I. Damages for Breach of Contract

Three "Damage Interests"

•**Expectation** [Benefit of the Bargain]: Put **promisee** in position he would have been in **had the contract been performed**:
•Measure: Wealth of promisee if promise had been performed – Actual Wealth

•**Reliance** (losses incurred due to expectation): Put **promisee** in the position he would have been in **had the contract never been made**
•**Restitution** (e.g., down payment, deposit): Put the **promisor** back in the position he would have been in **had the promise never been made**

Second Restatement § 347: Measure of Damages in General
Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach, less
(c) any cost or other loss that he has avoided by not having to perform. **[Expectation]**

Hawkins v. McGee (The "Hairy Hand" Case) (61) (NH 1929)
•Damages=Value of "perfect hand" (as promised) MINUS value of hand P ended up with
•In a proper case, P would also be entitled to lost profits or other positive harms done

Tongish v. Thomas (79) (KS 1992)
[Sale of seeds Tongish to Coop; Coop has re-sale contract with Bambino. Coop's profits would have been handling fee. Tongish breached due to market price increase]
•True expectation damages would be lost profits (handling fee) [UCC §1-106]
•In this case, it is more efficient to award Market Price minus Contract Price
•This measure of damages encourages market efficiency and deters breach [UCC §2-713]
•Utility of the rule: Maintains the appropriate incentives to preserve the business relationship which these parties found to be efficient

UCC §1-106: Remedies to be liberally administered so as to put Promisee in position he would be in had the contract been performed (General Expectancy)
UCC §2-712: Cost of substitution to Promisee minus Contract Price ("Cover")
UCC §2-713: Market Price minus Contract Price, plus incidental damages (2-715)
UCC §2-717: On notice to Promisor, Promisee may deduct damages caused by breach from any part of the price still due under the same contract

II. Limitations on Damages

A. Remoteness/Foreseeability of Harm

Hadley v. Baxendale (86) (UK 1854)
[P miller hires D shipping company to deliver a broken crankshaft for replacement]
•D promised P that crankshaft would be delivered in one day
•P's agent told D to hasten delivery, make special arrangements if necessary
•Some neglect on D's part caused delay in delivery
•Promisor is **only liable for damages foreseen or which could have been reasonably foreseen (by both parties) at the time when the agreement was made**
•If "special circumstances" are present, and are unknown to breaching party, that party is only liable for amount of injury he could foresee to arise generally.
•Utility of the rule: Encourages high-value shippers to self-identify and contract around the default rule of low-value damages. Separation of the pool (low-value versus high-value shippers) is desirable to avoid one group subsidizing the other). Better for high-value shippers to self-identify than low-value shippers, because there are less of them (less additional transaction costs)
•Hadley rule sometimes called the "information-enforcing rule"

Second Restatement § 351: Unforeseeability and Related Limitations on Damages
(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or
(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

Morrow v. First National Bank of Hot Springs (102)(AK 1977)
[Valuable coins stolen from house, failure of bank to notify that safety-deposit boxes were available is alleged to be a breach of contract]
•No tacit agreement that the bank, for no consideration beyond standard rental fee of the boxes, would be liable for $32,000 if promised notice was not given.
•"Bare promise" to notify P about the availability of the box was not an implicit agreement to assume responsibility for P's property in the event the notice was not given. There is nothing to suggest that this was a liability that the bank agreed to, despite the foreseeability of the damages
•Uses different test than Hadley, but adheres to the underlying principle of limited liability as the default—must contract around this if you want extra care with your high-value package. Again, good default rule when you have many more low than high value shippers and the transaction costs of contracting around the rule are significant.

Note: Tacit Agreement Test is explicitly rejected by the UCC, and Arkansas is the only state to use it.
•Unusual damages are normally not compensable. They become compensable, however, when there is evidence that there was an agreement to deviate from the default rule (agreeing to make them compensable, whether that agreement was tacit or explicit)

B. Uncertainty of Harm

Chicago Coliseum v. Dempsey (105) (IL 1932)
[Dempsey agreed to prize fight with Coliseum company; later backed out of it
•Coliseum claimed 4 forms of damages:
•Lost Profits (not recoverable): No expectancy damages: Losses are **too speculative**
•Expenses prior to contract (not recoverable): Can't rely on a promise which hasn't yet been made (for exception, see Anglia)
•Expenses between contract and breach (recoverable): Reliance damages
•Expenses incurred to gain compliance (not recoverable). Could, *inter alia*, prevent efficient breach, since a P could make it prohibitively expensive for a D to breach.

Second Restatement of Contracts §346: Availability of Damages
(1) The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.
(2) If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages.
Second Restatement of Contracts §349: Damages Based on Reliance Interest
As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.
Second Restatement of Contracts §352: Uncertainty as a Limitation on Damages
Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.

Anglia Television v. Reed (118) (UK 1971)
[D (Mr. Brady), contracted to work on TV-movie in U.K., and later decided not to]
•Usually, a promisee can seek lost profits **or** wasted expenditures, but not both
•P did not claim lost profit, because it was too speculative (Expectation)
•P instead sought lost expenditures (Reliance)
•Expenditures made **both before and after** contract was formed are recoverable
•Court is striving for expectancy damages (the ideal), in a way awarding expectancy damages assuming that the deal under the contract would at least break even (goes beyond pure reliance—which would only cover post-contract expenditures) (assumes that promisor reasonably knows that expenditures have been made and will be wasted)

Mistletoe Express Service v. Locke (120) (TX 1988)

[P enters into contract for delivery service, purchases vehicles and ramp in Reliance]
•P's business activity, however, was a losing enterprise
•Flipside of Dempsey: Breaching party can't claim that there would have been losses, since this is just as speculative as breachee claiming lost profits
•Reliance damages in the case of a losing contract. Burden on breacher to prove the amount of loss the breachee would have sustained had the contract been kept and have it subtracted from breachee's reliance damages.
•Courts disagree as to whether to award pre-and post-contract expenditures (Anglia) or just post-contact expenditure (Dempsey).
•**BEA** likes Anglia rule, as a presumption of profits equal to zero, and awarding expectancy damages on that basis
•If party proves profit or loss would have resulted, the court will entertain such evidence. However, the default assumption is no profits/no loss
•The fact that the reliance rule (as applied in Anglia and Mistletoe, as well as the Restatement) allows a breacher to rebut the expenditures incurred by the breachee—by showing that the expenditures would have been lost anyway—means that the standard being applied isn't truly reliance.
•If it were truly reliance, whether the expenditures would have been lost anyway shouldn't matter. The expenditures were made in reliance on the promise, therefore they should be recoverable.
•Therefore, the standard actually appears to be expectation with a rebuttable presumption that the losses/profits equal zero.

C. Avoidability of Harm (Mitigation)

•Breachee who refuses to mitigate will not be able to recover full expectation damages. They can only recover expectation MINUS what would have been saved had they mitigated.
•This is the law's way of attempting to prevent waste
•Important to understand this concept vis-à-vis efficient breach

Hypothetical - Shipper brings perishables to a dock, leaves them there when carrier fails to show. Duty to mitigate means shipper must try and sell—call a different carrier, even a more expensive one (and recover the difference) rather than just letting the fish rot.

Rockingham County v. Luten Bridge Co. (124) (4th Cir. 1929)
[County hires Luten to construct bridge; County cancels contract; builder keeps working]
•Plaintiff (Contractor) cannot sue for damages that could have been avoided after breach.
•There is a duty to mitigate damages (ceasing to work)
•Expenditures after notification of repudiation (breach) will not be included

Hypothetical #1
•Contract to build a bridge for $100 (Cost to builder is $40 in each of two periods)
•County repudiates after first period; Bridge finished anyway
•Damages are $60 — $50 from the first period ($40cost plus $10 profit) and $10 from the second period (just profit)

•Can also be described as Contract Price minus cost to finish the job
•Note: There must be an opportunity to mitigate (which is dealt with to some extent in some of the next few cases)

Parker v. 20th Century Fox (128) (CA 1970)
[P contracts to act in film; Movie not produced but studio offers her role in other film]
When contract is for personal services, P not required to accept any position substantially different from, or inferior to, the one contracted for in order to mitigate damages.
•Not always clear whether or not work is inferior, forces courts to calculate imponderables

Hypothetical #2
•$750k for the original movie—no net costs (harm or benefit done to career, etc.)
•$750k for the offered substitute) costs would net $250k (damage to career, unwillingness to make movie, etc.)
•Damages would be $250k
•Fox would have paid $1m for Parker's work, rather than $750k for nothing, and would be ahead by $500k as compared to cancellation of both movies
•No mitigation: $750k for no movies
•Mitigation: $1m for one movie (which nets $750k [benefit to society])
    •Loss with no mitigation: $750k
    •Loss with mitigation: $1m-$750k = $250k
•Waste prevented by mitigation: $500k
•The problem with this is that these amounts are too uncertain

Second Restatement of Contracts §350: Avoidability
(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

Neri v. Retail Marine Corp. (140) (NY 1972)
[Contract for the sale of boat—buyer breaches—Seller sells same boat to another buyer]
•Buyer says: Damages are NIL, because seller had to mitigate, and he did
•Seller says: Damages are lost profit; re-sale is not "mitigation" because if contract was not breached, he would have sold two boats
•Holding: There was no obligation to mitigate, because there is no opportunity to mitigate
•The "**lost volume**" doctrine applies because there is a theoretically limitless supply of boats, i.e., it is correct that he would have sold two boats, and it is correct that there was no opportunity to mitigate
•Seller is therefore entitled to lost profit on sale together with incidental damages
•Note: If the item were one-of-a-kind, and seller could or did sell to another buyer, the damages would be zero, because the second sale was a substitution, not a supplement (as in the case of the two boats)
•Note: Must subtract one-time-only preparation costs for the boat

•Only thing Neri could have argued is that the only reason for the second sale was the fact that his boat was there, second buyer saw it, and wanted it
•The idea is that, but for the breach, the second sale would not have occurred (same logic as that used in the case of a unique item)

Uniform Commercial Code
§2-706 Seller's Resale — Statement of Neri rule
(1) Seller should re-sell, then (subject to good faith) recover the difference between the resale price and the contract price + incidental damages – expenses saved by breach
(2) Resale may be at public or private sale, and may be as a unit or in parcels and at any reasonable time and place and on any terms. Must be reasonably identified as referring to broken contract, but goods don't have to exist or be identified to contract before breach.
(3) If private sale, seller must give buyer reasonable notification of his intention to resell.
(4) If public, **(a)** must be identified goods unless recognized market for public sale of futures, **(b)** must be at usual place for public sale if available (unless perishable or will decline in value speedily—seller must give the buyer reasonable notice), **(c)** if goods are not in view of those attending sale, must state where the goods are located and provide for reasonable inspection, **(d)** the seller may buy
(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

§2-708 Non-Acceptance or Repudiation — Expectancy
(1) Measure of damages for non-acceptance or repudiation by the buyer is the **difference between the market price at the time and place for tender and the unpaid contract price** + incidental damages – expenses saved by breach (proof of market price = §2-723)
(2) If above damages are inadequate then the measure of damages is the profit (including reasonable overhead) + incidental damages + due allowance for costs reasonably incurred and due credit for payments or proceeds of resale

§2-710 Incidental Damages
Incidental damages to an aggrieved seller: commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care/custody of goods after breach, return/resale costs

III. Liquidated Damages

UCC § 2-718 Liquidation of Damages — No penalty clause
•Liquidated damages must be reasonable (in the light of the anticipated or actual harm, 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.
(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds
(a) the amount to which the seller is entitled by virtue of terms liquidating the

seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

•**UCC (§2-719**) States that an agreement can limit or alter recoverable damages

- •Contractual remedy is optional unless expressly agreed to be exclusive
- •If exclusive or limited remedy is determined to "fail of its essential purpose," remedy may arise under UCC.
- •Consequential damages can be limited or excluded, unless it is "unconscionable"
- •Limitation of conseq. Damages for injury to the person in the case of consumer goods is *prima facie* unconscionable, but not if the damages are commercial.

•To be enforceable, Liquidated Damages must be (1) Reasonable measure of estimated damages [ex ante], and (2) Parties reasonably expect that calculation of actual damages will be difficult [ex ante]

•Example of unenforceable LD clause, which meets requirement (1) but not (2):

- •Farmer agrees to sell 1,000 hwt of seeds to buyer for $100/hwt
- •1,000 hwt is reasonable estimate of output; $100/hwt is reasonable estimate of market price
- •Farmer loses crop; fails to deliver
- •At same time, price of seeds plummets
- •(1) is satisfied; measure was reasonable
- •(2) is NOT satisfied, since damage is:
  - (a) nothing (since price plummeted)
  - (b) easily calculated
  - (c) a penalty

•Ex ante approach is the law (almost) whenever stated precisely, though ex post results outside an expected range may provide evidence of ex ante unreasonableness (e.g., Wassenaar)

•Reasonableness may be specific of the context of the breach (e.g., Kemble)

•When enforceable, LD logically precludes mitigation
- •e.g.: Buyer puts $10k down payment on house, which is kept if he doesn't buy
- •Buyer doesn't buy; seller keeps $10k
- •Seller sells house later to another buyer for at least as much
- •Seller, effectively, mitigated the loss
- •Does buyer get $10k back?
- •Under LD doctrine, no. $10k was reasonable estimate of damages at the time of contract, and there was no way to know what the damages would be at the time of breach (there is no buyer at the time of breach, and RE market fluctuates, so who knows what the damages would be?) ex ante approach makes LD clause reasonable; not a penalty

•Mitigation doctrine doesn't apply because (1) Waste is not an issue in this case (2) We don't imagine that either party would allow waste to occur. No reason to think that LD clause was designed to negate mitigation

•<u>Economic argument</u>: Penalties discourage Efficient Breach
Cost of performance (breacher) is $2,000; value of performance to breachee is $1,000. LD are $3,000. Efficient breach says do not perform, pay $1,000.
Under LD, breacher will perform (at cost of $2,000) rather than pay LD ($3,000)

•Penalties discouraged because parties should only recover for the actual loss(es) suffered

•The above principle reflects one of two ideas about contractual enforcement which have long been in tension: (1) Contractual institutions should aim to ensure that agreements are performed, as opposed to (2) It is enough that the law provide compensation for the loss suffered by failure to perform.

