**Contracts I Final Outline**

**I. Chapter 1: Basis for Enforcing Promises**

**A. Enforceable Promises: An Introduction**

**1. Contract:** a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty.

**a.** O+A+C=K

**2. Promises:** all are not enforceable, even if written & signed. Promises that lack an essential are not a contract & are essentially hot air. In order for there to be a contract the promise must be legally enforceable.

**3.** **Types of Contracts:** 2-> bilateral & unilateral

**a. Bilateral:** 2 promises. Promise for a promise.

**b.** **Unilateral:** only 1 promise. Promise for performance

**4. Sources of Law:** the Restatement (more than commentary, but less than law), the U.C.C., & case law. The law of Contracts developed through case law is fluid & reflects the tensions between the individual freedom to negotiate terms & enter binding contracts, & the public interest in various types of social control. The Restatement (2nd) was issued to refine the 1st & correlate with the U.C.C.

**5.** **Hawkins v. McGee (1929)->** distinguishing a promise from a belief

**a. Issue:** Whether there is evidence that the D’s promise of a particular surgical outcome constitutes an offer to enter a contract?

**b.** **Holding:** Yes. There was an offer, a contract, & it was breached.

**c.** **Reasoning:** There was evidence that the D repeatedly solicited from the P’s father the opportunity to perform the operation (O). There would be the reasonable basis then for the conclusion that if the D spoke the guarantee, he did so with the intention that it should be taken at face value, as an inducement, & there was ample evidence that it was so accepted (A). In addition, the father paid for the surgery (C). Therefore, there was a legally binding contract (O+A+C=K).

**d.** **Notes**

**1. 100%:** the father based his action on this guarantee. His expectation interest was a perfect or good hand.

**2.** **What makes a statement a promise?** Intent of the promisor. What is the expectation/perception of the other side?

**3.** The court had to decide initially whether the words could possibly have been meant as intending to form a contract? MD said his inducement merely represented his belief that the procedure would be a success. The law doesn’t look to subjective belief/intent of the individual(s), but rather the objective interpretation of those words & actions. The test is what a reasonable person in the position of each of the respective parties would be led to believe by the words & conduct of the other party. This is the Objective Theory of Contracts (see Lucy v. Zelmer). Words & actions mean a whole lot. One word can make all the difference.

**6. Bayliner Marine Corp. v. Crow (1999)->** general product information not a warranty

**a. Issue:** Whether there was sufficient evidence that the manufacturer breached express & implied warranties of merchantability & fitness when it supplied product specific information about goods with markedly different features than what the purchaser bought?

**b.** **Holding:** No

**c.** **Reasoning:** Only affirmations of fact or promise that relate to the goods at issue create express warranties. Here, Bayliner’s manual specified performance for boats based on their propeller size. Crow purchased a boat that had a smaller propeller than those described in the manual.

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**6. Bayliner Marine Corp. v. Crow (1999)**

**c. Reasoning:** The boats described in D’s manual also didn’t have all the extra equipment that P purchased. Therefore, Bayliner’s manual did not constitute an express warranty as to Crow’s boat. Crow also contends that D made an express warranty when they stated that his model “delivers the kind of performance you need to get to the prime fishing grounds.” However, the general rule is that a description of goods that forms the basis of a bargain constitutes an express warranty. Under VA Code Ann. §8.2-313(2) “a statement purporting to be merely the seller’s opinion or commendation of goods does not create a warranty.” The statement in the brochure did not describe a specific characteristic of the boat, but was merely Bayliner’s opinion.

**d.** **Notes**

**1. Express Warranty:** actual expressly stated warranty relating to a specific characteristic or unique feature of a good. EW=affirmation/promise+basis of the bargain.

**2.** **Implied Warranty:** arise out of the U.C.C. The 2 main ones are merchantability & fitness for a particular purpose. Crow, claimed an implied warranty of merchantability was breached because of the boat’s slow speed made it unfit for offshore fishing in the area. They can easily be disclaimed, but must be done so in writing. If they are not disclaimed they are automatically there when it involves the sale of goods & a merchant. Under the U.C.C. §2-314, goods are merchantable if they “are fit for the ordinary purposes for which goods of that description are used.” Crow was required to establish the standard of merchantability in the trade, but he failed to do this or to show that a significant portion of the boat-buying public would object to purchasing an offshore fishing boat with the speed capability of his boat.

**3.** **Basis of the Bargain:** integral reason for the purchase of the good.

**4.** **U.C.C:** Art. II is the primary source of law for transactions involving the sale of goods. Unless there is something else in the U.C.C., the common law is binding. Silence of the U.C.C. is authority for the precedence of the common law.

**7. Definitions**

**a. Promise:** an assurance or undertaking, however expressed, that something will or will not be done in the future.

**b.** **Promisor:** party who makes the promise.

**c.** **Promisee:** party to whom the promise is addressed.

**d.** **Beneficiary:** party, other than the promisee, who will be benefited by performance of a promise.

**e.** **Consideration:** a benefit received by the promisor, or a detriment incurred by the promisee.

**8. Theories of Contractual Liability**

**a. Express Contracts:** may be oral or written & must consist of an offer, acceptance, & bargained –for consideration. May be bilateral requiring both of the contracting parties to fulfill obligations reciprocally toward each other, or unilateral, where one party becomes bound to fulfill obligations toward the other without receiving any return promise of performance.

**1. Promises Enforceable without Consideration**

**i. Promissory Estoppel:** where one party acts to their detriment in reliance on a gratuitous promise. The detrimental reliance of the promisee will be deemed sufficient for estopping the promisor from asserting the defense a the lack of consideration.

**ii.** **Promise to Pay a Barred Legal Obligation:** subsequent promises to perform obligations which had become unenforceable.

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**A. Enforceable Promises: An Introduction**

**8. Theories of Contractual Liability**

**a. Express Contracts**

**1. Promises Enforceable without Consideration**

**ii.** **Promise to Pay a Barred Legal Obligation**

**a.** Promise to pay a debt when the statute of limitations has run.

**b.** Promise to pay a debt previously discharged through bankruptcy.

**c.** Promise to pay by an adult reaffirming a promise made when the promisor was a minor & could be avoided on that ground.

**iii. Promise to Perform Voidable Preexisting Duty:** subsequent promise to perform obligations which became unenforceable because of the assertion of some privilege or defense (lack of capacity, SoF, duress, etc.) are enforceable without consideration provided the new promise is not also subject to the same privilege or defense.

**iv.** **Promise to Pay for Benefit Previously Conferred:** where no contractual liability previously existed, a subsequent promise to pay for benefit previously conferred may nonetheless be enforceable.

**b. Implied-in-Fact Contracts:** one inferred as a matter of reason & justice from the acts, conduct, or circumstances surrounding a transaction rather than one formally or explicitly stated in words. As with express contracts, the source of the obligation is the manifested intent of the parties. Implied-in-fact contracts require one or more of the terms of the contract to be inferred from the conduct of the parties. As under the U.C.C. gap fillers r/t price.

**c.** **Implied-in-Law or Quasi-Contracts:** an obligation imposed upon a person, not because of their intent to agree, but because one party has conferred a benefit upon the other under such circumstances that in equity & good conscience there ought to be compensation for the benefit conferred. This avoids unjust enrichment of one party at the other’s expense.

**B. Remedying Breach:** when a contract which the courts recognize as enforceable is breached, the non-breaching party often has a choice of remedies, including damages, specific performance, rescission & restitution, quasi-contract, & a tort action. There are 3 fundamental assumptions in providing remedies: 1) the law is primarily concerned with the relief of aggrieved promisees & not with the punishment of promisors; 2) the primary purpose of the remedy is to put the promisee in the position it would have been in had the promise been performed. The promisee receives the “benefit of the bargain”, & the interest that is protected in this way is called the expectation interest; & 3) in most cases the relief should be substitutional & not specific.

**1. U.S. Naval Institute v. Charter Communications, Inc (1991)->** focus on injured P’s damages

**a. Issue:** Whether the measure of damages should be based on the breaching party’s profits?

**b.** **Holding:** No

**c.** **Reasoning:** There was no infringement of copyright since D was the exclusive licensee. P could not recover D’s profits from the sale of paperbacks. Damages for breach are generally measured by the P’s actual loss, which achieves the objective of compensating the injured party. Sometimes, D’s profits may be the measure of damages, but only where they define P’s loss. But, awarding D’s profits that far exceed P’s loss would be punitive, which are not a part of contract law. Therefore, P’s loss of hardcover sales is the measure of damages. This was their expectation interest.

**d.** **Notes**

**1. Determining Lost Profits:** look to the expectation interest, which is the expectation interest.

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**B. Remedying Breach**

**1. U.S. Naval Institute v. Charter Communications, Inc (1991)**

**d.** **Notes**

**1. Determining Lost Profits:** Aim to put them in the same position they would have been in had the promisor performed.

**2.** **How much should the breaching party pay?** They should pay what was expected, or whatever it takes to make the other party whole.

**3.** **Compensatory Damages:** doesn’t right a wrong, but it compensates for what occurred.

**4.** **Specific Performance:** court compels the breaching party to perform the specific obligation of the contract. To obtain, it must be deemed unique.

**2. Sullivan v. O’Connor (1973)->** measure of damages, unsuccessful surgery

**a. Issue:** Whether reliance is a proper measure of damages for breach of contract to produce certain results?

**b.** **Holding:** Yes

**c.** **Reasoning:** In ascertaining damages, mere restitution (an amount equal to the benefit conferred on the D) would usually be inadequate. On the other hand, expectation recovery (an amount intended to put P in the position she would have been in had the contract been performed as agreed) would be excessive. Reliance (putting P back where in the position she occupied before the agreement) provides a middle ground, particularly in commercial settings.

**d.** **Notes**

**1.** The court declined to follow the approach of Hawkins v. McGee, where an expectation interest of damages was applied.

**2.** **Benefit of the Bargain Rule:** when A contracts with B for B to perform some act & D defaults, A is given a measure of damages that would place him or her in the same position as if B had performed (expectation damages). There are many situations in which this rule does not provide a fair result, so the court uses some other measure of damages for breach.

**3. Ways of Measuring Damages:** damages in a contract action aim to put the P in the position he would have been in had the contract been fulfilled. In a tort action, the objective is to restore the P to the position he would have been in had the wrong not been committed. 3 basic measure.

**i. Expectation:** or compensatory damages. Intended to put the P in the position he would be in if the contract had been performed as agreed.

**ii.** **Restitution:** an amount corresponding to any benefit conferred by the P upon the D in the performance of the contract.

**iii.** **Reliance:** any expenditure made by the P & any other detriment following closely & foreseeably from the D’s failure to carry out his promise; i.e. putting the P back in the position he occupied before the agreement.

**3. White v. Benkowski (1967)->** punitive damages in an action for breach

**a. Issue:** Whether punitive damages are permitted in actions for breach of contract?

**b.** **Holding:** No

**c.** **Reasoning:** Except for breach of a promise to marry, a party may never recover punitive damages for a breach of contract. Breach of a contractual duty may be a tort, & punitive damages may be awarded, but no tort was proved or pleaded here.

**I. Chapter 1: Basis for Enforcing Promises**

**B. Remedying Breach**

**3. White v. Benkowski (1967)**

**d. Notes**

**1.** Nominal damages are a minimal sum that are awarded when the P had proved a technical invasion of his rights or a breach by the D of some duty owed to the P, but where the P cannot prove a substantial loss or injury.

**2.** Compensatory damages are awarded to compensate the P for the loss or injury suffered.

**3.** Punitive or exemplary damages are awarded to punish the D for wrongful conduct & to deter such conduct in the future.

**C. Consideration as a Basis for Enforcement**

**1. Fundamentals of Consideration:** consideration is a legal term defined as a benefit received by the promisor or a detriment incurred by the promisee. Courts will infer a legal detriment whenever a party obliges himself through a bargain to perform in a certain manner. The fact that a promise is bargained for is generally sufficient to make it enforceable. The element of bargain assures that when a contract is formed at the least the parties see an advantage in contracting for an anticipated performance. There are five typical categories of agreements: contracts for sale of goods, real estate transactions, construction contracts, employment agreements, & family contracts.

