

## CONTRACTS -- Spring 2013 --

### 1. REMEDIES

#### a. Damages

##### i. Intro

#### 1. § 344 - Protects 1 of 3 interests of the promisee

##### a. Expectation

- i. Where party would have been if K were performed as promised

##### 1. 2 types:

##### a. General

- i. Arise naturally from breach

##### b. Special

- i. Incidental - Caused by the breach
- ii. Consequential (loss of use); see Hadley v. Baxendale; creates open-ended liability; most contracts will disclaim consequential damages and courts will enforce this

##### b. Reliance

- i. That measure of recovery that will restore the position at the time of the contract (looks backwards, return to status quo)
- ii. can never exceed lost expectations

##### c. Restitution:

- i. The above two look to compensate aggrieved; but restitution is not concerned with the loss. It's concerned with unjust enrichment of the promisee

##### d. Expectation > Reliance (it's part of Expectation) > Restitution (it's part of Reliance)

### 2. **The categories overlap!**

- a. In most cases, § 344 lists them in descending order of importance (meaning amount you get to recover), so expectation will exceed reliance

- i. Reliance will exceed restitution

### 3. § 347 Measure of Damages in General

- a. Injured party has a right to damages based on his expectation interest in

- i. the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
- ii. any other loss, including incidental or consequential loss,

- caused by the breach, less
- iii. any cost or other loss that he has avoided by not having to perform

## ii. Expectation Damages

### 1. Hawkins v. McGee (Hairy Hand)

- a. Remember his smiley faces visual
- b. Addresses *what promises should the law enforce, and to what extent?*
- c. Rest of the world allows specific performance, but here in common law jurisdictions we have damages
  - i. We are reluctant to force people to do something
  - ii. Substitute: economic measure
- d. Here: awards stops at where he was in the position he occupied at time of the contract
  - i. Reliance
  - ii. Not lost expectations
- e. Lost expectations will always exceed reliance damages, except when P made a bad deal (e.g., let me operate on your hand, I'll make it worse)

### 2. Peevyhouse (Strip Mining -- Willie and Lucille)

- a. How much should W&L recover?
- b. Damages should be for diminution of value (300, not 29,000)
- c. Purpose was not to punish Garland but to compensate Peevyhouse
- d. The nature of the breach makes no difference, purpose is to compensate
- e. Rest 2nd has become more P friendly. If rest 2nd had been available the outcome may have been different
- f. When should money be awarded in these cases:
  - i. If there is convincing evidence P is actually going to use the money for repair
  - ii. If restoration was part of the price paid

### 3. John Thurmond & Associates v. Kennedy

- a. Subsection (b): two words—"to him." Built-in subjective value that the courts are willing to consider
- b. Rule has become more P-friendly simply by allowing consideration of subjective value to P
- c. Under Restatement 2d, Peevyhouse would've come out the same as it did back then

## iii. Reliance Interest

### 1. Sullivan v. O'Connor (Nose Job)

- a. Like Hawkins case when trial court limited P's recovery to reliance damages
  - b. Not exactly therapeutic assurance
    - i. Iffy promises case
    - ii. May not want to enforce to the extent that contract law allows
- 2. Anglia Television v. Reed
  - a. Reed dropped out of a movie, after agreeing to play the part
  - b. Anglia sued to recover expenses incurred; Reed said they could only recover expenses after his agreement/breach.
  - c. Court held he was liable for expenses incurred before contract when his breach of the contract caused the waste of expenditures.
- 3. §349 Damages based on Reliance Interest
  - a. Rather than suing for lost exp. P can recover reliance expenses
  - b. May recover all reliance expenses that don't exceed lost expectation
    - i. Cannot recover a greater amount in reliance damages than you would have recovered in lost expectation
- 4. Why recover reliance rather than lost exp.?
  - a. Easier to prove
  - b. May be in a better position if you made a bad contract
  - c. Nice guy cases: Intentionally recover less because you either have sympathy or you want to do business with them again in the future
- 5. Three hurdles to get damages
  - a. Proving damages w/reasonable **certainty**
    - i. 2 Rules
      - 1. Have to prove that that **breach caused you this type of loss**—"loss in fact" by preponderance of evidence
      - 2. Once above is proven, must prove **certainty as to amount of loss** (standard here is much less)--allowing jury to estimate amount of loss satisfies the standard—less than preponderance of evidence
  - b. Proving damages were **foreseeable** at time of making contract
  - c. Farnsworth's obligation to **mitigate** or avoid loss
- 6. Calculating:
  - a. Massachusetts Rule: contract price – expenses saved; contractor gets to recover the contract price less whatever expenses he saved
  - b. Connecticut Rule: can recover profit + expenses incurred

- i. Limitations on Recovery
  - 1. Certainty

2. Foreseeability
  3. Avoidability/Mitigation
  4. Punitive
- ii. Certainty
1. Requested relief can be denied as too speculative b/c there is too much uncertainty as to:
    - a. that breach caused the type of injury P alleges (causation); OR
    - b. the extent to which P suffered from the breach (dollar amount); OR
    - c. both the causation and the amount
  2. Burdens of Proof
    - a. Proving Damages with reasonable certainty
      - i. FIRST: Prove Loss in Fact (POE)
      - ii. SECOND: Amount of Loss (Less than POE -- Any reasonably certain basis for allowing jury to estimate amount of loss satisfies standard)
        1. Rarely Bars Recovery
        2. Most cases where certainty bars recovery: As yet untaken venture/New Venture
    - b. Proving damages were foreseeable
    - c. Obligation to mitigate or avoid loss
  3. Freund v. Washington Square Press
    - a. Rare case where certainty bars recovery
      - i. New Author
      - ii. Cannot show amount of loss
  4. Humetrix v. Gemplus
    - a. Good example of no past profit but still meet certainty burdens
      - i. One Way: Similar Businesses in same locale or marketing area
      - ii. Second Way: Humetrix: Brand new market (US)
        1. Humetrix proved by POE that there would be significant profits based on European performance
          - a. Expert testimony was more than sufficient
        2. Franchises often fit this model
          - a. Franchisors make strong biz forecasts to potential franchisees
          - b. If they breach by franchising with different franchisee, that biz forecast then gets used against them
- iii. Foreseeability
1. Hadley v. Baxendale
    - a. Hadley took shaft from Baxendale for repair; did not return shaft as quickly

- as they said. Baxendale's output was delayed and Bax lost profits
- b. Limited the discretion of juries; more control in the hands of judges
- c. Positive impact: Created schematic approach for measuring lost expectation damages
  - i. 2 Types of Damages
    - 1. General Damages
      - a. Arise naturally and necessarily from the breach
    - 2. Special and Remote Damages (Consequential)
      - a. Arise naturally but not necessarily
      - b. Arise because of special circumstances
      - c. Unless promisee makes known special circumstances at the time of the contract, promisor is not liable for that type of loss
      - d. Reason to know standard (consequential damages): the parties had to have reason to know about the consequences of the breach
      - e. Damages must be foreseeable
  - d. Negative impact: Foreseeability standard
    - i. Obligation that you make circumstances known to the promisor at the time of the contract so that he knows his breach will cause your loss
    - ii. You can recover special damages, but they must be foreseeable
- 2. AM/PM Franchise Assn. v. Atlantic Richfield Co.
  - a. Consequential damages
    - i. Franchise was given bad gas, which caused loss profits on food
  - b. Types of Lost Expectations
    - i. During contract period
    - ii. Lost future profits (loss of goodwill)
    - iii. Lost secondary profits (All of the junk food at the mini mart)
- iv. Avoidability
  - 1. Doctrine of avoidable consequences is the duty to mitigate
  - 2. P cannot recover any damages that could have been reasonably avoidable
  - 3. Avoidability is the third great hurdle to recovery of damages
    - a. *Certainty* wasn't much of one
    - b. *Foreseeability* hasn't become much of one
    - c. **Mitigation (avoidability) of damages rule**
      - i. Duty to mitigate damages (not same as a torts duty)
        - 1. Not affirmatively liable for not having followed through on duty
        - 2. It merely cuts into the recovery

3. Closely related to the causation principle
  - a. Prove that the wrong caused the loss
4. Plea and avoidance (affirmative defense)
  - a. D has to plead it or he waives it
  - b. D has to prove P did not act reasonably to avoid the loss
  - c. D has to prove P acted unreasonably at the time he made the decision
- ii. Acting as RPP
  1. If p acts reasonably to mitigate the loss, but actually INCREASES damages,
  2. D is then responsible for those damages as well
    - a. Example: Wrongfully terminated employee spends money seeking new employment, those expenses are additional damages
- iii. Rockingham County v. Luten Bridge
  1. After the breach, they exacerbated damages by continuing to incur expenses
  2. County was liable only for damages LB would have suffered if it had stopped work at the time of countermand
- iv. Parker v. Twentieth Century-Fox Film Corp.
  1. Parker declined 2nd job offer and sought full payment of original movie salary
  2. Substitute was not “substantially similar” and was both “different” and “inferior.”
  3. P was reasonable in refusing the substitute offer
  4. Reasonableness is a jury question (dissent)
- v. Punitive
  1. *Can't get punitive unless breach came from independent tort and unless it's the kind of tort that will allow punitive damages* (Hibschman)
    - a. Not followed by majority of states
  2. Generally found:
    - a. Leaky Caskets
    - b. Lost Bodies of Loved ones
- vi. DAMAGES BY AGREEMENT
  1. Extent to which right to recover damages can be affected by K
    - a. Liability Disclaimers (Fairness Standard – 2-316)
    - b. Remedy Limitations (Fairness Standard – 2-719)

