CONTRACTS – Ponoroff 2016

A. Contract Law (Overview)
   a. Contract – **The promise or set of promises that the law recognizes by way of enforcement.**
      i. Promise – The liability involved in contract law is undertaken intentionally by the parties.
         1. Relates to the happenings and non-happenings of some future event.
         2. The notion that promises will be kept is essential to social order.
            a. The relationship created by contract is single most important function of the legal system.
      ii. Enforcement – The harmed party can seek recourse in a court of law.
         1. Not all promises are enforceable under the law.
         2. Enforceable promises must be supported with consideration.
   b. Objective Theory (*Lucy v. Zehmer*)
      i. ***Would a reasonable person as offeree assume that a promisor's conduct is an intent to be bound, and did the offeree subjectively believe that there was an intent to be bound?***
      ii. Components of Objective Theory
         1. A reasonable person in the position of the promisee must believe the other party intended to be bound.
         2. The promisee must have so believed.
      iii. Restatement (Second) of Contracts § 27 Approach
         1. Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.
   c. Freedom of Contract – "***Promises are to be kept.***"
      i. Bargains and offers should be entered without reservation.
      ii. **Tension exists between freedom of contract and the restraints that exist on freedom of contract for furtherance of other social interests.**

B. Mutual Assent – "Coming Together of the Minds"
   a. **Mutual Assent –** Both parties are reasonable to believe the other intends to be bound by the deal, and neither believe the other is not serious.
      i. Contract formation occurs upon an apparent meeting of the minds.
         1. Does not need to be actual meeting of the minds.
         2. Rooted in reasonableness.
   b. ***Offer*** – *Objective intention to promise*
      i. Defined. – A promise by one party, made to another party, to do or not to do something in the future, contingent upon the other party's acceptance.
         1. Concerns how the offer is communicated.
      ii. What MUST an Offer Do (directly or indirectly)
         1. Be communicated
         2. Indicate a desire to enter a contract
         3. Be directed at some person or persons
         4. Invite acceptance

5. Create a reasonable understanding that upon acceptance a contract will arise.

iii. Elements/ideas
   1. Course of dealing
   2. Usage of trade
   3. Course of performance

iv. "Reverses the usual presumption that the terms of the contract consist only of those matters which the parties deliberately chose to ***include***."
   1. More objectivity assessed to the makings of a contract and the deal components.

v. Uncertainty of Offer
   1. Types of Communications that frequently create uncertainty with respect to whether an offer has been made.
      a. Price Quotes
      b. Public Advertisements
   2. Neither are generally believed to have been an offer. *WHY NOT?*
      a. Merchants need freedom to dispense information about goods to the market without committing to any offeree.
         i. Logical belief is that merchants are <u>*inviting*</u> offers to be made through quotes or advertisements.
         ii. Allows the merchant to reserve the right of final assent before entering the deal.
      b. Single Reward Example
         i. "Lost Armadillo…$50 to person who finds Armie."
         ii. Only one person may claim the reward.
            1. No risk of obligation in excess of supply.
            2. True bargaining is for the act of returning the missing pet/item to be performed.
               a. Offer – seeking people to volunteer to perform.
   3. Objective Theory Approach
      a. Answer often depends on specific facts and circumstances.

vi. Restatement (Second) of Contracts Standards
   1. § 26 – Ads would generally not be considered offers because it invites one party for further assent on what is being made available.

vii. Terminating the Offer – *What comes first, acceptance or termination?*
   1. Rejection – *the offeree declines the offer*
      a. Can be <u>expressed</u> or <u>implied</u> by the ***offeree***.
         i. Express – Firm rejection; once declined, the offer is terminated.
         ii. Implied – Creation of a new offer (counteroffer) which the original offeror can choose to accept or reject.
      b. Once terminated, the offer cannot be reinstated unless the offeror chooses to revive it.

   c. Rejection is absolute.
      i. Once rejected, only new offers can be made with the hope that the offeror will accept.
2. Revocation – *the offeror withdraws the offer*
   a. "Offeror is King" – An offeror maintains complete mastery and control over the offer until acceptance.
      i. The offeror may modify terms of the offer at any time, including revocation or withdrawal.
   b. Direct Revocation – Clear withdrawal of the offer by the offeror.
      i. Acts similarly to a rejection; the offer is "dead" once directly revoked.
   c. Indirect Revocation – Informing of offeror's withdrawal via a surrogate.
      i. An offeror can enter into more than one contract if the offeree does not communicate with the surrogate.
         1. The offeror can only perform the terms of contract once, and thus an inevitable breach will occur.
3. Lapse – *termination due to inaction*
   a. An offer lasts if the offeror says it will last—assuming it is not earlier terminated by rejection or revocation.
      i. Offer may exist for a definite amount of time for offeree to accept before it is terminated.
      ii. Indefinite (unstated) amount of time = a reasonable time
         1. "Reasonable time" depends on the facts and circumstances surrounding the offer.
            a. Market conditions
            b. Prior course dealings between the parties.
            c. If offer is made face-to-face, the offer lapses when the parties are no longer communicating in the same fashion.
4. Death (or incapacity) of Offeror
   a. **The offeror dies or is adjudicated incompetent and the offer terminates automatically and without regard to whether the offeree was notified or aware of the death or incapacity.**
      i. Offer—Death—Acceptance → Offer terminated
      ii. Offer—Acceptance—Death → Offer can be enforced; seek performance against decedent's estate.

