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Rosenthal -

- office 735
- hours after Tues/Wed class

Exam

- open book
- only essay - no short answer

Assignment

Redraft Pfeinberg corporate resolution (p. 64) to allow consideration (by Tuesday) - put in Rosenthal mailbox (D11)

BASIS FOR ENFORCING PROMISES

UCC (Rosenthal Commentary)

- Art. 1 - unclear if applies only to specific articles or to all commercial transactions
- Art. 2 -
 - generally applies only to transactions involving goods
 - can be applied to transactions w/ non-goods by analogy (e.g., warranties; lease of personal property (earlier by analogy to Art. 2; now = Art 2A))

Convention On K for Int'l Sale of Goods (Supplement 133)

- passed by Congress
- trumps any state legislation (including UCC provisions)
- Article 16(2) - recognizes element of estoppel

UCC vs. Restatement

- UCC = enacted law - Nat. conf. of comm. on unif. state laws & ALI
- Restatement K = commentary (super commentary) - ALI

UCC Article 2 - sale of goods

- in debate for 10 yrs

K defn =

- Restatement § 1 - set of promises enforceable by court
- UCC § 1-201 (11) - total legal obligations resulting from parties' agreement

K benefits

- stability
- social benefits
- allocate responsibility
- economy prospers

Is K = law?

- Yes → provides rules governing conduct of actions of parties
- No → to extent laws apply generally rather than specific parties

Enforcing promises - fundamental assumptions

- focus = relief to promisees; <> punishment of breachers
- relief = protects promisee's expectations (benefit of bargain)
- form of relief = substitutional (payment instead of promised performance)

Long term contract (e.g., 10 yrs) where party repudiates early (e.g., Yr 1)

- available remedies
 - monetary damages
 - specific performance

Faithless Fiduciary (p. 6) CIA agent ignores secrecy agreement and publishes book

- constructive trust - no official trust exists yet situation treated as though trust exists
- accountability for profits - author turns book profits over to gov't

Defining Enforce

United States Naval Institute v. Charter Communications - damages for breach of publishing contract (2)_

Facts

- Naval (PL) published hard back book
- PL sub-K paper back to Charter (Def) → Def distributing after Oct., 1985
- Def distributed from Sept. 15, 1985
- PL - alleges copyright infringement
- Def - at most breach of K

Procedure

- District Ct (on remand) - awards
 - damages for breach of K = difference b/w Aug. and Sept sales
 - lost profits for copyright infringement = profits from Sept. paperback sales which would never occur if paperback had become available in Oct.
- PL appeals for greater award of profits
- Def cross appeals for any money awarded
- U.S. CA (2nd 1991)

Issues

- Was TC proper in awarding damages for breach of K and copyright infringement?

Held

- Reversed infringement award
- Affirmed award for breach of K

Reasoning

- damages - compensate injured party for loss from breach
 - generally = PL actual loss
 - occasionally = Def profits (when define PL profit)
 - District court method <> clearly erroneous

Class

Punitive damages - why not for breach of K

- shouldn't we be more concerned w/ ultimate result?
- K vs. torts - punitive damages generally from torts
- some cases → tort for breach of K where particularly outrageous (insurance <> pay)
 - incurred academic criticism
 - perhaps c/h avoided if made two steps → aggrevious breaches = tort → tort = punitive damages
- why no punitive damages from K?
- economics - breach may be efficient
 - politics
 - historic reluctance
 - may introduce instability

Sullivan v. Connor - damages allowed for botched nose job (7)
Supreme MA 1973

Facts

- PL = professional entertainer
- PL = K w/ Def for two operations to reshape nose = more beautiful
- PL had to have 3 operations and nose <> more beautiful
- PL alleged
 - Def breached K to make beautiful and caused excess pain
 - malpractice
- Judge instructed that PL could recover
 - out of pocket fees
 - damages from breach of promise
 - for pain/suffering of third operation

Procedure

- Jury verdict
 - breach of K = \$13,500
 - negligence - none
- Supreme Jud Court of Mass (1973)

Issues

- Were judges instructions re: damages correct?

Held

- Affirmed. PL Can recover for expenditures, worsening condition, pain/suffering of added operation.

Reasoning

- Court skeptical of K in medical situation
 - uncertainty
 - variations of individual patients physical/psycho conditions
 - patient expectations may differ from doctors
- rule - allows action on K but requires clear proof
- damages for breach
 - compensatory (expectation) - PL position as if K performed (hi)
 - restitution - restoring benefit transferred by PL to Def (low)
 - reliance - PL recovers any expend. following approx./foreseeably on Def breach (mid) - PL in position prior to entering K
- pain and suffering from breach
 - excess/additional = recoverable
 - basic = recoverable to extent for naught
- no expectation remedy b/c
- disparity b/w fees and damages sought
 - uncertainty in medical procedure
 - difference in expectations b/w doctors/patients

Class

White v. Benkowski - damages allowed for breach re: access to well (14)

Facts

- Whites (PL) K w/ Benkowski (Def) to supply water

- Whites contributed equip + periodic fees as consideration
- Def shut off water at different times
- PL sues for breach of K

Procedure

- Jury - Compensatory damages = \$10; punitive damages = \$2,000
- trial court reduced comp damages = \$1; no pun. damages
- Supreme Court of WI (1967)

Issues

- Was court reduction = correct
- Are punitive damages available for breach of K

Held

- Amount of injury = jury decision; court was wrong to reduce; jury award re-instated

Reasoning

- where no damages proven - PL recovers nominal damages
- punitive damages - punish malice to deter others
 - not allowed for breach of K - even where willful

Class

- actual damages - incurs court costs
- nominal damages - no award of court costs
- maybe why issue of \$1 vs \$10

Klein v. Pepsico - no specific performance re: purchase of jet (22)

Facts

- Klien (PL) instructed intermediary to offer to purchase Pepsico (Def) jet for \$4.4M
- Def offered to sale price = \$4.6M
- Intermediary accepted \$4.6M and wired \$100K down payment
- Plane defects discovered during inspection
- Def agrees to pay for repairs
- Def subsequently rescinded K and refused to deliver plane
- PL demands delivery
- Intermediary accepts examination and demands delivery

Procedure

- District ct. - K formed at time intermediary accepted; required specific performance
- Applicable law = VA (? - U.S. CA references VA UCC)
- U.S. CA (4th)

Issues

- Was K formed for sale of Jet (indirectly) to PL?
- Was District Ct. correct in requiring specific performance?

Held

- K was formed
- No - Def airplane <> sufficiently unique w/i meaning of VA UCC to require specific performance - money damages appropriate

Reasoning

- trial court judge - memorializing K <> necessary condition of K's existence
- Def offers no evidence that trial court decision = clearly wrong

- VA UCC allows specific performance for unique goods
- PL could buy other similar planes → not unique

Class

- no specific performance - no uniqueness
- PL use (going to sell for profit) <> require unique plane (PL could cover)
- ability to cover - influences application of specific performance

Automobile cases

- Auto capacity used for war
- few cars/great demand = escalating car prices
- Mfr locked into sales K
- generally no specific performance b/c cars generally <> unique
- uniqueness test - supposed to be whether remedy at law was reasonableness
 - used as mechanism unto itself (?)

LaClede Gas Co. v. Amoco - specific performance allowed re: gas K due to difficult in projecting damages (28)

Facts

- In developing residential areas, owners/developers apply to LaCleide (PL) for propane
- PL forward propane request via form letter to Amoco (Def) w/ set price
- If Def agreed → sign form letter to be bound
- Def install, own, maintain propane infrastructure → allow to continuously meet PL needs
- PL install, own, maintain propane delivery system post Def infrastructure
- agreement ceases when developments converted to natural gas
- PL must provide 30 days notice of conversion
- PL could cancel K w/ notice; Def <> cancel K
- Def increased propane price
- Def cancelled K b/c no mutuality
- PL sued for injunction to prevent breach

Procedure

- District Court (Diversity jurisdiction) - applying MO law
 - K <> valid due to lack of mutuality (b/c Def <> cancel K as PL could)
- USCA (8th)

Issues

- Is specific performance (injunction from breach) allowed?

Held

- Specific performance is allowed

Reasoning

- <> legal requirement for mutuality
- public interest = paramount → overrides judicial burden of overseeing compliance
- long term K

Class

- Def -
 1. no mutuality - court says irrelevant
 - sometime used to ensure mutual consideration for each party
 - **relevant question - always ask - mutuality of what?**
 2. difficult for court to administer - court says discretionary rule which is often ignored
 3. K is indefinite and uncertain -

- variable calculation of costs;
- time b/c subdivisions eventually converted to natural gas
- quantity to be used
- court finds that uncertainties support specific performance
- 4. available remedy (other sources of propane + damages) is adequate -
 - court reasons that intended long term duration makes it difficult to project damages over future years
- Output/requirements K
- K too uncertain as to future amounts, supplies, prices → specific performance required

Northern Delaware Industrial Development Corp. v. EW Bliss - no specific performance re: hire sufficient workers where court enforcement difficult (33)

(Del 1968)

Facts

- Def contracted to refurbish PL plant
- Def fell behind for scheduled completion
- PL seeks chancery court order forcing Def to hire necessary workers to comply w/ K

Reasoning

- equity court order for specific performance <> appropriate where impractical to carry out such order (unless special circumstances or public interest involved)
- Request denied - specific performance would be impossible for court to enforce

Class

- PL - appeal to court on basis of current time - war going on - country trying to build up infrastructure
- Northern Delaware could always come back for monetary damages later - although w/b difficult to determine amount of damages
- difficult b/c - can't supervise to point of knowing that efforts of 300 workers will be sufficient
- court will not enforce K for "personal services" (undefined) - impossible for court to judge quality of work
- troubling points
 - public interest test
 - difficulty of enforcement -
 - PL's under construction K have been awarded specific performance where land to be conveyed/leased - court thought process = land (including buildings thereon) is best example for specific performance
 - no land conveyance in Bliss
 - Rosenthal - weak argument in Bliss

Specific performance - service K

- personal service contract - court <> order specific performance of opera singer to fulfill K b/c court not qualified to monitor performance (DeRivafinoli v. Corsetti)
- construction K - courts have awarded specific performance, but usually where conveyance or lease to follow construction

Walgreen v. Sara Creek Property Co. - specific performance allows parties to negotiate to efficient result (34)
(7th Cir. 1992)

Facts

- PL operated pharmacy in mall under lease w/ non-compete clause (no other pharmacies in mall)
- Def indicated would install pharmacy in mall
- PL sought permanent injunction

Procedure

- Trial court granted permanent injunction until PL lease expired - Def appealed
- CA appeals (Posner) - affirmed

Reasoning

- damages usually apply to breach of K b/c many breaches = efficient
- specific performance - only when damage remedy inadequate
 - Def - PL losses = easily calculated
- injunctions
 - benefits
 - burden of determining cost - shifted from court to parties
 - free market principle - prices/costs more accurately determined by market than gov.
 - costs
 - continued monitoring by courts
 - "bilateral monopoly" - parties must deal with each other (limited options increases costs)
- damages
 - benefits - avoids cost of continued supervision, 3rd party effects, bilateral monopoly
 - costs - diminished accuracy; increased court costs to parties for preparing calcs/evid.
- rule - if balance even b/w injunction/damages - no specific performance s/b required
- PL damages difficult to calculate and inescapably inaccurate

Class

- assumes that specific performance will be starting point from which parties will negotiate
- prospective breach - different from Bliss where pending deadline would require parties to work "under the gun"
- Posner's solution works in limited situations where no/few 3rd parties present

Justifying Specific Performance

- damages - easier to defend when cover market exists
- specific performance - easier to defend when no cover exists
- land -
 - under English law - all pieces of land = unique
 - specific performance applies by default (to buyers and sellers)
 - damages never apply
- specific performance may inhibit efficient breaches

Historical development of Equitable Law (39-)

- Common law courts
 - <> specific performance
 - sheriff seized property and sold to satisfy claim
 - required performance directed at sheriff; <> Def
 - acted in rem - against property of defendant
 - allowed jury trials
- Equity courts
 - punishment for failing to comply w/ court orders = criminal and civil contempt
 - acted in personem - against person of Defendant
 - applied to deficiencies of common law - perceived as extraordinary
 - practical limits in requiring specific performance (especially where Def cooperation <> required)
 - no jury trials - federal courts interpreted "trial by jury" rule as applying only "at law" (i.e., no jury trial required for equity considerations)
 - additional discretion??
 - still relevant -
 - lack of clean hands
 - trial by jury

-

NY Football Giants v. Los Angeles Chargers Football Club - equity requires clean hands (41)

(5th cir. 1961)

- Def (Giants) kept K w/ college player so could play in college bowl
- player signed w/ PL
- court did not require specific performance of Def K b/c "lack of clean hands"

Mitchell-Huntley Cotton v. Waldrep - specific performance proper where no other remedy available (41)

(ND Ala 1974)

- PL entered K with Def for purchase of cotton
- cotton price rose
- court enjoined Def from violating K due to scarcity of cotton

Arbitration (41-42)

- more flexible/informal than trial
- arbitrators may give no reason for decisions
- allowed only where parties agree to
- subject to very limited judicial review - (arbitrator corrupt; incorrect legal result involving strong public policy)

- previously - courts guarded their responsibilities
- currently - courts welcome reduction in work load
- how to enforce specific performance awarded by arbitrator? (Grayson Robinson (1960) = divided court (4/3) approved arbitrator awarded specific performance)
- punitive damages - NY CA - 4/3 denied arbitrator awarded punitive damages
- tort issue (rather than K breach) -
- **important issue - spent most of 9/12 on this issue**

Contract Remedies (43)

- award of costs <> typically include attorney's fees
- costs of litigation - may be non-monetary (even to winner)
- disputes often settled out of court
- merchant in better position to handle (economies w/ many disputes, prepares K, etc.)
- courts level playing field by
 - sweetening customer awards (civil penalties, treble damages, attorney fees)
 - allowing class action = subsidized representation by others
 - reduce cost of litigation - special courts (small claims)/system of arbitration
- Rosenthal - campaign contributions by large companies = reduced likelihood that legis will step in to help avg. consumer

Consideration

- covenant - action to enforce K under seal (e.g., w/ signet ring) - no consideration required/nor party to change position
 - evidentiary - seal = evidence of the existence of K
 - cautionary - seal = warned parties of the import of agreement
 - lost effectiveness as people other than nobility began to use seals
- debt - action to enforce unsealed promises to pay money (for money loaned/goods delivered)
 - quid pro quo

- at first → perfect defense = swore under oath that no debt made (believed condemned if lied)
- assumpsit ("he agreed") - action to recover damages to person/ property from consensual undertaking
 - misfeasance - agreed undertaking not undertaken inconsistently w/ agreement to detriment of PL
 - nonfeasance - courts extended assumpsit later to include this; still required detriment to PL
 - promise for promise - recognized by 16th century that promise = detriment b/c limited ability to take other actions

Class

Why does consideration exist? probably b/c historical development

Hamer v. Sidley - refraining from activity = legal detriment (47)

(C.A. NY 1891)

Facts

- Deceased promised PL \$5,000 if refrained from certain behavior (drinking, smoking, et al) until 21
- PL refrained from behavior until 21
- PL notified Decedent of accomplishing refraint
- Decedent suggested hold money until later w/ interest
- PL agreed
- Decedent died
- PL attempted to recover from Decedent estate (Def)
- Def refused to pay b/c
 - lack of consideration - b/c promisor (uncle) <> benefit
 - PL did nothing that harmed him and only benefited him
- PL sues for recovery under K

Procedure

- court at special term
- supreme court - reversed
- Court of Appeals hears

Issues

- Does fulfilling a promise to refrain from certain activity constitute consideration sufficient to bind parties to a K?

Holding/Reasoning

- Yes - promise = adequate consideration
- something promised, performed, forbore, or suffered = sufficient consideration
- waiver of any legal right at request of another = sufficient
- consideration - profit of party1 <> important as party2's abandonment of a legal right

Class

- Issue = act for promise (unilateral K) - not promise for promise (bilateral K)
 - no binding K until PL performed; although Decedent was bound to perform IF PL performed
- bargaining element - an exchange is required
 - Def argues that Decedent received no benefit
 - court - benefit <> required
 - PL = detriment (forbear from right to drink . . .)
 - Decedent = benefits from PL having same name <> ruin name
- conditional gift - has no bargain ("if come to corner, I will give \$100")
- recovery theory = expectation
 - not reliance - put PL back in original position
 - not restitution - give PL back what gave to Def
- Shadwell v. Shadwell - unclear what is consideration - perhaps a conditional gift
- Restatement of K - § 81 - what is bargained for may not induce promise

- nominal consideration - courts moving away from enforcement; more likely to treat as sham transaction
- one party thinks conditional gift/one party thinks bargain - court considers what a reasonable person would have thought

Recovery theories

- expectation - put party into position expected to be in w/o breach
- reliance - put party back into original position
- restitution - return items exchanged

Damages

- Actual - reasonably foreseeable at time of breach
- Consequential damages - arising after breach as a consequence of breach

Gratuitous Promises

benefits greater if enforceable - b/c parties can rely on

Fiege v. Bohm - compromising doubtful legal claim (believed bona fide) = sufficient consideration (55)
Court of Appeals MD 1956

Facts

- Def agreed to pay for support of bastard child in exchange for PL dropping bastardy proceedings
- Def breached agreement/failed to pay
- later proven that Def <> father of child
- PL sues for breach of K

Trial Court - for PL (denied Def motion to dismiss)

Appeals Court - affirmed

- PL - Def gave no consideration b/c had no viable cause of action for bastardy (she gave up nothing)
- Court -
 - compromise of a claim w/ no legal basis <> consideration
 - **compromise of a merely doubtful claim = consideration if**
 - parties believed to be bona fide at time of K (subjective test) AND
 - claim has reasonable basis for support (objective test)

Class

- what if mother 2B goes to several men and threatens to sue
 - unjust enrichment
- old restatement - considered PL's reasonable belief

Reform of Doctrine of Consideration

proposals to allow wider enforceability of K

Past Consideration

Feinberg v. Pfeiffer - past consideration <> bargained for (62)

St. Louis CA Missouri 1959

Facts

- PL (secy) worked for Def (corp)
- 1947 - Def granted retirement benefits in view of past services
- 1949 - Def retired
- 1956 - Def reduced amount of payments (counsel advised that no payment due)
- PL sues for breach

Court of Appeals - for Def

- Def - past services <> consideration
- PL - despite lack of consideration → K binding b/c
 - PL continued in employ beyond time benefits granted
 - PL changed position in reliance on promise
- Court - original board resolution made no reference to grant of benefits based on continuing work

Class

- no bargain b/c no consideration for payment
- what if unilateral K?
- at will agreements?
- against enforceability - if could fire at will, makes no sense that would pay her to retire → gift?
- expectation damages - reliance damages not practically calculable

Mills v. Wyman - moral obligation/gratitude <> sufficient consideration (67)

Mass. 1825

Facts

- Def son fell ill and was cared for by PL
- Def son died
- Def agreed to reimburse PL costs but subsequently refused to pay
- PL sues

Court - for Def

- benefit to son were not bestowed at request of Def
- Def promise = based on transient feeling of gratitude

Class

- What if son a minor? many state laws hold parents responsible under quasi- K for necessities of children
- Topic 2 (§ 82 -)Restatement of K
- distinguishing Webb v. McGowen
- distinguish Webb v. McGowen from Harrington - Rosenthal = cases virtually indistinguishable even though courts reached different conclusions

Web v. McGowen - moral obligation + benefit received = sufficient consideration (68)

CA AL 1935

Facts

- PL saved Def from injury by incurring injury to PL

- Def promised to pay PL annuity in consideration of injuries taken to save Def
- Def died and payments stopped

Court of Appeals - for PL

- if physician had saved McGowin (Def) and Def had promised → would be binding K
- where party promises to pay for past benefit received = sufficient consideration
- **moral obligation = sufficient consideration to support subsequent promise to pay**
- case distinguishable from moral obligation w/o benefit received

Class

- no bargain for consideration
- happened too quickly - no intention of any kind
- What about if recurred today under restatement?
- Rosenthal = this case is exception (?)

Moral Obligation (72)

- promisor promises to do what ought to have done anyway
- consideration = moral consideration (??)
- substantive ground for enforcing = court conviction that Def should do + Def admission of obligation

Harrington v. Taylor - humanitarian act + benefit received <> sufficient consideration (72)

NC 1945

- PL deflected axe from striking and killing Def
- PL hand mutilated
- Def promised to pay but didn't
- **Court - humanitarian act (voluntarily performed) <> consideration allowing recovery at law**

New York Statute

- NY law <> recognize moral obligation as = consideration
- § 5-1105 of general obligation law does recognize past/executed consideration (i.e., no contemporaneous bargain)
- K required to be in writing
- **eliminates requirement of a bargain**
- implicit in intent of drafters of the provision

Restitution (preventing unjust enrichment)

- rarest of remedies
- not based on a promise
- unjust enrichment theory = gains produced through another's loss are unjust and should be restored
- antithesis theory = no one should be required to pay for benefits that were "forced" upon them
- underlying tension - unjustly enriched vs. protection from intermeddlers

Schott v. Westinghouse Electric - use of suggestion from suggestion box resulted in savings (75)

- PL submitted suggestion as part of incentive plan promising reward if idea used
- suggestion form noted that all decisions were final
- Def rejected PL's idea twice
- Def used PL idea 1 yr later w/o paying reward to PL

- PL sued
- trial court dismissed
- PA supreme court reversed/remanded - PL COA = for unjust enrichment
 - PL expected reward if idea used
 - court distinguished from precedent b/c idea was "neither concrete in form nor novel in nature"

Cotnam v. Wisdom - implied K for emergency medical services (76)
 Supreme Court of Arkansas (1907)

Facts

- PL performed emergency operation on individual thrown from streetcar
- individual died w/o ever regaining consciousness (i.e., no discussion/bargaining w/ PL)
- decedent = relatively wealthy
- trial court instruction to jury =
 1. if find evidence that PL rendered professional service, then PL entitled to recover
 2. consider decedent's ability to pay
- Def appealed - b/c no K in fact - so s/b no recovery
- Supreme Court - reversed in part and remanded
 - instruction valid
 - implied in law K = quasi K = constructive K = rests upon no evidence; no actual existence = mythical creation of law
 - person bereft of capacity held liable (in assumpsit) for necessities furnished in good faith while incapacitated
 - instruction invalid
 - physician could not have considered decedent's ability to pay
 - decedent's ability to pay is irrelevant to services performed and value thereof
 - consideration - implied K requires reasonable consideration for services performed (market value)

Class

- Rosenthal -
 - court reasoning = OK in combating appeal to increase fee b/c decedent = wealthy
 - court reasoning may not be OK where decedent poor - b/c physicians often negotiate lower fees for poor in practice
- quasi K - grounded in remedy - implied in law to achieve remedy and avoid unjust enrichment (?)

Gratuitousness (79)

- where life/property imperiled - law presumes that assistance is gratuitous
- assumption may be rebutted where
 - burden incurred in assisting is excessive
 - assistance was provided in a business or professional capacity

Amount of recovery (79)

- K implied in fact -
 - court deems to exist from the surrounding facts and circumstances
 - parties intended to make K but failed to articulate promises
 - general theory of compensatory damages applies = market rate for similar K
- K implied in law -
 - legal fiction - does not exist - one unjustly enriched should make restitution to the other
 - parties intentions = irrelevant
 - restitution = limited to value of benefit acquired (absent fraud/other tortious conduct)

Callano v. Oakwood Park Homes Corp. unjust enrichment re: shrubbery - must show that Def was 1) enriched 2) unjustly (80)

Superior Court of NJ (1966)

Facts

- PL K for and installed shrubbery on land decedent intended to buy from Def
- Decedent canceled K
- Decedent died
- Def sold land w/ shrubbery to third party
- PL & Def agree that land value increased due to shrubbery
- PL - Def = unjustly enriched; entitled to recovery under quasi K
- Trial Court - awarded for PL
- Appeals Court - reversed (for Def)
 - quasi K -
 - imposed by law on basis of reason and justice
 - merely clothed in semblance of K for sake of remedy
 - while for actual K - agreement defines the duty; for quasi K - duty defines the K
 - where facts show Def has duty to pay → law imparts promise to fulfill (quasi K)
 - **to recover on unjust enrichment - PL must show that Def was 1) enriched 2) unjustly**
 - common threads b/w precedent - required to establish 1) unjust 2) enrichment

required factor	current case
<ul style="list-style-type: none"> • PL expected remuneration from Def (or if true facts known, w/h expected remuneration from Def at time of conferring benefit) 	<ul style="list-style-type: none"> • PL <> know Def
<ul style="list-style-type: none"> • quasi K involves direct relationship b/w parties <u>OR</u> • mistake in conferring benefit 	<ul style="list-style-type: none"> • neither factor present

- PL remedy is against decedent's estate
- PL may not use quasi K to substitute one promisor/debtor for another
- **basic rule - as long as party still available with which PL dealt and may recover from → PL <> allowed to proceed against 3rd party**

Paschall's Inc. v. Dozier - suit brought against non-party unjustly enriched (82)

(Tenn. 1966)

Facts

- PL contracted w/ daughter to build improvement on Def (parent's) house
- daughter became bankrupt
- PL sued Def for unjust enrichment
- Court - PL can recover for unjust enrichment
 - general rule = implied K cannot arise against a party which benefits from work done under a special K with another
 - general rule should not apply in this case - where work performed under K (for benefit of 3rd party) which becomes unenforceable (i.e., through bankruptcy)

Sub-Contractor's/Mechanics Claim (83)

- two separate K -
 - owner/general contractor
 - general contractor/sub-contractor - cannot be enforced against land owner on basis of sub-K alone
- unless sub-contractor placed lien on work done - only recovery = against contractor
- lien statutes (mechanics liens)
 - enacted in all states
 - provide a security interest in improvements to real property

- public property = generally exempt
- limited to reasonable value of work performed
- some states = limited to amount owner owes to general contractor
- generally - must be perfected by serving notice on owner and filing statement in public office w/i prescribed times
- some states limit liens to K w/ owner of property (why Callano had no lien)
- creates no personal obligation; enforceable through sale of owner's property thru foreclosure
-

Living Together - post termination restitution (83)

- termination of cohabitation - may = claim restitution for services in home
- services generally deemed gratuitous
- restitution may be allowed where extraordinary/unilateral effort of one spouse inures solely for benefit of other spouse by the time of dissolution (e.g., Pyeatte v. Pyeatte, Ariz. App. 1982 - financing legal education)
 - agreement and expectation that provider will eventually benefit from current detriment
- unmarried co-habitants - may raise restitution claim at termination where one party retains unreasonable amount of property

Reliance (and the Requirement of Bargain)

Kirkey v. Kirksey - promise to allow to move in = mere gratuity (84)

Supreme Court Alabama (1845)

Facts

- Def offered to allow PL to come live with Def
- PL moved from homestead to live w/ Def
- Def later kicked PL off land

Trial Court - for PL

Appeals Court - reversed for Def (promise = mere gratuity)

Class

- if clause - conditional gift or bargain? Court says conditional gift - language of letter appears that intending to supply a benefit
- Rosenthal - letter could have been amended to allow consideration
- **Rosenthal - a case for promissory estoppel exists (BUT developed subsequently - not applicable at time of Kirksey v. Kirksey)**

Central Adjustment Bureau v. Ingram - at-will employment = sufficient consideration for non-compete agreement

(86)

(Tenn. 1984)

Facts

- PL hired Def subject to agreeing to non-compete agreement
- Def left PL and started to compete w/ PL
- PL sues for breach

Trial Court -

Court of Appeals -

Supreme Court -

- at-will employment = sufficient consideration for non-compete agreement
- non-compete agreement signed shortly after at-will employment initiated = part of original agreement

HOLDING AND DECISION: (Drowota, J.) Is a covenant not to compete valid if it is signed after employment has begun? Yes. A covenant not to compete is valid even if it is not signed until after employment has begun; continued employment is sufficient consideration. As a general rule, restrictive covenants in employment contracts will be enforced if they are reasonable under the particular circumstances. The rules of reasonableness applies to consideration as well as to other matters such as territorial and time limitations. D argued that the agreements were executed after commencement of employment and are void for a lack of consideration. However, when an employer has the right to terminate an employee, the employer's forbearance from doing so is consideration if the employer continues to employ the employee for an appreciable length of time after he signs the covenant, and the employee severs his relationship with the employer by voluntarily resigning. D worked for a long period after the execution of the agreement. There was adequate consideration for the agreement. Reversed.

