CONTRACTS I
a Law school outline *by* corbin dodge

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INTRO

**1. Was a contract created? Is there a defense to the creation?**

 **2. Was there a breach? What was the breach? What is the defense of the breach?**

 **3. What was the appropriate remedy?**

**K=O+A+C**

*Definition of Contract:*

 1) Promise or set of promises

 2) Part of a voluntary exchange **&**

 3) Which the law will enforce (or recognize in some special way)

*Goal:* Uphold and promote voluntary exchange **!!!**

*Theory:* Exchange may not be equal, but fairness of voluntary exchange is usually irrelevant **!!!**

*Basis For Enforcing Promise as K:* BFX

*5 Main Categories of Contracts*

 1) Goods

 2) Real Estate

 3) Construction

 4) Employment

 5) Family

*Why enforce promises?*

1) Commerce

 2) Intent to legally bind in non-commercial cases

 3) Protect reliance in promise that fails as basis for a K

 4) Avoid unjust enrichment in cases where usual bargaining couldn't have occurred

*Not a K*

 - Gifts (Family is indicator)

 - Threat, Coercion, Duress (not voluntary)

 - Exchange (unless it involves a promise)

 - Predictions

 - Drunk, drugged (voidable)

 - Inheritance

TYPES OF CONTRACTS

**Express vs. Implied vs. Quasi**

1) *Express Contract* - Formed by language, oral or written

 2) *Implied Contract* - Formed by manners off assent other than language (EX: Conduct, ordering online)

 3) *Quasi Contract* - Not contracts

 - Used when Expectancy Damages are uncertain, inadequate, or cannot be covered

 - EX: Paint house for 4K. Not written.

 - I paint but lawyer advises you not to pay. If you must pay 🡪QK

**Bilateral vs. Unilateral**

       1) *Bilateral* - Promise for a promise **!!!**   EX: You promise to pay me. I promise to deliver car

 - Sometimes accepted by performance

 - Manifests a return promise

       2) *Unilateral* - Promise for a performance **!!!**

 - Always accepted by performance

 - Enforced only when performance is rendered

 - Frequently acceptance occurs over time

 - Rewards are unilateral K's EX: If you gain 100 yards, I'll buy you a car

 - No duty to notify of acceptance (unless no means of reasonable notice)

 *Implied Promise*

- If acceptance only by performance 🡪 Implied promise not to revoke while performing **!!!**

 - No consideration req'd

 - Preparing to perform does not trigger implied promise

 - Sub-contractor bids can be irrevocable if gen. contractor uses sub-quotes in his quote **!!!**

*Test to Distinguish:* Can one party sue the other if they don't perform?

*Language that looks like a promise, but isn't:*

 *-* EX: If you will come see me, I will...

*Anti-Unilateral Contract Theory*

- Requires mutuality (both must be bound)

 - On exam, assume we don't abide by mutuality **!!!**

UCC V. COMMON-LAW APPROACHES

**Common-Law (RST)**

- Developed by Judges

 - Evolves one case at a time

 - Judges value Consistency (*stare decisis)* v. Adaptability (Modifying the law for different facts)

 - Problems involving land 🡪 Common-law

**Statutory Law: UCC (-LA)**

 - *Requirements:* Must be sale of goods to apply **!!!**

*-* Not statute until embraced by state legislature

 - Courts cannot overrule

 - Overrides common-law

 - Common-law clarifies

 - Limits Cts. authority to change the law

 - Model law

 - Developed by legislatures (easily understood)

 - Legislative law acts prospectively

 - Lawyers decipher by reading the text

 - Courts bound by statute, sometimes interpret

 - K's enforced by Article 2 of UCC (no mention of consideration, but there is an exchange)

 - Goods

 - Applies to merchants and non-merchants

 - Acceptance of offer by shipment & effect of non-conformity

 - K defined as sale of goods (does it req. consideration or BFX?) §2-106

 - Purpose: "simply, clarify, modernize" commercial law

 - *Doesn’t apply:* Not UCC/Goods

 - Services 🡪

 - Land, Real Estate 🡪 CL

 - K to paint house 🡪 CL

 - K to buy 500 paintbrushes 🡪 UCC

 - K to buy vinyl siding & install 🡪 may be covered by both UCC & RST

OFFER

*Definition*

 - Provides offeree w/ power to make a K by acceptance. Contains or refers to essential terms. **!!!**

 - Manifestation of willingness to enter a bargain

 - Invites assent

 - The complete set of terms upon which there will be a K

*Requirements*/*Checklist for Exam* **!!!**

 1) Manifests assent to be bound

 2) Certainty & clarity of terms

 3) Directed to offeree (single person or narrow range)

*Test: Is it an Offer?*

 1) Is "yes" an appropriate response?

 2) If "yes", would it be a deal?

 3) Would a reasonable person think it was an offer?

 4) Does offeree believe they are the sole recipient?

*How to distinguish*

 1) Language

 *Examples*

- Offer: I will sell it for...

 - Negotiation: I will surely need...

 *Competing Public Policy*

 1) Cts should not be quick to impose substantial commitments **vs.**

 2) Speaker should exercise care that accidental offer isn't made

 2) Specificity

- *Test of an offer* is definiteness

 - Agreement unenforceable if terms are not sufficiently definite

 - BC when will you know BOC?

 - BC Can u determine DAS?

 - Reasons for intentional indefiniteness:

 - Diff. predicting future in long-term K

 *Views*

 1) *Common-law* 🡪 Offer must contain "essential terms"

 *Public Policy:* Ct should not make K in absence of essential element

 2) *UCC* 🡪 K enforceable if 1+ 'essential terms' are left open.

 *Requirements*

 - Offer intended

 - Reasonable basis for awarding a remedy

*Open-Price Agreement*

- Leaving price indefinite, to be determined

 - May be sufficient

 - *Remedy for failure to set price (CT says...)*

 - Set price **or**

- Order parties to mediate

- Offer more likely if:

 - More Specific

 - Defines Important terms

- Offer Less likely if:

 - More people targeted, esp if in short supply EX: 1st come, 1st serve

*Insufficient Clarity*

- Illusory

 - Duty Immeasurable

 *Test*

1) Can Ct. know if breach occurred?

 2) Are DAS calculable?

 3) BUT, Do facts show intent to be bound?

 *Reasons for Ct. enforce vague K*

- Intent to be bound

 - Circumstances req'd hasty agreement

 - Long-term K's (Future hard to predict)

 - Willing to risk conflict over remote issues

 - Avoiding difficult issue

  3) Context

 - Jokes/Intoxication 🡪 Depends on context

 - Not an offer if offeror has to assent after offeree accepts

 - Oral assent sufficient to make K, even if not written

 - but circumstances may reflect preliminary negotiation

 4) Past dealings & Customs

 - Any language may be an offer if the parties treated it as such in the past

 5) Communication (see specificity)

*Valid Offers*

- Price request 🡪 vendor replies w/ definite terms

 - Ambiguity on non-key terms (7am vs. 7pm)

 - Reward ads

*Not Valid Offers*

- Oral promises regarding at-will employment

 - Statement of willingness to negotiate

 - Ad to at-large public

 - Unless invites specific performance (unilateral) **or**

- Acceptance by limited class

 *-* Offers in Catalogs *(*invitation to "treat" or bargain)

 - Limited inventory, Unlimited audience

 - Quote

- Depends on context

 - More definite if limited audience

*Mistake in Transmission*

- Offer differs from intent §153

*General*

 - Don't say acceptance when making an offer (for clarity)

 **Agreement to Agree**

 *General*

 - Parties exchange promise to seek agreement in good faith

 - Evidence of motive is key

 - May engage in hard bargaining, but reject earlier term agreed

 - Unreasonable demand is suspicious

 - Social/family engagement, sales pitches, policies: Ambiguous

 - Specific facts are important

 - Assent relates to minimum terms, clarity

 - Cts will enforce if intent to be bound is clear

 *Breach of A2A*

 - Expectation: Ct. would enforce hypothetical K, Main

 - Restitution

 - Reliance

 *Test*: Did parties agree promise was legally binding?

*Duty*

 To attend & take action to reach a final agreement

 - Issue Ct: Ct must work out terms

 *Mistake*

- Each party thinks the agreement is something else

 - No K if essential terms fail

 *Letter of Intent*

 - Often accompanies A2A

 - Useful because:

 - More than a peppercorn

 - Shows good faith

 - Protects from bad faith withdrawal

 - Helps secure bank loans

 - May show suspicious bargaining if a party reneges

 - OK if negotiations fail

 - Allows hard-bargaining for best deal

 - Shows intent to take action to reach final, binding agreement

 **Agreement Subject to Memorialization**

 *Definition*

- Manifestation of assent otherwise sufficient to make a K

 - Doesn't fail simply bc parties also manifest intent to prepare & adopt a written version

 *General*

 - Is a deal in principle

 - Most key terms agreed

 - Handshake allows deal before formalized

 - Demonstrates good faith if negotiations fail

 *Caveat*

 *-* Agreement too uncertain **or**

**-** Parties just bargaining

ACCEPTANCE (RST)

 *-* Manifests assent to a K proposed by the offer

 - A volitional act, performed freely, deliberately, & with the intent to enter a K on the terms of the offer

- Manifestation of assent by reasonable manner & medium

 - Results in binding K

*Requirements*

 - Manifest & communicate

*Rules*

 1) How to Communicate (reasonable manner)

 - Words, **or**

 - Performing or Refraining from performing a specified act

 2) Performance or Forebearance

**Who can accept**

 - To whom an offer was made & they were aware of the offer **!!!**

 EXCEPTION: Offer to public (especially if no duration)

 - Member of class to which an offer was made  EX: Golfer hits goal, wants $. Course says offer was not intended for professionals.

 On day2 he does it again. Can't recover bc he knew offer wasn't intended for him.

 Might recover for day1 if reasonable person believes the offer could apply to him

**Mirror-Image Rule**

 *Definition*

- Acceptance must correspond w/ offer exactly

 - Cts. find ways around the rule to prevent strategic behavior

 *Not Acceptance*

 1) Conditional  **or**

2)Change terms

**Last Shot Principle**

 - Terms of K are those on the table when performance occurs.

 -  If offer/acceptance don't match but parties perform: Cts. pressed to say K exists

More typical: Performance w/out promise constitutes acceptance

**Communicating Acceptance**

*General*

- Usually by notice or communication to offeror, sometimes by performance (esp. if unilateral)

 - May have duty to notify

 - Must be objective

 - Depends on diligence in notifying or reasonable receipt

 - No K if offeree knows they haven't received acceptance

 *Majority*

- Acceptance is only effective if communicated:

 - Notify in reasonable time **or**

- Ensure they know of performance in reasonable time **or**

 - Indicate no notification req'd

 *Public Policy*: Allows offerer to make alternate arrangements if not accepted

 *Minority*

 - Acceptance effective when made

 - Occurs even if offeror doesn't immediately know

 - Must be reasonable time

 *Duty to Disclose:* Must disclose acceptance if you know the other party is unaware

 *Exceptions*

- My expressly or implicitly waive communication of acceptance

 - If notification is difficult, it's assumed to be waived

 - Offeror may specify how to accept (must follow)

 - Performance w/out promise may imply acceptance

 *Not Acceptance*

- Silence (unless past dealings, took benefit, intend to accept)

 - Inaction

 *Acceptance*

- Thumbs-up

 - Grumbling comment

**The Mailbox Rule** (CL)

 *Definition*

 - Acceptance by mail/email creates K the moment it's sent

 - Unless offer says no acceptance until received

 *4 Situations*

 1) Offeror sends revocation after acceptance 🡪 K

 2) Offeree sends rejection, then changes mind, sends acceptance -->Rejection

 - Offeree estopped from enforcing 🡪 K

 3) Offeree sends acceptance, then rejection

 - Acceptance 1st 🡪 K

 - Rejection 1st & changes position 🡪offeree will be estopped from enforcing K

 4) Acceptance communicated in wrong manner

 - If received while open 🡪 K

 - May specify not effective til received

 - Address must be correct, unless received

 - *Stealth Promise:* Entitled to unknown perks in the K, even if not aware when formed

 - Entitled to Expectation bc you accepted (no reliance needed) **\*\*!!!\*\***

**Non-Conforming Goods (UCC)**

 *General*

Shipment of non-conforming goods by the offeree in response to an order "aka offer" is:

 1) Acceptance of offer **&**

2) BOC

 *Exception*: No BOC if:

 1) Notice of Accommodation **&**

- In advance or

- w/ order

2) Gives buyer chance to reject

 - Buyer rejects 🡪 No BOC

 - Seller may reclaim goods bc the accommodation is not acceptance

MUTUAL ASSENT (RST)

*Definition*

 1) Consideration makes promise binding w/out reliance

 2) In bilateral K, parties are bound immediately w/ exchange of promises

 3) 1st: Assent to judicially enforceable promise vs. moral/social obligation

 4) 2nd: Assent to same terms

 *At Stake:* Liability based on exception

*Requirements*

 1) Each party makes a promise **or**

 2) Partial/Complete Performance

 - *Conduct only OK if party:*

 - Intends to engage **or**

 - Other party knows/can infer that you agree

*Assent Signaled by:*

- Manifestation

 - Words, Act, Inaction

 - Must be intentional conduct w/ reason to know of other party's interpretation of conduct

**Theories**

1) *Objectivist View* - Party may be bound even through he doesn't intend a K **!!!**

 *Requirements*

 1) Mutual Assent if acts like a 'reasonable person' **&**

2) Other party believes an offer was made- Dominant Theory

 *General*

 - Fly-on-the-wall Approach

 - Main process to determine assent **!!!**

 - Same goes for acceptance

 - Intent doesn't matter

 - Reliance doesn't matter

 *Context*

 - Legal Promise vs. Moral Obligation

 - Moral Obligation: Not enforceable (date, promise to wife)

 *2) Subjectivist View* - Must be "Meeting of the Minds" **!!!**

 - Intent: No offer or acceptance unless offer intended

*Misunderstanding*

 *Requirements*

 1) Parties attach diff. meanings to manifestation **&**

2) Neither **or** Each party knows meaning of other party

 *General*

 - No assent if misunderstanding/awareness of misunderstanding

 - Fault based approach to resolve conflict in the parties' intent to be bound

*Warranties of Cure*

- More formality is required than BFX

 - Must be in writing & signed by Dr. to be enforceable

 - Grave potential for misunderstanding

 - False/exaggerated allegations

 - Requires more than mere BFX of consideration

OFFER TERMINATION

*4 ways to terminate*

1) **T**ime Lapse

2) **R**evocation **!!!**

3) **I**ncapacitation/Death

4) **R**ejection or counter-offer **!!!**

**Time Lapse**

 - After reasonable time, unless specified

 - Rapid price fluctuation shortens time

 - Face-to-Face offer - closes @ conversation end

 - May be express or implied

**Revocation**

 *Definition*

- An offeror can terminate the offeree's power to accept by communicating the offer is no longer open.

- Retraction of a offer by the offeror

 *General*

 - Ends the offeree's power to accept

 - Must communicate before acceptance

 - Generally, terminate in same manner received

 - No requirement that a reasonable time elapse

 - Public Offer (Ad) terminated by same method even if offeree doesn't see it

 - Revoked once party RECEIVES notification

 - Express revocation may be in K

 - EX: Offer expires @ 12:00

 - By direct or indirect communication or receipt of info

 *2* *ways to Revoke*

1) Words

 - Ambiguous Statements EX: Market for this item has gone up considerably

 EX: Oh, Nevermind

 2) Acts (indirect)

 1) Conduct that is inconsistent w/ continuing the offer

 2) Must be correct info from reliable source

 *Cannot Revoke*

- Firm Offers

 - Unilateral K

 - Implied to not revoke once performance begins

**Incapacitation/Death**

 *Revocable vs. Irrevocable*

 *Revocable Offer* - Terminated by Death

 *Irrevocable Offer* - Not terminated by death

 - Not revoked if:

 1) In writing

 2) Signed

 3) Recites consideration

 *Offer Terminated When*

- Destruction of subject matter

 - May not terminate if already accepted

 *General*

 - If offeror dies 🡪 offer terminated (even if other party unaware)

 - Not applied to Express or Implied K's

 - Destruction of subject matter 🡪 offer terminated

 - Persistent incapacity terminates offer

 *Express Revocation*

 - May be put in the offer. Generally a duration term EX: Expires at midnight

 - Not effective until communicated (generally same manner as the offer)

 - Debt/Consistent incapacity terminates an offer.

 - Does not terminate a K

**Rejection or Counter-Offer**

 *Counter-offer*

 *Definition*

- An offer, relating to the same matter as the original offer & proposing a different substitute bargain

 - New terms 🡪 counter-offer, not acceptance

 *Rejection*

 *General*

- Acts like revocation

 *Implied Rejection*

- Rebuttable presumption that offeree rejected

 - Exceptions: Irrevocable offer, Subsequent conduct manifesting assent

 *Common-Law*

 *Mirror-Image Rule*

 *Requirements*

 - If acceptance includes terms already in offer **or**

- Terms accepted in grumbling manner **or**

- Adds additional bargaining inquiry (not new terms)

 *General*

 - May be express or implied

 - Acceptance w/ additional/diff. terms presumed to be rejection

 - EX: "I accept, can you include the sticker?"

 - May be counter-offer or acceptance w/ request

 - Argue BOTH!

