

MUTUAL ASSENT

1. Objective theory of K formation

- a. Meeting of the minds
- b. Outward manifestation of parties determines intent regardless of what either party secretly intended
- c. Objective reasonable person standard
- d. Two components
 - i. Reasonable person in the position of promisee understands promisor's intent to be bound
 - ii. Promisee actually believed promisor
- e. Lucy v. Zehmer
 - i. Based on Δ 's conduct, π took offer to be serious
 - ii. Reasonable person would have believed such
 1. Hence, serious offer
- f. Leonard v. Pepsico
 - i. **ADVERTISEMENTS ARE NOT OFFERS**
 - ii. Reasonable person would not believe that the offer for a Harrier jet was a serious one
- g. Gleason v. Freeman
 - i. Ebay's real-estate auctions are auction style ads, non-binding
 1. Only invited bidders to make further offers
 - ii. Court looks to circumstantial evidence such as conduct when intent is in doubt
 1. Δ added terms to scare non-serious bidders
 2. π kept trying to negotiate terms after paying deposit
 3. Suggests lack of intent, no K

OFFER

1. Generally

- a. Restatement § 24: Manifestation of willingness to enter into a bargain, assent to bargain invited and will conclude such bargain
- b. Loneragan v. Scolnick
 - i. If promisee knows or has reason to know that promisor does not intend it as an expression of fixed purpose until he has given further expression of assent, he has not made an offer
 - ii. Form letter not an offer but an invitation to make one
 - iii. Price quotes usually not offers
- c. Maryland Supreme v. Blake
 - i. Whether an offer was made depends on intention of parties and circumstances
 - ii. Offer would contain information such as quality and quantity of product to be supplied, number and date of deliveries, terms of payment
 - iii. "guaranteed to hold throughout job" measure of quantity for job, thus it was an offer
- d. Sateriale v. RJR
 - i. C-note program invitation to enter unilateral K
 - ii. Δ controlled supply and risk of unlimited liability

- iii. Redemption for rewards to induce buyers creates unilateral K
 - 1. Unilateral K – one party pays the other for its performance

DESTROYING OFFERS

- 1. **Rejection**
 - a. Offeree says no, offer is dead
 - b. Express rejection
 - c. Counteroffer is a rejection
- 2. **Revocation**
 - a. Offeror pulls offer, offer is dead
 - b. Direct revocation
 - c. Dickinson v. Dodds
 - i. If promisee hears from third party that promisor does not intend to go through with offer, it is adequate as revocation
 - ii. Indirect revocation
- 3. **Lapse**
 - a. Offer terminates due to inaction
 - b. Minnesota Linseed Oil v. Collier
 - i. Offer was only good for **reasonable amount of time**
 - 1. Reasonable amount of time determined from totality of the circumstances
 - 2. Market volatility taken into account in this case
- 4. **Death**
 - a. If offeree dies, he or she cannot accept offer, offer is dead
 - b. If offeror dies, offer dies with him or her if it was not accepted yet
 - i. Mailbox rule can possibly switch on depending on circumstances

PRESERVING OFFERS

- 1. **Option**
 - a. When supported by consideration, an option keeps offer open
 - b. Offer under option is irrevocable
 - c. Beall v. Beall
 - i. When consideration exists, offer is made irrevocable through an option
 - ii. If consideration fails or there is a lack of consideration, it is still an offer but it can be revoked by offeror
 - 1. Failure of consideration only destroys irrevocability of offer
 - iii. **Equitable estoppel**
 - 1. Misrepresentation and reliance on that misrepresentation to not go through with K
 - 2. Affirmative defense to bar or preclude party from asserting truth of a fact they previously lied about and caused party relied to, to depend on it
 - d. EMU v. Burgess
 - i. Acknowledgement of consideration shifts burden to Δ to prove such so that offer is irrevocable
 - ii. Restatement § 87(1)(a) – Recital of consideration creates implied promise to support an option, which is enforceable