DISSENT: (J. Brock) There was no guarantee that the employee would not be terminated even if he signed the non-compete agreement; the employer furnished no consideration. Common law principles governing employment contracts should not be employed to supply consideration for non-competition covenants where such a provision was not freely bargained for by the parties. These parties had already terminated their previous employment and had lost the power to bargain.

LEGAL ANALYSIS: This court reasons that future performance was in fact sufficient to constitute consideration. This was based on the premise of full or substantial performance by one party to a bilateral contract; the other party cannot refuse performance after receiving the promised benefits. The dissent has a good point and it seems quite enticing, but the parties did not lose their bargaining power for over a period of years.

Non-compete clauses are not favored by the law. Most court decisions strike these clauses because the restrictions are deemed to be overbroad. This contract is overbroad. If the employer had only restricted D from operating or working within a specified radius (20 miles) and had restricted the clause to only that knowledge actually acquired on the job from P, the clause just might survive in a modern jurisdiction.

Class

- illusory promise - "I will if I want to" = at will
- if illusory promise actually performed → unenforceable unilateral promise becomes enforceable bilateral K
- implied promise applicable to employer - employer required to act in good faith (Restatement § 205)
- K calls for negative specific performance - Courts traditionally say not bound by these BUT nevertheless act as tho they are so bound
- Courts may challenge non-compete agreement where overly large
 - geographically
 - by time
- court may change agreement
 - through omission of certain phrases
 - generally reluctant to alter provisions - rather invalidate agreement
-

Bankey v. Storer Broadcasting Co. - employment policy binding b/c benefit to employer (< b/c offered/accepted)
(95)

Supreme Ct. Mich 1989

Facts

- PL hired when written personnel policy = discharged only for cause
- Def changed policy = discharge at will
- Def fired PL; PL sued b/c policy changed after hired

Court - policy <> enforceable b/c offered/accepted; enforced b/c benefit employer derives from establishing policies

- employer may change policy even w/o express reservation of right to do so
- benefit of personnel policy
 - <> workers show up for work
 - = beneficial work place
- no binding agreement
- unilateral K theory <> apply to instant case

Class

- How to change labor K? courts may say that issue is subject to change and courts will not allow party (employer) to bind itself
- Rosenthal = judgement clearly wrong (b/c policy part of employment K)
 - should have been a binding K
 - obvious that case is wrong if original K included manual

Broadnax v. Ledbetter - reward → not binding reliance where no knowledge of offer (97)
(Supreme Ct. Tex. 1907)

- Def offers reward for return of prisoner
- PL captures prisoner and turns in w/o knowledge of reward
- Def refuses to pay reward

Supreme Court of TX -

- no bargain
- Def <> obligated to pay

Major classes of promises <> enforcement on basis of promise

Types

- gift - gratuitous
- past consideration
- moral obligation
- lack of knowledge of promise

Characteristics

- generally non-commercial = less incentive to enforce promises in this area
- unilateral K - generally not in commercial situation b/c both parties want certainty that other party will perform

Reliance (as an alternative basis for enforcement)

Ricketts v. Scothorn - offer binding where daughter quit job in reliance thereon (98)
(Supreme Court Nebraska 1898)

Facts

- grandfather offered interest bearing promissory note to granddaughter (PL)
- grandfather suggested that PL ought not to have to work
- PL - quit work; lived off of interest
- Grandfather died; estate (Def) denied obligation for lack of consideration

Court - for PL

- equitable estoppel prevents Def from arguing no consideration b/c PL changed position on basis of Grandfather's promise to pay interest/note in the future
 - award = expectation damages

Class

- no bargain
- not a unilateral OR bilateral K
- not even a conditional gift
- promissory estoppel -

Changing Position

- some cases required detriment
- Restatement - does not require detriment
- emotional consideration may be relevant - courts reluctant to consider emotions b/c intangible and may be faked

Promissory Estoppel - 4 Types of Cases (101)

- Family promises - bargained for exchange = somewhat inapplicable
- Promises to convey land - promisee relied on promise and moved onto land
- Promises coupled w/ gratuitous bailments - delivery of goods for free storage on the condition (w/ understanding; on basis of promise) that some action will be taken
- Charitable subscriptions - strong desire of courts to favor charitable institutions → enforcing gratuitous promises (e.g., others contribute b/c of large donation; charity changes position b/c of gratuitous promise - e.g., giving effect to any conditions of the promise)

Feinberg v. Pfeiffer Co. - changing position in reliance on promise = enforceable (104)

Facts

- see detail above
- PL relied on promise of pension to retire
- promissory estoppel applies to prevent Def from renegeing on promise

Cohen v. Cowles Media Company - reliance test = promise enforced to prevent injustice (107)

(Minn 1992)

- PL disclosed that competing Lt Gubernatorial candidate had been arrested on basis of newspapers promise of confidentiality
- newspapers disclosed identity
- PL = fired
- PL sued on basis of promissory estoppel - jury awards \$200,000

Minn Supreme Court - reverses b/c promissory estoppel would limit First Amendment freedom of press

U.S. Supreme Court - 1st Amendment = ancillary issue; reverse remand

Minn Supreme Court - affirms jury verdict

- test <> whether promise s/b enforced to do justice
- **test = whether promise s/b enforced to prevent injustice**
- PL relied on longstanding journalistic tradition of anonymous sources/reporters immediate promises

Class

- custom can sometimes fill issue missing from K
- consideration - exchange of promises (give information if promise to keep secret)
- **why did court provide remedy through promissory estoppel?**
 - Rosenthal - s/b classic consideration case; no need to reach out to promissory estoppel

D&G Stout, Inc. v. Bacardi Imports - promissory estoppel - no relief for expectation damages (110)
(7th Cir. 1991)

- PL liquor distributor loses its suppliers except 2 - Def + one other
- PL cannot operate w/o 2 distributors
- PL negotiates sale of assets to 3rd party
- PL discusses support from Def
- July 9, 1987 - Def promises support
- July 23 - PL rejects 3rd party offer
- July 23 - Def decides to withdraw support of PL
- July 30 - PL learns of Def decision to w/d support
- Aug 14 - PL executes agreement for sale at \$550,000 less than July 23 price
- PL sues for recovery of damages under promissory estoppel

Trial court - grants Def motion for summary judgement

- Indiana law applies - recognizes
 - expectation losses/damages - from expectation of future income/gain = **no recovery**
 - reliance losses/damages - **recovery allowed**
 - out of pocket losses - arising from changing position in reliance on promise (e.g., moving expenses)
 - opportunity costs - arising from not choosing one option in reliance on promise (e.g., forgone wages)
- PL had reliance interest in Def promise

Appeals Court - reverses summary judgement and remands for trial

- no relief for expectation damages under promissory estoppel

Class

- recovery
 - has to be reliance
 - no expectation recovery in an at-will relationship b/c no predicting how long will last

Class September 21, 2000

Damages

- reliance
- expectation -
 - general remedy under K
 - may be unmanageable
 - may lead to disparate remedy
- restitution

Bilateral K (Promise for Promise) (117)

- right = entitlement to receipt
- duty = obligation to perform
- power = capacity to change a legal relationship
- condition = event which must occur before performance of a promise will be due

- constructive conditions of exchange - one promise enforceable only on initial performance of reciprocal promise

Class

- why enforce exchange of promises
 - isn't easy to prove reliance
 - difficult to prove loss
 - likely that some harm would result from breaking of one of mutual promises

Strong v. Sheffield - illusory promise to forbear <> sufficient consideration (119)
(Court of Appeals NY, 1895)

Facts

- PL enters into promissory note w/ Def's husband
- Husband cannot pay
- PL agrees to forbear collection of promissory note (and refrain from selling) at will on basis of Def's guaranty
- PL attempted to collect on Def's guarantee

Court - no consideration b/c PL promise to forbear = illusory; no real detriment b/c could collect at will

- Debolt disagrees - PL restricted his rights of disposition; bound self to not sell to another party = consideration

Mattei v. Hopper - satisfaction clause (good faith/objective standard) <> make promise illusory (121)
(Supreme Court California 1958)

Facts

- Def received deposit of \$1,000 for sale of land
- PL (developer) made deposit with 120 days to examine title and consummate purchase on the condition realtor found leases satisfactory to PL
- Def (w/i) 120 days - notified PL would not sell
- realtor got the requisite leases and PL informed Def = accepting K
- Def failed to tender deed

- Def - deposit receipt = only an offer and only accepted when PL notified accepting K
- Court - no mention in K of Def condition (i.e., K not final until received notice of acceptance)

- issue of illusory promise
 - exchange of promises - must create mutuality of legal obligations
 - **K w/ "satisfaction" clauses** - one of two test applies
 - **objective** = satisfaction as to commercial value - reasonable person standard (objective) applies (difficult to apply/determine)
 - **subjective** = satisfaction as to fancy tastes - good faith standard (subjective) applies
 - Rosenthal - no clear rule as to which test applies - have to objectively look at parties' intent
 - PL = fancy tastes type = obligated to operate in good faith
 - PL could only avoid obligation where in good faith failed to obtain satisfactory leases
 - K w/ satisfaction clause = not illusory b/c rejection s/b based on more than just PL arbitrary decision

Class

- Good faith = UCC § 1-201(19) = honesty in fact

Eastern Airlines v. Gulf Oil Corporation - requirements K = legal detriment (125)
U.S. District Southern Florida, 1975

Facts

- Def agreed (on June 1972) to supply the requirements of PL through Jan. 1977
- agreement allowed variable price fixed to published price for specific grade of oil
- OPEC boycott of 1973 caused oil prices to escalate
- U.S. gov't implemented fixed price scheme whereby the relevant published price did not change
- Def repudiated K
- PL sued for injunction of specific performance

Def position	Court
<ul style="list-style-type: none"> • K <> binding requirements K <ul style="list-style-type: none"> - lacks mutuality - is vague and indefinite - subjects Def to P whims 	<ul style="list-style-type: none"> • Mutual obligations <ul style="list-style-type: none"> - PL must buy only from Def - Def must supply PL good faith demands
<ul style="list-style-type: none"> • K void for want of mutuality 	<ul style="list-style-type: none"> • addressed later (613)
<ul style="list-style-type: none"> • commercially impracticable w/i UCC § 2-615 	<ul style="list-style-type: none"> • addressed later (823)

- Remedy = specific performance - if not = chaos and irreparable damage to Gulf Oil
- finding for PL and not ordering specific performance would be "vain" (i.e. waste of time)

Wood v. Lucy, Lady Duff-Gordon - exclusive promotion right - implies promise to use reasonable efforts (133)
(Court of Appeals NY 1917)

- Def = fashion icon
- PL = exclusive right to place Def endorsements on items (subject to Def approval); pay Def 1/2 all profits and revenues
- Def started to place endorsements on her own
- Def claim = not a K b/c PL does not bind self to anything (no consideration)

Court -

- fair to imply promise that PL would take reasonable efforts to make money/ get endorsements for Def
- Def gave exclusive privilege
- PL assumed duties associated with making profit from such duties
- K requires PL to account monthly of results
- apparent parties intended/expected that arrangement would create profit
- implicit in this profit making venture = PL promise to use reasonable efforts to bring profits into existence

Class

- Key = Def would not make any money if PL did nothing (b/c of exclusive agreement)
- w/o implied promise, transaction cannot have the business efficacy that parties must have intended
- K only makes sense if court fills gap in terms implying PL promise to make reasonable efforts to bring profits into existence
- When will court fill gaps? continuing commercial purpose (Lucy = Yes; Strong = no)

BARGAINING PROCESS

- actual intent theory = meeting of the minds
- objective theory - what does the K say?

Assent

Lucy v. Zehmer - outward manifestation of assent controls even if actually intend otherwise(140)
Supreme Ct. VA 1954

Facts

- Def wrote on back of receipt offer to sell land for \$50,000
- PL took receipt/accepted offer
- Def claims = jest; drunk
- Trial Court = valid K
- Supreme Court = valid K from serious business transaction b/c

- appearance/existence of K
- K discussed for length of time (40 minutes)
- rewriting K to meet PL objection of wording
- Def ability to recall specific details (not as drunk as PL claims)
- provision for PL examination of title
- PL <> understand that = jest
- **rule - look to outward expression of person as manifestation of intention rather than to a secret/unexpressed intention. - the law imputes an intention corresponding to reasonable meaning of words/acts**
- essential elements
 - good faith offer
 - good faith acceptance
 - execution
 - delivery of written K
- mental assent of parties <> required to form K where law imputes requisite intent based on a party's actions

Class

- Lucy made the offer; Zehmer executed the agreement
- Does it matter who made the offer?
- Rosenthal - not sure would make any difference

Tests - subjective test = greater weight

- subjective - PL <> know K = joke
- objective - reasonable person <> know that K = joke

what if a bluff? -

- reasonable person understands that risk exists that bluff will be called
- bluff distinguishable from jest

Lasera v. Lasera - (143)

- use objective theory
- to determine if K exists
- to determine what K means

Keller v. Hollerman (143)

Mich 1863

- when neither party intends to be bound (agreement = frolic/banter) <>K

Gentlemen's Agreements (148)

- stock underwriting - letter of intent to buy stock offering - contains explicit wording that not binding
- bonus/death benefit plans - employer wants to provide incentive to employees but retain complete discretion over administration of plan
 - Cf. Spooner v. Reserve Life Insurance (Wash 1955) - ruled that such arrangement = binding K despite explicit wording that <> binding
- Living Together (149)- binding K <> recognized where married (Belfour v. Belfour) - BUT recognized where not married and expectation of reward existed (Marvin v. Marvin)

Considerations

- As a matter of intention - could not be binding
- As matter of public policy - could not be binding

FORMAL K CONTEMPLATED (150)

Winston v. Mediafare (150)

Class

- Terms listed = guide; not blackletter law

Offer (153)

- offer = act whereby one person gives another the power to create contractual relations
- voluntary act of offeree binds the parties
- may be gradual process - various proposals

Owen v. Tunison - negative statement <> offer (154)

Supreme Maine 1932

Class

- negative statement (will not accept less than . . .) <> a formal offer
- Def only opening negotiations
- not an offer b/c vast disparity between amount of offers

Harvey v. Facey - indicating lowest price <> offer to sell at such price (156)

Jamaica (1893)

Facts

- PL seeking to buy lot asks for lowest cash price
- Def telegraphs lowest cash price = L900
- PL accepts
- Def claims only negotiating

Trial Court - dismissed

Appeals Court -

- Def telegraph = precise answer to precise question re: lowest price <> agreement to sell

Class

- if close case - court could interpret statement either way - courts tend to find that no K exists
- important to consider all communications - Def did not answer all of PL questions raised in initial telegraph

Notes

- State v. Delaney (157) VT 1991
 - PL (agent of state of VT) attempts to buy land from Def for conservation
 - Def confirmed price would have to match to get property = \$1.2M
 - Governor proposed legislation to finance \$1.2M purchase
 - Def - indicated PL = another week to commit to a purchase (?)
 - Legislature passed funding bill
 - PL faxed signed purchase agreement
 - Def - six days later - indicated intention not to sell to State
 - District Court - summary judgement for Def
 - Appellate Court - affirmed - Def only inviting an offer from PL (i.e., "you have six days to commit to the purchase price")
- Hopper v. All Pet Clinic (157) Wyo. 1993

- PL signed non-compete clause w/ Def
- Def indicated that reasonable figure to release from non-compete clause would be \$40,000
- Def indicated that if PL agreeable to let Def know and Def would draw up paperwork
- Is this an agreement? Debolt = no - b/c not suggesting that parties be bound (implied that paperwork is necessary step in binding?)

Fairmount Glassworks v. Crunden-Martin Woodenware - price quote w/ sufficient information = offer to sell (158)

Court of Appeals KY (1899)

Facts

- 4/20/1895 - CMW wrote FGW asking for lowest price for specific quantity of glassware
- 4/23 - FGW replied with prices for various types of glassware - "for immediate acceptance - to be delivered by May 15, 1895"
- 4/24 - CMW telexed acceptance of FGW price quote
- 4/24 - FGW telexed - impossible to fill order b/c output all sold

Trial court - finds for CMW

Appellate Court - affirms

- generally price quotations <> offer to sell
- H/E - FGW price 4/23 telex = more than just quote
 - CMW had not asked for a quote - had asked for an offer
 - FGW knew what quantity CMW was wanting (requesting an offer for)
 - "for immediate acceptance" - can only mean acceptance of FGW's offer
- FGW - claims that CMW changed terms (e.g., first rate bottles) meaning that not accepting an offer from FGW
- H/E - FGW declined to ship goods before got CMW correspondence w// revised terms
- **by providing different prices - FGW gave CMW right to name quantity of goods ordered at each price listed**
- by providing "deliver by" date - FGW gave CMW right to name delivery date (????)

Class

relevant considerations

- CMW asked for an offer
- FGW "quote" had specific terms - for immediate acceptance
- for Def - no breakdown

Notes

- **Moulton v. Kershaw** (160) Wis 1884
 - Def wired offer to sell barrels of salt to PL city on specific RR
 - PL immediately wired acceptance of 2,000 barrels
 - Def <> ship
 - PL sued for breach
 - Trial court = overruled Def motion for dismissal
 - Appeals Court = reversed - wording not what business person would use in making offer to sell definite quantity
 - no quantity
 - no outside correspondence to provide additional insight as to intent

Battle of the Forms - **Power Engineering v. Krug International** - (161)

Iowa 1993

Facts

- PL sent proposal for Def to make an offer w/ specific terms (limiting cancellation options)
- Def sent purchase order w/ specific terms (reserving right to cancel)

Addressee of Offer - **Boulton v. Jones** - regular customer successfully denied order/K due to change in owner of supplier (163)

Eng. 1857

- PL bought out Pipe Hose business of employer
- Def (regular customer) placed an order
- PL received/supplied order w/o notifying of ownership change
- Def refused to pay
- Court - award for Def - no person can interpose/adopt K where identity = relevant (e.g., where set offs occur, or for personal services)

Class

- generally - offer can only be accepted by one invited to furnish the consideration

possible seller remedies

- quasi-K - restitution
- where "buyer" sells to 3rd party - conversion - if no legally binding sale

Group Discussion

- COA now conversion

Craft v. Elder & Johnston - advertisement = merely invitation to negotiate(163)

Court of Appeals OH (1941)

- Def offered "Thursday Special" on sewing machines as an advertisement in newspaper/flyer
- PL tendered \$26
- Def refused to sell (repeatedly)

Trial court - dismissed PL action - advertisement <> offer on which binding K can be made

Appeals Court - affirmed (for Def)

- ordinary advertisement = offer to negotiate/to public to come and purchase <> offer to be bound
- ordinary advertisement = invitation to enter into a bargain

Class

- **Rosenthal - court wrong - advertisement <> invitation to negotiate/make an offer**
- bait & switch advertising = problem - unclear if K law can effectively regulate
- consider how reasonable reader would read advert in determining if offer exists

Notes

- Consumer Protection - **Geismar v. Abraham & Strauss** (165) NYS2d (Dist Ct. 1981)
 - NY Statute allows recovery for misleading advertising of greater of i) actual damages or ii) \$50
 - Def advertised china regularly \$259 for \$39
 - PL tried to buy; Def refused
 - Court - no offer sufficient to be bound; PL allowed \$50 for misleading advertising

Lefkowitz v. Great Minneapolis Surplus Store - advertisement = valid offer where clear/leaves nothing to negotiation (165)

Minn 1957

- Def advert = Lapin Stole \$139 for \$1, first come/first served
- PL (male) tried to purchase
- Def - store policy = only sell sale scarves to women

Trial court - awarded PL damages = \$138

Appeals court - affirmed

- test for binding K from advert = was some performance promised "in positive terms" in return for something requested
- where offer = clear, definite, explicit and leaves nothing open to negotiation = offer acceptance of which will be binding
- advert - no restriction (e.g., reference to house rule of selling only to ladies)

Group Notes

- House rule (selling to women) - offerees must be notified prior to accepting

BIDS (168)

Bid sequence

- owner determines need for project
- owner employs architect to design project
- architect employs engineers to develop detailed plans
- architect distributes plans to general contractors
- general contractors are invited to submit bids
- bids may be solicited through advertisement
- sub-contractors obtain relevant portions of plans
- equipment suppliers/material men obtain relevant portions of plans
- all bidders calculate price willing to guarantee performance and which i) think they can win and ii) still make profit
- bids submitted - material men → sub-contractor → general contractor → owner

Considerations

- bid documents often reserve owner's right to reject all bids
- governmental bids bound to accept lowest qualified bid
- bidder may alter bid by writing change on envelope prior to submission (e.g., "Deduct X Dollars")

Bid shopping

- results in undesirable decrease in competition - subcontractors will pad bids
- results in undesirable increase in competition - subcontractors driven to bid so low as to operate at a loss and tempted to use sub-standard work

Mistakes

- If reasonable person would recognize a mistake in an offer - then offeror not bound to offer

Elsinore (in class)

- good faith mistake made by contractor
- when can mistaken bid be w/d -
 - statute generally restricts ability to w/d
 - Restatement unclear

Acceptance (179)

- acceptance = voluntary act by offeree whereby exercises the power conferred by the offer thereby creating set of legal relations called a K

- contractual distinguished from non contractual relations - offeror always has initial full control over succeeding relation called a power (offeror = master of offer)
- When can act operate as an acceptance?

