan v. O’Connor (nose job)
         1. Restitution: Return of fees paid ($622.25 to doctor)
         2. Reliance: Back to OP (out-of-pocket, worse, & pain & suffering for 3rd)
            1. Jury already found doctor not guilty of malpractice.
            2. To attempt to put a value on the nose may put exceptional strain on jury.
         3. Expectancy would have gotten her from the bad nose to the good nose.

***THEORIES OF OBLIGATION***

1. **AGREEMENT WITH CONSIDERATION**
   1. THE MOTIVATION OF A PARTY TO EXTRACT IS MEASURED *OBJECTIVELY*!
   2. Restatement 1st of Contracts § 75
      1. Consideration for a promise is:
         1. An act other than a promise or
         2. A forbearance or
         3. The creation, modification, or destruction of a legal relation or
         4. A return promise
      2. Bargained for and given in exchange for the promise
      3. May be given to the promisor or some other person (and vice versa) s
   3. Functions performed by legal formalities – *page 23*
      1. Evidentiary function (e.g., writing, attestation, notary)
      2. Cautionary function (shows it’s a serious matter)
      3. Channeling function
   4. Hardesty v. Smith (lamp invention)
      1. Even if the value of consideration (the invention) is worthless, it still counts.
      2. Promisor (Smith) has *extracted* something in exchange for the promise.
      3. Promisor is buying a chance of value, so it has benefit at the time of contracting, even if it turns out to be without value.
      4. Courts don’t weigh consideration.
   5. Gifts v. Consideration – USE THE *OBJECTIVE* REASONABLE PERSON MOTIVE TEST!
      1. Benefit to promisor only an aid and not conclusive  *ephemeral?*
      2. Dougherty v. Salt (gift promise to nephew)
         1. Gift promise not enforceable because the promisor is not extracting anything.
         2. Fails the *cautionary function* (e.g., guilted into the gift)
         3. Fix it? Extract something for consideration – the more concrete the better.
      3. Maughs v. Porter (car give-away at auction)
         1. D’s purpose was to extract attendance at his auction.
         2. Thus, because P attended (and paid $3), there has been consideration.
         3. If you deliver the gift, you can’t get it back.
      4. Allegheny College v. National (scholarship donation)
         1. Depends on if purpose in donating was to extract the perpetuation of her good name as memorial
      5. Tramp Example
         1. “If you go around the corner to the store, I’ll buy you a coat.”
         2. Tramp going is not consideration. The walk was not requested as the price of the promise, but was merely a condition of the gratuitous promise.
      6. Hamer v. Sidway (nephew foregoing bad activities) *some disagreement* 
         1. Was the action consideration or a condition?
         2. Family member who believes nephew is going down wrong path and offers $ for reform tends to show extraction to support promise because of *vested interest*.
         3. In general, waiver of any legal right at request of another is good consideration.
      7. Restatement Second of Contracts § 81
         1. The motive to extract does not have to be a *primary motive*.
         2. In fact, it could be a tiny motive!
         3. Comment b – Even if mainly trying to gift, good if secondary motive to extract.
         4. ACTUAL MOTIVE IS IRRELEVANT! JUST REANSONABLE PERSON
   6. Forbearance to sue
      1. Baehr v. Penn-O-Tex Oil Corporation (forbearing to sue)
         1. There must be motive for inducement, not merely convenience.
         2. Without mutual reciprocal inducement in both parties, there is no contract.
      2. Springstead v. Nees (promise to give up property in exchange for not suing for other property)
         1. To use forbearance as consideration, must have both *honest* & *reasonable* claim.
         2. Technically mutual inducement, but there is still no contract.
   7. Neuhoff v. Marvin Lumber and Cedar Co. (replacement windows) – Modern courts are more skeptical the more ephemeral arguments for consideration are.
   8. U.C.C. § 1-304: All contract and duties within U.C.C. impose good faith performance and enforcement.
   9. U.C.C. §2-306(2): Agreement for exclusive dealing is an obligation by the seller to use best efforts to supply goods and by buyer to use best efforts to promote their sale.
   10. Mutuality of Obligation for Agreements with Consideration
       1. De Los Santos v. Great Western Sugar Company (beet transport)
          1. No mutuality of obligation – there is no promise on D’s side.
          2. At best, an illusory promise, but not a real contract (“as may be loaded”)
          3. Once D puts beets on truck, they contract to pay for that load, but *only* that load.
       2. Wood v. Lucy, Lady Duff-Gordon (fashion endorsements)
          1. Implied contract implies a duty for Wood to make a reasonable effort – mutuality.
          2. It was an exclusive arrangement – rational party wouldn’t give exclusive rights unless they wanted Wood to do something.
       3. Weiner v. McGraw Hill (just cause employment)
          1. Mutuality is *not required* if the party has already given consideration.
          2. P already paid for the promise of just cause employment by quitting job and skipping other offers.
       4. Kamobj v. Eli Lilly & Co. (more employment relations)
          1. Mere relinquishment of a prior job to take a new one is insufficient consideration.
          2. But, if it is a specifically bargained for detriment, it may be adequate.
       5. Mattei v. Hooper (real estate developer)
          1. Satisfaction clause requires good faith (not 100% discretion) – so consideration!
          2. The satisfaction makes it valid because it imposes a good faith duty.
       6. Satisfaction Clauses:
          1. For commercial value, etc, use reasonableness test.
          2. For fancy, taste, or judgment use honesty test (pg. 29).
   11. Preexisting Duty Doctrine
       1. Additional promises made after an agreement with consideration typically not binding because they lack further extraction (and are thus gifts).
       2. Courts may find ways around this (saying D thought he got too great of a deal).
       3. ALSO, UCC §2-209(1) says that an agreement modifying a contract needs no consideration to be binding! (GOOD FAITH TEST/not extortion)
       4. ALSO RST 2nd § 89: A promise modifying a duty under contract not fully performed on either side is binding if the modification is fair and equitable in view of circumstances **not anticipated** by the parties when the contract was made (pg. 33.)
   12. Unconscionable Doctrine – If the exchange is SO far out of line, court may not honor the bargain.
2. **PROMISSORY ESTOPPEL (Justified Reliance)** 
   1. Estoppel is a distinct basis of liability without regard to bargain, contract, or consideration.
   2. Explanatory Notes in Restatement First of Contracts § 90
      1. Specific performance for gratuitous promise of land if:
         1. Promisee has been given possession or
         2. Promisee has been given possession and made improvements.
      2. Charitable subscriptions are generally enforced after reliance action has taken place.
      3. Promises to others may be upheld if injustice can only be avoided by enforcement.
         1. Action induced must be definite and substantial.
         2. Action induced should reasonably have been expected by the promisor
   3. Restatement Second of Contracts § 90
      1. Must be *promise* that promisor should reasonably expect to induce action or forbearance.
         1. *Often must be clear and definite* (not always, e.g., employment)