ACCEPTANCES

1. **Acceptance**
 - a. Manifestation of assent by offeree to be bound by the terms of the offer made by offeror
 - b. Objectively determined
2. **3 Rules of acceptance**
 - a. Offeree must have knowledge of offer – cannot accept offer he does not know about
 - b. Only the offeree can accept an offer
 - c. The acceptance has to be in a form authorized by offeror
 - i. **THE OFFEROR IS KING**
 1. Offeror controls manner and means of acceptance
 2. Must be complied with to formally accept offer
3. **Manner of acceptance**
 - a. Lasalle National Bank v. Vega
 - i. Bank “assented” but not in the way proscribed
 1. Acceptance invalid
 - b. Evertite Roofing v. Green
 - i. Parties entered K to redo roof, manner of acceptance ambiguous
 - ii. Offer accepted when π loaded trucks even though Δ supposedly revoked
 - iii. Δ could have easily contacted π to revoke but made no effort to do so
 1. π proceeded reasonably with respect to K terms
 - c. Davis v. Jacoby
 - i. Parties bargained for bilateral K, promise to come to CA to help get affairs in order and Caro will inherit everything
 - ii. **Unilateral K**
 1. Offer’s **acceptance is based on performance**
 - a. Pay \$100 when you actually finish walking the Mackinac Island bridge
 2. Upon death, unilateral K is revoked
 - iii. **Bilateral K**
 1. Seeking acceptance by a return promise
 - a. **Promise for a promise**
 - i. Will pay \$100 when you accept that you will walk across Mackinac Island bridge
 2. Upon death, revocation or not depends on when return promise was made
 - d. UCC 2-206
 - i. Offer to make K invites acceptance by any reasonable manner unless specifically stated in terms
4. **Promissory acceptance**
 - a. Hendricks v. Behee
 - i. Communication of acceptance to agent insufficient as acceptance
 - ii. Promissory acceptance **not valid until it is communicated**
 1. Mailbox rule not in effect because agent did not mail initial offer
 - b. Adams v. Lindsell
 - i. **Mailbox/dispatch rule**

1. Assuming there is a gap between dispatch and receipt of communication, the rule can be turned on or off
2. **Acceptances** are effective upon the **dispatch**
 - a. **Revocations** are effective upon **receipt**
3. **EXCEPTIONS**
 - a. Electronic communication effective upon receipt because it is near instantaneous
 - b. Option Ks are not effective until receipt
- 4.
5. **Acceptance by performance**
 - a. Carlill v. Carbolic Smoke Ball Co.
 - i. **ADVERTISEMENTS ARE NOT OFFERS**
 - ii. **POLICIES ARE NOT OFFERS EITHER**
 1. Policy – company is free to follow policy or not, does not create an offer
 - iii. **GAMBLING K's UNENFORCEABLE, VIOLATE PUBLIC POLICY**
 1. It's illegal
 - iv. Carbolic backed ad with £1000 to indicate seriousness
 - v. Notice not required in Ks where acceptance is by performance
 1. Have to indicate if you want notice
 - vi. Carbolic bargained for people to buy their product
 - b. Partial performance
 - i. Once an offeree learns of an offer after he has partially performed, he can show his acceptance of the offer by completing his performance
 1. Marchiondo v. Scheck
 - a. Once a **partial performance** has begun an **option K results**
 - b. Offeror's duty of performance conditional on tender of invited performance or tenders beginning of it
 - i. What is begun must be part of actual performance
 - ii. Preparation towards performance does not count towards actual performance
 - c. Reliance stands for consideration, makes K irrevocable
 - d. Restatement § 54
 - i. Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification
 - ii. If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless:
 1. the offeree exercises reasonable diligence to notify the offeror of acceptance, or

2. the offeror learns of the performance within a reasonable time, or
3. (c) the offer indicates that notification of acceptance is not required