**a. Hamer v. Sidway (1891)->** family contract, abstention from conduct

**1. Issue:** Whether a promisee’s abstention from legal conduct may constitute legal & sufficient consideration to enforce a promise?

**2.** **Holding:** Yes

**3.** **Reasoning:** There was sufficient consideration because the nephew suffered a detriment by abstaining from legal conduct. A valuable consideration may consist of some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. 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

**4.** **Notes**

**i.** A bargain promise is not always easily distinguishable from a conditional donative promise. The distinguishing test is how the parties view the condition. In Hamer, abstention was the price of the promise, so there was a bargain.

**b. Fiege v. Boehm (1956)->** contract not to sue, forbearance as sufficient consideration

**1. Issue:** Whether forbearance of a good faith belief, though later shown to be invalid, is sufficient consideration?

**2. Holding:** Yes

**3. Reasoning:** Forbearance to sue on a lawful claim or demand is sufficient consideration for a promise to pay for the forbearance if the party forbearing had an honest intention to prosecute litigation which is not frivolous, vexatious, or unlawful, & which is believed to be well founded.

**4.** **Notes**

**i. Contract not to Sue:** the majority rule is that forbearance is legally valid consideration so long as the claim is reasonable & honestly asserted.

**ii.** **To Prosecute:** a good faith belief in the right to file suit, & you forbear is consideration, even though in the future it is shown to be non-actionable.

**I. Chapter 1: Basis for Enforcing Promises**

**C. Consideration as a Basis for Enforcement**

**1. Fundamentals of Consideration**

**b. Fiege v. Boehm (1956)**

**e.** **Notes**

**iii. Consideration:** a detriment &/or benefit to one or both parties. Both parties may receive both. If it is in the past there is no consideration, because it can’t be based on past performance due to the fact that it cannot be deemed to be a detriment or benefit for the agreement at hand. In other words, it can’t be bargained for.

**iv.** Normally, the law does not look to the amount of the consideration to determine its sufficiency or adequacy. Simply, it must be something of value to the parties.

**v.** Forbearance only in the future.

**2. The Requirement of Exchange: Action in the Past->** past performance is no consideration

**a. Feinberg v. Pfeiffer Co. (1959)->** gratuitous pension plan

**1. Issue:** Whether a gratuitous pension plan is enforceable if the promisee detrimentally relies?

**2.** **Holding:** Yes

**3.** **Reasoning:** P concedes that a promise based on past services is not sufficient consideration. Although the plan initially was adopted in recognition of this, & therefore unsupported by consideration, P’s retirement was a change in position made in reliance on the plan. The actual change in her position was retirement, induced by D’s promise. D must pay the benefits.

**4.** **Notes**

**i. Consideration for a Promise:** 1) an act other than a promise; 2) a forbearance; 3) the creation, modification, or destruction of a legal relation; or 4) a return promise bargained for & given in exchange for a promise.

**ii.** Promise based on past performance is one type of gratuitous promise.

**iii.** If there is past performance you can still find consideration if there is some form of a change in position. Did they incur a detriment. Detrimental reliance is a substitute for consideration.

**iv.** **Promissory Estoppel:** permits enforcement of contracts lacking consideration without abandoning the doctrine of consideration. Other theories include treating the act of reliance itself as consideration & finding a bilateral contract (promisee by starting to rely, impliedly promises to complete, so there are two promises-option contract)

**b. Mills v. Wyman (1825)->** moral obligation, traditional approach denying enforcement

**1. Issue:** Whether a moral obligation constitutes sufficient consideration to enforce a promise?

**2.** **Holding:** No

**3.** **Reasoning:** The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, & cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful. In this case, the promise appears to have been made without any consideration, being based on a moral obligation. The law will give validity to a promise only if & when the promisor gains something, or the promisee loses something, as a result of the promise.

**4.** **Notes**

**i.** Case accurately reflects the traditional common law view that a promise made in recognition of a “moral obligation” arising out of a benefit previously received is not enforceable. A benefit conferred before a promise is made can hardly be said to have been given in exchange for the promise. In other words, it wasn’t bargained for.

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**C. Consideration as a Basis for Enforcement**

**2. The Requirement of Exchange: Action in the Past**

**b. Mills v. Wyman (1825)**

**4. Notes**

**ii.** Cases are split as to whether a promise to pay a moral obligation is enforceable when it arises out of a benefit previously conferred upon the promisor. The modern tendency is to hold that such a promise is enforceable, at least up to the value of the benefit conferred.

**iii.** **Moral Obligations:** a promise is said to be given for moral or past consideration when the promisor is motivated by some past event which inspires the promisor to make the promise.

**iv.** All expenses had been incurred by the time the promise had been made, so it was based on past performance, which is insufficient consideration.

**c. Webb v. McGowin (1936)->** modern approach allowing enforcement of moral obligations

**1. Issue:** Whether a moral obligation can be sufficient consideration?

**2. Holding:** Yes

**3.** **Reasoning:** It is well settled that a moral obligation is sufficient consideration to support a subsequent promise to pay, where the promisor has received a material benefit. This case is distinguishable from those cases where consideration is a mere moral obligation unconnected with receipt by the promisor of benefits of a material or pecuniary nature. Here the promisor received a material benefit constituting a valid consideration for his subsequent promise, giving rise to his moral obligation. The averments show that in saving the decedents life, the appellant was crippled for life. This was part of the consideration of the contract declared on. Decedent was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promsior’s agreement to pay.

**4.** **Notes**

**i.** Even when the only consideration is a moral obligation, the courts may enforce the contract if the promisee has detrimentally relied on the promise.

**ii.** **Gratuitous Promise:** promise given without consideration in circumstances that do not impose a duty. Done or performed without the obligation to do so.

**3. The Requirement of Bargain:** a bargain is an agreement between parties for the exchange of promises or performances. The element of bargain assures that, at least when the contract is formed, both parties see an advantage in contracting for the anticipated performance. Essential to the bargain is mutual assent. Under the traditional subjective theory of assent, it was required that the parties to the formation of a contract actually assent to the same terms, conditions, & subject matter. But modern contract doctrine requires only objective manifestations of assent usually in the form of offer & acceptance. As noted, mutual assent under the modern objective theory of assent is judged by the apparent intention of the parties as manifested by their words & actions.

**a. Kirksey v. Kirksey (1845)->** early cases didn’t apply estoppel doctrine

**1. Issue:** Whether P detrimentally relied so as to enforce a gratuitous promise?

**2.** **Holding:** No

**3.** **Reasoning:** The promise was a mere gratuity on the part of the D. The action for breach will not lie because there was no change in P’s position. She suffered no detriment, and the D gained no benefit. She retained her old homestead, and lived of the brother-in-law free.

**I. Chapter 1: Basis for Enforcing Promises**

**C. Consideration as a Basis for Enforcement**

**3. The Requirement of Bargain**

**b. Lakeland Employment Group of Akron, LLC v. Columber (2004)->** covn’t not to compete

**1. Issue:** Whether there was sufficient consideration in the form of subsequent employment to support the validity of a non-compete agreement?

**2.** **Holding:** Yes

**3.** **Reasoning:** It follows that either an employer or employee in an at-will relationship may propose to change the terms of their employment relationship at any time. Thus, mutual promises to employ & to be employed on an ongoing at-will basis, according to the agreed terms, are supported by consideration: the promise of one serves as consideration for the promise of the other. The presentation of a non-competition agreement by an employer to an at-will employee is, in effect a proposal to renegotiate the terms of the parties’ at-will employment. Therefore, we hold that consideration exists to support a non-competition agreement when, in exchange for the assent of an at-will employee to a proffered non-competition agreement, the employer continues an at-will relationship that could be legally terminated without cause.

**c. Rewards:** to collect upon a reward you have to have knowledge of the reward when you are engaged in the act stipulated for the reward. If you have a legal duty, you cannot collect. It does not matter whether you are on or off duty.

**4. Promises as Consideration:** a contract can be formed by the exchange of promises, or by the exchange of a promise for performance of a specific act. The former type of contract is called bilateral; the latter is unilateral. For a bilateral contract to be legally enforceable, each party’s bargained-for promise must be legally sufficient consideration for its counter-promise. The promises combine to create consideration The test is whether the performance promised would be sufficient consideration. In other words, a bargain must have mutuality of obligation. What constitutes a promise? It has long been clear that the consideration for a promise can be found in a return promise. With some exception “a promise that is bargained-for is consideration if the promised performance would be consideration.” Courts must determine from the language & context of the facts whether a performance has in fact been promised or whether only the illusion of performance has been held out.

**a. Strong v. Sheffield (1895)->** lack of consideration & specificity renders promise illusory

**1. Issue:** Whether a creditor’s promise not to collect a debt for as long as he elects lacks the required specificity for purposes of consideration & bargained-for promise?

**2.** **Holding:** Yes

**3.** **Reasoning:** The note in question did not in law extend the payment of the debt. It was payable on demand, & was in form consistent with an intention that payments should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. Therefore, there was no agreement to forbear for a fixed time or for a reasonable time, but merely an agreement to forbear as long as the P should elect. It is true that while P did not foreclose for 2 years, the test for consideration is what is the agreement, not what was actually done. The evidence failed to disclose any consideration given to the D through the agreement. The note was payable on demand, therefore, the agreement to forbear was illusory.

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**C. Consideration as a Basis for Enforcement**

**4. Promises as Consideration**

**a. Strong v. Sheffield (1895)**

**4. Notes**

**i. Illusory Promises:** promises reserving to the promisor the power to determine performance. If the promisor reserves expressly or by implication an alternative by which he can escape performance altogether, he really has not promised anything at all. Thus, the promisor’s promise is illusory, & such a promise is not sufficient consideration for the return promise. There is no mutuality of obligation, therefore no valid contract.

**ii.** **Illusory:** a promise that appears on its face to be so insubstantial as to impose no obligation on the promisor. An expression cloaked in promissory terms, but actually containing no commitment by the promisor.

**b. Mattei v. Hopper (1958)->** promise conditional on promisor’s satisfaction

**1. Issue:** Whether a satisfaction clause conditioned on the promisor’s satisfaction is illusory?

**2.** **Holding:** No

**3.** **Reasoning:** When a contract is made using an exchange of promises as consideration, the promises must be mutual in obligation or the consideration fails & there is no contract. This problem has been referred to as one of mutuality of obligation, or as one promise being illusory. But, the basic issue is whether the consideration is sufficient. While contracts making the duty of performance of one of the parties conditional on his satisfaction would seem to give him wide latitude in avoiding an y obligation & thus present serious consideration problems, such satisfaction clauses have been given effect. They have been divided into 2 categories: 1) contracts where the condition calls for satisfaction as to commercial value, quality, operative fitness, or mechanical utility, dissatisfaction cannot be claimed arbitrarily or unreasonably, & the reasonable person standard is used in determining whether satisfaction has been received & 2) contracts which contain satisfaction clauses that deal with fancy, taste, or judgment. Where the question is one of judgment, when made in good faith, has been held to be a defense to an action on contract. These decisions necessarily imply the promisor’s duty to exercise his judgment in good faith is an adequate consideration. A promise conditional on the promisor’s satisfaction is not illusory since it means more than that the validity of the performance is to depend on the arbitrary choice of the promisor. The dissatisfaction must be genuine. We here conclude, the contract was neither illusory or lacking in mutuality because the parties inserted a condition in the contract making the P’s performance dependant on his satisfaction.

**4. Notes**

**i.** An expression of dissatisfaction is not conclusive; the promisor must actually be dissatisfied with the performance, & not with the contract itself.

**ii.** **Objective:** based on value, quality, fitness, mechanical ability. Uses the reasonable person standard. Measured by some external source.

**iii.** **Subjective:** based on whim, taste, fancy, judgment. Uses good faith of promisor as a standard.

**c. Conditional Promises:** a promise is conditional if its performance will become due only if a particular event (condition) occurs. This does not mean that the contract is not binding until the event occurs, but only that the event must occur before the promisor must perform. Insurance contracts are good examples. When a party makes a promise in exchange for a return promise, it can be protected by making its promise conditional on performance by the other party.

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**C. Consideration as a Basis for Enforcement**

**4. Promises as Consideration**

**c. Conditional Promises:** As long as the promisor has undertaken something of a legal detriment to him, such as becoming bound if the contingency occurs, the promise is sufficient consideration.