- c. Liquidated Damages (Reasonable standard – § 356(1) Rest 2d Contracts (or 2-718 for goods))

## 2. Liability Disclaimer:

- a. RISK ALLOCATION – Puts risk on other party by agreement
- b. Obvious way to avoid liability
- c. In torts: Exculpation clause
  - i. Exculpating yourself from negligence
  - ii. BUT: Disclaimer to exculpate one from liability for breach of K would render contract void (no mutuality of obligation)
- d. Implied Warranty disclaimers work similarly
  - i. Regulated by fairness
  - ii. Must be communicated clearly in bargaining process
  - iii. UCC § 2-316
    - 1. Safe harbor for disclaimers
    - 2. Fairness principles

## 3. Remedy Limitations

- a. RISK ALLOCATION
- b. Warrant anything but protect yourself by limiting the remedy against yourself
- c. Must provide minimum adequate remedy (apology and tear won't work)
- d. UCC § 2-719
  - i. Must Leave buyer with a fair remedy
  - ii. See Schurtz (Good fair remedy that failed of its essential purpose -- BMW could not be repaired)

## 4. Liquidated Damages

- a. Generally
  - i. If you breach, you pay me X dollars.
  - ii. NOT RISK ALLOCATOR
  - iii. Must be reasonable
  - iv. If amount is a penalty it is not enforceable.
  - v. Compensation for breach, not for penalties (all 50 states).
- b. Found at § 356(1) and UCC §2-718
  - i. Rest: 356(1): Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in terms of the anticipated or actual loss caused by the breach and the difficulties of

proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

- ii. UCC 2-718 (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the **anticipated or actual** harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. [NOTE: specifics in further subsections]

c. Vexing area of law == Anderson says “Hypocrisy”

d. Fundamental rule under contract law is Compensation Principle – court determines damages based on Compensation

- i. Thus there’s a presumption against the enforcement of liquidated damage provisions (Preempts court calculation)

e. So when can we enforce Liquidated Damages clauses?

i. Two prong Test

- 1. Damages must be uncertain or incalculable
- 2. LD provision must be reasonable approximation

ii. Uncertainty Principle

- 1. Only if the damages caused by the breach are uncertain or incalculable
  - a. Thus for sale of goods, LD almost never enforced
  - b. Exception for goods -- only for cases where time is at issue – failure to deliver goods on time

iii. Reasonableness

- 1. If uncertain, parties can substitute their opinions for that of the court
  - a. Parties are in best position to assess what damages would be
  - b. Must be a reasonable approximation of those damages

f. Will not bar EQUITABLE remedy

g. QUESTION FOR THE COURTS:

- i. Should the calculability and reasonableness of the approximation apply at the time the *contract was formed* or at the time of the *breach*?
  1. **Actual Damage Rule – Minority Rule** (Texas and 8-10 states)
    - a. Look at damages at time of breach
  2. **Anticipated Loss Rule – MAJORITY RULE**
    - a. Look at anticipated damages at time of K
    - b. Actual loss is irrelevant and is inadmissible as evidence even in determining the reasonableness of LD at the time of K.
- c. Take note of mutual mistake here
  1. If at time of K the parties were suffering from a mutual mistake to the extent that the K would not have been entered – any other provision would not be enforceable BUT LIQUIDATED DAMAGES IS NOT AFFECTED by mutual mistake.
- d. NO DAMAGES Exception
  1. Restatement 2d says if it's clear from record that no damages exist, LD clause will not be enforce
    - a. Example
      - i. Party A had K to perform or pay LD
      - ii. Party A sells biz to Party B
      - iii. Party A is in breach, Party B performs
      - iv. No Damages, so No LD enforced against A
- ii. Intent of the parties
  1. Intent unimportant, UNLESS
    - a. Party(s) did not intend to liquidate
    - b. Instead sought to cap or limit damages
      1. In that case, it's a penalty
- h. Land Sale Contracts
  - i. LD provision often enforced – 10-15% of agreed price

ii. Land is unique, not fungible

i. CASES:

i. Lake River v. Carborundum

1. LD provision was penalty on its face
2. Never adjusts for expenses saved
  - a. Mass Rule: Lost Expectations = K price - Exp Saved
  - b. Here, liq damages = K price
  - c. Therefore this LD > actual Lost Expectations
3. Invalidating LD does not deprive Lake River of a remedy, merely says LD provision is not the appropriate remedy here

j. Examples:

i. Lay-Away (prob 76)

1. LD provides that if Buyer stops paying, merchant keeps money & product
  - a. Penalty: The more the buyer pays in (ie the more they perform), the higher the damages

ii. Shotgun clauses in Lease (prob 78)

1. All breaches have single LD penalty
  - a. Penalty -- Some breaches are minor and some are major, but all treated same
  - b. Tie specific LDs to Specifically named breaches

iii. Two Late Road Contractors

1. Bridge built late, but road built even later
2. Courts usually enforce
  - a. Avoids Collusion between contractors which would cancel out LD provisions

vii. UCC Buyer/Seller DAMAGES (2-703 through 2-715)

1. Generally

a. 1-305:

- i. Remedies under the UCC must be liberally applied so as to cover damages but not as to provide windfall (no more/no less)

b. Whaley:

- i. Watershed event to determine damages is (Final) ACCEPTANCE OF GOODS (defined in 2-606)
- ii. 2-601: if the seller tenders bad goods, the buyer can reject the bad

goods

- iii. 2-608: if accepts them he can revoke the acceptance of the bad goods

## 2. FOR BUYERS

### a. AFTER ACCEPTANCE, buyer's remedy is 2-714

- i. If defect in Tender of goods (e.g. late arrival), can be by any manner reasonable under the circumstances
- ii. Subsection (2): Bad Goods (Breach of warranty actions)
  - 1. buyer finds out early on, but needs the goods so he keeps them
  - 2. latent defect at time of acceptance but time for rejecting has passed by the time it's discovered
  - 3. REMEDY: Difference between value of goods as warranted and value of goods as delivered (most common measure = Cost of Repair)
  - 4. If not reparable: Market Value – In market in which the aggrieved party has access (with evidence of such being contract price)

### b. BEFORE ACCEPTANCE, buyers remedy is 2-711

- i. 2-711: Damages measured in 2 components
  - 1. Buyer gets refund of payments toward purchase
  - 2. PLUS gets one of two measures of damages (2-712 or 2-713)
    - a. 2-712 Cover Remedy
      - 1. New in 1960s–UCC introduced
      - 2. Cover the ADDITIONAL costs of purchasing a substitute
      - 3. Cover must be “in substitution” for the goods (e.g. if the subsequent purchase would have been made anyway, it's not cover)
      - 4. Must deduct amount of profit made off of covering with higher quality
      - 5. NO OBLIGATION TO COVER, BUT the obligation to cover doesn't take into account 2-715(2)(a) which allows for incidental and consequential damages (must mitigate those damages)
      - 6. Lack of obligation to cover meant only to address no need to cover in order to collect market-based damages (MITIGATION)

[OR]

- b. 2-713 Difference in Price and Market Value
  - 1. Only applies to the extent that the buyer did not cover (cmt. 1)
  - 2. Cover always trumps Mkt Price (cmt.5)

### 3. FOR SELLERS

#### a. AFTER (final) ACCEPTANCE OF GOODS

- i. 2-709 – Action for the Price
  - 1. Buyer gets to recover full payment of the contract price
  - 2. Always compensatory
  - 3. Identically enforces specific performance
  - 4. Very limited in application; only:
    - a. After Acceptance
    - b. Risk of Loss with Buyer
      - 1. Goods lost, damaged or destroyed after contract but before pickup/delivery
      - 2. 2-509, 2-510 (need not study)
    - c. Goods not reasonably resellable (no market; customized goods OR fad goods which have lost their marketability)

#### b. BEFORE ACCEPTANCE

- i. Two categories:
  - 1. Completed Goods
    - a. Look to any of 3 options
      - 1. 2-706
      - 2. 2-708 (1)
      - 3. 2-708 (2)
    - b. The three formula will end up with different calculations; so what should the court do?
  - 2. Incomplete Goods: Not yet begun MFR or mid-MFR
    - a. Look to 2-708 (2)
- ii. 2-706: Resale Remedy
  - 1. Damages = K price – Resale Price
  - 2. Mainly for private resale situations
  - 3. Not good for lost volume; Also usually not good for high volume but not lost volume sellers; better for one-off products
    - a. Must give buyer reasonable notice of resale except when perishable or rapidly declining in value