 *Last Shot Principle* (mentioned above)

 *Definition*

- Terms of last K on the table when performance occurs wins

 *Look for*

- Performance by both parties

 - Offer & Acceptance don't match but both parties performed

 - Obviously there was some kind of K

 *UCC (Battle of the Forms)*

 - Rejects Mirror-Image rule

 - K forms EVEN if acceptance has diff. terms

 - How-to avoid

 - Make acceptance expressly conditional

 - "I want K to reflect acceptance exactly"

 - "Not the original terms"

 - "No other new terms"

 - Rejects Last Shot Principle - Expressly conditional acceptance must be expressly accepted

 - If acceptance not expressly conditional, but new terms, they become part of K (*See Rules of New Terms)*

**Recission (Mistake)**

*Requirements*

1) Underlay basic & assumption of K **&**

 2) Material effect that's adverse to D **&**

3) D doesn't bear risk

 - Risk allocated by agreement

 - Is aware at time of K but only has limited knowledge

 4) Enforcement would be unconscionable

CONSIDERATION (RST)

**90% of Cases are BFX & Consideration**

**Definition**

 *-* What was given in exchange for a promise

**Requirements**

 1) Bargained-for-Exchange of consideration

 2) Voluntary exchange

**General**

- To express the legal conclusion that a promise is enforceable.

 - Generally, a promise is not enforceable unless supported by consideration.

 - Makes promise enforceable w/out reliance

 - No down payment needed

 - Intent doesn't matter

 - Equivalence doesn't matter

 - No requirement for consideration to be fair/equal to value of promise

 - "thing given in return"

**Types**

 *1) Performance*

 - An Act other than a promise **or**

 - Forbearance **or**

 - Creation/Modification/Destruction of a Legal Relation **or**

- A return promise

 Bargained for, and given in exchange of a promise

 *2) Return Promise*

**Approaches**

 1) *Traditional Approach*

 - Consideration if performance yields benefit to promisor, or detriment to promisee

 - Incomplete EX: If you walk up the street, I will buy you a coat (trip just a condition of the gift)

 2) *Modern Approach*

 - A promise has consideration if part of a **bargained-for-exchange**

BARGAINED FOR EXCHANGE

 $ ------------------->Seller

 Buyer <-----------Property *Bargain*

 - Agreement to exchange promises, performance, or promise of performance

 - Simply means agreement (not negotiation)

 *Requirements*

 - Benefits must induce each other (magnets)

  - Gift exchange is not BFX (EX: Flowers for wife, nothing required in return)

 *General*

- Common bilateral exchange

 - Reliance not necessary for K to be binding

 - If the condition for accepting a gift benefits the promisor -->probably BFX

 - Dominant Theory, most powerful

 - Avoids need to prove actual reliance (reliance need not to have begun)

 - Assent if eventually mutual, not necessarily simultaneous

- Judge/jury look at context & intent (common-sense)

 *Motive*

 *General*

- Honesty, reasonableness measured at moment of K

 - Late Discovery: Still binding (exception: misrepresentation)

 - Coercion doesn't promote commerce

 - Error in judgement still a K

 - Gamble still a K

 *Objective vs. Subjective Motive* (inner thoughts) in BFX

 - Mere pretense of bargain doesn't suffice

 - EX: False recital or nominal consideration

 *Reliance costs of Negotiation*

- Time, effort, expense

 - Research, Inspection

 - Loan Application fee

 - Gifts, entertainment, relationship building

 - Missed Opportunities

 - No recovery if negotiations fail

 - No rule for reliance on K

 *Settlement of Claims*

- Avoids inefficient litigation

 - May yield better value than jury trial

 - Threat to sue may be coercion, yielding more than value of the claim

 - Destructive to commerce (destroys, not create wealth)

 - Forbearance to assert or surrender of claim not consideration unless:

 1) Claim/defense doubtful bc of uncertainty of facts/law **or**

 2) Forbearing party believes claim of defense may be valid (but, belief may not be accepted if unreasonable claim)

 *Standardized Release of Claims* RST 74(2)

 - Written surrender of claim by one under no duty to execute,is consideration if BFX

 - Even though not asserting the claim/defense & believes that none exists

 *Pitching* - Extolling the virtue of what you offer in proposed exchange

 - Occurs in bargaining

 - Normally in commercial exchange (EX: Best Deal!)

 *Family Endorsement*: Promise for family to pay is worthless bc it is illusory

 *Undefinitized K's*

- Work begins before price, specifications, performance standard

 - Common for military

 - Remedy: Restitution, PE

*How to Protect yourself when negotiating a K*

 1) Buy an option contract

 2) Make an Agreement to Agree

DOES CONSIDERATION EXIST?

 *Does Exist*

 - Any performance that is bargained-for

 - Completion of Promise (Words good, deeds better)

 - Part bargain/Part Gift = maybe enforceable

 - $

 - Forbearance

 - Abstinence (if BFX)

 - UCC Sale of Goods

 - Stealth Consideration (more than you planned)

 - Promise not to sue

 - If signed in good faith

 - even waived if valid/invalid claim

 - Option K

 - Req's K

 - Peppercorn Theory

 - Implied/Exclusive Agency Promise

 - Open Price Agreement

 - *Waiver of Promise not to sue*

- Sufficient consideration if:

 1) Reasonable

 2) In Good Faith

 **-** *Exclusive Marketing Agreements*

 - Implies best efforts obligation upon agent

 - Most K's make this explicit.

 *Doesn't Exist*

 - Gift, Gratuity EX: Pencil for $5k

 - Coercion, Duress

 - Family/Social Promise (case-by-case basis)

 - Values are hard to measure

 - Indefinite Promise

 - Illusory Promise

 - Against Public Policy

 - Oral promise in at-will K (no mutual assent)

 - Legal Duty

 - Benefit is gift, not part of bargain.  May be incidental

 - EX: Dad promises son car for graduation. Jr. earns A's.

 - EX: House installs lamp, benefits neighbor.  Neighbor gives $ to playground, benefits house.

*Inadequate bargains*

 1. Error in Judgement - What you bargained with wasn't worth what you hoped it would be

    2. Gift Promise not BFX

 - Still a K

 - No negotiation needed

 - What is bargained for doesn’t (in and of itself) induce a promise 🡪 doesn’t prevent consideration

 - That a promise doesn’t induce performance/return promise 🡪 doesn’t prevent consideration

 *Worthless Consideration*

- Fairness is irrelevant unless inequality signals blackmail/coercion

STEALTH CONSIDERATION

 - One party may gain more than needed to assent (OK!)

 - Parties may gain/lose more than they knew

PAST CONSIDERATION

*General*

- Given before promise

 - Not product of BFX

 - Cannot induce promise

 1) *Traditional Rule* - A promise for a benefit already exchanged is not supported by consideration

 2) *Modern*

 - A promise made in recognition of a benefit already received is enforceable to the "extent necessary to prevent injustice"

 - Still very vague

 - Not enforceable if:

 1) No unjust enrichment **or**

 2) The value of the promise is disproportionately high

THE PEPPERCORN THEORY

 *Definition*

 - The value of one side of the exchange is extremely small in comparison to the value of the other side. **!!!**

 *2 Approaches*

 1) Enforced: Cts should not judge equivalence of exchange

 2) Not Enforced: Lacks consideration bc consideration is only a sham

 *General*

 - AKA token or sham consideration

 *-* Inequality of exchange: Value not important if it's what the party bargaining for

 - Some argue there shouldn't be an easy way to make enforceable promise: use nominal consideration.

 - Inadequacy of consideration may be red flag

ILLUSORY PROMISE

 *Definition*

 1) A promise can't serve as consideration for a return promise if

 2) it doesn't bind the promisor to do or refrain from doing anything

 *General*

 - Lacks mutuality of consideration

 - Often appear to have "zero" consideration

 - May appear to promise something, but doesn't commit promisor to do anything

 - Seems not to command promisor

 *Illusory if*

 - Conditional promises (unless in good faith)

 - Absolute Discretion

 - Right to cancel, even if in good faith

 - Allowed if restricted EX: cancel ok w/ 60 days notice

 - Misunderstanding, Deception, Manipulation

 *Implied Promise*

 - Cts may find implied promise to avoid striking agreements due to lack of consideration

 *Satisfaction Clause*

1) Satisfaction measured by reasonable person standard

 2) If dissatisfied

 - Must be good faith

 - Unwillingness to complete K not allowed

 - Cts may enforce illusory satisfaction req's, outputs, or exclusive agency K by implying good faith/best effort

 - Most likely to fill gap by implied term if commercial

 - May also uphold one-sided K as unilateral

PROMISSORY ESTOPPEL (RST)

**#2, Last tool you use**

*Definition*

 - A promise (not enforceable under usual K rules)

 - that promisor should have expected to induce reliance

 - & which caused reliance

 🡪 An equitable substitution for consideration

*Requirements*

 1) Promisor should reasonably expect to induce action or forbearance

 2) The promise is of a definite and substantial character\* (1st)

 3) Such action or forbearance is in fact induced

*\*Diff. Between 1st, 2nd RST*

1st - "Definite & Substantial Character"

 2nd "The remedy granted for breach may be limited as justice requires"

 - Leaves Cts. w/ little to work w/ & unfettered discretion

 - May limit by

 1) Requiring a strong show of detrimental reliance **or**

 2) Limiting remedy to value of reliance (rather than value of promise)

*Remedy:* Cts *can* hold K exists (but don’t have to) when it would be very unfair not to give at least reliance interest. Remedy may be limited

*Policy:* Prevent injustice

*General*

 - Used to enforce K when lack of consideration, BFX

 - Prevents, or estops a person from arguing a K shouldn't be upheld

 - Not every state recognizes

 - Some believe it should replace consideration

 - Exception for special cases where reliance is reasonable—esp when promisor foresaw reliance

 - Something shady 🡪 Ct won’t go out of its way to use PE

*Reliance*

 *Requirements*

1) Reasonable expectation or reliance

 2) Actual Reliance substantial/definite

 3) Action is actually induced

 4) Justice requires PE

*Equitable Doctrine*

- AKA Clean Hands

 - Shady Conduct 🡪 Ct. unlikely to use for DAS when K existence is questioned

*Gifts*

 - Do not need to prove action/forbearance

 - Gift Promises - P.E. is used to enforce

 - Charitable Gifts - future gifts enforceable if in writing

 - Marriage Settlement

 - EX: I'll pay for law school. You quit job but I die 🡪 Since no consideration, argue promissory estoppel

*Pensions*

 - Promise of pension for work 🡪 doesn't need PE

 - Promise of pension for past work 🡪 no consideration, PE is only hope if employer reneges

*Construction Industry*

 - May be used if subcontractor reneges on promise to work for gen. contractor, before gen. accepts offer

*Job offers/moving*: not enforceable

*Damages   (\*\*\*Always discuss both Expectation & Reliance in PE cases\*\*\*)*

1) Expectation

 - May be too much $

 - Too speculative

 - Hard to put price tag EX: At-will employment where expected time of employment is variable)

2) Reliance ???? *this must be an error. Need to double-check*

 3) Reliance

 - Expectation may be extreme (Father promise son 50K, induces 2K reliance)

 - More speculative than expectation

 - Allows balance of justice

*Other Bases for Enforcement*

 1) Restitution - Especially for cases where D conferred a benefit, but circumstances precluded advance bargaining

 2) Similar to restitution, except that D made after-the-fact promise as compensation for the benefit

 3) No consideration needed:

 1) Modifying K (oral allowed)

 2) Firm offers by Merchants

 3) Claim arising out of Alleged Breach of Sales K

DAMAGES (RST)

1) EXPECTATION INTEREST

 *General*

 - Puts promisee in as good a position as he would have been in if promisor had kept his promise

 - Most common

 - Most value

 *Calculation*

- [value of Ds promise] – [any benefits P received]

 - [Value of Unperformed Promise]-[Cost Avoided]=DAS EX: Art: 250K-4.5K=245.5K

 *Includes*

- P&S, Mental Distress

 - Loss breach caused (diminished value)

 - EX: Only for 3rd operation

|  |
| --- |
| **HAWKINS V. McGEE (aka The Hairy Hand Case) : Expectation Interest** |
| - Rule: Expectation Interest is diff between value of %100 good hand v. what is receivedMcGee agreed to operate on Hawkins's hand, guaranteeing "to make the hand 100% perfect." The court holds that the measure of plaintiff's damages is the difference in value between a "perfect" hand, as promised by defendant, and the hand in its present condition. The court does not allow damages for P&S bc P&S are necessarily incident to surgery whether it is successful or not. | **Which of the DAS did the court award?** **How would the court have measured DAS under the other 2?** Expectation.**Which of three measures of is likely to yield the highest award?** Expectation. Reliance interest is only for losses caused by the K. Restitution interest is only to restore benefits given to the other party. |

|  |
| --- |
| **SCENARIO** |
| On January 20, Peter Guggenheim stumbled into the Montrose art studio of Pete Casso–a talented but relatively unknown artist. Guggenheim was lost. He was searching for the Menile Collection & he needed directions. But once Guggenheim was inside Casso’s studio he was overcome by the brilliance & energy of Casso’s paintings. Being an avid & perceptive art collector, Guggenheim attempted to buy one of Casso’s paintings, but all of Casso’s finished paintings were promised to a local dealer. Casso therefore offered to finish the painting he was then working on, & to sell it to Guggenheim. Guggenheim agreed. After a little more discussion, Casso promised to finish & deliver the painting on March 20, & Guggenheim promised to pay $5,000 on delivery “as long as the painting is satisfactory to me.” They also agreed that Guggenheim would make a down payment of $500, refundable if the painting wasn’t “satisfactory” to Guggenheim. Guggenheim did make this $500 payment before he left. On January 21, Robert Hughes, famous art critic & writer, stumbled into Casso’s studio. Like Guggenheim he was searching for the Menile Collection, & like Guggenheim he was awed by the splendor of Casso’s paintings. The next day Hughes wrote a glowing review of Casso’s work in World of Art Magazine. Suddenly, art collectors from all over the world began to descend on Casso’s studio. The average price of a Casso painting surged from $5,000 to $250,000. Among the art collectors who visited Casso was Donald Trump. When Trump heard that Casso’s next painting was promised to Guggenheim, he offered Casso $350,000 for the same painting. Casso accepted Trump’s money, painted the last flourish, & handed the painting to Trump.  | *Would Hughes be able to claim this as a restitution interest loss?* Had he already owned the painting, he would be able to sell it at a $245,000 profit. But, since the K was oral, is it still valid (since it was a K for property)? If the K is not valid, then Hughes has no basis for argument (It's possible that the money exchange formalizes it). |

2) RELIANCE INTEREST

 *General*

 - Puts promisee in as good a position as if K was never made

 - Compensates for detriments suffered on reliance of the agreement

 *Types of Cases*

 *Emergency Setting Cases (*Service is a sort that one normally charges (gift is unlikely)

 - D was unavailable or unable to make a bargain for a K

 - Insane Persons

 - Lost Child

 - Often used in medical cases

 - Save another's property from fire

 *Includes*

- P&S, Mental Distress

 - Loss of work

 - Hospital Fees, Medications

3) RESTITUTION INTEREST

 *Definition*: "Value of benefit conferred to D" **!!!** EX: return Dr's fee

*Exam Checklist for Restitution* **!!!**

1) Was there a benefit conferred upon the other party?

 2) Would it be unjust to not pay back?

 *General*

- Requires the other party to restore any benefit he received by π

 - Recovery limited to only that which was conferred to D (*local* Dr's fee, not hospital fee)

 - Especially for cases where D conferred a benefit of D, but circumstances precluded bargaining in advance

 - Similar to restitution except that D made an after-the-fact promise as compensation for the benefit

 - Smallest, simplest

 - Cause of action w/out K

 - *Unjust Enrichment*

- Duress - $ or property delivered to another

 *2 Measures*

1) Value of what he received (What it would cost to obtain it) **or**

2)Accidental or Incidental Benefit (another party intended recipient) EX: Painted Wrong house

 - Incidental benefit is likely foreseeable from the outset

 *Categories*

1) Emergency

 - D unable to make K

 - D unable to bargain

 - Service is normally charged

 - Usual measure of what other local Dr.'s charge

 2) Incidental Beneficiary

 - D's performance w/ B incidentally enriches C EX: K w/ general contractor to enrich owner's house

 - Sometimes K's purpose is to benefit 3rd party

 3) Accidental Beneficiary

 - Performance mistakenly enriches wrong party

 - For: Beneficiary exploits

 - Against: Beneficiary shouldn't pay what he didn't seek EX: Reward for rescue

*Promise of benefit already received*

- Prior benefit given

 - Alleged promise in recognition of benefit

 - Enforcement to avoid injustice

 - Exception: Gift, Disproportionate

 - Remedy: Amount promised or Ct. determines proportionate amount

**Damages**

*General*

- Convert the promise to a $ figure, along w/ other consequences of breach

 - $ for the injured party, enough to buy a substitute

 - Goal in K Law: Compensate for breach caused by loss

*Punitive Damages*

 - No punishment in K law

 - No disgorgement in K law

 - K law doesn't punish bc:

 - Breach may not be intentional

 - Intended breaches often not meant to harm, may be efficient

 - Unlimited liability may discourage K's

 - Exception: Outrageous tortious conduct

 *Pain & Suffering*

- Usually not allowed for breach

 - Exception: P&S goes beyond what was agreed EX: 3rd surgery

 *Courts*

 - Why not take to court? Promise already broken

 - Impractical*,* Expensive

 - Preliminary injunctions: Supervision = More Work

 - Award is enough to buy supplement

 *Reasons to Enforce*

 - Permits reliance on promise if exchange takes time

 - Someone has to go first, which is risky

 - If the other party reneges, you lose the cost of your performance

 - Fault-based approach - Ct. sides w/ party who was misled

 *Unfair Contracts*

 - Inequalities from

 1) Bargaining Power **or**

 2) Subsequent Event

 - Possible for both to gain from unequal contract

 - Shocking inequalities: Red flag

*The Special Rule for Settlement of Claims*

- Avoids inefficient litigation

 - May yield better value than jury trial

*` Specific Performance -* For rare case when it is possible and expedient to order D to fulfill promise **!!!**

 *Disgorgement -* Requires infringer to disgorge profit to prevent a benefit from a wrongful act

**Efficient Breach**

*Definition*

- If a promisor can make $ by simultaneously breaching &

 - giving the non-breacher $ that places them in as good a position as if there was full performance.