•Might LD clauses, even Penalty clauses, be OK anyway? **<u>BEA</u>** says yes
- •Competent grownups can decide for themselves
- •Encourage performance (Market efficiency argument)
- •Reduce litigation costs
- •Encourage risk-averse parties to form contracts in the first place
- •LD clauses can encourage proper levels of investment by contracting parties

<u>Kemble v. Farren</u> (UK 1829)
[Theater (P) sues actor (D) for LD: violation of engagement to perform for 4 seasons]
•Jury awarded less than the full LD amount (jury instructed to award actual damages)
•Contract assesses LD too broadly (<u>any</u> violation, even a remote/minute = damages)
•If a large sum is to be paid for failure to pay a small sum, damages seem to be penal
•P says LD only for uncertain losses; certain losses for jury—but contract doesn't specify
•These are not LD, even though the contract characterizes them as such; they are penal

<u>Wassenaar v. Towne Hotel</u> (WI 1983)
[P is former hotel employee, suing hotel (D) for LD set in his contract]
•TC: Contract stipulated full salary for unexpired term in case of "wrongful discharge"
•AC reversed; Damages unenforceable—Penal

•Damages from breach easily calculated and proven; Fixing damages at full salary without considering how long it would take to find a new job is unreasonable

•SC: Stipulated Damages are Enforceable

•When breacher challenges stipulated damages, it is his burden of proof to show why it should not be enforced

•Court employs **reasonableness** standard, balancing 2 approaches to stipulated damages:

(1) Stipulated (Liquidated) Damages clauses are good.
   a. Allow control of risk exposure, setting payment for breach in advance
   b. Correct perceived judicial inadequacies(uncertainty/remoteness)
   c. Promote judicial economy and freedom of contract

(2) Stipulated damages are disfavored.
   a. Public law, not private agreement, ordinarily defines remedies
   b. Private remedy can't go far from principle of compensatory damages
   c. Stipulated damages substantially in excess unenforceable as penal

•Reasonableness test strikes a balance by respecting bargain but preventing abuse

•Normally damages would be salary employee would have received + expenses of securing other employment – income which employee earned, will earn or could (with reasonable diligence) earn during the unexpired term

•LD can also factor in normally non-recoverable damages (injury to professional reputation, loss of career development opportunities, emotional stress)

•Absent contrary evidence, courts can consider reasonableness of damages amount in light of these other possible consequential damages, in connection with LD clause

•In this case, there is no evidence in the record about employee's subsequent earnings

•Earnings after breach may be relevant, but once court determines that stip. damages were reasonable, there is no need to determine actual damages.

Restatement (Second) of Contracts, §355: Punitive Damages

•Punitive damages are not recoverable for breach of contract unless conduct constituting the breach is also a tort for which punitive damages are recoverable

§356, Liquidated Damages and Penalties

•Liquidated damages can be agreed upon as long as the amount is reasonable in light of anticipated or actual loss caused by breach, and difficulty of proving such a loss.

•Unreasonably large liquidated damages are unenforceable, on grounds of public policy, as a penalty

•Term in bond providing for money as penalty for non-occurrence of condition of bond [i.e., the old way of doing it] is unenforceable to the extent that the amount exceeds actual loss caused by breach

Lake River Corp. v. Carborundum Co. (7th Cir. 1985)

•Court wonders whether it is wise to refuse to enforce penalty clauses, when agreed to by a "substantial corporation" who is able to "avoid improvident commitments"

•Court recognizes that penalties increase risk to other creditors, risk of bankruptcy, but these are not so compelling, because we don't typically try to prevent businesses from assuming risks

•Compelling argument against penal damages is that they **may deter efficient breach**

•Since compensatory damages should be sufficient to deter inefficient breach, penal damages are unnecessary, and would only serve to deter some efficient breaches
•However, this argument overlooks the possibility that agreeing to penalty clause may make contractor more credible, and "may therefore be essential to inducing some value-maximizing profits to be made"
•Assuming parties are rational, they will weigh the benefits of the penalty clause against the possible costs (including the fact that it may deter efficient breach), and will only include penalties if its benefits exceed those costs (and other costs which would be considered)
•Court thinks the refusal to enforce penalty clauses is "(at best) paternalistic," which seems especially odd when it's parental concern for large corporations
•Courts should probably be more deferential to contracting parties
•Still, the court is enforcing Illinois law, and Illinois doesn't like penal damages
•Per Illinois, liquidated damages must be a reasonable estimate at the time of contract of damages likely to result from the breach (considering also difficulty of measuring actual damages after breach occurs)
•If the damages would be easy to determine at the time of contract, or if stipulated damages greatly exceed reasonable upper estimate of damages, they are penal, and invalid.

IV. Specific Performance and Injunctions
A. Land or Goods

•Alternative to expectancy damages—exception, rather than the rule
•An extreme form of liquidated damages, making breach impossible
•Replevin: Get the actual item back
•With unique goods, make party whole w/o idiosyncratic attempt to determine worth
•Most common with **unique goods, difficult-to-replace items, and land**
•Sometimes also used when expectancy damages wouldn't be fully compensatory

LAND
Loveless v. Diehl (184) (AK 1963)
[Purchase and resale of land, similar to Tongish, originally Diehl v. Loveless]
•Question about whether or not property had appreciated in value
•Court believed Diehl's claim that it had, since Loveless was contesting the sale
•Specific performance usually appropriate in sale of land

GOODS
Cumbest v. Harris (189) (MS 1978)
[P sold stereo to D with buyback option (essentially a loan with the stereo as collateral). D refused to re-sell. P sued for specific performance]
•Sentimental item, and many parts are difficult to replace
•Sufficiently unique to justify specific performance
•Note: This actually a security case (collateral), should be handled under UCC Article 9

Scholl v. Hartzell (192) (PA 1981)

[P contracted to buy D's corvette, and D backed out. P sought specific performance]
•Corvette not sufficiently unique to merit specific performance, $ damages sufficient

Sedmak v. Charlie's Chevrolet (194) (MO App 1981)
[P contracted to buy D's limited edition commemorative Corvette pace car]
•Unique item. Specific performance is appropriate
Where do we draw the line? Why specific performance?
•Expectancy damages sometimes fail to account for subjective valuation of unique goods
•If there's a market for the provision of goods or services, subjective valuation irrelevant
•Unique plot of land—no "market"
•Question courts ask is: How easy/hard will it be to price a similar item?
•Even if rare, if something's traded regularly, objective value may be ascertainable
•No bright line to determine how much trading/market activity, however
•Market value also only says how much next highest bidder would pay, which may be insufficient in cases of unique goods with subjective value
•Efficient breach usually not an issue, since the "thing" exists and performance=giving it
•Maybe if Tom Seaver moved next door and I was gonna sell you my house—I like him, you don't—this could make breach efficient, but unlikely

UCC § 2-716: Buyer's Right to Specific Performance or Replevin
(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered

B. Personal Services

Lumley v. Wagner (203) (UK 1852)
[Opera singer to perform at a specific opera house]
•Court can't demand specific performance to make her sing
•It **can**, however, enjoin her from singing elsewhere if she has agreed to such a negative stipulation
•Injunction can only last for a reasonable period of time

Ford v. Jermon (207) (DC Philly 1865)
[Same facts but in the U-S-of-A]
•Lumley was bad—amounts to "compelling obedience by imprisonment"
•"Mitigated form of slavery"
•If specific performance is not allowable, courts can't substitute indirect compulsion

Duff v. Russell (209) (NY Sup 1891)

[Singer refused to perform in opera]
•Even though no explicit negative stipulation, it's implicit, since had she followed the contract, she wouldn't have been able to perform elsewhere
•Injunction appropriate to prevent singer from performing elsewhere
•In most cases, neg. pledge has to be **explicit** and **limited in scope**

Should the court enforce negative stipulations?
Yes: Limited in scope and not tantamount to indentured servitude
•Courts place limits on negative pledges which they will enforce
•Very hard to prove actual damages in these cases—what would work have been worth?
No: Same result as SP on contracts for personal services—limit option to do other work, or compensate owner w/ $ damages, is indirectly compelling employee to work for him
•Either work for him, or you can't support yourself

V. Restitution
A. Restitution on the Contract

Bush v. Canfield (236) (CT 1818)
[D contracted to deliver 2k barrels of flour to P, $7 per. P paid $5k up front. Price dropped and D didn't deliver]
•D wants to cut $5k by $3k P would have lost if D delivered ($2k)
•TC awarded full $5k + interest
•**Breaching party cannot sue on the contract for damages**—offender can't profit

Restatement § 371: Measure of Restitution Interest
Restitution interest will be awarded, as justice requires, as one of the following:
1) Reasonable value to the other party of what he received (in terms of what it would have cost him to obtain it from a person in the claimant's position), **OR**
2) Extent other party's property has been increased in value/other interests advanced

§ 373: Restitution when the Other Party is in Breach
1) On a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.
2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.

§ 374: Restitution in Favor of the Party in Breach
•If party renders part performance and then breaches, he is entitled to restitution in the amount that the value of his performance exceeds the loss caused by the breach
•Parties can contract around this rule, letting the breachee keep the performance, subject to normal liquidated damages rules (reasonable anticipation of loss/difficult to prove loss)

B. Restitution to the Party in Breach

Britton v. Turner (243) (NH Sup 1834)
[P agreed to work for D for a year for $120. Quit after 9 ½ months. Sued to collect for work performed]
•Person who breaches after partial performance is entitled to value of benefit conferred minus damage caused by failure to complete
•In merchandise cases, if you accept incomplete delivery, you still have to pay for what you actually got
•Same for personal services—it's like each day P went to work, D "accepted" the labor

Hypo: Laborer contracts to work for one year at $30 per quarter; After contracts signed, market price of work goes up to $50 per quarter; Laborer quits after three quarters
•**Benefit Conferred**: **$150** ($50 x 3)
•**First Reduction = Loss Caused by Breach**: Employer has to pay $50 for one quarter of work, which he would have gotten for $30. Loss = $20. Now benefit is **$130**
•**Second Reduction = Contract Price can't be exceeded**: Market value exceeds market price by $20 per quarter. $20 x 3 = $60. Final award is **$70**
•Or, $90 (contract price $30/quarter x 3) - $20 loss = $70

C. Quasi-Contract

Cotnam v. Wisdom (251) (AK 1907)
[Doctor Wisdom sues Cotnam's estate for medical services rendered after car accident]
•Court recognizes "implies contracts" (quasi-contracts, constructive contracts)
•Even though a party was unconscious, still can be a contract implied by law
•P need not prove that D actually benefited (or, alternatively, benefit was increased chance of survival
•P is entitled to "reasonable compensation" (reasonable market-based fee—not what D would have paid if he'd been conscious, b/c that would be infinitely high)
•Jury cannot consider D's net worth in determining value of services
•This encourages doctors to help people, without infinitely high award
•Conceivably, rich guy could pay more if rich guys tend to pay more in the market (**BEA**)

Two Factors: (1) Service would have been wanted if there was an opportunity to negotiate, and (2) There was not opportunity to negotiate

Martin v. Little, Brown & Co. (255) (PA Sup. 1981)
[P gave D book publisher information which allowed D to recover against third person for copyright infringement, then sought compensation. D said it never contracted with P, offered $200. P demanded 1/3 of money won in the suit]
•Insufficient to establish a contract
•P's letter did not express or imply a desire to negotiate; Never expressed desire for pay
•D never offered contract or compensation for services
•**Contract Implied in Fact**: An actual contract, where parties agree on obligations, but their intention is inferred from their acts rather than expressed in words

•It can legitimately be inferred from their intentions, by looking at the circumstances in the context of our common understanding of people and their dealings with each other

•There is generally an implication of a promise to pay for:
- •Valuable services: Rendered with knowledge and consent (or no dissent)
- •Service is usually charged for; reasonable expectation of compensation
- •Not a gratuity or a gift
- •Recipient must "do something" from which promise to pay is inferred

•When services are requested by the recipient, promise to pay is usually inferred, unless proven otherwise
•When services voluntarily given to recipient, however, promise to pay not be inferred
•**Quasi-Contract**: Contract implied in law ("unjust enrichment," restitution remedy)
•May even be found in spite of a party's contrary intention
•It would be unconscionable for recipient of benefit to retain the benefit
•**General Rule**: Volunteers have no right to restitution
•In this case, P made unsolicited suggestion, not conditioned on any payment, that he would provide information of use to D—P was volunteer
•**BEA**: Case would likely have included an **explicit price term**
•The case might swing one way or another depending on whether there was a market for services like those provided by P—if there were, it would look much better for him

•Hypo: I tell neighbor I am going to store to buy supplies to fix my wall. I ask him if he wants me to "take care of [his] wall too" and he says yes
•Probably recover costs of materials, rare for neighbors to give for free (e.g. I'm going to the store, and you ask me to pick up some milk for you, you probably expect to pay for it)
•Probably not as to labor, common for neighbors to confer such benefits upon each other

Quasi-Contract versus Implied Contract
•Quasi-Contracts are implied in the law, form of restitution a la the "anti-tort" analogy
•Implied contracts: **actual** contracts; terms of the bargain happen not to be explicit

VI. Consideration
A. Consideration in General

Bargain Theory of Consideration
•20th Century saw the emergence of a new notion of consideration: the ability to identify a promise with reference to a **bargain**
•**Second Restatement**:
- •To be enforceable, a promise must be supported by a consideration
- •Such support is evinced if the promise is bargained for
- •Promise is "bargained for" if it is sought by the promisor in exchange for his promise and given by the promise in exchange for that promise

Distinguishing Bargains from Gratuitous Promises

Johnson v. Otterbein University (606) (OH 1885)

[P pledged by written instrument to give $100 to university, did not pay. University sued, P claimed no consideration. TC ruled for University and Johnson appealed]
•In general, an executory contract to give is without consideration, revocable at any time before payment. A gift is only enforceable when the thing promised is actually delivered
•D says provision that money is to pay off debt (or would be reclaimed) = consideration
•Decision: This is **not** valid consideration so as to make the promise enforceable
•Must be something to the advantage of the promisor, or to the detriment of the promise
•Provision on debt applies when $ given over. Can't be consideration before given.
•No "mutual promises," and the condition wasn't consideration. Reversed.
•**BEA**: University already under an obligation to repay its debts (pre-existing duty rule)
•How could University argue that there was a bargained-for exchange? Consider that the University had some discretion as to whether or when to repay its debt. Johnson is an alumnus of the University, and it is important to him that his alma mater not be seen as a deadbeat. Then it's not a sham, it actually was part of a bargained-for exchange

Hypothetical
•Johnson promises University $150; University to give $50 back (in a purple envelope).
•Probably not consideration, not b/c the envelope is worth very little, though this is relevant evidence. It is likely that the court will recognize that this is an attempt to evade the consideration requirement, to make binding what is really a gratuitous promise.
•The agreement doesn't really look like a bargained-for exchange

•Note that consideration does not have to be true value: I agree to sell you my car for $30k, and the Blue Book value of the car is $40k, there is still apparently a bargained-for exchange. One side gets a bad deal does not mean that it is not a bargained-for exchange.

•Consideration requirement is a mandatory rule—some parties try to evade it.

•If Johnson says he'll donate $100 if University promises to redirect funds from another area to supplement donation, more likely seen as a bargained-for exchange (not definite)

•Give $100 for promise to name a building after me—certainly a bargained-for exchange

•School is going to build a pool for $100. I'll give you another $100 if you agree to build a library instead of a pool (the difference in cost)—this is a bargained-for exchange too

•It is at least theoretically plausible that a party seeking a promise from other party to do something they're already obligated to do, is receiving a bargained-for exchange. For example, there are now two parties who can sue to enforce the obligation rather than one.