**d.** **Eastern Air Lines, Inc. v. Gulf Oil Corp. (1975)->** foreseeable quantity sufficiently binding

**1. Issue:** Whether a requirements contract that lacks specificity of terms r/t quantity of the goods is void for want of mutuality & commercial impracticability?

**2.** **Holding:** Yes

**3.** **Reasoning:** Gulf has taken the position that the contract lacks mutuality, is vague, & indefinite, & it renders Gulf subject to Eastern’s whims respecting the volume of fuel Gulf would be required to deliver. The “lack of mutuality” & “indefiniteness” is resolved since the court could determine the volume of goods to be provided for under the contract by objective evidence of volume required to operate a business. Therefore, well prior to the adoption of the U.C.C., case law generally held requirements contracts binding, & so here as well.

**4.** **Notes**

**i. Requirements Contract:** sufficient consideration for both sides, in that it effectively limits (detriment) the parties freedom to contract. On the other side, they are in effect exclusive agreements (benefit). Requires seller to make a good faith effort to meet the buyer’s requirements, & the buyer must buy all they require from the seller.

**ii.** **Output Contracts:** same thing as above. Requires buyer to buy all seller can produce, & requires seller to sell all he can produce to buyer.

**e. Wood v. Lucy, Lady Duff-Gordon (1917)->** exclusive contract, reasonable efforts implied

**1. Issue:** Whether there is mutuality of obligation where there is no express promise in an exclusive contract?

**2.** **Holding:** Yes

**3.** **Reasoning:** In an exclusive agreement, a promise that P will use reasonable efforts to promote D’s goods is fairly implied. The circumstances of such an agreement make the implication reasonable: It was an exclusive dealing contract D gave to P (detriment & benefit), any return to D (benefit) was to come from P’s profits (detriment). This means that if D was to get anything at all, P had to perform. D would not restrict herself to such an agreement unless their was an implied promise of a benefit to her.

**D. Reliance as a Basis for Enforcement:** in certain situations, detrimental action or forbearance by the promisee in reliance on a promise by the promisor will constitute a substitute for consideration & render the promise by the promisor enforceable. The role of reliance as a basis for enforcement is separate & distinct from consideration & reliance as a form of relief. Recognizing reliance in this capacity may ameliorate injustices that would otherwise result from a want of consideration. Detrimental reliance is also known by the name promissory estoppel. Estoppel meaning prohibit, & in the context of contracts the original Restatement §90 indicates that a promisor will be estopped from denying the enforceability of the contract on the basis of some missing material element (O, A, C). In the past, the general rule has been that promissory estoppel only applies where the reliance is on a promise as a gift. To the contrary, the modern trend, noted in the Restatement (2nd) §90, has moved to liberalize the doctrine of estoppel, applying it to more situations, including bargain situations as well as gift situations. Also, it eliminates the requirement of “substantial reliance”, so that where reliance is less than substantial, partial enforcement of the contract may still be granted.

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**D. Reliance as a Basis for Enforcement**

**1. Requirements of Promissory Estoppel**

**a. Forseeability:** it must be foreseeable that the promisee might detrimentally rely.

**b.** **Reliance:** the promisee did in fact rely.

**c.** **Reasonability:** the promisee’s reliance was reasonable under the circumstances.

**d. Detriment:** as a result of the reliance, the promisee suffered a detriment.

**e.** **Injustice:** injustice can only be avoided by enforcing the promise.

**2. Ricketts v. Scothorn (1898)->** gratuitous promissory note

**a. Issue:** Whether a promisee’s reliance on a gratuitous promise is sufficient consideration to enforce the promise?

**b.** **Holding:** Yes

**c.** **Reasoning:** Ordinarily such promises are not enforceable, due to the lack of any valuable consideration. But, it has often been held that an action on a note upon the faith of which money has been expended or obligations incurred, could not successfully be defended on grounds for want of consideration. The true reason is to deny the D, under the doctrine of estoppel, from denying consideration. The present case meets these requirements.

**d. Notes**

**1. The Development of Promissory Estoppel:** court uses powers of equity to fix problems.

**2.** **Enforcement to Prevent Injustice:** the test under the Restatement (2nd) §90 is not whether the promise should be enforced to do justice, but whether enforcement is required to prevent injustice.

**3. D&G Stout, Inc v. Bacardi Imports, Inc (1991)->** reliance interest in promise

**a. Issue:** Whether a party who relies on a promise to continue a business relationship has a valid claim under promissory estoppel?

**b. Holding:** Yes

**c.** **Reasoning:** A promise without consideration may nonetheless be enforceable to prevent injustice. Where a party has relied to his detriment on the promise of another, the detriment will suffice as consideration.

**d.** **Notes**

**1. Damages under Promissory Estoppel:** Stout’s damages were not expectation damages because they are not suing for lost wages, which are unrecoverable through promissory estoppel. They are suing for losses incurred due to a change in position (reliance damages).

**2.** The court, through promissory estoppel, is enforcing a promisor’s statement or assertion due to their knowledge that the other is or could rely to its detriment on that statement or assertion.

**3.** The law recognizes in fact, the absence of 1 or more material elements of a contract, but because of the promisor’s knowledge of the other’s reliance the court ignores the deficiencies & implies a contract.

**4.** Detrimental reliance is a substitute for consideration.

**E. Restitution as an Alternative Basis for Recovery**

**1. Restitution:** is to prevent unjust enrichment when there is no enforceable promise. “Gains produced through another’s losses are unjust & should be restored.” A simpler definition is to put the party back where they started. Restitution usually comes into play when there is a breach & you have expended money, conferring a benefit to the promisor, & they breach so that you are out that money & they have been “enriched”. Under such circumstances, the law implies a promise by the promisor to the promisee to pay the reasonable value of the benefits conferred.

**I. Chapter 1: Basis for Enforcing Promises**

**E. Restitution as an Alternative Basis for Recovery**

**1. Restitution:** The promisee recovers on a theory of “quasi-contract.”

**2.** **Quasi-Contract:** a quasi-contract is not a true contract, since there is no mutual assent bargained for & received by the parties (no bargain consciously made between the parties). Rather, the law implies or creates a contract. This is normally done where a promisor has received a benefit from the promisee under such circumstances that in equity the promisor ought to compensate the promisee. The law implies a promise by the promisor to avoid unjust enrichment at the promisee’s expense.

**a. Elements of Quasi-Contract Recovery**

**1. Benefit:** one party has rendered services or expended property which confers a benefit.

**2.** **Expectation:** benefit conferred with the expectation of receiving their own benefit.

**3.** **Volunteer:** party rendering benefit was not acting as a intermeddler or volunteer.

**4.** **Unjust Enrichment:** to allow receiving party to retain the benefit would result in unjust enrichment.

**3. Quasi-Contract as an Alternative to Express Contracts:** quasi-contract is often available as an alternative to the enforcement of the express contract.

**a. Ex.:** A has built B a house & B refuses to pay, A may sue for the reasonable value of the benefits conferred or for damages under the contract. Also, suppose A is in breach after having performed only in part. A cannot sue in contract for damages, but he can sue in quasi-contract for the value of the part performance.

**b.** Quasi-contract is governed by equitable principles. So, it may not be allowed where A’s breach after part performance is intentional

**4. Measure of Recovery**

**a. Unjust Enrichment:** Normally, recovery is measured by the reasonable value of the benefit conferred on the D. But, modern courts have also recognized that in some instances the proper recovery is the detriment suffered by the P, & hence the recovery is the reasonable value of the services or property expended by the P. This is critical in situations where the D has really received no benefit, although the P suffered a detriment.

**5. Cotnam v. Wisdom (1907)->** emergency services

**a. Issue:** Whether a contract to pay for medical services can be implied when the party receiving the services is incapable of contracting?

**b.** **Holding:** Yes

**c.** **Reasoning:** Here the decedent was unconscious, & therefore unable to consent to the rendering of the medical services. Thus, the theory of recovery by P was not based on an implied-in-fact contract, since there could be no conscious assent, but was based on implied-in-law or quasi-contract theory. Although the service did not avert death, it was competent professional service for which compensation is due. P is entitled to fair compensation & D or P is not allowed unjust enrichment.

**d.** **Notes**

**1.** Moral here is the MD, because the service he provided was in the scope of his employment, is entitled to be paid for his services.

**6. Callano v. Oakwood Park Homes Corp. (1966)->** indirect benefit

**a. Issue:** Whether D, with no direct contractual relationship to P, is obligated to pay for a benefit received on the theory of quasi-contract?

**b.** **Holding:** No

**c.** **Reasoning:** P was not in privity of contract with D or new buyers. Callano cannot use the

**I. Chapter 1: Basis for Enforcing Promises**

**E. Restitution as an Alternative Basis for Recovery**

**6. Callano v. Oakwood Park Homes Corp. (1966)**

**c. Reasoning:** fiction of quasi-contract or contract implied-in-law to substitute one promisor or debtor for another. The estate is the proper party to bring this cause against. The key words here are enrich & unjustly. To recover on the theory of quasi-contract the P must prove that the D was enriched, received a benefit, & that the retention of the benefit was unjust. Recovery on the theory of quasi-contract was developed under the law to provide a remedy where non existed.

**d.** **Notes**

**1.** In this case, because there is a remedy at law the P cannot invoke quasi-contract. It is only applicable when there is no legal remedy available.

**II. Chapter 2: Creating Contractual Obligations**

**A. The Nature of Assent:** the most common type of contract is the bargain, which is typically formed by the mutual assent of the parties, through the offer by one & acceptance by the other. In determining whether there is mutual assent, the usual test to be applied is the objective theory of contracts; i.e. what a reasonable person in the position of each of the respective parties would be led to believe by the words or conduct of the other party. This means words & conduct are not interpreted according to what the speaker or actor subjectively meant to convey, nor what the person to whom the words or conduct were addressed subjectively understood them to mean (subjective theory of contracts), but rather what a reasonable person, standing in place of the respective parties would understand them to mean. Courts today have rejected the requirement that there be any actual, subjective meeting of the minds. Demands for security & certainty in business, & the fundamental objective of protecting a party’s reasonable expectations in relying on the promise, make it imperative that the other party be able to rely on the other party’s apparent intentions without regard to his secret thoughts or mental reservations.

**1. Lucy v. Zehmer (1954)->** contract made in subjective jest

**a. Issue:** Whether a contract is enforceable if one of the parties agreed only in jest?

**b.** **Holding:** Yes

**c.** **Reasoning:** A person cannot set up that he was merely jesting when his conduct & words would warrant a reasonable person in believing that he intended a real agreement. An agreement or mutual assent is of course essential to a valid contract. But the law imputes to a person an intention corresponding to the reasonable meaning of his words & acts. If his words & acts judged by the reasonable person, manifest an intention to agree, it is immaterial what may be the real, but unexpressed state of his mind.

**d.** **Notes**

**1.** Holding influenced by the equal bargaining position of the parties, absence of fraud or misrepresentation, & the admitted fairness of the price.

**2.** A drunk man can make a contract if the deal is reasonable.

**B. The Offer:** a proposal by one party to the other manifesting a willingness to enter into a bargain & made in such a way (by words or conduct) that the other person is justified in believing that their assent (acceptance) to the bargain is invited, & if given, will create a binding contract between the parties. An offer creates the power in the offeree to make a contract between the parties by an appropriate acceptance. Invitations to deal, acts of mere preliminary negotiation, & acts evidently done in jest or without an intent to create legal relations are of necessity excluded.

**II. Chapter 2: Creating Contractual Obligations**

**B. The Offer:** The requirements of a valid offer are manifestation of a present contractual intent, certainty & definiteness of terms, & communication to the offeree.

**1. Requirement of Manifestation of Present Contractual Intent:** the words or conduct of the offer

must be words of offer rather than mere words of preliminary negotiation. The test is the objective theory of contracts. Would a reasonable person in the shoes of the offeree feel that if he accepted the proposal, the contract would be complete? Factors considered:

**a. Words Used:** some words strongly suggest that an offer has been made, while others suggest a mere invitation to make an offer. “I bid” suggests an offer. “Are you interested” suggests preliminary negotiation.