         2. BUT, Corardi employment (pg. 84)
      2. It does induce action or forbearance  And that action or forbearance is reasonable
      3. The reliance must be definite and substantial and to detriment (*implied*)
      4. Injustice can only be avoided by enforcement of the promise.
   4. Kirksey v. Kirksey (sister-in-law moves and then is kicked out)
      1. STILL, lacked consideration (a la tramp case)
      2. But, begins to open the door to promissory estoppel, but not yet.
   5. Ryerss v. Trustees of Presbyterian Congregation of Blossubrg (church building)
      1. Consideration – Motive to extract the building of the church (improve market value of land)
      2. BUT, better case possibly for detrimental reliance induced by the promise
   6. Seavy v. Drake
      1. Court is not deciding on consideration grounds – opening up for estoppel.
      2. P entered the land and made large improvements on it.
   7. Pomeroy’s Equity Jurisprudence
      1. Further stepping stone towards promissory estoppel
      2. Conduct that induces detrimental reliance is actionable.
   8. Siegel v. Spear & Co. (furniture storage)
      1. Gift promise notwithstanding, this is enforceable based on *reliance change of position*.
      2. Caveat, court jammed and distorted this holding. Just remember that reliance shows up.
   9. Wheeler v. White (promise for securing a loan)
      1. Not an enforceable contract because the terms are too uncertain
      2. BUT, promissory estoppel applies.
         1. Promise by D? Yes. P Reasonably rely? Yes. To his detriment? Yes. Injustice? Yes.
         2. RELIANCE, NOT EXPECTANCY
   10. Hoffman v. Red Owl Stores (grocery store chain)
       1. Recover under PE for *assurances made during negotiations*! (Precontractual reliance)
       2. Fairness concern (Red Owl’s bargaining position kept getting stronger).
       3. Efficiency concern (Hoffmans of world be reluctant to rely  detriment to society).
   11. Elvin Associates v. Franklin (singer reneging) – Again, promissory estoppel before execution
       1. If trade custom makes reliance reasonable, then PE may be appropriate.
   12. Local 1330 v. United States Steel Corp.
       1. No promissory estoppel in this case
          1. No promise
          2. Statements made by employees, not authorized agents
          3. No actual profit (P’s definition of profit was unreasonable.)
             1. We want to test a reasonable person *in their shoes*.
             2. No reasonable worker could believe that profit only involved direct costs.
   13. 29 U.S.C. § 2102 (2006) – Notice before plant closings and mass layoffs
       1. Typically 60 days notice but lots of exceptions
       2. Exceptions include:
          1. Actively seeking capital
          2. Not foreseeable
          3. Act of God
       3. Still need to give as much notice as possible and give a justification of reduction.
   14. Only about 9.7% of promissory estoppel claims actually succeed on merits.
   15. Problem 2-7
       1. Promissory Estoppel?
          1. He reasonably relied.
          2. Probably not substantial and definite reliance. Possibly if he forwent other offers.
       2. Agreement with Consideration? Maybe, because they promised partnership if he stayed and kept his clients with them.
3. **UNJUST ENRICHMENT**
   1. Can’t be foisted!!
   2. Unjust Enrichment – Person unjustly enriched at the claimant’s expense incurs a duty to satisfy the claim asserted to the extent of the enrichment (absent a defense).
   3. Contract Implied in Fact vs. Contract Implied in Law
      1. Fact – Enforceable agreement with consideration. Facts of agreement and consideration based on implication and inference rather than on explicit assent as in an express contract.
      2. Law – Obligations arising under unjust enrichment! s
   4. Unlike for *promissory estoppel*, where a breach of contract claim precludes use of justified reliance, you can choose either *breach of contract* OR *unjust enrichment*.
      1. Naturally, you would elect *UE* over *breach of contract* if the damages for *UE* exceed *breach*.
      2. In **employment** context – when value of the services conferred are greater than what the contract would get you (e.g., market value are actually $25/wk instead of $17. So, instead of getting paid for the remaining 2 weeks at $34 total, you get paid the difference for the $8/wk for 10 months.
   5. Bloomgarden v. Coyer (work done from arranging meetings and negotiations)
      1. *Implied Contract in Fact*
         1. Real contract – Requires an agreement and bargained for exchange
         2. It is not written or oral – It is implied.
         3. Parties’ conduct implies contract – Reasonable people see bargained for exchange.
         4. Examples of support include professional etiquette, informal situations, effort, etc.
      2. *Implied Contract in Law* (Quasi-contract)
         1. Lawn mowing guy mistake and mows the wrong lawn. Owner hides in bushes.
            1. Owner knows you’re in the lawn mowing business.
            2. Owner reasonably knows you should be paid.
            3. Owner unjustly gets gain without telling you and without paying.
   6. Sparks v. Gustafson (friend maintaining and working on friend’s business property)
      1. He never requested anything, but there was *unjust enrichment*!
      2. Test for *Implied Contract in Law*
         1. Conferred on D a benefit
         2. Inequity in failing to repay for that benefit.
            1. Gift or not? Would reasonable person think benefit conferred was a gift?
            2. Is there a choice or not (*foisting problem*)
      3. *Implied Contract in Fact*? Maybe – A reasonable person in the shoes of the executor may think that he was trying to extract compensation in return for his services.
   7. Gay v. Mooney (wife’s uncle living with them in exchange for house)
      1. Statute of Frauds
         1. No *enforceable contract* because of statute of frauds requiring writing for land
         2. Moreover, no *implied contract in fact* for the same reason.
         3. Why? Law is worried about husband fraudulently making a claim.
      2. *Promissory Estoppel*? Maybe
         1. Was there a promise? Yes.
         2. Was it reasonably relied on? Maybe, depending on whole circumstances.
         3. Was it detrimental? Maybe, again, depending on the facts.
      3. *Unjust Enrichment (Implied in Law)*?
         1. The intent was compensation, not a gift.
         2. So, hopefully this will show that it falls out of range of gifts between family
         3. Allowing unjust enrichment kind of sidesteps the whole purpose of S.O.F.
   8. Kearns v. Andree (oral contract for house sale where Kearns made changes for Andree)
      1. Even though D was never technically “enriched” (he never bought the house), still *UR*!
         1. Benefit conferred at the request of another is enough, even though no enrichment.
         2. Could argue that he had the benefit to go ahead with the deal or not.
      2. Costs awarded by courts (for expenses done for Andree)
         1. For Andree – Cut down trees and alterations to house
         2. For new buyer – Repainting, repapering, and -$250
      3. HYPOS
         1. *UE* – Costs for Andree
         2. *PE* – Costs for Andree + $250 (assuming changes diminished fair market value)
         3. Expectancy – Costs for new buyer
   9. Posner v. Seder (injured party seeking restitution after D breached contract and fired)
      1. P had 2 Options
         1. *Quantum Meruit* (*UE*) – Difference b/w value & pay for work done (invalidate K)
         2. *Expectancy* – Total year’s payment - $$ already earned
      2. No overtime because the contract stipulated no extra overtime pay