International Filter Company v. Conroe Gin Ice & Light - offeror may dispense w/ notice of acceptance (e.g., acceptance by operation of some fact) (180)

Commission of Appeals of Texas, 1925

Facts

- PLE mfrs machinery for purifying water in association w/ mfr of ice
- DefE - mfrs ice
- 2/10/1920 - PLE agent submitted proposal (to DefE agent) to be binding when i) accepted by Def AND ii) approved by PLE's executive officer
 - condition = submitted for prompt acceptance and unless accepted subject to change w/o notice
- 2/10 - DefE accepted proposal
- 2/13 - PLE executive officer approved
- 2/14 - PLE telexed instruction for DefE to ship water sample
- 2/28 - DefE - attempts to countermand order
- 3/2 - PLE denies right of countermand - insists on performance
- 3/4 - DefE - again attempts to countermand order
- PLE sues for breach
- DefE claims that orally indicated that prompt notification of approval was required for K to be effective

Trial court (w/o jury) - judgement for DefE

Appeals Court - affirmed

Appeals Commission - reversed remanded

- Offeror may dispense w/ need for notice of acceptance
- DefE order = an offer which made no specification that notice was required
- PLE promptly accepted - no other terms of proposal limit offer after prompt acceptance made
- in fact - PLE 2/14 telex provided prompt notice of acceptance
 - form of notice may differ from the form of the acceptance itself
- parties have to specify manner/form of notice

Class

- who makes the offer? - look at who exercises the final authority/discretion/power to cause binding K to arise ("last shot" rule)
- why does seller want to be offeree -
 - advantage = changing capacity/pricing; checking credit of buyer; control salesman
 - disadvantage = buyer can revoke until seller accepts
- offer made by Def in language provided by PL
- "PL in Error" = the appellant; respondent = Defendant in Error
- Note that TX state court ruled for IL company even though Def = TX (no need for diversity in this case - very little contemporary justification for the diversity jurisdiction)

White v. Corlies & Tift offeror not bound if acceptance not communicated in reasonable manner/time (184)

Court of Appeals of NY 1871

Facts

- PL = builder

- Def = merchants
- 9/1895 - Def request proposal for fitting office suite
- 9/28 - PL leaves estimate for work w/ Def
- 9/28 - Def change specs - send proposal for PL to approve under existing estimate
- 9/28 - PL approves and returns proposal for change
- 9/29 - Def notifies PL may begin work if agrees to finish w/i two weeks
- 9/29 - PL <> notify Def of agreement; purchases materials for job in accepting work
- 9/30 - Def countermands order of 9/29
- PL sues for breach of K

Court of general term (w/ jury) - for PL - judge charged jury to find if PL had obligation to notify of acceptance (Judge said he thought not; Def excepted to such indication)

Court of Appeals - reversed - for Def

- where offer made b/w parties not together - acceptance must be manifested to offeror by some act
- acceptance need not go to offeror before offeror will be bound
- while manifestation need not come to offeror's attention before becomes bound, **offeror not bound if manifestation not put in proper way to be in usual course of events, in some reasonable time**
- PL mental determination w/o appropriate action so as to notify other party <> binding as K
- PL purchasing of materials = no different from acts for working on other projects → not specifically indicative of accepting Def offer

Class

- to what extent is notice required
 - offer can dictate

Group

- difficult in communicating acceptance w/i one day due to distance/technology at time
- seems somewhat that starting immediate might be reasonable

Evertite Roofing Corporation v. Green - if K silent → reasonable time required for acceptance; K accepted w/ commencement (loading trucks) (187)

La. App. 1955

Facts

- Day 0 - PL sales rep = no authority to bind PL - signed K anyway
- K allows acceptance if - written by PL officer OR performance of work
- Def purchased on credit
- PL requested credit reports
- Day 7 - Def engages other contractor who starts work
- Day 9 - PL loads truck/drives to Def
- Def <> allow PL to work
- P sues

Trial court - rules for Def

- notice to PL workmen upon arrival = sufficient

Appeals court -

- since K <> specify time - reasonable time must be allowed
- performance began w/ loading of trucks - T/F K accepted prior to Def notice

Class

- why added provision that binding upon performance - Rosenthal = perhaps b/c company sloppy and wanted binding K even if forgot to accept offer

- preparatory performance = loading the truck = not true performance (per Rosenthal)
- perhaps court considered the fact that Def did not revoke the offer in reasoning for PL

Notice in Unilateral K (188)

Carlill v. Carbolic Smoke Ball Co. (188)

Eng (1892)

- case re: influenza ball and claim to the public for "bonus" if use and catch flu
- reward if used ball and then catch flu
- notification of acceptance benefits offeror
- offeror may dispense w/ notification requirement

Group

- Court - found for PL
- PL did not notify of acceptance → not fatal to claim
- Rosenthal - solid decision
- use of product = acceptance of offer

Bishop v. Eaton (189)

Mass. 1894

- case re: guarantee by Illinois party of Nova Scotia party debt
- performance may be sufficient acceptance of offer to bind
- H/E where knowledge of performance <> come quickly → promisee bound to provide notice w/i reasonable time

Indemnification - Allied Steel and Conveyors v. Ford Motor Co. (190)

USCA 6th 1960

Facts

- 8/1955 - Def sent PO to PL - broad indemnification clause marked void
- 8/1955 - PL accepted
- Def sent amended PO to PL - broad indemnification clause NOT marked void
- 9/1956 - PL employee injured - results from negligence of Def employee's in connection w/ PL work
- 11/1956 - Def receives acknowledged copy of amended PO
- 11/1956 - PL accepted
- PL employee sues Def → Def sues PL

Trial court - jury verdict for Def (Ford) - judge denies judgement NWS the verdict

Appeals court - affirms

- if offeror suggests permitted means of acceptance - other means not precluded
- tender w/in allowed time operates as promise to complete performance
- binding K occurred when PL - w/ Def knowledge, consent, acquiescence - undertook work called for by amendment
- **suggested method of acceptance does not preclude acceptance through some other means - e.g., performance - in this situation**
- Def primary concern
 - <> method of acceptance
 - = PL accepted terms

Class

- Ford redrafted provision even after winning to be more clear - b/c case decided by federal court applying MI law
→ MI state court might reach different decision on the interpretation of MI law

Debolt - defense in contra situation?
court reading a lot into inexplicit intent?

Shipment of Goods as Acceptance (194)

- shipment of goods in response to order for immediate delivery
 - shipment - seller accepts offer
 - non-conforming goods = breach of K unless seller indicates an accommodation

Silence Not Ordinarily Acceptance (195)

- generally silence <> acceptance - even where offeror provides otherwise
- where goods shipped without acceptance of offer
 - generally - recipient can keep goods w/o paying
 - exception - charitable organizations = ???
- **American Bronze Corp v. Streamway Products** (196) Ohio App. 1982
 - for 20 years - Streamway called in orders/fulfilled w/ writing → American began production
 - American then refused to fill 3 orders
 - Court - manner of filling orders = acceptance of binding K until notice of rejection provided
 - **Debolt** - wouldn't refusal to fill order = notice????

Termination of Offer (198)

Occurs by

- lapse of offer (express or reasonable time limit)
- revocation by offeror - **effective on receipt**
- rejection by offeree - **effective on receipt**
- offeror's death/incapacitation

Firm offer = not subject to revocation for some period of time

- under UCC 2-205 - only merchant can make

Lapse of offer (198)

- **Akers v. Sedberry** (Tenn App 1955) - face to face offer expires at end of meeting
- **Loring v. City of Boston** (Mass 1844) - (199) - reward offer for turning in arsonists <> valid 4 years after offer made through general public advertisements

Revocation and Rejection (200)

- **Hoover Motor Express v. Clements Paper** (Tenn 1951) - (201) - acceptance of offer not valid where Def earlier told PL not sure if wanted to go through w/ offer
 - why does doubts as to offer = revocation but question as to acceptance ("we might accept) <> acceptance?
 - b/c where uncertainty as to K → court generally does not find K to exist

Option K (201/207)

- option K = promise limiting offeror's power to revoke
- waiver = intentional relinquishment of known right

Dickenson v. Dodd - indirect notice of Def attempts to sell to other party = effective revocation (207)
Eng. 1876

Facts

- indirect notice of offeror's effort to sell to another party = notice of rejection
- offer "left over" = stay open/not revoked
- important issues addressed
 - does rumor constitute revocation
 - where promise to keep open - does indirect revocation revoke the offer
- subsequent criticism of case
 - why no obligation to keep open
 - is rumor enough to revoke offer

Court - **indirect notice of Def attempts to sell to other party = effective revocation**

Class

- seller can always protect position by putting self in position to accept offers rather than making offers

UCC - offers b/w merchants (209)

- UCC 2-205 - offer by merchant to hold offer open for time = binding w/o consideration
 - for stated (reasonable if unstated) time
 - may not exceed 3 months
 - must be initialed where state on offeree's form
- UCC 2-104 - merchant =
 - deals in goods of the kind
 - holds self out as having knowledge/skill peculiar to goods transacted
- recitals (210) - some courts hold to be sufficient to establish option K
 - Restatement § 87 - recital = binding if in signed writing and exchange = fair

Class

- why 2-205 only applies to merchant?
 - provides security naïve purchasers from untrustworthy sellers ("merchants")
 - strengthened wording of NY statute

Fragility of Offers (210)

- general public offer
 - can be required to give notice of revocation - equal/similar to notice given to offer
 - not bound to accepting parties which nevertheless miss the revocation
- Restatement - indirect revocation allowed if notice reliably given

Acceptance Varying Offer - **Minn & St. Louis RR v Columbus Rolling Mill** (215)

S. Ct. 1886

- 12/5 - PL asks for quote of specific quantity of rails
- 12/8 - Def provides quote
- 12/16 - PL places order (for less quantity of rails than originally quoted) at quoted price
- 12/18 - Def notifies cannot provide lesser quantity at quoted price
- 12/19 - PL accepts original offer quantity at quoted price
- Def denies existence of K
- PL sues
- Supreme Court

- proposal to accept on terms which vary from original proposal = rejection of original proposal (unless offeror renews offer)

Rejection of Irrevocable Offer (217)

- rejection of option K - doubtful that terminates offeree's power to accept

Death of an Offeror - **Jordan v. Dobbins** (218)

Mass (1877)

- Restatement § 48 - death/incapacitation of offeror/offeree = terminates offeree's/offeror's power of acceptance
- <> terminate offeree's power of acceptance under option K

Facts

- Def guarantees debt of 3rd party to PL
- Def dies
- PL continues extending credit to 3rd party
- PL sues Def estate

Court - rules for Def

- death of guarantor = revocation of offer to guarantee
- no hardship to require traders to exercise diligence in ensuring guarantors still alive

Note

Death of an Offeror(219)

Facts

- Aunt promises to pay Nephew (PL) if comes to Aunt's funeral
- PL goes to aunt's funeral
- Aunt's estate (Def) refuses to pay b/c no K

Class

- bilateral K - binding K arises at time of acceptance - did accept offer at time of offer by promising to go to funeral
- unilateral K - acceptance only occurs at time of PL performance (comes to Aunt's funeral)
- no illusory promise - b/c good faith standard applies - PL promise to perform (can't simply walk away at will)

Mailbox Rule - K by Correspondence (219)

Adams v. Lindsell (Eng. 1818) (220)

- dispatch of acceptance =
 - crucial point for creating binding K
 - offeror's power to revoke terminated
 - offeree's power to reject terminated
- Restatement § 63 - acceptance in manner/medium invited by offer makes offer binding at the moment put out of offeree's possession (unless option K which = operative only upon acceptance)
- acceptance by mail = offeree makes post office = agent
- Note - U.S. Post Office allows sender to recover letter before delivery
- Revocation - generally effective only on receipt by offeror
- offeror - bears risk of transmission of acceptance via post (e.g., it never arrives)
- rule does not apply to performance (e.g., mailing a check)

Class

- rejection overtaking acceptance -
 - only applies if offeror has not changed position in reliance on the acceptance
 - rejection should reference prior acceptance and its invalidity
- offeror's reliance on rejection trumps the operation of the technical rules
-

Acceptance of Varying Offer - Battle of the Forms

Mirror Image Rule (225)

- acceptance must be mirror image of offer
- if difference exists - represents a counter offer
- "last shot doctrine" -
 - last form equals the contract w/ the established terms
 - performance by recipient of last form = acceptance of K
 - **NOTE - overridden by UCC**
- mitigated in practice
 - implied term - e.g., industry practice which is generally understood by parties
 - precatory term - K binding on offeror's terms / offeror has option to accept offeree's additional term(s)
- Disputes arise when -
 - one party claims no K exists
 - some performance occurred/clear that K arises - parties dispute which terms control

Class

- common law -
 - started w/ mirror image
 - exceptions -
 - court would ignore trivial differences
 - precatory term - not a command
- difficult issue (assuming that K exists) = what does K require?
- **Ardente v. Horan** (225) - RI 1976
 - PL signed lease and paid consideration for sale of real estate
 - PL asked if furniture could remain
 - PL sues for specific performance
 - Court - for Def - agreement must be mirror image of offer
- **Stonewood Hotel v. Seven Seas** (226) N.D. 1990
 - parties prepared several drafts of K - each varying terms slightly
 - landlord withdrew long term lease/evicted tenant
 - tenant sues for breach
 - Trial court - for landlord - last draft = counter offer (along w/ rejection)
 - Appeals court - for tenant - reverse & remand
 - trial court failed to consider whether new proposals represented acceptance of offer w/ proposal of added terms
 - tenant's possession/partial performance = more appropriate for court to be flexible in determining the existence of a K

UCC 2-207 (ROSENTHAL COMMENTARY)

- 2-207(1)
- 2-207(2) - additional terms may be added as additional proposal (w/o rejecting initial offer) as long as following requirements met -
 - both parties = merchant
 - offer cannot limit offer to express terms of K
 - cannot materially alter the offer (most important)

- notification of offeror of objection to additional terms w/i reasonable time
- 2-207(3) - parties to intend to establish K but no sufficient writing to establish K
 - narrowly defined purpose - only applies if acceptance specifically says that offeror has to assent to additional terms (?)
 - "knock out" doctrine - where differences are expressed but performance occurs anyway - does § 3 knockout the differences b/w the parties
 - something must form the K b/c performance has occurred

Pre-contractual Liability (248)

- neither party bound until K accepted
- unjust enrichment - party may recover through restitution if conveyed benefit to another when no binding agreement exists
- Cronin v. National Shawmut Bank (249) Mass 1940
 - Def invited brokers to submit bids for work
 - Def uses PL bid to negotiate with other brokers (i.e., Def benefits from PL efforts)
 - Def hires other broker
 - PL sues
 - Supreme Court MA - for Def
 - deriving benefit from PL broker's work <> lead to liability where not employed
- Hill v. Waxberg (249) 9th Cir. 1956
 - Hill promised to hire Wax if financing came through
 - Wax assisted in preparing construction for Hill
 - Wax expected to be compensated for efforts out of profits from engagement
 - Hill contracted w/ another contractor
 - Wax sued to recover expenses incurred
 - Trial Court - jury award for PL = \$11,147
 - Appeals Court - reversed b/c jury did not consider that only K was implied in law (restitution damages rather than expectation (?) damages)
 - implied K exists where benefit conferred in expectation of being paid
 - irrelevant whether payment is expected immediately or over time in the future
- K implied in fact = compensation for services at the market rate
- K implied in law = restitution; recovery limited to value transferred

Class

- PL incurred detriment on basis of eventually expectation of future binding K

Brooklyn Bridge Hypothetical (250)

- Restatement § 45 - addresses problems posed by Brooklyn Bridge Hypothetical
 - commencing performance suspends offeror's ability to revoke an offer

Notes

- Brackenbury v. Hodgkin (251) Me 1917
 - Def offered PL use/income of farm cared for PL for rest of her life
 - Def offered to give farm to PL upon Def death
 - PL moved to farm
 - Def sued to force PL to leave
 - PL sued to enforce rights
 - Trial Court - for PL
 - Appeals Court - affirmed (for PL)
 - Def offer = unilateral K (requiring act for promise)

- PL move = act making Def promise binding
- court looks at starting the "act" (i.e., the move) rather than completing the "act" (i.e., taking care of Def until she died)
- implied promise - good faith performance required

Class

- detriment of bilateral K over unilateral K? - may be difficult/risky for offeree to perform but will nevertheless be bound b/c of promise

Reliance - **Drennan v. Star Paving** (253)

Supreme Court of CA 1958

Facts

- Def (Drennan) provides bid to general contractor (PL -Star Paving)
- PL submits general bid
- Def notifies of mistake in bid
- Def (subcontractor) refused to perform on bid submitted to PL (contractor)
- PL sues for recovery

Trial Court - for PL

Appeals Court - affirmed

- Def made offer
- PL relied on offer in making bid
- main offer includes subsidiary promise - if part of performance of given → offeror will not revoke AND if tender is made → will be accepted
- reasonable reliance on a promise holds the offeror in lieu of consideration ordinarily required to make the offer binding
- only fair that general contractor have opportunity to accept subcontractor's bid after K awarded
- different result may arise where contractor knows/s/h known that bid = mistaken
- as b/w Def who made bid and PL who relied on bid - loss due to Def's mistake should fall on Def
- PL reasonably attempted to mitigate loss from mistake

Class

- depends on who said what first(?)
- had Def bid expressly stated/implied that revocable at any time before acceptance → court says would view it as such (255)
- similar situations - where offeree incurs costs in preparation for performance

Holman Erection Company v. Orville E. Madsen (259)

Minn 1983

Facts

- PL provided sub-bid to Def
- Def listed PL on bid as sub-contractor
- Def awarded project
- Def awarded sub-K to another (minority) sub-contractor
- PL sued claiming listing of PL on bid = acceptance

Trial Court - summary judgement for Def

Appeals Court -

- precedent holds that listing sub-contractor on bid <> acceptance of bid/offer
- promissory estoppel may hold subcontractor (but not contractor) bound to agreement b/c

- general contractor' justifiable reliance on sub bid (sub-contractor does not rely on general contractor - sub K bids to several contractors)
- nature of bid process requires flexibility for general contractor (only receive sub bids at last minute)
- Def had legitimate reason for listing another sub-contractor (EEOC)
- ruling for PL would
 - put Minn in minority of states
 - impose rigidity on bid process and result in greater cost
 - such change s/b made by legislature

Class

Notes

Page & Wirtz v. Van Doren (263)

Tex. Ct. App. 1968

- PL (Van Doren) made sub bid to Def (Page)
- PL caught Def trying to bid shop
- Def told PL that would give sub bid to PL if Def won job
- Def won job
- Def awarded sub bid to other sub contractor
- PL sued

Trial Court - awarded PL judgement of \$25,000

Appeals Court - Reversed

- PL admitted that many conditions remained to be negotiated

Liability for Failed Negotiations (263)

- restitution
- freedom to negotiate w/o pre-K liability

Goodman v. Dicker (264)

DC Cir. 1948

Class

- court eliminated expectation damages - allowed reliance damages
- how do deal w/ relationship terminable at will
 - tort - fraud of deceit - were told would get franchise and then did not
 - requirement to provide good faith opportunity for party to perform - some states do not accept argument (e.g., NY - court of appeals says obligation of good faith does not require employer to show good faith in terminating relationship)

Prince v. Miller High Life if valid (written) K → promissory estoppel <> applicable (264)

Tex App. 1968

Facts

- PL agreed to develop market w/ expectation to recover costs through future profits
- K allowed either party to terminate K at will **w/o liability**
- Def terminated before PL recovered costs
- Def awarded distributorship to 3rd party which began earning profits
- PL sued to recover damages

Trial Court - ruled for Def

Appeals Court - affirmed

- specific written K allowing termination w/o liability controls
- because valid K → theory of promissory estoppel not valid

Grouse v. Group Health Plan (265)

Minn 1981

Facts

- PL = employee of 3rd party
- PL applied w/ Def
- Def told PL should give notice at 3rd party employee
- PL gave notice of quitting
- PL rejected job offer from 4th party believing would work for Def
- PL could not get reference required by Def
- Def hired someone else

Trial court - dismissed PL complaint

Supreme Minn Court - reversed/remanded for damages

- PL = right to assume would be given a good faith opportunity to perform his duties to Def satisfaction once he was on the job
- Restatement § 90 - Def promise reasonably induced PL actions
- b/c employment terminable at any time → damage measurement = what cost in quitting job (rather than what would have earned working for Def)

Hoffman v. Red Owl Stores - no recovery of lost profits under promissory estoppel (268)

Supreme Court Wisc. 1965

Facts

- PL sold store, moved, invested time, invested money in reliance of directions/promise of Def
- Def refused to grant franchise unless PL met additional financial requirements (got father-in-law to gift additional funds/rather than loan)
- PL sued when negotiations collapsed

Trial Court - jury awards special verdict including = damages for sale of store; court approves all damages except for sale of stores

Supreme Court -

- promissory estoppel
 - originally - promisee's acts of reliance = substitute for consideration
 - current case - no need for all elements of K for promissory estoppel to apply - only need
 - promisor reasonably expects promise to induce action
 - promise induces action
 - avoid injustice only by enforcing K
- damages for sale of store - s/h/b = sales price received and FMV of assets sold (including goodwill) - ignore profits but for effect on goodwill
- lost profits
 - PL contends - recoverable in breach of K action
 - court - this is not breach of K action/is promissory estoppel (required b/c Def unilateral promise otherwise not enforceable)

- promissory estoppel - damages awarded only to extent necessary to prevent injustice

Class

- terms of K need not be complete/definite for enforcement
- promissory estoppel need not require that there would be a breach of K - all promissory estoppel requires = change of position in reliance on another party's representation

Walters v. Marathon Oil (271) 7th Cir. 1981- allowed expectancy measure for promissory estoppel award (awarded damages on lost profits)

Wheeler v. White (272) Tex 1965

- where no K exists - promissory estoppel may be applied
- damages for promissory estoppel = only reliance damages

Channel Home Centers v. Grossman (272)

USCA 3rd Cir. 1986

Facts

- Grossmans negotiated w/ Channel to put store in Grossmans' mall
- 12/07/1984 - Grossman requested letter of intent from Channel
- 12/11/1984 - letter of intent (aided Grossman in obtaining financing) subject to various conditions for approval
- 01/11/1985 - Channel's parent sent lease to Grossman
- 01/22/1985 - Channel competitor contacts Grossman
- 01/24/1985 - competitor expresses interest in site
- 02/06/1985 - Grossman revokes offer
- 02/07/1985 - competitor signs lease for substantially greater lease fee than Channel

Trial court - no enforceable K

Appeals Court - reversed

- Grossman promise = negotiate in good faith
- Grossman violated promise -
 - unilaterally terminating K
 - precipitously entering into K w/ competitor
- factors needed for binding K

- parties' intention to be bound	- letter of intent - contains unequivocal promise from Grossman to w/d property from lease market <u>and</u> negotiate lease transaction w/ Channel
- sufficiently definite terms	- both parties signed
	- both parties took subsequent steps to prepare for lease
- consideration	- promise to w/d property = sufficiently definite for specific enforcement
	- letter of intent = valuable to Grossman

- Open issues for trial
 - does evidence support conclusion that parties intended to be bound?
 - was there time limit on negotiations?

Class (October 10, 2000)

- OK =
 - if negotiations had failed in good faith

- if reasonable time had been allowed
- express language of letter of intent = particularly damning
- Suppose nothing literal interpreted in K regarding good faith requirement
- references to unethical conduct
 - entering into unconscionable K
 - performance/enforcement of K - Restatement § 205 good faith required
- American Courts - do not generally require good faith negotiating
- generally difficult to show/prove that failed negotiations resulted from a lack of good faith

Heyer Products Co. v. United States (279)

Ct. Cl. 1956

- court rules - implied condition of request for bids is that each would be honestly considered
- cannot request offer merely for purpose of rejecting (e.g., in retaliation)
- limitation of ruling b/c gov't K - bidder's power to revoke is restricted
- court follows a high standard

Statute of Frauds (286)

Statute of Frauds

- largely revoked in England - criticism that caused more fraud than protected from
- UCC - sale of goods - earlier drafts proposed to repeal written; bar reactions = adverse → so w/drew proposed removal of writing requirement
- Specific situations where applied
 - suretyship - hold one party to answer for debt of another
 - case law = not required where individual will benefit (e.g., sole s/h of corporation)
 - 3rd party beneficiary
 - K not performed w/i 1 year - somewhat conflicting situations
 - longer term = more important (what if performance for 1 day in 53 weeks vs. 51 weeks of performance in 3 days)
 - lifetime K <>w/l scope of Stat of frauds
 - sale of interest in land (least controversial)
 - sale of goods (originally w/ cost > 10 pounds; originally in U.S. >\$50; currently in U.S. >\$5,000)
 - Some U.S. states = added situations
 - K performed after death
 - brokerage K - real/other
 - finder's fees - NY requires signed memo unless promissee/broker = atty/RE broker
- required
 - signed writing - not necessarily a signed K
 - memo may be sufficient (even letter mentioning terms but asking to revoke can suffice the writing requirement)
 - general K requirements (e.g., consideration)
- one way obligation - one party may sue on writing while other may not
- if memo lost - oral testimony may be sufficient to establish that writing existed
- Extent of writing required
 - all categories generally require all terms to be included in writing
 - sale of goods = substantially less terms allowed (except goods specially designed/delivered - no writing required)
 - UCC Article 2 - only required term = quantity (UCC provides gap fillers for other terms)

- What is a Writing - UCC now requires a record
 - record = identifiable to party intending to signal acquiescence
 - federal stat (2000) - e-sign - treated as an effective signing for interstate/international transactions
- Bind a non-signing party to a memo
 - § 2-201(2) - only b/w merchants - A sends B written confirmation of agreement and B fails to respond w/i 10 days
 - while intent to K/agree may not exist (and therefore pre-empt the issue of K existing) at least stat of frauds satisfied
- dispensing w/ writing requirement
 - similar to promissory estoppel
 - some courts require both
 - reliance in detriment AND
 - unjust enrichment
- restitution - where one party conferred benefit on another - may not be allowed b/c would be same remedy available otherwise / would destroy purpose of Stat of Frauds
- International Commercial Contract Rules - no Statute of Frauds

POLICING THE BARGAIN (324)

- status of the parties - disqualifies certain classes of parties from committing selves to K - minors
- behavior of parties - how parties bargained in fact (fraud/duress/mistake)
- substance of the bargain - court's find ways to discourage K derived from unequal advantage (e.g., resulting in unequal consideration)

Capacity (325)

Intoxication (325)

- reference the ability to comprehend the nature/consequences of the instrument executed (Lucy v. Zimmer)
- drunkenness must have drowned reason, memory, judgement and impaired mental faculties to render individual non compos

Minor's Contracts (326)

- minor may disaffirm K (i.e., K = voidable)
 - during minority (determined by state law)
 - w/i reasonable time after reaching majority - no specific rule
 - EXCEPTION - if K involves necessary goods/services - <> voidable
- minor buyer -
 - must restore goods re: voided K (prevents unjust enrichment at expense of seller)
 - gets restitution of prior

Kiefer v. Fred Howe Motors, Inc. - PL/purchaser able to disaffirm K after reaching majority (327)

- PL -
 - 20 yrs old,
 - married,
 - father of child
 - bought car

- signed K stating at least 21 yrs old
- had problems w/ car and sought to disaffirm purchase

Trial Court - rules for PL

Appeals Court (majority) - affirms

- Def <> argument which recognizes exception from general minority rule (e.g., K for necessities, statutory exception, etc.)
- better solution would be for Def to ask legis to change law
- infancy doctrine = obstacle for minors to make major purchases
- benefits of allowing doctrine to remain (protecting infants) outweigh costs

Dissent

- automobile = necessity to working father
- magical age of 21 = no longer relevant