**b.** **Surrounding Circumstances:** context may alter the normal meaning of words.

**c.** **To Who Made:** a proposal to the public at large or a large group of persons is more likely to be construed as a mere invitation to make an offer.

**d.** **Definiteness & Certainty of Terms:** the more definite, the more likely an offer.

**e.** **Written Contract Contemplated:** some courts hold that if there is a written document contemplated there is no contract until it is signed. Others resolve the issue on the intent of the parties, determined by all the surrounding circumstances.

**2. Owen v. Tunison (1932)->** stating minimum price

**a. Issue:** Whether a statement specifying a minimum price constitutes an offer to sell?

**b.** **Holding:** No

**c.** **Reasoning:** D’s letter at most may have indicated an intent to open negotiations, but it was not a proposal to sell.

**d.** **Notes**

**1. Price Quotations:** a simple quotation of a price is usually construed as an invitation to the buyer to make an offer.

**2.** A counter-offer will nullify an offer, an inquiry will not.

**3.** In these situations wording is very important. In the present case, the key words are...” it will not be possible.”

**4.** An offer ends or is terminated by a counteroffer, a reasonable amount of time, when expressly rescinded, or when you make an offer & the other part expressly rejects the offer (which is a counter-offer.

**3. Harvey v. Facey (1893)->** price quotation

**a.** Court held that a communication regarding only a price term is inadequate to constitute an offer. Facey never stated he would sell to Harvey, & Harvey’s last telegram was actually an offer that Facey never accepted.

**4. The Salt-Trade Case:** key word or phrase is “we are authorized to offer.”

**5. Lefkowitz v. Great Minneapolis Surplus Store (1957)->** exception to the general rule

**a. Issue:** Whether an advertisement to the general public can be binding on the seller to sell the advertised merchandise?

**b.** **Holding:** Yes

**c.** **Reasoning:** Advertisements addressed to the public are considered binding if the facts show that some performance is definitely promised for something requested. Here, the advertisement offered specific merchandise at a stated price to the 1st person to present himself. There was no room for negotiation as the offer was clear, explicit, & definite. Further, once the offer was published, D had no right to impose new or arbitrary conditions such as the alleged “house rule.”

**II. Chapter 2: Creating Contractual Obligations**

**B. The Offer**

**5. Lefkowitz v. Great Minneapolis Surplus Store (1957)**

**d. Notes**

**1. Advertisements:** generally deemed invitations to deal rather than offers. Lefkowitz is the exception to this general rule. Three reasons for this rule are that advertisements are usually indefinite as to quantity & other terms, sellers ought to be able to choose with whom they deal, & they are typically addressed to the general public, so that if they were considered offers a seller might find themselves over accepted.

**6. Elsinore Union Elementary School District v. Kastorff (1960)->** construction K/mistaken bids

**a. Issue:** Whether Kastorff is entitled to rescission where Elsinore had an irrevocable option to accept, but learned of a good faith mistake prior to acceptance?

**b.** **Holding:** Yes

**c.** **Reasoning:** The school district knew or should have known before it accepted the bid, that it contained an unilateral mistake. D was not guilty of negligence & informed the board promptly of his mistake. It would be unconscionable to enforce the contract under these circumstances. The error was material, & he was not negligent. Rescission may be had for a mistake of fact if the mistake is material & not the result of the neglect of a legal duty, if enforcement would be unconscionable, & if the other party can be placed in the status quo. In addition, the party seeking rescission must give prompt notice of his election to rescind & must restore or offer to restore everything of value that he has received under the contract.

**d.** **Notes**

**1.** An offer can be rescinded any moment prior to acceptance.

**2.** In construction bids acceptance occurs when a vote is taken & approved, or some analogous act.

**3.** Actual notice of error before acceptance, & knowledge by one party that the other is acting under mistake is treated as the equivalent of mutual mistake for purposes of rescission. Relief from mistaken bids is consistently allowed where one party knows or has reason to know of the other’s error & the requirement of rescission are fulfilled.

**4.** The law imposes a duty on both parties. D has a duty to get his bid correct, the party accepting the bid has a duty to accept in good faith & not rip somebody off. Point to take away is that whoever is accepting the bid must act in good faith, & if they know or should know there is a mistake, then they should not accept it.

**5.** Under a unilateral mistake, the party making the mistake is on their own. Under a mutual mistake, whatever agreement was had becomes null & void & everybody goes back to where they began.

**6. Summary of the Requirements of Rescission**

**i.** Material mistake of fact, not the result of negligence

**ii.** Enforcement of mistake must be unconscionable

**iii.** Other party van be placed in status quo

**iv.** Prompt notice of intent to rescind

**iv.** Restoration or offer to restore everything of value received under the contract

**II. Chapter 2: Creating Contractual Obligations**

**C. The Acceptance:** in order for there to be a valid contract there must be an acceptance of the offer. The acceptance, the assent to the offer, must be in the same manner requested or authorized by the offeror.

**1. Requirements for a Valid Acceptance**

**a.** Offer may be accepted only by the person to whom it is made

**b.** Acceptance must be unequivocal & unqualified. If it is qualified, then it is not an acceptance, but a counteroffer, which works as a rejection of the offer.

**c.** **Unilateral v. Bilateral Contracts**

**1. Bilateral:** the mere giving of a counter-promise to the offeror is all that is required. Offeree must have knowledge of the offer, & notice of acceptance to the offeror is generally required (there are exceptions, such as where the offeror indicates that no notice is required).

**2.** **Unilateral:** may be accepted only by doing the act requested by the offeror, with knowledge of the offer & intent to accept it. Normally, notice is not required (exceptions are where the offeror requires that notice be given or where the offeror has no reasonable means of knowing that the requested performance has been rendered; in such a case there is a requirement that notice that the requested performance has been rendered be given within a reasonable time).

**2. Methods of Acceptance**

**a. Unilateral v. Bilateral:** while the legal distinction between the 2 is easy to state, making the distinction in true factual situations is difficult. Whether a contract is found to be unilateral or bilateral makes a big difference in the mode of acceptance. The distinction is also important in regard to revocation (i.e., if all the offeror wants is a return promise, then if such a promise is given, revocation becomes impossible; but if the offeror requests an act as acceptance, then the act itself must be performed or the offeror can still revoke the offer).

**1.** Where the offer is unclear as to whether a unilateral or bilateral contract is contemplated, the law will construe it as an offer for a bilateral contract because a bilateral contract affords immediate rights & complete protection to both parties, since a contract arises as soon as the offeree promises to perform.

**2.** **U.C.C.:** accepts this same policy. it states unless an offer to buy goods expressly limits acceptance to shipment of the goods, it is to be construed as inviting acceptance by either shipment or by a prompt promise to ship.

**3. International Filter Co. v. Conroe Gin, Ice, & Light Co. (1925)->** no notice requested

**a. Issue:** Whether notice of acceptance must be given if the offeror does not require it?

**b. Holding:** No

**c.** **Reasoning:** A contract was formed when Engel (P’s EO) endorsed the paper with Conroe’s manager’s signature on it. Here Conroe was the offeror & made no stipulation as to notice of acceptance & therefore none was required. On the contrary, P specifically provided what D requested in the letter. Even though no notice was required the February 14th letter to D acknowledging the order fairly communicated P’s acceptance. Generally, the form & manner of notice of acceptance need only be such as to convey by word or fair implication the fact of acceptance itself.

**d.** **Notes**

**1.** Acceptance must be unequivocal & affirmative.

**2.** Restatement (2nd) **§**54 & 56requires that in a bilateral contract where the offeror requests a promise, that promise must be attempted or actually communicated to the offeror.

# II. Chapter 2: Creating Contractual Obligations

## C. The Acceptance

**3. International Filter Co. v. Conroe Gin, Ice, & Light Co. (1925)**

**d.** **Notes**

**3.** Under common law, acceptance occurred when it was placed in the mail. Generally, now acceptance occurs by whatever means is requested if a means is requested or a faster means if available.

**4.** **Notice & Acceptance:** 2 different things. The form of notice, if notice is required, may be quite a different thing from the acceptance; the latter constitutes a meeting of the minds, the former merely relates to that pre-existent fact.

**4. White v. Corlies & Tift (1871)->** communication of acceptance to offeror, implied acceptance

**a. Issue:** Whether an offeror’s request for notice in a return promise can be satisfied by the offeree’s beginning the requested performance?

**b. Holding:** No

**c.** **Reasoning:** D’s note to P was an offer to P & requested his return promise, which had to be manifested by some objective words of conduct or acceptance. There was no indication of P’s return promise before D’s revocation. The rule of the judge in the lower court was to be interpreted that the P need not indicate to the D his acceptance of their offer, & the purchase of the stuff & working on it after receiving the note made a binding contract between the parties. In this we think the learned judge fell into error.

**d.** **Notes**

**1.** The court held this was an offer of a bilateral contract. The Restatement (2nd) provides that in this situation the offeree’s return promise must be expressly or impliedly given. An implication of a promise can be given by commencement of performance, but here the D had no awareness of such commencement when it canceled the order.

**2.** A mental determination not indicated by speech, or put in the course of indication by act to the other party is not an acceptance which will bind the other.

**3.** **Intention to Accept:** Under the objective theory of contracts, subjective intent of the offeree is immaterial. If a reasonable offeror would be justified in relying upon the apparent intent of the offeree as manifested by his conduct, then acceptance will be deemed to have occurred, irrespective of the actual intent of the offeree. Further, if the offeree intends to accept the report but fails to communicate such intent in a manner which a reasonable offeror would understand as an acceptance, no contract is formed

**4.** **Time for Acceptance:** offeror must allow a reasonable time for acceptance by commencing the performance

**5. Carlill v. Carbolic Smoke Ball Co. (1893)->** notification of acceptance in an unilateral contract

**a. Issue:** Whether notice of acceptance in an unilateral contract is necessary?

**b. Holding:** No

**c.** **Reasoning:** If the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

**d.** **Notes**

**1.** How did Carbolic intimate sufficiently that to act on the proposal without communicating acceptance of it to them is sufficient acceptance? 1st sentence is an express warranty created by an affirmative statement to the general public containing express warranties.

# II. Chapter 2: Creating Contractual Obligations

## C. The Acceptance

**6. Allied Steel & Conveyors, Inc. v. Ford Motor Co. (1960)->** suggested method of acceptance

**a. Issue:** Whether a contract is formed when the offeree fails to comply with the suggested method of acceptance, but instead begins performance?

**b. Holding:** Yes

**c.** **Reasoning:** The suggested method of acceptance was not the only method since the order said “would”. Here, Allied (D) manifested its intent to accept by beginning performance with the knowledge of Ford (P) & in accordance with the material terms of the contract. If an offeror merely suggests a permitted method of acceptance, other methods are not precluded. If an offeror requests a return promise & the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract if such performance is completed or tendered with in the time allowable for accepting by making a promise. The tender operates as an implied promise to complete performance.

**d.** **Notes**

**1.** If an offeror merely suggest some method it is optional. If a particular method is specified you must follow it or any method faster.

**2.** If an offeror requests a return promise it must be given or performance of what would be promised in the time allowed with the offeror’s knowledge.

**3.** In White, the offeree failed to communicate its acceptance through commencement of performance to the offeror, whereas in Allied, performance was commenced with full knowledge, consent, & acquiescence of the offeror.

**7. Corinthian Pharmaceuticals, Inc. v. Lederle Labs (1989)->** accommodation as a counteroffer

1. **Issue:** Whether a seller’s shipment of non-conforming goods constitutes an acceptance of the buyer’s offer to purchase?

**b.** **Holding:** No

**c. Reasoning:** Lederle’s price quotations were not offers, but simply quotations, which are invitations to make an offer. Lederle did nothing prior to shipping which can be considered an acceptance. Under U.C.C. §2-206(b), the shipment of nonconforming goods does not constitute an acceptance if the seller seasonable notifies the buyer that the shipment is offered only as an accommodation to the buyer. Here, Lederle’s shipment didn’t conform, so it could not be considered an acceptance. It was merely an accommodation. The accompanying letter spelled out the terms of the accommodation & gave Corinthian the opportunity to cancel the balance of the shipment if they didn’t accept the higher price. Lederle satisfied the requirements of the U.C.C. section. Lederle’s shipment of nonconforming goods should be treated as a counteroffer, which Corinthian could choose to accept or reject.