Hamer v. Sidway (NY 1891)
[P sued executor of uncle's estate—promised that if he refrained from drinking, using tobacco, swearing and playing cards/billiards for money until 21, would give him $5,000. When nephew turned 21, he wrote his uncle informing him that he held up his part of the deal. Uncle acknowledged that in a letter, and promised to hold onto the money, and pay the nephew at a later time, with interest. Uncle died without ever paying the money]

•P says that his refraining from drinking, etc. = detriment to him = consideration
•D says P benefited, conditions were not to his detriment, thus it is not consideration
•Decision: Consideration is "some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."
•Courts do not ask if the consideration actually does benefit someone. It is enough that the thing promised/done/forborne is made as consideration for the promise made to him
•Waiver of any legal right at the request of another party is sufficient consideration
•If the nephew doesn't drink or smoke, would appear that there is no bargain in this case

•If interpreted by promise to make a gift, never perfected by delivery, no consideration

Dahl v. Hem Pharmaceuticals Corp. (9th Cir. 1993)
[Drug company got volunteers to participate in drug study, promising year's supply of the drug if it was approved. Company didn't deliver, and denied enforceable contract since the people volunteered to participate in the experiment and could withdraw at any time]
•Decision: P submitting to tests (injections and other procedures) **was** consideration

Restatement § 24: Offer Defined
•Proposal of Contingent Gift: Proposal of gift is not an "offer"
•There must be an element of exchange
•There must be a promise or performance by offeree as the price of/consideration for the promise
•Example: A promises B $100 to go to college
    •If circumstances show that B has reason to know that A is not paying B to go to college, but rather promising a gratuity, there is no **offer**

§ 71: Requirement of Exchange; Types of Exchange
•To be consideration, a performance or return promise must be bargained for
•Performance/Return Promise is "bargained for" if it is sought by the promisor in exchange for his promise and given by the promise in exchange for that promise
•The performance can be an act other than a promise, a forbearance, or the creation/modification/destruction of a legal relation
•The performance/return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person

Other meanings of "Consideration"
•Sometimes "consideration" = legal conclusion that the promise is enforceable
•Can also mean the *quid pro quo* required for an action of debt
•A seal has been said to import a consideration (what about an otter?)
"Bargained For"
•In typical bargain, consideration & promise=reciprocal relation of motive or inducement
•Consideration induces making of promise, promise induces furnishing of consideration

Second Restatement § 81: Consideration as Motive or Inducing Cause

•The fact that what is bargained for does not, in itself, induce the making of a promise does not prevent it from being consideration for the promise
•The fact that a promise does not, in itself, induce a performance or return promise does not prevent that performance/return promise from being consideration for the promise [Circumstances in which the promise is made are important, not subjective underlying motivations of the parties—also can contribute to the inducement of performance]
•Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows that this is the case

•**Why have consideration at all?** Why not bind selves to a gratuitous promise?
•Common answer is that a bargained-for exchange is a sign of the sort of solemnity that justifies the involvement of the legal system
•We don't want to burden the legal system, by applying it to every gratuitous promise
•We might make the decision that invoking law is costly, but necessary to encourage commercial enterprise, but we want to leave gratuitous problems to the realm of morality

UCC § 2-209: Will still allow for contractual modifications made in "good faith" even without consideration

B. The Pre-Existing Duty Rule

Stilk v. Myrick (634) (UK 1809)
[P seaman on D's ship. Two men deserted, captain promised to divide their wages]
•D cited previous case which held that permitting such agreements would enable seamen to extort the captain: "we'll sink the ship if you don't give us a raise"
•P: Agreement made on shore, no restraint or apprehension, captain's promise voluntary
•Decision: No consideration
•The sailors' original contract accounted for dangers of the sea, including possibility of extra work due to death or desertion. Their contract was for the entire length of the trip.
•Implicit bargain included working through emergencies, even manmade emergencies
•If they were only bound to work until they stopped at the place where the deserters left, and the contract was renegotiated or renewed at that point, it would be different
•Desertion was an emergency, part of the voyage. Original contract must stand.
•**BEA**: If the employer had engineered the terms of the more difficult arrangement, the court may have found that this was not part of the implicit agreement
•Implicit in this case is that the sacrifice of a right to breach and pay damages is an exception to the ordinary rule on consideration
•New agreement arguably was a bargained-for exchange (the sailors could have just quit), so it's strange to say that there was no consideration—not a gratuitous promise
•Considering that there was no threat of quitting, possible to interpret this as a gratuitous promise without consideration. But for the purposes of making the point about the exception to the consideration rule, we assume there was at least an implicit threat to quit

Alaska Packers Association v. Domenico (636) (9th Cir. 1902)

[Domenico (one of Ps) hired by Association (D) to work on fishing boat, to be paid $50 for season + 2¢ for each fish he helped catch. Later, contract was raised to $60 + 2¢ per. After work started, Ps stopped working and demanded $100 to re-start. In the middle of nowhere, no way to replace them, D agreed. The superintendent told Ps he wasn't allowed to change contract. When they got back, D refused to honor the new contract]
•Ps claimed they demanded more money because the fishing nets were defective.
•Evidence was conflicting, and since it was in D's interests to provide them with good nets, court credited the evidence showing that the nets were OK
•Decision: CoA will not disturb finding that the nets were OK
•The real question is, assuming the superintendent was authorized to make the new contracts, **was the new contract supported by consideration?**
•Answer: No.
•There was no valid reason to stop working
•The terms of the $100 contract were for the same work as the $50 and $60 contracts, so it was without consideration (pre-existing duty)
•Where a party agrees to provide the same services they are already under an obligation to perform in exchange for an additional benefit to be conferred by the other contracting party, such an agreement is without consideration
•Under the circumstances of this case, D didn't waive rights under original agreement.
•"[T]he party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party."

Historical Account
•In a subsequent historical account, it was hypothesized that the D may not have actually had an incentive to give the men good nets, for various reasons, and that the contract may have been set up to mislead the fishermen to some extent. Anti-organized labor?

Brian Construction and Development Co. v. Brighenti (644) (CT 1978)
[P contractor sued D subcontractor for refusing to complete work in building a library. After starting job, D discovered it was much more complicated than originally thought. D had relied on test results provided by P, which were inaccurate. D ceased and contract was renegotiated. Then D breached that new agreement]
•If the additional compensation is for additional burden not previously assumed, the agreement, supported by consideration, is valid and binding
•Key factor is additional unanticipated burdens, not contemplated at time of contract
•Above case, if nets were unserviceable, renegotiation may have consideration
•Cost for extra work not in contract price (extrapolating implicit terms/understandings)

Second Restatement of Contracts § 89: Modification of an Executory Contract
A promise modifying a duty under contract not fully performed is binding, if:

(1) The modification is fair and equitable in view of circumstances not anticipated by the parties at the time of contract, OR
(2) Authorized by statute, OR
(3) In the interest of justice based on a material change of position in reliance on the promise

UCC § 2-209: Modification, Recission and Waiver

•Agreement modifying a contract for the sale of goods does not need to be supported by consideration to be binding
•Modifications must meet the "good faith" test
•Reasonable standards of fair dealing in the trade must be observed
•Market shift, which makes performance come to involve a loss, may provide a valid reason, even if not an unforeseen burden that would otherwise excuse performance

U.S. v. Stump Home Specialties Manufacturing (649) (7th Cir. 1990)

[Modification of loan agreement argued to be invalid as without consideration]
•Posner evaluates the utility of the consideration doctrine in the context of contract modifications vis-à-vis the preexisting duty rule:
•Why talk about consideration? It's just a substitute for the doctrine of coercion, and a bad substitute at that.
•**BEA**: What the courts actually do, is find consideration where that leads to the most efficient result, and find coercion where it would lead to the most efficient result
•Where the courts seem most receptive to the argument of changed circumstances (no coercion, yes consideration) are the cases where the promisee looks to be in a weaker position than the promisor.

•**BEA**: Isn't always the case that the promisee is taking advantage of the promisor, it may indeed be the other way around—without renegotiating the contract, promisee is being taken advantage of (i.e., there is a valid excuse from performance)

•You were supposed to provide us with a full crew, and you didn't (Stilk)
•You were supposed to provide us with serviceable nets, and you didn't (Alaska Packers)
•You represented that the excavation would be easy, and it's hard (Brian Construction)

•Courts try to figure out who's right—was renegotiation demand based on valid excuse? Did the promisee coerce the promisor? Factual determination (if the crew was sufficient, if the nets were serviceable, if the excavation is manageable, there is coercion)

•Some say that courts can/should/do decide the issue of consideration or no consideration, based on the joint wealth maximization doctrine

•If damages are fully compensatory and Promisor is fully solvent: Consideration doesn't matter, because Promisee will never make a concession

•**Hypo**: Stilk
•Assume that captain is correct, nets are serviceable
•Captain: "OK, don't work," calculate losses due to non-performance, recover damages
•If fishermen know this, they won't attempt to breach and renegotiate
•So, it's fine to say there can be no modification without consideration, because under these circumstances, fishermen will not breach (because they'll never get the extra $)

•Now, consider a case where a change in circumstances for the promisor (fishermen) leads them to not want to perform the contract, even where the *ex ante* agreement would have required them to do so. Isn't clear that we never want to let them get away with this. Not because we worry about the fishermen, but because we worry about the captain

•So, relax the assumption of fully compensatory damages and full solvency (Common Law: consideration required) When will Promisor perform without renegotiation?

- •Cost of Performance < Contract Price + the lower of (Promisor's Assets, or Promisor's Liability for Breach under the contract)
- •C < P + min(A, L)
- •Perform, and get contract price – cost of performance (P – C)
- •OR Breach, and lose either Assets, or Liability under the contract (min[A, L])

•Example: C = 5 P = 1 A = 10 L = 100

- •Do the work: costs me $5, and I get $1 salary (I lose $4)
- •Breach: Costs me 0, and I lose $10 (my assets) (I lose $10)
- •So, I perform
- •But Captain stands to lose $100, and fisherman only has $10
- •Loss would be $100, court would award $100, but captain would only collect $10, because fisherman doesn't have $100: But it's OK, fisherman performs

•Efficient: Captain gains more than fishermen lose

•Example 2: C=15 P=1 A=10 L=100

- •Do the work: Costs me $15, get $1 (Lose $14)
- •Breach, lose $10
- •I breach

•Result still efficient, if renegotiation allowed (renegotiate for salary of $6 or more)
•Breach is inefficient: Captain loses more than fishermen gain (via minimizing losses)
•Under a strict consideration doctrine, inefficient result, b/c you can't renegotiate

•Courts may find a way out, by finding breach justified/there was consideration/no coercion—so renegotiation will be allowed to stand, and the efficient result will occur
•If we relax the consideration requirement, or a liberal coercion policy (whatever you want to call it, where courts are reluctant to find coercion/readily find consideration): Renegotiation will be allowed: and Promisor will perform for a contract price above $5

•The problem under this model, is the possibility of negotiation breakdown, OR, even if they reached the agreement, the hold-up can have other negative consequences (fishermen might hold out every time to claim the benefit of owner's profit)
•This may inefficiently reduce return to the promisee

•This problem may explain the shape of the Restatement and UCC rules (If you're a captain, you want a rule that allows you to make concessions when they will work, and no concessions where they won't work). But how does the law make the rule?

	Low Promisor Cost	**High Promisor Cost**
Consideration Required	GOOD	BAD
Not Required	BAD	GOOD

Hypothetical Rule: Modifications without consideration are enforceable where the promisor would otherwise have the incentive not to perform. This is not the law. But Adler thinks that decision on whether there was consideration or coercion, etc., may be at least influenced by an analysis of whether performance would have occurred otherwise

•Simple view of the doctrine of consideration is about gratuitous promises

•There are cases, however, where the reason for not enforcing the promise has nothing to do with the notion that a bargained-for exchange wasn't occurring (gratuitous promises), but has everything to do with other incentives (preventing hold-ups, etc.)

VII. Reliance on Promises
Promissory Estoppel

•Based on the compensation to a party for detrimental reliance

•**Example**: A promises to paint B's house for free. B relies on this and declines to hire a painter for $15. A reneges, and B cannot find another painter for less than $20
- •B gets $5 in reliance damages
- •Note: Expectation would be $15 ($15 job done for free), but this not the measure

Simpson Article (1975)
•Where promisor has derived benefit from the promise, e.g., law justifies holding him to promise or paying damages, to avoid unjust enrichment (restitution)
•Note that this has nothing to do with motives for making the promise
•Also, the idea of **induced reliance**. Promise induces promisee to act in certain way
•When there has been induced reliance, law holds promisor to promise (or pay damages)
•This found a "confused expression" in the idea of detriment consideration
•Confusion: Detriment induced by the promise is just that—it comes after the fact. It has nothing to do with the motives for making the promise (so calling it a form of "consideration" seems inappropriate)
•More sensible to look at detrimental reliance as alternative to consideration, part of it
•Reason for incorporating detrimental reliance into doctrine of consideration is the common law tendency toward "a sort of doctrinal monism"
•Same point can be made about benefit consideration: Fact that a promisor has been paid for his promise means that he should be held to perform (or pay damages). This isn't *necessarily* a matter of promissory motives.

•Promise, unsupported by consideration, enforceable if reliance is reasonable and occurs

•Usual damage measure is **Reliance**

•Sometimes cases that are decided under the heading of "promissory estoppel" or "equitable estoppel" (**BEA**: better understood as **ordinary contract cases**)

Hornbook on Promissory Estoppel:
•Doctrine of consideration designed to enforce promises which were bargained for
•Some promises which were not bargained for, but which induced promisee to rely on the promise, to his detriment, are also enforceable
•Doctrine of "promissory estoppel" is used to enforce such promises, not supported by consideration, but which promisee relied on to his detriment

> **Restatement § 90(1): Promissory Estoppel**
> A promise which the promisor **should reasonably expect to induce action or forbearance** on the part of the promisee or a third person and which does induce such action or forbearance **is binding if injustice can be avoided only by enforcement of the promise**. The remedy granted for breach may be **limited as justice requires**

•Promissory estoppel often applies to gratuitous promises (no consideration), though it can apply elsewhere (contract unenforceable because indefinite as to basic terms)
•Some (and Restatement) treat PE as **supplying consideration** where otherwise none
•Under that theory, action based on PE would be an action **on the contract**
•However, courts usually award **reliance damages** in cases of PE, rather than the usual contract **expectation** measure—wrong explanation

•Others treat it as more of a **tort** action: A causes harm to B by making a promise which he reasonably should have expected would cause such harm, and is therefore liable for the harm caused. Under this interpretation, damages would almost always be **reliance**
•Note that promisee must **actually rely** on the promise. If the claimed reliance is an act, P must show that he would not have taken the act except for the promise. If a forbearance, P must show that he would have acted but for the promise.

•Promisee's reliance must also be **reasonably foreseeable** to the promisor. This probably means not only that it was foreseeable that the promisee would rely, but that the promisee would rely in the particular way in which he did

•PE often applies to promises to **make gifts**. Example: grandfather doesn't want to see granddaughter working in a store, so he gives her a promissory note, telling her he did this so she wouldn't have to work anymore. She quits her job. Grandfather dies, and estate refuses to pay her. By quitting her job in reliance on the promise, this reliance made the contract enforceable, so as to "estop" the executor from denying the validity of the promise for lack of consideration

•PE also applies to **written** promises to make a **charitable subscription**, even without detrimental reliance or forbearance. **Oral** promises to make a charitable subscription, however, are not enforceable (in one case, court held that oral pledge of $25k to a temple was not enforceable, since no consideration and no detrimental reliance. Fact that temple included the $25k in its next budget was held to be insufficient to constitute reliance)

James Baird Co. v. Gimbel Bros., Inc. (722) (2d Cir. 1933)
[Subcontractor (D) sent out a bunch of offers to supply linoleum to contractors who were bidding on a construction project (including P). Due to error, D underestimated the amount of linoleum required by ½, and therefore its offer was at ½ the price it should have been. P incorporated D's bid into its own master bid, and won the contract. After D realized mistake, D sent notice to P withdrawing the offer. But P had already made the bid. Afterwards, P sent D letter accepting offer, then sued D for breach]
•Decision: D withdrew offer before it was accepted
•P should have secured the contract before submitting its bid
•Language of D's offer did not mean that offer was accepted once P placed bid
•Offer could only be accepted by P assenting to terms (i.e., agreeing to pay as requested)
•P's alternative theory is **PE**: P acted based on reliance on D's promise, to its detriment.
•Contractor says that the sub's bid was an offer to be bound by the contractor's own bid, conditional on the contractor getting the job (binding once bid submitted)
•Court essentially rejects the above interpretation of the implicit agreement
•Different if contractor had simply **told** the subcontractor that he intends to use his bid
•D's offer could only be an enforceable contract if it was **accepted**: if P agreed to the terms and made reciprocal promise to pay for the linoleum.
•There is no way that D meant to give P the option to accept the offer of linoleum at quoted prices if P's bid was accepted, but not actually binding to take it and pay if it found a better deal elsewhere. D would not subject itself to such a one-sided obligation.