iii. Death or incapacity of an offeror as a means of termination as a MINORITY view.
1. No termination until the offeree is aware of the termination; consistent with rejection and revocation.
iv. Not consistent with objective theory.
1. No mutual assent – meeting of the minds.
b. Death – Tantamount and indirect revocation of the offer.
c. Reliance of the offer might act as necessity for the contract to be enforced after the offeror's death.
d. Termination rule also applies to death or incapacity of the offeree.
i. Party with the power of acceptance is dead or incapacitated to be able to do so.

viii. Preservation of the Offer
1. Traditional Approach
a. Acceptance by the offeree should occur promptly.
b. **Option Contract**
i. Consideration is given to the terms of the contract.
ii. A party is given a specified time period to accept the offer.
1. Eliminates the fear of revocation of the contract offer.
iii. Irrevocable Offer – An offer unable to be revoked by the offeror so long as the offeree has given consideration to the offer.
2. UCC Approach – § 2-205 Firm Offers (example of lapse)
a. Promise by a merchant in writing to hold the offer open for a specified period, or if an open offer, a reasonable period of time deemed **not to exceed three months**.
b. The writing becomes a substitute for consideration. Evidence that there such a promise exists.
i. Consistent with intent when the offer is made and the expectations of the marketplace.
3. Reliance as a Basis to Create an Option
a. Restatement (Second) of Contracts § 87(2)
i. Reliance becomes more than a substitute for consideration. It becomes a form of promise of irrevocability.
1. Consistent to protect reliance. The Restatement protects the reliance interest.
ii. "Protects the offeree's reasonable reliance on the offer by implying a promise to hold the offer open, even when no express promise has been made, and to enforce that promise, even though unsupported by consideration."

c. ***Acceptance*** – *A manifestation of assent objectively determined to be bound by the terms of the offer in a manner invited or required by the offer*. Restatement (Second) of Contracts § 50(1).
    i. Rules about Acceptance
        1. The offeree must have intent to accept the offer.
            a. An offeree cannot assent into an offer of which there is no knowledge of its existence.
            b. Modern approach – If an offer is discovered in the middle of performance, then completion of performance is sufficient acceptance.
        2. Only an offeree can accept an offer.
            a. "The power of acceptance is personal to the offeree."
            b. Consistent with objective theory and the notion that the "offeror is king."
        3. The acceptance must be in a form authorized by the offeror.
            a. "Offeror is king" – An acceptance must conform to how the offeror wants it to be completed.
            b. Restatement (Second) of Contracts §§ 30(2), 32
                i. Softens the classical approach – Unless indicated, an offer will be treated as inviting acceptance in any manner reasonable in the circumstance, including return promise or performance.
                ii. Further codified for merchants in UCC § 2-206.
            c. Contemporary Standard – Specific manner of acceptance is regarded as a convenience, unless the offer clearly indicates a manner of assent.
    ii. Communication of Acceptance
        1. When an Offer is Accepted
            a. Not accepted until communicated to the offeror.
                i. Important when there is a gap in distance or time between the parties.
                    1. Gap between when the acceptance is made and when the offeror receives communication of the acceptance.
        2. **The Mailbox (Dispatch) Rule (*Adams v. Lindsell*)**
            a. Defined. – *Who bears the risk of transmission?* – Unless the offer prescribes to the contrary, an acceptance sent by a reasonable means is effective on dispatch (and not receipt).
                i. Acceptance is the moment of dispatch. (**Restatement (Second) of Contracts § 40**)
                    1. If offer is sent via the same or more efficient means, then the moment of dispatch applies.
                    2. The offeror extends offer via mail, and thus the offeror impliedly authorized the offeree's acceptance in the same manner.

ii. Revocations, counteroffers, and rejections are effective at the moment of receipt.

b. Acts as **an exception** to objective theory.

c. Risks involved with Dispatch

i. Offer or acceptance may be lost in the mail. – *Who should bear the risk for such an incident?*

1. Offeror assumes more risk because method for acceptance and effectiveness of contract could have been specified.

d. Example of Dispatch Rule

i. Offeror: A; Offeree: B

1. Day 1 – A sends B a letter offering to sell the armadillo for $100. No specific method of acceptance expressed.
2. Day 2 – A realizes attachment to armadillo and mails a revocation letter to B.
3. Day 3 – B receives A's offer and mails an acceptance.
4. Day 5 – B receives A's revocation letter.
5. Day 6 – A receives B's acceptance.

ii. Contract is formed on **DAY 3** – B mails acceptance.

iii. Would A's death make a difference? – No because the parties were bound to the contract.