**d. Notes**

**1. U.C.C. §2-206:** acceptance of an offer can be by prompt promise to ship or by prompt or current shipment of nonconforming or conforming goods, but such shipment of nonconforming goods does not constitute an acceptance if the seller seasonable notifies the buyer that the shipment is only offered as an accommodation.

**2.** Accommodation implies no consideration, & such shipment of nonconforming goods is treated as a counteroffer, & the buyer may accept or reject the counteroffer.

**3.** **Perfect Tender Rule:** under the U.C.C. the buyer has the protection of the perfect tender rule. Unless the seller perfectly tenders what was ordered the buyer doesn’t have to accept them. Seller’s shipment without notice of accommodation would be acceptance, but under the perfect

# II. Chapter 2: Creating Contractual Obligations

## C. The Acceptance

**7. Corinthian Pharmaceuticals, Inc. v. Lederle Labs (1989)**

**d. Notes**

**3. Perfect Tender Rule:** tender rule the buyer has the right to reject. But, the seller has a reasonable time to cure his mistake under the perfect tender rule.

**D. Termination of the Power of Acceptance:** after a party has made an offer conferring on another the power of acceptance, that power can be terminated by 1) lapse of the offer, 2) by its revocation by the offeror, 3) by the offeror’s death or incapacity, or 4) by the offeree’s rejection. In effect, another may no longer be effectively accepted if the offeree’s power of acceptance has been terminated by an act of the parties or by the operation of law.

**1. Lapse of an Offer:** by time, death, or incapacity. This is termination by operation of law. Offer lapses by operation of law after expiration (and before acceptance) of whatever period of time was specified in the offer. Time is computed from the actual date of receipt by the offeree. Where a time is not specified, an offer lapses after a reasonable period of time. Offers are revocable even where they are specified to remain open. Just because an offer states it will remain open till some date, does not mean that the offeror cannot validly revoke the offer before acceptance.

**2. Revocation of Offers:** where the offeror communicates a revocation before an acceptance by the offeree, the offer is terminated.

**a. Requirements of Effective Revocation**

**1. Words/Conduct:** offeror’s words or conduct must be sufficient for a reasonable person to interpret as revocation.

**2. Communicated to the Offeree:** or the offeror must at least make reasonable efforts to communicate the revocation.

**3.** **Effective when Received:** generalrule of acceptance is the opposite

**b. Option Contracts:** a promise made by an effort or that effectively limits the offeror that effectively limits the offeror’s power to revoke is called an option contract. It expresses, directly or indirectly, a fixed period within which the offeree must exercise the option. Options may be created in 3 ways: 1) consideration, 2) firm offers, and 3) reliance by the offeree. These 3 ways make an option contract irrevocable. Firm offers, under the U.C.C., are a signed, written offer to buy or sell goods, which states it will be kept open for a definite time, or if none is stated a reasonable period of time, may not be revoked for this period (as long as the period is no longer than 3 months). If the offeree has given any consideration, it then becomes an option & is irrevocable for the period stated therein.

**3. Dickinson v. Dodds (1876)->** revocation of offer prior to specified term

**a. Issue:** Whether an offer that is to remain open for a specified time can be revoked prior to that date?

**b. Holding:** Yes

**c. Reasoning:** Although Dodds originally agreed to keep his offer open until June 12th, he could revoke the offer at any time prior to acceptance by P. Before accepting D’s offer, P learned that D was going to sell to another person. This is a sufficient communication of D’s retraction of the offer.

**d. Notes**

**1.** Court held that D was not bound by the option because there was no consideration for it

# II. Chapter 2: Creating Contractual Obligations

**D. Termination of the Power of Acceptance**

**4. Ragosta v. Wilder (1991)->** revocation prior to acceptance by performance

**a. Issue:** Whether an offeror may revoke an offer at any time before the other party accepts by performing, given there is no consideration for the promise to keep the offer open?

**b. Issue:** Yes

**c. Reasoning:** Ragosta’s offer could only be accepted by performance prior to the deadline, & his promise to keep the offer open was not supported by consideration so it was not enforceable. To constitute consideration , a performance or return promise must be bargained-for. A performance or return promise is bargained-for if it si sought by the promisor in exchange for his promise & is given by the promisee in exchange for that promise. Where an offer invites an offeree to accept by rendering a performance & does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. However, what is tendered or begun must be part of the actual performance invited in order to preclude revocation. P’s were merely engaged in preparation to perform. No contract.

**d. Notes**

**1.** The court below applied equitable estoppel, which requires the part relying to do so to their detriment on the promise. P’s started getting financing even before D made the offer.

**2.** You can accept an offer through a return promise or performance. If performance is elected it must be such that of which is actually requested. All that is required is to begin that actual performance.

**3.** **Equitable Estoppel:** simply, you must rely to your detriment on what the other has said, & the other party must know or should have known you are relying on your detriment, & reliance must be reasonable, & injustice can only be avoided by enforcing the promise.

**5. Rejection by the Offeree:** a rejection by the offeree terminates the offeree’s power to accept. If the offeree later attempt to accept the offer notwithstanding the prior rejection, the acceptance is a mere counteroffer.

**a. How Effected?:** a rejection may occur by either words or conduct, or by qualified acceptance (which amounts to a counteroffer & therefore a rejection of the offer).

**b. Equivocation:** acceptance must be unequivocal & unqualified. If it is qualified, it is legally insufficient as acceptance. The line between qualified & unqualified acceptance is not alwys clear.

**1. Conditional Acceptance:** an acceptance which includes any term or condition which was not part of the original offer is ordinarily considered a qualified acceptance & thus an implicit rejection.

**2. Inquiries & Requests:** acceptances which include inquiries or requests by the offeree for a better deal generally do not impair the original offer.

**3.** **U.C.C. §2-207:** In a contract for the sale of goods, the inclusion of different terms by the offeree in the acceptance will not operate as a rejection of the offer unless the offer expressly limits acceptance to its terms. The additional terms included in the acceptance are treated as proposals for modifications to the contract. If the transaction is between merchants, the additional terms included become part of the contract unless they materially alter the contract or are promptly rejected to by the offeror.

**c. When Effective?:** only when received by the offeror.

**6. Death of an Offeror:** generally accepted rule is that an offeree’s power of acceptance is terminated by the offeror’s death or incapacity. Death or incapacity of the offeree has the same effect. The death/incapacity of the offeror does not terminate the offeree’s power of acceptance

# II. Chapter 2: Creating Contractual Obligations

**D. Termination of the Power of Acceptance**

**6. Death of an Offeror:** under an option contract. The death of a party after a contract has been formed does not terminate the power of acceptance because an option contract is already an accepted offer. A contract has been formed which creates the option for a specific time. But, if the offeree dies an option contract can be terminated.

**7.** **Rejection & the Mirror Image Rule:** a rejection by the offeree terminates the offeree’s power to accept. If the offeree later attempt to accept the offer notwithstanding the prior rejection, the acceptance is a mere counteroffer. a rejection may occur by either words or conduct, or by qualified acceptance (which amounts to a counteroffer & therefore a rejection of the offer). Acceptance must be unequivocal & unqualified. If it is qualified, it is legally insufficient as acceptance. The necessary conclusion then is that for an acceptance to be valid it must be on the terms proposed by the offeror, without the slightest variation. This is called the mirror image rule. A response that does not exactly mirror the terms of the original offer is a rejection, & acts as a counteroffer. The offeror as “master of the offer”, enjoys freedom from contract except on his terms. This rule applies only to common law situations. U.C.C. §2-207(5) makes significant changes r/t merchants.

**8.** **The Mailbox Rule:** when parties are not negotiating orally it is important ot determine when a communication takes effect. The general rule is that acceptance is effective on dispatch, but all other communications are effective on receipt. The reason is that at the moment of dispatch the offeree has done all that he can to reasonably manifest assent; this is the safest & fairest point at which to hold that a contract is binding. To be effective, the dispatch must be timely & made in a proper manner (properly addressed with postage paid).

**E. The Battle of the Forms & the U.C.C.:** modern business transactions are conducted primarily through forms. Typically, a buyer sends a purchase order to the seller. The order form contains the basic terms of the sale, but it also contains printed terms drafted by the buyer’s attorney in favor of the buyer. The acceptance contains the same basic terms, but also a series of printed terms drafted by the seller’s attorney in favor of the seller. These terms may conflict with the terms printed on the purchase order.

**1. Transcending the Mirror Image Rule: U.C.C. §2-207**

**a.** Article II abandoned the mirror image rule in favor of an analysis more attentive to kinds of commercial practices. §2-207(1) provides “an expression of acceptance “ may indeed “operate as an acceptance even though it states terms additional to or different from those offered or agreed upon.” §§ (2) provides an elaborate scheme that determines whether additional terms found in the expression of acceptance are part of the contract. Another innovation is found in §§(3) which provides that even when the parties writings do not establish a contract under §§(1), a contract may be found through conduct by both parties. In such cases the terms of the contract will be the terms to which the parties have agreed, supplemented by the Code’s “gap-fillers”.

**b. Additional Terms:** where the offeree’s response contains terms additional to those in the original offer, a contract exists consisting of the terms on which the offer & acceptance agree. Additional terms are proposals for additions to the contract. Where parties are merchants, proposals become a part of the agreement unless the offeror/offeree expressly limits acceptance to the offered terms or additional terms are material alterations of the contract.

**c. Inconsistent Terms:** if an offeree’s response contains terms inconsistent with those contained in the original offer the courts look to parties conduct to determine whether they acted as though a contract had been formed. If so, the contract consists of those terms on which the writings agree, the conflicting terms cancel each other out, & the necessary terms are provided by the U.C.C.

# II. Chapter 2: Creating Contractual Obligations

**E. The Battle of the Forms & the U.C.C.**

**1. Transcending the Mirror Image Rule: U.C.C. §2-207**

**c. Inconsistent Terms:** Under the common law the required terms of a contract were subject matter, price, & who. Under the U.C.C., only who & what is required. Under common law’s last shot rule, the last person to send a document in a back & forth exchange was the one that prevailed. This is not the case under the U.C.C.

**2. Step-Saver Data Systems, Inc. v. Wyse Technology (1991)->** terms printed on packaging that vary from contract documents

**a. Issue:** Whether terms, printed on the packaging of goods, modify the terms of the otherwise applicable warranty so that they become part of the contract between the parties?

**b.** **Holding:** No

**c.** **Reasoning:** Here, the dispute is not over the existence of a contract, but over its terms. The contract is governed by the U.C.C. §2-207 replaces the common law’s “last shot rule” with a rule that binds the parties to the terms they have both agreed to, together with any terms implied by the U.C.C. Warranty information was not included on the forms, but warranty information is inessential because the U.C.C. provides for express & implied warranties if the seller fails to disclaim them. The default rules of the U.C.C. fill the blank on warranties. D’s partner, TSL, claims the box top license should be considered a conditional acceptance under §2-207(1) because the 1) the license itself states that “opening this product indicates your acceptance of these terms,” & 2) the license permits the return of the product if the purchaser does not agree to the terms. However, D & its partner did not satisfy the U.C.C. requirement regarding clear expression of its unwillingness to proceed with the sale unless P accepted the terms of the box top license. Therefore, the box top license did not constitute a conditional acceptance. In effect, the box top license is a written confirmation containing additional terms. Under §2-207, an additional term included in the box top license is not incorporated into the parties’ contract if the terms addition to the contract would materially alter the parties agreement. The disclaimer of warranties that were otherwise part of the agreement is, as a matter of law, a substantial alteration & therefore can’t be a part of the agreement.

**d. Notes**

**1.** Warranty information is inessential under the U.C.C. It will provide them if the seller does not expressly disclaim them. Default rules fill the gaps.

**2.** **Assenting to Material Terms:** If the alteration is material, the other party can accept it, but it must be expressly done because any term that makes a material change is excluded automatically. Objection by the other party is not necessary. If a new term does not effect a material alteration, silence is consent period. If it does effect a material alteration, the party who proposed it must present additional evidence, beyond the term itself, to show he was reasonable in conferring consent to the new term from the other parties failure to object (silence). Ordinarily this will be evidence of prior dealings.