6. **Acceptance by silence or inaction**

a. General rule: Silence or inaction is insufficient to constitute an acceptance

- i. Fairness
- ii. Inconsistent with objective theory – not reasonable
 1. Offeror not reasonable in believing that when offeree says nothing, he is manifesting his intent to be bound by the terms of the offer

iii. **EXCEPTIONS (Restatement § 69)**

1. When offeree takes benefit of offered services with reasonable opportunity to reject them and knowing that compensation was expected
 - a. Protects offeror
 - b. Hot dog seller
2. Where the offeror **has stated or given offeree reason to understand** that **assent may be manifested by silence or inaction**, and the offeree, in remaining silent, intends to accept the offer
 - a. Protects offeree
3. Where because of previous dealings, it is reasonable that the offeree should notify offeror if he does not intend to accept
 - a. Protects offeror

b. Laredo National Bank v. Gordon

- i. Suit over contingency fee
- ii. Silence misled π in thinking bank had accepted
- iii. **Where the relationship between the parties is such that the offeror is justified in expecting a reply, or the offeree is under a duty to reply, the latter's silence will be regarded as an acceptance**
- iv. You can keep unsolicited merchandise received in the mail, not obligated to pay for it

7. **Imperfect acceptances** – “acceptance” where the reply to an offer presents different terms (price), becomes an **implied rejection** of original offer and becomes a **counteroffer**, original offeror has opportunity to accept or reject new terms

a. Gresser v. Hotzler

- i. Common law mirror image rule
 1. Acceptance may not introduce new terms
 2. Changes must not be material changes
 - a. Material change – change that a reasonable person would see as a big change
 3. Only minor changes that do not substantially alter performance obligations are immaterial
 - a. Date changes made postponed performance obligations – material change

- b. UCC-2-207 – solves “battle of the forms” between sellers, merchants who may have different terms on each other’s sale forms to favor the respective party
 - i. 2-207(1) – definite and seasonable expression of acceptance operates as an acceptance even though it states additional or different terms from those offered **unless acceptance is made conditional on such terms**
 - ii. 2-207(2)
 - 1. Additional terms – treated as proposals to be added to K
 - a. Conditional
 - i. If there is assent, then K includes additional terms
 - ii. If no assent, then there is no K
 - 1. **But** if there is conduct which recognizes existence of K:
 - 2. K is formed on which writings agree 2-203
 - 3. 2-204 fills in remaining terms
 - b. Unconditional
 - i. Between non-merchant
 - 1. If assent, then K includes additional terms
 - 2. If no assent, K still formed but **no additional term**
 - ii. Between merchants
 - 1. If assent, K includes additional terms
 - 2. If no assent, K includes additional terms unless:
 - a. Offer expressly precludes additional terms
 - b. Additional terms material alter the offer
 - c. Offeror rejects additional terms in a reasonable amount of time
 - 2. Different terms
 - a. 2-207 **does not apply** to different terms, silent about different terms
 - b. Different approaches
 - i. Fall-out
 - 1. Conflicting term drops out
 - ii. Knock-out
 - 1. Conflicting terms cancel out
 - 2. Neither becomes part of K
 - 3. Majority rule
8. **Electronic acceptances**
- a. Hancock v. AT&T
 - i. Dispute over forum selection clause and arbitration agreements in ToS
 - ii. π 's given ample opportunity to read ToS that included such agreements as service would not begin until they have actually scrolled through and assented to ToS
 - iii. Held that customers assented to ToS

- b. Clickwrap agreements
 - i. ToS available by hyperlink
 - ii. Customers presumed to have assented if they download software, even without seeing and clicking hyperlink to read ToS
 - iii. Similarly, **browserwrap** agreements available to users by link or directly that say that by continuing to use the site, user agrees to ToS
 - 1. Assent inferred from continuation to use site
 - 2.