- iii. 2-708 (1): Market Formula
  - 1. Damages = K price – Mkt Price
    - a. Can't recover more than resale formula provides (Coast Bank v. Cutty)
- iv. 2-708 (2): Lost Profit – MOST WIDELY USED for reasons related to lost volume issues
  - 1. (Including reasonable Overhead)
  - 2. Similar to CT rule Profit + Expenses Incurred (less due credit for payments made; less proceeds from resale of incomplete goods as scrap)
    - a. resale only applies to incomplete scrap
  - 3. 2-704 (2) Mitigation required: Seller must act reasonably to mitigate breach for incomplete goods by either scrapping or completing and selling
    - a. Be sure to include expenses to complete AND lost opportunity (scrap price) in calculating whether to complete or scrap

|        | Before Acceptance                                                                          | After Acceptance                                                                                                    |
|--------|--------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| Buyer  | 2-711 + 2-712 OR 2-713<br>Refund of Payments towards K +<br><br>Cover OR<br>Market Formula | 2-714<br>Defect of Tender: Reasonable<br>or<br>Bad Goods: Market value OR<br>cost of repair (+<br>incidental/consq) |
| Seller | 2-706 OR 2-708(1) OR 2-708(2)<br>Resale Remedy or<br>Market Formula<br>Lost Profit         | 2-709<br>K Price (used only after<br>acceptance, after Risk of Loss<br>x-fers, or if not resellable)                |

- 4. Case: Teledyne v. Teradyne
  - a. Issue:
    - i. Not on individual item but on sales
    - ii. Could they have made both sales? If so, lost volume seller.
    - iii. How to calculate Overhead
      - 1. K - Variable cost = Gross Profit

- b. Lost Volume Seller
  - i. Second sale is not resale – second sale would have been made regardless of breach
  - ii. Most breaches of sales in commercial setting are lost volume sales
    - 1. Economic literature says that's not true
  - iii. Courts assume that a commercial seller is a lost volume seller
    - 1. Only have to prove that
      - a. you could have made both sales
      - b. both sales would have been profitable
  - iv. (Situations where sellers are not lost volume)
    - 1. Demand exceeds supply
- c. Overhead:
  - i. Fixed in the sense that once the contract is breached, the expense does not change
  - ii. As opposed to variable cost in the sense that they can be saved as a result of breach
- d. Variable Costs:
  - i. Labor
  - ii. Mat'ls
  - iii. Packing/Shipping
- e. WHY do you get to recover overhead?
  - i. UCC says profit INCLUDING reasonable overhead (not “plus” overhead).
  - ii. Unless you charge breacher with their share of overhead, you're going to reduce profitability of all remaining contracts.
- f. How do you calculate?
  - i.  $K - \text{Total Costs} + \text{Fixed Costs} = \text{Gross Profit}$
  - ii. Better way:
    - 1.  $K - \text{Variable Costs} = \text{Gross Profit}$  (Staley: “Overhead should always be a tacit award”)

#### viii. RESTITUTION

- 1. QUANTUM MERUIT TYPES:
  - a. Quasi-Contract Actions (Action for unjust enrichment)
  - b. [Implied in Fact K??] (Recover on value or benefit??)
  - c. Alt. Measure of Damages or Independent Remedy for breach of enforceable K
    - i. For either
      - 1. Non Breaching party
      - 2. Independent remedy for party who has breached enforceable

## K

### 2. Remedies of Restitution (All LEGAL Remedies)

- a. Quantum Meruit : the benefit derived from services rendered by another
  - i. Quantum Valebant: the value of property (goods) delivered to another (generally now included under Quantum Meruit)
- b. Money had and received: money unjustly held by one person but belonging to another (paid by mistake; overpaid; etc. – drug dealer example from fall)

### 3. Restitution for Quasi-Contract

- a. Kingpin of Restitution
- b. Found wherever
  - i. Benefit/enrichment in hands of defendant
  - ii. Injustice if it were to be retained
- c. Can replace Conversion tort
  - i. One can “waive the tort and sue in assumpsit”
  - ii. Disgorges all of unjust enrichment, not just value at time of taking
- d. Day v. Caton (if it were treated as Quasi-Contract)
  - i. Three ways to measure unjust enrichment
    - 1. Value gained (increase in property value)
    - 2. Ordinary expense of building such a wall (Mkt value of expenses)
    - 3. Actual cost
  - ii. 3 different numbers all reasonably calculated to measure the unjust enrichment – Which to choose?
    - 1. In Day: Actual cost
    - 2. In Restatement 2d Contracts §371 “as justice requires”
- e. Quasi K both disgorges unjust enrichment AND reimburses P
- f. MAGLICA v MAGLICA
  - i. Court says it’s QM
    - 1. But court analyzes as QC
  - ii. Court says it’s an Equitable Remedy
    - 1. NO. IT’S A LEGAL REMEDY
  - iii. Court indicates that this is a QC issue, but it’s really Implied-in-Fact
  - iv. Court says proper measure is not benefit to the D
    - 1. BUT IT IS supposed to be the benefit to the D
    - 2. ONLY MEASURE IN QC is benefit to the D
      - a. Question is over determining “How much of that

benefit is it unjust for him to retain?"

v. COURT DOES PROPERLY remand on basis of Implied-in-Fact jury instructions

1. Jury Instructions misconstrued what could represent Implied-in-Fact
2. Trial court said disregard entirely living together, holding out as husband and wife, companionship in determining whether there was an implied in fact contract
3. Appeals court holds that such is evidence of such, even if not proof in and of itself

g. FEINGOLD V. PUCELLO

- i. Contingency Fee Attorney (never actually engaged)
  1. Unrequested Benefit
  2. No actual benefit
  3. No Quantum Meruit

4. Restitution for Breach of K

a. CONSTRUCTION

- i. QM available as remedy for breach of K
  1. For either Breaching or Non-breaching party
  2. Limitations
    - a. P has not begun performance
      1. Remedy: None; No benefits conferred
    - b. P has completed Performance
      1. Remedy: Unpaid K price

ii. Restatement § 371 Measure of Restitution Interest

1. Can recover either
  - a. Benefit Conferred
  - b. Reasonable Value
2. ... as justice requires

iii. US v. ALGERNON BLAIR

1. Construction K
  - a. Kor breaches with Sub-Kor
  - b. Sub-Kor had terrible K terms
  - c. Sub-Kor sues on QM rather than K price
2. COURT
  - a. Remands with instructions to award reasonable value

of services

- b. Attorneys on Contingency who are dumped mid-case (Rosenberg v. Levin)
  - i. CONTRACT RULE – historic rule
    - 1. Bound only to pay him lost expectations
    - 2. Can't recover contingency that doesn't pay out
      - a. so attorney who has been dumped gets nothing regardless of outcome
  - ii. QUANTUM MERUIT – Martin v. Camp (Majority)
    - 1. Reasonable Value of Services
    - 2. NY Rule – Accrues at discharge
      - a. (Therefore can recover if contingency does not occur)
    - 3. CA Rule – Accrues at disposition of underlying case
      - a. (Therefore CANNOT recover if contingency does not occur)
      - b. Recover only if client ends up winning
- c. MODIFIED QUANTUM MERUIT RULE LIMITED BY K PRICE
  - i. Apply QM rule, but don't allow more than K price
- d. BREACHING PLAINTIFF
  - i. Old Rule:
    - 1. Innocent Breacher can recover Reasonable Value of Svcs
    - 2. Willful Breacher takes nothing
  - ii. New Rule (Britton v. Turner)
    - 1. If non-breaching party derives benefit in greater than damages, reasonable value of partial performance is due to the breaching party
      - a. Limited by total K price
  - iii. BRITTON v. TURNER
    - 1. 12 month K
    - 2. 9.5 months in, P quits K
    - 3. P sues for work done up to this point
      - a. Action to disgorge unjust enrichment
        - 1. Even though there's actual K
        - 2.
      - b. 2-718(2) (seller returning breaching buyer's deposit)
        - 1. Even when buyer is in breach he is entitled to recover back his down payment
        - 2. Seller can deduct his damages and deduct smaller of \$500 or 20 percent of value of promised performance not to exceed the K

price (in absence of Liq. Damages Provision)

- e. Equitable Remedies (Injunction / Specific Performance)
  - i. Equity  $\neq$  right
  - ii. Actions in law are required if case is met
  - iii. Actions in equity are discretionary if case is met
    - 1. Goods are readily replaceable and require unique or other proper circumstances for SP (rare outcome)
    - 2. Land is a possibility for SP
  - iv. CENTEX HOMES CORP. V. BOAG
    - 1. Remedies for seller not the same as buyer
      - a. mutuality of obligation does not equal mutuality of remedy
  - v. LACLEDE GAS CO V. AMOCO OIL CO.
    - 1. Long term supply K for oil/gas was unique
    - 2. Consider goods themselves but also the nature of the K
  - vi. LUMLEY V. WAGNER
    - 1. Can't force someone to perform a service, regardless of how unique service is (slavery and coercion)
- f. Defenses to Quantum Meruit
  - i. Benefit was not unjust
    - 1. given as a gift (consider relationship of parties)
  - ii. No benefit received

# STATUTE OF FRAUDS (Rest. 2d §§ 110-150; UCC 2-201)

## 1. Generally:

- a. To be enforceable against a party, there must be a writing signed by that party when:
  - i. K in consideration of marriage (dowry promises by 3d party e.g. father)
  - ii. K for services which cannot be performed in less than a year
    - 1. Possibly vs. Reasonably (split)
    - 2. If death is a specific terminating event (e.g. "lifetime K"), then K not within statute
    - 3. If K not of determined length, K not within statute
  - iii. K for interest in Real Property
  - iv. K which that an Executor will personally pay obligation of an estate
  - v. K for goods > \$500 (UCC 2-201)
  - vi. K in surety
- b. Mnemonic: MYLEGS
  - i. Marriage
  - ii. Year
  - iii. Land
  - iv. Executor/Estate
  - v. Goods (\$500)
  - vi. Surety

## 2. What to Consider RE Statute of Frauds

- a. Does SOF Apply?
- b. Does the Writing Satisfy SOF?
- c. Does an exception to the SOF apply?
- d. Even then, does Promissory Estoppel or Unjust Enrichment apply to make K enforceable anyway?