   10. Kelly v. Hance (breaching contractor seeking restitution)
       1. P abandoned work with no justification, D didn't accept any of work, so P gets nothing.
       2. Here, the value of P’s miniscule work was foisted on D.
       3. Counter: Maybe argue that D waited too long to cancel (4 months).
   11. Briton v. Turner (employee breached without good cause and is seeking payment for work done)
       1. *Contract price is the ceiling for what the breaching party is entitled to.*
       2. Here, employee breached, so can only recover up to contract value (contrast with Posner).
       3. Policy – You want to allow breaching contractors to recover to get rid of incentives for employer to make bad conditions for employee.
   12. Majority Rule vs. De Leon Rule for defaulting land purchases
       1. Majority – Defaulting purchaser can’t recover any money paid by him under contract to vendor.
       2. De Leon v. Aldrete
          1. P can get back payments minus the damage done to D.
          2. Especially true when P paid a big percentage (more than 70%, not just 10%)
   13. Watts v. Watts (non-marital relationship that went sour after long time)
       1. Breach of Contract (express or implied)
          1. P quit her job and abandoned career training.
          2. Support with McGraw Hill.
       2. Unjust Enrichment – She did all of these things for no compensation. Use this to support these:
          1. Bloomgarden – Implication that if the company wasn’t going to get business out of it, that, in a business context, a reasonable person would want compensation.
          2. Local 1330 – Steel workers able to share in the historical enrichment and keep it open?
   14. Marriage in general precludes agreement enforcement for many things (pg. 156).
   15. Gilmore, The Death of Contract
       1. With *UE*, we are losing the important bargain element. All we need is *UE*, no extraction.
       2. With *PE*, all we need is a detrimental reliance inducing promise. Again, no bargain.
       3. BUT, REMEDIES ARE DIFFERENT FOR THESE THEORIES!
4. **PROMISE FOR BENEFIT RECEIVED** 
   1. Will enforce in:
      1. Promises to bay debts barred by bankruptcy
      2. Statute of limitations
      3. Infancy
   2. Elements (Restatement (Second) of Contracts § 86)
      1. Material benefit
         1. Comment b – Can’t be foisted!
         2. Definite and substantial character of benefit received is helpful.
      2. Benefit is not a gift
      3. Subsequent promise
         1. To the extent necessary to prevent injustice
         2. Value of the promise is not disproportionate to the benefit.
   3. No *UE* here – Benefit before promise  Foisting
      1. How to get rid of foisting?
         1. Ds make promises after the fact to negate foisting.
         2. EX: Midnight painter comes to house next day, owner loves it, promises to pay.
      2. So, maybe think of it as an extension of *UE* that gets rid of the foisting problem.
   4. Mills v. Wyman (took care of sick son)
      1. No bargain
         1. Care was already conferred before the promise to pay.
         2. No motive to EXTRACT because he already had the benefit!
      2. *UE*? No, Foisted! “Good Samaritan”
      3. BUT, several exceptions where moral obligations are enforceable because there was at least at one time a bargained-for-exchange.
         1. S.O.L. (debtor sees lender years after S.O.L. & promises to pay.) RST 2nd §82(1)
         2. Debts by infants
         3. Debts by bankrupts
   5. Webb v. McGowin (worker fell off walkway to save D)
      1. Unlike Mills “Good Samaritan”, the act here was done under *employment*.
      2. Another (somewhat weak) way to distinguish this form Mills is that the history of 8 years of payment satisfies the cautionary and evidentiary functions for promise enforcement.
   6. Harrington v. Taylor (P caught axe in hand and saved D’s life)
      1. Gift defense, like in Mills
   7. Edson v. Poppe (tenant asks P to build well, landowner likes, promises to pay, then reneges)
      1. Material benefit? Yes, assumed increased property value
      2. Was it a gift? No. P intended to be reimbursed (asked by tenant).
      3. Subsequent promise? Yes. Easy case!
5. **TORT**
   1. General principle: Tort liability for misperformance of a contract whenever there would be liability for gratuitous performance without the contract, i.e., whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of P.
   2. Mauldin v. Sheffer (engineer gave architect really bad plans)
      1. There must be *misfeasance* for contract to give rise to tort, not just nonfeasance
      2. The duty arose out of the contract, but it was defined by statute.
      3. Typically involves professional relationship (but somewhat watered down when sympathetic P)
   3. Hargrave v. Oki Nursery, Inc. (bad wine grapes)
      1. Independent tort based on elements of fraudulent representation: Representation of material fact, falsity, scienter (prior knowledge of wrongness), deception, and injury
      2. HYPO: Suppose D did not know vines were diseased, but didn’t bother to check?
         1. Still tort
         2. The reckless disregard should be enough (making it like Mauldin).
      3. Also, tort opens the door for *punitive damages* (unlike contract).
   4. Ayres and Klass, Insincere Promises
      1. Promissory fraud
         1. The promisor, by the very act of promising, typically communicates that she intends to perform her promise.
         2. If the court finds that D did not intend *at the time of promising* to perform her promise, it can subject her to both *compensatory* and *punitive* damages under promissory fraud.
      2. Why does a promisee care about promisor initial intent?
         1. Breach of contract damages in the U.S. typically do not compensate for litigation costs, speculative damages, emotional, etc.
         2. And, there is a chance that a good breach-of-contract claim won’t prevail in court.
      3. 3 Necessary Inferences
         1. What the promisor said (explicitly or implicitly)
         2. Was the representation true at the time?
         3. Recklessly, knowingly…
   5. Foley v. Interactive Data Corp and Vanlente v. University of Wyoming Research Corp.
      1. 2 Failures to win tort out of bad-faith employment
      2. Hillman: Maybe too narrow-minded. Maybe tort should be easier for employment.
6. **FORM**
   1. Bind the party simply by mechanically following requirements such as a writing
   2. Not common – unless there is a statute indicating that a writing is sufficient, an enforceable promise typically requires a bargained for exchange still.
   3. *Problem 2-10* – Reconcile option contract with bargained for exchange:
      1. Offeree must give *purported* consideration (e.g., $1) to constitute binding option contract.
      2. Why is faking enough? To facilitate transactions
      3. Analogous to the cautionary function of a seal in form contract – Jump through hoops
7. **STATUTORY WARRANTY**
   1. *Remember for sale of goods* – Look to UCC first, not common law
   2. Express and Implied:
      1. Express – Solely out of parties’ agreement
      2. Implied from P relying on skill and knowledge of D
   3. Disclaimers – UCC 2-316
      1. Express Warranty Disclaimers
         1. Seller responsible for any ambiguities that can’t be resolved. *Resolve against S*
      2. Implied Warranty Disclaimers
   4. Keith v. Buchanan (D boat seller, “seaworthy” create express warranty?)
      1. Express – UCC 2-313
         1. Affirmation of fact or promise made by seller to buyer (not just opinion) AND
            1. Here, fact.
            2. Opinions where reasonable buyer would consider it opinion?