 *General*: One party is better off and no one is worse off.

 *2 Economic Theories*

 1) Pareto-Improving Efficiency

 - Transactions that make no one worse off, but someone better off

 - Efficient, but not only efficient way

 - Promisee must receive at lease Expectation DAS. W/out, they are worse off

 2) Kaldor-Hicks Efficiency

 - $ for those better off than those worse off, so all not better/worse than before

 - Less stringent requirements than Pareto

 *Morality of Breaching*

- K remedies provide incentives for moral/fair behavior.

 - Choice to breach may harm reputation, even if not in best interest.

 - Allows balance of Harm v. Reputation

**The Economics of Remedies**

 *2 Approaches*

1) *Perform-or-Pay Approach*

 - The promisor's obligation is reduced to a choice between performing a specified act & paying for non-performance

 - Often characterized as immoral, but better understood as amoral system

 2) *Law of Economics School of Thought*

 *Efficient Breach Hypo*

 - Promisor can breach & pay expectation DAS if in best interest

 *General*

 - Major influence in last 40 years

 - Expands on perform-or-pay approach & adds idea of 'mutual gain'

MISC

OUTPUT & REQUIREMENT CONTRACTS

*Common-Law:* Reluctant to enforce: to indefinite, too vague

*UCC*

 - Enforceable w/ limitations:

 1) Quantity must be reasonable to estimate

 2) Cannot be unreasonable to normal output/requirements

*Illustrative Problems* **!!!**

1) *Worthless Consideration*

 2) *Past Consideration*

 3) Language that looks like exchange, but isn't: "If you will come down and see me, I will..."

 4) *Illusory Promises*

OPTION CONTRACTS / FIRM OFFERS

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*Non-revocable\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

**Irrevocable Offer**

 *General*

- Offer subject to a promise to not revoke for period of time or until occurrence of an event

- Promise not to revoke is unenforceable w/out consideration (or a substitute like option K)

 - Not terminated by death/incapacity

 - A promise alone has no consideration

 *Reasoning*

- Problem w/ pre-k costs. Wish to reserve opportunity

 - Worth risk to attract an offeree

 *RST*

- Written, signed irrevocable offer (option) w/ recital of purported consideration

 - Enforceable

 *UCC*

- Written, signed, promise not to revoke ("firm offer")

 - Enforceable

**Firm Offer**

*Definition*

 - Promise not to revoke offer is binding w/out consideration if signed (for duration stated)

 *Common-Law*

 *Requirements*

1) Offeror promises to keep open for certain period of time **&**

 2) Received consideration

 *UCC*

 *General*

- "No consideration" provision applies only to a UCC transaction & only in context of firm offer.

 - The core K must still have consideration

 *Requirements*

1) Merchant promises not to revoke **&**

 2) Signed

 --. Then no consideration req'd to bind

 *Limit*

 *-* 3 months

 - 3+ months if consideration

**Option Contract**

 *Definition*

 - Promise that limits the offeror's power to revoke

 - Expresses, directly or indirectly, a fixed period within which the offeree must exercise the option

 - Offeror promises to keep the offer open for a specified time & receives consideration

 - Offeree pays to reserve right to accept

 - Deposit forfeited at revocation

 *3 Forms of Consideration in Option Contracts*

 1) Consideration

 2) Firm offers by the UCC

 3) Reliance by the offeree

 *Views*

 *Common-law*

 - Unilateral Firm Offers creates option K for the offeree

 - **Texas:** Must recite consideration

 *UCC*

 Firm offers

*Precontractual Liability*

 - When parties do not reach K, rule is each party negotiates at their own risk.

 - Neither party is liable under PE for expenses of other party in trying to reach K.

 - Rarely impose liability.

BATTLE OF THE FORMS

**§2-207**

*Definition*

- An exchange of typically pre-printed documents, in which each party attempts to have the K on their terms

*General*

- Problem that comes from exchange of standardized forms

 - Always consider acceptance before the forms EX: Telephone

 - Only for sale of goods

 - Eliminates mirror-image rule, if acceptance otherwise manifests intent to make K

 - Offeree still can make counter-offer (acceptance is expressly conditional)

 - Anticipates problem of confirmations § 2-201 & SOF

 - Each party wants protection of its own form

 - Applies to merchants and non-merchants

*Acceptance of Goods*

 - Occurs after buyer receives and has opportunity to inspect & does not reject

 - See 2-207(3) if accepted by parties exchange

*Goods*

- Things moveable at time of identification to K

 - Unborn animals

 - Things attached to, but severed from realty

*Non-Goods*

- $

 - Securities

 - Things in action

*Standardized Agreements*

 *Common-Law*

- Last shot rule applies

 *Requirements*

 1) When party signs agreement or manifests assent to a writing **&** believes they are used for same type of agreement **&**

 2) Writing treats all alike w/out regard to knowledge/understanding

3) Reason to believe the other party would not assent if they knew the writing contained particular terms

 - Term is not part of the agreement

 *UCC*

- See *Rules of New Terms*

 *Examples*

 - Purchase order

 - Invoice

 - Confirmation

 - Acknowledgement

 - Fine print terms

 - Warranties

*UCC*

 ***3 Parts of 2-207***

 1) Reject the Common-Law Mirror-Image Rule

 2) Additional/Different Terms are Proposals

 3)

 ***Additional Terms become part of K unless:***

 1) Materially alters **or**

 2) Expressly limits acceptance **or**

 3) Objection given w/in reasonable time

*Post-Agreement Terms (Common-Law) Rolling K's*

 *General*

- Not binding until chance to read Post-Agreement Terms, w/ opportunity to return

 *Shrinkwrap Concept*

- Terms are inside the box

 *Clickwrap Concept*

- Terms must be 'clicked' to accept

 *Uniform Electronic Transactions Act (EULA)*

 *Rolling K*

- Practicality sometimes requires payment before presentation of terms

 - Allows seller to avoid direct presentation

 - Allows presentation of complex terms in quick exchange

*Re-occurring Problems*

- Once agreement has formed, subsequent forms cannot undo agreement 🡪 only propose changes

 - Acceptance v. Counter-offer

 - Did offerees response clearly require other party's expression of agreement to diff. terms?

 - When did a binding K form?

*How to Win at BOF*

1) Negotiate an overriding master K (Continuing Nature Agreement)

 2) Standardized terms in a trade association or industry

 3) Make offer or acceptance expressly conditional

 4) Past Practices

 - Determines the K terms

 5) Other

*Non-Identical Form*

- Confirms prior K: Doesn't negate it

 - Accepts prior offer: Diff./Add. terms don't defeat acceptance

*Different Terms*

 *-* Diff. bc can't have both in same agreement

 1) Address same subject **&**

 2) Conflict

 - EX: Cost, choice of forum clause

*Additional Terms*

 *-* If they may be added w/out contradicting

 - 'Proposals'

 - Confirmation w/ add. terms is proposal

 - Proposal may chance K w/out express assent (as long as doesn't materially alter)

 - May object

 - EX: Choice of forum vs. arbitration

*Rules of New Terms*

- If both parties are MERCHANTS:

 1) Both parties are merchants **&**

 2) Acceptance not expressly conditional **&**

 3) Acceptance adds new/diff. terms

 -->New terms become part of K unless:

 1) Terms materially alter or

 2) Offeror objects w/in reasonable time

 - If both parties are NOT MERCHANTS

 1) Acceptance not expressly conditional **&**

 2) Acceptance adds new/diff. terms

 --> Additional new terms must be accepted/rejected separately

 - If writing is not exactly a K:

 - Terms agreed by both parties wins

 - (Supp. terms from Art. 2)(???)

STATUTE OF FRAUDS

*Requirements* **!!!**

- Requires signature of D

 - Writing needs to only contain essential terms

 - Some terms may be in error

 - Must identify parties (w/ signature)

 - UCC - writing can only be enforced to stated quantity (even if wrong)

 - Signature - A mark w/ intention to authenticate

*Six Original K's*

- Promise that cannot be performed w/in 1 yr.

 - Sale of goods for $500

 - K in consideration of marriage EX: If you marry me, I will buy you a car

 - Guarantee of another's debt

 - Executor's promise to *personally* pay a debt of the deceased

 - Interest in reality

 - Cannot sue if not in writing

*New Types*

- Sale of Real Estate must be in writing **!!!**

 - Pre or Post-nuptial K's

 - Surrogate mother K

 - *Some* option K's

 - K for sale of goods >$500

 - Promise to a creditor to pay what a debtor owes

 - *Exception:* Main purpose advances promisor's interest

 - If promisor completes w/in 1 yr

*Physical Characteristics of the Writing*

 *Minimum Contents*

 - Signature **or**

 - Electronic: Sound, signal, or process

 *May be*

 - Record

 - Electronic Form (EX: emails)

 - Accidental memo of agreement **!!!**

 - Lost/unavailable to π at time of lawsuit

 - Mistaken in price

 *Doesn't need to be*

 *-*Signed memo **!!!**

 - Signed by promisee (Exceptions)

 - One document

 - Made at time of promise

*Performance not to be completed in one year*

- Part performance unequivacably referable (???)

*Surety for another's promise*

- Guarantee of debt paid to creditor

 EX: Executor's pledge to pay deceased death

 EX: Owner guarantees debt of wholly owned corp.

 EX: Owner/Gen. Contractor guarantees debt of sub-contractor to enable sub-contractor's completion of work.

 EX: Parent fulfills Ct ordered child support duty by promising to pay the obligee child's debt

 - Risk of Fraud bc non-party perjures as a witness

*Sale of Real Estate*

- Land isn't perishable

 - K is eternal

 - Certainly re: ownership

 - State interest in records

 - Importance of symbol of ownership

*Ways around the SOF*

 *Main Purpose Rule*

 *Definition*

 - If the promisor's promise for own benefit, even if oral

 - Enforced

 *Requirements*

1) Promisor benefits **&**

 2) It was the main purpose

 *Situations*

- Owner guarantee's debt of wholly owned corp

 - General contractor guarantees debt of subcontractor to complete work

 - Parent promises to pay obligee child's debt

 *Promissory Estoppel*

- Cts. split whether estoppel overcomes §

 - RST suggests higher threshold for estoppel to overcome the §

*Why exceptions exist*

- Judicial, American hostility (not our law)

 - Pro-underdog vs. Pro-business judges

 - Rebellion against arbitrariness

 - Tool for fraud

 - Other evidence sufficient to prove K

*Admitted Oral K's*

 *2 Rules*

1) If D admits promise, SOF not a defense

 2) Common-law *Rule of Effrontery*

- Admission doesn't preclude asserting defense

*Noncompliance*

 *General*

- May sue for restitution

 - Unlikely for PE

 *Views*

 *- Majority:* Voidable

 *- Minority:* Void

*Mitigating Doctrines*

Pro-Underdog v. Pro-Business Judges

 - SoF is extremely Pro-Business

 - Not consistent, depends on judge’s stance

 - It's as important to know the judge, as it is to know the law

***Special Problems***

- Oral Modification only must be in writing for SOF areas

 - Original writing may be sufficient

 - 2-201: Confirmation signed by one party binds other, subject to objection

 - Effort to cancel may confirm K

***Avoiding SOF Writing***

- Specialty goods (UCC)

 - Admission in testimony (UCC)

 - Goods/$ delivered & accepted (UCC)

 - K subject to CISG

 - Part performance that corroborates existence of K

 - PE when elements are strong & corroborate existence

 - Cts divided

 - UCC divided

**Exceptions to the SoF**

 *4 Exceptions*

1) Part or Full Performance

 2) Admitted Oral K

 3) PE

 4) Wills

 *Part or Full Performance of K*

 *Real Estate*

1) Consideration ($ or services) **or**

 2) Possession **or**

 3) Improvements

 *Other*

- Part performance might be inequitably referable to alleged K

 - Most Cts: Does not remove agreement from SOF

 - May give action for restitution or reliance

- Specialized Goods

*Admitted Oral Contracts*

 *Views:* (Know both!)

 *Majority: Rule of Effrontery* **!!!** (RST)

 *-* Admission of the Promise doesn't preclude asserting the defense

 - This means: You can admit there was a K, but still claim SoF

 - Main common-law view

 *Minority (UCC)*

 - If D admits promise, No SoF defense **!!!**

 - Sworn admission of K, avoids need for writing

*Promissory Estoppel under the SoF*

 *3 Old ways to avoid SoF under PE*

 1) Promise that K is in writing

 2) Promise to put K in writing

 3) Promise that writing is not req'd by law (esp. if made by lawyers)

 *Arguments against PE*

 - Applies to specified promises

 - Estoppel will become, the exceptions swallows the rule

 *Reasons for PE*

- Promisor is enriched

 - Not enforcing would be unconscionable

 *Views*

 *RST*

- Injustice avoided only by enforcement

 *New Factors*

- Other remedies available (Ex: Restitution)

 - Do reliance & facts corroborate?

 - Enrichment

 *UCC (2 Views)*

 1) May implicitly reject by listing exception

 2) Permits as part of supplementary common-law

*Not covered by SoF*

- Wills 🡪 bc SOF would make will a binding K

COERCION & DURESS

*Duress*

 *Definition*

 *-* Force sufficient to overwhelm one's free will

 *General*

 *-* Voidable at victim's option

 - Must be no effective legal remedy

 - Victim's right to sue makes bearable, non-coercive

 - Exception: Right to sue won't compensate if threat carried out (demanding party lacks $ for judgment)

 *Examples*

 *Duress*

 - Battery/Kidnapping

 - Threat of Personal Injury

 *Not Duress*

 - Threat of unlawful act (if a legal remedy exists)

 - Threat to breach

 - But modification gained by threat may not have consideration (See *PED Rule*)

 - Old Law: Actual or threatened unlawful harm to property is *not* duress

 EX: Threat to burn down house-->not duress bc you have remedy to sue

**Pre-existing Duty Rule**

*Definition*

 - Performance of a legal duty owed to promisor which is neither doubtful nor the subject of honest dispute

 - is *not* consideration

 *General*

 - Promisor exacts toll for going forward

 - Legal duty may not be contractual or by operation of other law

 - Legitimate negotiation concerning duty that is doubtful or subject of honest dispute is consideration

 *Views*

 *RST: Replaces PED Rule w/ new rule:*

 - A promise modifying K duty not fully performed on either side is binding if:

 A) The modification is fair & equitable in view of the circumstances how K was made **or**

B) to the extent justice requires enforcement

- Offers an implied rescission rule even for unsophisticated parties **!!!**

 *UCC*

 *-* Rejects PED

 - Looks at good faith of parties

 - No consideration to bind

 *-* An agreement modifying a K needs no consideration to be binding **!!!**

 - Technical consideration cannot support bad faith

 *Goal*: Prevent lawful but opportunistic threat of breach as means to change K terms

*Doesn't apply*

 - Good faith dispute

 - If threatening party demands payment in advance, duress must still be restitution

*Response to PED Claim*

 *General*

- Diff. Performance: Consideration for new promise

 - Destruction of old agreement

 *Problems with Lack of Consideration Approach*

- Bars good faith agreement

 - Sophisticated parties not deterred by consideration rule

 - EX: Settle good faith dispute, perform differently, rescind K to make another

*Loopholes:*

 1) Doubt (re: K)

 2) Offer of diff. performance

 3) Demand payment or performance in avoidance of K date

 4) Mutual rescission of K

 *Steps*

1) Parties make 1st K

 2) Parties agree to release 1st K (making 2nd)

 3) Parties make 3rd K w/ desired changes

 --Not enforceable

 *Public Policy*

- Good faith adjustment to unexpected event v. Opportunistic Exploitation of power balance

 - Implied rescission for all acting in good faith

 - Amendment might be beneficial to both sides **!!!**

 - Threat to breach K to coerce amendment (sue if threat carried out)

 - Early solution: Avoid duress, treat as issue of consideration issue

 - Theory doesn't equal litigation reality

**Misrepresentation**

 *Elements*

1) Material misrepresentation

 2) Justifiable reliance

 *General*

- Creates defense against duty to perform K

 - Ground for rescission (an equitable remedy), Not DAS

 - Intent is irrelevant (or torts)

 - Concealment as misrepresentation bc half-truths/actions prevent fact-discovery

 *Who Misrepresents*

- Education, Experience

 - Personal experience w/ thing being sold/bought

 - Expensive investigation into particular subject

 - Chance acquired info

 *Duty to Disclose*

 *Rule*

 - No duty to disclose even material facts

 - No relief for concealment

 *When to deny Duty to Disclose*

- Reward instrument in education & research

 - Some States require disclosure of material facts, esp. if π seeks equitable remedy

 *TEXAS: Deceptive Trade Practices Act*

- A cause of action for "false, misleading, or deceptive "acts or practices"

 - Includes failure to disclose if:

 - Transaction made w/ intent to induce customer when they wouldn't have if it was disclosed

EMPLOYMENT

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*Look for Illusory Promises & Lack of Consideration\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

*At-will Employment*

 *General*

 - Employment is a K

 - Oral promises modifying at-will employment not valid

 - A moments employment is valid consideration

 - Employer's don't routinely intend to limit discipline

 - Subject to constant renewal

 - Not firing you is consideration for changing K terms

 *Command:* Don't discharge w/out cause

 *Goal:* Fair to employees

 *Promise:* Your employment will last at least 2 years, unless good cause to terminate for misconduct/poor performance

 *Promise not to sue*

 - Valid if signed in good faith

 - Even waived if valid/invalid claim

 *Examples: Promise of a Job*

 *Binding*

 - Unequivocal expression of definite intent to be bound not to discharge

 - Except in clearly specified circumstances

 *Not Binding:*

 - General comment not to discharge as long as satisfactory

 - Statement that employee will be discharged only for 'good cause' w/out further agreement on terms

 *Public Policy*

- Allows Cts. to exercise discretion--> Commerce

*Severance Pay*

- See RST 81(2)

*Retirement Pension*

- ?