## 3. Requirements of the Writing

- a. Memorandum or note regarding the promise to be enforced, containing:
  - i. Subject matter of K
  - ii. Essential terms of the unperformed promises
    - 1. Essential term = Term necessary to resolve the litigation
    - 2. (writing is not insufficient merely because it omits or misrecords a term)
    - 3. Goods K - Only essential term is quantity
      - a. (exception: Output or Requirements K)
  - iii. "Signature" of party against whom the promise is to be enforced
    - 1. Includes any symbol of intention to accept the writing, even letterhead
- b. May be multiple writings which, when taken together, refer to one K (Crabtree)
  - i. Relation Rule: Must relate to the alleged transaction (Majority, Restatement 2d)

- ii. Reference Rule: Must refer directly to the signed writing (Minority, Texas 2008)
- iii. One must be signed

#### 4. Exceptions and Narrow Constructions

##### a. Generally

- i. Admission by party to be charged
  - 1. If party raising SOF defense has admitted facts sufficient to show existence of K in pleadings/testimony
    - a. Up to extent/quantity admitted
- ii. Full Performance
  - 1. If both parties have fully performed
- iii. Part Performance
  - 1. In some Jdxn, enough to enforce entire K -- both the executed and executory portions; otherwise
  - 2. Up to extent already delivered/performed/paid unless indivisible (similar to Admission limits)

##### b. General Faux Exceptions (Actually alternate theories under which party can recover without showing existence of enforceable K)

##### i. Detrimental Reliance

- 1. Promissory estoppel can be applied in many but not all jurisdiction when the charging party detrimentally relies on the otherwise unenforceable contract.
  - a. Majority allows this
  - b. Texas does not
  - c. Not generally applied to employment Ks (at will for period > year without writing)
- 2. Equitable Estoppel (Misrepresentation that a writing is not required or that the writing has been signed; or a promise to provide a signed writing which is then not carried out)

##### ii. Unjust Enrichment

##### c. Marriage Exceptions:

- i. Does not apply to the actual promise TO marry

##### d. Exceptions for Services which cannot be completed in less than a year

- i. Does not include services of undetermined length even if they take more than a year
- ii. Does not include services which were anticipated at time of K to take less than a year which take longer
- iii. ??? Does not include services which can be performed in less than a year even if the anticipated completion date is over a year away (e.g. K in March 2013 for services from May 2013 to April 2014).???
- iv. If one party has fully performed, K may be removed from SOF

e. Land Exceptions:

- i. Party seeking to enforce, in reliance on agreement of party breaching, has so changed his position that injustice can only be avoided by specific performance.
  - 1. Generally this requires combination of:
    - a. Consideration Paid
    - b. Possession Taken
    - c. Improvements Made
- ii. Generally part performance in land not good enough for monetary damages

f. Goods Exceptions:

- i. Merchant Confirmation Rule (UCC 2-201(2)) (*Thompson Printing*)
  - 1. If one merchant sends a writing sufficient to satisfy the statute of frauds to another merchant and the receiving merchant has reason to know of the contents of the sent confirmation and does not object to the confirmation within 10 days, the confirmation is good to satisfy the statute as to both parties.
- ii. Specially Mfd Goods (UCC 2-201(3)(a))
  - 1. Goods are Specially Mfd;
  - 2. Seller has either
    - a. Begun Mfg; or
    - b. Entered a 3d Party K for Mfg; and
  - 3. Goods are not the sort that seller could sell to others in his normal course of business.

5. MODIFICATIONS

a. Land:

- i. Acreage change requires writing
- ii. Other term change (price, date, etc.): Split
  - 1. Majority: Can be oral
  - 2. Minority: Requires writing

b. One-Year Service

- i. Modification requiring more than one year = Within statute
- ii. Modification of < 1 Year service added on to K of < 1 year service
  - 1. May fall within statute depending on jdxn
  - 2. E.g. 9 month K with modification adding 6 more months
  - 3.

## STATUTE OF FRAUDS EXCEPTIONS

| Exception                                        | Marriage  | Year      | Land                                      | Executor  | Goods                                                                                         | Surety       |
|--------------------------------------------------|-----------|-----------|-------------------------------------------|-----------|-----------------------------------------------------------------------------------------------|--------------|
| Admission                                        | YES       | YES       | YES                                       | YES       | YES                                                                                           | YES          |
| Full Perf.                                       | YES       | YES       | YES                                       | YES       | YES                                                                                           | YES?         |
| Full Perf. One Party only                        |           | Yes       |                                           |           |                                                                                               |              |
| Part Perf.: Executed portion of K                | YES       | YES       | Consideration, Possession, & Improvements | YES       | Payment or Goods must be rec'd & accepted; only for portion paid/delivered (unless indiv'ble) | YES?         |
| Part Perf.: Executory bilaterally                | SOME JDXN | SOME JDXN | SOME JDXN                                 | SOME JDXN | NO                                                                                            | SOME JDXN    |
| Promise to Marry                                 | Yes       |           |                                           |           |                                                                                               |              |
| Undetermined length                              |           | Yes       |                                           |           |                                                                                               |              |
| Longer than expected                             |           | Yes       |                                           |           |                                                                                               |              |
| Actual Perf. less than a year                    |           | Yes       |                                           |           |                                                                                               |              |
| Land: Changed Position (Consd'n Improve & Poss.) |           |           | Specific Perf.                            |           |                                                                                               |              |
| Merchant Confirmation Rule                       |           |           |                                           |           | 10 days w/o objection                                                                         |              |
| Specially Mfd Goods                              |           |           |                                           |           | If: can't be sold to others normally & begun or 3d party K for mfg                            |              |
| Primary Purpose to protect OWN interest          |           |           |                                           |           |                                                                                               | Yes (Yarbro) |

# PAROL EVIDENCE RULE

## 1. Three Steps

- a. Decide whether or not the rule applies
  - i. Need a written K (doesn't have to be signed)
  - ii. Must show some agreement outside of K
- b. Does the parol evidence rule bar this evidence?
  - i. Bars all prior oral or written evidence OR any contemporaneous oral evidence
  - ii. Doesn't bar contemporaneous written evidence (2-202)
    1. Writings executed simultaneously are to be interpreted together
  - iii. Never bars subsequent!
- c. Is the writing integrated w/ respect to the evidence (does the writing bar the evidence)
  - i. Full integration
    1. This is all of it; this writing is the entire agreement
    2. You can't add anything and you can't conflict w/ the writing
    3. Bars all evidence w/in its scope
    4. Bars CATs (Consistent Additional Terms)
  - ii. Partial integration
    1. An integration which is not full
    2. It, but not all of it...
    3. Could be more to the agreement
    4. DOES NOT bar CATs
      - a. unless the writing is integrated w/ respect to that term
  - iii. How to figure out if it's fully integrated:
    1. Merger Clauses
      - a. Good evidence that parties intended full integration
      - b. But, not dispositive
        - i. Boilerplate language thrown into most K's
        - ii. In reality, you can't know until you see the evidence
        - iii. Law's distinction between full & partial is a crock
    2. Restatement Tests
      - a. shifted from Restatement to Restatement 2d
        - i. Majority & First Restatement
          1. "Would we naturally expect to find this in writing of **this type of agreement?**"
        - ii. Minority & 2d Restatement
          1. "Would we naturally expect to find this in the writing of **these parties?**"
    3. UCC Test (2-202)
      - a. Would the term **certainly** have been included?