Lack of specificity in statement

Equivocal manner – verifiable?

Definitive?

Oral or writing?

Experimental in nature

* + - 1. Part of the basis of the bargain
         1. Doesn’t have to be a but-for or even a dominant factor
         2. Reliance is not a prerequisite either.
         3. *Burden on seller* to prove that it was not part of basis.
    1. Implied – UCC 2-314 (Not here) – P did not rely on skill of D in making the purchase.
    2. Implied warranty of fitness for particular purpose! (merchantability) – UCC 2-315
    3. Warranty HURDLES
       1. Must prove D made warranty
       2. Must prove that goods did not comply with warranty
       3. Must prove that injury (proximate and in fact) was caused by defective goods
       4. Must prove damages
       5. Must fight off *affirmative defenses* (e.g., disclaimers, S.O.L., assumption of risk)
  1. Webster v. Blue Ship Tea Room (fish bone in chowder)
     1. Loses on implied warranty
     2. Maybe location matters depending on coastal distance. Still seems reasonable to expect.
  2. Convention on Contracts for International Sale of Goods (Article 35)
     1. Subsection 1, 2(c)  2-313
     2. Subsection 2(a)  2-314
     3. Subsection 2(b)  2-315

1. **STATUTE OF FRAUDS**
   1. Different form theory of obligation based on *form*
      1. In *form*, writing makes promise enforceable, even without bargain.
      2. Here, we must have a bargain, but we ALSO need a writing!
   2. Issues (last paragraph pg. 207 – Using Hawaii as example) UCC 2-201 (pg. 230) lots of others
      1. Does the statute apply (legally, is the case within the statute)?
         1. Sales of land, tenements, or hereditaments
         2. Any agreement that can’t be performed within one year
            1. EX: Hire a 122 year old man for 366 days – Need writing
            2. EX: Hire a 22 year old man for life – No writing (could die in 1 day)
         3. $500 or more
      2. If yes, does a memo, note, or other writing satisfy the statute?
      3. If not, is there an exception?
         1. Lots of exceptions! 2-201 pg. 230
         2. You can object, but it must be within 10 days (if you don’t, doesn’t mean you’ll lose, just can’t use S.O.F. defense).
      4. If not, is there another doctrine to mitigate what would otherwise be effect of noncompliance?
         1. UE or Reliance
   3. What kind of writing?
      1. Both parties don’t have to sign – only party enforced against.
      2. Doesn’t have to be formal
      3. Reasonably identifies subject matter of contract
      4. Sufficient to indicate that contract has been made or offered by the signor
      5. States with reasonable certainty essential terms of unperformed promises
      6. Can have incorrect portions
   4. Watering down – Lots of exceptions – Why? **Pg 131 HB**
      1. For instance, if buyer pays for part of oral K (FOR SALE OF GOODS ONLY)
      2. When opportunity to reject
      3. Specially manufactured goods
      4. If opponent admits contract in court
      5. Purpose of S.O.F.
         1. Prevent fraud with respect to never making a contract at all
         2. Prevent fraud with respect to terms of agreement
         3. Fuller’s functions – Evidence, cautionary, and channeling
      6. Sometimes breaching parties try to use S.O.F. to hide behind – Injustice!
   5. McIntosh v. Murphy (25 April – phone call to employ P start on 27th, until April 26th midnight)
      1. D’s claim:
         1. S.O.F. bars employment contract because was oral and for more than 1 year.
         2. Claims phone call was official start, making contract longer.
      2. *Equitable Estoppel*
         1. More broad than promissory and can include conduct and representations, whereas promissory requires promise that induces detrimental reliance
         2. BUT, CT here is relying on RST that is really talking about promissory (pg. 227)
      3. HYPO: Appeal for D
         1. Reliance – Wasn’t a full promise made before P made arrangements? Maybe
         2. S.O.F. is statutory law that we shouldn’t usurp! (Squib Dumas v. Infinity)
         3. Use specially manufactured clause of 2-201 on pg. 231 – Move to Hawaii does not necessarily imply a non-terminable contract.
   6. Problem 2-12 (pg. 234)
      1. Express contract? No
      2. Contract implied in fact?
         1. No. They were neighbors. Iris protests and asks for no payment (Bloomgarden). But, she does later accept payment of $250.
         2. Yes. Not the kind of work neighbors do without expecting $ (Sparks).
      3. Contract implied in law (unjust enrichment)?
         1. Yes – Benefit conferred was not a gift and was not foisted (Watts).
            1. 3 Days of hard labor
            2. D requested it
      4. Promise for benefit received?
         1. Yes. Webb v. McGowan. Not a gift, not foisted. Only difference from UR is the subsequent promise negates any foisting problem.
      5. Promissory Estoppel?
         1. No. No detrimental reliance
      6. Equitable Estoppel? MAYBE, did she reasonably think she was to be paid?

***REMEDIES***

1. **EXPECTANCY DAMAGES FOR BREACH OF AGREEMENT WITH CONSIDERATION**
   1. D Failure to Restore
      1. General Rule: Cost of restoration unless:
         1. Grossly disproportionate AND
         2. Restoration is incidental.
      2. Groves v. John Wunder Co. (P leases land, D fails to remove gravel and leave at grade)
         1. Holding: P can recover cost of completion.
         2. RULE: Injured party can get restoration damages even if way above property MV (foolish monument rule).
         3. Other considerations:
            1. Perhaps FMV of lease was actually much greater and P lowered it for D so that he would perform the $60,000 restoration.
            2. If you could prove that removal was necessary prerequisite to P agreeing and that the removal *induced* the contract, P wins.
            3. DON’T dismiss willfulness  Just a tool though.
         4. Hillman: Dissent probably right  seems clear from K that land was for sale, so should only give MV difference.
         5. For tort, formula is MV lost, not cost of completion.
      3. Peevyhouse v. Garland (Again, D fails to restore)
         1. Holding: P does NOT get cost of completion.
         2. RULE: If breach pertains to matter only incidental to main purpose of K and performance would be disproportionately costly, then MV (after) – MV (before).
         3. BUT, when restoration is contemplated by parties and is main or principal purpose, then give expectancy for cost of performance.
      4. Ways to ensure getting cost of restoration?
         1. Give evidence in the contract!
         2. Say that you gave a discount for restoration because of its huge importance to you.
         3. Show in other ways (lover of environment, etc.)
      5. Rock Island Improvement Company v. Helmerich & Payne Co.
         1. Contract did not ensure restoration, but CT still gives completion costs.
         2. P wins from *reclamation statute* – Used to support restoration NOT incidental.
         3. So, we have another TOOL  reclamation statutes
      6. Radford v. De Froberville
         1. P gets cost of completion even though no diminution of value.
         2. Court assured that P is going to spend the $ for the improvement (no windfall).
         3. UPSHOT – ASK P what he’s going to do with the $!
      7. Problem 3-1
         1. 1st – Look what the law is 
            1. Completion unless grossly disproportionate and incidental
            2. Here, disproportionate because value of home went up more than cost, so whole key is whether or not the 2 foot discrepancy is incidental or very important.
         2. LOOK AT INTENTION
            1. Against:

Did not testify that actually intended to arrange for reconstruction

Did not make known that he was a diver

Economic waste argument (pg. 246)

No *reclamation statute* like in Rock Island

* + - * 1. For

P was a diver and felt uncomfortable at that depth.