Second Restatement § 87 Option Contract
(1) An offer is binding as an option contract if it
(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
(b) is made irrevocable by statute.
(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
Comment E: Reliance
Subsection (2) states the application of § 90 to reliance on an unaccepted offer, with qualifications which would not be appropriate in some other types of cases covered by § 90. It is important chiefly in cases of reliance that is not part performance. If the beginning of performance is a reasonable mode of acceptance, it makes the offer fully enforceable under § 45 or § 62; if not, the offeror commonly has no reason to expect part performance before acceptance. But circumstances may be such that the offeree must undergo substantial expense, or undertake substantial commitments, or forego alternatives, in order to put himself in a position to accept by either promise or performance. The offer may be made expressly irrevocable in contemplation of reliance by the offeree. If reliance follows in such cases, justice may require a remedy. Reliance must be **substantial and foreseeable**.
•In determining remedy, courts consider: formality of offer, commercial/social context, extent to which offeree's reliance was understood to be at his own risk, relative

competence/bargaining position, the degree of fault of offeror, ease/certainty of proof of particular damages and the likelihood that unprovable damages have been suffered.

Drennan v. Star Paving Co. (725) (CA 1958)
[Same facts as above, P is contractor bidding on a school job, D is subcontractor who is to provide paving. D withdrew the offer after P had already relied on it and placed his bid. After D's refusal, P got another subcontractor to do the work for about $3,800 more than D's offer, then sued D for the difference and won. D appealed]
•No evidence that D's offer was irrevocable in exchange for P using it in his own bid
•No basis to consider P's use of the offer in his own bid figure an acceptance of the offer
•No consideration, not bilateral contract
•But, then there's Second Restatement § 90: D had reason to expect that P would act based on the offer.
•If D expressly stated that offer was revocable before acceptance, it would be so treated
•Second Restatement § 45 says: Unilateral contract offer: part of the consideration in the offer is given by offeree in response, offeror is bound. Performance due once full consideration is given within stated time stated (if none, within a reasonable time)
•If main offer includes subsidiary promise (implied), that partial performance makes the offer irrevocable, offer is binding
    •Part performance or tender may furnish consideration for the promise
    •Acting in "justifiable reliance" on the offer may also make it binding
•Decision: Whether implied in fact or law, the subsidiary promise precludes injustice that would occur if offeror could revoke offer after offeree acted in detrimental reliance
•"Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract"
•Absence of consideration is not fatal to enforcement
•**BEA**: Court seems to really be saying there's a contract:
    •Not a gratuitous promise
    •No Promise! (Offer—maybe conditional promise to make a future promise)
•If the reliance is dependent on acceptance of the offer, it seems like a **contract**
•What factors support characterizing this opinion as a contract case (rather than PE)?
    •Contractor is not entirely free to get a better price (Contractor is bound. Why? Because there's a contract)
    •Acceptance by partial performance
    •Damages reflect difference between offer price and cost of substitute performance (Expectation damages)

•§45 talks about partial performance of bargained-for exchange as consideration for implied subsidiary promise, but that consideration is not required in all cases (§90)
•D could reasonably predict that P would act to its detriment in reliance on the offer
•Reasonable to assume that D submitted its bid to obtain the subcontract
•D had reason not only to expect P to rely on the offer but to want him to (so P would get the contract and D would get the subcontract)—**BEA**: sounds like consideration
•Given this interest, and the binding nature of P's bid, "it is only fair that P should have at least an opportunity to accept D's bid after the general contract had been awarded to him"

•Dicta: P couldn't delay acceptance of D's offer in hopes of getting a better one, or try to reopen negotiations with D on the price, and still claim a right to accept the original offer.

Goodman v. Dicker

[Retailers apply for an Emerson franchise, told by distributor that they have been approved, relied on promise and then told they were not awarded franchise]
•Even though distributor did not have power to award franchises, it was reasonable to believe they could. Reliance on their promise, therefore, was reasonable, and reliance damages awarded (because expectancy too speculative). Not a promissory estoppel case since there is a bargain.
•Distributor had every reason to encourage the belief that Goodman would get the franchise (he would get the business)

Hoffman v. Red Owl

[Essentially same fact pattern as Goodman]
•Court finds that there was not a contract, since enough terms were not agreed on.
•In general, though, courts will often fill in missing terms.
•Again, reliance damages awarded, and again, not really PE since no gratuitous promise.
•**BEA**: If you have enough to say that reliance was reasonable, you have enough to say that there was a contract. Even gaping holes in an agreement can be filled, and courts are willing to do this

•If the holes are so big that no reasonable person would believe that they had a binding agreement, why should they get any damages?
•Adler: This is clearly a contract (unless no contract because terms were too vague): may not have been a promise, or offer (because of missing terms): it clearly meets the definition of consideration, however

•Court refuses to consider "profits" lost based on P closing his store, etc.
•Adler: Court is likely confused, knowing that "lost profits" (the general measure of expectancy damages) are not recovered in PE cases
•P would not be entitled to lost profits from the franchise
•But these lost profits were actually within the reliance measure (opportunity foregone in reliance on D's promise)

•**BEA**: Why not award lost profits?
    - •Perhaps because the profits are too speculative, given right of "at will" termination
    - •Perhaps because the implicit warranty was for those expenditures

•Regardless, all of these factors tend to go toward treating these situations (promissory estoppel cases not dealing with gratuitous promises) as ordinary contracts
•Response: Restatement refers only to offer, does not require a promise
•Restatement's wrong too
•So what? Well, for starters, the courts get the remedy wrong

Restatement § 90 (741)
(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

VIII. Offer and Acceptance
A. Introduction to Objective Theory

Embry v. Hargadine, McKittrick Dry Goods Co. (276) (MO App. 1907)
[P employee claimed that he had verbal understanding with D employer that his contract would be extended by a year. D fired P and P sued]
•P approached D to ask about the contract, and D told him "Go ahead, you're all right; get your men out and don't let that worry you." P took this as contract
•Question: Did this constitute a contract of re-employment, regardless of D's intentions?
•Analysis: Contract said to require a "meeting of the minds," though this is not literal
•Inner intention of parties cannot make or deny a contract if **what was said** was enough
•Courts consider: conduct, acts, express declarations; what a reasonable man would think was being agreed to; reasonable meaning of words/acts, etc.—objective standards
•Decision: If a reasonable man would think D was extending P's employment by what he said, it is a valid contract
•In this case, no reasonable man would interpret P's version of the conversation as anything other than an agreement to his request that his contract be extended
•Jury instruction as to both parties intending to make contract was erroneous.
•Correct instruction: reasonable for P to interpret as agreement to extend employment?

Texaco v. Pennzoil (281) (TX 1987)
•Jury can look at evidence reflecting the demonstrated intent of the parties.
•Public statements and the like can be relevant (e.g. SEC filing and press release)
•Secret or subjective manifestations of intent are not relevant (e.g. conversations between one party and a third party, to which the other party to the alleged contract was not privy)

Restatement § 17: Requirement of a Bargain
(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.

§ 18: Manifestation of Mutual Assent
Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

§ 19: Conduct as Manifestation of Assent
(1) The manifestation of assent may be made wholly or partly by written or spoken

words or by other acts or by failure to act.
(2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
(3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause

Lucy v. Zehmer (282) (VA 1954)
[Contract for sale of land, later claimed to be a joke]
•Contract was in writing, there was negotiation and inspection, therefore court finds that circumstances suggest that dealings between parties were serious. Objective appearance of parties' actions is what matters.

B. Preliminary Negotiations

Nebraska Seed Co. v. Harsh (291) (NE 1915)
[D (seed grower) sent P (seed company) letter saying he had seed to sell and quoted a price. P replied that they wanted the seed and accepted price. D didn't deliver; P sued]
•Court found that the D did not make a binding offer to sell
•It was "nothing more than an invitation…to make an offer" and therefore not such an offer to be turned into a contract by acceptance
•"Mere statement of the price at which property is held cannot be understood as an offer to sell" (Knight v. Cooley [Iowa 1972])
•Factors: D's letter only **estimated** the amount he had to sell—what if it was more or less? If less, he wouldn't be able to deliver. If more, maybe he wanted to make sure he sold it all in one shot.
•**BEA**: Harsh should seek to prove that based on industry custom, it would be reasonable to assume from this letter that Harsh sent out letters to others—that would lead to the conclusion that it was only an invitation to make an offer
•Didn't specify time for delivery
•What if D sent out this letter to a bunch of companies to get bids? If they all accepted, and this could be binding, he'd be liable to all of them
•Decision: This was intended only to be a preliminary negotiation, not a formal offer
•**BEA**: Though it is conceivable that a reasonable person would interpret this as an offer to sell, in cases where there is ambiguity, the law will err on the side of not finding an offer to have been made: It must be clear and unambiguous

Leonard v. Pepsico (294) (SDNY 1999)
[P saw D's ad on TV about Pepsi Points and prize redemption. At the end of the commercial it showed a Harrier fighter jet, for 7 million points]
•Commercial specifically said "Not available in all areas. See details on specially marked packages"
•P raised $700k to buy enough points to get the jet and sued when Pepsi said no

Second Restatement § 26: Preliminary Negotiations

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

•Comment B in this section says that advertisements of goods "are not ordinarily intended or understood as offers to sell." (unless there's a clear invitation to take action without further communication)
•Ad=unenforceable offer even if expressed willingness to accept through order form
•In Mesaros v. US (Fed. Cir. 1988): Similar catalog situation: In this context, displaying a good in a catalog is not a binding offer, rather, filling out the order form is the offer, and the company selling the good is the party who accepts the offer (by accepting the order form and processing payment)
•**BEA**: There are examples where a catalog would likely represent an offer. What arguably distinguished this case is the possibility of purchasing points. If it were solely from getting the points by buying the product, the company would know how many points it had out there, etc., and a court might be more likely to say it was a binding offer
•The exception is when an advertisement is "clear, definite, and explicit, and leaves nothing open to negotiation," e.g. Lefkowitz v. Great Minneapolis Surplus Store (MN 1957): Where D specified goods for sale, where and when to come to buy them, and specified the person who could accept (first come, first served)
•Ad referred to catalog for clear terms—jet not in the catalog
•Proposal being very detailed suggests an offer; omission of many terms suggests it's not
•Absence of terms of limitation like "first come, first served" makes it "sufficiently indefinite that no contract could be formed"
•**Objective Reasonableness Standard**: If it's objectively clear that an offer is not serious, then no offer has been made
•Here, it's clear that the Harrier Jet thing was a joke. Does this really need explanation?

Restatement §22: Mode of Assent: Offer and Acceptance
•Manifestation of mutual assent of an exchange is usually an offer and acceptance
•But not always

§24: Offer Defined
•Manifestation of willingness to enter into a bargain, so made as to **justify another person in understanding that his assent to the bargain is invited and will conclude it**

§29: To Whom an Offer is Addressed
•Manifested intention of offeror determines the person(s) who have power of acceptance
•Can be specified person, or a specified group/class, acting separately or together, or in anyone and everyone who makes a specified promise or renders a specified performance

Second Restatement §33: Certainty
•Even if manifestation of intention is intended to be understood as an offer, it can't be accepted so as to form a contract unless terms of the contract are **reasonably certain**

•Terms are Reasonably Certain: If they provide a basis for determining **the existence of a breach** and **an appropriate remedy** (**BEA**: Good description**)**
•Leaving one or more terms open **may** show that manifestation of intention is not intended to be understood as an offer or as an acceptance (see also §2-204)

Uniform Commercial Code
§ 2-204: **Formation in General**
(1) A contract for 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) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

•Courts will **not** supply a quantity term, since this is an essential basis for determining remedy on breach (thus, if no quantity is specified, there is no contract)
•Courts **will** supply terms such as price, time/place of delivery, etc.

§ 2-206: Offer and Acceptance in Formation of Contract.
(1) Unless otherwise unambiguously indicated by the language or circumstances
(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is **not notified of acceptance within a reasonable time** may treat the offer as having lapsed before acceptance.

§ 2-305: Open Price Term
(1) The parties if they so intend can conclude a contract for sale even **though the price is not settled**. In such a case the price is a **reasonable price** at the time for delivery if
(a) nothing is said as to price; or
(b) the price is left to be agreed by the parties and they fail to agree; or
(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a **reasonable** price.

(4) Where, however, the **parties intend not to be bound unless the price be fixed** or agreed and it is not fixed or agreed **there is no contract**. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

§ 2-308: Absence of Specified Place for Delivery
Unless otherwise agreed
(a) the place for delivery of goods is the **seller's place of business** or if he has none his residence; but
(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
(c) documents of title may be delivered through customary banking channels.