*Contract of Rescission*

- Resignation: Give up duty as employee, duty as employer

 - May be mutual

*Promissory Estoppel* **!!!**

- EX: Worker is promised job at another firm & gives up employment, possibly changes location:

 - Most Cts will NOT find the job promise binding

 - Unless of fixed duration

 - Argue BOTH sides

*Defenses*

- Undue Influence

*Non-Compete Agreements*

 - Can't use just for non-competition

- Acceptable if: Special Training, etc

*Employment Agreements across State lines*

- States vary tremendously

 - State policy of employment dominates

INTERNATIONAL COMMERCE CONTRACTS

*The Convention on the International Sale of Goods*

 - K does not need to be in writing **!!!**

 - Applies to sale of goods between parties w/ businesses in diff. signatory nations.

 - Parties can adopt different choice of law, or override popular provisions

DEFENSES (RST)

**Types of Defenses !!!**

 Capacity

 Duress

 Mistake

 Misrepresentation

 Nondisclosure

 Intoxication

 Undue Influence

 Unconscionability

CAPACITY

 *Types*

1) Age

 2) Mental

 3) Intoxication

 *History*

- Unable to make K bc of Race, gender, marital status

 *Age <18*

 *Requirements for child to disaffirm*

1) Within reasonable  time

 2) Adult must represent child

 *Potential Remedies*

 - Unreasonable delay

 - Emancipation to legal adulthood

 - Marriage

 - Purchase of 'necessaries'

 - Restitution of goods

 - May return goods

 - If destroyed, tough luck

 *Misrepresentation*

 - May be estopped from disaffirming

 - Dealers may look the other way

 - Employer shouldn't have this benefit

*Mental Incapacity*

 *Traditional Test:* Cognitive Rule Test

- Complete insanity (EX: Delusions)

 *-* Do they understand the nature of the transaction?

 *Modern Test:* Reasonably Act Test

 *General*

- Test for diminished capacity

 - Not complete disability

 - Depends on notice **!!!**

 *Requirements*

 1) Unable to act in a reasonable manner re: K **&**

2) Other party had reason to know

 ...If satisfied, still allows for judicial discretion in enforcement of K

 *Test*

 *-* Was K fair or partly performed?

 *More likely binding if...*

 - Seller doesn't know otherwise (! most important)

 - Consult w/ attorney

 - Negotiate for higher price

 - Family doesn't know of senility

 - Understands the transaction

 *Less Likely if...*

- Grossly inadequate price

DURESS

 - Remedy: Restitution

 - $ or property delivered to another under duress = Unjust enrichment

 - When threatening party completes payment up front, victims PED defense becomes useless

MISTAKE

 *Definition*

 *-* A belief that is not in accord with the facts

 *Elements*

 1) Mistake occurs when K formed

 2) Involves basic assumption of K

 3) Party claiming mistake did not assume it's risk

 4) The Ct. does not allocate risk on grounds of reasonableness

 *General*

- Sender bears risk of error caused by self/agent

 - Relief more likely for mutual mistake

 - Mistakenly adverse effect

 - Voidable

 *Situations*

1) Relief-seeking party didn't bear risk & enforcement is unconscionable **or**

2) Other party had reason to know of error or fault in causing mistake

 *Test*

1) Is risk allocated to sender by prior K or agreement to rules?

 2) Other reasons to uphold? (EX: Bait & Switch)

 3) Risk of making K voidable?

MISREPRESENTATION

1) Fraudulent

 2) Intentional (even if other party didn't know)

NONDISCLOSURE

- No duty to disclose

 *Must disclose*

 - Real Estate

 - Facts not easily discernible

 - Condition likely to worsen

INTOXICATION

*Requirements*

1) Unable to reasonably understand K & consequences **or**

2) Unable to reasonably act

 *General*

- Drug addict may argue intoxication or mental incapacity

UNDUE INFLUENCE

 *RST Definition*

 1) A has domination over B &

 2) Uses unfair persuasion to get assent or

 3) B assumes A will not at in a manner inconsistent w/ B's welfare

 *Types*

Main: Domination + unfair persuasion

 Variation: 1st party makes 2nd trust they'll look out for best interest

 *General*

- Confidential Relationship

 - Improper use of dominance

 - Improper use of position over a subservient

 - Gradual Extension

 - Improper bargaining w/ dominance

 - No BOC

 - No DAS

 *Remedy*

 1) Rescission of K or

 2) Defense against liability of breach

 *Dominance*

 - Use of superior position

 - Targets weak party

 - Manipulation for hasty assent

 - Manipulation of fear

 - Exaggerating benefit (false reward) or

 - Adverse result of not agreeing

 *Solution*

- Standardized, professionally written

UNCONSCIONABILITY

 *General*

- Ct. may deny enforcement of K if unconscionable when made

 - Unfair terms alone usually don't justify avoidance

 *Signs*

- Complex legal terms

 - Lengthy, complex agreement (deters close reading of terms)

 - Drafted only by one side (standardization)

 - Adhesion K: Take it or Leave it

 - Setting

 - Oppression

 - Unfair Surprise

 - Superior bargaining power

 - Purpose of Term

 - Effect

 - Price

 *Oppressive Terms of Consumer Credit*

- Formulas for fees, interest is complex

 - Creates setting for unfair surprise

 - Confidential terms are principle profit for merchant

 - Snowball effect of late payment

 *The Dragnet Clause*

- Monthly payment for all goods bought.

 - As long as consumer buys, no item is ever 'paid off'

 - Goods becomes collateral for all debt

 *Substantive Unconscionability*

- In substance of K

 - Purpose & Effect

 *Remedy (Legislation)*

- Cts. defer to legislature **!!!**

- Fight standardization w/ standardization (§)

 - What must be/not be in K

 - Careful study of the problem

 - Make rules universal

 *Procedural Unconscionability*

- Transaction Setting (EX: Fine print form)

 - Domination

 *Standardization of K's*

 *Goals*

1) Reduce Cost

 2) Gain uniformity, certainty

 *Danger:* May include oppressive terms

 *General*

- Enforceable if not unconscionable

 *Resisting Standardized Terms*

1) Mutual Assent

 - Were the challenged terms presented before acceptance?

 - Was there term presented on a document that seems to be a K?

 - PED Rule: Was there consideration for seller/employer modification?

 - Caveats:

 - Rolling K (BOF)

 - Employment: At-will employment subject to constant renewal

 - Not firing you is consideration for changing K terms

 2) Public Policy

 - Based on norms of acceptable action

 - EX: Deal to fix industry prices

 - Monopolistic position

 - Dependency

 *Adhesion Contracts*

- Take it or leave it K

 - EX: Buy electronics: Warranty is adhesive

 *Limits on Waiver of Liability*

- Clear mutual assent

 - No monopoly power

 - Public policy limits waiver of negligence liability

 - Gross Neg. v. Ordinary Neg.

 - Not Liable: Ordinary Neg.

**Renegotiation of Contract**

Not allowed bc

 - Lacks consideration

 - Unfair

 Allowed bc

 - Shows no duress

 *UCC Approach*

- Consideration not required

 - Must show good faith

 *RST Approach*: ???

**Behavior***:* Some Rules regulate how players behave on the field

**Substantive Fairness***:* The referee calls the gam if outcome is too one-sided

**Public Policy***:* Some K's violate the public interest

ILLEGALITY

*Effect on Court*

- Denies enforcement

 - No remedy for injured promisee

 *Exceptions*

 - Policy doesn't explicitly imply EX: Head shops

 - Denying remedy encourages crime EX: Steals from gambling pool

*Factors*

- Policy strength

 - Seriousness of misconduct

 - Directness of connection between K & public harm

 - Forfeiture from non-enforcement

 - Public interest favors enforcement

 - Justifiable expectation

*Illegal*

- Gambling K

 - Performance EX: Weapons delivery

 - Violates civil duty EX: Bribing employer's agent

 - Facilitates Crime EX: Crack dealer in apt

 *- En Pari Delicto:* Equally culpable EX: Paying Mafia to operate your business

CASES

|  |
| --- |
| **2. SULLIVAN V. O’CONNOR : Nose Job : DAS TYPES !!!** |
| A doctor promised to improve the appearance of plaintiff's nose with an operation. The appearance of the nose was worsened by the operation and two subsequent operations. Issues are 1) whether such a promise is enforceable & 2) how to measure DAS. Ct (reluctantly) finds the promise to be enforceable. It measures DAS according to the Ps expectancy and reliance interests. (diff between promised nose v. what she received). P wasn’t confined only to out-of-pocket expenses. P can recover for worsening of condition, & P&S & mental distress are allowed for the 3rd operation. Expectancy or Reliance Interest allowed. P waives claim to Expectancy, so reliance allows for diff. between promised condition & pre-condition. Affirmed.**Is P&S, & mental distress reasonable recovery for DAS?** YES under expectancy or reliance**Can a Dr's promise be enforced?** YES if the promise is specific **Which measure of DAS did the court award?** Reliance interest **Why did the court favor the alternative measure?** Right to expectancy interest waived**How did this measure of DAS compare with the “usual” measure of DAS?** Lower $ |

|  |
| --- |
| **3. WHITE V. BENKOWSKI : WATER : NO PUNITVE DAS** |
| - Rule: No punitive DASA property owner contracted to supply water to a neighbor for a fixed period of time. The water owner shut off the supply to the neighbor in order to harass him. Ct refuses to award punitive DAS. An award of actual injury is allowed for BOC. Ct overlooked P's testimony as inconvenient, however some injury was deemed to be acceptable. There's no need for a precise calculation of loss, but DAS must be set at a reasonable amount, even if nominal. $10 is acceptable. Based on persuasive authority, punitive DAS are not recoverable under BOC. Original verdict for $10 compensatory affirmed. Punitive DAS affirmed at cost to appellant. | **Was the TrCt correct in reducing the award of compensatory DAS from $10 to $1**? No punitive DAS.**Are punitive DAS available in actions for BOC?** No is only to restore benefits given to the other party. |

|  |
| --- |
| **4. US NAVAL V. CHARTER : HUNT FOR THE RED OCTOBER : NO DISGORGEMENT** |
| Rule: No Disgorgement \*\*Good Essay Topic on Efficient breach, Culpability (moral wrong) no one cares about culpability in K law bc K law too black and white, not right or wrong\*\*The publisher of the paperback The Hunt for Red October published earlier than the contract permitted and before the hardcover sales had dropped sufficiently. CT holds that the TrCt wasn’t in error to consider the sales of paperbacks as evidence of lost hardcover sales. Although it may be ok in the industry to ship early, Berkeley was still under K to keep the sales at the Oct'85 date. US Naval Institute claimed recovery for copyright infringement but Charter argued that at most BOC & profits claimed were inflated. [Copyright infringement OK as it is a part of the DAS] AppCt found that $730k was excessive & reduced to $35k (they figured many people were just waiting to buy the paperback & would not have bought the hardcover in the one month period before sales were to commence. Reversed award of profits, affirm DAS | **Are BOC DAS calculated by actual loss sustained by P?** Yes. Purpose of DAS is to compensate the injured party |

5. HAMER V. SIDWAY: NO DRINKING: DETRIMENT=CONSIDERATION

Rule: Anything you do has consideration if it is a detriment

William E. Story promised his nephew that if the nephew "would refrain from drinking, using tobacco, swearing, and playing cards for money" until the nephew became 21, the uncle would pay him $5,000. When the uncle died without having paid the money, the nephew sued the uncle's estate for breach of contract. The court holds there was consideration for the promise, using a benefit/detriment formulation of consideration. The nephew's forbearance was a detriment.

Proposition 1. A promise is enforceable if, and only if, it is enforceable by "consideration".
Proposition 2. Consideration is defined as "either . . . some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other". Put more simply, consideration is a benefit to the promisor or a detriment to the promisee.
Proposition 3. The forbearance from doing something that the promisee has the legal right to do is a detriment to the promisee. This is so even if we believe that the promisee was better off by the forbearance.

Here, the nephew gave up doing things that he had a right to do-smoking, drinking, and so forth-until he was 21. This was a detriment and made the uncle's promise enforceable. Whether the context is one of unilateral or bilateral contract, unless the promise sought to be enforced is supported by consideration, it is not enforceable. If refraining from smoking, etc., was not consideration, then the uncle's promise would be unenforceable whether the nephew promised to refrain, or just refrained. The case is disposed of on the ground that the nephew suffered a detriment.

The RST (2) new definition of Contracts, call it the bargained-for exchange definition:
1) To constitute consideration, a performance or a return promise must be bargained for.
2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
3) The performance may consist of
(a) an act other than a promise, or
(b) a forbearance, or
(c) the creation, modification, or destruction of a legal relation.

First, do not conclude that this has replaced benefit/detriment as the articulation of the test of consideration. The benefit/detriment language continues to be used by courts, perhaps more so than bargained-for exchange. Second, it is not clear to me that the Restatement sets out a different test. If you are looking to see whether there is a bargained-for exchange, a benefit to the promisor or a detriment to the promisee is pretty good evidence of a bargained-for exchange.

Did D become indebted to P for $5k on his 21st birthday? (Does K have consideration?) D's estate holds that the K was w/out consideration, therefore invalid.Is forbearance from permissible legal conduct sufficient consideration to create a valid & enforceable K? Y. This case established that forbearance of legal rights (voluntarily abstaining) on promises of future benefit constitutes consideration (exchange)Since the promise was validly considered, the estate is responsible for paying the $ to P. The Estate must recognize & abide by the K by paying the money owed to P. RST 72 enforced the K on the element of exchange for performance. The uncle acknowledged his performance of the agreement in a letter. Had there just been a 'promise for a promise' without any acknowledgment of Ps completion, it is possible that P would not be entitled to the DAS.Q2 No, the uncle could not have sued the boy for using tobacco. The K states nothing about 'owing money' for use of the restricted substances/acts. It simply states that he will be rewarded if he refrains from them. Furthermore, P would have been within his legal rights to participate in such acts, therefore, his uncle & uncle's estate would have no valid basis to sue P.

6. KIRKSEY V. KIRKSEY: GRATUITOUS PROMISE
Rule: Gifts are not adequate for consideration
A man wrote to his sister-in-law, who was recently widowed: "If you will come down and see me, I will let you have a place to raise your family." She did, and after some period, the promisor forced her to leave. A jury awards damages, but on appeal, the promise is held to be a gratuitous promise with a condition.

1st RST treatment of promissory estoppel v 2nd RST:
RST, First: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. So the Restatement carries forward the idea that promissory estoppel is a substitute for consideration, rather than a wrong, like a tort. If it were the latter, the remedy would be the value attributed to the detrimental reliance, not the amount of the promise. And unless the promisee makes a mistake, the value of the reliance will always be less than the value of the promise-after all, one does not knowingly expend costs for a benefit worth less than the costs.

Elements
 A promise
 Actual reliance by the promisee, which was foreseeable by the promisor
 The reliance is definite (clearly connected to the promise) and substantial (big)
 Is binding
 If necessary to prevent injustice

RST, Second: A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. So, the Second Restatement continues the same grammatical error of RST first (see it? It is a which/that error). It continues to make liability turn on that term "injustice". The new additions are "third person" (I don't know what they are thinking of) and the remedy limitation "as justice requires". Perhaps this is a signal to courts to measure the damages by the amount of the detrimental reliance, rather than by the face amount of the promise.

Is a gratuitous promise enforceable once already undertaken? Was P's detriment of moving classifiable as consideration? Gratuitous promises not enforceable, not classifiable as consideration even if a party has suffered a loss or inconvenience.