Expert testimony

* 1. Breaching contractor and injured owner
     1. General vs. Consequential Damages (Remember White v. Benkowski)
        1. Every injured P that doesn't get water gets general damages (MV)
        2. Not all injured Ps gets consequential (inconvenience of taking kids to neighbors)
     2. General Formula: *FOR GENERAL DAMAGES*
        1. Cover – KP
        2. Or, if cover chosen is too high, MV – KP
     3. Thorne v. White (Injured wants cover price)
        1. P doesn’t get cover because cover was better than was originally contracted for.
        2. HYPO: Bunch of contractors for $400, but P picks more expensive one.
           1. Don’t let P recover, only give $400-KP (don’t want to build up damages).
        3. HYPO: P gets better roof, but it’s the only one available.
           1. Let P recover full price, because it’s only option for P.
           2. *Foisted!*
     4. Morello v. J.H. Hogan (breaching subcontractor wants UE, contractor wants Cover – KP)
        1. When a breaching sub-contractor confers a partial benefit on the contractor who has to cover, that benefit is already factored when the contractor has to cover.
        2. Here, sub did $9,000 work, but cover was extra $10,000. $9,000 value is factored in. If it weren’t, the sub would owe $19,000, not just $10,000.
        3. SO, sub does get UE, it’s just already factored. And contractor gets Cover – KP.
  2. Breaching owner and injured contractor
     1. General Formula:
        1. Expenses already paid + Expected profit (KP – Total costs)
           1. Hillman’s: KP – CC i.e., Contract Price – Savings
        2. HYPO: Suppose contract for $100K, costs $95K, P spends $75K
           1. $75K + ($100K – $95K) = $80K
           2. $100K – $20K = $80K
     2. Warner v. McLay
        1. Must use the formula!
        2. Jury instructions (saying around 10% profit) incorrect  Need #s and evidence.
     3. Don’t forget about mitigation and avoidable consequences (act reasonably after breach)!
     4. Fuller and Purdue on Reliance/Expectancy: Sometimes foregone opportunities are hard to prove in court, so using expectancy can get you lost reliance even if you can’t prove it.
  3. Breaching employee and injured employer
     1. Formula – Same as breaching contractor: Cover (must be reasonable) – KP
     2. Handicapped Children v. Lukaszewski
        1. P gets Cover – KP even though better cover.
        2. Here, school gets a better teacher (better cover), but it DOESN’T MATTER – Foisted  neither wanted or expected better
     3. Posner’s efficient breach – If you can make more, even when paying P, do it.
     4. Fuller’s response – Efficient breach has negatives qualitative effects on K system.
  4. Breaching employer and injured employee
     1. Duty to *mitigate* through reasonable efforts (Boehm v. American)
        1. Formula: Expected Salary – what has earned or should have earned
     2. Parker v. Twentieth Century-Fox Film Corp.
        1. After employment breach
           1. Mitigate if *comparable or substantially similar* (or damages lessened)
           2. Not forced to mitigate if *different or inferior*
        2. Original movie was musical, in L.A., etc. Here western in Australia…
     3. Also, even though P doesn’t have to, if P mitigates with an inferior job, the $ earned will be deducted from expectancy (Marshall School District v. Hill).
     4. Problem 3-2: 1 yr. contract at $1.5K/mo. MV is $1.2K. Fired after 1 mo. No job 10 mos.
        1. Seek to recover expectancy of $1.5K for 10 months  Look at all circumstances.
        2. Caveat – Look at what he did with his free time.
           1. If he makes some $ that he couldn’t have had without the breach, this factors into damages.
           2. Not going to make him take McDonalds job, but must be *reasonable*.
  5. Injured buyer of goods
     1. General Rule
        1. UCC § 1-106: Liberally administered to give expectancy
        2. UCC § 2-710: Recovery of incidental damages due to breach (e.g., storage)
        3. Common Law: MV – KP at the time and place of breach of contract
        4. UCC § 2-713: MV – KP but measure when buyer learns of breach.
        5. If, buyer gets substitute, UCC § 2-712(1) and (2): Cover – KP
        6. UCC § 1-305(a) suggests: When MV is greater than cover, but cover gives expectancy, then can’t use § 2-713, must use § 2-712.
     2. Cooper v. Clute (common law before UCC)
        1. Here, MV=KP, so P recovers only nominal damages.
        2. The fact that D sold it to somebody else for more than original KP is irrelevant!
        3. ALL WE CARE ABOUT IS MAKING THE INJURED BUYER WHOLE.
     3. When a buyer gets worse quality stuff? (Breach of warranty under § 2-313-§ 2-315)
        1. UCC § 2-714: MV of goods as warranted – MV of goods as accepted
        2. Think of it like Sullivan v. O’Connor (get from bad nose to good nose)
        3. EX: KP = $15, MV = $17, D gives you goods at $5 value. So, instead of being at +2 (17-15), you are at -10 (15-5). So, expectancy gives you +2 – -10 or +12.
  6. Injured seller of goods
     1. General Rule
        1. UCC § 1-106: Liberally administered to give expectancy
        2. UCC § 2-710: Recovery of incidental damages due to breach (e.g., storage)
        3. UCC § 2-708(1): At time and place for tender (usually time of breach)
           1. (1): KP – MV
           2. (2): *If Volume Seller* (more supply than demand): Entitled to lost profits!
           3. \*\*Caveat\*\*: Last clause of (2) seems to defeat volume seller profits. Courts interpret this to apply only to manufacturers, not all dealers.
        4. UCC § 2-706: KP – Resale Price (assuming sold in commercially reasonably)
        5. UCC § 2-718(2) and (3):
           1. Breaching buyer gets back Deposit – (20% of value of total performance of $500, whatever is less) **– *Damages to seller***
           2. \*\*\*$500 is the only penalty or fine in common law or Article 2 of UCC.
     2. Problem 3-8: KP $40, Cost $27, buyer breaches; Reallocate $15$10; Resell $10$8; $2 unrecoverable
        1. KP – CC (savings)  $40 – [$10+8] = $22
        2. Profit + Amount Expended  $13 + $5 + $2 + $2 = $22
        3. What if seller had finished the job instead of stopped in this case if he found someone to resell after completion for $15 after market falls?
           1. KP – Resale: $40 – 15 = $25
           2. In order to get higher recovery, you MUST show that it was reasonable for seller to keep going at time of breach, thinking he could just resell.
     3. Neri v. Retail Marine Corp (breaching buyer, injured boat seller)
        1. Here, breaching buyer can get UE under § 2-718.
        2. BUT, there are seller damages too!
        3. So, formula is: Deposit – $500 – Lost Profits – Incidental Damages.
        4. As volume seller, seller lost one whole sale, so entitled to profits under § 2-708(2).
  7. Real Estate (pg. 169 HB)
     1. Injured Sellers
        1. Difference between KP and MV + any consequential damages on date sale should have been completed (Orr v. Goodwin)
     2. Injured Buyers
        1. 1 line of authority: KP – MV
        2. Different authority: Restitution of amount already paid, unless willful or bad faith

1. **EXECTANCY HURDLES**
   1. Hurdle 1: Foreseeability
      1. Hadley v. Baxendale (lost mill profits)
         1. General damages: Can it fairly and reasonably be considered arising naturally?
         2. Consequential: Reasonably supposed to have been in the contemplation of both parties at the time of K as a probable result of the breach (penalty default)
      2. Armstrong v. Bangor Mill Supply Corp.
         1. *Contemplation does not necessarily rest on communication*.
         2. P doesn’t always have to tell D of special circumstances.
         3. Reasonable to think that repair shop in business would foresee special damages
      3. UCC § 2-715(2)(a):
         1. All consequential damages that you had reason to know at time of (like Hadley)
         2. No tacit agreement test
      4. Article 74 of International Sales Convention – Respects Hadley again
      5. Posner/Ayres and Gertner Incentive Analysis
         1. Posner – Efficiency  Carrier can make sure it doesn’t delay, so blame him.
         2. Ayres – Create incentives for Ps to disclose.
      6. Problem 3-7 #2 (pg. 288): KP $10; Buyer changes and wants to resell for $20; Seller breaches (MV $18); Buyer unable to buy substitute for resale
         1. Damages?
            1. Only general damages  MV – KP = $18 – $10 = $8

Seller wouldn’t reasonably assume reselling, so no profit factor.

Profit is consequential because not every manufacturer will resell.

* 1. Hurdle 2: Proportionality – RST § 351(3): Must prove award is not disproportionate to K price
  2. Hurdle 3: Mitigation (Avoidable Consequences)
     1. Clark v. Marsiglia (Before work was done, requested worker to stop, but worker refused)
        1. When you’re told to stop, stop! ACT REASONABLY
        2. So damages if KP – CC, but CC is savings you should have had if you stopped when you reasonably should have.
     2. Schiavi Mobile Homes, Inc. v. Gironda – Must take affirmative steps to mitigate damages
     3. Parker v. Twentieth Century-Fox Film Corp.
        1. After employment breach
           1. Mitigate if *comparable or substantially similar* (or damages lessened)
           2. Not forced to mitigate if *different or inferior*
        2. Original movie was musical, in L.A., etc. Here western in Australia…
     4. Problem 3-10: Different or inferior employment mitigation? Bottom Line – Reasonable!
        1. Argument for employee:
           1. Different in kind job (is probably superior, but maybe different is enough)
           2. Commuting costs maybe offset or outweigh increase in pay. (Subjective desire not to commute?)
        2. Argument for employer: The job is better! Greater prestige, pay, etc.  You should mitigate!
     5. In Re Worldcom, Inc.
        1. Must show that party *could have and would have* done new agreement.
        2. We look subjectively at what P would have done for lost volume.
           1. Jordan is not a lost volume seller.

He determined not to enter into any other deals like this.

Same as if the boat dealer in Neri was shutting down its operation.