1. Only an offer could be terminated in that case.
2. If A died on Day 2, it might matter if the offer is terminated or not; depends on when B dispatches letter of acceptance.

iv. Would B's misaddressing of the letter matter? – YES. Even if acceptance by mail is authorized, **the offeree loses the benefit of the mailbox rule if careless in replying to the offeror.**

e. Option Contracts under the Mailbox Rule

i. No application.

ii. The offeree is protected against unexpected revocation during the period stated by the option contract.

f. Instantaneous Communication

i. Rule does not apply to sending of email for acceptance.

3. Restatement (Second) of Contracts Approach

a. § 63 – Recognizes the Dispatch Rule as a means of authorized promissory acceptance.

b. § 64 – Any form of instantaneous communications is recognized as a means as if the parties were communicating face-to-face.

i. The offeror must be aware of the acceptance at the moment it is made by offeree.

c. Continues the traditional rule that acceptance by performance is effective without the need of notification to the offeror.

i. § 54(2) – The offeror's duty to perform is discharged if the offeree rendering performance fails to take reasonable steps to allow the offeror to be aware of such performance.

ii. § 62 – Partial performance is a form of promissory acceptance.

4. Unilateral and Bilateral Contracts

a. Unilateral Contract – Non-wholly executory – Offeree already performs promise.

b. Bilateral Contract – Wholly executory – Promises must be performed by both offeree and offeror.

i. Traditional Common Law view – Offeror can revoke before performance.

d. Imperfect Acceptances (and Counteroffers)

i. **"Mirror Image Rule"**

1. Acceptance was required to be an <u>unconditional expression of assent</u> to the terms of the offer without variance or additional terms.

a. Anything less of that would constitute a counteroffer—placed the power back to the original offeror to either accept or reject the counteroffer.

b. Strictly applied against offers that were countered and later revoked by offerees.

i. Original offeror would be unable to recover for failure to act on offeree's counteroffer before it is revoked.

ii. UCC § 2-207 Approach ("Battle of the Forms") – see § 2-207 chart (p. 31)

1. Only occurs if there are different, additional, or competing terms.

a. Competing terms depend on how they are presented.

2. Applies only to merchants.

3. Steps of § 2-207 Analysis

a. Step 1 "**The Gateway**"

i. § 2-207(1) – "Definite and seasonable expression of assent shall constitute an acceptance even though it contains additional or different terms."

1. Acceptance occurs regardless of varied terms presented by the offeree.

b. Step 2 "**Conditional vs. Unconditional**"

i. "Even a definite and seasonable expression of assent won't get through the Gateway if the offeree makes explicit that her assent is expressly made

contingent on the offeror's further assent to the additional or different terms contained in the acceptance."

1. Offeree must assert its desire to not move forward without the offeror's agreement to the additional or different terms.

c. Step 3 "**Additional Terms**"
   i. § 2-207(2) – "Additional terms are proposals that only become part of the contract upon the assent of the offeror."
      1. Exception between TWO MERCHANTS
         a. Additional terms become a part of the contract in question unless:
            i. The offer expresses preclusion of additional terms.
            ii. The additional terms provide a material alteration of the offer.
            iii. The offeror objects to the new terms in a reasonable time.
d. Step 4 "**Agreement by Conduct**"
   i. § 2-207(3) – If no contract formed under 2-207(1) and (2), but the parties' conduct suggests a contract exists, the term consists of terms from the two writings agree and other terms are supplied by default under Article 2.
e. Step Back "**Different Terms**"
   i. Substitute "different terms" for "additional terms."
   ii. Same application as in step 3 for additional terms.
      1. § 2-207(2) makes no mention of treatment of different terms.
      2. Approaches – *What are the terms of the contract based on a response to an offer containing different terms?*
         a. Treat different terms the same as additional terms.
         b. "Fall-Out" – Conflicting terms drop out.
         c. Majority approach – Conflicting terms knock-out each other; neither become part of the contract.

e. Silence or Inaction
   1. Generally, silence or inaction alone are not sufficient to form an acceptance to a contract.