CONSIDERATION – required for K enforcement

1. **Generally**

- a. Promise is legally binding if it is given in return for some benefit which is rendered, or to be rendered to the promisor
- b. Promise becomes binding if the promisee incurs a detriment by reliance upon it
 - i. Promisee would be worse off if promise were broken than he would be if promise had never been made
- c. To constitute consideration, a performance or promise **must be bargained for**
 - i. Bargained for if sought by promisor in exchange for return promise
- d. Performance may consist of
 - i. Act other than promise
 - ii. Forbearance
 - iii. Creation, modification, destruction of legal relation
 - iv. Performance or return promise may be given to the promisor or to some other person
 - 1. May not be given by the promisee or by some other person
- e. Promise must be voluntary assumption by one party of an obligation upon condition of an act, forbearance, or return promise by the other party
 - i. Reciprocal relationship of motive and inducement
 - 1. Promise must induce consideration, consideration must motivate promise
- f. No consideration for gift promises – nudum pactum
- g. McCormick v. Dresdale
 - i. Waiving one's right to bring cause of action can be valid consideration for a promise
 - 1. Except when release is made in bad faith
 - a. Then it's unenforceable
- h. Kirksey v. Kirksey
 - i. With promise of mere gratuity, action will not lie for its breach
 - ii. No benefit to promisor for sister in law to move 60 mi to be closer
- i. Hamer v. Sidway
 - i. Must either be a benefit to the promisor or a detriment to promisee
 - 1. It is enough that something is promised, done, forborne, or suffered by promisee to satisfy as consideration
 - ii. Forbearance is a legal detriment
 - 1. Agreeing not to do something someone has a legal right to do
 - 2. Reed v. UND

- a. Surrender of legal right constituted valid consideration
- j. Restatement § 79 – Courts do not look into the adequacy of consideration
 - i. Except when they actually do
 - ii. Schell v. Nell
 - 1. Nominal consideration – transaction is a ruse, gift disguised as a bargain
- k. Hooters v. Phillips
 - i. Illusory promise – words of promise which by their terms make performance optional
 - 1. One could perform whenever he or she felt like it
 - ii. Illusory promises as consideration for another promise invalid consideration
 - 1. One party held all of the bargaining power
 - 2. Unfair

2. Modification

a. Pre-existing duty rule

- i. Performance or promise to perform something promisee already bound to do or refrain from something promisee already agreed not to do does not constitute valid consideration
- ii. Alaska Packers Ass'n v. Domenico
 - 1. Modifying K for pay raise to catch fish falls under pre-existing duty rule, invalid consideration for new K
 - 2. One sided modification – hold up game
- iii. Angel v. Murray
 - 1. UCC 2-209 – agreement modifying K for sale of goods needs no consideration to be binding, must meet test of good faith
 - 2. Restatement § 89(a) – prohibits modifications made under coercion, duress, extortion, agreements entered voluntarily will be enforced by courts
 - 3. Modified agreements enforced as long as
 - a. Promise modifying agreement not coerced
 - b. Circumstances prompting modification not anticipated
 - c. Modification must be fair and equitable in light of unanticipated circumstances
 - d. K still must be executory, still must be performance obligations on both sides of K

3. Quasi-K's, Unjust Enrichment, and Restitution

- a. Quasi-K – somewhere between K and tort, liability is based neither on an express nor implied in fact promise
 - i. Promise implied in law to make Δ pay for a benefit received from another under circumstances where it would be inequitable to allow that person to retain that benefit without paying for it (unjust enrichment)
- b. Cause of action based on doctrine of unjust enrichment
 - i. Provides restitution in circumstances where no K exists

1. Restitution – right of an innocent party to recover for unjust enrichment at law or equity
 - c. **One who without intent to act gratuitously confers a measureable benefit upon another is entitled to restitution if he affords the other an opportunity to decline the benefit or else has a reasonable excuse for doing so**
 - i. If the other refuses to receive the benefit, he is not required to make restitution unless the actor justifiably performs for the other a duty imposed on him by law
 - d. At the request of Δ (benefits conferred)
 - i. Schott v. Westinghouse
 1. Δ took π 's idea from suggestion program after numerous denials, made \$, π seeks his cut
 2. Δ unjustly enriched by π 's idea, quasi-K appeared to exist even though no real K existed
 3. Quasi-K created in law
 - e. Not at the request of Δ (benefits conferred)
 - i. Cablevision v. Tannhauser
 1. Δ converted cable signal to tenants
 2. To recover under a quasi-K or unjust enrichment π must show
 - a. Benefit was conferred on Δ by π
 - b. Benefit appreciated by Δ
 - c. Benefit was accepted by Δ under such circumstances that it would be inappropriate for it to be retained without payment of its value
 3. Benefit – any form of advantage
 - ii. Law does not protect mere volunteers or officious intermeddlers
 1. Good Samaritan doctor who helps patients who cannot consent to treatment may not anticipate working for free
4. **Past Consideration**
 - a. Usually **PAST CONSIDERATION IS NOT CONSIDERATION**
 - b. Harrington v. Taylor
 - i. π loses hand defending Δ from attack, Δ promises to pay π for losses but reneges
 - ii. Humanitarian act, voluntarily performed, not consideration
 - c. Mills v. Wyman
 - i. π took care of Δ 's son, Δ 's father promised to pay, reneges
 - ii. π 's act determined to be a gift, no opportunity to decline so not bargained for
 - iii. Moral obligation is sufficient consideration for an express promise is to be limited in its application to cases where at some time or other a good or valuable consideration has existed
 - iv. Past consideration not good consideration except when:
 1. Promise reviving previously enforceable obligation barred by limitations period