- d. **ANDERSON'S 7 CATEGORIES OF EXTRINSIC EVIDENCE**
  - i. **Conflicting Terms (BOTH FULL & PARTIAL INTEGRATION BAR)**
  - ii. **CATs (consistent additional terms)**
  - iii. **Conditions Precedent**
  - iv. **TU (Trade Usage)**
  - v. **COD (course of dealing)**
  - vi. **COP (course of performance)**
  - vii. **Terms that define or give meaning!!!! (Parol evidence rule NEVER bars such terms!!!)**
    - 1. **Only bars evidence that goes to the content of the writing**
    - 2. **DOES NOT BAR EVIDENCE OF**
      - a. **Meaning**
      - b. **Intent**
  - viii. **Lastly – Not really extrinsic evidence**
    - 1. **Evidence of Defenses is NEVER BARRED (Goes to enforceability)**
- 2. **Hierarchy of Evidence (UCC 1-303)**
  - a. Express Terms
  - b. Course of Performance
  - c. Course of Dealing
  - d. Trade Usage (although sometimes given preference, esp. when it gives meaning to Express Terms)
- 3. **Application**
  - a. Only applies to agreements prior or contemporaneous to the written K in question
- 4. **Exceptions to the rule**
  - a. **MITCHELL v. LATH**
    - i. Whether the writing by the parties is integrated in respect to the agreement to move the ice house
      - 1. Majority and Dissent: Seller agreed to move Ice House; fully integrated
      - 2. Majority: PER makes agreement to move ice house unenforceable
        - a. Would parties expect this term to be in the writing
        - b. Agreements were not separate because they are related/connected
          - i. 4 corners is effect; since its not in the writing its not enforceable
      - 3. Dissent: If the parties have adopted a writing it is a conclusive presumption that its a full integration
        - a. Agrees that 4 corners rule applies, BUT
        - b. Moving the Ice House was a separate K (Collateral Agreement)
          - i. Consideration under separate K was the buyer's agreeing to land conveyance K
  - b. **LEE v. SEAGRAM (still in NY as was Latham)**

- i. Agreement for sale of company and new franchise
  - ii. Collateral Agreement (Not subject to PER)
  - iii. Agreement was outside the scope of the sale of the franchise because:
    - 1. Would you naturally expect this agreement to be in writing? NO
      - a. Significant Relationship
        - i. Relevant to determine whether or not they would operate on a handshake and mutual trust
      - b. Corp deal vs. Personal side deal
        - i. Not all parties to Corp deal were part of side deal
        - ii. Akin to buyout with concomitant employment agreement
    - 2. Absence of merger clause:
      - a. Argues strongly that this was not a singular agreement
      - b. Presence of merger clause is not dispositive
- c. BETACO v. CESSNA
- i. ISSUE: Whether a brochure indicating gas mileage of a jet was admissible as a warranty
  - ii. K included merger clause and warranty disclaimer
  - iii. UCC test: whether it certainly would have been included
  - iv. Ct. holds K is fully integrated w/ regards to warranties
- d. CONDITION PRECEDENT as defense against K formation
- i. CONDITIONS PRECEDENT look like CATs
  - ii. 100% of courts agree that PER does not bar evidence of defenses (but see Luria)
  - iii. Conditions precedent are on fence between a CAT and a defense
    - 1. RULE:
      - a. Evidence is admissible; PER does not bar it unless it is in direct conflict with a term of the writing
      - b. Most courts require Clear & Convincing proof for Condition Precedent
  - iv. Restatement 2d § 217. Integrated Agreement Subject to Oral Requirement of A Condition
    - 1. Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition
- e. PYM v. CAMPBELL
- i. Sale of machinery conditioned on OK from second engineer yet to inspect
  - ii. "Lets go ahead and put this down while we're here; if Abernathie approves the machinery, we have a deal."
  - iii. PER does not bar evidence
    - 1. K was not enforced b/c condition was precedent to K
    - 2. Condition did not occur, therefore there was no K

- f. LURIA BROS. & CO. v. PIELET BROS. SCRAP IRON
  - i. PER bars evidence; Condition precedent treated as a CAT (MINORITY VIEW)
  - ii. This CAT was inconsistent, therefore no Parol Evidence of Condition Precedent permitted
- g. HUNT FOODS CASE (Majority View)
  - i. Evidence of a Condition Precedent is not barred by PER

## 5. INTERPRETATION

- a. Approaches:
  - i. Provisional Admission Approach (CORBIN):
    - 1. Although the language of a K is facially unambiguous, P can offer parol evidence to show that the writing taken in context with extrinsic evidence is ambiguous or incorrectly states intent
  - ii. 4 Corners (WILLISTON):
    - 1. Look only to the 4 corners of the document
      - a. You can't use extrinsic evidence to create an ambiguity
- b. Admissibility of Evidence of Surrounding Circs and Evidence of Intent
  - i. EICHENGREEN v. ROLLINS (alarm company and house fire) (4 corners vs provisional admission)
    - 1. P sought to introduce evidence going to meaning/intent of K
    - 2. D argued that these were rather Consistent Add'l Terms
    - 3. COURT:
      - a. These are CATs
      - b. Further, this jdxn has rejected provisional admission, therefore, Court may only consider extrinsic evidence when there is an ambiguity within the four corners
  - ii. PACIFIC GAS & ELECTRIC CO. v. G.W. THOMAS DRAYAGE & RIGGING CO.
    - 1. Hallmark for the Provisional Admission approach
    - 2. Issue: what does "indemnify" mean?
    - 3. Judge can hear what the extrinsic evidence is on their own w/out jury or can hear it and decide to tell the jury to disregard it
      - a. Trainor's test to decide whether to exclude:
        - i. Is it relevant?
        - ii. Are the words reasonably fair?
  - iii. CHICKEN case (Anderson's fav case)
    - 1. Both meanings would work, so, the judge adopted the broader interpretation

· Admissibility of Evidence of TU, COD, COP

iv. NANAKULI & ROCK CO. v. SHELL OIL CO.

1. Issues:
  - a. Whether the price protection a contradiction of Shell's posted price
    - i. Held: No, it explains or supplements it
  - b. Whether these two occasions represent a waiver or meaning of the K?
    - i. Held: meaning, bc Shell had price protected before and it was common in TU
2. TEST: should the party have reasonably known of the TU?
3. UCC 1-303: states an order of priority for evidence
  - a. (1) Express terms
  - b. (2) Course of performance (how these two parties performed this particular contract)
    - i. One COP is not enough
  - c. (3) Course of dealing (how these two parties perform not this contract but other prior contracts like this contract)
  - d. (4) Usage of Trade (how parties –not these parties – perform contracts –not this particular contract – but like this contract (contracting of similar parties generally)
    - i. Can explain or supplement, but not contradict
    - ii. Can include people not necessarily in that trade
    - iii. Reason to know standard
  - e. Anderson Says: In reality, Trade Usage almost always trumps Express Terms
4. UCC 2-202:
  - a. Terms set forth in writing are are final expression of agreement and and may not be contradicted by evidence of a prior agreement or contemporaneous oral agreement but may be explained or supplemented
    - i. by COD, COP, or TU
    - ii. By evidence of CATs unless the court finds the writing to have been complete and exclusive statement of terms
  - b. Careful negation test - unless carefully negated by the writing, it is to be let in (directly negated) (2-202 Comments)
5. Final Issue: Waiver vs. Meaning (Does COP indicate meaning or waiver?)
  - a. 2-209: Waiver is preferred over a meaning (or modification)
    - i. choosing waiver allows flexibility of the K and can be taken back
    - ii. meaning/modification would forever bind Shell
  - b. Here however

- i. two occasions + well established trade usage = Meaning

- c. Parol Evidence and Interpretation Conclusion

- i. ZELL v. AMERICAN SEATING

- 1. WWII profiteering
    - 2. PER has so many exceptions, courts should only impose it in limited circumstances

## AVOIDANCE OF THE CONTRACT

### 6. MISTAKE

- a. Misunderstanding

- i. Restatement 2d § 20 Effect of Misunderstanding

- 1. (No K) There is no mutual assent if the parties attach materially different meanings AND
      - a. neither party knows/has reason to know the other's meaning OR
      - b. each party knows or has reason to know the other's meaning.
    - 2. (K is valid) Manifestations of the parties are operative in accordance with the meaning attached to them by party A if
      - a. Party A does not know of any different meaning attached by Party B but party B knows/has reason to know the meaning attached by Party A

- ii. RAFFLES v. WICHELSHAUS

- 1. 2 ships sailing at different times (Peerless)
    - 2. Rule: Where neither party knows or has reason to know, ambiguity is given the meaning that each party intended it to have
    - 3. Court ruled that this was not a mistake but a misunderstanding (not correct result - was actually a mistake)
    - 4. NO binding contract
      - a. Both parties are mistaken as to the facts that are the fundamental basis of the K
      - b. Didn't matter which was more reasonable as long as there was an honest belief
    - 5. Mutual mistake v. No meeting of the minds
      - a. Depends on how far the contract went, and at what point the mistake was discovered

- b. Mutual Mistake

- i. Restatement 2d § 152 Mutual Mistake

- 1. To avoid K mistake must be:
      - a. Mutual
      - b. Material

2. **Effect of Mutual Mistake**
  - a. **If found, either party is generally allowed to rescind**
    - i. **Except if that party bears the risk of the mistake under § 154**
  - b. Restitution is available for considerations already exchanged
- ii. **SHERWOOD v. WALKER (Fertile cow)**
  1. Mutually mistaken as to the fact of the fertility of the cow
  2. Majority:
    - a. Mistake when it is to the whole substance of the agreement
    - b. Required mutuality -- both parties believed the cow to be barren
    - c. Not about the quality of the cow but rather its very nature
    - d. K invalid
  3. Dissent:
    - a. Unilateral mistake
      - i. Nothing to indicate that he would have bought her only if she would breed
      - ii. Walker was mistaken as to quality and unless P knew or should have known about that mistake, he was not taking advantage
      - iii. Valid K
- iii. **WOOD v. BOYNTON (Ignorant jewelry seller)**
  1. Absent evidence of fraud, mutual mistake as to the nature and value of a thing sold will not allow a basis for rescission of K where the thing sold is the same as the thing delivered
  2. Risk was borne by the seller; proceeded w/ uncertain knowledge, but deemed it sufficient
  3. Valid K
  4. **§ 152 Mutual mistake**
    - a. Mistake of both parties makes a contract voidable, unless party bears risk of mistake under 154
  5. **§ 154**
    - a. RISK ALLOCATION—when a party bears the risk of a mistake
    - b. Mutual mistake is not granted if one of the parties is allocated the risk of that mistake
      - i. He is aware, at the time the K is made, that he has only limited knowledge w/ respect to the facts to which the mistake relates but treats limited knowledge as sufficient, or
      - ii. the risk is allocated to him by the court on the ground that it is reasonable to do so
- iv. **BAILEY v. EWING (Lilac bushes)**
  1. **§ 161**
    - a. Failure to disclose is fraudulent if disclosure comports with standards of good faith and fair dealing
- v. **WILLIAMS v. GLASH (Car accident w/no observable injuries until later)**