§ 2-309: **Absence of Specific Time Provisions; Notice of Termination**
(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a **reasonable time**.
(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a **reasonable time** but unless otherwise agreed may be terminated at any time by either party.
(3) Termination of a contract by one party except on the happening of an agreed event requires that **reasonable notification** be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

§ 2-310: Open Time for Payment or Running of Credit; Authority to Ship Under Reservation
Unless otherwise agreed
(a) **payment is due at the time and place at which the buyer is to receive the goods** even though the place of shipment is the place of delivery; and
(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and
(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

C. Agreements in Principle and Letters of Intent

Empro Mfg. Co. v. Ball-Co Mfg., Inc. (7th Cir 1989)
[P negotiating to buy D's assets. Parties signed document laying out general principles of the agreement, to be finalized by a formal "Asset Purchase Agreement." Later, they could not agree on certain details, and D balked. P sought to enforce "letter of intent"]

•DC said that because the letter twice referred to the agreement being "subject to" the execution of a later agreement (the definitive contract), the letter had no force on its own
•Where parties make a pact "subject to" a later, definitive agreement, they have manifested an objective intent **not** to be bound: Where no ambiguity exists in the language, intent will be determined solely from that language
•"Subject to" are not always magic words, but in this document they appeared twice, and the document used the words "general terms and descriptions," implying that each party had the right to make additional demands
•Accompanying letter also said the terms were "generally acceptable," but that "some clarifications are needed," which suggests that negotiations were still needed
•P alternatively asks for reliance damages, which the court also rejects

Restatement §27: Existence of Contract Where Written Memorial is Contemplated
•Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but circumstances may show that the agreements are preliminary negotiations

Texaco v. Pennzoil (309) (TX 1987)
•Factors in determining whether parties intended to be bound only by a formal writing:
(1) Whether party reserved right to be bound only when a written agreement is signed
(2) Whether there was partial performance accepted by party disclaiming contract
(3) Whether all essential terms of the alleged contract had been agreed upon
(4) Whether complexity/magnitude of transaction meant that a formal, executed writing would normally be expected
•The issue of when the parties intended to be bound is a fact question to be decided from the parties' acts and communications
•Where intent determinable by written agreement, the question is one of law for the court.
•However, where intent is not conclusively discernible from their writings alone; extrinsic evidence of relevant events is properly considered on the question of that intent.
•"Subject to" is not conclusive, nor is the phrase "agreement in principle"
•Here, there was sufficient evidence for the jury to conclude that the parties intended to be bound by the preliminary agreement, subject to being formalized by a later written contract.
•**BEA**: In dealing with something of this size, parties should be forced to be **absolutely clear** on the existence of a binding contract

D. Revoking an Offer

Dickinson v. Dodds (314) (UK 1876)
[D agreed to sell real property to P (in writing), allowing P a certain amount of time in which to accept. P accepted within the specified period, but D had already sold the property to someone else]

Offer→Promise to leave open until Friday→Revocation→Acceptance→Friday
•One interpretation was that the offer was binding as long as the offer was accepted within the period specified
•Even though postscript makes offer irrevocable through a certain time—no consideration for option contract—promise to leave offer open is a nullity
•The offer could have been left open based on an enforceable provision, if there had been some consideration (e.g. partial payment)
•Under UCC, option contracts are enforceable—promise to keep option open in irrevocable, even if not supported by consideration
•Question—what if the price included something extra as consideration for keeping the option open?
•Still not consideration—option to pay <u>any</u> price is only valuable to the offeree. Offering extra to keep the option open is not consideration—**giving** them extra is consideration
•Another interpretation was that the offer was not binding until accepted, and therefore, no contract existed between P and D at the time that D sold the property to the other person

<u>Second Restatement § 25</u>: Option Contracts
•A promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke the offer

<u>Second Restatement § 35</u>: Offeree's Power of Acceptance
•Offer gives the offeree <u>continuing power</u> to complete the manifestation of mutual assent by acceptance of that offer
•A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated per § 36

<u>Second Restatement § 36</u>: Methods of Termination of the Power of Acceptance
•Rejection or counter-offer by offeree
•Lapse of time
•Revocation by the offeror
•Death or incapacity of offeror or offeree
•OR, non-occurrence of any condition of acceptance under the terms of the offer

<u>Second Restatement § 37</u>: Termination of Power of Acceptance Under Option Contract
•Power of acceptance under option contract is **not terminated** by rejection or counter-offer, by revocation, or by death/incapacity, unless the requirements are met for the discharge of a contractual duty

<u>Second Restatement § 42</u>: Revocation by Communication From Offeror Received by Offeree
•Power of acceptance terminated when offeree receives from offeror a manifestation of **an intention not to enter into the proposed contract**

<u>Second Restatement § 43</u>: Indirect Communication of Revocation

•Power of acceptance terminated when offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect

UCC §2-205: Firm Offers

• An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Acceptance

•Acceptance must be made without altering the terms of the original offer
•This is sometimes called the "Mirror Image" rule

Note: UCC does not apply mirror image rule where parties act like they have a contract.
•Rule "eroding" under common law (more use of common sense to fill in terms)

E. Acceptance by Correspondence

The Mailbox Rule

•An acceptance is effective upon dispatch (protects the offeree over the offeror)
•Offeror can still insist that acceptance is effective only upon receipt (Lewis v. Browning, MA 1881)
•Offeror cannot revoke offer after mailing of acceptance but before receipt. The offer becomes a contract upon mailing (acceptance)
•Contract is still valid if delayed/lost in transit (though duty to perform may be modified)
    - •Analysis would be that the contract is "discharged"
    - •Under these circumstances, courts may find that the contract was formed, but it was a "conditioned" one
    - •When receipt of notice of acceptance is essential to enable the offeror to perform, this condition is usually implied
•Offeree cannot revoke acceptance after mailing but before receipt either (this would be unfair and allow speculation by offeree)
•Offeree cannot revoke acceptance by intercepting the acceptance before receipt (but, practically, offeror cannot enforce acceptance he doesn't know about)

•In the case of **option contracts** offers, the opposite rule applies—contract is formed upon receipt of the acceptance, and offeree can revoke before acceptance is received

Restatement § 63: Time When Acceptance Takes Effect

Unless the offer provides otherwise,
(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; but
(b) an acceptance under an option contract is not operative until received by the offeror.

§ 64: Acceptance by Telephone or Teletype
Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.

§ 65: Reasonableness of Medium of Acceptance
Unless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received.

§ 66: Acceptance Must Be Properly Dispatched
An acceptance sent by mail or otherwise from a distance is not operative when dispatched, unless it is properly addressed and such other precautions taken as are ordinarily observed to insure safe transmission of similar messages.

F. Acceptance by Performance

Unilateral Contract: Acceptance by performance + same performance satisfies the obligation (**Acceptance by Full Performance**)

Carlill v. Carbolic Smoke Ball Co. (UK 1893)
[D offers £100 to anyone who uses its product and still gets sick. Makes clear in its ad that it is serious about this. P uses it as directed and still gets sick. D says it won't pay unless P uses product under its supervision. P sues for breach]
•Not a unilateral contract—Offerror gains nothing from the performance
•This is a warranty, and of course it's enforceable

"Real" acceptance by performance
•Offer may permit (or be deemed to permit) acceptance by full or partial performance
•In general, a so-called "unilateral contract" is one that is formed where an offer is accepted by full performance
•Example: Reward of $100 to the person who finds and returns my lost dog, Rufus
    •The offer doesn't include compensation for the effort, only for the result
•Once there's been part performance, irrevocable, offeree can complete performance
•Unless the offer otherwise specifies, where the offeror's knowledge of performance is uncertain, an offeree risks an inability to enforce unless she takes reasonable steps to notify offeror of performance (and thus acceptance)

Acceptance by Partial Performance

White v. Corlies White & Tifft
[Builder contracting for construction of offices, after negotiations, bought lumber]
•Not a unilateral contract case because partial performance can be acceptance.
•Acceptance must clearly communicated to the offeror.

•An act which is in itself no indication of an acceptance does not become acceptance even if motivated by an unequivocal intention to accept.
•Here, the carpenter did nothing that he wouldn't have done *anyway* (the materials could be used for **any** project), nothing to indicate to offeror that he had decided to accept.
•**BEA**: There is a lot of communication here which would suggest the formation of a contract
•Perhaps it was a strict interpretation of the "Mirror Image" rule or some other more formalistic approach that led the court to find no contract
•If there was an objective manifestation of assent, there would have been a **bilateral** contract
•The difference between this and the finding the dog case (unilateral contract) is that the dog finder could start to perform (look for the dog) and then change his mind
•Here, if the builder started working on the office, he couldn't then stop performing in the middle of the work
•Unless the offer otherwise specifies, where the offeror's knowledge of performance is uncertain, an offeree risks an inability to enforce unless he takes reasonable steps to notify an offeror of performance (and thus acceptance)

Performance Option
•Unless an offer communicates different terms of acceptance, an offeree who begins performance has an option to complete performance according to the terms of the contract (this doesn't apply to White v. Corlies, because you still need an objective manifestation of beginning performance)
•If everyone knows acceptance has occurred, the option disappears

§ 45 Option Contract Created by Part Performance or Tender
(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, **an option contract is created** when the offeree tenders or begins the invited performance or tenders a beginning of it.
(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
•This applies to both unilateral and bilateral contracts
•This doesn't work in White v. Corlies because the beginning of performance is not observable

§ 54 Acceptance by Performance; Necessity of Notification to Offeror
(1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.
(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless
- **(a)** the offeree exercises reasonable diligence to notify offeror of acceptance, or
- **(b)** the offeror learns of the performance within a reasonable time, or
- **(c)** the offer indicates that notification of acceptance is not required.

Restatement (348)
§ 30 Acceptance Invited — Either acceptance such as is explicitly in the contract or whatever reasonable in the circumstances
§ 32 Invitation of Promise or Performance — If not explicit, up to offeree how to accept, promise or performance

Petterson v. Pattberg (348) (NY 1928)
[Contract for early payment on a mortgage—discount for early payment. P went to D's house to pay early, within specified time, P won't let him tender payment before notifying him that the offer is revoked]
•Unilateral contract, until payment neither side bound.
•Since defendant revoked *before* made the actual tender, there was no contract.
•Court says that the requested act (i.e., the *completed* act of payment) was incapable of being performed unless assented to by the person being paid.
•**BEA**: Maybe court thought gathering the money is preparation for possible performance, not the beginning of performance
•Or, maybe this case was just wrongly decided, either because it is inconsistent with the Restatement, or simply because the tender was complete, as the dissent suggests

G. Acceptance by Silence

•**BEA**: Something more than silence has to be at work here
•I show up at your house, slip a letter under the door—"After reading this letter, you are bound to give me $100. I will paint your house by Tuesday; if you don't object before Tuesday, you are so bound"—Definitely not binding

Second Restatement § 69: Acceptance by Silence or Exercise of Dominion
(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

> **(a)** Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
> **(b)** Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
> **(c)** Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

•**BEA**: If it's really easy to decline the offer (send it back in the SASE), the courts will likely say that the offeree has to send it back (law imposes burdens which are reasonable)—if you **use** it, you may very well be bound by the terms of the offer. If there

is a substantial burden, however, the courts become less likely to treat keeping it or throwing it away as acceptance of the offer

•**BEA**: How can using an unsolicited good be an external manifestation of acceptance?
•Just as plausible to treat it as a manifestation of "Yay, free stuff!"
•As a practical matter, there is often ambiguity as to the meaning of certain actions—keeping the CD may or may not be an acceptance, throwing it away may or may not be an acceptance (courts are unclear on this)

•Hypo—Company sends you a CD, supplies SASE, says if you don't want this, just return it, otherwise you accept it and owe us $X
•Common law: If you just throw it out or keep it for yourself, you are bound
•Statute says you can't impose an obligation on a person by fiat—if someone sends you something unsolicited, it's deemed to be a gift: Legislature decided that these unsolicited offers were a nuisance, and many people didn't know their legal rights and assumed that the were bound to accept and pay

Hobbs v. Massasoit Whip Co. (353) (MA 1893)
[Shipment of eel skins, no contract per se, defendant did not contact shipper of acceptance or rejection]
•Conduct which imports acceptance or assent *is* acceptance or assent in the view of the law, regardless of the party's actual state of mind.
•Here, plaintiff and defendant had a regular arrangement by which silence was acceptance, so there was a standing offer.
•Court will not impose this burden without evidence of prior deals or custom.

Restatement § 69 (354) Acceptance by Silence
(1)(a) Offeree takes benefit of offered services w/ reasonable opportunity to reject them and reason to know compensation is expected
(b) Offeror stated/gave offeree reason to know that silence may be assent, and offeree intends silence to be assent
(c) Past dealings, etc.: Reasonable for offeree to notify offeror if he doesn't accept
(2) Any act inconsistent with offeror's ownership is binding in accordance with terms of offer unless they're unreasonable

H. Acceptance in General

•In the manner invited by an offer—and by the medium invited by the offer (§§ 63, 66)
•Offeror generally master of the means of acceptance (common sense rule = default)
•Offer, Revocation and Acceptance are the components of **assent**
•Objective manifestation matters
•Dickinson v. Dodds: Court did not consider objective manifestation of revocation—they knew, however, that Dodds knew about the revocation
•If the parties both thought there was a revocation, there was

•Mirror-Image rule not literal, If A does enough to convey an offer and B does enough to manifest acceptance, a binding agreement will likely be found, even if there is a slight disparity in the terms of offers and acceptance

•Recall Corlies, where offeree's claim of partial performance is deemed insufficient to make a contract enforceable, since an offeree could decide to produce evidence of performance if he wanted to enforce the contract and not produce such evidence if he didn't. This is not reasonable—offeror would not give offeree a "secret option" to claim that he accepted the offer or not—there must be an external manifestation of acceptance (notice to offeror, customizing materials for the specific job, etc.)

Restatement § 61 Acceptance Which Requests Change of Terms
An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

UCC § 2-207. Additional Terms in Acceptance or Confirmation.
(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the **offer expressly limits acceptance to the terms of the offer**;
(b) they **materially alter it**; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is **sufficient to establish a contract** for sale although the writings of the parties do not otherwise establish a contract. In such case **the terms of the particular contract consist of those terms on which the writings of the parties agree**, together with any supplementary terms incorporated under any other provisions of this Act.

IX. Interpreting Assent
A. Agreements to Agree

Sun Printing v. Remington Paper (404) (NY 1923)
[Contract to buy paper, price TBD in unknown intervals, no higher than index price]
•Contract fails because it doesn't provide enough terms to determine proper remedy.
•Cardozo thinks that assigning arbitrary terms is too speculative by the court. There is a fixed quantity, so unlikely that this is an option contract. Adler questions whether court could fill in terms that give buyer the worst deal, yet still better than what he gets.
Restatement (433)
§34 Certainty of Terms — Contract can be binding even if it involves choice of terms by one or both party(ies). Part performance and reliance give courts reason to enforce uncertain contracts, or "make a contractual remedy appropriate"

§204 Supplying an Omitted Essential Term — If sufficient to be a contract but lacking term essential to rights/duties, Court's discretion to supply reasonable terms

Texaco v. Pennzoil (410) (TX App. 1987)
[More Texaco and Pennzoil]
•To be enforceable, terms must be ascertainable to a reasonable degree of certainty.
•Sufficient to recognize a breach and to fashion a remedy.
•Court rules that Texaco is just trying to add terms that were not essential.

B. Illusory Promises

•Some cases of "empty terms" are referred to as "no consideration" cases—the difference here, however, is that parties act as if they have a bargained-for exchange. Court just doesn't want to enforce these contracts because they are too one-sided

•Hypo: Treasury Bond with face amount of $100. Maturity date of 2010. A sells the bond to B for $110. This makes no sense. This is not a lack of consideration, since there appeared to be a bargained-for exchange. The real reason for rejecting this as a contract would be unconscionability

•Can explicit terms be considered empty? Based on idea of rationality, it seems they can

NY Central Iron Works v. US Radiator (411) (NY 1903)
[Requirements contract for radiator needs, demand increases, refusal to supply]
•D claimed mistake—it thought it would only be required to supply up to past needs
•Contract is enforceable, but to protect sellers, imputed obligation to act in good faith.
•Requirements contract can't be used by buyer to speculate in a rising market
•Can't become a re-seller

Hypo - If Buyer is reseller of iron instead of manufacturer of radiators, than he will buy only when the price of iron increases. In this instance, court should deem illusory contract because the lack of quantity term.
•No seller would enter into a contract where they can only break even or lose money
•Like the case of buying a $100 T-bond for $110.
•The court might call this bad faith—but why is buyer acting in bad faith just because he is in the business of speculation?
•Not so much bad faith as unconscionability—totally irrational for seller to enter into no-win contract. Court may say that this is an "illusory promise"—but how is it illusory?
•It's really not—rather, it is simply irrational, and therefore unenforceable.
•Courts sometimes call this no consideration, which is correct if the definition of consideration is a "fair exchange." But this is not the definition of consideration (it's a bargained-for exchange)
•But, assuming the buyer is an actual manufacturer, as in the real case, different situation
•Manufacturer can't just go out of business—customers expect him to fill orders
•If price goes down, manufacturer is still going to have to buy some iron to make radiators for existing customers (presumably manufacturer's demand will go down

somewhat, because his competitors will be able to buy iron for less), but iron seller can still make some money (he's selling at greater than market price)
•If price goes up, manufacturer can't sell an infinite amount of radiators
•If price goes down, seller will make some money; If price goes down, seller will lose some money—this might not be the best deal in the world, depending on one's perspective, but it is not an irrational deal *per se*.
•There are going to be some cases where the question of whether buyer is a manufacturer or a re-seller, but this is the general principle

Eastern Airlines v. Gulf Oil (413) (DC SDFL 1975)
[Contract for required jet fuel, seller demands price increase, buyer refuses] Good faith requirement not to abuse changes in the market.
•In this case court finds parties acted in good faith
•Have to stay within a reasonable range of demand, based on past practice, etc.
•UCC and comments: **Shutdown by a requirements buyer might be permissible due to lack of orders but not permissible merely to curtail losses**. If you're a radiator manufacturer, and you don't have any customers demanding your radiators, it's OK not to order Iron. But you can't not place orders just to not lose money
•**BEA**: If there's a requirements or output contract, a fluctuation of market price can put the seller at the mercy of the buyer—UCC §306(1) requires good faith
•**Problem**: Distinction between lack of orders and shutdown is impossible to make: If you are a buyer, and price goes down (but you are still bound by requirements contract price), good faith requires lack of orders. So, if you keep your sales price at the same level (while your competitors presumably drop theirs in accordance with lower prices for component materials), you won't have any orders. So, you will literally be limiting requirements due to lack of orders, but at the same time, you are also lowering requirements to curtail losses

•Safe to assume, under requirements K, seller didn't intend buyer to become a re-seller
•But in cases where there is no re-selling going on, what's the point of other implicit requirements of good faith? If courts limit their inquiry to the re-selling question, they would have a more focused analysis than the UCC approach to determining good faith
•Example—Requirements buyer (prices go up, buyer aggressively expands business): His argument is that it can't be bad faith to do what is allowed under the agreement
•This position, taken too far, however, means that buyer could go into re-sale business
•This could be limited by saying that an implicit term of the contract was that the buyer would remain a manufacturer, and would not become a re-seller

Wood v. Lady Duff (416) (NY 1917)
[Licenser agrees to use her name in order to exclusively market goods in exchange for half of the profits, she endorses without his knowledge]
•Cardozo uses good faith to save K—Wood must make good faith effort to use name/sell
•**BEA**: Terms give Wood incentive to make efforts, that's what was bargained for.
•This is the only way that he can profit from the agreement with Lady Duff.