2. Promise to pay an obligation rendered discharged by insolvency
 3. Promise to pay a voidable obligation incurred by an infant after the minor reaches the age of majority
- d. Webb v. McGowan
- i. Material benefit rule – circumstances under which Δ 's moral obligation will be sufficient to support a subsequent promise by a party who received a material benefit from the past act of the promise
 - ii. Restatement § 86
 - iii. Allows court to enforce a promise it feels ought to be enforced even though there is technically no consideration and some element of unjust enrichment is not satisfied
5. Promissory estoppel
- a. Promisor estopped from asserting the non-existence of consideration as a defense
 - b. Requires only a promise that induces detrimental reliance
 - c. Used as a sword to enforce a claim that would otherwise be unenforceable because of the absence of consideration
 - d. Restatement § 90
 - e. Elements
 - i. Promise
 - ii. Detrimental reliance on such promise by promisee
 1. Reliance must be reasonable
 - iii. Foreseeability of the reliance by promisor
 - iv. Injustice can be avoided only by enforcement of the promise
 - f. Ricketts v. Scothorn
 - i. π promised \$2000 by grandfather to not work anymore, π gives up job and lifestyle, grandfather dies, estate reneges on payment, π sues
 - ii. Use promissory estoppel as substitute for consideration
 - iii. Remedy: Expectation v. reliance interest
 1. Either give non-breaching party what was expected, or
 2. Measure reliance interest and put party back into position she would have been in had promise never been made – status quo ante

CONSTRUCTIVE CONDITIONS, SUBSTANTIAL PERFORMANCE

1. Express conditions – will be respected and enforced, require strict compliance
 - a. “I agree to buy your car subject to loan approval” – If loan is not approved, I am relieved of my obligation to buy your car
 - b. When parties condition their performance, risk is allocated to promisee
2. Constructive conditions
 - a. Each party's performance becomes condition to the other party's performance
 - b. Usually want simultaneous performance but this is usually impossible
 - c. Who goes first?
 - i. Restatement § 234(1) – Party whose performance will require a period of time will have to perform first