**3. ProCD, Inc. v. Zeidenberg (1996)->** acceptance when terms are not disclosed before purchase

**a. Issue:** Whether terms not disclosed prior to the purchase of a product may be enforced by the seller where the option to return the product ir the terms are unacceptable exists?

**b. Holding:** Yes

**c. Reasoning:** Under U.C.C. §2-204(1), “A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties, which recognizes the existence of such a contract.” §2-206 which defines the acceptance of goods states, “a buyer

# II. Chapter 2: Creating Contractual Obligations

**E. The Battle of the Forms & the U.C.C.**

**3. ProCD, Inc. v. Zeidenberg (1996)**

**b. Reasoning:** accepts good when after an opportunity to inspect, he fails to make a rejection under §2-206(1).” ProCD extended an opportunity to reject if the buyer found the terms unsatisfactory. Zeidenberg inspected the package, tried out the software, learned of the license, & did not reject the goods. Reference to §2-206 is only to show that the opportunity to return goods can be important; acceptance of the offer differs from acceptance of the goods after delivery. But the U.C.C, consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

**d. Notes**

**1.** Licenses are ordinary contracts accompanying the sale of products & are governed by contract law, & the U.C.C.

**2.** D contends that P’s offer was by putting the good on the shelf & his acceptance was his purchase. Not only does this contradict the U.C.C., but is impractical. Also, one of the terms D agreed to in his purchase was that the transaction was subject to a license.

**4. Hill v. Gateway 2000, Inc. (1997)->** purchase by phone

**a. Issue:** Whether receipt & use after a 30 day return policy is sufficient acceptance to additional terms made known after purchase?

**b. Holding:** Yes

**c. Reasoning:** Terms inside a box are binding where consumers receive & have an opportunity to read the terms & return the product if they disagree with the terms. The vendor is master of the offer & may invite acceptance by conduct. The buyer may accept by performing the acts the vendor proposes to treat as acceptance.

**d. Notes**

**1.** Approve-or-return type transaction are common & practical. A vendor may propose that a contract for sale be formed, not with payment or a request to send a product, but after the customer has had a chance to inspect the items & terms.

**2.** Gateway indicated in ads that the products cam e with limited warranties. Buyers have 3 ways to discover the seller’s terms: 1) ask for an advance copy of the terms, 2) consult public resources, & 3) inspect the documents after delivery. The Hill’s took the 3rd option & accepted Gateway’s offer & arbitration clause. If you are put on notice of an additional term, you can either accept or reject the term. An acceptance can either be express or by keeping the product.

**F. Precontractual Liability:** Normally, neither party is bound until the contract is final. An exception is the situation in which one party, in reliance on the expectation of a contract, confers a benefit on the other party & can seek restitution to prevent unjust enrichment. In some situations a party who relies, but does not confer a benefit may still have a claim.

**1. Promissory Estoppel:** In addition to detrimental reliance & forbearance as a substitute for consideration, for similar reasons a number of growing courts hold that an offeree’s forseeable, detrimental reliance on an offer, will serve as a substitute for consideration, so as to create an option & prevent the offeror from thereafter revoking the offer for at least a reasonable time.

**2. Restatement (2nd) Approach:** an option contract is created when the offer invites acceptance by performance & the offeree tenders or begins the invited performance. The offeror’s duty of performance under such an option contract is conditional on completion or tender of the invited performance according to the terms of the offer. Originally, under the old common law rule, performance was required to obtain benefit of the promise. It is different under the modern view

# II. Chapter 2: Creating Contractual Obligations

### F. Precontractual Liability

**2. Restatement (2nd) Approach:** It is different under the modern view (Restatement). If an offer invites an offeree to accept by rendering a performance, & doesn’t invite a promissory acceptance, an option contract is created when the offeree begins or tenders performance invited. It helps to understand that one can’t tender performance that is to extend over a period of time. Under an option contract, an offeror can’t revoke when performance is tendered or began. Under the common law, the offeree had to fully perform before he was entitled to anything, & the offeror could revoke at any time prior to completion. Under the modern rule, the offeror is estopped from revoking in an unilateral contract when performance, tendered or begun, & the offeree is entitled to the benefit of the promise if she completes it. The offeror does not have to know she is performing because it is a unilateral contract. Under a bilateral contract, both parties must be aware of performance. Performance must just be initiated in a reasonable time. Acceptance may be by acceptance.

**3.** **Drennan v. Star Paving Co. (1958)->** liability of subcontractor

**a. Issue:** Whether a parties detrimental reliance on the other’s offer constitutes an irrevocable offer?

**b. Holding:** Yes

**c. Reasoning:** When the general contractor submitted his bid, which included the subcontractor’s bid, it made the sub’s bid irrevocable. At any point prior to the general contractor submitting his bid, the sub can revoke, unless the general contractor knew or should have known there was an error.

**d. Notes**

**1.** Star did not offer to make its bid irrevocable, nor was Drennan’s use of the bid an acceptance which bound them to award the subcontract to D. There was neither an option contract supported by consideration or a bilateral contract binding both. Also, the bid didn’t expressly state that it was revocable any time before acceptance.

**2.** Star made a clear offer. They had reason to expect Drennan would use its bid if lowest & by bidding Star induced Drennan to detrimentally rely on its bid. This was reasonable & foreseeable. This was sufficient to imply a subsidiary promise not to revoke the bid.

**3.** Modern cases hold that if the reliance is detrimental, reasonable, & foreseeable, then the sub will be bound to his bid

**4. Hoffman v. Red Owl Stores (1965)->** promise incomplete as an offer

**a. Issue:** Whether the doctrine of promissory estoppel is applicable where there is only negotiation?

**b. Holding:** Yes

**c. Reasoning:** Even though the promise that Hoffman relied upon lacks the necessary elements to form a contract, the doctrine applies. The required elements for the doctrine are a promise, reliance, detriment, injustice, & forseeability of P’s reliance by the D.

**d. Notes**

**1.** The decision extends promissory estoppel since it doesn’t rationalize it in terms of relaince as a substitute for consideration. Here, there is not even an offer, only negotiation. The implication is that the parties must bargain in good faith. Where they do not & 1 party relies to their detriment, promissory estoppel will apply.

**2.** The parties did not have a binding contract, otherwise we would not be using promissory estoppel. It is used when an agreement between 2 parties lacks some material element necessary to form a binding contract. But it would be a gross injustice to say there is not. To remedy the situtation the court uses promissory estoppel.

**3.** Where damages are awarded in promissory estoppel instead of specific performance,

# II. Chapter 2: Creating Contractual Obligations

### F. Precontractual Liability

**4. Hoffman v. Red Owl Stores (1965)**

**d. Notes**

**3.** they should only be such as in the opinion of the court are necessary to prevent injustice.

**5. Channel Home Centers v. Grossman (1986)->** preliminary binding agreements/commitments, obligation to negotiate in good faith

**a. Issue:** Whether a letter of intent, negotiated for, & its included terms can bind parties?

**b. Holding:** Yes

**c. Reasoning:** Pursuant to a detailed letter of intent to negotiate in good faith with the prospective tenant & to withdraw the lease promises from the marketplace during the negotiation, can bind the owner for a reasonable period of time where the prospective tenant has expended significant sums of money in connection with the lease negotiations & preparation & where there was evidence that the letter of intent was of significant value to the property owner.

**d. Notes**

**1.** Preliminary negotiations & agreements to enter a binding contract in the future are not contracts. However, parties may agree to negotiate in good faith, & this agreement may constitute a binding contract. The test is whether 1) both parties manifested an intention to be bound by the agreement, 2) the terms of the agreement are sufficiently definite to be enforced, & 3) there was no consideration.

**2.** What would have to be included in a letter of intent to make it definite enough to be binding? Definiteness of location, the parties, & a timeline for negotiation.

**3.** Was there consideration? For the owner the letter allowed him to obtain financing. For the tenant the benefit was taking the property off the market so their competitor can’t use it.

**4.** The purpose of the letter was to bind the parties to negotiate in good faith. For the tenant it was real close to an option contract. Both parties, pursuant to the letter of intent, had the option to make a contract if the tenant will agree to the terms the owner put out there. It also provided for enforceability of the term of negotiating in good faith. The moral of the story is you have to be definite in what you are doing, & did either or both receive some benefit.

**G. The Requirement of Definiteness:** terms of the offer must be sufficiently clear & complete so that the court can determine what the parties intended & can fix damages in case of nonperformance. There must be a definite, ascertainable method of determining what the challenged provision should be

**1. Essential Terms:** a contract must cover expressly or impliedly the following four essential terms.

**a. Who:** the parties

**b. What:** the subject matter

**c. When:** time for performance

**d. How Much:** price

**2. Implication of Reasonable Terms:** the general trend of the courts is to adopt a policy of liberal construction so as to uphold the reasonable expectations of the parties; thus the court will usually imply reasonable terms where none are expressly covered by the parties. Where the price is completely omitted, but a charge was intended, the court will normally imply a “reasonable price.” Where the price stated is indefinite, but the parties have made some attempt to include terms on the price, but it is so vague & unintelligible, the courts will refuse to imply a reasonable price, & the contract will be unenforceable due to lack of certainty on an essential term.

# II. Chapter 2: Creating Contractual Obligations

**G. The Requirement of Definiteness**

**3. The U.C.C.:** omission of 1 or more essential terms does not render an offer invalid, as long as it appears that the parties intended to make a contract & there is a reasonably certain basis for giving an appropriate remedy.

**4.** **Toys, Inc. v. F.M. Burlington Co. (1990)->** conditional exercise of option

**a. Issue:** Whether a letter of intent expressing acceptance of an option is binding where the optionee disputes the terms of the agreement?

**b. Holding:** No

**c. Reasoning:** The option was valid, however, an option must be accepted according to the terms to create a binding contract. Under these circumstances, it cannot be said that Toys accepted the option according to its terms, & summary judgment was improperly granted. Toys conduct also suggest it may have waived its acceptance of the option because its conduct was inconsisitent with the letter of February 7th to renew.

**d. Notes**

**1.** Remember, an acceptance that varies from the offer does not create a contract

**2.** The concept of definiteness is also implicit in the principle that the promisee’s expectation interest is to be protected.

**3.** Terms such as good faith & reasonable efforts are regarded as sufficiently definite if the content can be determined by reference to an external standard.

**5. Flexible Pricing:** must be based on something. U.C.C. §2-305 a contract will not fail if the price is left out. Price is determined at the time of delivery. The price then will be “a reasonable price at the time of delivery.”

**6.** **Oglebay Norton Co. v. Armco, Inc. (1990)->** omission of a specific price term in long-term contract

**a. Issue:** Whether a long-term contract is enforceable when price is omitted?

**b. Holding:** Yes

**c. Reasoning:** Under the U.C.C. the court can look to external standards to establish a reasonable price, where there is evidence of the intent of the parties to be bound even though price is excluded. The price must be a reasonable one at the time of delivery.

# III. Chapter 3: Statutes of Frauds

**A. Overview:** In most instances oral contracts are valid. However, by statute a few types of contracts are required to be in writing, or at least evidenced by a signed, written memorandum of the essential terms. Their purpose is to prevent fraud & perjury as to the actual terms of the contract & to provide better evidence of the contract terms in the event of a dispute. Failure to comply renders the contract voidable, but not void. Thus, the Statute relates only to remedy & not to the substantive validity of the contract.

**1. 9 Classes of Agreements Required to be in Writing->** statutory texts

**a.** An agreement for any performance that cannot be completed, on 1 side or the other, within 1 year of making the agreement.

**b.** “ “ “ the transfer of an interest in real estate, other than the grant of a lease, & 1 for the grant of a real estate lease for a period of 1 year or more.