UCC §2-306 (423) Requirements Contracts — Must be good faith demand, cannot be unreasonably disproportionate to stated estimate (if none, normal or otherwise comparable prior output). In licensing case, parties must use best efforts.

•**BEA**: In all of these illusory promise cases, the consideration doctrine can usually be invoked: If one side has made a deal that is completely irrational (one party can only win and one can only lose), doesn't look like there could have been a bargained-for exchange
•However, in the classic consideration case, there is a gratuitous promise. In illusory promise cases such as this, however, it is relatively clear that there was a bargained-for exchange, just a completely irrational one that we don't want to enforce
•In that sense, looks more like an unconscionability issue than a consideration question
•Absent imputed good faith requirement, Wood required to do nothing is bothersome
•However, there is a basis for believing that there was a bargained-for exchange here
•Giving Wood exclusive right to her name, without return promise to do anything (except pay her 50% is he decides to use the name), is a sensible economic arrangement

C. Ambiguous Terms

SUBJECTIVITY IN OBJECTIVE THEORY OF ASSENT — If there is an objective meaning, subjective intent irrelevant. If no objective meaning, court looks at subjective intent and decides whether to favor one side or the other or to declare the contract void.

•Objective theory is meant to **foster reasonable reliance on contract terms** (recall the example of A offering to sell B his car for $10k, then saying [when value went up] "when I said $10k, I meant $20k")—even if the court were perfect at determining whether or not it was true that A had this subjective meaning, we still wouldn't want to enforce this contract, considering the goal of reasonable reliance on contract terms

Second Restatement § 201:
•Same meaning controls
•If different meanings, meaning of party ignorant of disagreement or doubt controls over meaning of party knowledgeable of disagreement or doubt (or party that should be knowledgeable of it)
•Otherwise, subjective meaning does not matter
•**BEA**: Put simply, it prevents fraud—encourages the knowledgeable party to clarify the term(s), or to accept the other party's interpretation
•This is an information-maximizing rule, a la Hadley v. Baxendale
•In terms of efficiency, this rule allows people to rely on promises
•Rare that there is a subjective understanding where an objective meaning cannot be discerned—usually, if the former exists, so too does the latter

•**Hypo:**
•You and I are good friends.
•I own a Buick and a Replicar (VW chassis with vintage Porsche body on top)
•I love my Replicar
•I am financially distressed

•At lunch, I offer to "sell you my car for $10,000"
•You say, "I accept"
•Market value of Replicar is $12,000; Market value of Buick is $8,000
•Do we have a contract for the sale of a car, and if so, which one?
•My position: We either have a contract for the sale of the Buick, or no contract (assume at this point that I'd rather not sell any car at all than sell the Replicar for $10,000)
•You should have known I meant my Buick, because you know I love my Replicar
•Your position: You know I need the money, because I'm financially distressed, so I may well sell below market value because I need the money
•In reality, court probably wouldn't find a contract per Restatement §201
•See also Raffles and Oswald
•In cases like those, court will throw up its hands—no reason to know that one meaning was intended rather than the other, so the court cannot determine the basis of a contract

Raffles v. Wichelhaus (378) (UK 1864)
[Peerless case, shipment to arrive on Peerless, only there are two ships by same name]
•Ambiguity is one the parties did not intend at the time of the agreement
•Buyer: I didn't mean the December Peerless, I meant the October Peerless
•Seller: No reason why it should make a difference—Peerless not a material term
•How convenient that Buyer now says he cares which boat it came on, since as of December, the market price of cotton fell below the contract price
•Buyer: I did care which ship it came on, since I named the ship in the contract
•Seller: We named the ship only to say that if the ship sank, the deal would be off (to do this, we had to name the ship, otherwise if I changed my mind, I could say the cotton was on any ship which sank)
•But neither Peerless sank, so the name of the ship was immaterial
•Buyer: That's not the only reason I named the ship—I also wanted to name the ship to have a gauge on when the shipment would arrive—I speculate on cotton (as opposed to being a textile manufacturer, in which case the time of arrival may not matter so much)—so time of delivery is very important to me
•Seller: Why, then, did you wait until after the December Peerless came in to bring this up? Why didn't you ask for your cotton after the October Peerless came in?
•Buyer: I realized that the cotton didn't arrive (since it was never delivered), and I was actually happy, since the price of cotton had fallen—I didn't say anything, because you breached, but there were no damages (contract price > market price)
•Seller: Even if you were happy that the cotton didn't arrive on the October Peerless, why didn't you at least inquire as to what happened?
•Buyer: I didn't care why it didn't arrive, I was happy that the contract was the nullity
•Conclusion: Both sides make relatively reasonable arguments. Seller says buyer is trying to get a free option. Buyer says no—didn't know there was a December Peerless
•Maybe there would have been a way to get to the bottom of this, if there was a standard trade practice regarding the tender of goods for sale (e.g. a meeting place to settle accounts), but the court didn't make this inquiry
•Simpson: Think about what the parties would have agreed to *ex ante*: They might have been perfectly happy to suggest that if some unanticipated ambiguity arose, in no case

should one party lose more than that party would have lost had that contract been enforced on the terms that that party thought he had
•At the very least, don't give the buyer a windfall because of the seller's misunderstanding
•At least give the seller the $ that he would have received under the version of the agreement most favorable to the buyer (i.e. the December Peerless) (Market Price – Contract Price)
•Mechanically, however, we can't get to that solution, because unless there was a contract for the December Peerless, the seller didn't perform, and there were no damages
•No objective measure to lead one to conclude that one or the other Peerless was meant
•Court cannot determine which meaning is correct, therefore contract is void
•Criticism: The term "Peerless" was not material term of the contract—it was only included to mean that if the goods were lost at sea, seller would absorb the loss but buyer couldn't sue for non-delivery

Oswald v. Allen (389)
[Sale of Swiss coins, P thinks he's buying rare ones that D doesn't want to include]
•Agreement to buy "Swiss Coin Collection"
    •To P, this meant all Swiss coins in D's collection
    •To D, the collections were divided in twain: the "Swiss Coin Collection" and the "Rarity Coin Collection"—she only meant to sell the former
•Trial evaluated witness credibility, D's records, coin values and other circumstances
•No subjective understanding, so no contract unless there's an objective meaning
•In other words, if parties understand a term or terms differently, there is no contract **unless one of them should have been aware of the other's understanding**
•**BEA:** Court says "no sensible basis for choosing between conflicting understandings"
•Buyer: Wouldn't the seller ask about selling the other rare coins? (Adler thinks this is a really strong point)
•Also, "Swiss coins" could be seen as a general term, while the specific collection could be seen as a specific term (general meaning prevails over specific)

Second Restatement (390)
§200 Interpretation of Promise or Agreement: Ascertainment of its meaning

§201 Whose Meaning Prevails: If parties have different meanings, and one doesn't know (or have reason to know) of the other's meaning, but the other knows of his (or has reason to know), the ignorant party's meaning is applied
•Otherwise, no contract

§202 Rules of Interpretation — Generally prevailing meaning or terms of art are used

Uniform Commercial Code (392)
§1-205 Course of Dealing and Usage of Trade — Past conduct between parties governs custom, both are overruled by course of performance
§2-208 Course of Performance — Action under the contract governs, except when there are express terms

Hierarchy — **(1)** Express terms (actual words in this contract between the parties)
(2) Course of performance (actions between parties on this contract)
(3) Course of dealing (past contracts between these parties)
(4) Usage of trade (custom among these and other parties)

•**Course of Performance and Course of Dealing**: Adler thinks these are of limited value—parties don't always force the issue, maybe they waive a contractual right in the interest of working it out by non-litigious means—a waiver does not imply a contractual modification—example: If contract is for delivery "by mid-week," if party routinely delivered on Thursday, but the receiving party always objected, e.g. "We really need this wood by Wednesday; if you deliver on Thursday one more time, I'm gonna sue," court wouldn't saythat recipient waived its right to object by accepting prior late deliveries
•**Usage of Trade**: Can be useful—example: contract for delivery of 2x4 lumber; everybody in the trade knows that the measurements are slightly less than 2"and 4", because the wood-cutting machines plane the wood and it ends up slightly less than those dimensions—a buyer who decided to sue for breach would likely lose for this reason

D. Vague Terms, Context

Weinberg v. Edelstein (393) (NYSC 1952)
[Plaintiff not allowed to lease to dress sellers, defendant sells skirt-blouse combinations]
•Court doesn't care what plaintiff's understanding of "dress" was, instead looks to industry standards to find an objective definition.
•P: an ensemble that could be manufactured as a two-piece dress *is* a dress for the purposes of the covenant—from a customer's perspective, there is no difference—the identical appearance of the item is exactly what the contract sought to avoid
•D: Hey, these are skirts and blouses—they're separate pieces—separate price tags, etc.
•Tiebreaker is that restrictions on land use are to be narrowly construed
•Court says no to P, but issues some limited restrictions on D, attempt at compromise

Frigaliment v. BNS (397) (SDNY 1960)
[Contract for sale of "chicken," parties disagree over meaning]
•Seller said "chicken" includes fowl; buyer thought it meant "young chickens"
•Objective meaning and trade usage permitted either interpretation—one industry expert said chicken meant anything not a duck or a turkey; another said using English word "chicken" was because it's a "term of art" meaning young chicken
•Rule: When there's a broad definition and a narrower definition, the party seeking the narrower definition should make that explicit in the agreement—everyone knows that "chicken" might mean old or young chicken, but only experts know that "chicken" means "young chicken"
•Court thus decides that buyer (seeking the narrower definition) is the more appropriate party on which to place the burden
•Negotiation proved inconclusive on whose meaning, if any, was understood
•Court reverts to the objective meaning because there is no evidence that something different was meant.
•There *is* an objective standard (Agriculture Department definition), but Judge Friendly cares about the subjective intent because objective meaning wasn't overwhelmingly clear

•Adler questions the burden on the buyer to prove subjective meaning, but justifies it as narrower descriptions are not inherently as ambiguous, and seller might be known to be new to the business.
•**BEA**: Why didn't the court say "no contract" for the same reasons cited in Peerless? Adler thinks that there is no real reason to distinguish them on the facts, just the result
•Peerless court arguably should have looked at context and common practice more, as was done in this case (Peerless was wrong, this one is OK)
•Court put burden on buyer to show that the more restrictive definition is the operative one—because the buyer was the P? Or because the buyer's definition is more narrow? Is this a justifiable burden in all cases? That remains an open question
•Note: In modern contract law, courts are less and less willing to say there's no agreement, particularly when parties act as though there were—willing to fill in terms

X. Unconscionability, Good Faith, and Warranties
A. Unconscionability

•Unconscionability can be seen as the use of context, not to interpret the promise, but to decide whether the promise should be enforceable

•These forms of unconscionability are related to the defenses of "Capacity" (eg mentally ill persons), "Fraud-in-the-inducement" (people are defrauded into the agreement), and "Mercy" (e.g. where buyer is a re-seller)
•This is where we don't really believe that the parties entered into an agreement which they both understood
•Mercy defenses (Illusory promise defenses), courts don't enforce because:
    •Either they assume seller didn't really know what he was agreeing to
    •Or, it just seems unfair

Procedural Unconscionability
•Deals with the actual process of contracting
•Fraud, Duress, Mistake
•**BEA**: This is the uncontroversial kind of unconscionability
•Similar to the idea that if one person is knowledgeable of the terms that it might obtain and the other person is ignorant, we don't accept the knowledgeable person's interpretation—we either make him accept the ignorant person's meaning or clarify
•Commercial contract law is all about mutually beneficial exchange

Substantive Unconscionability
•Deals with the resulting contract
•Impossibility, Illegality
•Is this a contract we want to enforce?
•The controversial kind of unconscionability

•Standardized Agreements
•A "regular" term in a form is enforceable unless one party has reason to believe that another would not accept a term in known

•Think about a rental car agreement—we never read the contracts, because we have a sense that it's unenforceable

•Avoiding surprise is the key

•There still might be clauses beneficial to the seller which are not so outrageous that they are unenforceable—e.g. arbitration clause

•Companies sometimes ask customers to initial an unusual or adverse term

Restatement § 211 Standardized Agreements
(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
(3) 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.