DISSENT: The act of relocating was justifiable as consideration.Didn’t Antillico (the sister-in-law) do exactly what her brother-in-law stated was the condition of his promise? If so, why was this not a “bargained for” exchange? Not bargained for because she didn't give him anything for the promise. It was simply a gratuitous promise with no strings attached.It appears to be a promise, but it wasn't. It was a gift promise. This case illustrates that you cannot rely on the isolated text. Common sense, circumstance, & reasonable inference shows that he is trying to rescue his relative out of the goodness of his heart. This is why the case is so famous. He's given her the gift of staying there, but he hasn't given her the property so he can take it back. She lost her preference, but that's not what he was bargaining for. He actually asked her to not lose her preference (her land she may one day own)

7. FEINBERG V. PFEIFFER: RETIREMENT: PAST CONSIDERATION & PROMISSORY ESTOPPEL
Rule: No past consideration

After many years of employment with defendant firm, defendant's board of directors votes to provide plaintiff a pension when she decided to retire. After working two more years, plaintiff retires. She receives the pension for several years, then the company discontinues its payments. The court holds that the years of employment, having been rendered before the pension promise cannot be consideration for it. But the court enforces the promise because plaintiff detrimentally relied on it.

**Does Ps past employment history consideration?**
No. Past performance is not valid consideration to render a K enforceable.

**Is a gratuitous promise enforceable if recipient relies on the promise?**
Yes. A gratuitous promise is enforceable if the promisee justifiably relies on the promise.

**Is this an enforceable K?** It wasn’t bargained for because it already happened (past performance not valid consideration)- There were no strings attached to the promise- It is not a BFX bc the company wasn’t trying to get anything out of her

However, may be enforced by promissory estoppel

The court reasoned that past performance is not valid consideration, however the K allowed her to retire. A woman of her age is not in a position to find comparable employment elsewhere & her retirement made her reliant on the pension. TrCts judgment affirmed, with $5100

**Why do you suppose the company made the promise to Feinberg? Why do you suppose it breached its promise?**

The company made the promise to Feinberg for her long loyal history as an employee to allow her to retire whenever she chose. When the new president took over, it was his obligation to review company transactions. Those that were questionable were considered by the company attorneys as to whether they were required or not,.They saw no consideration, & that it was gratuitous

**What did Feinberg give to Pfieffer?**

**Why were none of these things “in exchange” for Pfieffer’s promise (at least in the court’s view)?**
P provided nearly forty years of employment, but it lacked consideration because past transactions are not valid consideration.

**Suppose you were general counsel for the corporation at the time of the alleged promise. What might you have advised Mr. Lippman to say or do to make the promise binding?**
A K in writing regarding the gift should have been made with a condition that she continues employment for at least 1 year’s time in order to show detriment on the recipient’s behalf

8. FIEGE V. BOEHM: WHO’S YOUR DADDY?: PEPPERCORN THEORY (worthless consideration)

Defendant promised to pay medical and miscellaneous expenses for plaintiff's pregnancy and child support for plaintiff's child in return for plaintiff's promise not to bring a paternity suit against defendant. Blood tests later proved that the child was not defendant's. The court enforces the promise because defendant's belief that he might be the father supports a finding of consideration.

Did the K lack consideration bc of Ps forbearance to prosecute as an invalid claim of fatherhood? Has consideration & is enforceable. D had an honest belief that he was the father of the child & agreed based on that reasonable belief that he would pay the amount due. Her promise to not initiate bastardly charges is enough consideration for his promise to pay the child support, regardless of whether the pregnancy was induced by him. The general rule in Ks law is that there's no duty to disclose so there was no requirement for her to disclose about other possible fathers There was no underlying fraud. Affirmed with costs, $2415.8

Peppercorn Theory - What he was bargaining for was worthless (to avoid bastardy proceedings).

**Was Hilda's promise not to sue at least some consideration?** Yes, if reasonable or in good faith.

**In Feige, was Louis’s K with Hilda “voluntary?”**Imagine the argument you would make if you represented first Louis, & then Hilda. The original K was a voluntary agreement. Had she taken him to bastardy courts & found he wasn’t the dad, he’d have no financial obligation to her. However, his promise was in good faith & her detriment to not take him to criminal court was enough justification for consideration to validate this K. **What’s the danger in enforcing Ks to settle claims like this one?**

**How do the rules the court describes deal w/ that danger?**

Situations where there are doubts about the parenthood of the child should be handled by the criminal courts on bastardly charges so that valid proof should be made before questionable agreements are made. (?)RIF, Inc. decided to lay off 1,000 employees. Lawyers advised the company that the layoff would spawn some lawsuits, especially age discrimination lawsuits. Terminated employees also frequently assert other types of claim, such as unpaid overtime claims, when they no longer depend on the employer’s goodwill. Therefore, the company asked each laid off employee to sign a written promise not to sue the company (AKA a “covenant not to sue”) based on any alleged claim related to his or her employment, in exchange for a payment of $1,000 in “severance” pay. The company made the same offer to all laid off employees, w/out investigating the likelihood that any individual might actually have a claim. Ralph Elder signed the promise not to sue & accepted the payment of $1,000. Later, he realized that the company had laid off mainly people over the age of 50, & Elder happens to be 55. Elder has come to your office to inquire whether he might sue for age discrimination**.**

**Is Elder’s written promise not to sue binding?**

Severance pay constitutes a detriment on the companie’s part, & is possibly consideration. However, there is question if the K was made in 'good faith' or was a fraudulent on the companies part, however it seems that his willingness to sign, & the fact that the money exchange has already been executed would make his written promise not to sue binding. One may argue that the legal duty rule applies here, where the agreement on the promissor’s behalf (the employee) was straightforward (his agreement not to sue in exchange for $) which validates the K.Payment is consideration if it is bargained for exchange (RST 74)

**Suppose RIF had a “severance pay” plan for years before the layoffs. The plan promised the payment of $1,000 in the event of an involuntary layoff. Would this additional fact affect your answer?** No, it would be a case of past consideration.

9. STRONG V. SHEFFIELD: ILLUSORY PROMISES

Husband owed a debt to creditor. Wife endorsed the note evidencing the debt, thereby promising to pay the debt if the husband did not, in return for creditor's promise to "hold it until such time as I want my money." The court holds the wife received no consideration for her promise. In this case, forbearance is not sufficient. Since P did not PROMISE to forebear, but rather just acted, his inability to set the ground rules (i.e. forbearance) doesn’t count as consideration & the promise is illusory, therefore not legally enforceable. Illusory promises have too much discretion to be a promiseIs the promise illusory if one party's performance is entirely up to them? Yes, if performance of a promise is optional, the promise is illusory. forbearance=consideration

 -------> I promise to give you the note<------- I promise to hold the note until I want my money

Nudum Pactum - a promise that is legally unenforceable for lack of consideration.

Forbearance - agreement between the lender & the borrower to delay foreclosure

**Was alleged K bilateral or unilateral?**
Don’t assume Cts answer is correct. Unilateral bc only accepted by D's promise to pay $. If the K was bilateral why was Uncle Ben’s promise not worth a “peppercorn” (I’m referring to the extreme view that equivalency of exchange is irrelevant).

**The promise wasn’t equal, P agreed to forebear until he decided to cash the check.Assuming Strong is a “close” case, why might the court have favored Louisa?**

**Was there reason to deny enforcement, other than the lack of consideration?**

Think like a 19th century judge! Sexually Transmitted Debt: Ct may view the woman as trying to back up the debts of her husband or, at the time it was a woman's duty to do what husband says (he told her to sign the note).

10. MATTEI V. HOPPER: SHOPPING CTR: CONDITIONAL PROMISES (conditional=may be illusory)

A real estate developer entered into a contract to buy land. The promise to purchase was expressly made "[s]ubject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser." Rejecting an argument that the purchaser's promise was illusory, the court holds that the purchaser must exercise his judgment in good faith.Mattei--->$100k--->HopperMattei<---{provided lease is obtained} deed<----Hopper

**Is the promise illusory due to the personal satisfaction clause?**
No

**If this is the case, is the K valid?**

No, if there is no duty for the promise it is illusory

**Must the promises be mutual?**

YES, the promises must be mutual for consideration]

**Suppose the court is correct that Mattei made a real & not illusory promise. If a party like Mattei reneges on a promise (he falsely asserts there are no satisfactory leases), by what means (or with what sorts of facts) could a party Hopper prove “bad faith”& breach?**

'good faith' under these terms is an agreement that D would fulfill his end of the promise by actively & aggressively trying to fulfill his end of the bargain (obtaining the leases). It is understood & implied that D would try to fulfill that duty, especially after all the negotiations. It was in D's interest to uphold his end of the bargain & try to obtain leases, if not for financial reasons, then for moral reasons.

**What is a possible defense for Casso against Guggenheim’s claim?**

On January 20, Peter Guggenheim stumbled into the Montrose art studio of Pete Casso–a talented but relatively unknown artist. Guggenheim was lost. He was searching for the Menile Collection & he needed directions. But once Guggenheim was inside Casso’s studio he was overcome by the brilliance & energy of Casso’s paintings. Being an avid & perceptive art collector, Guggenheim attempted to buy one of Casso’s paintings, but all of Casso’s finished paintings were promised to a local dealer. Casso therefore offered to finish the painting he was then working on, & to sell it to Guggenheim. Guggenheim agreed. After a little more discussion, Casso promised to finish & deliver the painting on March 20, & Guggenheim promised to pay $5,000 on delivery “as long as the painting is satisfactory to me.” They also agreed that Guggenheim would make a down payment of $500, refundable if the painting wasn’t “satisfactory” to Guggenheim. Guggenheim did make this $500 payment before he left.Guggenheim could claim that the painting was (1) unfinished or (2) unsatisfactory’in good faith’

**What if Casso delivered a painting, but Guggenheim refused to pay because the painting wasn’t “satisfactory.”?**

**What facts or evidence might help Casso prevail in his BOC claim against Guggenheim?**

The need for the painting to be satisfactory is a condition of the claim that in fairly undisputable because it is so subjective. However, Casso could argue that a reasonable man would find the painting satisfactory because of his newfound fame. Certainly, he could argue that the painting is worth much more that the agreement & that since the buying price is so high, that it could in turn be sold for a considerable sum. What reasonable man wouldn't find that satisfactory?

11. EASTERN AIR V. GULF OIL: JET FUEL: OUPUT & REQUIREMENTS K’S

P & D had a mutually advantageous standing relationship in good faith for several decades where D supplied jet fuel to P based on the market price of crude oil. They used the Texas Sour Index as an indicator of the market price. During the 1970's energy crisis, OPEC raised the prices of oil during the embargo & the Texas Sour Index was no longer reflective of the real world price (it was much lower). D threatened to cut off fuel supply to P if P did not agree to pay a much higher price than the K required. D argued that the K was invalid because it (1) lacked mutuality of obligation however the court denied this position, stating that the K had a long standing history of mutual agreement & that OPEC - nationalization of crude oil in order to raise the foreign price of crude oil. During the Mid-East war & the Arab oil embargo, the prices shot bc the amount of oil coming into the US was drastically limited. This is where the case originated by causing the price of jet fuel to shoot up above the indicator that they set. Ct made the injunction permanent.

**Is a requirements K binding?**

Yes, Seller must provide a reasonable amount of the product (UCC) & buyer must act in good faith to uphold their end (unless extreme impracticability)

The ct ruled one the following issues:

1. "Requirements of K" - the ct stated that the K had a longstanding history of mutual agreement & was a binding & enforceable requirements K.

2. BOC: Ct determined that Ps performance under the K did not justify BOC bc they were acting in good faith & under the commercial practices required by the UCC

3. Commercial Impracticability: ruled that D wasn’t excused on the grounds of commercial impracticability. The fluctuating prices were taken into account under the terms of the K & where therefore foreseeable. (1) D assumed the risk by agreeing to the K & (2) disturbances in the price of oil were reasonably foreseeable PLUS reneging on the K would have disastrous consequences

**For what business reasons do parties sometimes need open-ended “requirements” or “outputs” K”?**

**What facts are useful to prove a party’s breach of a promise to buy its “requirements?” To sell its “outputs?”**

The cessation of production must be made in good faith (IE bankruptcy)

12. WOOD V. LUCY LADY DUFF: GOOD FAITH AGREEMENTS

P- Wood D-Lady Duff Gordon P & D entered a K where P agreed to place D's endorsements on the designs of others. P had exclusive right to place Ds designs on sale, & to market them. In return, D promised to give P 1/2 of all profits from the Ks he might make. Wood claims that Gordon breached the K when she placed her endorsements on other designs & withheld the profits. Gordon insists that the employment agreement lacks the elements of a K. TrCt denied motion for judgment bc promise on Woods' part wasn’t binding. The Court believes that the K was fairly implied & that the acceptance of the K on Wood's part should imply the assumption of its duties (that is to make best efforts to market her product. That is, the acceptance to be an exclusive marketing agency is implied that they will use best efforts to maximize profits ('what is good for the goose is good for the gander'). Reversed. This is an example of a good faith agreement, where a party should perform an implied promise. The implied promise constitutes consideration.-------->[subject to her approval] Promise to Place & market designs WOOD<-------- 1/2 all profits LADY GORDONMay reasonable efforts be implied based on Kual circumstances? Good faith agreements may have an implied promise to perform that is worthy of consideration.Is an implied promise to use best efforts sufficient for consideration? [YES] What was the defect in the K, & how did the court rescue the K from that defect? Why was the court determined to rescue the K? The defect in the K was that it only implied that Wood would use his best efforts to market the product--it didn't actually state that he would. The court rescued this K because being given the exclusive right to perform duties should imply that one would use their best efforts to fulfill them, especially when it is a K in a business relationship that is good for both parties, & that would seriously inhibit one side if the implied promise wasn’t performed.Could a party like Lucy, Lady Duff-Gordon ever prove a breach by an agent’s failure of best efforts? How? It would have been wise to include a description of what was expected, rather than leaving the K so vague. An actual breakdown of what 'best efforts' might entail could have put more obvious pressure on Wood to perform. Had it stated that a certain level of effort was required 'ie secure x number of Ks', she would have a stronger recourse if he failed to perform. Vague language in a K is not good for either party--since both parties may have their own opinion on what the K seeks from both sides. More definite terms need to be used, to secure & protect both sides & to avoid simple misunderstandings.Why would sophisticated business people make this K? Both want to make $, what's good for the goose is good for the gander

13. JENNINGS V. RADIO STATION: PRISON: UNILATERAL K’S

P-appellant Jennings (Prisoner) D Radio Station Jennings was a prisoner in the TX department of corrections who listed to KSCS radio & claims that they owe $25,000 for breaking the oral promise that they will play at least three songs in a row or pay the listener. Jennings claims he contacted the radio station on several occasions after they failed to play 3 songs in a row. KSCS refused to pay stating that Jennings did not have a cause of action & there was no K bc there was no consideration. Jennings suffered a detriment when he listened specifically to KSCS. He could have listened to any station, but chose this one due to the contest to win $25k. KSCS benefitted from the contest & Jennings listened (detriment). AppCt remanded after deciding Jennings had a cause of action.

Is there consideration in an unilateral oral K? Yes, consideration may be applicable in an unilateral oral K. How did the court avoid the Radio Station’s “no consideration” argument in Jennings? What kind of K did the court believe the parties had made? What kinds of Ks are involved in the “reward” cases? The TrCt agreed with the radio stations summary judgment that Jennings had no cause of action. According to Rst. 81, the fact that there was no promise 'bargained for' & that no return performance was needed doesn’t prevent his listening from being consideration. In the reward case, the K is oral & unilateral as well. Even though he wasn’t aware of the award at the time, he is still entitled to it because the capturing of the convict was sufficient consideration (see Rst 81 & 51)

14. LAKE LAND V. COLUMBER: NONCOMPETITION AGREEMENTS “fly on the wall approach”

P-appellant Lake Land D-Columber Lake Land claims Columber violated a non-competition agreement. The agreement stated Columber wouldn’t have a business within 50 miles of Akron for 3 years. Columber agreed the was an ex employee of Lake Lind & that he formed a corp. similar to Lake Lind, but claims lack of consideration His employment at Lake Lind for 23 years & he signed the agreement 4 years ago and has little memory of it. TrCt concluded the agreement lacked consideration & was unenforceable. Continued employment constitutes sufficient consideration for that employees promise to be bound my a non-competition agreement. Generally courts have looked upon these agreements with skepticism because they feel it puts the employee in a situation where they have no bargaining power & may be terminated if they don’t agree to sign, however more modern courts hold that an agreement accompanied by promotions, raises, or forbearance to terminate is executed constitutes consideration because the employee agrees to sign & the employer agrees not to terminate. Reversed & Remanded. AppCt questioned the issue: "Is subsequent employment alone sufficient consideration to support a covenant-not-to-compete agreement with an at-will employee entered into after employment has already begun?" The issue was later decided that yes, it is consideration because both parties had the legal right to terminate their relationship. The dissenting opinion stated that the employer relinquished nothing by forcing the agreement (may even be coercion)& that consideration is not present.Does consideration qualify in a non-competition agreement where the employee is employed at-will? (Is the employee's promise not to compete supported by consideration?) Yes, if the employer continues employing the employee in an at-will agreement where they could terminate the relationship without cause.