2. The offeror is not reasonable in believing that when an offeree is not responding that he or she is accepting or assenting to a contract.
3. Usually require the silence to be coupled with something else. Silence *PLUS* something else.
    a. Silence PLUS
        i. Benefits (performance)
        ii. Intent to be bound
        iii. Prior Dealings
    b. Restatement (Second) of Contracts § 69
        i. The connection with implied in fact contracts.
        ii. Contracts formed by conduct – Intent inferred from conduct.

f. Electronic Acceptances
    i. Click wrap agreements
        1. Requires customers to click on webpage to accept the terms and agreements for assent.
            a. A link is presented for customers to review the terms and agreements before assent.
    ii. Scroll wrap agreements – better than click wrap agreements
        1. Requires customers to scroll through the full listing of terms and conditions before assenting to them.
    iii. Browser wrap agreements
        1. Every commercial website owner has terms and conditions with regard to the use of their site.
        2. *At what point do you become bound to the conditions?*
            a. By continued use, assuming you were given prominent opportunity.
    iv. There is market discipline surrounding engaging online sellers to exploit consumers.

C. Consideration
    a. Definition/Overview
        i. Traditional Consideration
            1. Conferring of a benefit to the promisor, or a detriment to the promisee.
        ii. Contemporary Approach
            1. Consideration is the most fundamental limitation on the enforcement of promises under common law.
            2. Restatement (Second) of Contracts § 71 Definition – Something given in exchange for the promise that is bargained-for.
                a. § 71(2) – A performance or return promise is bargained for if it is sought by the promisor in exchange for a promise and is given by the promisee in exchange for that promise.
                b. § 71(3) Elements of the Performance
                    i. (a) An act other than a promise
                    ii. (b) A forbearance

iii. (c) The creation, modification, or destruction of a legal relation.
c. § 71(4) – Performance or return promise may be given to the promisor or to a third person.
i. May be given by the promisee or a third person.
3. *Why is the process of bargaining central to the enforcement of promises? Why only economic expectations arising out of bargain transactions?*
a. Private exchange transactions that facilitate the allocation of resources in the market.
b. Doctrine of consideration is more than a seal; it distinguishes transactions deemed important in law.

iii. **Gift Promise** – not enforceable.

b. Past Consideration
i. Not deemed to be actual consideration.
1. Something that happened before a promise cannot be consideration for that promise.
2. Bargaining for a party to perform something cannot occur once the performance has occurred.
ii. Promise Made on Antecedent Benefit
1. One party confers a benefit on the other.
2. Prompts the second party to promise to compensate the first party of the benefit conferred.
a. A helps B, then B offers compensation to A.
3. The promise would not be enforceable under traditional theory.
a. No past consideration (action already occurred before the promise was made).

c. Adequacy of Consideration
i. Courts are more concerned with the existence of consideration rather than the adequacy of such consideration.
1. "A mere peppercorn will suffice to satisfy the requirement of consideration."

d. Nominal Consideration
i. Restatement (Second) of Contracts Approach
1. A promise should not be enforced if the consideration was not truly bargained-for.

e. Promise as Consideration – Restatement (Second) of Contracts § 75
i. A promise of performance can serve as consideration for promise of a performance.

f. Illusory Promises and Mutuality of Obligation
i. Mutuality of Obligation – An exchange of promises typically creating a binding contract, with each party's promise constituting the consideration for the other party's promise.
1. Each party is bound to the other party by performance.

ii. Illusory Promise – A promise that appears on its face to be so insubstantial as to impose no obligation on the promisor; an expression cloaked in promissory terms but actually containing no commitment by the promisor.
    1. The promisor holds discretion over the proposed performance.
    2. **When a real promise is exchanged for an illusory promise, neither promise is enforceable.**
        a. Not supported by consideration – Illusory promises are not "real."
    3. Includes promises for which they are based on conditions that cannot occur.
    4. A "now you see it, now you don't" approach.
iii. Restatement (Second) of Contracts § 77
    1. A promise or *apparent* promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless
        a. (a) Each of the alternative performances would have been consideration if it alone had been bargained for.
        b. (b) One of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

g. Modification
    i. Modification requires a new promise.
        1. If there is a modified promise, there is a pre-existing duty.
    ii. **Pre-existing Duty Rule** – A performance or promise to perform something that the promisor is already bound to do is not good consideration for a contract modification.
        1. Traditionally, it would not matter which party approaches the other in modification.
        2. When one person agrees to pay more or take less than already entitled to, the concern is that it is a product of bad faith or duress.
            a. New rule to curb bad faith modifications.
            b. The idea that any consideration will suffice responds to the over inclusiveness of the rule. Arises the issue of under inclusiveness.
        3. Modification needs consideration to be enforceable.
            a. A modified promise will be enforced even in the absence of consideration if:
                i. Must be unanticipated
                ii. Must be fair and equitable adjustment in light of the circumstances
                iii. Voluntary
                iv. The contract must be executory to some extent on both sides (neither party can have fully performed the contract).