•**BEA**: Knowing that this is the rule, why is there still boilerplate language?
•There's no reason for the seller not to put in all kinds of pro-seller terms—some people might see these terms and go along with them out of ignorance
•The seller can get any rule it wants out of the contract, as long as the court decides that it's a rule that society would adopt—it it's senseless, it won't be enforced; if it's not so ridiculous, court may go along with it

Williams v. Walker Thomas Furniture Co. (1010) (DC Cir. 1965)
[Ps contracted to buy furniture from D through installment payments. Contract said that subsequent purchases would use already totally paid-for items as security, so that even once the balance was satisfied, if there was a default on an installment of a subsequent purchase, all items could be repossessed]
•Unconscionability includes absence of meaningful choice by one party + terms unreasonably favorable to the other party
•Sometimes meaningful choice is negated by "gross inequality in bargaining power"
•Was there a reasonable opportunity to understand the terms of the contract?
•Were important terms "hidden in a maze of fine print and minimized by deceptive sales practices?"
•Were the terms "so extreme as to appear unconscionable according to the mores and business practices of the time and place?"
•Arguments favoring the buyer:
•Uneven bargaining power—she may have been forced into agreeing to it
•Security she put up was grossly out of proportion to what she was buying

•Store forced her to give up a huge amount for a relatively insubstantial benefit to itself
•The store knew she didn't need the stereo—they sold it to her on highly unfavorable terms, knowing she didn't need it—they took advantage of her (court liked this argument)
•Arguments favoring the seller:
•This was not a purchase necessary for survival, it was a discretionary purchase
•All she had to do was pay what she promised to pay, and she keeps everything
•Seller is never going to get paid more than it's owed
•We have a responsibility to our other customers to keep prices low—if we couldn't ensure that we'd receive payment, we'd have to raise our prices
•Reasoning
•Protects against "sharp practice" and "duress" without need to develop specific evidence
•Do we want to allow people to make these bargains? Risk all of their life savings on a mortgage, or risk all of their possessions on a stereo? This is a hard question, and inevitably will have to contend with the arguments on parentalism and lack of choice

UCC § 2-302: Unconscionable Contract or Clause
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 208 Unconscionable Contract or Term (See comments ff., pp. 1015-1017)
If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

•This determination is made in light of its setting, purpose and effect
•Factors include: Weaknesses in contracting process (contractual capacity, fraud)

B. Good Faith

Restatement § 205 Duty of Good Faith and Fair Dealing
Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

UCC § 1-203: Obligation of Good Faith
Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.
•Good faith: "honesty in fact and the observance of reasonable standards of fair dealing"

•Even when there's no explicit terms prohibiting certain conduct under the contract, court imputes a "good faith" obligation on one of the parties—what the court is really doing is reading an implicit term in the contract

Goldberg 168-05 Corp. v. Levy (Queens 1938)
[P lessor sues D lessee for violating commercial lease agreement which based rental payments in part on sales proceeds. D allegedly diverted business to another store in order to get out of the lease]
•Court imputes good faith dealing requirement on all contracts, meaning that D had a duty to use reasonable efforts to bring about sales (Lady Duff)
•**BEA**: Real issue: Court says there's an implicit term in the agreement which would prohibit the lessee from changing its business practices in the way it did
•Intentionally diverting business to bring gross receipts below specified figure is "in direct violation of the covenant of good faith and fair dealing which exists in every contract"

Mutual Life Insurance Co. v. Tailored Woman (800) (NY 1055)
•Not a breach of good faith when tenant transferred some merchandise from leased premises (she was merely exercising her rights)

Stop & Shop, Inc. v. Ganem (806) (MA 1964)
Tenant allowed to discontinue business that is subject to gross-revenue rent (yet still lease premises) since there is no implied covenant to continue operations in the contract
•If the minimum rent (not based on sales) was clearly out of sync with market rental value, would be different.
•"Apparently substantial minimum rent in an apparently complete written lease" (absent showing stated above) = fixed rent + lessee's interest in making sales were enough

Food Fair Stores, Inc. v. Blumberg (809) (MD 1963)
•Duty of good faith does not prevent tenant from expanding business to other area stores
•Finding these implicit terms is context-specific

HYPO:
•Retailer agrees to pay lessor rent of fixed amount + 10% of gross sales of bike shops
•Retailer purchases (from manufacturer) 100 bikes per period for $300 each, selling each for $400
•So, lessor gets $40 per sale; retailer (lessee) gets $60 per sale
•Lessee then converts business, purchasing 100 bikes of a different brand per period for $200 each, selling them for $305 each
•Lessor gets $30.50 per bike, lessee gets $74.50
•**Variant**: Lessee buys 100 bikes per period for $200 each, sells them for $295 each
•Lessor gets $29.50 per sale, lessee gets $65.50 per sale
•Less overall profits in 3rd deal, more overall profits in 2nd deal—joint wealth maximization—2nd deal increases the total profits to be divided between the two (net gain), whereas the 3rd deal results in a net loss

•Once a court sees that there's no explicit term limiting this change in business practices, it will look at what the fair implicit terms would be—fair implicit terms would be to allow the retailer to maximize the joint welfare of the parties
•JOINT WEALTH MAXIMIZATION
•Ex ante, it's in both parties' interest to allow flexibility which allows for joint wealth maximization and ,if necessary, they can adjust the price to account for possible differences between what proportion of that wealth each will capture

Texaco v. Pennzoil (813) (TX App. 1987)
[Texaco objects to Pennzoil's "duty to negotiate" theory]
•If the parties intended to be bound (jury question), requirement for good faith negotiation would be binding as well

C . Implied Warranties

•Sometimes implicit warranties are default rules: parties can expressly disclaim them

Step-Saver Data Systems v. Wyse Technology (814) (DC EDPA 1990)
•Difference between warranty of merchantability (for ordinary purposes) and fitness for a particular purpose:
•Extra requirements for particular purpose (UCC §2-315):
(1) Seller has reason to know buyer's particular purpose
(2) Seller has reason to know buyer relies on seller's skill/judgment
(3) Buyer in fact relies on seller's skill or judgment
•General Warranty of merchantability (UCC §2-314[2]):
(a) Pass w/o objection in trade under contract description
(b) For fungible goods, fair/average quality within description
(c) Fit for ordinary purpose for which goods are used
(d) Within variations permitted in agreement, generally same quality/quantity
(e) Adequately contained/packaged/labeled as required by agreement
(f) Conform to promises/affirmations made on container/label (if any)
•No requirement of "outstanding or superior" goods

•Implied Warranties of Merchantability and Fitness for a Particular Purpose

•Recall the hierarchy: express language, course of performance, course of dealing, usage of trade. **UCC §2-208, §1-205**
•Context of agreement matters in addition to explicit language.
•Terms may include not expressly in contract but implied through course of dealing, etc.

UCC §2-314: Implied Warranty: Merchantability, Usage of Trade:
•When seller sells a good that's typically used in a particular way, seller warranties that the good is fit for that particular purpose
•Note connection to good faith—even without concept of warranties, it would be bad faith for a seller to rely on a lack of explicit terms about merchantability as a way to avoid making good on the implicit promise that the goods sold are merchantable

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
(2) Goods to be merchantable must be at least such as
  (a) pass without objection in the trade under the contract description; and
  (b) in the case of fungible goods, are of fair average quality within the description; and
  (c) are fit for the ordinary purposes for which such goods are used; and
  (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  (e) are adequately contained, packaged, and labeled as the agreement may require; and
  (f) conform to the promises or affirmations of fact made on the container or label if any.
(3) Unless excluded or modified other implied warranties may arise from course of dealing or usage of trade.

UCC §2-315: Implied Warranty: Fitness for Particular Purpose
Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under next section an implied warranty that the goods shall be fit for such purpose.
•If you bought skates in Wal Mart for a competitive race, and sued when they weren't fit for that specialized purpose, you'd lose
•If the same thing happened in a specialty shop that specialized in skates for competitions, and you told the owner what you needed the skates for, you may win

UCC §2-714: Buyer's Damages for Breach in Regard to Accepted Goods
The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
In a proper case any incidental and consequential damages under the next section may also be recovered.

D. Explicit Warranties

•Role of explicit warranties can be questioned on good faith grounds

•**Hypo**: I buy a carbon fiber bike frame from a retailer who "warrants that the frame will last for at least 10 years even under hard use by a rider over 200 lbs."
•My own research tells me that frame will not last that long under those conditions
•After three years, frame fatigues and buckles, becoming worthless, as I knew it would
•I sue→what result?
•Why might this happen? Maybe seller thought I wouldn't really use it strenuously, so it wouldn't be an issue

•If the seller makes a false statement, and the buyer knows it's false, it's a nullity
•For example, if seller said "Buy this bike because it will last 10 years," that would be fraud in the inducement
•But that's not what happens here→a warranty cannot be false, because it really means: "If the bike breaks within ten years, you get your money back."
•Under CBS (824), I win

XI. Writings as Evidence
A. Parol Evidence Rule

•**Hypo**: Abel and Baker sign the following writing:

> "Abel agrees fully to landscape GreenAcre (owned by Baker) according to the attached plans, for which Baker agrees to pay $10k"

•Would parol evidence rule exclude evidence of a prior agreement for Abel to sell Baker Abel's car?
•No→Parol evidence rule excludes extrinsic evidence which one would expect to be included in the agreement. The landscaping agreement is not a fully integrated agreement with respect to the sale of a car
•If the parol evidence related to building a fountain on the property, it likely would be excluded, since one would expect such an agreement to be included in the agreement for the landscaping
•Parol evidence rule can help rule out (w/o excessive litigation or interpretation) what you might think is a lie
•What would have strengthened Abel's argument that parol evidence about the fountain should be excluded? Baker's contention of single price, as noted regarding Brown, or an explicit "integration clause," (i.e. all other previous agreements are integrated into this one; this is the complete and exclusive agreement on the landscaping)
•This wouldn't end all analysis, however, since there is nothing in the parol evidence rule that prohibits extrinsic evidence on interpretation (i.e. what does "landscaping" mean?)
•Compare Brown v. Oliver: In that case, court said that the written agreement did not conclusively establish that the furniture sale would have been included
•This was a surprising result, considering that the buyer claimed that the furniture was included in the price written in the contract. If the price in the contract was for the hotel and the furniture, you would think the agreement would have mentioned the furniture
•Parol evidence rule applies only to extrinsic evidence about previous agreements and evidence of contemporaneous oral agreements—if there's a contemporaneous written agreement, the parol evidence rule does not apply

Thompson v. Libbey (468) (MN 1885)
[Seller and buyer agree in writing for sale of logs; dispute over whether a warranty was included in the agreement]
•Parol Evidence Rule: Where parties have put an agreement in writing in terms sufficient to "import a legal obligation," courts presume that it includes all material terms
•In these situations, parol evidence can't be admitted to introduce another term
•If there were a warranty on the logs, we would expect that to be written in the agreement

Brown v. Oliver (469) (KS 1927)
[Contract for sale of real property, P claims oral agreement to sell personal items in the subject premises as well]
•Where there's a written agreement which is sufficient to create a contract, but it is uncertain whether that agreement was meant limit that writing to a "single subject of negotiation," another subject of negotiation not included in the writing can be proved by parol evidence
•Here, maybe they wanted to put the real property transfer in writing, and the personal property would be subject to a separate agreement. It's a question of fact. The court did not err in allowing parol evidence on the agreement for sale of personal property
•Some evidence of shady dealings by D (he snuck the personal property out at night)

•**BEA**: Does the parol evidence rule exclude evidence that in the parties' past dealings, "full" compliance with plans meant only a roughly equal amount of work?
•Evidence of prior dealings to be used to interpret meaning of a contract term
•Restatement §214 (parol evidence rule does not exclude extrinsic evidence used to interpret terms, whether the agreement was meant to be integrated, etc.)

Pacific Gas v. GW Thomas (474) (CA 1968)
[Contract to remove cover on turbine, question of whether indemnity clause included damage to P's property]
•Traynor lets in evidence that clarifies the "objective meaning" because words are inherently ambiguous. Basically allows any evidence of prior agreements in the name of interpretation.
•Though extrinsic evidence isn't admissible to add to, detract from, to vary the terms of a contract, it may be admissible to determine what those terms are in the first place
•Even if an agreement is unambiguous on its face, courts can entertain evidence on meaning of terms when an alternate interpretation of the language is reasonable
•Credible evidence which shows the intention of the parties may be admissible
•This includes evidence on circumstances surrounding the making of the agreement (including the object, nature and subject matter of the writing), trade usage, custom, etc.
•**BEA**: Courts will consider extrinsic evidence on question of whether writing is intended as "fully integrated" or "exclusive"—this won't get you around an integration clause, but if used by a crafty party, it can seriously limit the application of the parol evidence rule
•The bottom line is, if you phrase it in terms of interpreting a term, you are likely to get the evidence considered, or at least heard
•At the end of the day, however, the real question is whether or not plain meanings are going to rule the day

Trident Center v. CT General Life Insurance (477) (9th Cir. 1988)
[Construction of office building, loan to be paid back under certain restrictions]
•Kozinski believes words must have objective meaning or courts are stuck interpreting every contract. Disagrees with Pacific Gas, but bound by it. Adler argues that ultimately words require some context so Trident too harsh. Can avoid this problem by using "we really mean it" clause.

Restatement § 209 Integrated Agreements

(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.

(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

§ 210 Completely and Partially Integrated Agreements

(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.

(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.

(3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

§ 213: Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

§ 214: Evidence of Prior or Contemporaneous Agreements and Negotiations

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

(a) that the writing is or is not an integrated agreement;

(b) that the integrated agreement, if any, is completely or partially integrated;

(c) the meaning of the writing, whether or not integrated;

(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;

(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

§ 216 Consistent Additional Terms

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumstances might naturally be omitted from the writing.

B. Statute of Frauds

Certain types of agreements must be manifested in writing

§ 110 Classes of Contracts Covered

(1) The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception:

(a) a contract of an executor or administrator to answer for a duty of his decedent (the executor-administrator provision);
(b) a contract to answer for the duty of another (the suretyship provision);
(c) a contract made upon consideration of marriage (the marriage provision);
(d) a contract for the sale of an interest in land (the land contract provision);
(e) a contract that is not to be performed within one year from the making thereof (the one-year provision).

(2) The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by Statute of Frauds provisions of the Uniform Commercial Code:

(a) a contract for the sale of goods for the price of $ 500 or more (UCC § 2-201);
(b) a contract for the sale of securities (Uniform Commercial Code § 8-319);
(c) a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond $ 5,000 in amount or value of remedy (Uniform Commercial Code § 1-206).

(3) In addition the Uniform Commercial Code requires a writing signed by the debtor for an agreement which creates or provides for a security interest in personal property or fixtures not in the possession of the secured party.

(4) Statutes in most states provide that no acknowledgment or promise is sufficient evidence of a new or continuing contract to take a case out of the operation of a statute of limitations unless made in some writing signed by the party to be charged, but that the statute does not alter the effect of any payment of principal or interest.

(5) In many states other classes of contracts are subject to a requirement of a writing.

XII. Material Breach

Jacob & Youngs v. Kent (867) (NY 1921)

[P built house for D; contract specified certain brand of pipe for plumbing, which was not used. D withheld final payment. Would have to rip up the walls to fix it]

•Courts won't excuse full performance, but a "trivial and innocent" omission can be made up for by paying for the damage
•Making an entire promise dependent on its "utmost minutiae" is unjust
•Where line is drawn between important and trivial is not subject to a formula
•Substitution of equivalent materials may be more serious in some contexts than others (fields of art, versus those of "mere utility")
•Change is not allowed "if it is so dominant or pervasive" as to "frustrate the purpose of the contract"
•Court must weigh the **purpose** of the term, the **goal** it relates to, the **excuse** for deviation and the **injustice** or **disproportionality** of enforcing the term
•Implicit in contracts that if the "significance of a default is grievously out of proportion to the oppression of the forfeiture" courts may not enforce it, unless explicit on that term
•Decision: P does not pay the cost of replacement (big), but cost of difference in value between the materials (little or nothing)
•Normally owner would get cost of completion according to the terms, unless it's "grossly and unfairly out of proportion" to the good to be attained. In a case like that, as we have here, the measure is the difference in value
•Dissent: People can contract to get what they want, right? This contract was explicit
•Question of substantial performance depends a lot on good faith of the contractor
•This is not a minor omission, we're talking about a lot of fucking pipe here
•Doesn't matter why he wanted this particular kind of pipe, he wanted what he wanted, and he's entitled to it
•TC's directed verdict for the D was correct

Sales Contracts: UCC

§2-610: Anticipatory Repudiation

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

> **(a)** for commercially reasonable time await performance by repudiating party; or
> **(b)** resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
> **(c)** in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

•**Anticipatory Repudiation** is when one party explicitly withdraws from the contract, e.g., "Don't bother delivering the goods—I'm not gonna buy them"
•If that "substantially impairs" the value of the contract, aggrieved party may resort to (buyer's or seller's) remedies for breach, or suspend its own performance while negotiating with (or waiting for performance by) the repudiating party
•Substantially impairs: Test: Will inconvenience or injustice result if the aggrieved party has to wait and receive an ultimate tender minus the part repudiated?