At-will employment is a doctrine of American law that defines an employment relationship in which either party can break the relationship with no liability (= to hire, = to leave) A practical issue with employment at will is whether either party can make a binding relationship or notRemember Strong v. Sheffield, p. 69. Could that transaction be viewed as a unilateral K? Would doing so change the outcome? Are there reasons, apart from abstract law, why the court did not go down that road? ??? Strong v. Sheffield appears to be a bilateral K bc there was a promise to pay the note, & a promise to hold on to it (plus the original K was a promise to pay/for a promise to sell the business). Viewed as a unilateral K, which it was, SvS showed that nothing was really promised (the check was eventually going to be cashed no matter what)??? Crypto Netics, Inc. was advised by its attorney that it needed to take steps to prevent employees from divulging confidential or trade secret info to outsiders, especially when employees leave employment with Crypto to go to work for other companies. Crypto asked all its employees to sign the \document: “In consideration for my continued employment with Crypto, I promise not to divulge any trade secrets or confidential information to any other person, including any other employer.” Melba signed the agreement. A week later, the company terminated her employment. Is there any basis in K law, for a lawsuit by against Crytpto Netics? If Brainard goes to work for Crypto’s chief competitor, would Crytpo have a BOC claim against Brainard? No, the K would lack circumstantial consideration. It is implied that "continued employment" is representative of more than a week.

15. LUCY v. ZEHMER: RESTAURANT BILL: BEHAVIOR=ASSENT, MTG OF THE MINDS

One evening in December 1952 after several drinks, Zehmer (D) wrote a K on a restaurant bill in which he agreed to sell his farm to Lucy (P) for $50,000. Zehmer later insisted that he had been intoxicated & thought the matter was a joke, not realizing that Lucy had been serious. Lucy claimed that he wasn’t intoxicated & believed that Zehmer was also sober. Zehmer testified that he was already “high as a Georgia pine” when he began drinking with Lucy. He claimed that he was merely bluffing to try to get Lucy to admit that he did not actually have $50,000. Lucy brought suit for specific performance when Zehmer refused to complete the transaction. TrCt ruled for Zehmer holding that Lucy had not established a right to specific performance.

**In determining whether a party has made a valid offer, how does the court determine whether the party had the intent to K?**

In determining whether a party has made a valid offer, the words & actions of the party are interpreted according to a reasonable person standard. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Ct looks to the objective, outward expression of a person & not to their secret & unexpressed subjective intent. The test is whether a reasonable person would conclude that the party’s words & actions constituted an offer. In this case Zehmer’s acts & words could be reasonably interpreted by Lucy as an offer to sell his farm. The parties discussed the matter for over forty minutes, addressed the issue of examination of title, & both Zehmer & his wife signed the agreement. Judgment for Zehmer reversed & remanded.

**Does the RST adopt a mainly subjective or objective view of mutual assent?**

Most of the time it’s objective. The one situation where it is purely subjective is when it’s apparent that both parties had different meanings, & both parties are at fault.

**If you were a judge instructing a jury, how would you explain the jury’s task in accordance with either the subjective or objective approach to determining the parties’ intent?**

Under the objective approach, if the K appeared on the outside to be 'real,' then it should stand as real bc unexpressed intentions shouldn't be a factor. Parties must be accountable for their actions.

**How might a court’s choice of an objective versus subjective view affect the relevance & admissibility of evidence?**

Can you think of a type of evidence that might be rendered irrelevant under an objective view? Under a purely objective approach, testimony is worthless. The evidence speaks for itself. The outward manifestations are what was seen, heard, & interpreted by the other party, not their inner monologue.

16. HAWKINS V. MCGEE II: HAIRY HAND: THERAPEUTIC PROMISES

The doctor appears to have made two promises in Magee. Why did the court enforce one but not the other?1. "how long will the boy be in the hospital..." The reply to this statement is an expression of opinion & even if the time was exceeded, no K’ual obligation on the doctors part.2. "I will guarantee..." These spoken words were taken as an inducement to perform the operation & since it was, it’s apparent that there was acceptance for the offer. K validated.

'therapeutic promise', doctors do all the time. Employers may during 'lay-off' periods. It was 'reasonably understood' that this was a binding promise. Under the circumstances, Hawkins believed the Dr. was making a binding promise.

17. MONT. CTY. HOSP. DIST. V. BROWN: INTENT TO BE BOUND

MCHD ------------------------> Promised not to fire w/out just causeBrown <------------------------- WorksTrCt Summary Judgment. Texas Supreme Court: No intent to be bound by promise. No K. We never find out whether there was cause or not. Summary judgment says they can fire w/out will bc they had no intent to be bound by promise

Pitching

- extolling the virtue of what you offer in a proposed exchange

- occurs in bargaining - normally occurs in commercial exchange

Problems with Pitching

1) "Puffing" what sales people do.

 2) Employers frequently make statements to employees that sound like a promise, but are not Binding if

1) Unequivocal expression of

2) definite intent to be bound not to discharge except in clearly specified circumstances

Policy:

1) Employers don’t routinely intent promises that limit their right to discipline

2) Compare fear of false claims against doctors - & legislative solution 3) Employees should know ambiguity4) Good Cause comes close to matter of opinion

**A Pitch, a policy, or a promise in this case?**

Not binding in this case bc it was such a general comment

**Doctors & employers often make statements that patients or employees might believe are promises. If they aren’t promises, what are they?**

A statement. It is possible to be a promise, but not a binding K. Viewed as enticements w/ no binding legality.

**In what way is Brown possibly inconsistent with the RST, Lucy & Hawkins?** 10 years of employment can be viewed as consideration for the agreement to work for MCHD. There was most certainly an offer of employment with the assurance that her status as an employee would not end without a solid reason. By accepting, relocating, & performing as an employee for 10 yrs, consideration was at the heart of her acceptance. Courts sometimes begin with general rules, & develop specialized rules for particular types of transactions, based on judicial values or attitudes about a transaction.

**If Brown is not entirely consistent with the general rule why did the court create a different, more specialized rule?** Certainly businesses need the ability to lay off employees in order to participate in commerce. If a company is in danger of going bankrupt, they need the ability to lower expenditures by laying off employees, so that they can continue to profit--otherwise this would have a drastic effect on commerce. Not terminating employment within one year is acceptable, but at some point, the company should no longer have that obligation to an employee. Certainly a reasonable person would not believe that a promise to continue employee a worker would last ten years...a few maybe, but at some point it becomes ridiculous.

*Note:* Not everything that sounds like a promise is legally enforceable as such. The problem of distinguishing enforceable promises from unenforceable promises will be a continuing theme this semester. You have only seen the tip of the iceberg. A negotiation of sale is another context in which there may be some confusion about a statement that looks like a promise. Salespeople like to “puff” the thing they are selling–inflating its character or worth to persuade the buyer it purchase the thing.

**At what point is praise or opinion a promise?** In Bayliner Marine Corp. Crow, 509 S.E.2d 499 (Va. 1999), a boat seller’s brochure described a sea-going fishing boat & stated that the boat “delivers the kind of performance you need to get to the prime offshore fishing grounds.” The buyer purchased the boat believing he would be able to reach the local prime offshore fishing grounds, which were 90 miles from the coast. However, the boat’s maximum speed proved to be only 17 miles an hour, meaning that a one-way journey to the fishing grounds required well over five hours. A two-way trip required nearly 11 hours of transit. **Did the boat seller breach a promise?**

18. RAFFLES V/ WICHELHAUS: COTTON SHIP: NO ASSENT/NO MTG OF MINDS=NO K

1864. Agreed between P & D that P would sell goods to P (125 bales of cotton) & guaranteed them to arrive ex Peerless from Bombay, & that the cotton would be taken from the platform (quay) & that D would pay P 17 1/4 d per pound within a limited amount of time. The goods did not arrive & P was then & there ready & willing to offer the goods to the merchant. BOC bc D refused to accept the goods or pay. Cotton wasn’t sailed on the named ship, but on another ship with the same name & same commute. The K was for the sale of cotton of a particular description. The words 'to arrive Ex Peerless" means that if vessel is lost on the voyage, the K is no more. It doesn’t appear there were goods on the other peerless. Claim that this is like getting wine from a different vineyard. It wasn’t fraud or misrepresentation, but there is latent ambiguity. Holding: No consensus, therefore no binding K. Judgment D

**If the parties in Raffles were mistaken about the date of delivery (Sept 10 vs. Sept 11) instead of the ship, would the outcome have been the same?**

Each case stands on its own with time. Some cases time is essential, & others it is not.

**If a seller & buyer agree that a package will be delivered by Federal Express by 10 a.m. the next day, but the package arrives by Airborne Express at 10 a.m. the next day, have the parties exhibited sufficient mutual assent to be bound (i.e., could the buyer return the goods because they were delivered by the wrong courier**)**?**

It doesn't make a lot of difference with this case----Cts enforce vague Ks bc - circs compelled a vague agreement. (Sometimes when an agreement is made quickly) - Long term Ks because the future is difficult to predict - Parties may be willing to risk conflict in the future over remote issues - May avoid issues that they don't want to deal with\*\*These can affect cts willingness to deal with the issues (?)

19. CHANNEL HOME CTRS V. GROSSMAN: PRELIMINARY AGREEMENTS=DUTY OF GOOD FAITH

Major home furnishing store that wants to lease some space. They negotiate for some space with Mr. Grossman. Channel Home agrees to seek agreement on details: preliminary agreement or an agreement in principle. They invest heavily in research & site preparation. Grossman talks secretly with Mr. Good Buys (Channel's rival). He signs a K with Mr. Good Buys. CH sues for breach of K & seeks. Remanded to TrCt. Whether a promise to negotiate in good faith is an enforceable K.? (An agreement to agree) R: Yes3 reasons the court said this may be an enforceable K:

1) Both parties intended this promise to be binding & it was made in good faith.

2) The promise was sufficiently specific (when, where, how much, etc)

3) Consideration existed (Space in the mall was held, construction, zoning, draft lease, loans were being secured).

The court said the TrCt will have to resolve two issues to conclude whether this was an enforceable K:

1) Is there sufficient evidence to support that the parties intended to be bound by the letter of intent?

2) Was there a time limit on the negotiations? If 30 days was agreed upon, this would not be a valid K bc 30 days had passed. But if no time limit were agreed upon, this would be an enforceable K if the time were considered a 'reasonable time'. However, there is question as to what constitutes a reasonable time & that would need to be resolved.Chapter 2: Creating Kual ObligationsFor there to be an enforceable K, both questions must be answered YES:Section 6: Pre-Kual Liability

**Do both parties intend to be bound?**

2 types of Preliminary Binding agreements:

1) Tribune I: BINDING- Fully binding preliminary agreement- Both parties agree on all points that require negotiation but agree to formalize in a more formal document- It is preliminary in form but fully binding.

2) Tribune II: NOT BINDING- Binding preliminary commitment- Parties agree on certain major terms, but leave others up for negotiation- Accept mutual commitment to negotiate together in good faith- Parties may abandon as long as they made a good faith effort Section 7: The Requirement of Definiteness

**Are the terms of the agreement sufficiently definite to be enforced?**

The requirement of definiteness serves two basic functions:

1) For a ct to determine whether a K has been broken, it must know what the terms of the K are

2) Ct must be able to determine what the promise was in order to calculate DAS (I'll pay 'fair share of profits"--> too vague)

20. OGLEBAY V. ARMCO: DEFINITENESS

Armco entered into a long-term K with Oglebay that required Oglebay to have adequate shipping capacity available & Armco to use that capacity for the transportation of iron ore on the Great Lakes. The pricing mechanism relied on the regular net K rates for the season by the leading ore shipper & further specified that if that rate did not exist, the parties would mutually agree on a rate, taking into account current charges by other shippers. Twenty-four years later, a serious downturn in the iron & steel industry found the parties in disagreement over the application of the pricing clause. The court holds that the trial court was correct to order the parties to negotiate a rate. Valid K bc there was a unique & lasting business arrangement, hey had an intent to be bound, & there is difficulty in ascertaining DAS.

Case raises 3 questions:

**Did the parties intend to be bound?**

Yes

 **If so, may the TrCt establish $6.25 as the rate for Armco to pay?**

Yes

3) **May the TrCt exercise jurisdiction & utilize a mediator?**

Yes

**----**

**What are some recent examples of Ks you made that might seem at first glance to be too “incomplete” or “indefinite” to be enforceable Ks?**

**How you describe the bargain in a way that would make it enforceable?Is Oglebay Norton another instance in which the court rescued a contact that, at first glance, appeared to be defective? Why might the court have felt it necessary to rescue this transaction?**

21. OWEN V. TUNISON: OFFER

In response to an inquiry about selling his property, owner wrote "it would not be possible for me to sell it unless I was to receive $16,000 cash." This is held not to be an offer to sell.

**If Tunison’s letter wasn’t an expression of intent to make an offer, what was it?**
It was a willingness to negotiate.

22. HARVEY V. FACEY: INDEFINITE TERMS

Harvey - Will you sell us Bumper Hall for lowest cash price--answer paid. Facey replied: Lowest price for Bumper Hall 900 poundsHarvey answered: We agree to buy Bumper Hall for 900 pounds. No confirmation by Harvey. Ct ruled that there was no acceptance of the offer. The Jamaican Ct said that the 'mere statement of the lowest price" that a vendor would sell is not a K to sell

23. FAIRMONT GLASS V. CRUNDEN-MARTIN:: DETAILED TERMS = OFFER

In response to a buyer's inquiry, seller wrote, "we quote you Mason fruit jars [stating prices & delivery terms] for immediate acceptance." Because of the detailed terms, the court finds this to be an offer

Extended Essay Crunden-Martin wrote to Fairmount: Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f. o. b. cars your place, as you prefer. State terms & cash discount. Fairmount replied: Replying to your favor of April 20, we quote you Mason fruit jars, complete, in one‑dozen boxes, delivered in East St. Louis, Ill.: Pints $4.50, quarts $5.00, half gallons $6.50, per gross, for immediate acceptance, & shipment not later than May 15. Crunden-Martin responded: Your letter twenty‑third received. Enter order ten carloads as per your quotation. Specifications mailed. But Fairmount disappointed: Impossible to book your order. Output all sold. The issue was whether this exchange made out a K or whether it was only negotiations toward a K that was never reached. The court holds there is a K. First, it should be obvious that the offer & acceptance of a K need not be in the same document. Indeed, either an offer or an acceptance may be found only by putting more than one communication together. For example, whether a letter with the single word "yes" constitutes & acceptance depends on what communications have come before. The first communication from Crunden-Martin is not an offer to buy but it has significance if it pours content into the reply from Fairmount. The statement "$340" is an offer if it is a response to "How much would you sell that mule to me for?". It is not an offer if it is in reply to "How much have you been offered for that mule?". If I post a notice on boards around town saying "Have 600 pounds of Creeping Red Fescue grass seed, 2 pound bags. $4/bag. Cash or MasterCard." Courts will hold that this is not a offer to sell. The product & price are specified, only the quantity to be purchased by a particular buyer is left to be determined. What keeps it from being an offer is not the words used, but the context. The public dissemination of the notice risks that I will have more "acceptances" than I have seed. So the rationale is my presumed intent in putting up the notice: I want to make sales, but I don’t want this to be an offer. So, how is Fairmount Glass different? Like the example, price is specified. Unlike the example, the quantity the buyer had in mind (not what the seller had on h&) is stated. If Fairmount made an offer in reply, its exposure would be limited. Also, the letter from Fairmount included the words "for immediate acceptance". This suggested both that the next communication from Crunden-Martin would complete the negotiations & implies that the seller has sufficient inventory on h& to fill the order. If Fairmount had wanted to protect itself, it could have put qualifying language in its letter, such as "this is conditioned on our having adequate inventory at the time of shipping."

24. LEFKOWITZ V. GREAT MINN. SURPLUS: ADVERTISEMENTS

A store advertised a black lapin stole for $1 to the first customer on Saturday. Lefkowitz, plaintiff, was first, but the store refused to sell the stole to him because the offer was intended for women only. The court finds the advertisement to be an offer because the price was set & the quantity limited. The court enforces the Ks. (This was the second time plaintiff had arrived first at this store, but was refused the sale.)

Why is an advertisement usually not an offer? Why was the advertisement in Lefkowitz, p.134, an offer? The general rule is that an advertisement is not an offer, but rather an invitation by the seller to make an offer to purchase. - Supply & demand is an issue- French law rules by stating 'first come, first serve'Extended Essay: On April 6, 1956, defendant store advertised in a city newspaper

Saturday 9 A.M. Sharp3 Br& New Fur Coats Worth to $100.00First Come First Served $1 Each

Morris Lefkowitz was the first in the store & up to the counter but defendant refused to sell the merchandise to him, stating that by a "house rule" the offer was intended for women only & sales would not be made to men.The next week, defendant store advertised again in the newspaper:

Saturday 9 A.M. 2 Br& New Pastel Mink 3‑Skin Scarf’sSelling for $89.50Out they go Saturday. Each . . . $1.001 Black Lapin Stole Beautiful, worth $139.50 . . . $1.00First Come First Served

Again Lefkowitz was first on the scene & again D refused to sell him the stole saying that π knew Dshouse rules. Ct holds the advertisements were offers & Lefkowitz accepted. The general rule is that a newspaper advertisement is not an offer but merely an invitation to negotiate. The court departs from that rule in this case because: the offer by the defendant of the sale of the Lapin fur was clear, definite, & explicit, & left nothing open for negotiation.