4. How important is consideration to a modified promise as opposed to the purposes of consideration to the original promise? Should the analysis be different?
5. Separate gift promises from where there is a true economic exchange.

iii. Restatement (Second) of Contracts § 89 – Modification
1. A promise modifying a duty under a contract not fully performed on either side is binding:
a. (a) If the modification is fair and equitable in view of the circumstances not anticipated by the parties when the contract was made.
b. (b) Extent provided by statute.
c. (c) Extent that justice requires enforcement in view of material change of position in reliance on the promise.

iv. UCC § 2-209 Approach for Merchants
1. An agreement modifying a contract for the sale of goods needs no consideration to be enforceable.
a. Comment: A modification must meet the test of good faith or it is barred.

h. Material Benefit Rule (Promise + Prior Benefit Conferred)
i. Exceptions to Past Consideration
1. "A debt barred by a statute of limitations"
2. "A debt discharged in bankruptcy"
3. "A promise to perform a previously voidable obligation"

ii. **Material Benefit Rule** – A moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.

iii. Restatement (Second) of Contracts § 86
1. (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent justice.
2. (2) A promise is not binding under (1) if:
a. (a) The promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched.
b. (b) To the extent that its value is disproportionate to the benefit.

D. Promissory Estoppel (Promise + Non-Bargained For Reliance)
a. Involvement of a bar or preclusion to defense.
i. Extension of the doctrine of equitable estoppel.
ii. The promisor is estopped from asserting the absence of consideration as a defense. (No consideration is given)
1. Difference is that promissory estoppel is a contract law doctrine that warrants a promise that induces a reliance.
2. No requirement of false representation of past or present fact.
3. Only a representation of future intention.

iii. When invoked, it forms the basis for a claim against a party.
1. Acts as a sword – a basis for a claim.

b. Restatement (Second) of Contracts § 90 Approach
i. (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. ***The remedy granted for breach may be limited as justice requires.*** (Lesser type of reliance).
1. Some relationship between promissory estoppel being introduced (gift promise or misleading statement intended to be a bargain relationship).

ii. (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
1. Elements of a cause of Promissory Estoppel
a. A promise must exist.
b. Justifiable and detrimental reliance on such a promise by the promisee.
c. The promisor should have expected that the promisee would change position based on such a reliance.
d. Enforcement is necessary to prevent injustice.
2. Promissory estoppel has not eliminated bargain.
3. Falls between traditional contract law and traditional tort law.
4. ***PROMISSORY ESTOPPEL SHOULD NOT BE THE PRIMARY DOCTRINE, OR "GO-TO" DOCTRINE FOR CONTRACT ANALYSIS.***
5. If there is a contractual remedy, there is a breach of contract.
6. Limited to gratuitous promises.
7. Trend today is in the other direction; ruling in *Dargo* is an outlier.
a. Promissory estoppel is an independent theory of promissory liability on which recovery made be had even though a cause of action for the same promise would fail.
i. It includes lack of consideration.

c. Promissory vs. Equitable Estoppel
i. **Equitable Estoppel** – A defense that can be asserted that states that one party, by words or actions, leads another party to believe that a particular state of affairs is true.
1. **A defense that can be invoked to bar a person from later asserting the truth of the matter earlier misrepresented against a party that relied on the detriment of an earlier statement.**
2. Equitable estoppel is based on prior or present fact, while promissory estoppel is based on future behavior.
3. It is not true, but the person relied on foreseeable detriment of statement.

4. Even though person has an enforceable contract, he/she should be estopped (barred) because person was misled and relied on what was told.

d. Pre-Contract Negotiations
   i. One party makes a specific promise in order to entice the other party to enter into negotiations and then the first party breaks the promise for no apparent reason.
   ii. Courts should award damages based on expectancy.
      1. Put the party in as good of a position as if performance of the contract occurred.
      2. Compensating the injured party for a detrimental change in position.
      3. Traditional bargain measure (expectancy) is inappropriate.
         a. Damages should be limited by amount necessary to prevent recuperation of the cost of the detriment incurred.
         b. Put the plaintiff back in the position as if the promise had never been made. (Return to status quo).
      4. If a gift promise is made and plaintiff proceeds to act based on reliance of that promise, the plaintiff will prevent the defendant to use the defense of estoppel.

e. Estoppel en Pais (from *Ricketts*)
   i. Defined. – A right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.