Class

- majority = 18 (now in all states)
 - per Rosenthal - major campaign to reduce b/c had to serve in armed forces → s/b allowed to vote
 - Constitutional amendment allowed federal vote = 18; practically states changed to facilitate state voting
 - if able to serve in armed forces/to vote → s/b allowed to K

Ortelere v. Teachers Retirement Board - no K where PL unable to act reasonably and Def aware of mental disorder(329)

NY CA 1969

Facts

- PL (teacher) = on leave from teaching for mental disorder
- PL retirement fund = \$70,000 from 40 yrs contributions
- PL borrowed maximum \$8,000 against plan
- PL husband quit job to care for PL
- PL elected (one time/irrevocable) to take maximum monthly benefit = meant foregoes payment to survivors after death
- PL died 2 months later

Trial court - ruled for PL

Appellate Division - reversed/dismissed (for Def)

CA

- standard rule = mind so affected as to render individual wholly/completely incompetent to comprehend nature of transaction
- state knew or s/h/ known PL = mentally ill
- "not a sound scheme" - where 40 years of contribution nullified by one instant act by individual known to be mentally ill
- **Ruling - no K where**
 - **PL unable to act in reasonable manner**
 - **Def knew of mental disorder**
 - **mental disorder has to be mentally established disorder**

Dissent

- actions/correspondence of PL indicated she comprehended what the transaction meant
- PL husband staying home to care for PL = made election necessary in addition to being rational

Class

- what test applied
- cognitive test still generally used - did person know what doing
- PL knew what was doing - but was able to act reasonably
- Court expands mental incompetence defense- but provides limits
- **important effect - Court will accept less restrictive rule for finding mental incompetence (also picked up by Restatement)**

Cundick v. Broadbent - mental incapacity test = did party possess sufficient reason to understand act (333)
CA 10th 1967

Facts

- 1961 - PL = psychiatric treatment
- 1964 - PL sold ranch to Def at ridiculously low price
- two neurosurgeons/psychiatrist testified that PL = mentally incompetent to conduct business transactions at time of ranch negotiations

Trial Court - rules for Def - PL = knew what was doing/K<> unconscionable

Appeals Court - affirms

- standard - did PL possess sufficient reason to understand nature/effect of act
- unlikely that PL was mentally incompetent for years w/o wife knowing - even during time that wife assisting in sale of ranch

Dissent

- medical evidence of incompetence = uncontroverted

Unfairness - Conventional Controls

McKinnon v. Benedict - oppressive K <> enforceable; if doubt → interpret against restricting use of land(337)
Supr. Ct. Wisc. 1968

Facts

- PL loaned money to Def allowing Def to buy neighboring land
- 25 yr condition of loan = Def <> build closer to PL land than present buildings/cut no trees next to Def property
- PL agreed to assist Def in developing business
- PL actually did little to help business
- PL lived on neighboring land for couple of months during summer each year
- Def repaid loan in 7 months
- Def camp <> proper; sought to develop property into trailer park in violation of loan covenant
- PL sues for specific performance

Trial Court - ruled for PL; enjoined Def from developing camp

Appeals Court - reverses (rules for Def); merely ignores restrictive terms; contract remains valid

- general rules
 - equitable principle - oppressive K will not be enforced
 - public policy principle - restrictions on the use of land are not favored in law (**Rosenthal finds incredible**)
 - if doubt exists - restrictions on use of land s/b resolved in favor of free use
- Def unable to deal at arms length w/ PL (evidenced by inability to buy land w/o interest free loan)
- inadequacy of consideration - so gross = unconscionable
- PL detriment recognizable in an equity action = minimal; damage to Def = severe

Class

- K enforceable at law
- K <> enforceable at equity b/c harsh disparity of terms
- Equity vs. Common Law principles
- equity = specific performance = common remedy
- inequality of terms may be respected in equitable action (i.e., for specific performance) even though not basis in action at law
- reason this is equity is b/c PL asks for specific performance
- common law action would have been to sue for damages (arguably - damages could not compensate PL for loss of seclusion)

Tuckwiller v. Tuckwiller - relevant time for determining fairness of terms = time of contracting (ignore subsequent developments) (341)

Supreme Court Missouri 1967

- relevant time for determining fairness of terms = time of contracting (ignore subsequent developments)

FACTS: Ruby Tuckwiller (P) rented a portion of the Hudson family farm, mostly owned by her husband's aunt, Metta Morrison. Metta Morrison got Parkinson's disease when she was 70. Morrison asked P to quit her job and care for her for the rest of her life. Morrison signed a paper stating that if P nursed her in her lifetime, P could have the farm on Morrison's death. P resigned from work and Morrison made an appointment with a lawyer to change her will. The same day Morrison fainted and fell and was taken to the hospital. While on the way to the hospital, Morrison had the date put on the agreement and obtained the signatures of two ambulance attendants as witnesses. Morrison died a month later without ever having changed her will. The original will provided for a sale of the farm with the proceeds to go to a student loan fund at Davidson College. P brought a bill for specific performance of the contract. Marion Tuckwiller (D), the executor of Morrison's estate, and the College (D) opposed the bill. Specific performance was granted, and D appealed.

ISSUE: In determining whether or not a contract is so unfair or inequitable or is unconscionable so as to deny its specific performance must the transaction be viewed prospectively and not retrospectively?

RULE OF LAW: In determining whether or not a contract is so unfair or inequitable or is unconscionable so as to deny its specific performance the transaction must be viewed prospectively and not retrospectively.

HOLDING AND DECISION: (Welborn, Commissioner) In determining whether or not a contract is so unfair or inequitable or is unconscionable so as to deny its specific performance must the transaction be viewed prospectively and not retrospectively? Yes. In determining whether or not a contract is so unfair or inequitable or is unconscionable so as to deny its specific performance the transaction must be viewed prospectively and not retrospectively. The same rule applies with respect to consideration. At the time of this agreement P did not know how long she would have to perform to receive the farm. The insistence of Metta that the contract be witnessed by the ambulance drivers was clear evidence of her satisfaction with the deal. There was adequate and fair consideration at the time the contract was entered into. If a contract concerning real property is in its nature and incidents entirely unobjectionable, that is when it possesses not of those features which appeal to the discretion of the court, it is as much a matter of course for a court of equity to decree a specific performance of it. Affirmed.

LEGAL ANALYSIS: The only thing that swayed this court was the desire on the part of Metta to complete the deal on the way to the hospital. Under that type of circumstance, it would be grossly unjust not to honor Metta's contractual intent.

Black Industries v. Bush (344)

FACTS: Black Industries (P), a drill and machine part manufacturer, was invited by the Hoover Co. to bid upon certain contracts for anvils, holder primers, and plunger supporters. Bush (D) agreed to manufacture the parts for P in accordance with government specifications and in conformity with certain drawings. P was to service the contract

and would be entitled to the difference between D's quotations and the ultimate price. P's profit on the anvils was 84%, on the holder primers 39%, and on the plunger supports 77% (note the casebook says 68% but that was calculated improperly $((21.20-12)/12= 77\%)$). D failed to complete the order, and P sued for damages of \$14,625. D also sued for an additional \$4,460.95 on lost business with a similar resale contract with P for Standby Products Company. D moved for summary judgment, alleging that the contracts were void as against public policy because P's profits were passed on to the government and the public in the form of increased prices.

ISSUE: Is a contract for the sale of goods to the government void as against public policy because it provides compensation for a middleman?

RULE OF LAW: A contract is void against public policy if it induces a public official to act in a certain manner, if it involves a contract to do an illegal act, or if it is a contract that contemplates collusive bidding on a public contract.

HOLDING AND DECISION: (Forman, C.J.) Is a contract for the sale of goods to the government void as against public policy because it provides compensation for a middleman? No. A contract is void against public policy if it induces a public official to act in a certain manner, if it involves a contract to do an illegal act, or if it is a contract that contemplates collusive bidding on a public contract. This contract's only effect on the government was to buy machines made by component parts manufactured by D and resold to P who would then sell to the government. It is quite possible that P was to have received a very high profit on the sale of the parts, either because Hoover agreed to pay too high a price or D quoted too low a price. Even so, D is bound by this agreement by the familiar rule that relative values of consideration in a contract between business men dealing at arm's length without fraud will not affect the validity of the contract. The fact that the government is the ultimate purchaser is of no relevance. In addition there are other methods to protect the government from excessive prices on the goods it purchases. The contract is not void and the summary judgment motion is denied.

LEGAL ANALYSIS: A court will not relieve a party from a bad bargain if there is no evidence of wrong doing. The casebook has a worthless conversation on page 347 with respect to the economic viability of middlemen. If you have ever conducted business, this is a prime example of idiots that do not understand the concept of velocity in business transactions and the rule of de minimus.

Overreaching - Conventional Controls

Duress (349)

- Duress - K = voidable
- restitution allowed to return payments made under duress
- How much duress in order to void a K?

Pre-existing Duty Rule - Alaska Packers v. Domenico - agreement unenforceable where induced by duress (consider party's intent in pressuring) (352)

- originally an English rule - adopted in U.S.
- UCC § 2-209(1)
 - requires good faith - including absence of duress

Class

- agreement for increased compensation (possible reasons for ruling for Def)
 - w/o consideration
 - made under duress

Class

Schwartzreich v. Bauman-Basch (354)

- court - sees two separate transactions
 - first - original K
 - second - second K which replaces original K
 - rescission merged into subsequent K
- could be simply a single K w/ amendments? - was there any time that either party could have walked away from agreement?

- Rosenthal - clear in the parties minds that this was only a single K with an amendment
- tearing up first K - not relevant (?)
- Williston - rescission followed shortly by new agreement re: same subject matter creates legal obligation in new agreement

Arzani v. People (355)

Sup. Ct. NY 1956

- Court - rules for Def
- termination of original K <> presumed/must be proven
- PL did not prove termination

Class

- Revised K - not in writing (therefore - no help from NY statute)

Watkins & Son v. Carrig (357)

Supreme Ct. NH 1941

FACTS: Watkins and Son (P) agreed to excavate a cellar for Carrig (D) for a stated price. When P started to work he discovered that two-thirds of the space was solid rock. P's manager notified D, and the parties orally agreed that P should remove the rock at a unit price about nine times higher than the unit price for excavating upon which the gross amount to be paid according to the written contract was calculated. When the work was finished, P sought to recover the increased payments. D argued that the oral agreement was not supported by consideration; P's promise was illusory because P had a preexisting duty to excavate the cellar. A referee found that the oral agreement superseded the written contract. D appealed.

ISSUE: Does a modification of an original agreement for payment of more money for the same services violate the rule of preexisting duty for valid consideration?

RULE OF LAW: A modification of an original agreement made in good faith operates as a partial rescission of the prior contract and results in valid consideration.

HOLDING AND DECISION: (Allen, C.J.) Does a modification of an original agreement for payment of more money for the same services violate the rule of preexisting duty for valid consideration? No. A modification of an original agreement made in good faith operates as a partial rescission of the prior contract and results in valid consideration. The facts show that this modification was done in good faith. The law is a means to the end. It is not the law because it is the law, but because it is adapted and adaptable to establish and maintain reasonable order. In a case like this, of conflicting rules and authority, a result which is considered better to establish the fundamental justice and reasonableness should be attained. It is not practical for the law to adopt the precepts of moral conduct, but it is desirable that its rules and principles should not run counter to them in the important conduct and transactions of life. Exceptions overruled.

LEGAL ANALYSIS: The court should have just accepted UCC 2-209 and used public policy to justify the shift to a modification done in good faith instead of using an endless and almost impossible to follow argument about the various positions regarding support under the common law for the premise of UCC 2-209.

This case was about the preexisting duty rule.

Class

- Williston - agreement for rescission <> eliminate need for consideration

Notes

De Cicco v. Schweizer (363)

NY 1917

Class

- consideration for father's promise = refraining from terminating engagement (which together they could do but could not do individually)
- Pre-existing duty destroys consent
- what if pre-existing duty to 3rd party

Austin Instrument v. Loral Corporation (365)

CA NY 1971

FACTS: Austin (P) was a subcontractor for Loral (D) who had a contract to produce radar sets for the government. P supplied precision gear components that were needed to make the radars. The Loral contract contained a liquidated damages clause for late delivery and a cancellation clause in case of default by D. D won a new contract for the production of the radar units and awarded P a new contract based only on the components for which it was the low bidder. P threatened to cease delivery of all the parts due under prior subcontracts unless D consented to a substantial increase in the price of all parts due for all contracts both ongoing and prospective. D attempted to place the business with 10 other manufacturers of precision gears, but found none capable of producing the parts in time to meet D's commitments with the government. D consented to P's demands. D refused to pay any price increases and P sued D. Judgment was given to P and D appealed. The appellate division affirmed: "the facts are virtually undisputed, nor is there any serious question of law. The difficulty lies in the application of the law to these facts."

ISSUE: Is a contract modification under economic duress enforceable against a party if the duress is created by a party to that contract?

RULE OF LAW: A contract modification between parties to a contract is voidable for economic duress if one of the parties to that contract caused the duress.

HOLDING AND DECISION: (Fuld, C.J.) Is a contract modification under economic duress enforceable against a party if the duress is created by a party to that contract? No. A contract modification between parties to a contract is voidable for economic duress if one of the parties to that contract caused the duress. This evidence makes out a classic case, as a matter of law, for duress. D has shown a prima facie case of duress: P threatened to withhold the delivery of goods unless D agreed to a new price; D could not obtain the goods from other sources within a reasonable period of time; and D was subject to liquidated damages under its government contract (the ordinary remedy for a breach of contract was not adequate for D). D was deprived of its free will. Judgment reversed.

DISSENT: (Bergan, J.) The facts as determined by the trial court do not support D's contentions. To reach the majority opinion the court has overturned the findings of fact by the lower court. There were many suppliers listed in a trade registry but Loral chose to rely on those who had in the part come to them for order and with whom they were familiar.

LEGAL ANALYSIS: A decisions of duress must be based on the facts and the facts do not support the majority position. Once again the casebook tries to create a discussion for a legal standard for the supposition that the government should be protected from its poor contracting practices by the courts. The example used is on page 369 of the casebook. Answer: Immense profits during wartime are usually taxed excessively; the courts should stay clear of these issues.

Class

- would pre-existing duty rule have helped Loral?
 - performance had already been made
 - pre-existing duty rule - applies only to pending promises
 - subset under consideration and that additional promise must be supported by additional consideration
- UCC § 2-209 - should have applied(per Rosenthal/not referenced in case)
- remedies available = inadequate largely due to tight time deadlines and inability to cover needs

Victims Options (369)

Payment in Full (371)

- UCC § 1-207 - Reservation of rights - allowed reservation of rights when cashing check in accord and satisfaction
 - substantially limited efficiency benefit of accord and satisfaction
 - 3 states adopted; academics came out against; 12 states came out against new rule
 - NY CA came out for UCC

Concealment

- experts - accepted that experts <> required to divulge special info (bargaining advantages compensate for cost of becoming expert)
- special information
 - = property right where special efforts used to obtain
 - <> not a property right where casually obtained
- concealment = generally not ground for rescission w/o Def action creating elements of misrepresentation

Swinton v. Whitinsville Sav. Bank - no liability for bare non-disclosure re: sale of house (376)

MA 1942

Facts

- Def sold house to PL w/o disclosing termite infestation
- PL learned of termites 2 yrs after sale
- PL sues for concealment (i.e., not divulging relevant info)

Trial Court - dismisses

Supreme Court - affirms - no liability for bare nondisclosure_

- no allegation of -
 - fraud/misrepresentation
 - preventing PL from alternatively obtaining relevant info
 - fiduciary duty on Def
- if Def liable
 - all sellers liable for not disclosing non-apparent detriments
 - all buyers liable for not disclosing non-apparent virtues

Class

- some courts require that seller disclose latent defect not obvious to buyer
- possible remedies to actionable non-disclosure =
 - specific performance
 - rescission of agreement
 - repayment of amounts received plus interest
 - reasonable rental value of home while occupied

Kannavos v. Annino - where seller implies benefits (can rent apt.)→ obligation to disclose (378)

Supreme MA 1969

Facts

- Def converted home into multi-dwelling apt in violation of zoning laws
- Def advertised dwelling for sale as able to rent apartments - emphasized income expense re: renting

- Def knew PL bought dwelling for purpose of renting
- PL <> zoning laws/violation thereof
- PL bought dwelling
- city enforced zoning laws preventing rental of apts
- PL sues for rescission of K

Trial court - denies dismissal; grants rescission of K

Supreme Court - affirms - allows rescission due to Def conduct

- where sellers = wholly silent - failure to disclose <> actionable (no liab for bare non-disclosure)
- distinguished from Swinton
 - sellers = more than simply bare non-disclosure
 - if speak on a point (either voluntarily or in response to question) - must speak fully and honestly and divulge all material facts
 - seller implied that apt could continue to be rented
 - effect of non-disclosure = deceptive and fraudulent
 - buyers could have discovered w/o reliance on outside experts (simply reviewed municipal records)
 - reliance on fraud = over rules failure to exercise due diligence

Class

- Distinguish Kannavos from Swinton
 - type of latent defect - Kannavos = latent *legal* defect; Swinton = latent *physical* defect
 - impact of latent defect
 - Kannavos - whole sale premised on ability to rent (i.e., the latent defect)
 - Swinton - still might buy house if knew of termites; just affect price
 - COA
 - Swinton - COA = tort of fraud/deceit (remedy w/h/b money damages);
 - Kannavos - COA = K (remedy is rescission; (Rosenthal) gentler remedy)
- Rosenthal - Swinton probably on the way out
 - not proper to not reveal something that is relevant to other property

Misrepresentation

- elements
 - misrepresentation of fact (not opinion)
 - misrepresentation = material (no uniform standard; allows judge to control volatile jury behavior)
 - victim justifiably relied on misrepresentation
- misrepresentation =
 - ground for rescinding K - even if misrepresentation = innocent
 - may be ground for tort action (deceit w/ knowledge of misrepresentation or reckless disregard for truth = scienter)
 - Scienter = knowledge or reasonable to know
 - inequality of competence = ground for relief (e.g., lawyer speaking on law to client)
 - fiduciary relationship (Dr/patient; atty/client) = ground for relief
- misrepresentation of opinion (rather than fact) <> ground for relief
- when K enforced in favor of misrepresenting party - suffering party = negligent in reliance
- diligence required of PL depends on -
 - victim's capabilities
 - nature of transaction
 - plausibility of misrepresentation
- statement of legal effect of a document - generally viewed as opinion rather than fact

Confidential Relations (e.g., duty to not misrepresent) (385)

- no arms length transaction =

- fraud must be affirmatively shown/ will not be presumed
- evidence of fraud must be clear and convincing
- Confidential relationship -
 - bargain must = fair, conscientious, beyond reach of suspension
 - exists where one party has power/means to take advantage/exercise undue influence over the other
 - possible factors
 - age
 - education
 - business experience

Unconscionability/Adhesion K

O'Callaghan v. Waller & Beckwith - landlord's power not so great where tenant signed waiver for injuries as part of lease (388)

Supreme Ct. IL 1958

Facts

- PL (tenant) signed exculpatory clause in lease K protecting Def (landlord) from negligence
- PL injured due to defective pavement
- PL died; Husband/executor continues suit
 - concedes that if exculpatory clause applies → no COA
 - argues clause against public policy → does not apply
 - shortage of housing gives landlord all bargaining power

Trial court - jury awards \$14,000

Appeals Court - reversed (recognized validity of exculpatory clause)

- exculpatory clause generally enforced unless
- against settled public policy
- relationship b/w parties warrants ignoring clause

Supreme Court - affirmed

- freedom of K basic in law
- beware when freedom to K dilutes effect of public protections
- precedents = obvious public policy + dominant position of one party
- relation of lessor/lessee = private concern
- only one precedent where a State Supreme court has ignored exculpatory clause due to public policy w/o an applicable statute
- power of landlord = not so great
 - housing shortage has been addressed by legislature w/o addressing exculpatory provisions = legislature must have deemed not necessary
 - thousands of landlords (tenant could just go somewhere else)
 - PL did not try to negotiate exculpatory clause
- ignoring exculpatory clause = better left for legislature

Dissent

- not even theoretical competition - b/c all K w/ landlords = same (all included exculpatory clause)
- exculpatory clause = clearly against public policy
- factors when exculpatory clause s/b ignored

Factor	O'Callaghan
<ul style="list-style-type: none"> • importance of thing negotiated for party negotiating release 	<ul style="list-style-type: none"> • shelter = extremely important (essential)
<ul style="list-style-type: none"> • bargaining power 	<ul style="list-style-type: none"> • landlords have all power - <ul style="list-style-type: none"> - would have rejected tenant if argued

	any term - intense housing shortage
• free choice available	• none - same terms w/ any landlord
• existence of competition	• none - all same

Standard Form K (394)

advantages

- leverages off experience enabling judicial interpretation of one K for all K
- reduces uncertainty/saves time & trouble
- simplifies planning/administration
- makes draftsman's skill available to all
- makes risks calculable
- address unforeseeable contingencies
- reduce juridical risk (risk that juries swayed by emotion/irrational factors)

dangers

- imposes will of one party on another unwilling/unwitting party = adhesion K
 - bargaining <> b/w equals
 - no opportunity to bargain over individual terms at all
 - one party unfamiliar w/ terms (fine print/convoluted clauses)
 - atty - at a disadvantage b/c more difficult to believe that would not understand terms of K
 - society - by allowing freedom of K guarantees will not interfere w/ exercise of power by/thru K
- Adhesion K - take it or leave it K (no room for bargaining)
- no black letter rule

Exculpation (Hold Harmless) Terms/Statutory Problems - K which hold party harmless for fraud/willful injury = against public policy (397)

distinguishing characteristics

- absence of meaningful choice
- terms unreasonably favorable to one party
- no option to pay additional amount for protection from negligence

Class

- consider non-enforcement when
 - one party = monopoly
 - product = necessity

Tickets Passes and Stubs (399)

- generally - no obligation for terms in unsigned paper incident to everyday transaction

Klar v. H&M Parcel Room (399)

- PL left package; received claim check
- Def (bailee) lost package
- if bailee wishes to limit liab - must prove
 - gave adequate notice of special K
 - received assent to special terms

Henningsen v. Bloomfield Motors - warranty disclaimer ineffectual as part of adhesion K (402)

Supreme Ct. NJ 1960

Facts

- PL bought car from Def
- PL signed standard form K disclaiming warranty of merchantability (as allowed by USA)
- only warranty = for defective part = only w/i 90 days/4,000 miles
- steering mechanism failed w/i 10 days of purchase causing injury to PL
- PL sues for breach of implied warranty of merchantability under USA
- Def position - PL disclaimed warranty

Trial Court - for PL

Supreme Court NJ - affirmed for PL

- guiding ideas
 - general principle = one choosing not to read K cannot later avoid burdens (absent fraud)
 - basic tenet = freedom of competent parties to K
 - not followed in instant case b/c
 - apply to traditional K where parties have equal power and bargain/negotiate terms
 - standardized form K - allows stronger party to impose will on weaker party
 - all competitors use same standardized form K = no competition/choice/bargaining for consumer
 - standardized form K - resembles imposition of law rather than meeting of minds
- auto consumer - gross inequality in bargaining position w/ auto industry - no other means to fill need
- limitation of liability - no effect if unfairly procured =
 - not brought to buyer's attention
 - buyer not made understandingly aware of provision
 - provision <> explicit/clear
 - type of print/wording such that buyer does not see/understand
- Even if notice of disclaimer proper - wording = unclear such that buyer understands what rights given up for benefits received
- judiciary task =
 - administer spirit and letter of law
 - protect ordinary people from loss of important rights thru unilateral act of mfr

Class

- form terms (407) - consider degree of commercial utility vs. degree to which inclusion merely to gain power over other party
- PL - consequential damages requested
 - new car
 - money damages for injury
- Def - PL entitled to direct damages (new cotter pin)
- strict liability
- UCC - if applied → case would have been decided the same way
- hypothetical
- what if warranty had disclaimed liability for negligence (failure to exercise due care)? - UCC = cannot disclaim obligation of due care (such disclaimer would be unconscionable)

UCC Unconscionable K (418)

- UCC 2-302
- principle =
 - prevention of oppression and unfair surprise
 - not allocation of risks because of superior bargaining power
- Campbell Soup v. Wentz
 - court finding = K drafted by skillful draftsmen for benefit of buyer
 - court ruling <> that K illegal/excuse for party to break K

Class

- UCC 2-302
- application to anything but sale of goods (Art. 2)?
 - use of analogies to other types of commercial transactions
 - next Art. 1 revision may apply unconscionability to whole UCC
- Restatement § 208 - also supports application of unconscionability to K in general
- substantive v. procedural unconscionability
 - courts do not limit themselves to policing substantive unconscionability
 - Epstein = procedural unconscionability s/b only basis for policing K

Unconscionability - Two Views (420)

- View One
 - procedural unconscionability - fault/unfairness in bargaining process
 - substantive unconscionability - fault/unfairness in bargaining outcome (unfairness of terms)
 - unfair surprise = knowing assent is absent from bargain hypothesis
 - methodology for developing unconscionability norms
 1. appropriate to develop/apply norm when specific class of cases identified where neither fairness nor efficiency support application of the bargain principle
 2. closely related to way in which relevant market deviates from perfectly competitive market
 3. distinction b/w procedural/substantive unconscionability = too rigid to help in development of norms
- View two
 - defends attacks on freedom to K
 - freedom of K -
 - does not require court to enforce every K
 - allows non-enforcement of K in two situations
 - ❖ defect in process of K formation (duress, fraud, undue influence)
 - ❖ some (w/i narrow limits) incompetence of party

Wilson Trading v. David Ferguson (422)

NY 1968

- PL supplied yarn to Def
- Def refused to pay b/c unable to determine defect present in yarn (shading) until cut, knitted into sweaters, and washed