* + - 1. We look *objectively* for reasonableness of mitigation.
         1. A reasonable person in Jordan’s position would have taken a new deal.
  1. Hurdle 4: Certainty
     1. Evergreen Amusement Corp. v. Milstead (theatre property purchase):
        1. Future lost profits for new company are too speculative and uncertain.
        2. RST § 331 – Expert testimony only relevant as evidence when it can serve s a *sufficient basis* for estimating amount with reasonable certainty.
        3. BUT can get rental value of improved property.
     2. Lakota Girl Scout Council v. Havey
        1. Expert testimony *is* admissible here. Only used *rational basis*!
        2. Upshot: The more you can show causation, the less you have to show certainty.
  2. Emotional distress and other damages?
     1. Very reluctant to grant ED and outright prohibits punitive (WIS-Bay City). **HB 182**
     2. Chrum v. Charles Heating and Cooling, Inc. (No recover for commercial K)
        1. Tort Rule:
           1. If definite and objective physical injury as result of E.D. and independent tort proximately caused by D negligence.
           2. Also, D must be a professional (Mauldin v. Sheffer)
        2. For Breach of Contract:
           1. Deeply personal, not property, spelled out in contract (Stewart exception for stillborn child breach of K)
           2. Foreseeability hurdle
        3. Some property exceptions BUT GENERLLY NO COMMERCIAL RECOVERY
           1. If you can prove foreseeability (like deep emotional connection with property spelled out in K) then *maybe* good!
           2. Lots of other hurdles – Worry about 2nd hurdle – proportionality
        4. Also very hard for jury to quantify

1. **RELIANCE ONLY FOR BREACH OF K (NOT PE)**
   1. Nurse v. Barnes: Consequential reliance damages can be recovered even if no general damages.
   2. Chicago Coliseum Club v. Dempsey
      1. No future lost profits after D repudiates – *Uncertainty hurdle* plays a huge role here.
      2. No reliance expenses prior to agreement – You can’t rely before K! (*Exceptions below*)
      3. No expenses for attempting to restrain D from breaking K
         1. CT generally out of public policy doesn’t enforce SP (slavery)
         2. CT gets around this by ordering not to do *anything else* (indirect force).
      4. YES expenses after signing and before breach
         1. D can’t prove it’s a losing K, so err on the side of P.
         2. Fixed overhead not awardable, but special expenses are.
   3. Anglia Television LTD v. Reed: May get prior reliance damages if implied term in K that is interpreted to say that D will take on risk of reliance already done.
   4. Albert v. Armstrong
      1. Reliance damages must be reduced by loss *in losing K*.
      2. If no side can prove if K would have been losing or profitable, err on side of non-breaching party.
      3. If P can’t prove winning K with facts, unlikely D can prove losing K with same facts.
2. **VALIDITY OF DAMAGES CLAUSES IN K**
   1. McGrath Co. v. Wisner
      1. 2 Prong Test
         1. Must be a reasonable forecast of just compensation for breach harm
         2. Harm that is caused is incapable or very difficult to accurately estimate.
      2. UPSHOT – Enforceable only when the prospective beach damages are uncertain AND the parties make a good faith effort to estimate them. ELSE A PENALTY!
      3. In this case, fails both prongs – We have an injured buyer so just use MV – KP.
         1. Not proportionate to anticipated damages
         2. Not difficult to estimate
      4. Possible ways to remedy the clause
         1. Need a sliding scale that has a relationship to breach (not just static $300)
         2. Ensure that parties seriously negotiate the liquidated damages and indicate as such.
   2. Truck Rent-A-Center, Inc. v. Puritan Farms
      1. Again, 2 Prong Test
         1. Reasonable? Yes. Sliding scale. Damages decrease as time goes.
         2. Difficult to estimate? Lots of questions  Re-rent, resale, storage costs…?
   3. What if it turns out there are no actual damages?
      1. General rule is agreement held on day of making & not breach, so probably still recover.
      2. But, sometimes exceptions when courts want to use hindsight & see no damages.
   4. *Courts usually look not what the parties say, but what the actual meaning is!*
   5. Vanderbilt University v. DiNardo
      1. Adds to Rule: Must be reasonable in relation to anticipated damages *and* not *grossly disproportionate* to actual damages
      2. CT says his salary is reasonable estimate of damages and difficult to ascertain liquidated.
      3. Criticism – It’s not connected!
3. **PROMISSORY ESTOPPEL**
   1. Background RST
      1. RST 1st § 90
         1. Argue enforcement of promise requires $1000
         2. Counter: Substantial justice is still enforcing promise at $500!
      2. RST 2nd § 90
         1. Argument for not more certain – Even worse!
         2. Comment b and d on pg. 357 trying to illustrate meaning of “injustice”. Captures what Sullivan v. O’Connor was trying to say.
         3. *Comment d is BAD!* PE is not for valid bargained for exchange! It’s reliance!
   2. Goodman v. Dicker (D lead P to detrimentally rely on promise that he would get franchise)
      1. Reliance damages proper when D leads P to reasonably rely & P acts based on promise.
      2. No lost profits  Reliance damages only what he lost through detrimentally relying
         1. Possible counter for profits: Use Walters v. Marathon – lost opportunity for profit
      3. Even though terminable at will, D had assured P to rely, so reasonably expect reliance.
      4. *Make sure you argue that what was said WAS IN FACT A PROMISE! Don’t assume*
   3. D & G Stout v. Bacardi (P lost seller bargaining position after relying on D’s promise to stay)
      1. Under PE, we can only award reliance damages, so need to determine if case like lost wages (expectancy) or moving costs (reliance).
      2. If the court had used Walters (below), this would be easy (opportunity foregone).
      3. Elements of PE  P gets reliance! (Lost selling price)
         1. Promise? Yes
         2. Reasonably expect to rely? Yes
         3. Did P rely? Yes
   4. Walters v. Marathon Oil Co. (P buys gas station, D promises to provide gas and reneges)
      1. Enforceable K? No. Use Hoffman v. Red Owl – PE ok even if based only on negotiations and bargaining
      2. No reliance damages expenditures because MV increase of land outweighed $ spent.
      3. *Court allows lost profit recovery under LOST OPPORTUNITY THEORY*
      4. CT analysis problematic because seems to not consider hurdles (mitigate, uncertainty…)
         1. EX: Think about avoidable consequences: Maybe someone more experienced could have avoided lost profits, but *must measure reasonableness in P’s shoes!*
      5. *Modified Reasonable Person Test* – Subjective element (in P’s shoes), but not completely (think Torts)
   5. Problem 3-14: Pension $200/wk., refused employ for 3 years at $175/wk., renege after 3 mo.
      1. If reliance – Can get 175 but must look for substantially similar job
4. **RESITITUTION**
   1. Background
      1. Lots of variation in ways to measure benefit conferred  We want to pick the highest
      2. The non-breaching party wants to show:
         1. How nasty and calculated the bad breacher was and how wonderful you are
         2. THE WORSE THE BREACH THE GREATER THE RESTITUTION!
      3. RST 2nd § 371
         1. 2 Choices
            1. What it would have cost receiver to obtain the work P did (MV)
            2. The value that the receiver’s property has been increased by
         2. Injured seeking restitution for part performance commonly allowed best option.
      4. Example: 4 Choices
         1. FMV of what would have cost for someone else (e.g., hypo cover) under § 371(a)
         2. Increased market value (§ 371(b))
         3. Measure by your cost of performing services
         4. KP  argue that might be best evidence of true value of benefit!!
   2. Non-Breaching P confers benefit and elects restitution
      1. Susi v. Zara (unexpected soil conditions subcontractor) – Used KP as evidence for FMV
      2. Oliver v. Campbell: General rule is that UE is not available after full performance of K.
   3. Non-Breaching P confers benefit but has losing K
      1. Choices for UE (DEPENDS ON JURISDICTION)
         1. Johnson v. Bovee – Original K price is ceiling for UE (Refuses Posner v. Seder).
         2. City of Philadelphia v. Tripple – UE can be > K ceiling
   4. Non-Breaching P confers benefit but cannot prove lost expectancy
      1. Bausch & Lomb, Inc. v. Bressler – UE even if losing K (Philadelphia type jurisdiction).
      2. Osteen v. Johnson
         1. FOR UE, breach has to attack the *essence*/material of K! (not just tiny)
   5. Non-Breaching P confers benefit but unenforceable K (e.g., Kearns v. Andree pg. 5)
   6. Breaching P after conferring benefit (e.g., Briton v. Turner pg. 5)
      1. EX: Breaching P after spending $8,000 for $10,000 job. Increases D’s land by $4,000. Costs D $9,000 to complete.
         1. P should get $1,000 based on rule of thumb saying breaching P’s get smallest restitution. Here, unjustly enriched D by $1,000 (only costs $9,000 to complete).
         2. *Could* argue for $4,000 if the whole point was just to sell land.
5. **SPECIFIC PERFORMANCE**
   1. SP for land
      1. Kitchen v. Herring
         1. For breaches by land sellers, injured buyers can get SP  Almost irrefutable presumption that *land* is unique and $ damages can’t make injured buyer whole.
      2. Curran v. Barefoot (when chattels are included with land, chattels are included in SP.)
      3. If you already sold the land to a bona fide purchaser, P can usually get amount you gained by breaching and selling to new (e.g., KP = $180K, resale = $200K, so get $20K).
   2. SP for goods/services
      1. Curtice Brothers Co. v. Catts
         1. Typically hard to get SP of service (13th Amendment and supervision problems)
         2. Can get around it by restraining D from doing other Ks (Chicago Coliseum)
         3. RULE: For sales of goods and such, where no adequate remedy at law (i.e., $) to make whole (losing reputation, market share, etc.), SP (or quasi-SP).
      2. UCC § 2-716: Codifies SP: When goods are unique or in other proper circumstances
      3. In Re Dorsey Trailer Co., Inc.
         1. Indicia/stand-ins for uniqueness
            1. Inability to cover
            2. Difficult to obtain similar goods on the open market
      4. Stephan’s Machine & Tools, Inc. (SP when debt from commitment to breaching seller)
      5. Laclede Gas Co. v. Amoco Oil Co. (long-term K SP if unable to obtain sub. similar l-t K)
      6. Pratt Furniture Co. v. McBee (legal economic history)
         1. 19th Century – Predictive nature of legal rules  Computer could spit out result
         2. Early 20th – Legal Realism (fairness, subjective)
         3. Late 20th – Overreaction to Legal Realism  Economic efficiency
         4. Very Late 20th – Reaction to Economic  Behavioral decision theory (complex)
6. **ADR**
   1. Early problems – Stubbornness (Winner agrees with you, loser thinks you’re wrong)
   2. No certain form of arbitration – Set up any way you and other party agrees to
   3. Usually  3 arbitrators who follow rules of ABA (2 party appointed and 1 umpire)
   4. Doesn’t have to have a written opinion
   5. Large companies who don’t have law on side want arbitration (equities)
   6. No judicial review (efficiency)
   7. BUT everybody who loses in ADR just tries to fight in court and say ADR was bad.