E. Quasi-Contract (Restitution)
   a. **Wade, *Restitution for Benefits Conferred Without Request***
      i. One who without intent to act gratuitously, confers a measurable 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 failing to do so. 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 upon him by law.
   b. Quasi-Contract viewed as legal fiction.
      i. Promise implied in law.
         1. Implied-in-law agreement, based neither on an express agreement nor and agreement implied-in-fact.
   c. Doctrine of Unjust Enrichment
      i. Alternative method to mutual assent.
      ii. Rationale. – An appreciation for the doctrine of unjust enrichment helps to understand the basis for antecedent or prior benefit serving as a substitute for consideration.
      iii. Cause of action (theory of liability) is either unjust enrichment of quasi-contract.
      iv. Restatement (Second) of Contracts § 86
         1. (2) A promise is not binding under Subsection (1)

a. (a) If the promisee conferred the benefit as a gift or for other reasons the promisor has not been **unjustly enriched**.
i. **Cannot recover under quasi-contract theory.**
2. There is a difference between something gratuitous and a gift.
a. Something that is gift connotes a donative intent. Done without an expectation of compensation. Cannot take gifts back.
3. The promise removes the impediment of the quasi-contract claim.
4. § 86 took an approach to question the necessity of such actions.
a. Transformed it into an elastic standard.

d. Restitution
i. Remedy in a successful action is restitution.
1. Defined. – Restoring the benefit conferred or restoring the value of the benefit conferred.

F. Defenses
a. Duress
i. A "gun to the head" approach. – One party is placed in a position to accede to the other party's modification of contract terms.
1. Required to recognize a defense of Duress
a. The party trying to enforce the contract applied wrongful pressure on the other party.
b. The party avoiding enforcement had no reasonable alternative.

b. Misrepresentation
i. Defined. – Restatement (Second) of Contracts § 159
1. A misrepresentation is an assertion that is not in accord with the facts.
a. Fraud ordinarily connotes culpability.
b. Deceit typically is the tort action.
c. Misrepresentation is the basis for contract defense whether or not the material fact is fraudulent.
d. Innocent misrepresentation may lead a contract to be voided.
ii. Categories of Misrepresentation
1. Fraudulent or Material Misrepresentation
a. Restatement (Second) of Contracts § 162
i. (1) Inducement by a party of another party to manifest assent.
1. Inducing party's knowledge of misrepresentation
a. Knows or believes the assertion is not in accord with the facts.
b. Lacks confidence that the truth is stated or implied in the assertion.
c. Knows that there is no basis for stating or implying the assertion.

ii. (2) Material misrepresentation if it is likely to induce a reasonable person to manifest assent.
1. The inducing party knows that the recipient would likely be induced to manifest assent.

b. Misrepresentation is about <u>inducement of a party to enter a contract</u>, even if the material fact is **intentionally fraudulent or not**.
c. Most fraud cases are going to involve consumer transactions.
i. In business transactions, there will be the following:
1. Series of warranties from seller that will be negotiated as part of the contract.
2. Due diligence clauses that gives buyer the opportunity of true representation of facts.

2. Concealment or Nondisclosure
a. Restatement (Second) of Contracts § 161
i. Non-disclosure of fact known is equivalent to an assertion that the fact does not exist.
ii. Applicable Cases/Scenarios
1. (a) Knows that disclosure of the fact is necessary to <u>prevent</u> previous assertion from being a misrepresentation or from being fraudulent or material.
2. (b) Knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which the party is making the contract.
a. Applies if non-disclosure leads to a failure to act in good faith and in accordance with reasonable standards of fair dealings.
3. (c) Knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of writing, evidencing, or embodying an agreement in whole or part.
4. (d) The other person is entitled to know the fact because of a relation of trust and confidence between the parties.

iii. "A misrepresentation, even though innocently made, may be actionable, if made and relied on as a positive statement of fact." (from *Halpert*)
iv. Rescission of Contract
1. Defined. – The revocation, cancellation, or repeal of the agreement.
2. Permitted if there was any misrepresentation, intentional or not.

c. Illegality Based on Public Policy

i. Derivation – Not necessarily criminal in nature; stems from a matter of public policy.
    1. Public policy changes over time. → Determination of illegality has evolved.

ii. Restatement (Second) of Contracts § 178 Approach
    1. A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
        a. Allows for greater judicial flexibility against the strength of other legally recognized policies, if freedom of contract was respected.
        b. A contract that violates the criminal law could be enforceable.
        c. A non-criminal or non-tortious contract may be unenforceable.

iii. Equal Fault – *pari delicto* – Relief will not be granted to the claimant.
    1. Court will leave the parties where it finds them in the given case.
    2. Advantageous for the **defendant**.