- ii. Restatement § 234(2) – When simultaneous performance impossible, sellers of goods must perform first, payors more trustworthy
 - d. If I don't perform an unconditional performance, I have breached
 - e. If I don't perform a conditional promise because the condition did not occur, there is no breach and my performance is excused
 - f. **Condition** – an event not certain to occur but which must occur, unless excused, before liability for non-performance of the promise to which the condition relates can be imposed
3. **Substantial performance**
- a. Basis for excusing a constructive condition
 - b. Avoids unfair or disproportionate forfeiture
 - c. **Material breach** – major screw-up
 - d. **If there is substantial performance, there is no material breach**
 - e. Jacob & Youngs v. Kent
 - i. π built house for Δ , Δ demanded specific piping, different but same quality piping used, to replace would require tearing down walls and whatnot, π demands balance withheld
 - ii. When performance is substantial, we will look at the rest as excused
 - iii. Owner must still pay and K'or liable from damages from breach
4. **Divisible K's**
- a. The entire performance is divided into sets of partial performances
 - b. Each part of each performance the agreed exchange for a corresponding part of the set of performances to be rendered by other promisor
 - c. Failure to perform one part does not bar recovery for performance of another part
5. **Anticipatory Repudiation**
- a. Repudiation of an obligation in advance in time for performance
 - b. Have right to withhold performance when there is repudiation
 - c. Hochster v. De La Tour
 - i. π was hired by Δ to serve as courier for 3 months, Δ repudiates before performance could begin
 - ii. Wasteful to make π wait for day until performance, who has put faith in the agreement
 - iii. π unable to mitigate his damages, seek alternative employment
 - d. Restatement § 250
 - i. Defines repudiation as:
 - 1. Express statement by obligor that he will breach
 - 2. Voluntary affirmative act that renders obligor unable to perform without such breach
 - e. Restatement § 251
 - i. Obligees can demand **adequate assurance** from obligor in light of repudiation and suspend performance until adequate assurance is given
 - ii. If adequate assurance not given within reasonable amount of time, it can be treated as a repudiation
 - f. Restatement § 253
 - i. If obligor repudiates before he breaches by non-performance:

1. Repudiation gives claim to damages for breach
 2. If return performances were exchanged, repudiation excuses the non-repudiating party from his performance
- g. Restatement § 256
- i. Repudiation can be nullified if non-breaching party is notified before he relies upon repudiation

DEFENSES

1. Misrepresentation

- a. Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts
- b. Generally ask for rescission of K
 - i. Courts look at:
 1. How important (material) representation was
 2. Whether the other party relied on misrepresentation
 3. Whether reliance was reasonable
- c. Halpert v. Rosenthal
 - i. Where one induces another to enter into K by means of material misrepresentation is grounds for rescission of K
 1. Misrepresentation can be an innocent, negligent, or known to be false
 2. Material misrepresentation – when it is likely to affect the conduct of a reasonable man with reference to a transaction of another person
- d. Swinton v. Whitinsville Savings Bank
 - i. Mere failure to reveal information not actionable unless parties were in a fiduciary relationship
 - ii. Concealing akin to misrepresentation
 1. Moving a dresser to hide a crack in the wall
- e. Weintraub v. Krobatsch
 - i. Sellers are under obligation to inform buyers of latent defects of significant nature
 1. Latent – non-observable, significant
 - ii. Active concealment the same as affirmative misrepresentation

2. Illegality

- a. Illegal subject matter
 - i. K that orders a hit on someone unenforceable
- b. Unenforceable K because of failure to comply with licensing statutes
 - i. Restatement § 181 – if party is prohibited from doing a certain act because of failure to comply with licensing requirements, promise unenforceable on grounds of public policy if:
 1. Requirements meant to regulate industry and
 2. Interest in enforcement of the promise outweighed by public policy behind the requirement

- c. Violates public policy
 - i. Exculpatory K's
 - 1. Hanks v. Powder Ridge
 - a. Exculpatory K unenforceable because customers always in control of Δ , family activities
 - b. Customers have little bargaining power
 - i. Adhesion K, take it or leave it
 - ii. Agreements always on Δ 's terms
 - iii. π unable to negotiate protection against Δ 's potential negligence
 - ii. Valley Medical Specialists v. Farber
 - 1. Freedom to choose healthcare provider of choice
 - 2. Non-competition covenant too restrictive
3. Unconscionability
 - a. Combination of problems in bargaining process and substance of bargain that make agreement unfair
 - b. Procedural unconscionability
 - i. Problems with agreement process
 - c. Substantive unconscionability
 - i. Problems with terms of agreement
 - d. Williams v. Walker-Thomas Furniture Co.
 - i. π entered agreement buying things on credit and payments were prorated among all items purchased, items not fully paid off until balance paid off
 - ii. Absence of meaningful choice on the part of one of the parties
 - iii. Gross inequality of bargaining power – unlikely that an objective manifestation of intent was given to all terms
 - iv. Primary concern with the K terms considered in light of the circumstances when K made
 - 1. Consider whether terms are so extreme as to appear unconscionable to the business practices of the times
 - e. UCC 2-302
 - f. Vernon v. Qwest
 - i. To be found unconscionable in CO, K must be substantively and procedurally unconscionable
 - ii. Seven factors
 - 1. Standardized agreement executed by parties of unequal bargaining power
 - 2. Lack of opportunity to read or become familiar with document
 - 3. Use of fine print in portion containing disputed provision
 - 4. Absence of evidence that provision was reasonable
 - 5. K terms
 - 6. Relationship of the parties
 - 7. Circumstances surrounding K formation