**Why should the general rule be that advertisements are not offers?**

The problem is multiple acceptances. You advertise your Rio Carbon MP3 player in the paper & give a price. Bob calls & you reach a deal. The phone rings again & after you say "hello", Mary says "I accept your newspaper offer to sell the Rio Carbon." You, of course, only wanted to sell the Rio Carbon once. A court could reach this result by implying a "first come, first served" term in the advertisement, or a "while quantities last". Probably it is easier to treat the advertisement as something other than an offer. If the rule were otherwise, would it mean fire, pestilence & famine? No, each ad would have language suggested by the newspaper, I would think, saying the ad wasn’t an offer to sell (like one of those documents in securities offerings). But, even better, the language saying that the ads are not offers could appear at the bottom of the newspaper page & apply to all ads. So, this is a default rule. & default rules can be altered by the parties to a particular deal. That is, in effect, what the court is holding in Lefkowitz. By framing the newspaper ad the way it did, the seller specified the means of acceptance & avoided the multiple acceptances problem. The opinion has its problems, however. As D argued, when Leflowitz came to the store the second Saturday, he knew that he wasn’t an intended offeree. If I announce an offer in class to sell my IPod for $20 but before class I tell you that you are not included in the offer, you cannot accept. The same is true if you know that I am intoxicated, or joking. Your actual knowledge prevents you from being able to accept. The court writes:

D contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. While an advertiser has the right at before acceptance to modify his offer, he doesn’t have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer.

This is just nonsense. It doesn't matter what the offer says if the person who would accept it has actual knowledge that he is not an offeree. & we are not talking about a modification of an existing offer. That might have been the case on the first Saturday sale but not the second.

**List the facts in Owen & Fairmont Glass that evidence an offer, or something short of an offer.** details (quotation of price, time period, payment). The true meaning of the correspondence is determined by reading it as a whole.

**Rewrite the alleged but failed offers in Owen, Harvey, to make each very clearly an offer.** Facey would have to reply: I will sell you Bumper Hall for 900 pounds. Please indicate your acceptance.

**Rewrite the offer in Fairmont Glass to make it very clearly not an offer.** We will consider....

25. DONOVAN V. RRL:: CAR SALES: MISTAKE OF FACT

Advertisement for Jaguar $25,995. P visited dealership, found exact car, said he accepted the offer. The advertisement was a mistake--the dealer ship failed to check the proof & the car was marked $12k lower than price. Ct confirmed it was a mistake in good faith. TrCt Ruled for D, dealership bc unilateral mistake of fact negated Kual intent. Ad was in good faith & not to deceive + Donovan was unaware of the mistake before it was disclosed to him. Donovan appealed. Rescission of K on grounds of unilateral mistake of fact. Judgment for DWas there mutual assent? Is an advertisement an offer? Some are, some aren't. AppCt says it was an offer. Ct held advertisement-satisfied reqs of statute of frauds

**Does mistake negate offer?**

1st RST-No 2nd RST- "growing willingness to allow avoidance of consequences" if grave mistake

**Are Reqs satisfied for mistake?** Reqs for mistake:

1) D made a mistake re: basic assumption of K

2) mistake has a material effect upon agreed ex of performances-adverse to D

3) D doesn’t bear the risk of the mistake4) effect of mistake is such that enforcement would be unconscionable.

Public Policy: Allowing auto dealers to avoid K's bc of carelessness would undermine protection of consumers

**In Donovan, did the court hold that no K formed, or that a K formed but the K was “voidable?” What difference might it make?**

A K was formed but it was voidable due to an erroneous mistake in an advertisement. Had no K been formed, the ct would not have to consider the requirements of mistake.

**What is the downside of granting the dealer relief in Donovan? Can the result be squared with the goal of preserving the other party’s legitimate expectation interest?**

The downside is public policy-- Allowing dealers to avoid K's bc of carelessness undermines the protection of consumers. No, no reasonable man can expect 100% accuracy in auto ads. The mistake had a serious material effect on the dealer, but not on the buyer. The buyer suffers no detriment either.

26. INT’L FILTER V. CONROW GIN: CONDITIONS ON ACCEPTANCE \*\*START OF BATTLE OF THE FORMS\*\*

International offered to sell Conroe a water purification system. The offer stated that there would be a K only when Conroe's assent was approved by an officer of International. Conroe sent a reply stating, "Accepted." An officer of International wrote "OK" on Conroe's reply, but did not notify Conroe of this fact. Conroe refused to perform. The court holds that the reply of "Accepted" was itself an offer & that the offer implicitly waived Conroe's right to be notified of International's acceptance.

**Who drafted the “offer” in International Filter? The offeror? Or the offeree? Can you describe a strategy this represents?**

Intl Filter (Waterman)--------------------------------->1 Steel Tank water softener & filter1230.00<--------------------------------------------------- Conroe GinIntl Filter (Waterman)🡪proposal

Conroe Gin🡪 Accepted

Intl Filter VP PN Engel 🡪OK

Conroe Gin 🡪 Acknowledgement, instructions, & Thank youConroe Gin--->Countermanded the order (revoked)Intl Filte r🡪 Denied, claimed under KIntl Filter 🡪Sued, BOC

**It is often said that offer & acceptance are manifestations of assent. How did the offeree in International Filter manifest its assent, & to whom did it manifest its assent?**

Signed notion "accepted" made on paper

**Did the offeror in International Filter know when it was bound by a K?**

Yes, International Filter alleged that the terms acceptance & the communication bound them by K.

**If you have grasped questions 2 & 3, answer this question: How does the RST address this problem?**

 The RST gives specific terms for acceptance. See Rst 30, 56, 58, 60

27. WHITE V. CORLIES & TIFT: COMMUNICATING ACCEPTANCE

Defendant wrote to plaintiff, "Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once." Plaintiff did not communicate with defendant but bought lumber & began to work on it. The court holds that there was no acceptance because plaintiff made no attempt to communicate his acceptance to defendant & the lumber could have been purchased & the work on it begun for other customers.

September 22: Signals of Mutual Assent: The Acceptance of Unilateral v. Bilateral Ks a. Read RST §§ 32, 50, 51, 52, 53, 54, 62, b. **Be prepared to discuss the following:If performance can be “acceptance,” does such an acceptance result in a unilateral K or a bilateral K?**

unilateral. If the performance is optional, acceptance would result in a unilateral K.

EX: $1K for promise to deliver car, paid when delivery occurs

EX: I'll pay you $20 to mow my lawn. (unilateral)If the performance is simply "a promise for a promise", then it may be bilateral.

EX: $1K promise to pay for promise of car.

EX: I agree to mow your lawn, & you agree to pay me $20 (bilateral)Communication of Acceptance is not necessary in a unilateral K. The performance acts as the acceptance.

**What are the facts or circumstances most likely to be important in determining whether acceptance by performance is appropriate, & whether it results in bilateral K or a unilateral K?**

1) If an offer invites a performance, the performance acts as acceptance. (must be full performance)

2) If you perform, but notify offeror of non-agreement within a reasonable time, there is no acceptance

3) If there is no intention to accept, & then there is performance, there is no acceptanceAn employer announces a new policy in which employees will be required to submit any disputes about their employment to arbitration, & they will waive their right to file lawsuit. Must the employer obtain the employees’ written acceptance of this policy in order for it to be binding on them? No, because by continuing their employment, the employee shows acceptance of the new policy. OR by submitting their disputes, the employee shows acceptance of the policy.A city posts a reward for the capture of Notorious Thief. To win the reward, a person must deliver Thief to the city jail. Charlotte Bounty hunter spots Thief & captures him but he escapes from her just before she arrives at the city jail.

**Can the city sue Charlotte for breaching her K with the city?**

No, because this was a unilateral K. Unilateral K's are a type of K where one party promises a second party something if the 2nd party will act (or refrain from acting). The second party is generally not obligated to perform because they have not made a promise. Rewards, insurance policies are unilateral K's

28. ALLIED STEEL V. FORD MOTORS: COMMUNICATING ACCEPTANCE

The offer read, "This purchase order agreement is not binding until accepted. Acceptance should be executed on acknowledgment copy which should be returned to buyer." The court holds that the stipulated method of acceptance was a suggestion only & did not preclude acceptance in another manner, here by the rendering of part performance without objection by the other party.If you perform the work, you are responsible for DAS. This is an:Indemnity agreement - Where a party undertakes contingent liability for a loss threatening another. This is common.

29. CORINTHIAN PHARM V. LEDERLE LABS: ACCOMODATION DOCTRINE

Rule: When an accommodation is made, it becomes a counter-offer. Counter-offer accepted by accepting accomodation
Buyer attempted to order a large quantity of vaccine at a time when it knew seller was in the process of raising the price of the vaccine substantially. The communications between the parties did not constitute an offer & acceptance. After the communications, the seller made a partial shipment of vaccine: 1000 vials had been ordered, but the seller shipped only 50. The seller wrote buyer that the remaining balance of the order would be priced at the higher price. The court holds that the shipment was an "accommodation" under section 2-206(b) of the UCC. The shipment then became a counter-offer that could be accepted under ordinary K principles.Ordered 1000 vials day before price increase order placed by calling in phone order. Received tracking # from telephone computerCorinthian also sent 2 written confirmations for the 64$ price. June 3: Lederles sent an invoice for 50 vials at the regular $64 price. They also sent a letter stating that their standards & terms under the normal policy would be to price at time of shipment. They made an exception for the 50 vials, but invoiced $171 for a June 16th shipment. Also gave option to cancel. Corinthian sues for performance of 950 vials. Lederle defends no K, & even if K, it was governed by their policy. The 50 vials were merely an accommodation.

In Corinthian Pharmaceutical the court refers to UCC 2-206. How does this codification of rules of acceptance change the common law rules? Why do you suppose the drafters of that UCC wanted to change the rule?UCC: (1) offer to make K is an invitation for acceptance in any manner/medium(2) An order to buy invites acceptance by prompt promise to ship of prompt shipment of conforming goods. Non-conforming goods w/ notice of accommodation-->no acceptanceRST69. Is “silence” acceptance of an offer? EX? Read UCC §§2-204. Does this change the common law of K formation?RST: Silence is not an acceptance unless prior arrangements were made. UCC 2-204: (1) K for goods may be made in any manner to show agreement.(2) Even if moment of formation is undermined, K is still valid(3) still k if intended

30. DICKINSON V. DODDS: REVOKING OFFERS

D-Dodds P-Dickinson Dodds made an offer to sell property to Dickinson & said the offer would be held open until 9:00 AM on Friday. On Thursday, Dickinson was informed that Dodds had been offering or agreeing to sell the property to Allan. Dickinson tried to accept by leaving an acceptance with the mother-in-law of Dodds & also by handing Dodds an acceptance at a railway station. The court first holds that Dodds wasn’t legally obligated to leave the offer open until Friday morning. He had so promised in his offer, but there was no consideration for that promise, Dickinson having paid nothing for it. The court construes Dickinson's testimony as admitting that at the time he delivered an acceptance to the mother-in-law, & therefore at the railway station as well, he knew "that Dodds was no longer minded to sell to him, & that he was selling or sold to some one else. . . ."

The case is used by casebook authors to show several rules of K law:

* An offer to K can be withdrawn by the offeror any time before it is accepted if the offeror gives notice to the offeree of the withdrawal. It cannot be withdrawn if the promisee has given something valuable in exchange for a promise to keep it open.
* An acceptance is not effective until the acceptance is communicated to the offeror.
* An acceptance is not effective if, at the time it is communicated to the offeror, the offeree knows that it is no longer open.

You can see the kinds of issues raised by these rules. For example, what precisely did Dickinson know about the dickering that Dodds was doing with Allan. If he was lining up an alternative buyer, this is not necessarily inconsistent with leaving the offer to Dickinson on the table (first to accept wins). Perhaps Dobbs was looking for a buyer (perhaps at less money) if Dickinson did not accept. Or there is the scenario that was attractive to the court that Dodds was selling to someone else. When Allan & Dickinson went to the railway station, on the court's view of things, it was too late to accept. But suppose Dodds had said, "Great, we have a deal." Would there have been a K (yes). Who was the offeror (Dickinson-his words "I accept" act as an offer). Now suppose that court construed the facts as not giving Dickinson notice that the offer was off the table. In that event, whether there is a K depends on who speaks first when the parties meet at the station, Dickinson's "I accept" or Dodds' "Offer is revoked." Do you find it odd that the existence of a K will depend on the accident of who is the first to speak? Well, perhaps; but we do need rules & a rule that is easy to apply will look odd in the occasional case

Considering there is no hard rule for the number of days an offer might remain “open,” what factors might determine when any particular offer lapses?- Lapse occurs after reasonable time, unless specified in offer- occurs at death/incapacitation of offeror- rapid price fluctuations shorten time- Face to face offers close when communication ends. An option is clearly advantageous to a buyer who wants time to decide without worrying that the offer will be snatched away. But how much should he be required to pay for it? Power of revocation is not limited by deposit of $/property or performance.Is it advantageous to the offeror to grant an option? Balances the protection. Becomes more advantageous to the promisee because the promisor cannot revoke the offer once performance begins. Generally, it is the opposite case. The promisor has maximum protection. ----------------------------------------------------Is consideration really required to make an option binding? How are the RST & UCC different in answering this question?RST: binding if 1) in writing, 2) has consideration, & 3) proposes & exchange on fair terms within a reasonable time. Also, forbearance (evidence is admissible (rst 218))UCC: No consideration of if 1) in writing 2) for a reasonable time (-3 months)Are RST Sections 87 & 218 consistent?87 require 1) writing, 2) consideration & 3) fair terms within reasonable time. 218 say that evidence is admissible to prove whether there is consideration. If the evidence shows that there is consideration, there may be an option K as long as the other two requirements are met.

1464-EIGHT V. JOPPICH (!!!!) \*\*MADE A POINT TO REVIEW THIS ONE\*\*

**What is the best approach? The majority approach, the approach of the concurring opinion, or the approach of courts that reject Section 87?**

 The court reasoned that nominal consideration is valid, even if not paid. It merely creates an obligation to pay. The court held that RST 87 should be incorporated into TX common-law (rst on option Ks requiring the 3 requirements: 1) writing 2) consideration (nominal ok) 3 reasonable time. Minority Approach: section 87 of the RST

Majority approach: nominal consideration is unenforceable Read RST § 45. Be prepared to cite an example of a situation where § 45 might apply. 45- Option K created by part performance or payment: doesn't invite acceptance. Performance is condition on completion. !!!!!!!!!I promise to pay you $25 if you would like to file all my papers & I also promise leave this offer open indefinitely. You begin filing the papers & I cannot revoke the K once you have begun the performance. ???

**What kind of offer did the seller make in Ragosta? A simple offer requiring a statement of acceptance? A simple offer requiring performance or tender? A simple offer requiring tender at a particular time or place? An option?**

The offer required tender (88K) at a particular place (the Randolph National Bank) at a particular time (On 4/17/72). This wasn’t an option K, because the K was still revocable on the offeror's part. The place, time, & manner must be complied with in order to create a K per RST 60.Termination of the Power of Acceptance: Death & Rejection - Power of acceptance under option K is not terminated by rejection, counter-offer, or revocation, or death. Then explains other forms of termination.- Conditional acceptance is a counter-offer, not acceptance- Acceptance not invalidated by REQUEST to change of terms if merely suggested.

**Does a counteroffer constitute an “acceptance?”** A counteroffer acts like a rejection. In Battle of the Forms, we see that the terms may actually differ when acceptance occurs, however as long of those terms don't materially alter the original bargain, they are acceptable. This though, is different from a rejection. Is it possible to make a counteroffer that will lead to a K based strictly on YOUR terms? How? The last person to send the acceptance, or offer, will have the K terms based on their terms. So, if you accept, but send back a form that has some minor changes & terms, those will be applicable to the K.

32. RAGOSTA V. WILDER: Promissory Estoppel \*\*PE is heavily tested\*\*

Owner of a business offered to sell it to buyer if buyer appeared at a bank with a specified sum of money. Owner promised to hold the offer open for a period of time. After the buyer had secured financing, owner revoked his offer. The court holds that only buyer's performance would be an acceptance, that the revocation terminates the power of acceptance & that the promise to leave the offer open lacks consideration. CT remands for determination of what remedy should be applied under a promissory estoppel theory.

33. DORTON V. COLLINS: ARBITRATION CLAUSE

In a UCC § 2-207 battle of the forms case, the words "acceptance . . . subject to all of the terms on the face & the reverse side hereof" were held not to make out an "acceptance expressly made conditional on assent to the additional or different terms" (UCC § 2-207(1)). The issue of whether the addition of an arbitration clause is a material alteration is remanded as a factual question.