iv. Policies that underlie illegality
    1. Belief that refusal to enforce will deter the making of such contracts.
    2. The dignity of the court should not have to take on this type of deal.
    3. Does not mean the entire contract is illegal.

v. Illegality via Licensing – Restatement (Second) of Contracts § 181
    1. If a party is prohibited from acting because of a failure to comply with licensing, registration, or a similar requirement, a promise in consideration of doing an act is unenforceable on grounds of public policy.
        a. (a) The requirement has a regulatory purpose.
        b. (b) The interest in enforcement of the promise is outweighed by the public policy behind the requirement.

vi. Adhesion Contracts
    1. Defined. – A standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.
    2. Contracts in which there is no bargaining permitted and which offer no choice but to accept the terms as presented.
        a. "Take it or leave it" approach.
        b. Benefits of mass marketing by means.
            i. Mass or standard forms of contracts.
            ii. Differs from unconscionability in that court need only decide to shot the conscience of the court to refuse enforcement.

c. Establishes the limits of proper behavior in the marketplace. *Who should decide such behaviors?*

3. **Adhesion contracts may still be enforceable.**
4. Most contracts in use are adhesion contracts.
    a. Courts will often narrowly construe the terms in favor of the party who had no choice but to accept the terms offered.
    b. Restatement (Second) of Contracts § 211

vii. "Blue Pencil" Rule
1. Defined. – "Where the severability of the agreement is not evident from the contract itself, the court cannot create a new agreement for the parties to uphold the contract." (from *Valley Medical v. Farber*)
    a. "Blue Penciling" – Modifying an agreement to a level that is reasonable.

viii. Covenants (Contracts) Not to Compete
1. Debatable whether it is unenforceable due to public policy or not.
2. Discussion in Covenants
    a. Freedom of contract
    b. Restraint of trade
    c. Freedom to compete
    d. Right of an employee to earn a livelihood.

d. Unconscionability
i. Viewed as a combination of misrepresentation (problems with the bargaining process) and illegality (problems with the contract's terms).
1. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (from *Williams v. Walker-Thomas Furniture Co.*)

ii. Uniform Commercial Code § 2-302 Approach
1. (1) If it is found that any clause of the contract is unconscionable at the *time it was made*, the court may refuse its enforcement.
    a. Court may choose to enforce the remainder of the contract without the unconscionable clause.
    b. Court may choose to limit the unconscionable clause to avoid any unconscionable results.
2. (2) When a contractual clause appears to be unconscionable, the parties shall be afforded the opportunity to present evidence as to the clause's setting, purpose, and effect to aid the court's determination of enforcement.

iii. Restatement (Second) of Contracts § 208

iv. Application of Unconscionability
1. **Unconscionability is tested as of the time of the agreement.**
2. Hierarchy for analyzing Reasonable Fairness (from *Williams*)
    a. What are the terms of the contract?
    b. How was the process of entering the deal handled?

3. Procedural and Substantive Unconscionability Factors (from *Vernon v. Qwest*)
    a. Standardized Agreement
    b. Lack of opportunity to read or become familiar with document before signing it.
    c. Use of fine print in the contract portion containing provisions.
    d. Absence of evidence that provision was commercially reasonable.
    e. Terms of the contract
    f. Relationship of the parties
    g. All the circumstances surrounding the formation of the contract.

G. Excuse
    a. Defined. – Nonperformance of the promise is not considered a breach that gives rise to liability.
        i. Post-contract excuses are somewhat limited due to the important policy of performance of promises.
    b. Conditions
        i. Restatement (Second) of Contracts § 224 Definition
            1. ***An event, not certain to occur, but which must occur, unless excused, before liability for nonperformance of the promise to which the condition relates.***
        ii. Express Conditions
            1. The non-occurrence of an express condition excuses performance.
            2. *What is an express condition?*
                a. Language in a contract
                b. Language that excuses the contract's other promises rather than create new ones.
                    i. Failure to satisfy a promise is not a breach of contract.
                c. "Magic words" to look for in exam hypotheticals.
                    i. "If…"
                    ii. "Only if…"
                    iii. "Provided that…"
                    iv. "So long as…"
                    v. "Subject to…"
                    vi. "In the event that…"
                    vii. "Unless…"
                    viii. "When…"
                    ix. "Until…"
                    x. "On condition…"
            3. *How is an express condition satisfied?*
                a. If the express condition has been "satisfied," then there is no excuse for a non-performance.

i. Express conditions are "satisfied" if strictly complied with by the performing party.