•Until the repudiating party's next performance is due, he can retract the repudiation unless the aggrieved party says that he regards the repudiation as final (e.g. when the aggrieved party has materially changed his position)

§ 2-611: Retraction of Anticipatory Repudiation
(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.
(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).
(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

XIII. Mistake
A. Mutual Mistake

Sherwood v. Walker (1029) (MI 1887)
[Contract for sale of cow. Both parties thought she was barren; D (seller) later discovered she was pregnant, meaning she was worth much more, and rescinded the contract]
•"If the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold,--then there is not contract"
•Mutual mistake—both parties thought they were bargaining for the sale of something other than what they actually were bargaining over
•Contract is voidable on that basis
•Dissent (Sherwood): P thought he could make the cow breed. D thought the cow was incapable of breeding
•Both parties made their assessments, and contracted for sale. P turned out to be right. This doesn't mean the contract should be annulled
•One party doesn't have a remedy for making a mistake, provided that both parties acted on their own judgment, without any understanding with each other as to the quality of the animal

Nester v. Michigan Land & Iron Co. (1037) (MI 1888)
[Now Sherwood's in charge. D contracted to sell P a bunch of wood for $27k, payable in installments. Wood was not to be cut faster than paid for. P made one payment, and then went and cut down all the wood and took it. D sued to get it back. Now P is suing to enjoin that suit, and to cut the contract price in half since the quality of the wood is less than they both thought at the time of contract]
•TC cut contract price in half, and D appealed
•P and D both estimated how much of the wood sold would be of the quality P desired, and both knew that the amount of good-quality wood would not be known until it was cut.
•The agreement took a long time to make, prices went back and forth, each setting the price based on their estimate of how much wood was of a particular quality

•Finally they agreed on a price based on each of their estimates. There was no part of the contract which referred to the quality of the wood being purchased. Both parties, to some extent, took a gamble
•If it turned out that the amount of high-quality wood was twice what they both anticipated, would P be able to charge D double the contract price? No way
•So it works both ways, my friend, and the contract price stands
•As far as the Sherwood case goes, that rule only applies to the exact same facts pattern as in that particular case (in other words, J. Sherwood thinks that decision was wrong)

Wood v. Boynton (WI 1885)
[P had a stone, and was unsure of its value. D bought it for $1. It was later ascertained that it was an uncut diamond, worth about $750]
•P went to store and asked what it was worth. She said she'd been told it was topaz and D said that was probably right. D offered her a buck, which P refused at the time but later accepted. Neither knew at the time that it was a diamond
•D said he'd never seen an uncut diamond, so he didn't know that's what it was, despite the fact that he's a jeweler. Hmm.
•Court says no fraud, and the only other way contract is voidable is if there was mutual mistake about what was being sold. Here there was no such mistake
•Neither knew the true value, and both thought $1 was reasonable
•No suppression of knowledge by D; no evidence he knew or suspected it was a diamond
•Absent fraud or warranty, value of property sold, as compared to price paid, is no ground for rescission of a sale. It's unfortunate for P, but hey, that's life

Casebook: Notice the similarity between these cases and consideration cases. Distinction may be that instead of denying the existence of the elements of a contract, these cases present additional circumstances that undermine the significance of those elements

Lenawee County Board of Health v. Messerly (MI 1982)
[The Pickles family (now Ps) bought Ds' land (on which is a 3-unit apartment building). Board of health condemned the property and got injunction prohibiting human habitation until sewage system fixed. Contract said that buyers accepted land as-is with no further understandings. Buyers later discovered how bad the problem was, and board of health shut it down. Buyers want out of the contract]
•TC granted foreclosure and judgment against Ps for contract price
•Court decided that seller didn't know about the condition, and "negative…value cannot be blamed upon an innocent seller"
•Question: Was there a mistake by one/both parties, and if so, what is the significance?
•Mistake is "a belief that is not in accord with the facts" (Restatement § 151)
•Mistaken belief by one/both parties must relate to a fact in existence at the time the contract is executed
•The mistake can't be about a prediction as to a future occurrence or non-occurrence
•Parties were mistaken as to the income producing value of the property sold
•Septic system defect existed prior to execution of contract
•So, there was a mutual mistake here
•Ps say that the mistake related "to the very nature of the character of the consideration"

•They argue that this means the contract can be rescinded (Sherwood)
•Sherwood seems to distinguish mistakes "affecting the essence of the consideration" from those which go to its quality or value
•However, a mistake about quality or value cannot be "collateral" (able to void the contract) just because that also affects the very essence of the consideration
•In Sherwood, court concluded that "the thing sold and bought had in fact no existence"
•Decision: Distinction between mistake on value and those affecting the "substance of the consideration" not useful, so forget Sherwood unless you're talking about a barren cow
•Mistake can only lead to rescission where "the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties"
•Rescission unavailable where one "assumed the risk" of loss in connection with mistake
•Here, the nature of the mistake was "fundamental" and "materially affects the performances of the parties"
•The mistake can only be remedied by rescission, but guess what? We're not going to allow rescission!
•Rescission is an equitable remedy, and courts must consider which blameless party assumes the loss resulting from the mutual mistake
•First, see whether the parties agreed to allocation of risk between themselves
•Some agreed allocation of risk was agreed upon by incorporating "as is" clause
•That is persuasive indication that parties decided risk goes to buyers
•If the "as is" clause has any meaning at all, it means unknown, latent defects (which normally fall under implied warranty) are accepted by buyer

Restatement § 151: Mistake Defined

A mistake is a belief that is not in accord with the facts.

Comment *a.*
•Belief need not be articulated
•Party may have a belief as to a fact when he merely makes an assumption with respect to it, without being aware of alternatives.
•The word "mistake doesn't mean an improvident act, like stupidly making a contract
•Erroneous belief must relate to the facts as they exist at the time of the contract
•A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a "mistake" as that word is defined here.
•An erroneous belief as to the contents or effect of a writing that expresses the agreement is, however, a mistake.
•Mistake alone has no legal consequences. The consequences are stated in this Chapter.

§ 152 When Mistake of Both Parties Makes a Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

§ 154 When a Party Bears the Risk of a Mistake

A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Comment *a. Rationale*:

•Usually a party takes the risk of most supervening changes in circumstances, even though they upset basic assumptions and unexpectedly affect the agreed exchange of performances, unless there is such extreme hardship as will justify relief on the ground of impracticability of performance or frustration of purpose.

•A party also bears the risk of many mistakes as to existing circumstances even though they upset basic assumptions and unexpectedly affect the agreed exchange of performances.

•Example, seller of farm land generally cannot avoid the contract of sale upon later discovery by both parties that the land contains valuable mineral deposits, even though the price was negotiated on the basic assumption that the land was suitable only for farming and the effect on the agreed exchange of performances is material.

That risk of mistake goes to the seller

•Even though a mistaken party does not bear the risk of a mistake, he may be barred from avoidance if the mistake was the result of his failure to act in good faith and in accordance with reasonable standards of fair dealing. See § 157.

b. Allocation by agreement.

•Party may agree, by appropriate language or other manifestations, to perform in spite of mistake that would otherwise justify his avoidance.

•An insurer, for example, may expressly undertake the risk of loss of property covered as of a date already past.

•Whether the agreement places the risk on the mistaken party is a question to be answered under the rules generally applicable to the scope of contractual obligations, including those on interpretation, usage and unconscionability.

Illustration:

1. A contracts to sell and B to buy a tract of land. A and B both believe that A has good title, but neither has made a title search. The contract provides that A will convey only such title as he has, and A makes no representation with respect to title. In fact, A's title is defective. The contract is not voidable by B, because the risk of the mistake is allocated to B by agreement of the parties.

c. Conscious ignorance.

•Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited.
•If he was not only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake.
•It is sometimes said in such a situation that, in a sense, there was not mistake but "conscious ignorance."

d. Risk allocated by the court.
•Sometimes reasonable for court to allocate risk of mistake as appropriate
Example: seller of farm land seeks to avoid the contract of sale on the ground that valuable mineral rights have newly been found.
•Court will consider the purposes of the parties and will have recourse to its own general knowledge of human behavior in bargain transactions, as it will in the analogous situation in which it is asked to supply a term under the rule stated in § 204.

§ 157 Effect of Fault of Party Seeking Relief
A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

§ 158 Relief Including Restitution
(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 376.
(2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

B. Unilateral Mistake

Tyra v. Cheney (1052) (MN 1915)
[P subcontractor bid on part of a job obtained by P contractor. P claims he originally said about $4k, later sent it in writing, left one thing out, putting it at about $3k]
•Jury found that D didn't accept bid in good faith (i.e. he knew of the mistake)
•Decision: "One cannot snap up an offer or bid knowing that it was made in mistake"
•TC properly let in evidence of reasonable value of the work, and the evidence supported a showing that D knew bid was erroneously low when it accepted it. Affirmed.

Drennan v. Star Paving (1054) (CA 1958)
•If offeree knew or "had reason to believe" that offeror's bid was in error, "he could not justifiably rely on it" and it is unenforceable
•Here, offeree had no reason to know of error—variance of 160% b/w high/low bids
•Some mention of detrimental reliance as additional grounds for enforcing bid
•Mistake falls on the party who caused it (the offeror)

Restatement § 153: When Mistake of One Party Makes a Contract Voidable
•Where mistake of one party at time of contract was made as to a basic assumption on which he made the contract and has a material effect on the agreed exchange that is adverse to him, the contract is **voidable** if
•He does not bear the risk of the mistake under § 154 (risk allocated to him by agreement, was content with imperfect knowledge, or court decides it's reasonable), **AND**
•(a) the effect of the mistake is such that the enforcement would be **unconscionable**, **OR**
•(b) the other party had reason to know of the mistake **OR** his conduct caused the mistake

Laidlaw v. Organ (1055) (US 1817)
[P bought 111 hogsheads of tobacco from D, which was delivered, then D came and took it back by force]
•TC entered judgment for P (per jury verdict) to recover the 111 hogsheads in exchange for the contract price
•D appealed, alleging that P knew that the Treaty of Ghent had been signed, making the tobacco considerably more valuable, and when D asked if there was any news, P said no
•D: This was equivalent to a false answer
•P: D could have known about it too, but was not as diligent or fortunate
•Even if he'd been entitled to an answer, he didn't press the issue
•Decision: P was not bound to communicate the information
•Information was equally accessible to both parties
•It's OK to withhold public information, as long as you don't mislead
•Judgment reversed for better jury instruction, instruction to determine whether there was "any imposition" (i.e. affirmative misleading) by the P
•**BEA**: If one party develops information by earning it (he does his research), does he have to tell the other party that information? This would destroy the incentive to collect the information
•Contracts rules are supposed to be designed to maximize the value of the transactions
•Where one party has information that is not the result of effort (typographical error, misunderstanding), we want to favor the ignorant party
•If, however, the party earns the information, we want to allow him to use it strategically

Restatement § 160: When an Action is Equivalent to an Assertion
•Action which is intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist

§ 161: When Non-Disclosure is Equivalent to an Assertion
•Non-disclosure is equivalent to an assertion that the fact does not exist when:
•a) He knows that disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material
•b) He knows that disclosure would correct a mistake of the other party as to a basic assumption on which that party is making the contract, and non-disclosure amounts to a failure to act in good faith in accordance with reasonable standards of fair dealing
•c)He knows that disclosure would correct a mistake as to the contents or effect of a writing, embodying an agreement in whole or in part
•d) The other person is entitled to know because of a relation of trust and confidence

XIV. Impossibility, Impracticability and Frustration
A. Impossibility and Impracticability

Paradine v. Jane (1061) (UK 1647)
[Landlord sued lessee to recover unpaid rent. D defended by pointing out that he had been driven off his land by the army of Prince Rupert]
•Decision: Spare us the Prince Rupert song-and-dance—you assumed that risk. If you didn't want to be liable for the rent in the event that a foreign army drove you off your land, you should have written that into the contract, silly-head
•This is the "absolute liability" standard
•**BEA**: At least the court doesn't confuse the impossibility of performance with the impossibility of paying

Taylor v. Caldwell (1064) (UK 1863)
[P rented banquet hall for certain events, and before the event dates, it burned down]
•"[I]n contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."
•This applies as long as neither party was at fault for the thing perishing
•Because this contract depended on the hall's existence, and neither party was at fault for its burning down, both parties are excused
•**BEA**: It may be impossible to perform, but it's not impossible to pay for your failure to perform—the court's confused
•The question is **who should pay** for the impossibility of performing
•If the parties did contemplate this contingency, it makes sense that the burden would have been placed on the hall itself, since it was in the best position to prevent the fire

Restatement § 261: Discharge by Supervening Impracticability
Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 236: Destruction, Deterioration or Failure to Come into Existence of a Thing Necessary for Performance
If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

UCC § 2-613: Casualty to Identified Goods
Where a contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without the fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (§2-324)
•(a) if the loss is total the contract is avoided, **AND**

•(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer **may** nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

CNA & American Casualty v. Arlyn Phoenix (1070) (FL App 1996)
[P sued insured actor for breaching movie contract by overdosing on drugs]
•Argument was that loss of necessary person for the contract was due to "fault" of one party (River Phoenix), since he caused his own overdose
•Court rejects this argument, the death of a party makes a contract for personal services void. Period.
•**BEA**: Who should bear the loss? The employer
•Can this be distinguished from Taylor or the UCC? Why is this the right rule?
•If suicide is rare, even if reckless behavior is not, and incentives to stay alive are sufficient for promisee.

Eastern Airlines v. Gulf Oil
•Even if Gulf had established great hardship under UCC §2-615 (which it hasn't), Gulf loses because the events associated with the energy crisis were reasonably foreseeable at the time of contract (could have been accounted for)
•**BEA**: Court believed market changes are not an excuse

B. Frustration

Krell v. Henry (1077) (UK 1903)
[D rents room from P to watch coronation. Coronation cancelled, D refuses to pay]
•Who bears the burden of the coronation not happening?
•Hard to know what the right answer—court could be right or it could be wrong
•Surprise doesn't answer the question of who should pay
•Decision: Coronation regarded by both as "foundation of the contract"
•What was the foundation of the contract? Was performance prevented? Was prevention of performance unforeseeable? If yes (as here), both are discharged

Lloyd v. Murphy (1083) (CA 1944)
[Ps leased D a hot spot in Beverly Hills to set up car dealership—no sublease/assignment]
•Government said no sale of new cars—due to WWII
•P waived no sublease/assignment provision and offered to reduce rent
•D vacated, Ps renewed above offer in writing; then Ps re-rented (to mitigate), then sued
•War didn't relieve D of obligations; judgment for P
•Frustration, unlike impossibility: "performance still possible but "expected value of performance to party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration"
•The question is, who should bear the burden
•This turns on "whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected"

•If foreseeable or controllable, or counter-performance possible, no excuse
•D knew war was a ‘brewin; it was foreseeable—affirmed

Restatement § 265: Frustration
Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.