**c.** “ “ “ “ sale of goods for a price of $500 or more.

**d.** “ “ “ “ lease of goods providing for rent of $1000 or more.

**e.** “ “ by a firm/person to be surety for the debt or other obligation of another.

# III. Chapter 3: Statutes of Frauds

## A. Overview

**1. 9 Classes of Agreements Required to be in Writing**

**f.** “ “ by which personal property (goods) is to stand as security for an obligation.

**g.** “ “ the performance of which is not to be completed before the end of a lifetime.

**h.** “ “ to pay a commission for the services of a real-estate broker.

**i.** “ “ by which a person/firm undertakes to extend credit to another. Only affects agreements of considerable size.

**2. Ameliorating Rules:** if an agreement is with in a statute of frauds, it is unenforceable unless documented in some way by a writing that is “signed.” An agreement with in a statute may be taken out by circumstances accepted as sufficient reason for enforcing an undocumented agreement. Courts have tried to ameliorate some of the harsh results that may ensue from applying a SoF. For those that remain, a palliative is found in the doctrine of estoppel

**a. Madame Butterfly:** An oral contract for 13 months could not be enforced, but if payments are made in advance in lump sum or in some form of installments, a court might give effect to the agreement as to the final performance once the last payment has been made. That would be to apply the usual rule that full performance on one side takes an agreement out of the one year clause. In some courts, if the payments are made entirely within a year, then they will enforce the contract entirely. A few courts hold that if you don’t make all the payments in the 1st year, then on an 18 month contract where payments are completed in month 13, then the other side doesn’t have to perform, because payment must be made in the 1st 12 months.

**b.** **U.C.C.:** §2-201 makes a special case of performance by the parties to a contract for sale of goods, if the performance takes the form either of the making & acceptance of a payment or the receipt & acceptance of goods. According to the U.C.C., it doesn’t matter that further performances are called for by agreement, & will not be forthcoming, a contract is enforceable against a seller with respect to goods for which payment was received & accepted, & against a buyer with respect to goods that have been received & accepted.

**c.** **Part Performance:** As to another clause of the SoF, one about selling an interest in real property, an agreement may be taken out of the Statute by part performance. That doctrine has applications both for & against a party who has rendered performance. Part performance of most types of agreement within the SoF may generate a remedy against a recipient of that performance. It is likely to do so when it gives immunity to the recipient from an action based on the agreement, & the claimant’s performance has conferred a benefit on the recipient cannot in justice be retained without compensating the claimant for it. That is, the performance generates a claim in restitution

**B. Writing, Signing, & Otherwise Recording & Authenticating**

**1. The Required Writing:** ordinarily a writing must be in a permanent, written form, & signed by the party to be charged. This does not mean that the writing must be a fully integrated, formal contract. Under the U.C.C., a writing is defined as “includes printing, typewriting, or any other intentional reduction to tangible form.”

**a. Essential Terms:** will satisfy the SoF if it contains these essential terms

**1.** Identity of contracting parties

**2.** Description of the subject matter

**3.** Terms & conditions of the agreement

**4.** Recital of the consideration

**5.** Signature of the party sought to be charged

# III. Chapter 3: Statutes of Frauds

**B. Writing, Signing, & Otherwise Recording & Authenticating**

**1. The Required Writing**

**b. Integration of Documents & The U.C.C.:** the required writing may be composed of several documents, provided each document refers to or incorporates the others, or they are physically attached. The traditional rule requires that the writing contain the essential terms of the agreement. The U.C.C. has modified this rule, but still requires at least a quantity term. Also, under the U.C.C., even less completeness is required in contracts for sale of goods. There need only be some writing sufficient to indicate a contract has been made & which specifies the quantity term. Also, note that if a merchant sends a written confirmation of a contract to another (in a form sufficient to bind the sender), the requirement of a writing is satisfied & the other merchant is bound, unless he objects within 10 days following receipt, even though he never signed anything.

**C. Statutory Scope:** refers only to contracts which cannot by any possibility be performed within 1 year from the making thereof. The period begins from the date the contract is made, not when the performance is promised. Some contracts will probably take more than 1 year to perform, but performance is theoretically possible within 1 year. These contracts are not within the SoF

**1. Duration Of Performance: The 1 Year & Lifetime Clauses**

**a. C.R. Klewin, Inc. v. Flagship Properties, Inc. (1991)->** no express term r/t time of performance

**1. Issue:** Whether a contract that fails to specify the time for performance is a contract of “indefinite duration”, & therefore outside the SoF?

**2.** **Holding:** Yes

**3.** **Reasoning:** Contracts of indefinite duration are excluded from the statute, & there is no distinction under the statute between contracts of uncertain or indefinite duration & contracts that have no express terms regarding the time for performance. The statute only applies to contracts whose performance cannot possibly be completed in 1 year. To construe the statute narrowly, the statute must be interpreted so that “can only be performed” means only contracts whose completion within a year would be inconsistent with the express terms of the contract. All that matters is that the terms of the contract would allow performance within the year.

**4.** **Notes**

**i. Contracts Incapable of Being Performed Within 1 Year:** refers only to contracts which cannot by any possibility be performed within 1 year from its making.

**ii.** **Contracts Where Performance Within 1 Year is Possible but Unlikely:** these contracts do not fall within the SoF.

**iii.** **Can Only Be:** refers to contracts that can only be performed in a time > 1 year. I will sell you 100 widgets for 36 months is a can only be contract, because it can only be performed in a time > 1 year, which makes it subject to the SoF. If a contract is of an indefinite duration, it does not fall within the SoF & does not violate it.

**iv.** Possibility/impossibility of completion is based on terms, not what can realistically, physically occur within 1 year.

**2. Interest In Real Property:** A contract for any sale of land or any interest therein must be in writing. Leases are normally covered, unless for 1 year or less. When a P brings an action for specific performance, part performance of the land sale contract, may take it out of the SoF

# III. Chapter 3: Statutes of Frauds

**C. Statutory Scope**

**2. Interest In Real Property**

**a. Richard v. Richard (2006)->** partial performance in reliance on oral agreement

**1. Issue:** Whether partial performance in reliance on an oral agreement for the sale of land is enforceable?

**2. Holding:** Yes

**3.** **Reasoning:** Part performance is an exception to the SoF when repudiation of the oral contract would lead to an unjust or fraudulent result. Part performance may consist of conduct taken in reliance on the contract, including possession of property, improvements made, or payment of a substantial portion of the purchase price. Here, the combination of P’s continued possession, the improvements made, & there periodic extra payments, deducted from D’s own ledger, is sufficient to part performance of D’s oral agreement to sell the property.

**4.** **Notes**

**i.** A continued possession by a purchaser already in possession may still relate to an oral contract of sale & therefore constitute part performance, as long as there is evidence that refers the possession to the purchase contract.

**ii.** Improvement made in reliance on an oral contract ordinarily must be permanent to constitute part performance.

**iii.** Just any part performance is not enough. Performance must be substantial & permanent & must be referable or go straight or directly to what the parties had agreed to.

**3. Sales of Goods:** a contract for the sale of goods for the price of $500 or more must be in writing. Goods are all tangible, movable property. U.C.C. §2-201(1) states, “unless there is some writing sufficient to indicate that a contract for the sale of goods has been made between the parties & signed by the party against whom the enforcement is sought or by his authorized agent or broker the contract is not enforceable by way of action or defense. Under the U.C.C., quantity is an essential term for a sufficient writing. Under the U.C.C must have who & what.

**a. Exceptions:** oral contracts for the sale of goods of more than $500 will be enforced in the following situations

**1.** The buyer receives & accepts all or part of the goods (the contract is enforceable as to the goods accepted);

**2.** The buyer gives something in part payment for the goods (the contract is enforceable as to the goods paid for);

**3.** The contract calls for the manufacture of special goods for the buyer & the seller has made a substantial beginning in the manufacture thereof;

**4.** The contract is between merchants & within a reasonable time a written confirmation is sent & the party receiving it does not send a written objection within 10 days; &

**5.** The contract is admitted by the party against whom enforcement is sought (in court pleadings or testimony.

**b. St. Ansgar Mills, Inc. v. Streit (2000)->** reasonable time determined by parties’ course of dealing

**1. Issue:** Whether a delayed, written confirmation may satisfy the SoF is such a delay is consistent wit the parties’ course of dealings?

**2.** **Holding:** Yes

# III. Chapter 3: Statutes of Frauds

**C. Statutory Scope**

**3. Sales of Goods**

**b. St. Ansgar Mills, Inc. v. Streit (2000)**

**3. Reasoning:** §2-201(2) modifies the traditional SoF for merchants by specifying the writing requirement is satisfied if a written confirmation is provided within a reasonable time & the merchant receiving it has reason to know of its contents. This means the writing need not be signed by the party disputing the contract. The written confirmation exception includes a 10 day requirement for a merchant’s objection to the writing, but it applies a flexible standard of reasonableness for the time in which the confirmation must be received. This permits the expansion of commercial practices through the custom & practice of the parties. The trial court focused on the large amount of the sale, volatile market conditions, & P’s lack of an explanation for not considering confirmation. These are relevant, but others are as well, especially their prior course of dealings.

**4.** **Notes**

**i.** A determination of the reasonableness of the parties conduct is a jury question

**ii.** **10 Days:** begins with receipt of the message.

**iii.** **Sufficient to Bind the Sender:** meansadequate acceptance of the offer by the sender. Must not be deemed a counteroffer.

**iii.** Remember under the U.C.C. you don’t need a formal offer, acceptance, consideration, just conduct evincing there is a contract. Also, under the Battle of Forms what matches stays, what contradicts is not added, & the holes are filled with “gap-fillers”.

**c. Estoppel & U.C.C §2-201:** the common law still applies under the U.C.C., unless there is something specifically contradictory in the U.C.C. The U.C.C. supersedes the common law where it speaks. But, if the U.C.C. is silent, that is, there is nothing that contradicts the common law, then that part of the common law is still applicable to situations between merchants. The silence of the U.C.C. is authority to apply & follow the common law.

**4. The Suretyship Clause:** by the law of every state, an undertaking to be a surety is not enforceable, as a rule, unless it is expressed in a signed writing.

**a. Central Ceilings, Inc. v. National Amusements, Inc. (2007)->** the main purpose rule

**1. Issue:** Whether in the absence of a writing, a guarantee to pay if another cannot is enforceable when the guarantor’s main purpose was to secure a benefit enured to him by reason of his promise?

**2.** **Holding:** Yes

**3.** **Reasoning:** A long recognized exception the SoF was applied here. It states, “A case is not within the statute where the fair inference of the whole transaction is that the leading object or purposed effect of the transaction, was the purchase or acquisition by the promisor from the promisee of some property, lien, or benefit which he did not before possess, but which enured to him by reason of his promise, so that the debt for which he is liable may fairly be deemed to be a debt to his own, contracted in such purchase or acquisition.

**4.** **Notes**

**i.** The leading object exception to the SoF addresses a separate & distinct set of circumstances: 1) a 3rd party is indebted, 2) there is no novation, 3) the 3rd parties duty to the creditor will be terminated by the performance promised by the D.

**ii.** **Novation:** delegate a duty & assign a benefit. A novation is different from an assignment. It is a substitution of a party wholly for another so that the party in loco the 1st party is on the

# III. Chapter 3: Statutes of Frauds

**C. Statutory Scope**

**4. The Suretyship Clause**

**a. Central Ceilings, Inc. v. National Amusements, Inc. (2007)**

**4.** **Notes**

**ii. Novation:** hook. A novation requires A+B+C to contract that A is going away & C is willing & going to take A’s place, with B agreeing to it. In an assignment, A would still be on the hook. A novation is the assumption of another’s debt, not an assignment.

**iii.** A novation is but one ground on which a promise is removed from the SoF.

**iv.** Under the main purpose exception to the SoF, an oral agreement that does not effect a novation may nonetheless be enforceable if the facts & circumstances of the transaction show that the promise was given primarily or solely to serve the promisor’s own interest.

**b. Guarantee Contracts:** promises to answer for or discharge the debts of another must be in writing to be enforceable. This applies to promises made 1) by one who isn’t presently liable for the debt, 2) a creditor, & 3) in order to discharge the present or future obligations of a 3rd party.

**1. Promises to a Debtor:** if a promise is made to a debtor & it is supported by consideration, it is enforceable, though it is only oral.

**2. Primary Debt Promisor:** the statute doesn’t apply to primary promises. If the underlying contract was between the promisor & creditor, the promise is enforceable although oral.

**3. Exception:** where the guarantor’s main purpose is to benefit himself. If it appears the promisor’s main purpose in guaranteeing the obligation of another was to secure an advantage or pecuniary benefit, the promise is enforceable though not in writing.