1. When personal injury is involved, the risk ratchets up
2. In this case, the personal injury was not bargained-for
3. Same scenario as § 152 Illustration 12

c. Unilateral Mistake

- i. §153 Unilateral mistake that voids the K exists when:
  1. enforcement would be unconscionable; OR
  2. the other party had reason to know of the mistake of the other
- ii. Rare as hell - Courts rarely allow this in
- iii. Never a defense if mistake was related to bad judgment
- iv. Gross negligence is the standard
  1. NOT want of ordinary care
- v. Prerequisites for obtaining relief for Mistaken Contractor Bids:
  1. Mistake is of such consequence that enforcement would be unconscionable
  2. Mistake must relate to the substance of the consideration
  3. Mistake must have occurred regardless of exercise of ordinary care (Anderson says "Total bunk! Really Gross Negligence Standard")
  4. It must be possible to place the other party in status quo
- vi. FIRST BAPTIST CHURCH OF MOULTRIE V. BARBER CONTRACTING CO. (Mistaken bid case)
  1. Factors for relief
    - a. Clerical Error
    - b. Unintentional
    - c. Arising out of ignorance or misplaced confidence

d. Reformation

- i. In essence:
  1. Don't reform agreements (deal itself)
  2. Reform writings (that don't reflect deal)
- ii. Ex: Scrivener's error
- iii. Discretionary equitable remedy
- iv. Rest. 2d § 155: When Mutual Mistake Justifies Reformation
  1. We're not reforming the deal, we are reforming the writing that doesn't accurately reflect the deal
  2. Don't change where it affects GFPs or other third party rights
- v. Clear and convincing evidence standard

e. Unconscionability

- i. §153
- ii. Decent people will cover their mouths and run away at the thought
- iii. 2 Types of Unconscionability (**Leff Test**)
  1. Procedural
    - a. Bargaining process issue

- b. Ex: abuse of leverage, other items that taint the K process
  - 2. Substantive
    - a. Issue w/ provision itself
  - 3. Anderson says: Sliding scale: the more of one type you have, the less you need of the other
- iv. UCC 2-302
  - 1. If unconscionable may refuse to enforce K or enforce K less unconscionable part
  - 2. If K appears unconscionable, the court is given a reasonably opportunity to present evidence as to its commercial setting, purpose and effect to aid the court
- v. RESTATEMENT 211(3)
  - 1. "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term the term is not part of the agreement"
    - a. But this gets largely ignored by the courts
    - b. ANDERSON: Goes well with Mutual Assent law
- vi. Factors:
  - 1. bargaining power
  - 2. one-sidedness of deal
  - 3. how K was presented (adhesion)
  - 4. ridiculousness - no one would agree
- vii. WILLIAMS v. WALKER-THOMAS FURNITURE CO. (poverty-ridden areas)
  - 1. Cross-collateral clause
    - a. Don't own anything until you've paid for everything
    - b. Incentive to keep customers paying down their debts
  - 2. Remanded for review of UCC (newly adopted)
  - 3. Generally:
    - a. Nat'l Comm'n on Consumer Finance
      - i. Cross-Collateral Clauses are:
        - 1. Not unconscionable
        - 2. necessary ingredient to doing business
          - a. Those companies are only ones willing to fill void
- viii. AT&T v. CONCEPCION
  - 1. Claim: substantive unconscionability
  - 2. An arbitration clause is not unconscionable
- ix. WEAVER v. AMERICAN OIL (sprayed with gas)

1. Oil company exculpation clause + Indemnification Clause
2. Holding: Unconscionable
3. Weaver had limited understanding of provisions of K
4. Presumption in contracts is that even when there are terms not in your favor, you should at least be able to assume that they are reasonable (when you don't read the contract)
  - a. You should not be presumed to have agreed to unconscionable, unreasonable terms
5. These provisions are just so special, there must be a meeting of the minds and it must be demonstrated that they were clearly communicated to the other party
6. Dissent:
  - a. Standardized form K w/ indemnification provision
  - b. Indemnification clause here is worse than exculpation clause
  - c. Gross negligence cannot be exculpated
7. Anderson's Proposed Rule: Exculpation and indemnification Clause's with dramatic effect should be allowed only where the provision should be carefully communicated and explained to the parties.
  - a. Special provisions should be communicated
  - b. You must demonstrate that you have communicated the clauses (ex: initial here)

f. ~~Impossibility~~ - Excuse

i. Three Types:

1. Failure of a thing (essential to the performance of the contract)
  - a. most common type
  - b. UCC 2-613 - Casualty to Identified goods
    - i. Situations in which risk hasn't passed to buyer
    - ii. By no fault of seller, goods are destroyed
    - iii. Seller is excused if:
      1. Goods identified at time of K
      2. K requires those particular goods
    - iv. If partial loss: buyer's option to inspect and either avoid K or accept with due allowance for deterioration or deficiency
    - v. Total loss: Voided
2. Commercial Impracticability (§ 2-615)
  - a. There must an occurrence of a condition (the non-occurrence of which was a basic assumption of the contract)
  - b. Renders performance impracticable (super-impractical)
    - i. Something that
      1. Parties don't anticipate
      2. Goes to the heart of the K

3. Frustration of Purpose
  - a. Event or failure renders moot a fundamental purpose of the contract
  - b. e.g. Krell (Coronation Cases)
- ii. Where excuse does not apply (§266)
  1. Affirmative Fault
  2. Assumption of the Risk
    - a. See Occidental Crude sales
      - i. Force majeure did not apply
    - b. See Tomlinson
      - i. Foreseeability – sufficiently foreshadowed
- iii. Express Clauses:
  1. FORCE MAJEURE CLAUSE
    - a. Will be narrowly construed by court
      - i. Again see Occidental - could theoretically have taken “reasonable steps” to comply (however stupid it would have been)
- iv. TAYLOR v. CALDWELL (Music hall burned down)
  1. Failure of a thing
  2. No liability; unforeseen event
  3. Impossibility to perform the K
    - a. basic assumption of the K was destroyed
  4. Released unless he assumed the risk or if the risk is allocated to him
    - a. If it was foreseeable he assumes the risk
  5. Essential distinction between Mistake and Excuse
    - a. Mistake: about an existing fact at the time of the K
    - b. Excuse: something that happened later to destroy an existing fact at the time of the K
- v. SUNFLOWER ELECTRIC COOPERATIVE INC v. TOMLINSON OIL CO. (oil)
  1. Failure of a thing b/c no oil was ever even available
  2. 266
    - a. Where at the time a contract is made, a party's performance under it is impracticable w/out his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the K is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
  3. Existing excuse = mistake
  4. Impossible to perform, BUT Sunflower assumed the risk (had uncertain knowledge but proceeded accordingly)
    - a. Should have foreseen risk
- vi. NISSO-IWAI CO. v. OCCIDENTAL CRUDE SALES (Libyan Oil)

1. Liable even though Force Majeure clause because could have taken reasonable steps to comply

vii. OFFSET OF RELIANCE EXPENSES under EXCUSE

1. ENGLISH

- a. Under Coronation cases:
  - i. Money paid at time purpose was frustrated stayed with parties
- b. English courts overruled that part of coronation cases in 1943 Fibrosa Case
  - i. Refunded full deposit to equipment buyer even though mfr had spent significant money in reliance
- c. Parliament immediately passed law that any unjust enrichment claim under frustration of purpose could be offset by reliance expenses