Trial Court - entered judgement for PL

Appeals Court -

Class

- UCC 2-719(2) - where limited/exclusive remedy fails its purpose → look to remedy under UCC
- UCC 2-316(1) - words creating express warranty/words negating or limiting warranty = construed as consistent wherever possible
 - negation/limitation inoperative to extent construction is unreasonable
- warranty in current situation
 - P 4 - requires good/merchantable yarn
 - P 2 - allows no warranties after weaving/knitting/processing/10 days
- UCC 2-607(3) - must notify supplier of breach w/i reasonable time
- UCC 1-204 - defines "reasonable time" - anything not manifestly unreasonable may be fixed by agreement

Warranties and Loss Limitations (423)

- virtually impossible to preclude buyer from all remedies but repair/replacement
- acts of party may be unconscionable (even where K is not) to the extent of court not enforcing K
- damages
 - consequential - separate but arising from the defect
 - direct - e.g., difference between price and value of defective item
- failure to comply w/ warranty - may be interpreted as repudiation of warranty
- rare for court to find unconscionable limitation in K b/w business people in commercial setting
- unconscionable decisions - may be differentiated on basis of commercial vs. consumer goods
- Collins v. Uniroyal - NJ 1974 (425) - court = giving what looks like relief in form of express warranty but which is not relief = surprise limitation = unconscionable = against public policy

Class

- consequential damages - arise as a result of direct injury
- 2-719(3) - may be limited/excluded unless limitation = unconscionable
 - limitation of personal injury damages = prima facie unconscionable
 - limitation of commercial damages = not prima facie unconscionable
 - commercial K - where parties equal bargaining power - not necessarily unconscionable (may simply be more efficient)
- Unconscionability - reference
 - UCC 2-302(1) - if court finds unconscionability as a matter of law (i.e., as determined by court rather than jury)
 - possibly b/c want to limit jury discretion to limit abuse
 - UCC 2-302(2) - summary judgement requested by Def would not allow pleading on issue of unconscionability
- certain cases where courts tend to reject limitations on remedies
 - consequential damages
 - personal injuries as form of consequential damages
 - consumer goods
 - automobiles

Williams v. Walker Thomas Furniture Co. - unconscionability = issue where Def sold PL knowing financial condition under terms allowing recovery of all prior sold items(426)

U.S. CA - DC 1965

Facts

- Def sold goods on installment credit
- credit policy = all installment payments applied prorata to all outstanding debts (nothing paid off until all paid off)
- PL defaulted
- Def sought replevin
- PL sues for unconscionability

Court of General Sessions - judgement for Def

DC Court of Appeals - affirmed judgement for Def

- condemns Def conduct b/c knew PL economic position but still gave credit (i.e., put all other credit at risk)
- H/E - no DC statute on which court can grant unconscionability relief

U.S. CA DC - reverse - remands to consider issue of unconscionability

- common law = ground for holding K unconscionable
- first impression - no precedent on unconscionability in DC makes this case of first impression
- other state's common law allows unconscionability of K as COA
- UCC 2-302
 - adopted after PL K w/ Def

- H/E - persuasive authority as to what common law in DC should be
- **consider**
 - absence of meaningful choice
 - K terms unreasonably favoring one party
 - meaningfulness of choice may be negated by gross inequality of bargaining power b/w parties
 - consider manner in which K entered into
 - consider party's education or lack thereof
 - terms considered in light of general commercial background and commercial needs of particular case

Dissent

- PL apparently knew her position w/ respect to new credit and outstanding credit

Class

- landmark case
- UCC not yet in effect
- cross collateralization - of prior purchases w/ new purchases
 - since forbidden by FTC
- risk of paternalism
 - oppressive obligation on seller's
 - oppressive inhibition/restriction on buyers (e.g., maybe safer for sellers to not extend credit to protected class at all)
- depreciation of second hand merchandise - often selling recovered goods would lead to recovery less than claim
 - duty to get best price - not as stringent as might be appropriate (Rosenthal) b/c seller probably not able to recover amount due anyway
 - larger ticket items (e.g., house) probably challengeable if seller does not get best price b/c better chance that sale of item will cover amount due w/ surplus

Jones v. Star Credit Corp - fraud not required for unconscionability (432)

NY Sup. Ct. 1969

Facts

- PL = welfare recipient
- Def (agent/factoree) - sold \$300 freezer on credit
- PL paid > \$600 on freezer w/ > \$800 still owing (for extensions of time et al)
- COA - PL sues for unconscionability

Sup. Ct. - Rules for PL

- amounts paid (>\$600) sufficient for purchase of \$300 freezer
- UCC § 2-302 -
 - enacts moral sense of community into commercial transaction law
 - applies to price term of transaction (as opposed to merely whole transaction)
- fraud not present/not required for unconscionability
- **consider**
 - disparity b/w price and value
 - Def knowledge of PL limited resources
 - inequality of bargaining power
 - PL education (?)

Class

- price unconscionability - issue cam up later than other terms
- rationalizing decision - law attempt to intrude to the minimalist amount possible
- Black v. Bush Industries - gov't sub-K - PL complained about price charged and passed on to gov't - court declined to intervene in price complaint

Price Unconscionability (435)

- UCCC - focuses on what = too much for buyer to pay as opposed to what = too much for seller to charge considering
 - like buyers
 - similarly situated sellers
- door to door selling = distinctive so as to warrant special legislative treatment

Hell or High Water Clauses (438)

- consumer <> assert against assignee/financer defense has against seller
- consumer will pay "come hell or high water"
- UCC 9-206(1) - makes term enforceable where consumer not involved
- FTC consumer credit rule - requires that consumer may assert all defenses against financier (nullifies hell or high water provisions)

Class

- "waiver of defenses clause" - essentially the same thing
 - 3rd party financier takes free and clear of defenses against merchant
- UCC 9-206 - (secured transactions)
 - type of transaction is given effect subject to any applicable consumer protection legislation
 - problems w/ just exercising defense against merchant
 - cash flow - consumer still has to pay
 - consumer has to bring action/rather than merchant
 - subsequently - large amount of consumer protection legislation has been enacted

Home Solicitation Sales/Cooling Off Periods (439)

- UCCC § 3.502 - except for emergency requests, buyer may cancel home sale until midnight of 3rd business day after K signed
 - must be mailed by midnight of third business day

Class

- rescission allowed w/i 3 days

Carnival Cruise Lines v. Shute (441)

U.S. 1991

discussed in class

Class

- choice of forum provisions -
 - stronger party use provision to put consumer to disadvantage
 - stronger party picks
 - choice of law
 - choice of forum
- race to bottom - least protective laws = most attractive to corporations

Franchise Relations (451)

Class

- generally more of a remedy given in franchise K than typical relations-
 - much more investment from franchisee - generates more sympathy
 - statutes applicable in this field - secondary roles by lawyers (if can't win by litigation → win by lobbying)

- e.g., statutes protecting specific types of franchisers
 - auto dealers - federal law - Automobile Dealers Day in Court Act
 - gas stations -

Illegality (454)

(covered very briefly in 10/25/00 class)

- otherwise concerned w/ interests of each party in respect of each other
- illegality = concerned w/ interests of public at large vs. either or both parties
- often stats <> mention effect on K
- illegality may derive from indications other than stats or indirectly from stats
 - legislative habits
 - expression of legislative disapproval (e.g., gambling K)

(covered very briefly in 10/26/00 class)

- K in restraint of trade
 - English doctrine
 - anti trust legislation
 - common law (Ingram v. Central Bureau) - non-compete clauses
 - some states forbid by statute
 - excessive - "unclean hands" minority doctrine - ER asks for too much
 - ❖ modify terms of agreement (majority of situations)
 - ❖ reform to extent can take out words only
 -
 - attorneys may not take clients when leave
 - ABA rules - strong interest in allowing client to pick service provider
- inducing official action
 - broken promise to pay for gov't action (executory bribe) - not enforceable
 - contingency fee - atty forbidden re: obtaining gov't K
- **Circun v. 14th Street Store**
- seller delivered goods
- buyer discovered that purchasing agent bribed by seller
- court - no duty to pay or return goods
- illegal transaction - leave parties where they are
- tremendous windfall for buyer/ loss for seller
 - possible restitution COA - but equity issues apply (clean hands, etc.)
 - possible - hold person bribed as constructive trustee for buyer - remit bribe received to buyer
- licensing -
 - screen qualified parties
 - revenue generating measure
 - registration
 - public policy
 - milk - keep dairy industry healthy
 - case - lack of licence - no recovery w/o licence
 - liquor - protect public
 - case - lack of licence - recovery allowed even w/o licence
- stakeholder - escrow account pays to wrong party -
 - wrong party holds property in trust
 - wrong party required to pay to correct party
- motion picture distributor
 - unenforceable K where distributor acquired distribution rights thru bribery
- Reeks v. Palmer (NY)
 - heir killed testator to get will
 - heir could not recover
- Degree of involvement

- case (MA) - Holmes
 - sale of liquor valid in MA/illegal in Maine
 - bought liquor in MA intending to sell in Maine
 - K enforceable even tho seller knew buyer intended to sell illegally in Maine
- case - sale of phonograph to prostitute for use in services
 - K enforceable - sale of phonograph not sufficiently connected to illegal activity
- gambling
 - customer wins - customer may sue
 - professional gambler wins (beats non-professional) professional may not sue
- amendment of acts

REMEDIES (483)

Measuring Expectation (483)

- measured by net gain would have enjoyed
- ignore hypothetical reasonable person
- depends on specific circumstances
- breach - (4) possible effects
 1. loss in value - deprivation of expected return performance
 2. other loss - loss beyond loss in value (e.g., additional expenses, causal damages as opposed to direct damages (?))
 - if K deemed terminated, then -
 3. cost avoided - beneficial effect of saving party from further expense
 4. loss avoided - party salvages/reallocates resources otherwise used for breached K
- **Formula A damages** = *loss in value* (1) + *other loss* (2) - *cost avoided* (3) - *loss avoided* (4)
 - *cost avoided* = *cost of complete performance* - *cost incurred in reliance on K*
- **Formula A damages** = *loss in value* (1) + *other loss* (2) - (*cost of complete performance* - *cost incurred in reliance on K*) - *loss avoided* (4)
 - *expected profit* = *loss in value* - *cost of complete performance* (?)
- **Formula B damages** = *cost of reliance* + *expected profit* - *loss avoided* + *other loss* - *consideration received*
- sentimental damages (485 nt 1) - not allowed to extent relates to "indulging in feeling to an unwarranted extent"

Vitex Mfring v. Caribtex Corp - inclusion of overhead for idled wool plant (486)

CA 3rd 1967

Facts

- Virgin Islands (VI) imposed quota on amount of wool allowed to be processed
- PL (Vitex) closed plant b/c had unused quota capacity but no wool to process
- Def (Caribtex) planned to import wool into VI for processing; K w/ PL for processing
- PL recalled workers and started plant
- Def breached K (failed to deliver wool)
- PL sues for breach of K (exp. plus profit)

Issue - should district court have included overhead as part of PL costs (thereby reducing profit)

District Court - awarded damages to PL (excluded overhead costs from reducing profit awarded)

Court of Appeals -

- **Issue** - should district court have included overhead as part of PL costs (thereby reducing profit)
- overhead expenses
 - executive/clerical salaries
 - property taxes

- general admin
- rule - claim for lost profits → O/H treated as part of gross profits and recoverable as damages
- PL recovers - losses incurred and gains prevented in excess of savings made possible
- OH - do not bear direct relationship to any specific transaction
- UCC 2-708(1) - PL damage measure for repudiation of K = K price - market price
- UCC 2-708(2) - if relief inadequate to put PL in position as if K fully performed → damages = profit (including reasonable overhead)
- Def claims unconscionability - mitigated against by Def bargaining power (successive / substantial price reductions wrested from PL during negotiations)

Laredo Hides v. HH Meats (491)

Court of Civil Procedures 1974

Facts

- PL K'd to buy Def hide by-products
- Def made 2 deliveries
- PL payment delayed in mail
- H&H demanded payment w/i couple hours
- H&H regarded failure to meet demand as breach justifying cancellation
- PL purchased replacement hides
- price of hides went up
- PL sued for breach (= Def repudiation)

Trial Court - take nothing verdict in favor of Def

Civil Court of Appeals - Reversed

- TX UCC 2-711 - buyer may "cover"
- TX UCC 2-712 - buyer may recover cover cost - K price
- cover presumed proper - Def = burden to prove cover improper
- PL may also recover incidental damages (shipping exp, handling charges, etc.)

Notes

- PL sometimes argues that replacement <> cover (double benefit)
- personal service - replacement employment must be viewed as cover
 - person <> serve two masters
- contractor - could have expanded business → replacement <> viewed as cover/replacement
 - lost K = lost volume

Class

- cover - defines reasonable price

Class October 30, 2000

- lost volume hypothetical -
 - Toyota = excess demand (dealer can sell all cars gets)
 - breach <> lost volume b/c can replace sale
 - Chevrolet = deficient demand (dealer = more than enough cars available)
 - breach = lost volume b/c cannot replace sale

David v. Diosonics (494) - in class

CA 7th 1987

Class

- lost volume case
- court - PI must show would have/could have made additional sale

- buyer puts deposit down; buyer breaches
- question - can seller retain deposit
- UCC 2-718 - buyer entitled to refund of deposit - (lower of \$500/% of deposit) + loss from lost volume (e.g., portion of profit)
 - may result in additional payment from buyer to seller
 - purpose of deposit? may be liquidated damages (but may not be)

United States v. Algernon Blair - restitution remedy allowed where expectation damages w/h/b less (b/c of loss K)(502)

CA 4th 1973

Facts

- PL K to supply cranes to Def building project
- Def refused to pay rent for cranes
- PL ceases work under K
- PL sues quantum meruit (fair value of services)

District Court - for Def

Appeals Court - reverse for PL; remand to determine value of services performed

- PL may forgo K claim to pursue quantum meruit (= restitution)
- PL may join quantum meruit/breach of K claim
- PL entitled to restitution in quantum meruit
 - unjust enrichment plus unjust impoverishment
 - **allows recovery value of services provided - irrespective of if w/h lost money/not recovered in K action**
 - recovery measure = value of performance
 - value of services provided = market price at time/place services rendered (i.e., not date of K)

Class

- Losing Contracts
 - expectation - technically requires PL to incur loss
 - reliance - at least allow PL to break even
 - restitution - applicable?
- recovery
 - quantum meruit = restitution = allowed
 - Def retained benefits conferred by PL (cranes)
 - generally no reduction for losing contract
 - reliance recovery not allowed
- **Albert & Son v. Armstrong Rubber** - 2nd Cir 1949 (501) - PL entitled to reliance damages but for Def meeting burden of proof of loss PL would have suffered under completed K
 - Restatement § 349(?)
- court claims quantum meruit reasoning (restitution) BUT calculation of damages references value of performance (more like reliance)
- possible recoveries (?)
 - expectation = at time of K
 - restitution = value conferred at time of lawsuit
- hypothetical - work stopped before completion - can sue for
 - reliance (limited by K)
 - restitution (even though more than K price) - Restatement says yes as long as K not
- hypothetical - what if work finished w/ cost overrun - should contractor get additional value
 - Restatement § 349(?) - says yes if K unfinished

Notes

Bausch & Lomb v. Bressler (504)
CA 2nd 1992

Facts

- PL paid Def \$500,000 non-refundable prepaid royalty for 5 yr exclusive equip distributorship

Trial Court - awarded \$500,000

- Def broke K by selling in PL territory
- awarded no profits b/c PL <> prove lost profits

Appeals Court - reversed/remanded

- damage award cannot be correct
 - if \$500,000 = expectation damages → incorrect b/c no evidence of lost profits
 - if \$500,000 = reliance damages → part s/h been offset b/c evidence that K = loser for PL
 - restitution - not addressed by trial court
- terms of K (i.e., non-refundable royalty) <> applicable to restitution

Loss Limitations - Avoidability (505)

- injured party =
 - duty to mitigate damages
 - incurs no liability to breaching party for failure to mitigate
 - simply precluded from recovering avoidable losses

Rockingham County v. Luten Bridge - contractor obligated to cease building bridge when notified K will be breached
(506)

CA 4th 1929

Facts

- PL K to build bridge for Def
- Def instructed PL to cease construction (PL cost = \$1,900)
- PL continued construction per K
- PL sues for \$18,301 price under K

Trial Court - for PL

CA 4th -

- PL = duty to avoid increasing damages
- remedy =
 - treat K as broken when notified
 - sue for damages (cost to date + expected profit)
- after absolute repudiation - other party <> continue to perform/recover damages on full performance
- continued performance = damage on Def w/o benefit to PL
- PL = only interested in profit

Class

- case - easy b/c bridge to no where
- hypothetical - suppose county simply did not want - same decision (Def should stop)? Yes
- hypothetical - bridge will rust and fall into river → PL paints w/ rust proof paint? maybe PL should stop or maybe not
- UCC § 2-704(2) - seller completes project to minimize loss
 - goods more readily available for resale than non-goods (e.g., bridge)

Notes

- UCC 2-704(2) - mfr may continue mfring after breach in exercise of reasonable commercial judgement to avoid loss and allow effective realization

Howard v. Daly (508)

NY 1875

- rejects English rule of "constructive service"
- affirmative duty (American ideal) - would not want to compensate idle workers the same as those who put themselves to work
 - unemployed must seek out other employment
 - not obligated to find other work

Parker v. Twentieth Century Fox - loss mitigation of employment K - no obligation to accept different/inferior work(508)

Supreme Court CA 1970

Facts

- Def (studio) repudiated K w/ PL (actress)
- Def offered another K w/ different terms
- PL sues for
 - money due under K - expectation (\$750,000) of original K
 - damages from breach
- Def claims - PL failed to mitigate damages by accepting alt. employment offered by Def

Trial Court - granted summary judgement for PL

Supreme Court CA - affirms

- Def = burden of proving alt. employment = comparable/substantially similar
- Reserved issue - Def <> challenge reasonableness of PL efforts in finding alt. employment
- alt K =
 - different
 - type of employment (musical v. western)
 - location of employment
 - inferior
 - PL = reduced screenplay approval rights under alt. K

Dissent -

- alt. employment - must only be "substantially similar" - e.g., another acting role
- Majority rule - only replacement job would be offer of same job back

Class

- differences in employment alternatives
 - type of movie
 - location
 - actress's authority over production
- Bloomer Girl (original movie) = dealt with women's suffrage = particular interest to PL (due to activities for suffrage)
- not typical that substitute employment from same employer (suspicious - evidence of employer pressuring employee to take undesirable job rather than risk losing everything in litigation)

Notes

Vorhees v. Guyan (514)

W. VA 1994

- re-employment - may not be accepted (w/o injuring EE's possibility of recovery) where further association = offensive/degrading

Cover - Contracts for Sale of Goods (514)

- failing to cover - damage recoverability = contract price - market price of hypothetical substitute transaction (UCC 2-708/713)
 - provision inapplicable when cover made
- market price (UCC 2-723/4)

Notes

- Specific Relief
 - unique goods/other proper circumstances - UCC 2-716(1)
 - replevin - UCC 2-716(3)
 - action for price - UCC 2-709(1)(b) (??????)
- UCC provisions - compare buyer/seller

Issue	Buyer	Seller
	2-712	2-716 (?)
	2-713	2-708
	2-716	2-709

Tongish v. Thomas (516 - covered in class)
KA 1992

- follow UCC (2-700's) - projection of indirect consequences = unmanageable

Relative Cost to Remedy - Jacobs & Young (520)
CA NY 1921

Facts

- PL built Def house
- K required Reading pipe
- PL used other pipe
- Def asked for replacement of pipe (w/v/ required destruction of house)
- PL asked for payment then sued

Trial Court -

Court of Appeals -

- omission = neither fraudulent nor willful = oversight/inattention
- pipe used = same as Reading pipe
- defect = insignificant in relation to project
- **Rule - trivial/innocent omission → damages allowed (rather than complete forfeiture)**
- **Limitation - change not tolerated if so dominant/pervasive as to frustrate purpose of K**
- factors to be considered
 - purpose to be served
 - desire to be gratified
 - excuse for deviation
 - cruelty of enforced adherence
- parties may explicitly require (in K) strict compliance
 - law slow to impute such requirement where K silent and enforcement out of proportion to injury
- **measure of allowance** -
 - **cost of replacement - applies in most cases - great in current case**

- **difference in value - applies if cost of completion grossly/unfairly out of proportion to good to be obtained**
 - establishes lower limit for recovery

Class

- two issues
 - what constitutes substantial performance
 - where K substantially performed - can contractor still recover if performance <> complete/perfect
 - UCC 2-601 = perfect tender rule
 - remedies
 - damage - how do calc damages - in reality = nominal damages
 - specific performance - would require substantial damage
 - breach <> willful
- economic waste
 - what if pay damages and PL doesn't use to repair defect? (Rosenthal - not economic waste - maybe unfair)

Cost v. Value of K Performance - **Groves v. Wunder** (526)

Supreme Court MN 1939

Facts

- PL owned "trackage" land
- Def - nearby plant for screening gravel
- PL signed K w/ Def → Def leased PL land/agreed to remove sand/gravel from PL land and leave land at specified grade
- PL claims
 - Def removed only best gravel
 - Def failed to put ground at required grade
 - cost of completing performance = \$60,000
 - reasonable value of "graded" land w/h/b \$12,160

Trial Court - awarded PL difference in value of land

- denied PL claim for cost of completing performance

Supreme Court - reversed/remanded

- Def breach = willful → Trial court decision rewards bad faith
 - **proper rule = value of intended product of K = reasonable cost agreed performance**
- law aims to give disappointed promisee in damages ~ what was promised
- owner's right to improve property <> limited by small value
- loss from breach = promised/paid for alteration to land → damage = cost of performance
- if economic waste (= wrecking a physical structure completed/nearly complete) →
 - will limit recovery to difference in value rather than cost of replacement

Class

- arguments for PL
 - willfulness of Def
 - awarding smaller amount = windfall to Def (e.g., K price reflected work required under K)
 - owner entitled to own economic judgement (right to speculate) awarding smaller amount = restricting PL owner's ability to make profit on land
 - PL owner s/b allowed to treat land however want
 - land is unique - K involving use of land → protected slightly more than usual protection afforded to goods
- arguments for Def
 - economic waste
 - windfall for PL
 - economic breach - threat of high damages operates against Def economic breach

Peevyhouse v. Garland - remedial/restorative work = incidental to main K (532)

OK 1962

Facts

- PL leased farm to Def (coal mining operation)
- Def agreed to restore land at end of K
- Def failed to restore land
- PL claim
 - restorative work would cost \$29,000
 - value of farm w/h increased by \$300

Trial Court

- **Groves v. Wonder** - only case where cost of performance applied where cost of performance greatly exceeded diminution in value
- **remedial/restorative work = incidental to main K**
- Restatement § 346 - cost of performance applies unless = unreasonable economic waste
- **Ruling - damages ordinarily = cost of performance EXCEPT diminution in value applies:**
 - **where provision breached = incidental to main purpose of K AND**
 - **where economic benefit from performance = grossly disproportionate to cost of performance**

Class

- distinction b/w cases
 - willfulness
 - provision separately negotiated

Loss Limitation - Foreseeability (534)

Hadley v. Baxendale - carrier not liable for consequential damages from mill closure (534)

Eng 1854

Facts

- PL mill closed b/c shaft broke
- PL delivered shaft to Def (shipping company)
- Def promised to deliver expediently to shaft fixer; delayed shipment
- PL mill closed 5 days longer due to Def delay
- PL claimed 300 damages for wages/exp paid while waiting for shaft

Trial Court - jury awarded 25 damages

Alderson (Appeals Court) - new trial required

- **reasonable foreseeability of damage**
 - **damages from breach = fairly/reasonably arising naturally from breach OR as reasonably supposed in the contemplation of the parties at the time of K would be consequence of a breach**
 - **if special circumstances communicated → damages for breach would include special circumstances**
- PL <> communicate special circumstances → no damage for losses arising from mill closing

Class

- consequential damages allowed where known at time of K
 - fore knowledge - e.g., informed, communicated
 - foreseeable - reasonable to expect
- effect on area of permissible recovery - decrease in what damages permitted (subsequent commentary seems to point to this)
- common notion at time - protection of entrepreneurs

- balance between foreseeable damages against consideration weighs on type of damages (expectation/reliance) awarded
- UCC 2-715 - buyer's consequential damages
- foreseeable of incidental emotional damages - nature of K must be such that emotional damages naturally flow from breach

Loss Limitation - Certainty

Fera v. Village Plaza (547 - covered in class)

Supreme Ct. MI 1976

Class

- evidence of competing enterprises and subsequent years activities submitted
- court rejected for lack of certainty in determining damages
- subsequently such information allowed by courts

Liquidated Damages/Penalties (553)

- why courts refuse to enforce liquidated damages clause
 - against reasonable rules of contract (??)
 - substituting K for judgement of court (i.e., courts against parties infringing on role of court)
 - where liquidated damages = concealed specific performance
 - where liquidated damages <> honest/reasonableness attempt to preliminarily value breach
 - unreasonableness - Wasserman seems to support
- why courts uphold liquidated damage
 - eliminates uncertainty
 - reduce litigation
 - reduce costs of resolving disputes
- what if unreasonably low liquidated damage clause
 - **unreasonably low damage clauses respected more often than unreasonably high damage clauses**
 - consider who suing - insurance company (rather than mere consumer)
 - cases OK unless K = unconscionable (e.g., bargaining power of consumer vs. informed companies)
- arbitration clauses
 - damages may be enforced even if would not otherwise enforce if approved by court
- does liquidated damage bar specific performance - no - liquidated damages are not as good as actual performance
- "blunderbust" clause - covers any violation of K regardless of nature of K
 - irrational b/c <> differentiate b/w breaches which cause injury and harmless breaches
- what if no actual loss even though liquidated damage clause present?
 - UCC 2-715/Restatement - allowed if clause is reasonable either
 - at time of entering K OR
 - at time of breach