**D. Reliance & Other Equities:** sometimes reliance by a party by an agreement is a ground for enforcing an agreement that would otherwise be unenforceable owing to a statute of frauds. Enforcement proceeds under the name estoppel. In recent times courts have become more receptive to the doctrine as a way to circumvent a statuteof frauds**.**

**1. Monarco v. Lo Greco (1950)->** estoppel

**a. Issue:** Whether a P who has relied to his detriment on an oral contract required by the SoF to be in writing is enforceable?

**b.** **Holding:** Yes

**c.** **Reasoning:** The doctrine of estoppel to assert the SoF is applied to prevent fraud. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other party to change his position in reliance on the contract, or in the unjust enrichment that would result if a party who has received the benefits of the other’s performance were allowed to rely upon the Statute. Often both elements are present, & are present in this case. Furthermore, the estoppel to plead the SoF is not dependent on a misrepresentation that a writing is not necessary, as long as one or both of the above elements is necessary.

**IV. Policing the Bargaining Process**

**A. Capacity:** The general rule is legal capacity of both offeror & offeree is essential to the formation of a contract. If they lack capacity, they cannot give the required legally binding mutual assent. If a person possesses certain legal disabilities that effect/affect capacity the purported contract will either be void or voidable. Typically, contracts entered into by infants (those not having yet reached the age of majority), insane persons, convicts deprived of civil rights, & drunken persons will be void or voidable.

**IV. Policing the Bargaining Process**

**A. Capacity**

**1. Kiefer v. Fred Howe Motors, Inc. (1968)->** emancipated minor

**a. Issue:** Whether a contract made by a minor in which he misrepresented his age is voidable at his behest?

**b.** **Holding:** Yes

**c.** **Reasoning:** The general rule is that the contract of a minor, other than for necessaries, is either void or voidable at his option. With respect to the representation of the majority by P, the court held that D didn’t establish by evidence that P meant to deceive or D’s justifiable reliance on the representation.

**d.** **Notes**

**1.** Many jurisdictions lowered the age of majority to 18 when the voting age was lowered.

**2.** **Minority:** contracts of a minor are voidable at the option of the minor, but a minor may nevertheless enforce the contract against an adult. However, a minor is always liable for the reasonable value of necessaries furnished him. This liability is quasi-contractual, hence minority is no defense.

**2. Ortelere v. Teacher’s Retirement Board (1969)->** mental illness, mental infirmity

**a. Issue:** Whether a contract is voidable when 1 party to a transaction knows or should have known of the mental incompetency of the other?

**b.** **Holding:** Yes

**c.** **Reasoning:** The Restatement (2nd) §18 C states, “a person incurs only voidable contractual duties when entering into a transaction if by reason of mental illness/defect he is unable to act in an unreasonable manner in r/t the transaction & the other party has reason to know of his condition. Also, the Board’s position would not change by voiding the contract.

**3. Cundick v. Broadbent (1967)->** weakness v. capacity

**a. Issue:** Whether one not under guardianship can claim deficiency?

**b.** **Holding:** No

**c.** **Reasoning:** The modern rule is that contractual acts by one claiming mental deficiency but not under guardianship, absent fraud or knowledge of such asserted incapacity by the other contracting party, is not a void act, but at most only voidable at the instance of the deficient party, & then only in accordance with certain equitable principles. Mental capacity to contract depends on whether the deficient person possessed sufficient reason to enable him to understand the nature/effect of the act.

**B. Overreaching:** if unfairness results from unfairness in the bargaining process, it is generally voidable. Such circumstances as duress, fraud, & mistake are the usual things courts look to find unfairness.

**1. Preexisting Duty:** Where A & B have a contract under which A is obliged to perform some act, neither A’s new promise to perform that same act nor his actual performance constitutes consideration for the promise by B to pay a greater amount for that performance than that set by the original contract. This prevents A from taking advantage of B’s inability to contract with someone else to perform the consideration

**a. Exceptions**

**1.** A agrees to perform an act similar to, but distinct from, the act we was obliged to perform.

**2.** A owes the preexisting contractual duty to someone other than B.

**3.** A had a valid defense under the original contract.

**4.** Unanticipated circumstances arise that make modification of terms of the 1st fair & equitable.

**IV. Policing the Bargaining Process**

**B. Overreaching**

**2. Alaska Packers’ Assn v. Domenico (1902)->** threat of nonperformance

**a. Issue:** Whether a contract entered into under threat of nonperformance of the original is enforceable?

**b.** **Holding:** No

**c.** **Reasoning:** D’s (APA) consent to P’s demands was without consideration because it was based solely on P’s agreement to render the exact services they were already under contract to render. A party who refuses to perform, thereby coercing the other party to pay him more for doing what he was already legally bound to do, takes unjustifiable advantage of the other party. There is no consideration, even when the 1st party has completed his duty in reliance on the 2nd contract.

**3. Rescission & Modification:** if the parties mutually agree to rescind the original contract, a subsequent contract calling for the same performance at a higher price is enforceable

**4.** **Watkins & Son v. Carrig (1941)->** economic adversity/avoiding the preexisting duty rule

**a. Issue:** Whether economic adversity is sufficient consideration to support a 2nd contract?

**b.** **Holding:** Yes

**c.** **Reasoning:** D released his right as a creditor under the 1st contract & made a new one. This is analogous to a gift. There was an effective release of P’s obligation under the 1st contract. The promise of a special price necessarily imported a release or waiver of any right to hold P to the lower price the 1st contract stipulated. Their mutual understanding was that the original contract price was not to control.

**d.** **Notes**

**1.** The contract could have been rescinded since something still was left to do. However, the court allowed what amounted to partial rescission.

**5. Accord & Satisfaction:** an accord is a contract between a creditor & a debtor for the settlement of a claim between them by some performance other than that which was originally contracted for. Satisfaction occurs upon performance of the accord. Payment of part of an undisputed debt is not a discharge. But where a claim is in dispute & the amount owed is uncertain, a compromise in which the creditor accepts a partial satisfaction of the claimed amount is sufficient to discharge the claim. However, in order for there to be a discharge, a creditor must know he is being offered a full settlement.

**6.** **Duress:** any wrongful act or threat by one contracting party that compels or induces through fear the other party to enter into a transaction against his will. While the courts only look at whether the victim exercised free will in entering into or assenting to the transaction, factors such as age, emotional nature, surrounding circumstances, etc., are to be considered.

**a. Austin Instrument, Inc. v. Loral Corp. (1971)->** economic duress

**1. Issue:** Whether a contract modification executed under threat of economic duress is enforceable?

**2.** **Holding:** No

**3.** **Reasoning:** A contract is voidable on the ground of duress when 1 party is forced to agree to modification by means of a wrongful threat precluding exercise of free will. Economic duress/ business compulsion is evinced by proof of immediate possession of needful goods is threatened or that 1 party to a contract has threatened to breach by withholding goods, unless the other party agrees to some further demand. However, threatened breach without proof that the threatened party cannot obtain goods from another supply source is inadequate to constitute economic duress. Here, threats deprived D of its free will & constituted economic duress.

**IV. Policing the Bargaining Process**

**B. Overreaching**

**7. Undue Influence**

**a. Odorizzi v. Bloomfield School District (1966)->** undue influence

**1. Issue:** Whether a threat of termination for cause may constitute undue influence?

**2.** **Holding:** Yes

**3.** **Reasoning:** The Ds sought to secure the P’s signature on the resignation, not his consent to his resignation. It assured P it was trying to help him, that he should rely on their advice, & that there was not time to consult a lawyer. The Ds also advised P that there would be dire consequences if he did not immediately sign, & that if resigned, the incident would not prevent him from getting a teaching job elsewhere. These elements were sufficient to raise a question about whether the Ds used undue influence to secure P’s resignation.

**4.** **Notes**

**i.** There was no duress in this case because the Ds had the right to threaten dismissal & even had a positive duty to do so.

**ii.** Unlike duress, undue influence is persuasion that is coercive in nature, characterized by high pressure that works on mental, moral, or emotional weakness. It is described a s persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment.

**iii.** A critical element of undue influence is the lessened capacity of 1 party to make a free contract. It involves an unfair advantage attributable to a mismatch between parties. It is not merely hindsight that makes 1 party wish to escape a bad bargain.

**iv.** Misrepresentation of law or fact is not essential.

**v.** Most reported cases of undue influence involve confidential relationships, but this isn’t an essential element where the undue influence involves unfair advantage taken of another’s weakness or distress.

**vi.** **Elements of Undue Influence:** 1) discussion of the transaction at an unusual/inappropriate time; 2) consummation of the transaction at an unusual place; 3) insistent demand that the deal be done at once, 4) extreme emphasis on the consequences of delay, 5) use of multiple persuaders by the dominate side against a single servant; 6) absence of 3rd party advisors to the servient party; & 7) statements that there is no time to consult. The more of these factors that are present, the more likely the persuasion may be characterized as excessive.

**8. Vokes v. Arthur Murray, Inc. (1968)->** misrepresentation of opinion as fact

**a. Issue:** Whether a party’s misrepresentation r/t its opinion constitutes a cause of action?

**b.** **Holding:** Yes

**c.** **Reasoning:** The D had superior knowledge regarding P’s dance potential & the amount of her progress. D should have known that P’s payment for hundreds of additional hours of instruction was not justified by her slow progress. In this situation, D’s statement of opinion may be treated as statements of fact for purposes of misrepresentation. Though normally, to rescind a contract for misrepresentation, the misrepresentation must be one of material fact & not opinion, where there is a fiduciary relationship between the parties, where 1 party has tricked another, where the parties do not deal at “arm’s length,” or where 1 party has a greater opportunity to learn the truth or falsity of the fact represented, a statement of opinion may be treated as a statement of fact.

**V. Determining the Parties’ Obligations Under the Contract: Ascertaining, Interpreting, & Supplementing the Agreement**

**A. The Parol Evidence Rule:** when a writing has been reduced to writing which the parties intend as their final & complete expression of their agreement, evidence of an y earlier oral or written expression is not admissible to vary the terms of the writing. This is because the law favors written contracts as more reliable. This rule is only applied where the parties intended the writing as a final expression of their agreement. Such an agreement is termed an integrated agreement. Two test are used to determine if an agreement is integrated: 1) Face of the agreement (old view-if the agreement appeared to be complete & final, no parole evidence could be admitted) & 2) Any relevant evidence (modern view-any evidence may be admitted to determine whether the parties intended the conduct as a final & complete expression of their agreement).

**1. Gianni v. R. Russell & Co. (1924)->** prior oral agreement excluded

**a. Issue:** Whether P can recover on an oral agreement unincorporated in the subsequent written agreement?

**b.** **Holding:** No

**c.** **Reasoning:** The writing, which was subsequent to the oral negotiations, & read by P & 2 others before signing the agreement, constitutes the entire contract. It appears P is attempting to reform the written document. The only instances in which the parole evidence rule may not apply to exclude prior oral agreements unincorporated in the subsequent writing are those in which fraud, accident, or mistake are involved.

**2. Masterson v. Sine (1968)->** partially integrated agreement

**a. Issue:** Whether a contract is integrated with respect to a term, when the term is such that it must necessarily be included in the agreement?

**b.** **Holding:** No

**c.** **Reasoning:** The parol testimony as to the limitation of assignment should have been admitted since that term would not necessarily have been included. The parol testimony as to the other terms was properly admitted to explain the meaning of terms not clear on the face of the instrument.

**d.** **Notes**

**1.** The parol evidence rule must accommodate several policies: 1) policy assuming written evidence is more accurate than human memory, though this policy can be adequately served by excluding parol evidence of agreements that directly contradict the writing; 2) policy that is based on the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of fact; 3) evidence of oral collateral agreements should be excluded only when the fact finder is likely to be mislead & that the rule should be based on the credibility of the evidence.

**3. Bollinger v. Central PA Quarry Stripping & Construction->** mutual mistake

**a. Issue:** Whether a court may reform a written contract when a provision is excluded by mutual mistake?

**b.** **Holding:** Yes

**c.** **Reasoning:** Evidence of D initially removing & replacing the topsoil indicates that the provision was initially intended to be included. The fact that 1 of the parties changes his mind after the

mistake is immaterial to P’s right to reformation.

**d. Notes**

**1.** Parol evidence may be admitted to show fraud, duress, or mistake in the formation of the contract.