DAMAGES

1. Expectation damages

- a. Place party in the position it would have been in had the breaching party performed
 - b. Expectation interest
 - i. Loss in value due to other party's breach
 - 1. Difference between what was expected and what was received
 - ii. Plus other loss such as incidental or consequential losses due to breach
 - iii. Minus cost avoided by not having to perform and other losses (mitigation)
 - c. $(LV + OL) - (CA + LA) = D$
 - d. Hawkins v. McGee
 - i. What measure is the difference between a hairy hand and what was received?
 - e. Lewis Elec. Co. v. Miller
 - i. K'or who substantially performs is entitled to recover K price less cost of repairing defects or completing work to bring up to level required
 - ii. K'or can recover value in work at most in quantum meruit
 - iii. Where performance is incomplete and remediable, measure of recovery is unpaid K price minus cost of completion of unfinished work and remedying defective work plus other damages suffered by owner not to exceed benefits received
 - f. Groves v. John Wunder
 - i. Willful transgressor – substantial performance does not apply - Jacob & Youngs
 - ii. In construction K where damage is remediable, damages should be measured by value of cost of remedying the defect
 - iii. Sometimes defects cannot be remedied without tearing down and rebuilding at an unreasonable cost – economic waste
 - 1. **If no economic waste then cost of remedying defect is the amount awarded as compensation for failure to render promised performance**
2. **Reliance damages**
- a. Used when expectation damages to non-breaching party are difficult to calculate and measure
 - b. Put non-breaching party's reliance interest back into same position it would have been in had K never been made
 - c. Restatement § 349 – injured party has right to damages based on reliance interest, including expenditures made in preparation for performance or in performance
 - d. Hollywood Fantasy Corp. v. Gabor
 - i. Cannot recover lost profits as reliance interest unless they are proved with reasonable certainty
 - ii. π can only get out of pocket expenses in preparation for performance
3. **Restitution damages**
- a. Restores any benefit conferred to the non-breaching party
 - b. Applying restitution precludes application of other remedies
 - i. Rescind K, seek restitution

- ii. Enforce K, seek compensatory damages
- c. Restore non-breaching party to the position it would have been in had there been no K to breach
- d. US v. Algernon Blair
 - i. π (suing under US) did steel erection as sub-K'or, main K'or refused to pay for crane rental, π terminated performance, and sued to recover for labor and equipment costs
 - ii. π would have lost \$ had it fully performed, precluding reliance damages as in Restatement § 349
 - iii. If performance completed, cannot get restitution as per § 373(2)
 - iv. Recover for benefit conferred on Δ (labor and equipment) by π
 - v. Non-breaching party may seek restitution in losing K
- e. Britton v. Turner
 - i. Δ hired π to work for 12 months, π leaves 9 months in, sues for pay
 - ii. Δ could argue the 12 month K constructive condition for payment
 - 1. Breach means he is excused from paying
 - 2. Unjust enrichment
 - iii. Net benefit rule – Restatement § 374
 - 1. If a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the **party in breach is entitled to restitution for any benefit that he has conferred by way of part performance** or reliance in excess of the loss that he has caused by his own breach
 - 2. To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss

4. Limits on damages

- a. Avoided costs
 - i. Breach may save injured party costs had it had to perform
 - ii. Such is subtracted from loss in value figure in determining damages
 - iii. Argnetinis v. Gould
 - 1. π gets out of paying a \$43k mortgage because of failure of substantial performance
 - 2. Damages limited to damages based on actual loss caused by breach
 - a. Breach may have saved \$ if injured party had to perform
 - b. Otherwise, non-breaching party could be doubly compensated as in this case
- b. Avoidable loss
 - i. Mitigate damages