Wasserman v. Township of Middletown (554)

Supreme Ct. NJ 1994

Facts

- Def leased property to PL
- lease cancellation provision =
 - prorata re-imburement for improvements
 - percentage of average gross receipts for prior 3 years
- Def cancelled lease

- PL sues for damages under terms of lease
- Def seeks declaration of invalidity

Trial court - ruled for PL (recognizing both cancellation provision as valid)

Appeals Court - affirmed

Supreme Court - remanded to consider gross receipts damage clause

- issue - gross receipt damage clause =
 - **enforceable liquidated damages clause =**
 - **good faith effort to estimate in advance actual damages from later breach**
 - **reasonable forecast of just compensation**
 - **unenforceable penalty clause = fixed as punishment for later breach**
- factors for liquidated damages -
 - control parties exposure to risk
 - avoid uncertainty, delay, expense of judicial process
 - parties can correct perceived judicial short-falls
- factors against liquidated damages -
 - public law should define remedies
 - may be unfair/contravene public policy
- subjective intent = irrelevant as to whether clause = objectively reasonable
- **reasonableness = at time of -**
 - **K and**
 - **breach**
- UCC 2-718 - reasonableness in light of actual or anticipated harm (K and time of breach)
- Restatement § 356 - reasonable in light of actual/anticipated loss
- **liquidated damage clause - purpose =**
 - **not to compel promisor**
 - **compensate promisee for breach**
- factors to consider on remand
 - reasonableness of gross receipts
 - significance of 25%
 - reasoning of parties in agreeing to clause
 - lessee's duty to mitigate damages
 - fair market value/availability of rent space

Gustafson v. State (562)

SD 1968

Facts

- PL contractor finished road construction late
- Def w/h liquidated damages from PL per provision in K

Trial Court - for Def

Hanson (Appeals Court) -

- liquidated damage provision sustained if (at time of K) -
 - **incalculability** - actual damages difficult of estimation
 - **fairness** - reasonable effort to fix fair compensation
 - **reasonableness** - stipulated amount = reasonable to actual damages incurred
- **method of computing supports reasonableness**
 - **time** accounted for - breach per day amount
 - **damage variable** per size of K - larger K incur larger penalties

Class

Notes (563)

- high liquidated damages = contractor susceptible to wage pressures
- **Loopholes** -
 - reverse liquidated damage - provide incentive for completing project early
 - alternative performances - breaching party either performs OR pays

FINDING LAW OF K - INTERPRETING SUBJECT MATTER (565)

- parol evidence rule
 - not rule of evidence - i.e., where related facts may be proved otherwise
 - = rule of fact - precludes ultimate showing of fact itself
 - failure to object <> waive right of subsequent objection (unlike rule of evidence)
 - federal court - applies state parol evidence laws

Parol Evidence Rule

Gianni v. Russell (566)

Supreme Court PA

Facts

- PL rented room in building to sell various goods (including tobacco)
- Def re-negotiated lease to exclude sale of tobacco
- PL subsequently rented neighboring room to pharmacy
- pharmacy sold soda
- PL claims Def orally granted exclusive right to sell soda separate from written agreement
 - 2 days prior to signing written agreement
 - repeated orally at time of signing agreement
 - written agreement <> contain related provision
 - in consideration of paying higher rent/not selling tobacco

Appeals Court - judgement for PL

Supreme Court - reversed - for Def

- no fraud/duress/mistake claimed
- parol evidence excluded only where K = entire agreement
 - look at face of written K
 - question - would oral agreement naturally/normally included in written agreement if made
- PL COA relies on subject in written agreement → must assume that writing = entire agreement re: subject

Class

- subject matter so close to written K that s/h/b included in K
- K represents entire agreement b/c "appears to be complete"
- UCC § 2-202 - allows extrinsic evidence if not contradictory and addresses "consistent additional terms"

Masterson v. Sine - existence of written K <> preclude parol evidence from rebutting term which law would imply (570)

Supreme Court CA 1968

Facts

- PL1&2 conveyed ranch to family members w/ repurchase option
- PL 1 adjudged bankrupt
- PL2 and trustee seek to recover ranch thru option

Trial court - for PL on issue of assignability

- precluded extrinsic evidence that option = non-assignable

Supreme Court - reverses for Def on issue of assignability

- integration question - did parties intend that agreement = entire agreement
 - look at written agreement
 - always consider collateral agreements
 - circumstances at time of writing
- parol evidence policies
 - written evidence more accurate than human memory
 - uncredible evidence = fraud/unintentional invention → result in misleading trier of facts
- Restatement § 240 - parol evidence allowed if agreement such as might naturally be made as separate agreement
- UCC § 2-202 - if parol evidence terms certainly have been included in K (assuming have been agreed upon) → exclude from jury
- current case -
 - option clause <> explicitly integrated
 - difficult to alter formal structure of K to account for other provision (e.g., non-assignability)
 - inexperience of family in land transactions → not necessarily aware that K s/b integrated
 - T/F - collateral agreement might naturally be made as separate agreement
- existence of written agreement <> preclude parol evidence from rebutting term law would imply
 - **parol evidence trumps law gap filler?**

Dissent

- majority opinion
 - undermines long established parol evidence rule
 - weakens ability to rely on instruments affecting title to real estate
 - allows defrauding of creditors

Class

- issue = non-assignability
- if assignable could be recovered by trustee in bankruptcy
- statutory gap filler - if K silent as to assignability → assume K assignable
- Restatement § 214 - more liberal in allowing parol evidence
 - Rosenthal - court moving in this direction
- Parol Evidence - Dictum (573) - parol evidence may be allowed

Notes (576)

- Integrated agreement (Restatement § 209/215)
 - where explicitly stated to be final expression of one or more terms
 - evidence of prior agreements/negotiations = inadmissible
- completely integrated agreement - where explicitly stated to be complete and exclusive statement of all terms
- Test of complete integration
 - Williston (strict formulation) - look only to face of agreement
 - Corbin - writing cannot prove own completeness/accuracy
 - Restatement § 210 - writing cannot prove own completeness → look to parties' intent
- Merger clauses
 - consider unconscionability of merger clause

Class

- merger clauses -
 - vulnerable
 - not enforceable if obtained by fraud

Bollinger v. Central Pennsylvania RR - court may reform K for missing term where mistake = mutual (re: replacement of topsoil) (578)

Supreme Court of PA 1967

Facts

- PL = K w/ Def to deposit construction waste on PL property
- Def deposit waste and initially replaced topsoil - but then ceased replacing topsoil
- Def claims provision not in K
- PL sues to correct K for omission of requirement to replace topsoil

Trial Court - reformed K for missing term

Supreme Court -

- **may reform K where mistake = mutual**
- PL burden of proving mutual mistake = satisfied
 - Def at first replaced top soil
 - neighbor K = contained relevant provision

Class

- parol evidence allowed b/c mutual mistake -
- corroborating evidence supporting parol evidence -
 - prior actions on property in question
 - Def had acted consistent w/ PL claim on neighbors property

Notes (579)

- parol evidence rule <> bar extrinsic evidence to prove K = invalid

No Oral Modification Clauses (580)

- parol evidence = inapplicable (only applies to prior negotiations/not subsequent negotiations)
- **common law - parties could always subsequently modify prior agreement**
- **UCC 2-209 - subsequent modification limited - H/E can operate as a waiver**
 - estoppel - would bar rescinding waiver
 - e.g., similar to promissory estoppel
 - unilateral offer - Brooklyn bridge example
 - bilateral k - Drennan v. Star Paving
 - statute of frauds/past consideration (?)

Interpreting K Language (581)

- Difficulty in interpretations
 - ambiguity - multiple meanings of terms
 - vagueness - unclear how terms/provisions relate to each other

Frigalment Importing Co. v. BNS (585)

U.S. DC (SDNY) 1960

Facts

- PL (Swiss) - K to buy chicken from Def
- PL received stewing chicken - not young chicken for broiling/frying
- Def new to poultry trade

Trial Court - for Def

- PL claims - Def conversant in German → Def s/h known re: PL use of word "chicken" = fryers
- **trade usage** = clear that chicken = young fryer
 - H/E- Def = new to trade
 - **when one not member of trade - acceptance of trade standard → must be affirmative/explicit**
- **publication usage** - supports PL
- **Department of Agriculture** - regulations support Def (K made regs = dictionary)
- **Def necessary profit** - if PL position → Def = no profit = no economic sense = supports Def

Class

- types of evidence
 - two kinds of birds in K - reference weight indicated of other type of chicken as indicative of intent
 - English vs. German language
 - trade usage
 - Regulatory language
 - economics of K - price of types of chicken; seller not likely to agree to sell at a loss
 -
- PL did not sustain burden of proof
- UCC 2-607 - burden on buyer to establish breach with respect to any goods accepted

Objective v. Subjective Theory of Contract Formation (591)

Mutual Mistake - Raffles v. Wichelhaus - ship named Peerless (592)
Eng. 1864

Facts

- PL entered K w/ Def to sell cotton shipped from India on ship = Peerless
- Def delivered goods to PL
- PL refused to accept because wrong ship (even tho named peerless)

Milward - for Def

- immaterial which ship cotton sent on

Pollock - ??

- ship is relevant

Martin - ???

- K called for specific ship
- intention is of no avail unless stated at time of K (no parol evidence allowed)

Mellish -no K exists

- **parol evidence may be presented to show that PL/Def meant two different things by term in K**

Class

- if no mutual assent → no contract → PL loses b/c no basis for breach claim
- restitution = quasi K (??)
- reliance = (??)

Mutual Mistake - Oswald v. Allen - mistake re: coin collection (594)
2nd Cir. 1969

Facts

- PL examined two Def coin collections and made offer for both
- Def thought offer for one coin collection
- PL sues to enforce K for sale

Trial Court (Moore) - no K exists

- Restatement § 71(a)
- **where any term ambivalent AND parties understand differently → no K**

Class

Function of Judge and Jury (595)

- meaning of language = question of fact
- interpretation of written K = often w/h from jury on basis that is question of law

Pacific Gas v. GW Thomas Drayage & Rigging - test for admitting extrinsic evidence = is evidence relevant to proving a meaning to which K reasonably susceptible (597)

Supreme Court CA 1968

Facts

- PL K w/ Def to replace cover on steam turbine
- Def agreed
 - to perform work at own risk and indemnify PL for all damage in any way connected to K
 - obtain insurance against injury of property
- during work → cover fell/damaged motor
- Def claims that indemnity against damage only applies to third parties (not PL)

Trial Court - for PL - indemnity provision covers damage

- plain meaning of K controls (covers all damages → reimbursement of PL required)

Appeals Court - ??

Supreme Court -

- **test for admitting extrinsic evidence = is evidence relevant to proving a meaning to which K reasonably susceptible**
 - **plain meaning = irrelevant**
- exclusion of extrinsic evidence = only if feasible to determine meaning from K alone
- H/E words <> absolute/constant referants
- rational interpretation requires at least preliminary consideration of all credible evidence to prove parties intent
- **extrinsic evidence admissible if → K fairly susceptible to either of contended for interpretations**

Class

- issue = meaning of "indemnification"
- ?? resembles differences b/w Gianni and Masteson re: parol evidence
- (Rosenthal) - result way out of line b/w K amount, offers received, and appraised value

Notes

Delta Dynamics v. Arioto (600)

Cal 1968

Facts

- Delta entered into exclusive distributorship of trigger locks to Pixey for 5 yrs
- Pixey agreed to sell minimum of 50,000 trigger locks
- Pixey only sold 10,000 trigger locks

- Delta sues for breach
- Pixey contends that Delta exclusive remedy = K termination

Trial Court - for Delta

- excluded extrinsic evidence re: termination meaning

Supreme Court - Reversed

K language reasonably susceptible to Pixey's interpretation

Notes (601)

- **Trident Center v. Connecticut General Life Insurance Co.** 9th Cir. 1988 (602) - rejects idea that K can ever have plain meaning → must consider extrinsic evidence
 - K cannot be rendered impervious from attack by parol evidence
 - PL must have opportunity to present extrinsic evidence
- **Garden State Plaza Corp v. S S Kresge** NJ 1963 (602) - **clause limiting ability to use parol evidence in interpreting K = void as against public policy**
 - Rosenthal - unsure if ruling would be upheld

Steuart v. McChesney - K referencing outdated assessment value for option to purchase land (602)

PA 1982

Facts

- Steuart gave McChesney right of first refusal on farm (1968)
- option to purchase at market value according to assessment rolls (= \$7,820)
- Steuarts receive offers for farm = 30/35K (1977)
- McChesney sues for specific performance at assessed value

Court of Common Pleas - for Steuarts

Superior Court - reversed - for McChesney - plain language of K controls

Supreme Court - affirmed for McChesney

- must consider surrounding circumstances in order to interpret K
- parties = right to make own K - not role of court to re-write K/re construe contrary to words
- right of first refusal = express/clear
- **in looking for ambiguity in K → court <> rely on strained interpretation to establish ambiguity**

Dissent

- consider date of assessment

Class

- maybe Steuart c/h argued that intended value based on periodically re-assessed rolls
- assessed value - closer to true value on newer houses than older houses
 - generally below actual market value (owner's oppose increases)
 - Steuart's should have known better than to use assessed value
- Dissent - takes softer line - sounds more fair
- equitable fairness - wasn't strong enough to carry court
- **McKinnon** - seems similar

Rules in Aid of Interpretation (606)

- *Purpose* interpretation (as applied to K) -
 - examine law before enactment of statute
 - identify defect for which law does not provide
 - identify remedy provided by statute

- determine true reason of remedy
- apply statute to suppress defect/advance remedy
- *Recitals* (whereas) - three rules
 - if recitals = clear and operative part = ambiguous → recitals govern
 - if recitals = ambiguous and operative part = clear → operative part governs
 - if recitals = clear and operative part = clear (but both contradictory) → operative part governs
- *Maxims*
 - **against the author** (contra proferentem) - K interpreted against the author
- *Public policy* - provision restricting use of land = strictly construed

Notes (608)

Hurst v. WJ Lake - custom = round up to 50%(609)

OR 1932

Facts

- Hurst K to sell horsemeat scraps to WJL for price if >50% protein
- WJL paid less for tonnage >49.5% & <50% protein
- Hurst claims trade usage - round up 49.5% to 50%
- Hurst sues for damages

Trial Court - for WJL (judgement on pleadings)

Supreme Court - reversed

- evidence of custom = admissible to determine meaning of words even tho K = plain on face

Class

- UCC § 1-205 - express terms control course of dealings and usage of trade
 - if contradictory → express terms control
- Restatement § 203 - express terms > course of performance > course of dealing > usage of trade
- **Hurst** follows general trend of recent cases - doesn't sit so squarely with UCC/restatement
- general trend = against plain meaning
- UCC § 2-202 (parol evidence) -
 - prevents contradiction from usage of trade
 - allows explanation from usage of trade

Notes (610)

- Restatement § 203 -
 - course of performance - dealing in present K
- UCC 1-205
 - course of dealing = sequence of previous conduct b/w parties
 - usage of trade = practice or method of dealing having regularity of observance in place, vocation or trade justifying expectation as to use
 - **express terms control course of dealing/usage of trade**
 - **course of dealing controls usage of trade**
- **Williams v. Curtin** DC 1986 (610) - interstate custom v. local custom
 - Rosenthal - no rule as to which controls
- canceling K "w/o prejudice" - two possible meanings
 - claims for breach are forgiven
 - canceling any future obligations under K w/o impacting past obligations

Gap Filling (611)

Notes (612)

- promise implied in fact = found by interpreting promisor's words/conduct
- promise implied in law = legal duty created merely by party's assent (w/o promissory words/conduct)
- most implied terms - subject to agreement b/w parties

Good Faith Implied - Eastern Air Lines v. Gulf Oil - court implies good faith into K (613)

USDC (Southern District FL) 1975

Facts

- Parties K to buy/sell fuel
- Gulf accuses Eastern of fuel freighting b/w stops to control purchases in high price stations

Trial Court - for Eastern

- UCC 1-201(19) and 2-103(b)
- good faith = honesty in fact in conduct/transaction concerned
- good faith b/w merchants = observance of reasonable commercial standards of fair dealing in the trade
- fuel freighting
 - established industry practice/inherent in nature of business
 - largely beyond control of airline due to capacity, schedules, etc.
- Gulf accepted fuel freighting in past - UCCSS 2-208 allows to consider Gulf's prior acceptance

Class

- court assumes that good faith = implied
- Not accepted by court = argument against Eastern's good faith
 - peculiar situation w/ oil crisis
 - prior experience should not apply
 - Eastern's actions beyond reasonable
- course of dealing - can be used

Reasonable Efforts Implied - Wood v. Lucy Lady Duff-Gordon (616)

see text p. 133

Notes

Class November 7, 2000

Percentage Lease (617)

- Prins v. Van der Vlugt OR 1959 - where no minimum rent reserved - percentage lease construed as having implied covenant to continue business

Dickey v. Philadelphia Minit-Man - no implied obligation to continue washing cars where Def acted in good faith (618)

Supreme Court PA 1954

Facts

- 1947 - PL (Dickey) leased land to Def for washing/cleaning cars
- lease payment = 12.5% of gross receipts OR minimum \$1,800 per year
- Def erected buildings on land (buildings revert to PL lessor at time of lease expiration)
- 1952 - Def discontinued washing/cleaning cars
- PL sued to eject Def for breaching K by discontinuing business in lease

Issue - was there implied obligation on lessee to continue washing/cleaning cars if discontinuance reduced rental payment to PL?

Trial Court - dismissed action (for Def)

Supreme Court - affirmed (for Def)

- limitation on use of leased property <> require lessee to put property to such use (= covenant against non-complying use - <> covenant to use)
- **impossible to predict limits of implied obligation to continue use to avoid reduced lease payments**
- no proof that Def actions <> in good faith

Class

- to what extent is party obligated to maximize performance so as to benefit other K party
 - e.g., exclusive use of land = landlord gets no other possibility to generate income
- critical factor = minimum rental
- **implication of case - if no minimum rental → Def may be obliged to keep activity at higher level**
 - landlord not as dependent on gross sales b/c some minimum rent coming in
- **best efforts <> apply**
- **good faith applies**

Notes (619)

- substantial minimum rental - many courts consider when considering issue of implied obligation to continue use
- Empire Gas v. American Bakeries 7th Cir (620) - **reduction of requirements must not be motivated solely by reassessment of balance of advantages/disadvantages under K**

Market Street Associates v. Frey - sharp dealing = taking advantage of oversight of opposing party = breach of duty of good faith (621)

7th Cir. 1991

Facts

- JC Penney = sale/leaseback arrangement w/ Pension Trust
- Pension Trust agreed to give reasonable consideration of JCP requests for improvements
- Art. 34 lease K - allowed JCP to buy back property below FMV if breakdown in finance negotiations
- PL (Market Street) = successor to JCP interest in one store
- 20 years later - sought to buy back property to get financing elsewhere
- PL requested \$4 million financing (no mention of Art. 34)
- Def replied that no requests for < \$7 million considered
- PL notified Def that exercising Art. 34 right to repurchase
- Def refuses to sell
- PL sues for specific performance

Trial Court - summary judgement for Def

- PL suspected that Def = not aware of Art. 34 in corresponding w/ PL
- judge deemed that PL didn't really want financing → really wanted property at low price

Appeals Court - reversed and remanded for trial to determine what PL thought as to Def awareness of Art. 34

- **duty of honesty/good faith <> duty of candor**
- **sharp dealing = deliberate taking advantage of oversight by contract partner concerning their rights (rather than taking advantage of own superior knowledge)**

Class

- subjective good faith - did lessee know that lessor unaware of relevant clause?
- no basis for summary judgement b/c issue of lessee's state of mind

Bloor v. Falstaff (623) - covered in class

- express K provision to use best efforts (rather than implied)
- best efforts
 - does not require spending into bankruptcy
 - does prevent Def from focusing on maximized profits to detriment of reducing gross receipts (and benefit to K party)

Zilg v. Prentice Hall (630) - covered in class

Bak-a-Lum Corp v. Alcoa - every K = implied covenant of good faith; allowing K party to incur capital exp when knowing will terminate K ≠ good faith (638)

Supreme Court NJ 1976

Facts

- 1962/3 - PL signed K to be exclusive distributor of Def (Alcoa) product
- 1969 (Jan/Feb) - Def allegedly already decided to terminate exclusive distributorship
- 1969 (Spring) - PL expanded warehouse (on basis of Def encouragement)
- 1970 - Def terminated exclusive distributorship by appointing other distributors

Trial court - for PL (binding agreement terminable after reasonable notice of termination)

- reasonable notice of termination = time needed for PL to arrange replacement business = 7 months
- Def = ruthless in not notifying PL of planned termination
- Def <> notify PL to avoid risk of PL lower interest in selling Def products

Supreme Court - modified ruling for PL

- **every K = implied covenant of good faith/fair dealing**
- **implied covenant = that neither party shall injure right of other party to reap fruits of K**
- w/h intention of impair distributorship while knowing PL relying on distributorship in incurring capital expense = breach of implied covenant of good faith
- time needed for PL to arrange replacement business = 20 months

Class

- breach = from Def's inadequate notice
- indefinite relationship = terminable at will

Notes (641)

- **Massachusetts Gas v. VM Corp.** 1st Cir 1967 (641)- PL order in anticipation of K termination by Def (expressly allowed by K) = bad faith = not allowed

Lockewill Inc. V. U.S. Shoe - PL entitled to reasonable time to recoup costs under shoe franchise (but already had so no further recovery allowed (642)

8th Cir 1976

Facts

- 1965 - PL signed K to exclusively sell 3rd party shoes in St. Louis
- K = not written (w/ no mention of termination by parties)
- PL invested \$100,000
- Def bought out 3rd party
- 1973 - Def allows competitor to sell shoes in St. Louis
- PL sues for breach

Trial Court - for PL = \$150,000

Appeals Court - reversed (PL = received actual notice; adequate time to recoup expenditures)

- no termination provision = terminable at will
- H/E - where party incurred expense w/o time to recoup → principal must recompense on basis on quantum meruit
- PL = reasonable time to recoup expenditures
- PL <> suffer loss
- formal notice of termination not required where PL received actual notice

Class

- **PL entitled to reasonable time to recover costs**

Notes (643)

- Warner Lambert v. John Reynolds SDNY 1959 (643) - K for Listerine royalty payable to heirs/ assigns w/ no termination date payable as long as PL continue to sell product (even tho copied by other companies)
- Tanner v. Sparta Broadcasting 7th Cir 1983 (644) -
 - courts reluctant to enforce perpetual/unlimited K right w/o express wording clearly stating parties' intent
 - rather → K = incomplete as to duration → determine "reasonable time"
- Haines v. NY NY 1977 (644) -
 - 1924 - PL and city Ked for sewer treatment
 - city agreed to extend capacity as necessitated by future growth
 - ~1970 - sewage exceeded capacity of plant
 - city refuses to expand plant
 - Trial Court - for PL -
 - Def must make expenditures
 - while no provision for perpetual performance → city obligated until PL legally obligated to maintain sewage system
 - Appeals Court - order modified - Def obligated to maintain plant
 - parties intended city to support as long as needed/wanted pure water
 - parties <> foresee environmental control laws reducing city's need for plant
 - may not avoid obligation for reasons not contemplated by parties

Sheets v. Teddy's Frosted Foods - PL dismissed for blowing whistle (645)

Supreme Court CT 1980

Facts

- PL = quality control director for Def
- PL noted discrepancy from labeling requirements/reported to supervisors
- discrepancy = violation of CT law
- Def terminates PL for unsatisfactory performance
- PL sues -
 - violation of implied K of employment
 - violation of public policy (not for lack of "just cause" but where former employee proves for *demonstrably improper reason*)
 - malicious discharge (later dropped)

Trial Court - for Def (PL claim = legally insufficient)

Appeals Court - Reverse - (Trial court should not have struck PL claim for legal insufficiency)

- legitimate K rights may give rise to tort liability
- Def <> contest precedent that right to discharge EE ~ contract right
- common law - public policy imposes limit on unbridled right to terminate (even w/o statute)

- common law protects employees w/o bargaining power to negotiate definite duration employment K
- Factors
 - PL **position** = exposed to criminal prosecution for misbranding
 - PL = **expertise** relevant to claimed Def wrong (misbranding)
 - **state statute** = labeling laws

Dissent -

- retaliatory discharge does not directly contravene applicable state statute
- PL need not have jeopardized continued employment - could have sent anonymous note
- no evidence that PL informed authorities of misbranding
- majority decision - allows unrestricted use of allegation for almost any statutory/regulatory violation
- other jurisdictions → created COA with caution

Class

- courts - once good faith enters relationship → relationship no longer at will
- recovery - for tort

Notes (650)

Nanakuli Paving v. Shell Oil (651 - covered in class)
USCA 9th

Class

- language in K - referenced posted price
- protection of buyer
- UCC 1-205(4) - hierarchy of terms/usage
 - court → review together in instant case
- consider effect on **Hurst v. Lake** (49.5% trade usage)
 - construing term vs. adding term
 - Nanakuli adds term that buyer protected by bids already made (?)