***AGREEMENTS AND PROMISES***

1. **THE NATURE OF ASSENT  LOOKING AT THE AGREEMENT**
   1. Intent doesn’t matter, only what appears.
   2. 2-Prong Test (Embry v. Hargadine)
      1. Objective: Would the reasonable person *believe* what was expressed was a K *and*
      2. Subjective: Did P *believe* that it was a K (Doesn’t matter what D thought)
      3. EX: Lucy v. Zehmer (another context of applying 2-Prong Test) OUTWARD INTENT
         1. Length of conversation longer than mere joke
         2. Specificity in conversation (title thrown in, changed to include “we”)
         3. Lots of past interest
         4. THE PRICE WAS REASONABLE!
      4. Caveat 1: Relationship (Family, friends, etc.): Presumption that there is *no* intent to K in family setting. It can be overturned by evidence to the contrary (Morrow v. Morrow).
   3. Entire day for which a contract expires is open to compliance with it (Tilbert v. Eagle Lock Co.)
   4. Internet Purchases?
      1. When we click through standard from disclaimers, argue that express (2-313) should trump because disclaimer is contradictory, causes confusion, and reasonable person wouldn’t know that all representations that have been made have been disclaimed.
   5. Doctrine of Unilateral Mistake (Cargill Commission Co. v. Mowery – 35000, not 3500 bushels)
      1. If party makes a simple clerical error and can retract the error, explain that it was simply clerical, before the party receiving the communication relies, then they can get out of K!
      2. In Cargill, P already relied, so D is bound even though innocent and provable error.
   6. Ambiguities and Misunderstandings
      1. If a latent ambiguity shows there is no meeting of the minds, no K (Raffles v. Wichelhaus – P thought 1 boat, D thought another, no one knew that other was thinking differently).
      2. BUT, the *misunderstanding must be material* (not fungible ambiguity).
      3. RST 2nd § 20 (pg. 461)
         1. No mutual assent if materially different meanings *and*
            1. Neither party knows or has reason to know other’s meaning *or*
            2. Each party knows or should know other’s meaning (mutual deceit)
         2. YES mutual assent if
            1. Only 1 attaches different meaning, and 2 knows that meaning (sub) *or*
            2. 1 has reason to know of different meaning, 2 doesn’t (obj)
         3. EX: Dickey v. Hurd (D knew P thought differently, so bound under §20(2))
2. **THE OFFER**
   1. **O + A = K**
   2. **IO** (invitation to offer) **+ “A”** (acceptance of what’s not really an offer) **=/= K**
   3. Ad for offer must be *clear*, *definite*, and *explicit*, and *leave nothing open for negotiation* AKA *would reasonable Bob believe that D is making offer and intends to be bound by P acceptance?*
      1. Lefkowitz v. Great Minneapolis Surplus Store, Inc.
         1. Coat Ad: NOT offer because value too speculative (up to $100), so tipped off that inviting offers, not a clear offer.
         2. Stole Ad: YES offer because it definite price and is clear and reasonable.
      2. Ford Motor Credit Co. – No offer because not definite or certain (not all qualify for loan)
      3. Courteen Seed Co. v. Abraham – No offer because seller said, “asking” not “offering”. Counter that buyer asked for an offer and seller responded…Reasonable?
3. **THE ACCEPTANCE**
   1. Again, use the objective reasonable person test.
   2. Responses imposing *extra conditions* are counter-offers, not acceptances.
      1. Ardente v. Horan – Reasonable person would believe that P’s response land sale letter was not intent to be bound to offer, but a request for counter-offer (made it wishy-washy)
         1. Instead, lawyer could have made firm counter-offer (we won’t go through unless)
         2. OR, accepted but said they would really like the furniture, but will take without.
   3. What about when offeror includes signing clause?
      1. UCC § 2-206(1)(a) (pg. 481): Unless unambiguous, acceptance OK in any reasonable medium.
      2. Allied Steel and Conveyors Inc. v. Ford Motors Co.
         1. Must distinguish prescriptions that *must* be followed from mere suggestions.
         2. Here, just suggestion because it said, “should be executed” instead of must.
         3. Also, start of the work signaled acceptance – Reasonable person.
         4. HYPO: Buyer puts in MUST – Showing up w/o signing becomes like a counter-offer. If buyer lets seller do work, reasonable person believes acceptance.
   4. Unilateral or bilateral?
      1. When there is a clear request, the offeree can accept only by following the offeror’s prescription (promise or performance).
   5. What about when we don’t know if offeror wants promise or performance?
      1. RST 2nd § 32 – When in doubt, resolve in favor of offeree (whatever he chooses).
      2. White v. Corlies
         1. Here, the offer said *upon an agreement* to begin at once – Clearly wants promise!
            1. So prescription not suggestion
            2. Needs to reply with an acceptance/promise
         2. Not like Allied, reasonable person wouldn't know by starting that he’s accepted.
         3. But, if P was doing earmarked work that, in the usual course of events, would get back to D, there would be K, even if D didn’t know at time that P was doing work.
   6. Silence?
      1. Ducommun v. Johnson
         1. Silence is generally not an acceptance because reasonable person wouldn’t believe that silence means acceptance.
         2. BUT, there are contexts where silence *might* be an acceptance.
      2. RST 2nd § 69 (pg. 487)
         1. Silence is acceptance when:
            1. Takes benefit of offer with reasonable opportunity to reject and reason to know that offeree expects compensation
            2. When offeree has given reason for the offeror to think that silence counts and, by remaining silent, offeree intends to accept the offer
            3. Because of previous dealings, it is reasonable that offeree needs to notify offeror if he does NOT intend to accept by silence.
         2. Or when the offeree does any act inconsistent with ownership of offeror’s offered property
      3. 39 USC § 3009 – Unsolicited goods in mail is unfair trade practice (treat as gift)
4. **DURATION OF OFFERS**