2. AMERICAN

- a. **NO RULE IN AMERICA ALLOWING OFFSET OF RELIANCE EXPENSES IN EXCUSE CASE**
  - i. Courts can equitably adjust according to parties reliance expenses
- b. REPAIR DOCTRINE:
  - i. In existing structure repair/remodel/addition, owner assumes risk under "Repair Doctrine."
    1. As opposed to Kor in a new construction situation
  - ii. But Kor has to have performed in order to collect reliance damages under an excuse situation (e.g. House blown down by tornado mid-renovation)
    1. WROUGHT-IN DOCTRINE
      - a. In order to be deemed to have begun performance, Kor must have wrought materials into the structure
      - b. Expanded in some cases:
      - c. Angus v. Scully (1900)
        - i. House moved halfway but burns down overnight (at halfway point)
        - ii. Court holds owner "unjustly enriched" for half of K price
        - iii. Court had no vehicle to award reliance expense (nothing was technically "wrought in", so they fudged quasi-K
    - d. Albre Marble & Tile
      - i. Because the K required Albre to provide drawings in addition to doing the construction, he was able to collect

for reliance damages even though no materials were wrought in

g. Warranty

- i. UCC 2-313; Express Warranties by Affirmation, Promise, Description, Sample
  - 1. (1) Express warranties by the seller are created as follows:
    - a. (a) **Any affirmation of fact or promise made** by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
    - b. (b) **Any description of the goods which is made part of the basis** of the bargain creates an express warranty that the goods shall conform to the description.
    - c. (c) **Any sample or model which is made part of the basis** of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
  - 2. (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.
- ii. Implied Warranty of Merchantability
  - 1. Good/fair quality, suitable for ordinary purposes
    - a. E.g., food
  - 2. What is reasonably expected
- iii. A warranty allocates risk to seller

7. Conditions and Promises

- a. Three Types of Conditions:
  - i. Express
    - 1. Require precision
    - 2. can operate harshly (forfeiture)
    - 3. Must be strictly complied with
    - 4. **Require exact language (conditioned on, in the event, time is of the essence)**
  - ii. Implied
    - 1. Arise as a matter of fact
    - 2. Examples
      - a. Implied condition of cooperation
      - b. Non-interference
      - c. Implied condition of not doing the job naked
  - iii. Constructive
    - 1. Material breach is a failure of a constructive condition

2. Operate as a matter of law
- b. What is a condition?
    - i. Condition is an event:
      1. that is not certain to occur
      2. that neither party is willing to promise that it will occur,
      3. that if it does not occur, it will relieve party(s) of further performance
  - c. Two Purposes of Express Condition
    - i. Relieve party(s) of further performance if condition fails
    - ii. To avoid the doctrine of substantial performance
  - d. The Issue: Satisfactory Performance
    - i. Standards
      1. Perfect Tender Rule UCC § 2-601
        - a. Delivery must be perfect, else buyer may
          - i. reject all goods
          - ii. accept all goods
          - iii. accept some and reject the rest
        - b. Applies to single-delivery K's between merchants
          - i. Good for the buyer because it takes the risk away from the buyer being in material breach for rejecting the goods for a trivial defect
      2. Substantial Performance (non-Goods; also good in rest of the world)
        - a. If material breach, no substantial performance
        - b. If substantial performance, no material breach
        - c. Distinguish between big breaches and little breaches
          - i. Big = material
          - ii. Little = partial
        - d. Rule: Whichever takes longer has to be substantially completed first
        - e. How to avoid the Doctrine of Substantial Performance: make it an express condition
        - f. Rights & Remedies
          - i. Material Breach = excuses non-breacher continued performance
            1. breacher can only recover on quantum meruit
          - ii. Partial breach = non-breacher can only get damages
            1. breacher can still get the K price (less damages)
        - g. Does not apply to single-delivery K's between merchants
          - i. If it did apply, the buyer would be in material breach if he

rejects the goods for trivial defect--too much of a risk

3. Mutual Dependence
    - a. Material promises are mutually dependent
  4. **Mutually dependent promises = material breach = no substantial performance = failure of constructive condition**
  5. Satisfaction Clauses
    - a. May be interpreted either objectively or subjectively
      - i. Subjective is Majority... but
      - ii. Depends on the nature of the good or service (See Jacobs)
    - b. Good faith is implied
  6. Order of Performance (**Restatement § 234**)
    - a. If possible, simultaneous performance is required
    - b. Default Rule: performance of service comes prior to payment
      - i. (The performance that takes longer must come first)
  7. **Acceptance of Goods: (UCC §2-606)**
    - a. **Occurs when the buyer:**
      - i. **after a reasonable opportunity of inspection, signifies that goods are conforming or that he will retain them in spite of non-conformity**
      - ii. **fails to reject (after reasonable opportunity for inspection)**
      - iii. **does anything inconsistent w/ seller's ownership**
  8. **Revocation of Acceptance (UCC §2-608)**
    - a. **Burden on buyer to show that nonconformity substantially impairs value of item to the buyer**
    - b. **lose benefit of perfect tender rule; harder to revoke than reject**
    - c. **Must have originally accepted:**
      - i. **On assumption that non-conformity would be cured, but it has not been OR**
      - ii. **prior to discovering non-conformity if based on difficulty of discovery or on seller's assurances of conformity**
- e. HOWARD v. FEDERAL CROP INSURANCE CORP.
- i. Issue where the condition precedent term is used in one clause of K but not the other
    1. Condition not to plow stalks until insurance co had assessed damage
  - ii. Court found it was not a condition precedent
    1. Look at the whole K

- 2. Crop inspection did not use the same language
    - 3. Expression of one thing is the exclusion of another
  - iii. When in doubt, language will be construed as a promise
    - 1. No condition precedent in the absence of language plainly requiring such construction
    - 2. B/C Conditions result in forfeiture and undue hardship
- f. JONES ASSOCIATES v. EASTSIDE PROPERTIES
  - i. P prepared a feasibility study for D's property
    - 1. Parties disputed whether payment to P was conditioned on approval of the plans by the county
  - ii. Ambiguous contract language will be construed as a condition where the event conditioning performance is out of control of the obligee
- g. BRIGHT v. GANAS
  - i. Letter from servant to decedent's wife
  - ii. Condition failed b/c employee did not fulfill faithful service requirement
  - iii. Breach of an implied condition b/n master/servant as a matter of law justifies voiding of the K
- h. Conditions Precedent v. Conditions Subsequent
  - i. Classification has to do w/ time conditioning event is to happen in relation to promisor's duty to perform
    - 1. Condition Precedent must occur before performance is due
      - a. P has BOP to prove D breached
    - 2. Condition Subsequent performance obligation is due but will cease to exist upon occurrence of specified event
      - a. D has BOP to prove condition arose
  - ii. GRAY v. GARDNER
    - 1. K to purchase whale oil for extra amount if it came in by a certain date
    - 2. If a party to a K can avoid his duties under the K on the happening of an event, that party has the burden of proof as to proving that the event occurred
    - 3. Court found:
      - a. Condition subsequent b/c it says you have an obligation to pay, BUT if this doesn't happen then it's void
        - i. Have obligation, BUT its relieved by non-occurrence of condition
  - iii. Express Conditions
    - 1. CHODOS v. WEST PUBLISHING CO.
      - a. Attorney made K w/ publishing co.

- b. West could reject K if book did not meet “form and content” requirement
- c. West breached b/c they terminated agreement for economic reasons
- d. Remedies available for Chodos under QM (restitution for time and effort), but not under liquidated damages b/c payment was dependent on sales that weren’t actually produced

## 2. GULF CONSTRUCTION CO. v. SELF

- a. Self (sub) contracts w/ Gulf (gen) to construct a plant
  - i. Gen isn’t required to pay Sub’s until payment by owner
  - ii. Plant owner backs out
- b. NO condition
  - i. Gen should bear risk b/c he is in privity w/ actual owner
- c. Forfeiture by failure of a condition precedent is to be avoided when there is another possible reasonable reading of K
- d. Sub can recover UNLESS K clearly says he assumes the risk

## iv. Performance and Constructive Conditions

### 1. KINGSTON v. PRESTON

- a. Silk mercer didn’t turn his practice over to his apprentice at the designated time; apprentice sues.
  - i. Mercer says you were supposed to provide security and didn’t
- b. Independent, dependent, concurrent conditions in covenants
  - i. Dependent: Condition in that the two promises are reliant upon each other – if one doesn’t occur, the other doesn’t have to occur
    - 1. default rule
  - ii. Independent: One’s performance is independent of the obligation to pay
  - iii. Concurrent: Both parties performances occur at the same time
- c. Court ruled this was dependent

### 2. SHAW v. MOBIL

- a. Constructive condition of Shaw’s duty to pay minimum rent to receive the minimum amount of gas; minimum rental was tied to the per gallon amount
- b. Clause said: seller will not be liable when doing what the gov. requires
  - i. They are excused for breaching their part of the K; BUT
  - ii. They can’t expect to be paid for the rent
- c. Promises were dependent;
  - i. Can’t require either party to perform
  - ii. Here there was a force majeure clause

1. Risk allocation of the unforeseeable
- v. Substantial Performance of Constructive Conditions; the Effects of Material Breach on Performance
  1. JACOB & YOUNGS, INC. v. KENT (pipe)
    - a. P build house for D for 77k and sues to recover 3k outstanding retainer payment
    - b. Issue over the type of piping used in the house
    - c. P sues on the K to recover the balance due
      - i. If substantial performance, they can sue on the K
      - ii. If not substantial performance, they are limited to recovery in QM
    - d. Court finds substantial P and NO express condition
      - i. Recover on the K
      - ii. Reasoning; Can't expect exact perfection in construction agreements
        1. May be room for error in construction K's
        2. May substitute judgment when in good faith and used in respect to substitute products
      - iii. Was a constructive condition that the pipe be of certain quality
        1. Was not express because term about the pipe was construed as a condition of quality not of brand
      - iv. Architects satisfaction: Satisfaction is an express condition
        1. The satisfaction should be viewed objectively
          - a. Normally subjective standard is the majority
    - e. Dissent: Should assess the diminution in value
      - i. Here no actual diminution, but in that instance the recovery would be the cost to complete
  2. O.W. GRUN ROOFING & CONSTRUCTION CO. v. COPE (roof diff color)
    - a. Not substantially performed = material breach because he has to install a completely new roof
      - i. Part of the primary purpose was a uniform color, therefore substantial part of K was not performed
      - ii. Differs from JACOBS b/c this deals w/ aesthetics, not necessarily quality
    - b. No unjust enrichment, therefore no QM
      - i. Has to tear out roof and replace, so no retainable value
  3. CARTER v. SHERBURNE CORP.
    - a. Time of the essence
      - i. If time is of the essence, a contractor cannot both be late and substantially perform
      - ii. Not a constructive condition
    - b. In this case, the presence of liquidated damages coupled with the absence of an express condition stating that time was of the essence