Notes (659)

- **Fisher v. Congregation** - PA Super 1955 (660) -
 - PL (cantor) signed K for service w/ congregation
 - K silent as to orthodox nature of services
 - PL sues for breach when congregation changed from orthodox tradition
 - Trial Court - judgement for PL
 - Appeals Court - affirmed - Hebrew law ~ custom relevant to interpretation of K
- **Tucker v. 4525** - FL App. 1967 (660) -
 - PL (cantor) signed standard form K for service
 - K allowed for second service
 - PL expended resources for second service
 - Def notified during 1st service → w/b no second service
 - PL sues for breach
 - Trial Court - for PL
 - Appeals Court - affirmed
 - two forms of service = acceptable under Hebrew tradition (w/ 1 or 2 services)
 - tradition of Def = only one service

Trade Usage - **Columbia Nitrogen v. Royster** - trade usage admissible where consistent w/ express terms of K (661)
4th Cir. 1971

- 1966 - Royster K to sell minimum of 31,000 pounds chemical to Columbia for 3 years

- K contained merger clause
- price of chemical dropped → Columbia unable to resell chemical
- Royster sold unused chemical below K price and sued Columbia for difference
- Columbia - trade usage → express terms = mere projections/not binding; substantial precedential price changes

Trial Court -

- excluded evidence of trade usage
- trade usage not admissible to contradict express unambiguous language of written K

Appeals Court (Butzner)-

- UCC - requires excluding trade usage when inconsistent with express language
- H/E - trade usage should not be excluded merely b/c K appears complete on its face
- UCC 2-202 - allows trade usage to explain terms in written K
- **Test of Admissibility (of trade usage) = whether trade usage reasonably consistent w/ express terms of agreement**
 - *Debolt- doesn't this imply have an understanding of express terms*
- K <> expressly state that trade usage evidence cannot be used
- K silent as to adjusting prices in declining market
 - neither permits/prohibits adjustment = appropriate to allow trade usage to interpret
 - *Debolt- does any K? - seems like very narrow interpretation - would court have allowed contra (i.e., rising prices?)*
- default clause only addresses Columbia's failure to pay for delivered chemical (does not address consequences of Columbia's rejection of delivery)
 - *Debolt- but Columbia could always reject delivery - so provision re: delivery has no effect*

Class

- Rosenthal -
 - not clear answers to all issues associated w/ case
 - seems clear that parties intended that default clause would be broader than court construed

PERFORMANCE AND BREACH (665)

Effects of Conditions

Luttinger v. Rosen (665)

Supreme Court 1972

Facts

FACTS: Rosens (P) agreed to purchase the Luttings' (D) premises for \$85,000. This was subject to the condition of P obtaining a first mortgage from a bank or lending institution in the amount of \$45,000 for a term of no less than 20 years at an interest rate not exceeding 8.5% per annum. P agreed to use due diligence in seeking the financing but applied to only one bank because that was the only one lending as much as \$45,000 on single-family dwellings. The bank would not commit to an interest rate lower than 8.75%. D's attorney offered to make up the difference between the rate offered by the bank and the 8.5% rate provided for in the contract by lowering the purchase price. P refused and sued for a refund of their deposit. The trial court rendered judgment in their favor, and D appealed.

ISSUE: Is a contract enforceable before all conditions precedent are satisfied?

RULE OF LAW: A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance, and a contract is not enforceable before all conditions precedent are satisfied.

HOLDING AND DECISION: (Loiselle, J.) Is a contract enforceable before all conditions precedent are satisfied? No. A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance, and a contract is not enforceable before all conditions precedent are satisfied. It is clear that the

parties conditioned the purchase by P on their obtaining a mortgage as specified. This condition precedent was not fulfilled. The subsequent offer by D is not relevant. The contract is unenforceable. Affirmed.

LEGAL ANALYSIS: A plaintiff bears the burden of proof of all conditions precedent. The defendant bears the burden of proof of all conditions subsequent.

This ruling is rather harsh. The offer by D to make up the difference should allow the agreement to be enforced.

Class

- easy case
- no dispute as to existence of condition (required financing at 8.5%)
- only dispute = whether condition could be met by 3rd party making up difference between mortgage available and mortgage required
- hypothetical - if buyer <> used due diligence → possible sue for breach OR lose deposit
- seller's obligation to refund conditioned on two things
 - condition = ability to procure mortgage in accordance w/ specifications
 - condition = buyer uses due diligence to obtain required financing
- condition NOT substantially met -
- literal language of K
 - buyer gets measure of reasonable deal
 - unclear if seller be able to continue subsidy for 25 years
- hypothetical - what if purchase money mortgage (seller finances) - only question = is it critical that banking institution be the lender

Internatio - Rotterdam v. River Brand (668)

USCA 2nd Cir. 1958

Facts

FACTS: River Brand (D) contracted with Internatio-Rotterdam (P) for the sale of 95,600 pockets of rice in July 1952 to be delivered alongside ship at Lake Charles or Houston, Texas. at \$8.25 per pocket. P, which had already committed itself to supplying rice to a Japanese buyer, was unexpectedly confronted with U.S. export restrictions upon its December shipments. December is a peak month in the rice and cotton seasons in Louisiana and Texas and D became concerned about shipping instructions under the contract because congested conditions prevailed at both the mills and the docks. P elected to deliver 50,000 pockets at Lake Charles and notified D. December 17 was the last date in December which would allow D the two week period provided in the contract for delivery of the rice to the ports and ships designated. On December 17, D had still received no shipping instructions for the 45,600 pockets destined for Houston. On the morning of the 18th, D rescinded the contract for the Houston shipments but still made the Lake Charles deliveries. One of the reasons for the prompt cancellation was a rise in the market price of rice. P sued for refusal to deliver the Houston quota. The trial court dismissed the complaint.

ISSUE: Does a condition require literal compliance to be enforced?

RULE OF LAW: A condition, which is an act or event other than a lapse of time, must be complied with literally.

HOLDING AND DECISION: (Hincks, J.) Does a condition require literal compliance to be enforced? Yes. A condition, which is an act or event other than a lapse of time, must be complied with literally. Shipment was impossible until the ship and location were delivered to D. The failure to notify by December 17 was a breach because that was the last day that notice could be given in order to allow D to meet the December 31st deadline. A postponement would damage D in light of the fluctuating prices and the letter of credit guaranteed payment only for December. The establishment of the letter of credit was mere preparation for performance and was of no benefit to D. Because there was an option for delivery sites, the contract was divisible. D did not waive its rights to cancel the Houston deliveries by continuing delivery to Lake Charles. Affirmed.

LEGAL ANALYSIS: A condition is an act or event, other than the lapse of time, that must occur before a duty arises. The promise to sell was conditioned upon timely notice by December 17.

Class

- breach = failure to provide instructions
- did instructions =
 - condition - Yes
 - duty - Yes - parties agreed in several months in advance to limit price risk
- time of essence
- no cause of action for buyer's breach b/c prices rising → so damages = zero
- condition <> duty
- imposing duty can be less harsh than imposing condition (imposing condition may deprive one party of performance)
- divisibility
 - does acceptance of one part of K = acceptance of total K (i.e., all or nothing)
 - court said no b/c against seller's interest to fulfill any part of K due to rising prices
 - divisibility not allowed where breach makes whole K worthless
- failure to specify time - ??? buyer may ???

Notes

- **Constable v. Cloberie** Kings Bench 1626 (673) - only duty to sail w/ next wind → not condition
 - duty only = ship owner promises w/ next wind
 - condition only = freight payable only if ship owner sails with next wind
 - duty + condition = ship owner promises . . . with freight payable only if . . .
- constructive condition of exchange - court can read into K

Interpreting Conditions - Condition, Duty, or Both

Peacock Construction v. Modern A/C (674)

Supreme Ct FL 1977

Facts

FACTS: Modern Air Conditioning (P) and Overly Manufacturing (P1) subcontracted with Peacock (D), to do the heating/air conditioning and swimming pool work for a condominium project. The written subcontracts provided that D would make final payment to the subcontractors within 30 days of completion, and would obtain written acceptance by the architect and full payment by the owner. When the subcontractors completed the work, D did not pay them because the owner had not paid in full. P and P1 sued for payment. D claimed that payment by the owner was a condition precedent to payment to the subcontractors. The trial judges disagreed and granted summary judgment for P, and the court of appeals affirmed. The state supreme court granted certiorari.

ISSUE: Is a subcontractor's payment conditioned on payment to the contractor by the owner?

RULE OF LAW: Unless expressly agreed, a subcontractor's payment is not conditioned upon payment to the contractor by the owner.

HOLDING AND DECISION: (Boyd, Acting C.J.) Is a subcontractor's payment conditioned on payment to the contractor by the owner? No. Unless expressly agreed, a subcontractor's payment is not conditioned upon payment to the contractor by the owner. In a normal subcontracting relationship it is not intended for the subcontractor to bear the risk of nonpayment by the owner. The parties may expressly shift that burden but there was no such express agreement here. Affirmed.

LEGAL ANALYSIS: A condition may be express, implied in fact, or constructive.

Class

- interpretation allowed b/c provision = ambiguous
- intent of parties = determinative
 - small sub-K unable to operate w/o payment

Mattei v. Hopper (see above)

Gibson v. Cranage (679)

Supreme Court MI 1878

Facts

FACTS: Gibson (P) contracted to make a portrait of Cranage's (D) deceased daughter. The parties agreed that if the portrait was unsatisfactory to D, he would not have to pay for it. D was dissatisfied and refused to pay. P sued for the contract price. Judgment was given to D. P appealed.

ISSUE: Is a contract conditioned on personal satisfaction valid?

RULE OF LAW: A contract conditioned on personal satisfaction is valid.

HOLDING AND DECISION: (Marston, J.) Is a contract conditioned on personal satisfaction valid? Yes. A contract conditioned on personal satisfaction is valid. Where the parties deliberately enter into an agreement which violates no rule of public policy, and which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it. An excellent portrait in the eyes of one party may prove unsatisfactory to another. Affirmed.

LEGAL ANALYSIS: This condition precedent is purely subjective. There is a problem because the contract could have been considered to be purely illusory. However, if the personal satisfaction is rendered in good faith, most courts will affirm such a contract.

Note: If the matter pertained to something that could be judged objectively, personal satisfaction would be judged from an objective perspective.

Class

- not illusory (I'll take it if I want it) b/c buyer obligated to make decision in good faith

Doubleday v. Curtis (681 in class)

U.S. 1985

3rd Party Certification - Laurel Race v. Regal Construction - involving engineer certification (685)

CA MD 1975

Facts

FACTS: Laurel Race Course, Inc. (D) contracted with Regal Construction Co. (P) to reconstruct its horse racing facilities. Engineer Watkins was to have approval authority over the quality of work performed. Payment to P was expressly conditional on the issuance of Watkins' final certificate. Watkins refused to sign off on P's work or issue a final certificate because the quality of the track did not conform to the contract's specifications. D refused to make the final payment, and P sued. The trial court ruled that P had substantially performed, and awarded P \$49,648 for the final payment and interest. D appealed.

ISSUE: If payment is conditioned on the satisfaction of a third party, does that satisfaction become a condition precedent to the duty to pay?

RULE OF LAW: If payment is conditioned on the satisfaction of a third party, that satisfaction becomes a condition precedent to the duty to pay.

HOLDING AND DECISION: (Levine, J.) If payment is conditioned on the satisfaction of a third party, does that satisfaction become a condition precedent to the duty to pay? Yes. If payment is conditioned on the satisfaction of a third party, that satisfaction becomes a condition precedent to the duty to pay. If a contractual duty is subject to a condition precedent there can be no breach by nonperformance until the condition precedent is either performed or

excused. The only exceptions to this rule are fraud, bad faith, waiver, or estoppel. It is not sufficient for P to argue that the engineer was incorrect in his analysis or even that his failure to approve was arbitrary. The contractor must show that the failure to approve was tainted by fraud or bad faith. P's contention was that under a subsection of the contract, the condition precedent is dispensed with once "either party resorts to legal action." This only applies when there is a conflict over an interpretation of the meaning of the specifications. This dispute relates to nonconforming work and so this exception does not apply. P has not shown fraud, bad faith, waiver, or estoppel. The condition precedent was neither performed nor excused, and therefore no duty to pay arose. Reversed.

LEGAL ANALYSIS: D should have sued under quasi-contract rather than under the contract itself.

Class

- Majority rule - honest decision of 3rd party rules unless bad faith
- **NY** - <> **follow majority rule** → **applies objective standard** (i.e., why Jacobs & Young v. Kent arose)
 - parties can bring 3rd parties as expert witnesses

Doctrines Mitigating Conditions

Prevention (693)

- **Shear v. NRA** (693) - prevention of performance of condition (breach by client of broker (= seller's breach)) → liability to seller (?)

Waiver, Estoppel, Election (694)

Class November 9, 2000

- **waiver** - excuse of condition/duty by party; (when retracted - look to estoppel)
- **estoppel** - more clearly defined - conduct/manifestation by one party followed by change in position in reliance on conduct/manifestation
- **election** - choose 1 of 2 courses of conduct - usually means such term = irrevocable
- questions to ask
 - when revocable (when can be revoked)
 - what if reliance (does estoppel apply)

Waiver - **McKenna v. Vernon** - continually waiving condition (re: approval of construction changes) does not allow one party to later invoke condition to excuse non-performance (696)

PA 1917

Facts

- PL built theatre under K required 7 installment payments after certification
- Def paid first 6 w/o certification
- PL sued for final payment - despite lack of certification
- architect testimony = no unauthorized departures from specs

Stewart - for PL (contractor)

- if Def waives condition repeatedly → Def cannot attempt to apply condition on final payment

Class

- case rests on waiver or estoppel? arguable that PL relied on Def waiver of certificate requirement
- estoppel - often invoked to prevent revocation of waiver/election
- **hypothetical** - K <> requires certificate - Def demands for 3rd installment but does not receive; what happens w/ 4th installment?
- election -
- architect testified that work = OK

- condition (requirement for certificate) - is conclusive on both parties?
- **hypothetical** - insurance K requires notification w/i 10 days; insurer indicates that insured may wait; insured waits 15 days → case of estoppel
- what is being waived in McKenna? - condition
- waiver's affect on dependency of promises - waiver makes promises independent

Interpretation and Forfeiture (697)

- Restatement § 229 - condition may be excused to avoid disproportionate forfeiture
- **Ferguson v. Phoenix Assur.** (698) - insurance K required visible marks on safe before would pay
 - court - look to reason for condition and do not apply beyond need to achieve such reason
 - K against public policy - if insurance condition applied beyond reasonable requirements to prevent fraudulent claims

Constructive Conditions of Exchange (699)

Kingston v. Preston - PL giving security = condition precedent for transfer of silk business (700)

King's Bench 1773

Facts

- Def owned silk business
- PL became apprentice to Def w/ understanding would take over business upon providing sufficient secured consideration
- Def refuses to transfer business at appointed ate
- PL claims capable/ready to transfer consideration
- Def claims insufficient security for consideration

Trial Court - for Def

- three types of covenants
 - **mutual and independent** - breach of either party <> excuse non-performance by other party
 - **dependant conditions** - one performance depends on prior other performance (and no liability until other performance occurs)
 - **mutual conditions** - performance to occur at same time - breach occurs where one party tenders performance and other party <> reciprocates
- PL giving security = condition precedent

Class

- purpose of condition precedent = secure expectations of performance

Notes

- independent covenant - being replaced by distinction b/w material/immaterial breach
- opportunism = self interested conduct
- constructive conditions - limits opportunism (~party obtains performance even tho breached)

Stewart v. Newbury - where no agreement as to payment → substantially performance required before payment (702)

CA NY 1917

Facts

- PL contracted to do excavation work for Def
- PL called Def and indicated expected payments in "usual way" (not in K) = partial payment during project
- Def refused to pay first bill

- PL stopped working (claims Def prevented from working)
- Def claims PL abandoned work

Trial Court - verdict for PL for amount of unpaid bill (but not other damages)

- PL entitled to part payment at reasonable times

Appellate Division - affirmed

Court of Appeals - reversed/remanded

- agreement = entire K
- **Rule = where no agreement as to payment → work must be substantially performed before payment required**

Class

- court refused to fill gap - no single custom for making progress payments

Concurrent Conditions and Tender (705)

- sales of goods
 - tender of goods (seller) and tender of price (buyer) = concurrent
 - tender of delivery (seller) = condition to buyer's duty to accept/pay
- formal tender seldom made

Notes

- **Lawrence v. Miller** NY 1881 (706) - court said physical tender not required b/c seller had been prepared to tender but buyer had asked for more time on multiple occasions - read either →
 - seller's conduct = sufficient tender
 - perfect tender excused by buyer's conduct
- **McMillan v. Smith** Tex. 1962 (707) -
 - action at law - requires tender as condition precedent before breach occurs
 - b/c at law involves only money damages
 - action at equity - tender not required in order to bring action for breach
 - court mechanism can secure party's interest by holding deed, title, etc.
- if no material breach (then substantial performance occurs) → perfect performance not a condition of the owner to pay
- if material breach (then no substantial performance) → condition still in effect

Perfect Tender Rule -

- not generally required for goods b/c mfr can likely re-sell to other parties

Damage Limitations - Substantial Performance (707)

- often applied to construction K - b/c neither party has access to specific performance as remedy
- **applies only to constructive conditions (not express conditions)**
- "willful" deviation precludes substantial performance

Plante v. Jacobs - diminished value rule applies to misplaced wall; cost of replacement applies for other items (710)
WI 1960

Facts

- PL K to renovate Def house for ~\$26,000
- Def paid \$20,000

- Def refused to continue payments b/c disputes
- PL refused to complete renovations
- PL sues
- Def argues no damages b/c PL <> substantially perform

Trial Court - for PL

- applied cost of repair/replacement rule to some items

Supreme Court -

- Question 1 - did PL substantially perform
 - common law precedent = no recovery w/o substantial performance (as distinguished from quantum meruit)
 - substantial performance test = whether performance meets essential purpose of K
 - less than perfection allowed unless all details = essence of K
 - **ruling** - Def dissatisfied w/ house but PL substantially performed
- Question 2 - what damages for substantial but incomplete performance
 - **diminished value rule** - generally difference b/w value of house w/ faulty construction vs. value of house had been properly constructed
 - **cost of replacement rule** - cost of rectifying improper/incomplete performance
 - not allowed where results in unreasonable/unjustified waste economic waste
 - determining which rule depends on nature/magnitude of defect
 - **ruling** - diminished value appropriate for wall; cost of replacement appropriate for other items

Class

- willfulness - court doesn't seem to find as destroying substantial performance
- divisibility - doctrine which mitigates applicability of/failure to meet substantial performance

Class November 15, 2000

- material breach - breaching party can sue for
- restitution (quasi K) - unjust enrichment?
- substantial performance

Mitigating Doctrines (714-731 skipped - covered briefly in class)

- substantial performance
- divisibility - breach part of K but respect remainder of K
- restitution -
 - injured party - may sue
 - breaching party - historically may not sue (equity actions required PL to come in w/ clean hands); more currently action allowed to extent that reduce by harm to injured party
 - **Britton v. Turner** - farm hand hired to work whole year w/ payment at end; quit after 9 months
 - ⊂ court - no showing of harm to farmer; apportioned fee over period worked
 - what if benefit conferred > than K - court = for breaching party → can never be more than K price

Damage Limitations - Divisibility

Damage Limitations - Restitution

Kirkland v. Archibold - breaching PL recovers for benefit conferred less damage cause by breach (732)
CA OH 1953

Facts

- PL K to dry wall Def house
- K allowed for periodic payments
- Def prevented PL from working b/c PL not using rock wool lathes

- PL made part of first payment and then stopped (\$800)
- PL sues for amount expended (~\$2,900)

Trial Court -

- PL = in default
- Def part payment = admission that first installment = earned

Court of Appeals - reversed

- Issue - can breaching PL maintain COA for part performance
- precedent = no recovery for breaching party
 - penalizes defaulting party to extent of value conferred
- more recently - allow recovery to avoid unjust enrichment
 - **allow recovery on quantum meruit basis reduced by damage from PL breach**
 - no recovery allowed where willful breach

Class

- being free from breach <> necessarily required to recover in restitution

Notes (734)

- down payment - seller allowed to retain where effectively = liquidated damage due to either i) usage of trade (NY land) or ii) explicit terms of K (OH)
- Restatement
- Statute of Frauds - one party may be bound and other party not so bound
 - e.g., land sale where one party signs K but other does not

Walker v. Harrison - immaterial breach of condition precedent does not excuse non-breaching party's duty (735)
Supreme Court MI 1957

Facts

FACTS: Walker (P) rented a neon sign to Harrison (D). At the end of the rental contract, D would own the sign. The rental agreement included a repair service clause which stated that repairs would be performed "as deemed necessary by P to keep sign in first class advertising condition." After the sign was installed, it was hit with a tomato. Rust was visible on the chrome and cobwebs had collected in the corners. D made numerous calls to P to procure service. P did not respond. D repudiated the contract and P sued for the rent due. P won the verdict. D appealed.

ISSUE: May a party repudiate a contract for a minor breach?

RULE OF LAW: A party may repudiate a contract only for a material breach.

HOLDING AND DECISION: (Smith, J.) May a party repudiate a contract for a minor breach? No. A material breach is necessary before a party may repudiate a contract. P's delay in rendering service was not a material breach. There are no hard and fast touchstone rules to determine if a breach is minor or material. If a party is incorrect in his assumptions about the nature of a breach, he will become guilty of a material breach if he does not render service. The trial court found that the breach was not material based on the facts. Judgment affirmed.

LEGAL ANALYSIS: There is no simple test for materiality. Factors that influence the decision is material include whether the breach was willful, the extent of contract performance, and the hardship that could result to the parties. Once again, the courts have determined that if the minimum is not good enough, it would not be the minimum.

Note: On page 738 of the casebook there is a list of the items that determine materiality.

Class

- immaterial breach of duty (forming condition for subsequent payment) does not excuse Lessee's duty to pay

Class November 16, 2000

- Material breach - sufficiency to warrant breach
 - consider Restatement

Notes (744)

- where progress payments called for → lack of payments =
 - material breach AND
 - justifies other party in suspending performance

Hindrance and Prevention (745)

- hindrance preventing by one party preventing performance of other party = excuse for non-performance
- duty to cooperate (doing whatever necessary to enable other party to perform) - generally an implied complimentary obligation (**Kehm v. U.S.** (746))
- consider if lack of cooperation = breach of condition
- sales of goods - Article 2 Gap fillers often fill in

Iron Trade Products v. Wilkoff - no duty upon Def to assist PL in performing (747)

Supreme Court PA 1922

Facts

- PL signed K to buy rails from Def
- PL buying all rails possible
- PL bought out Def's source
- Def failed to deliver any rails → claims PL hindered performance
- PL bought rails elsewhere at higher price and sues for price difference

Trial Court - judgement for PL

Appeals Court - affirmed

- difficulty of performance will not excuse a breach of K
- no express requirement that PL (buyer) cooperate w/ Def (seller)
- conduct of party which prevents performance excuses performance
- Present case - PL conduct <> prevent Def performance
 - no claim that supply of rails exhausted by PL purchases
 - increase in price = no excuse

Class

- K <> explicitly require cooperation
- Rosenthal = really close case

Anticipatory Repudiation (755)

- Restatement Second - breach by anticipatory repudiation
- technically no breach when repudiate prior to time of performance

Class

- does prospective repudiation
 - suspend other parties duty to perform OR
 - create cause of action for breach immediately OR
 - both

Hochster v. De La Tour - party may bring immediate action for anticipatory repudiation (756)
Queens Bench 1853

Facts

- PL K'ed to act as courier for Def (June 1 to Sept. 1)
- Def repudiated in May
- PL brought suit in May
- PL accepted other job in July

Appeals Court -

FACTS: Hochster (P) contracted to serve as De La Tour's (D) employee beginning on June 1. On May 11, D wrote to P and repudiated the agreement. P sued for breach. P was hired for another job between May 22 and June 1. Judgment was given to P. D appealed.

ISSUE: If a promisor repudiates a contract before performance is due, may the promisee bring an immediate action for damages?

RULE OF LAW: If a promisor repudiates a contract before performance is due, the promisee may bring an immediate action for damages.

HOLDING AND DECISION: (Lord Campbell, C.J.) If a promisor repudiates a contract before performance is due, may the promisee bring an immediate action for damages? Yes. If a promisor repudiates a contract before performance is due, the promisee may bring an immediate action for damages. P may either wait until the date set for contract performance, or may sue immediately. After the repudiation by D, P should be at liberty to consider himself absolved of any obligation to D for future performance. Judgment affirmed for P.

LEGAL ANALYSIS: This is the doctrine of anticipatory repudiation.

Note: Even when the promisor has repudiated his contract, the promisee must mitigate his damages.

Class

- PL arguments
 - idleness <> encouraged (against public policy)
 - PL needn't keep ready to perform
 - Def has implied duty to not repudiate
 - whatever dispenses w/ condition = breach (Rosenthal - not sound; not necessarily follows)
- Rosenthal - peculiar logic tho not questioning logic of case
- date of repudiation = essentially irrelevant

Phelps v. Herro (761)

MD 1957

Facts

Appeals Court - doctrine of anticipatory repudiation = no application to money contracts where one party has performed and the other party merely has to pay money

Class

- doctrine of anticipatory breach <> apply in money K when performance has already occurred and only duty left is payment of money
- installment payments
- exception created by Phelps not in UCC - not adopted for sales of goods

Class November 20, 2000 - ROSENTHAL SAYS COVERING IMPORTANT STUFF TODAY

- Exception (from Phelps v. Herro) - does apply to sales of goods?