1. π has duty to mitigate his damages
 2. If he fails to do so, Δ cannot be charged with them
 3. Applies to damages π could have avoided with reasonable effort
- ii. Parker v. 20th Century Fox
1. π K'd to make film but Δ reneges, offers very similar alternative K, π refused, sues for damages
 2. Alternative work sought under mitigation must be substantially similar to one deprived of
 3. Duty to mitigate does not encompass accepting inferior employment
- iii. R.R. Donnelley & Sons Co. v. Vanguard Transp.
1. Time sensitivity of K to be performed
 2. π failed to mitigate when it had ample opportunity
 3. One cannot rely on promises of performance, especially when material is time sensitive
 4. Breaching party's ability to remedy the breach does not excuse injured party's duty to mitigate
- c. Foreseeability
- i. Damages from breach limited to those foreseeable at time K made
 - ii. Breaching party must have had reason to foresee injury
 - iii. Hadley v. Baxendale
 1. π sends broken part to Δ to fix, delivery delayed, π loses \$, sues for lost profits
 2. Breaching party should only be responsible for damages that flow from the breach – loss in value
 3. Damages may also include those related to special circumstances only to the extent that the non-breaching party was informed in advance that such damages would be a result of the breach
 4. Must be known and communicated such that Δ has tacitly agreed to these additional terms
 - iv. Manouchehri v. Heim
 1. π bought x-ray from Δ , x-ray underperforms, π loses \$, sues for lost profits
 2. Normally consequential damages (lost profits) cannot be recovered but π kept in contact with Δ so Δ would fix and waited a reasonable amount of time
 3. Foreseeable that π , a physician, would use x-ray for a specific purpose
 - v. ESPN v. MLB
 1. π seeking compensatory damages has burden to prove them with reasonable certainty
 2. Failure to show evidence of projected consequential damages means you can only get nominal damages

5. Specific performance

- a. Equitable relief
 - i. \$ damages possibly inadequate
- b. Mandatory injunction
 - i. Order to do something such as specific performance
- c. Restatement § 357 - 369
- d. Ash Park, LLC v. Alexander & Bishop
 - i. Under WI law one can seek specific performance in real estate deals
 - ii. Discretionary
 - iii. Impossibility (no \$) vs. contempt (unwilling)
- e. Reed Foundation v. FDR Four Freedoms Park
 - i. Dispute over placement of donor recognition due to aesthetics
 - ii. Art commissions are usually unique
 - 1. Difficult to calculate damages in case of breach
 - 2. Specific performance best remedy in this case

6. Stipulated/liquidated damages

- a. Provision in K that breach will cost \$X pro rata
- b. Conditions for enforcement
 - i. Parties must intend stipulation to act as penalty or forfeiture
 - ii. Damages anticipated from breach must be uncertain in amount or difficult to prove
 - 1. Traditional rule – measured from at time K is entered
 - iii. Stipulated sum must be reasonable forecast of damages in light of anticipated loss
 - 1. Traditional view – at time K is entered
 - 2. Contemporary view – look at anticipated or actual loss
- c. Carr-Gottstein v. Benedict
 - i. Δ had construction overdue, covenant says \$25 per day fine because of aesthetic damage to property
 - ii. Two step test
 - 1. Damages are difficult to ascertain
 - a. How do you measure aesthetic damage to property?
 - 2. Damage amounts are a reasonable forecast
- d. Nohe v. Roblyn Development Corp.
 - i. K for sale of property had stipulation that allowed seller to keep deposit in case of breach, buyer breached, seller resells at higher price than that of K in dispute
 - ii. Because seller suffered no loss, stipulation acted as penalty
 - 1. Unenforceable
- e. Kvassy v. Murray
 - i. Δ reneges on sale of cases of baklava, K has stipulation of \$5 per unsold case, sues to recover lost profits
 - ii. Measure of anticipated losses should be the figure used in the K stipulation (\$5 per case) to determine if it is reasonable, not the previous year's income