--> contractor being late was a non-material breach

4. PRINTING CENTER OF TX, INC. v. SUPERMIND PUBLISHING CO.
  - a. Fact question as to whether goods failed to conform to K because not sure what K required
  - b. Express warranty (sample) that pages be white
    - i. Non-conformity and therefore the right to reject
5. CAPITOL DODGE SALES v. NORTHERN CONCRETE PIPE, INC. (truck)
  - a. Have the absolute right to reject
    - i. Must be w/in a reasonable time
    - ii. If reject you reject on time, you don't accept, and don't have to pay
6. COLONIAL DODGE, INC. v. MILLER (spare tire)
  - a. Failure to include spare tire was a substantial impairment
  - b. Could revoke his acceptance under the UCC
    - i. [Revocation of Acceptance \(UCC §2-608\) \(above\)](#)
    - ii. BOP Shifts to buyer
    - iii. If you've accepted the goods, you lose the benefit of PT rule
      1. therefore buyer must show non-conformity substantially impaired value to buyer
  - c. Here he accepted prior to discovery of non-conformity
    - i. Fully rejected upon discovery (gave notice and opportunity to cure the nonconformity)

vi. Excuse of Conditions

1. No consideration required
2. SULLIVAN v. BULLOCK
  - a. Woman hires contractor to renovate home
  - b. She is upset with the work and prevents contractor from completing
  - c. RULES
    - i. Implied in every contract is a condition of cooperation
    - ii. If prevention occurs, and K is otherwise performable, then prevention is a breach and injured party recovers on K price
    - iii. Nonperformance is excused if other party prevents performance
3. BURGER KING v. FAMILY DINING
  - a. If Family Dining opened up a new BK every year for 10 yrs, would get area exclusivity rights for 90 yrs. (Condition)
  - b. They fail to do so, BK tries to terminate exclusivity provision
  - c. Court excuses the failure of the condition and bars BK from terminating exclusivity provision
  - d. RULES
    - i. When a condition operates severely it may be excused
    - ii. Waiver of a condition may be grounds for excuse (although

not the basis of this ruling)

4. **RESTATEMENT § 229 - Excuse of a Condition to Avoid Forfeiture**

- a. To the extent that the nonoccurrence of a condition would cause disproportionate forfeiture, a court may excuse the nonoccurrence of that condition unless its occurrence was a material part of the agreed exchange
- b.

5. **INMAN v. CLYDE HALL DRILLING**

- a. Fired employee was required to give notice w/in 30 days of any claim that arises out of or in connection w/ employment
- b. D argues that filing suit was notice -- invalid b/c it requires that you file suit sometime between 6-12 months later (completely different term)
- c. To give effect to the language, Court couldn't hold that suit itself was sufficient notice
  - i. The K could not have contemplated that the notice requirement was covered by a lawsuit since the K required lawsuit to be filed after 6 months (well after the 30 day period required for notice)
- d. Anticipatory repudiation would be required before the breach
  - i. No repudiation of the K before the performance here

vii. **WAIVER AND ESTOPPEL (as a defense to a condition)**

1. **Waiver**

- a. Express waiver
- b. Waiver through conduct (taking late payments)
- c. Anti-waiver clauses may or may not have effect
- d. Can be retracted through a written notice
- e. Requires no reliance
- f. Requires no consideration

2. **Estoppel**

- a. Often used interchangeably with waiver
- b. However, MUST show reliance
- c. Requires no consideration

3. **MOE v. JOHN DEERE**

- a. Man finances a tractor purchase through John Deere
- b. He is late on multiple payments, but JD continues to accept payments
- c. Eventually, JD repossess the tractor
- d. **ISSUE**
  - i. Was there a waiver
  - ii. What effect did the anti-waiver clause have
- e. **HOLDING**
  - i. Yes, there was a waiver implied through course of

- performance (taking multiple late payments)
  - ii. Anti-waiver clause was garbage
  - iii. Waiver can be retracted, but requires notice
  - iv. Course of performance > Terms
- i. Anticipatory Repudiation
  - i. Questions
    - 1. What constitutes an anticipatory repudiation?
    - 2. Is the aggrieved party discharged?
      - a. And can it sue immediately?
        - i. Answered by Hochster v. De La Tour and Problem 166
    - 3. When are damages calculated?
    - 4. Can aggrieved party suspend? Yes. Also can cancel (after repudiation but before retraction)
      - a. If you suspend, still the possibility of retraction
      - b. If cancel, no retraction
  - ii. HOCHSTER v. DE LA TOUR (courier)
    - 1. Should you have to wait until performance was to commence to sue? NO
    - 2. Aggrieved party can go ahead and seek damages to mitigate
      - a. If you suspend, there is a retraction
      - b. If you cancel, there is no retraction
    - 3. [§ 2-611 Retracting repudiation](#)
  - iii. HOPE'S ARCHITECTURAL PRODUCTS v. LUNDY'S CONSTRUCTION (windows)
    - 1. If you're in breach, you can't demand assurance from the other party before suspending performance
    - 2. Excessive demand for assurance/performance put Hope in material breach
      - a. Overreaction can put the alleged aggrieved party in breach
    - 3. K was repudiated when Hope said "if you don't pay upfront, we're not deliver"
  - iv. [UCC 2-609](#)
    - 1. [When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.](#)
    - 2. [\(4\) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.](#)
  - v. GREGHUN v. MUTUAL OF OMAHA INSURANCE
    - 1. Ins. Co. denied liability for injured back claiming pre-existing condition
    - 2. Held: Not an anticipatory repudiation
      - a. Owes at present only installments accrued and unpaid at time of judgment

3. Dissent: Anticipatory repudiation
    - a. When ins. co denied coverage, they are denying they have liability
      - i. Repudiating the K now and in the future
  4. Majority errs and treats P's case as seeking SP and not damages
8. Fraud in General
- a. Pacta sunt servanda: K's are to be enforced
  - b. Caveat emptor: Let the buyer beware
  - c. Elements of Fraud
    - i. Material Misrepresentation of **Existing Fact**
      1. Can be misrepresentation through silence in most jdxn (nondisclosure)
        - a. When Justice, Equity and Fair Dealing demand
        - b. (Where otherwise dangerous things will be unmentioned)
      2. Can be misrepresentation by action (concealment)
        - a. Painting over evidence of existing roof leak to make the sale
      3. Fraud applied to Opinion:
        - a. If you can prove that the opinion given was not actually his opinion
    - ii. Misrepresenting party must
      1. Know they're doing so or
      2. Have a reckless disregard for the facts
    - iii. Reliance on the misrepresentation (need not be reasonable)
      1. "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is a fool"
    - iv. Must be some Damages
      1. (See below re punitive damages)
  - d. Misrepresentation
    - i. When are misrepresentations substantial enough to allow a party to avoid the K?
  - e. Election of Remedies
    - i. CL: cannot both seek rescission and also damages for breach of K (one or the other)
      1. UCC 2-721 allows both; some courts allow both
    - ii. Suing for fraud in tort rather than K: can get punitive damages but must prove knowledge and intent
  - f. CASES
    - i. VOKES v. ARTHUR MURRAY, INC. (dance lessons)
      1. Distinguish between misrepresentation or puffing
        - a. Puffing is not a basis for rescission
        - b. At some point, an opinion can count as a fact for the other person, when the opinion is of greater knowledge
      2. Reliance
        - a. P relied on D's superior knowledge

3. Rescission
  - a. So, it's a suit in equity because there is no breach
  - b. Seeks avoidance of K via Rescission
- ii. STAMBOVSKY v. ACKLEY (haunted house)
  1. Material nondisclosure essentially has the same effect as a material misrepresentation
  2. Nondisclosure of fact would materially diminish the value of the home
    - a. Seller knew
    - b. Buyer didn't know
    - c. Nobody reasonably expected the buyer to inquire
  3. Nondisclosure is created by the seller
  4. Remedies:
    - a. Legal remedy not available
    - b. Equitable remedy:
      - i. Avoidance of K
    - c. Merger clause does not bar
- iii. COUSINEAU v. WALKER (gravel)
  1. P seeks rescission
  2. Court considers whether there was:
    - a. Fact statement
    - b. Reliance
    - c. Statements material
    - d. Reliance justified
  3. Held: none of these standards are met
  4. Trend away from caveat emptor in a number of jur's