- No - UCC 2-610 - allows recovery for future payments after anticipatory breach
- UCC Article 2A (leases) - Rosenthal guess = has equivalent of 2-610

NY Life Insurance v. Viglas (763) U.S. 1936

Facts

Class

- hears case to consider amount in controversy requirement as basis for jurisdiction
- unclear how long PL will live → unclear how much in controversy if consider whole K
- issue = PL obligation to continue paying premiums
- two issues
 - should Def (insurance co.) continue disability payments
 - should PL (insured) continue premium payments
- distinguished from Phelps & Herro - PL still has to perform (either pay premiums or get certified as disabled again)
- possible alternative solutions
 - structured judgement (at law) - require specific amount for remainder of life
 - UCC - 2-609/251
 - specific performance
 - NOT restitution - b/c past premiums very small in comparison to payout
-

Anticipatory Repudiation - Criticisms

- makes Def perform before K called for (type of performance may be relevant - e.g., money)
- uncertainty as to the amount of damages
- repudiation = less unequivocal (little fuzzier) than pure breach

McCloskey v. Minweld - extreme example of (implied) K duty to cooperate (769)

U.S. CA 3rd 1955

Facts

FACTS: McCloskey (P) made three contracts with Minweld (D) for D to furnish and erect the steel for two hospital buildings. The contract called for P to set up schedules for the delivery and erection of the steel. If D failed or refused to supply sufficient materials of proper quality, P would have the right to terminate on two days' notice. P sent specifications and plans to D and requested a delivery estimate. D's schedule was not sufficient. P requested assurance that the work would be completed in 30 days. D had difficulty procuring the steel due to the outbreak of the Korean war. D requested help from P or the state to find steel. P treated this reply as a breach. P terminated the contract and hired another contractor who had no problem procuring steel. P sued D for anticipatory breach. D moved for dismissal after P's case was completed. D's motion was granted. P appealed.

ISSUE: Was D's request for help to find steel an express, absolute, and unequivocal refusal to perform?

RULE OF LAW: The doctrine of anticipatory repudiation requires that there must be an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so.

HOLDING AND DECISION: (McLaughlin, J.) Was D's request for help to find steel an express, absolute, and unequivocal refusal to perform? No. The doctrine of anticipatory repudiation requires that there must be an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so. The last letter on July 24 conveyed no idea of contract repudiation. The doctrine of anticipatory repudiation requires that there must be an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so. D did not absolutely or unequivocally refuse to perform and only sought assistance in obtaining the required materials. The failure to make timely preparations before the time when any performance is promised is not an anticipatory breach. P must wait until the time for performance to determine if D is in breach. Judgment affirmed.

LEGAL ANALYSIS: There must be an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so under the doctrine of anticipatory repudiation.

Appeals Court -

- repudiation - requires
 - absolute/unequivocal refusal to perform OR
 - distinct positive statement of inability to do so
- K <> allow demand for assurances

Class

- court implies that McCloskey obligated to do what could to assist Minfeld in completing K
- timeliness -
 - beginning of Korean war
 - steel incredibly important
 - White House was collapsing b/c of wood construction - McCloskey did refurbishment
- UCC 2-609 - not around at time
 - what if 2-609 applied - (Rosenthal) McCloskey demand for assurance might have been viewed as unreasonable
- (Rosenthal) extreme example of duty to cooperate

Class November 21, 2000

- courts not always eager to allow repudiation

Bills Coal v. Board of Public Utilities (774)

10th Cir. 1982

Facts

Class

Cosden Oil (775 in class)

- Seller anticipatorily repudiates - what date do look to to determine market price
- UCC 2-713 - market price at time buyer learned of "breach"
- but repudiation <> necessarily/immediately a breach → issue wide open per Rosenthal
- possibilities
 - when buyer learns of repudiation
 - when buyer learned and had reasonable time to react to repudiation
 - when contract calls for performance
- court - looked to time buyer learned and had reasonable time to react b/c -
 - UCC 2-610(a) - buyer has options - including
 - late performance
 - remedy for breach
 - suspend own performance
 - UCC 2-611 - retraction of repudiation
- (Debolt) - general rule → injured party's damages limited to extent did not minimize - (Rosenthal) not applicable b/c price might always fluctuate to minimize losses even further (???)

Retracting a Repudiation - U.S. v. Seacoast - retraction allowed so long as other party has not acted on retraction (783)

U.S. CA 5th 1953

Facts

FACTS: Seacoast (D) contracted with the United States (P) to supply gas to a federal housing project. Seacoast then anticipatorily breached the contract by writing P that, because of P's breach, D intended to cancel the contract. P notified D that unless it retracted its repudiation within three days of the letter date, P would accept another bid for the job. When D did not respond, P accepted another company's bid. D claimed that P had altered its position before D retracted its repudiation and therefore suffered no damages. The trial court gave the judgment to D. P appealed.

ISSUE: May a repudiation be retracted up until the time the other party changes position or has commenced an action upon the repudiation?

RULE OF LAW: A repudiation may be retracted up until the time the other party changes position or has commenced an action upon the repudiation.

HOLDING AND DECISION: (Hutcheson, C.J.) May a repudiation be retracted up until the time the other party changes position or has commenced an action upon the repudiation? Yes. A repudiation may be retracted up until the time the other party changes position or has commenced an action upon the repudiation. Even though the contract with Trion was signed on the 17th and D's retraction was received before that date on the 10th, it was still made after P had accepted Trion's bid. D had reasserted its position on the 13th that no retraction would be made. P notified D that it had three days to retract. The only reason that the Trion contract was not signed earlier was that Trion had not yet supplied a bond. Mr. Zell was president of both D and Trion, D's grounds are not very firm. Reversed.

LEGAL ANALYSIS: A party may retract a repudiation up to the time another party has materially changed its position or otherwise considers the repudiation to be final.

Class

- Def claims retracted before agreement made
- potential determining factors as to finality of repudiation
 - judge made law (in case) -
 - change in reliance effectuated by intent to K w/ other sub-contractor
 - change in position has to be material change
 - statute applicable to sales of goods (UCC - 2-611) - material change (??)
 - general theory (Restatement § 256) - when injured party indicates considers repudiation to be final
- UCC would apply but U.S. = party to action (→ Erie doctrine does not apply) and UCC adopted after 1953
 - UCC never adopted by Congress to apply to federal questions
 - courts use UCC as a guideline
- Rosenthal - Zell likely trying to do something funny

Demand for Assurance (788)

- UCC 2-609 -
 - 30 day limit = maximum - parties may require shorter
 - if assurance given but not lived up to
 - treat as breach or
 - treat as repudiation
 - see comments
- assurance may be requested - for any reason which creates uncertainty
 - issues unrelated to K at all (e.g., party is leaving town)
 - K related issues
 - credible rumors (even where rumor turns out to be false - similar to revocation of offer)
- when is party reasonably insecure
 - demand for assurances may be repudiation if demand for assurance = unreasonable
- what kind of security = sufficient?
 - what if party asks for specific type of security - (Rosenthal) substitute s/b adequate if reasonable

Pittsburgh v. Brookhaven (788 - in class)

- example of excessive action
- seller demanded assurances
- buyer<> provide assurances
- why did seller not win
 - requests for assurances <> reasonable (not clear that buyer had cash flow problems)
 - demands of seller were inappropriate - requests went beyond what reasonable even if a reasonable basis for uncertainty existed
- seller deemed to repudiate

BASIC ASSUMPTIONS

Mutual Mistake (795)

- **test = is mistake material**
- e.g., of affects of unexpected
 - problems arising after K made
 - Eastern Airlines v. Gulf Oil
 - Gill v. Johnstown Lumber (re: flood floating logs past mill)
 - McCloskey v. Minwall (re: Korean War)
 - problems existing before K made but apparent after K agreed
 - Watkins v. Carry (working sub-soil)
- issue re: allocation of risk
- distinguish from unilateral mistake

Stees v. Leonard - mere hardship in constructing does not excuse performance (796)

Supreme Court of MN 1874

Facts

FACTS: Leonard (D) agreed to erect a building on Stees' (P) lot. The building was built up to the third story when it fell to the ground. D began again and the building fell down a second time. D claimed that it did the work in compliance with P's specifications, but the soil at the building site was quicksand and would not support a building. P's specifications contained no provision relating to the building's foundations. P sued, claiming that the fall of the building was due to D's negligence. P got a judgment for \$5,214.80 plus interest. D appealed.

ISSUE: Does the mere hardship in the execution of a contract excuse performance under that contract?

RULE OF LAW: Mere hardship in the execution of a contract does not excuse performance under that contract.

HOLDING AND DECISION: (Young, J.) Does the mere hardship in the execution of a contract excuse performance under that contract? No. Mere hardship in the execution of a contract does not excuse performance under that contract. The contractor accepted an absolute rather than a qualified liability. Prior cases regarding latent defects in the soil and unexpected impediments have stated that those burdens must fall on the contractor. D contracted to erect and complete a building. D was required to do so even if that meant going beyond P's specifications. Affirmed.

LEGAL ANALYSIS: This builder accepted the owner's plans. Other than that fact, there is no reason for such a ruling. If the owner had supplied plans prepared by professionals, the owner would have warranted that the plans were adequate.

Class

- court finds that contractor assumed risk of unforeseen contingencies
- at time of K - courts more strict as far as following explicit wording of K

- PL asked for rather modest relief
- reliance damage easy to calculate
- hypothetical - what if mutual mistake
- K = unenforceable
- owner could get restitution from K

Sherwood v. Walker (799)

MI 1887

Facts

- PL K to buy cow (believed to be sterile) from Def
- Def discovers cow pregnant and refuses to deliver
- PL sues for replevin

Trial Court -

Supreme Court - for Def

Class

- difference b/w quality and intrinsic nature
- parties thought they knew and made mistake

Notes

- **Wood v. Boynton** - uncut diamond sold for \$1 to vendor who discovered and sold for \$700
 - knew they didn't no and made mistake (but not forgiven b/c they both knew they lacked sufficient knowledge)

Dover Pool Club v. Brooking (802)

Supreme Judicial Court of MA 1975

Facts

FACTS: Brookings (D) contracted to sell land, part of which was in Dover and part in Medfield, to the Dover Pool and Racquet Club (P) for use as a tennis and swim club. The agreement provided for a conveyance free from encumbrances, except it had provisions for existing building and zoning laws. Zoning laws permitted the construction of the planned club at the time of the sale. A few days before the sale, the Medfield planning board had published a notice of a public hearing on a proposed amendment which would require a special permit for the use of the property as a country club. The proposed amendment would be retroactive to the date of publication. After they discovered this problem, P sought rescission of the contract and a return of its deposit. The court decreed rescission on the basis of a mutual mistake of fact. D appealed.

ISSUE: Is a contract voidable for a mutual mistake of fact?

RULE OF LAW: A contract is voidable for a mutual mistake of fact.

HOLDING AND DECISION: (Braucher, J.) Is a contract voidable for a mutual mistake of fact? Yes. A contract is voidable for a mutual mistake of fact. The zoning amendment was not an existing zoning law at the time of the closing. It was not an encumbrance, and therefore was not within the exception in the agreement. The notice was published four days before the agreement was signed. That notice had a material impact on P's intended use. When they signed the contract, both parties made the assumption that the zoning bylaws would present no obstacle to the use of the premises for a nonprofit tennis and swim club. Both were mistaken. The contract is voidable by P unless P bore the risk of the mistake. The agreement does not provide for that risk, nor is there any common understanding that purchasers take the risk in such an unusual predicament. Affirmed.

LEGAL ANALYSIS: This is perhaps the closest case you will ever find that relates to a true mutual mistake of fact. Most cases that claim a mutual mistake of fact revolve around one party believing the honest representations of the other.

Class

- what test could be applied? -
 - objective = would reasonable person in position of either party have known about pending ordinance change
- **test - is mistake material**

Impracticability (805)

- K often used as assignment of risk
- **Paradine v. Jane** (805) -
 - parties could have provided for risk of war in K
 - could have been a case of frustration
 - some vestiges of case exist today - limited extent in leases
- **test - more stringent than being material**

Taylor v. Caldwell - destruction of music hall excuses non-performance (806)

King's Bench 1863

Facts

- PL (performer) K w/ Def (owner) to provide music hall
- PL agreed to pay L100 at end of each of 4 performances
- music hall burned before first performance

Trial Court - verdict for PL

Appeals Court -

FACTS: Caldwell (D) agreed to let the Musical Hall at Newington to Taylor (P) for four days for 100 pounds per day. The contract stated that the Hall must be fit for a concert. Before the contract was executed the Hall was destroyed by fire. Neither party to the contract was at fault. P sued for breach of contract.

ISSUE: Will performance will be excused under impossibility of performance, if performance in a contract depends on the continued existence of a person or thing, and that person or thing perishes.

RULE OF LAW: If performance in a contract depends on the continued existence of a person or thing, and that person or thing perishes, performance will be excused under impossibility of performance.

HOLDING AND DECISION: (Blackburn, J.) Will performance will be excused under impossibility of performance, if performance in a contract depends on the continued existence of a person or thing, and that person or thing perishes. Yes. If performance in a contract depends on the continued existence of a person or thing, and that person or thing perishes, performance will be excused under impossibility of performance. The agreement was a contract to let. The Hall was essential to the planned entertainment. It appears that the parties must have known from the beginning that the contract could not be fulfilled unless the Hall continued to exist. There was no express or implied warranty that the Hall shall exist. It is apparent that the contract was made on the basis of the continued existence of the Hall. The Hall was destroyed. Judgment for D.

LEGAL ANALYSIS: Prior case law (Paradine v Jane) dictated that a lease must be performed despite unforeseen hardship. But, this contract was not a lease agreement. An important element of impossibility is that neither of the parties be at fault in the destruction of the person or thing.

Note: There is really no distinction between a contract to let and a contract to lease and the only difference allows the court not to make the party pay under such circumstances.

Class

- court carefully avoids issue of leases by classifying as a licence
- is availability of concert hall condition precedent of tenant to pay rent
- **hypothetical** - what if reversed and owner (Def) sued performer (PL) for daily deposit
 - condition that PL provide hall
 - impracticability
- personal services - estate may be obligated for K, but impracticability applies to personal service

Transatlantic Financing Corp v. U.S. (812 - in class)

U.S. CA DC 1966

- ship incurred additional cost b/c had to sail around Africa due to closing of Suez Canal
- arguable whether unexpected
- degree of impracticability
 - event may be foreseeable → but still may be unclear as to which party assumed risk
 -
- damages requested
 - quantum meruit for change in route
 - contract K COA for part involved
- is foreseeability of risk relevant

Canadian Industrial Alcohol v. Dunbar (821)

NY 1932

Facts

- PL K to purchase molasses from Def to be produced by 3rd party refinery
- refinery produced less than amount K by Def
- Def delivered much less than K amount
- PL sues for breach
- Def claim - implied term = limited by production of specific refinery

Trial Court - judgement for PL

Appeals Court (Cardozo) - affirmed

- Def duty = ensure ability to supply molasses
- Def = contributory fault b/c didn't make effort to K w/ mfr

Class

- impossibility of performance vs. impracticability of performance (?)
- Def could have protected position by insuring supply
- not a case where seller did everything to supply goods
- impracticability - allowed where specified goods not available (due to circumstances beyond control of parties)
- **UCC 2-615 - not very helpful - better to look at cases (Rosenthal)**
 - when may party assume greater obligations than allowed by UCC

Eastern Airlines v. Gulf (823)

U.S. DC SD FL 1975

Facts

- see above

FACTS: Gulf (D) contracted with Eastern (P) to supply petroleum products over a period of time. The price was tied to an escalator clause to protect against unforeseen increases in the cost of procuring the products. The parties used Platt's, a trade publication, to regulate the prices. Federal price controls subsequently rendered the escalator

clause useless. D could not raise its prices to P due to price controls. P sued for breach and D defended on the basis of commercial impracticability.

ISSUE: May a price increase render performance of a contract commercially impracticable?

RULE OF LAW: A price increase will make a contract commercially impracticable only when it would be fundamentally unjust to hold the parties bound.

HOLDING AND DECISION: (King, J.) May a price increase render performance of a contract commercially impracticable? Yes. A price increase will make a contract commercially impracticable only when it would be fundamentally unjust to hold the parties bound. This contract provides a clear and unambiguous method for adjusting prices. Platt's adequately reflects the price of crude, and even though the contract is not as lucrative to D as it once was, it is not commercially impracticable to perform. The transfer prices at which D sells if foreign oil to its domestic subsidiaries is set by a pricing committed in D's Pittsburg home office. Intra-company profit can be and is allocated among those 400 plus corporate subsidiaries through the transferred price devise. D used not the actual book cost, but the transfer price. D's performance was not excused. Judgment for P.

LEGAL ANALYSIS: The court found that at least 60% of D's oil was old oil procured prior to the implementation of the price controls.

Class

- no ambiguity in provision for posted price
- Gulf claims badly hurt by K pricing terms
- Gulf assertions of losses based on internal transfer prices

Mineral Park Land v. Howard (829)

Cal 1916

Facts

- Def K to take/pay for all gravel necessary to build bridge
- Def only took approx. 50% of bridge requirements from PL

Trial Court - for PL

- Def took all gravel above water line → removed all gravel advantageously to Def
- taking any advantageously located materials <> excuse Def from complying w. explicit K terms

Appeals Court -

Class

- issue should buyer recover difference b/w K price and cost associated w/ achieving goals of K

Class November 28, 2000

- **Excuses from K performance** - b/c basic assumptions changed
 - **mistake of fact** (mutual mistake) - has to be material to K
 - **impracticability** - performance not possible
 - **frustration** - performance possible; purpose of K no longer relevant
- Force Majeur Clause

Eastern Airlines v. McDonnell Douglas (830)

5th Cir 1976

Facts

- PL K to purchase planes from Def

- Def delivered planes late
- PL sued for damages

Class

- court considered
 - "act of government"
 - "including but not limited to" = intended to exclude all types of occurrences similar to those specified
- what is impact where party proves that something happens was foreseeable?
 - Rosenthal - relevant factor but no clear rule

Frustration of Purpose (834)

Krell v. Henry (834)

Court of Appeal 1903

Facts

FACTS: Henry (D) contracted through Krell's (P) agent, Bisgood, to use P's flat in Pall Mall, London, to view the coronation procession of King Edward VII from the window of the flat. The rental contract made no mention of this purpose. The king became very ill and the coronation was delayed. P sued for the balance due under the contract and D counterclaimed for his deposit. Judgment was given to D. P appealed.

ISSUE: Will contract performance be excused under frustration of purpose?

RULE OF LAW: When the purpose of a contract is frustrated by an unforeseeable supervening event, and the purpose was within the contemplation of both parties when the contract was executed, performance will be excused.

HOLDING AND DECISION: (Vaughn, L.J.) Will contract performance be excused under frustration of purpose? Yes. When the purpose of a contract is frustrated by an unforeseeable supervening event, and the purpose was within the contemplation of both parties when the contract was executed, performance will be excused. The purpose of this contract may be implied from extrinsic sources. The purpose for the high rent of the room on those particular dates during the daytime was to view the coronation. Without the coronation, there is no purpose to this contract. Judgment affirmed.

LEGAL ANALYSIS: Under this doctrine, the attainment of the purpose of the contract is an implied condition precedent to performance.

Note: This case follows Taylor v. Caldwell and the use of the word 'lease' under Paradine v. Jane.

Class

- first case re: frustration
- what re: fraction of rent paid deposit? PL didn't ask for deposit back
- **hypothetical** - what if PL asked for deposit back?
 - claim for restitution

Swift Canadian v. Banet (836)

U.S. CA 3rd Cir. 1955

Facts

- PL K to supply Def w/ lamb pelts FOB Toronto
 - neither party to be liable for acts of any gov't
 - title/risk of loss transfers when loaded on RR cars
- PL delivered first shipment
- U.S. Gov't changed rules before second shipment
- Def refused to accept delivery of pelts

- PL did not load car in Toronto
- parties concede that change in U.S. regulations prevented import of lamb pelts in question

Trial Court - Def motion for summary judgement granted

Appeals Court -

- party not obligated to take action in vain (assuming ready to perform) when other party has given notice of refusal

FACTS: Swift Canadian Co. (P) contracted to sell lamb pelts to Keystone, a division of Banet (D). After some of the pelts had been shipped, P advised D of its readiness to ship the remaining pelts. Around the same time, the U.S. government issued stricter regulations for the importation of lamb pelts into the United States. D refused to accept delivery of the pelts. P sued to recover for breach. D was granted a summary judgment. P appealed.

ISSUE: Is a party obligated to perform when the other party to a contract has given notice of his refusal to perform?

RULE OF LAW: A party is not obligated to perform when the other party to a contract has given notice of his refusal to perform.

HOLDING AND DECISION: (Goodrich, J.) Is a party obligated to perform when the other party to a contract has given notice of his refusal to perform? No. A party is not obligated to perform when the other party to a contract has given notice of his refusal to perform. This still assumes that the party is ready to perform. P fulfilled its obligation when it delivered the pelts. It failed to load the pelts because D refused to accept them. There is a presumption that goods sold F.O.B. pass at the point where they are loaded. There is nothing in these facts to counter that presumption. After P made delivery he was to send the bill of lading to a Philadelphia bank. The seller's performance was fully completed when the goods were delivered F.O.B. to Toronto. The risk of loss moved to the buyer at that point in time. Even though the pelts could not be shipped to the U.S., they could be delivered anywhere else in the world. Reversed.

LEGAL ANALYSIS: This is a simple case of allocation of the risk of loss in an F.O.B. contract. This court seems to have placed the burden on each party to be responsible for government action.

Class

Chase v. Paonessa (839 in class)

Supreme Jud. Ct. MA

Facts

FACTS: Massachusetts entered into two contracts with Paonessa (D) to replace a median strip. D contracted with Chase (P) to supply the concrete median barriers. P produced one-half of the barriers, and then 100 residents brought a halt to the project. On June 7, 1983, D notified P by letter to stop producing the barriers. P stopped production on June 8. D paid P for all the barriers it had produced at the contract price. P then sued D for its anticipated profit on the barriers called for in the contract but not produced. D obtained a judgment based on impossibility of performance. The appeals court affirmed but noted that the doctrine of frustration of purpose was a more accurate theory of recovery. P appealed.

ISSUE: Must the risk under frustration of purpose be allocated before it can be used as a defense to a breach of contract?

RULE OF LAW: A defendant may rely on frustration of purpose as a defense to a breach of contract claim if the risk of the occurrence of the frustrating event is not allocated to the defendant by the contract.

HOLDING AND DECISION: (Lynch, J.) Must the risk under frustration of purpose be allocated before it can be used as a defense to a breach of contract? No. A defendant may rely on frustration of purpose as a defense to a breach of contract claim if the risk of the occurrence of the frustrating event is not allocated to the defendant by the contract. Frustration of purpose is defined by the Restatement 2nd of Contracts section 265. Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an

event, the nonoccurrence 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. D was in no way responsible for the state's elimination of the median barriers from the project. D can rely on the defense of frustration of purpose if the elimination of the barrier was not a foreseeable risk allocated to D by the contracts. P had supplied barriers to the state on many occasions and it was aware of the state's power to eliminate items from its contracts, paying only the contract unit price for items actually accepted. P was also aware that lost profits were not an element of damage. Even though the parties were aware of the state's power to eliminate items, neither party contemplated the cancellation of a major portion of the work and did not allocate that risk. Affirmed.

LEGAL ANALYSIS: Under impossibility, no one can perform the contract. Under frustration of purpose, any party can perform but there is no reason to.

Class

Northern Indiana Public Service v. Carbon County Coal (845 in class)

U.S. CA 7th 1986

Class

- Def entered into stupid K
- Def claimed impracticability/difficulty due to economics
- ordinary competitive situation → disadvantaged party loses
- no relief to Def b/c disadvantaged position due to own foolishness

Half Measures (851)

- one party excused due to impracticability of performance
- divisibility = possibility

Young v. City of Chicopee - bridge contractor supplies destroyed by fire able to only recover items put into bridge (853)

Supreme Judicial Court of MA 1904

Facts

- PL K w/ Def to repair bridge
- per K - PL delivered supplies to bridge prior to initiating work
- PL initiated work
- bridge burned destroying some unused supplies
- Def agreed to liability for supplies used in bridge at time of fire
- PL sued for damage to unused lumber

Supreme Court

- K = entire agreement
- destruction of bridge = impracticable of K = both parties excused from further performance
- implied K that bridge will continue in existence → Def default where bridge no longer exists
- Def liable for work that w/h inured to Def but for the destruction of the bridge
- Def <> insure PL as to loss of supplies not yet used in bridge

Class

- repair of bridge (rather than construction of bridge)
- court draws a line
 - no excuse to contractor if K to repair (rather than construct) bridge
- why differentiate b/w build/repair bridge

Reformation of K - Alcoa v. Essex (857)

WD PA 1980

Facts

- Alcoa K to convert Essex aluminum
- K employs complex pricing formula based on Wholesale Price Index (WPI)
- energy costs sky rocketed but WPI did not account for
- Alcoa faced substantial losses

Trial Court - reformed K to allow Alcoa profit \geq \$.01 / pound

- Alcoa sought profit = \$.04 per pound w/ expectation that profit b/w \$.01 and \$.09 per pound

Class

- causes of failure of formula = increased cost of electricity
 - OPEC dramatic increases in oil costs
 - environmental movement - restricting power plants
- court interfered w/ case

Oglebay Norton v. Armco (859)

Supreme Ct. Ohio 1990

Facts

- Def K w/ PL for shipping allowing primary and secondary pricing options
- K - expressly indicates that parties will negotiate to agreed price if other mechanisms failed
- K extended 4 times - valid thru 2010
- PL began \$95M capital improvement
- 1983 = downturn in steel industry - Def challenged PL shipping rate
- both pricing mechanisms fail
- 1984 - parties negotiated pricing arrangement
- no further agreement reached
- 1986 - PL seeks declaratory judgement re rate
- Def counter claims K no longer enforceable

Trial Court - K enforceable

- fixed rate for 1986
- required parties to negotiate and submit to mediation if no agreement reached

Appeals Court - affirmed

Supreme Court -

- **intent of parties to be bound to K despite failure of pricing mechanisms?** Yes
 - long standing close business relationships - joint ventures, interlocking directorates, Def ownership of PL stock
 - question of fact - trial court correct in determining
- **may trial court fix price for 1986?** Yes
 - authority to set price b/c parties intended to be bound
 - Restatement 2nd - reasonable price at time of delivery
 - UCC 2-305 - gap filler = reasonable price
- **may trial court order parties to utilize mediator?** Yes
 - specific performance allowed b/c complexity/length of transaction/K makes impossible to compute damages accurately

Class

- if pricing functions failed → expressed that would negotiate to agreed settlement