   1. RST 2nd § 36 (pg. 488) – Power of acceptance may be terminated by:
      1. Rejection or counter-offer
      2. Lapse of time
      3. Revocation by offeror
         1. Revocation by letters not good until received
         2. Revocation of offers is not good until party is *actually notified* (RELIANCE!)
            1. Exception for some unilateral contracts – Can revoke if same form (like a wanted poster) – pg. 503
         3. Dickinson v. Dodds
            1. A revocation is good even if you don’t hear it from the offeror, but instead from a 3rd party that the offeror has done something inconsistent with the offer remaining open (JUST REASONABLE PERSON!)
         4. Promise to leave offer open is revocable because no consideration.
      4. Death or incapacity of offeror or offeree
   2. Akers v. J.B. Sedberry, Inc.
      1. If not revoked, offer only stays open for a reasonable time (depends on circumstances) if not prescribed. *Typically THIS MEANS END OF CONVERSATION!*
      2. 2 Terminators – Rejection and Lapse of Time
      3. Though unsure what exactly D said, definitely didn’t accept at time of conversation.
   3. Vaskie v. West American Insurance Co. (settlement offer gets accepted after S.O.L)
      1. What would a reasonable person believe about how long the offer stays open (keeping in mind the running of the S.O.L.?
      2. Holding: Reasonable time is an issue of fact, so no summary judgment.
      3. Hillman: NO! After S.O.L., no liability, so not reasonable! Also no consideration!
   4. *Distance and similar points* 
      1. If offers are made at a distance and offeror says “you have 10 days to accept”, and mail takes 3-4 days to get to offeree, the 10 days starts on *receipt*, not on sending!
      2. Acceptance by letters good when posted, not when received.
         1. EX: 1 DEC: Seller offers to sell; 5 DEC: Buyer receives offer in mail and posts acceptance; 8 DEC: Seller sends revoke; 9 DEC: Seller receives acceptance. SO YES K! ACCEPTANCE! Can’t revoke.
   5. Marsh v. Lott (obligation solely from form, 25 cent option for purchase of $100,000 land)
      1. D can’t revoke option contract even when it’s only 25 cents!
      2. Civil code used addressed adequacy of sale consideration, *NOT* option.
      3. 2 reasons consideration of form is enough:
         1. No standard exists to determine adequate value of option (counter that there are)
         2. To not enforce option K is to destroy efficacy
   6. RST 2nd § 87(1) – Option K is binding if
      1. In writing and signed by *offeror*, recites purported consideration for making offer, and proposes exchange on fair terms in reasonable time *or*
      2. Is made irrevocable by statute
   7. UCC § 2-205 (pg. 507)
      1. Firm Offers Without Consideration Not Revocable
         1. Offer *by merchant to buy or sell goods*
         2. Signed writing by offeror
         3. Gives assurance that it will be held open
         4. During time stated or, if no time stated, a reasonable time
         5. BUT MAY NOT EXCEED 3 MONTHS
      2. KEY: You don’t need an option – the UCC keeps it open! (For 3 months or less) THIS ONLY APPLIES FOR BUYING AND SALE OF GOODS (NOT LAND  use state)
   8. Davis v. Jacoby: When there is a contradictory offer, *presume bilateral* (promise for promise)
   9. Wormser Unilateral Conception (BAD) (pg. 512)
      1. If offeror revokes when offeree is halfway done, Wormser says offeror has right to revoke until acceptance (completion).
      2. The risk of the offeror revoking is then on the offeree.
   10. Brackenbury v. Hodgkin (Unilateral K that if P moves to D’s house and cares, P gets house)
       1. Though P didn’t complete the K, he had begun performance and was ready, willing, and able to complete (*TENDERED*). SO K is ENFORCEABLE.
       2. RST 1st § 45: If part of consideration requested has been given (as in here), then offeror is bound and duty of immediate performance conditional on full consideration being given or tendered (like here).
       3. RST 2nd § 45: Same result. Framed as an option K (no bilateral/unilateral distinction).
       4. Wormser would have wrongly said no enforcement.
   11. Petterson v. Pattberg
       1. Unilateral K – Promised discount if paid off (reasonable person test – wanted payment)
       2. Offer revoked once D said he sold it. Thus, P tendering after was irrelevant.
       3. REMEMBER – EITHER TENDOR OR PAYMENT IS OK!
       4. Result: Who can scream 1st contest
   12. Garber v. Harris Trust & Savings Bank (VISA class action)
       1. In CC agreements, each transaction constitutes a new offer and acceptance. The offer is issuance of card and acceptance is use.
       2. Thus, D is free to unilaterally change terms before each use of card.
       3. Like De Los Santos.
   13. Drennan v. Star Paving Co. (sub-contractor bid revocation)
       1. D sub immediately revokes before P personally accepts.
       2. BUT, P still gest reliance (promissory estoppel).
       3. Court uses RST § 45 (pg. 529) to analogize unilateral K analogy (shaky argument).
          1. BUT, lots of possible support  Foreseeability, custom, etc.
          2. Custom to wait to very end and not have P accept sub offers immediately.
       4. Could argue majority is wrong because disparity in costs  Reasonable person
          1. P showed up very next morning because he knew too good to be true.
          2. Secretary wanted D to repeat.
          3. SO, arguably reliance not reasonable.
       5. Watch out, custom is special in these cases for reliance.
       6. ***HILLMAN’S WEIRD RESTRICTING FREEDOM THING: JUST SAY IT***
   14. Problem 4-13: NO K, just bilateral. NO reasonable P would rely on a revocable offer. So NO!
5. **AGREEMENTS TO AGREE (IN THE FUTURE)**
   1. Arnold Palmer Golf Co. v. Fuqua Industries, Inc.
      1. 3 Possible interpretations of preliminary agreement:
         1. No legal effect
         2. Intending preliminary agreement to be K with simply a more formal memorial than already made K.
         3. OR, as in here, you can have middle ground (pg. 546) where parties are intending a reasonable, good faith effort to reach ultimate agreement. So argument that parties are bound to try to reach final agreement.