**Is there a difference between an “acceptance” & a “confirmation?”When did a K form? Over the phone, or at some later point?**

**Does the affect the way you analyze a case under Section 2-207?**

**Is there a way an “offeror” can be sure that if any K forms, it will be based on his terms?**

**Is there a way an “offeree” can be sure that if any K forms, it will be based on his terms?**

**Suppose after buying an MP3 player at Best Buy, you send Best Buy & the manufacturer 14a confirmation stating you purchased the product & will require a 1-year extension of the warranty. What result?**

34. STEPSAVER V. WYSE TECH: SHRINKWRAP TERMS

When software proved defective, the seller relied on a limitation of warranty printed on the outside of the box containing the software. The court holds that under UCC § 207(1), the language of the writing on the box is not an expressly conditional acceptance. Therefore, the warranty limitation was an additional term that materially altered the agreement & under § 2-207(2)(b), doesn’t become part of the agreement.
When did the K form in Step-Saver? Upon acceptance of the shipment, performance= KIn Step-Saver, were the proposed terms in question contained in an “acceptance,” or in a “confirmation?” Does it matter?- Under Common-law -->this would be considered a counter-offer based upon the Last Shot Principle- Under the UCC, which is how the court viewed it, the terms in question would be OK if they don't materially alter the K. However, the court reasons that they do materially alter the K. The court states that the box-top license should have been treated as a written confirmation w/ additional terms. Since the warranty materially alters the agreement, it should not be deemed a part of the agreement.Post-agreement terms (3 common scenarios) 1) Box tops 2) encoded on disks 3) enclosed in box containing goods

EXAM TIPS

**Knee-Jerk Responses**

 - Employment 🡪 Illusory K, Lack of Consideration

 - Sale of Goods, both merchants 🡪 UCC 2-207

 - Oil, Gas, Crops, Creative Works🡪 Output, Requirement K's

 - Merchant/Dealer 🡪 UCC

 - 'Bad Guy' breach 🡪 Disgorgement, Punitive Problems, Lack of Culpability

 - Rewards 🡪 Acceptance Issues

 - Dr's🡪 Guarantee, exception, practicality in determining DAS

 - Family 🡪 Gifts, Natural objects of bounty

 - Drugs, prostitutes, smuggling 🡪 Illegal K's

 - "If it pleases me", "to my satisfaction" 🡪 good/bad faith rejection, illusory promise/consideration

 - Can cancel at any time 🡪 Unilateral or bilateral? Illusory promises

 - Giving up/Refraining 🡪 forbearance/detriment of consideration

 - Price fixing, public safety/values, moral issues 🡪 public policy, judicial values to support non-enforcement

 - Pre-printed forms 🡪 BOF, material additional/diff. terms, UCC, Stop-gap

**Exam Checklist for Mutual Assent**

- Did parties manifest assent to be bound?

 - Did parties assent to the same set of terms?

 - Are terms sufficiently complete & clear?

 - Of other party said yes, would both reasonably understand there to be a K?

**Exam Checklist for Consideration**

 1) Was the promise and the consideration traded in a process of BFX?

 - The form of the transaction, not the motive of the promisor is critical

**Exam Checklist for PE**

1) Is there a promise?

 2) Is there consideration?

 3) If no, Does justice require that we enforce the promise?

 - Never say the Ct. will use PE

**Exam Checklist for Breach**

*1st determine if there is a K*

A) Is there a K (Skip if its says there was)

 1) Was there an offer?

 - Does it meet the req's

 - Was there intent to be bound in a legal sense? (Gift, Family 🡪 No)

 - revocable?

 - Definite Terms?

 - Expressly Conditional?

 2) Was there acceptance?

 - In the manner specified?

 - Counter-offer?

 - Request for favor or Alter material terms?

 - Are they merchants?

 - Battle of the Forms?

 - Silence as Acceptance?

 3) Was there consideration?

 - Adequate?

 - Illusory?

 - PE? (Never say they will absolutely use it!)

B) Is there a defense to the creation of the K?

 - UCC or Common-Law?

 - Duress?

 - Coercion?

 - Infancy making it void/voidable?

C) Breach (No K=No breach)

 1)Was there actually a breach?

 - Accommodation?

 - Revocation?

 2)Is there a defense to the breach?

 - Illegality?

 - Mutual Mistake?

D) Determine whether UCC or Common-Law prevails!

**Exam Checklist for Illusory Promise**

- Is there a good reason for Ct. to find that promise is more than it seems?

 - Implied duty of "best effort"

**Exam Checklist for BOF** (stop at any point if it doesn't fit)

1) Are there new terms?

 2) Sale of Goods?

 3) UCC or CommonLaw? (See Rule of New Terms below)

 4) Are both parties merchants?

 1) Was it expressly conditional? (Was it clear they wouldn't continue unless new terms incorporated?)

 2) If No, did they accept?

 - Not a material change: Silence as acceptance OK

 - Material change: Burden to prove that silence is acceptance

 - Show through prior dealings

 - Burden to prove EX: Always accept by silence

 4) Do the new terms become part of the agreement?

 - Automatically becomes a part of the K unless:

 - Materially alters **or**

 - Offeror objects w/in reasonable time.

**Exam Checklist for SOF**

1) Is the transaction in an applicable category?

 - Sale of goods over $500?

 2) Part or full performance?

 *Test:* DidD take or permit an act that was:

 1) Part Performance **or**

 2) Unequivocal referable to the alleged K

 *Test for Part Performance of Real Estate:* Was there...

1) Consideration ($ or services) **or**

 2) Possession **or**

 3) Improvements

 3) Is it unequivocally referable to the K? (If yes, you can't defend w/ SoF, but you can claim there was never a K)

 - If you have delivered the goods, and the other party accepted

 - If you've made improvements

 - If you have payment

**Exam Checklist for Arbitration Laws**

Arbitrator's are believed to be more conservative in awarding damages. (learn more about this !)

 1) Were they of age?

 2) Does continuing employment affirm or ratify the K?

 General trend is no bc

 - When you continue your work, you are not necessarily consciously remembering and ratifying the arbitration clause

**General Tips**

 - Looking for ability to spot where the clash/issues are **!!!**

 - If there is a writing that is signed (no need to discuss SOF issues bc it's already established)

 - Always consider if UCC or CommonLaw prevails

 - Anticipate both sides of the argument

 - Make all arguments, not just the best

 - If it states there's a K, don't question it, don't discuss whether it is or not.

 - Bring earplugs

 - Bring your exam #

 - Half essay (50 points), half MC (50 mc)

 - MC Extremely Objective Yes/No

 - Essay vague--> No particular answer

 - Evaluate strengths & weaknesses

 - Use the facts & account for all the facts (each is there for a reason)

 - 3 Hours long

 - Always start w/ expectation interest

 - Reliance is not necessary for K to be binding

 - Acceptance by performance yields unilateral, sometimes bilateral K

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**Inconsistent Promises**

All 3 involve Misfeasance – Making a promise but doing it inconsistently & at detriment to promisor.

 *1) Mistake*

 *2) Covenant*

- Enforced promises under seal

 - Once promise was sealed it didn't matter whether promisor received anything, or changed position.

 - UCC overturned.

 *3) Assumpsit*

 - Grew out of cases where promisor sought to recover DAS for injury to person/property

 - Based on consensual undertaking

 - EX: If you agree to build a house but it is a lemon

**Other Definitions**

 *Forbearance* - Voluntarily Abstaining

 *Good Faith between Merchants* - UCC, honesty & observance of reasonable commercial standards of fair dealing

 *Extreme Impracticability* - Performance is not feasible from a commercial viewpoint & may be excused as if impossible.  Cost increase may factor into fixed-price K's (place under requirements Ks)

 *Requirements K* - Seller will supply as much as buyer wants

 *Output K's* - Buyer will buy all goods seller produces

 *Void* - Cannot be enforced even if desired

 *Voidable* - Enforceable unless party w/ power declares not to

 *Disaffirm* - Declaring the K unenforceable

 *Boilerplate* - K language hat is not dickered, but is borrowed from another standardized K

 *Express* - A condition that is found in the K

 *Blue Pencil Rule* - A covenant not to compete that is unreasonable in scope or duration will be modified & enforced if:

 - A grammatically meaningful restriction remains after the words making the covenant unreasonable are crossed out

 - EX: Texas cannot be blue-penciled.  Harris, Galveston, etc can be

 *Anticipatory Repudiation* - An express or implied announcement that promisor won't perform their promise.

 - Prior to performance

 - EX: I know we agreed to sell the car, but I sold it to Jim instead.

 *Ratification* - Waiver of right to disaffirm

 - Usually occurs after the disability ends

 - May be express or implied from conduct

**Open-Price Agreement**

 *Definition* (UCC, RST)

 - Reasonable price at delivery **or**

- Price to be decided by one party in good faith

 *General*

- Don't need to agree on price

 - May still be a binding K

 *Common in*

- Long term K

 - Risk of Inflation

 - Open-ended services

**Pre-contractual Liability: Remedies for exceptional reliance**

- Practical solutions for cost of seeking K:

 - Option K

 - Conditional bilateral K

 - Option based on part performance of unilateral K

 - A2A

 - Option created by exceptional reliance on offer inviting bilateral K

 - Promise that offer & K will be forthcoming might induce exceptional reliance

 - Undroit - Adopts concept of bad faith bargaining

 - Channel Homes - A2A

Newsweek: Sodomy is anything that isn't ten toes up and ten toes down

Problems

Practice Problems

What is the goal of awarding damages for a Ps loss of his or her expectation interest.

A. to force the D to disgorge the value of any gain it achieved by breaching the contract

B to reimburse the P for any expenses or losses incurred because it relied on the contract

C to give the P the value of a broken promise and to compensate for certain losses caused by the breach

D To require the D to pay for the value of any benefit the P provided to the D

The Answer is C.  It is the Expectation Interest in different words.

D is wrong bc it is the Restitution Interest

Buyer contracted with the seller to purchase land for $100k, the parties promising to exchange money for the deed in one month.  Two weeks later, Buyer repudiated the contrack when he learned that the State had cancelled plans to build a road through the land.  By the date scheduled for the closing, the land had declined in value to 30k.  What are the Sellers damages?

a. 100k

b. 70k

c. 30k

d. 0k

The Answer is B

Value of promise (100) - cost avoided (land, 30k) = 70k

What is the value of a promise to pay $100k?  100K

Owner made a K with painter to paint house purple.  painter painted the house blue and owner for 6k and sued for boc.  appraiser testified that the house is worth $10 more due to painter's work, but it would have been worth 15k less if painted as owner wanted it.  What are owners damages?

a 0

b -10000

c. 6000

d. the cost of repainting the house

The answer is D because it may or may not cost the same amount

9.20.2010

Problem

Solving the problem:: The questions you need to consider:

 1) Does it have a basic assumption of the K terms?

 2) Does it have a material effect on the exchange?

 3) Was the risk allocated by agreed rules for the parties communications?

 4) What was the degree of the sender's negligence?

 5) Would enforcement be unconscionable?

 *What we mean by Unconscionable?*  Would it shock the conscious of the court or the jury to abide by the rules of the K?

Practice Problem

9.27.2010

Problem #1

Contract.  Assent was manifested by shipping the goods.

Problem #2

This is not acceptance bc there was no performance.  Do not get preparing to perform confused with actually performing.

Problem#3

Ford may make the argument that there was not mutual assent on their part.  Contracts II will go into interference as BOC.

Problem #4

Bilateral Contract bc the employee is promising something back.  Arguably, showing up for work manifests your assent of the terms the employer is imposing on you.  The employer could clarify by stating, "by showing up to work, you are accepting this offer."  This works in Texas, but not in all states.  At-will employees are being given employment, and by showing up to work they manifest their assent to the employer's policies.

Problem #5

Unilateral contract.  The bounty-hunter was under no obligation to perform.  Yes, the bounty-hunter accepted, but we don't necessarily have a contract.  So the question is, what happens when you accept a unilateral contract and fail?  In this case, the city cannot sue for breach bc the bounty-hunter did not make a promise.

DIsregard 2003 revisions to the UCC.  All the state legislatures have disregarded them.

Only know current versions of Article 2.  Applies to sellers who are merchants and non-merchants.

Was K between Uncle.... No

What about the K in Allied Steel?  Construction is always difficult.  He said it was too difficult to go into.

Was Pete Casso's...mixed

Someone makes a K with...mixed, land is realty, not goods, but when you sell farmland, it comes with stuff that could be goods.

Problem#6

No

Lapse Problems

A's offer has deadline... March1

A's offer states...no contract, not in hand

A's offer dates...lapse would probably deem this not a K since it's not a reasonable amount of time

Suppose... Yes, the bottom line is mutual assent....

offer dates 9/30/09...Yes, the contract formed upon acceptance when it was mailed. delay does not undo the K

**October 6**

Problem#1

 - We ask you to please delay delivery: Does not violate the mirror-image rule because it is merely a request

 - If March 30 is unacceptable, you can make a counter-offer.  But the counter-offer may not be accepted which could mean no contract.  So, you would only want to reject if the date is so important that you would breach the contract if it was not delivered on your requested date.

Problems 1 and 2 under Battle of the Forms

Problem#1

Under Common-Law, acknowledgement of order does not make a K

Under 2-207 Sub-part 1: Creates a presumption in favor of acceptance.  If it is not acceptance, you as the offeree must be able to point to language that demonstrates it's not acceptance, but a counter-offer

Problem#2

Now it is express.  Manifestation will be by signed and returned agreement.

Problems 1 and 2 Proposal Effective or Ineffective?

Problem#1

The choice of forum clause may or may not be important.  If both parties are in TX, then it is probably not important and may even be beneficial to both parties.

They are just proposals.

If this were an exam question, just say "it looks like it may be something that materially alters, or maybe not, depending on the location/situation of parties.

Ask yourself: 1) does the change materially alter it? 2) does it expressly limit acceptance to the terms? 3) has objection been given w/in reasonable time?

Problem#2

Problem 11/3/2010

: D has asserted the SoF: The Ct's are hopelessly divided.  If the client is asked about the promise and admits that there was a promise under the old view, you would need the SoF to protect your case, otherwise it would fail.

\*\*\*\* LANGDELL NOTES \*\*\*\*

  - Good Essay: Not a single answer.  Look at all scenarios: "We would use expectation interest bc, but we wouldn't use reliance bc..."

  - Cali: Exams, exercises. Carlson doesn't have stuff there.

  - Lexis: Study aids, and the contracts study aid is excellent.

  - [www.masteringcontracts.com](http://www.masteringcontracts.com)

  - Outlines: Phi Delta Phi, Law Review, SBA, Honors

  - jennifer.mechalik@stcl.edu or jennifer@weissereng.com

  - Stanley: Streaming Videos under 'Information Technology'

  - <http://www.stcl.edu/faculty/richard_carlson.htm>

  Specific Performance (Injunctions either positive or negative)

  UCC (governs goods) (Contract to do vs contract to buy (UCC)

  Unilateral vs Bilateral...need to know very well

  Illusory Contracts

  What was the lesson in the nose job case?

  What is a bargained for Exchange? (the magical term "meeting of the minds")

  Illusory Promise (promises that are not enforceable)

  Efficient Breach (policy arguments, why it is bad to breach)

  Measures of Damages \*has a sample outline

For there to be an enforceable contract, both questions must be answered YES:

**QUESTION#1:**

Do both parties intend to be bound?

Two types of Preliminary Binding agreements:

1) Tribune I: BINDING

- fully binding preliminary agreement

- both parties agree on all points that require negotiation but agree to formalize in a more formal document

- It is preliminary in form but fully binding.

2) Tribune II: NOT BINDING

- binding preliminary commitment

- parties agree on certain major terms, but leave others up for negotiation

- Accept mutual commitment to negotiate together in good faith

- Parties may abandon as long as they made a good faith effort

**QUESTION#2:**

Are the terms of the agreement sufficiently definite to be enforced?

The requirement of definiteness serves two basic functions:

1) For a ct to determine whether a K has been broken, it must know what the terms of the K are

2) Ct must be able to determine what the promise was in order to calculate damages (I'll pay 'fair share of profits"--> too vague)

\_\_\_\_\_\_\_\_\_\_

Bait and Switch Laws - Get you in the door, then change terms

 If Violated:   Degrees of Culpabilty:   simple negligence-->gross negligence-->willfull-->intentional

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**LANGDELL POWERPOINTS**

**Tips for success in Prof. Carlson’s class**

DO answer the questions on the syllabus! \*\*\*You may experience some déjà vu during the exam\*\*\*

Prof. Carlson specifically said to remind you that good essay questions do NOT have a single simple answer. A good answer discusses ALL possibilities, states the rules, and then uses policy, values, and judicial perspectives to argue!

**Gifts to law students from the court**

If the word “test” appears in the case, as in “the test for determining whether the consideration is adequate is...”,KNOW THIS TEST**!!!**!!!!!

If you see the word “element”, as in “the elements of a contracts are offer, acceptance, and consideration”, KNOW THESE ELEMENTS**!!!**! Elements must ALL be met.

If you see the word “factors”, KNOW these factors BUT be aware that NOT ALL FACTORS must be met---and there can be OTHER factors not listed in this particular case.

\*He wants you to develop your advocacy skills

**Reference materials**

🡪CALI exercises log into STANLEY, click the Library tab, click “CALI”...or just go to [www.CALI.org](http://www.CALI.org)

🡪Lexis study aids <http://www.lexisnexis.com/lawschool/study/outlines/html/>

contracts/index\_Full.asp)

**Am I on track??? Suggested Review Terms**

Assignment

Bilateral contract

Consequential damages

Consideration modern definition

Consideration pre-modern definition

Constructive condition

Detriment

Efficient breach

Gratuitous promise

Output contract

Past consideration

Peppercorn theory

Promissory estoppel,

elements of Promissory estoppel,

generally Punitive damages

**Am I on track??? Suggested questions to ask yourself**

Can you name a few different ways in which you could provide consideration for a contract? •

Can you think of an example of an illusory promise? •

What was the “lesson” in the nose job case? •

What IS a bargained-for exchange? •

Can you think of an example of a bilateral contract?

How is that different from a unilateral contract? •

Can you think of an example of a promise that wouldn’t be enforceable? •

What are some policy arguments FOR an efficient breach?

Can you have punitive damages? •

What are some measures of damages? Can you think of a scenario that would be an example of each type?