4. *When non-occurrence of an express condition occurs?*
5. *What are the differences between conditions precedent and conditions subsequent?*
    a. *Express vs. Constructive conditions*
6. Condition Precedent
    a. Defined. – A condition that is a prerequisite to the parties' performance obligations.
    b. Occurs between the express condition and the time the actual obligation to perform according to the contract terms.
    c. The **non-occurrence** of an express condition precedent excuses any contract performance.
7. Condition Subsequent
    a. Defined. – A condition that imposes a post-contractual limitation on the duty to perform.
    b. The **occurrence** of an express condition subsequent excuses continuing performance.

iii. Constructive Conditions

1. Defined. – Language of promise in the contract and are subject to the material breach rule.
    a. "Constructive" refers to actions made up by the courts, and not the parties involved.
    b. **Doctrine that explains why performance by a party is dependent on performance by the other party.**
2. Constructive Conditions of Exchange
    a. Since a bilateral contract involves an exchange of promises, each party's performance of his or her promise becomes a condition to the other party's duty to perform.
    b. Examples
        i. Constructive Receipt Doctrine (tax law)
        ii. Constructive Trust
    c. Each party will receive the promise from the other party. Reasoning for dependence, and whenever possible, to be performed simultaneously.
    d. Absent those circumstances, each party is protected in the sense of not sacrificing the leverage associated with withholding one's own performance.
    e. Restatement (Second) of Contracts § 234
        i. (1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.

ii. Foregoing the constructive conditions – *Which party's performance becomes a constructive condition precedent to the other party's performance? Who goes first?*
1. The first thing to do is to look at the agreement between the parties.

f. Restatement (Second) of Contracts § 234(2)
i. (2) Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.
ii. The party requiring a longer period of time should go first.
iii. The providers of services or goods should go first. (Payee vs. payer)
1. Rationale – Reflects a bias rooted in certain class-based assumptions about employers as a group believed to be more trustworthy than the proletariat classes.
2. If someone gets paid first, motivation is lost to perform to the best of his or her ability.
a. *What if anything less than full performance will fulfill the constructive condition precedent to the other party's performance?*

c. Material Breach
i. **Only material breaches can excuse further performance of a contract governed by common law.**
1. Determined by a question of fact.
ii. Types of Material Breach
1. Quantity-Based – Not enough of the performance is completed.
2. Quality-Based – Performance is completed at a level unacceptable to the party receiving the benefit of performance.
iii. ***Substantial Performance***
1. Breach is NOT material if there is unsubstantial performance.
a. Both substantial performance and material breach cannot exist together for a single breach.
2. **RULE:** Condition is excused once performance reaches a substantial performance.
a. The rule avoids a disproportionate forfeiture.
b. *Does this mean the owner must pay the remaining balance, and the builder is off the hook?*
i. YES, the owner must pay, and NO, the builder is not off the hook. The builder is still liable for

damages resulting from the duty of the performance.

c. Prevents forfeiture that can result from strict application of such performances.
d. Unjust enrichment – One who has conferred a benefit to another.
e. Cannot recover under contract, but it will not fully cost to complete performance.

3. What are the damages?
    a. To avoid economic waste, that adds no value to the structure, using the alternative method of diminution in value.
        i. Limitations on the doctrine
            1. Deviation from performance if frustrating the purpose of the contract.
            2. Express considerations are not express stipulations in the contract.
                a. Required to cut the breaching party more slack if it was careless or inadvertently committed nonperformance. If an intentional breach, it will affect the court's ruling on duty to perform.
                    i. "Willful transgressor" will not be rewarded.
    b. Strict performance down to the finest minutia is probably not aligned with the intent of the contracted agreement.

iv. Divisible Contracts
1. Treat the terms as separate contracts, and avoid the unfair forfeiture.
    a. Would be associated with a strict application of constructive conditions.
2. Determinations
    a. Is the contract divisible, or is it one for the entirety? – Requires ascertaining intent of the parties.
        i. Restatement (Second) of Contracts § 240
            1. If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

d. Repudiation (Anticipatory Breach)
    i. Defined. – One party's indication that it will breach by not performing before the time of performance.
        1. If material, the anticipatory repudiation excuses contract performance for the non-breaching party.
        2. Anticipatory repudiation is a form of breach of contract.
        3. Requires an unequivocal indication of intention to not perform the promise by the breaching party.
        4. "If one party stops his performance because he honestly but incorrectly interprets the other party's post-contract words and conduct as rising to the level [of] an anticipatory repudiation, then it is the first party who has actually committed the anticipatory repudiation."
            a. A party's misinterpretation of the other party's repudiation may result in that party becoming liable for breach of contract due to repudiation.
    ii. Restatement (Second) of Contracts § 250
        1. (a) A statement made by the obligor to oblige indicating that obligor will commit a breach to give oblige a claim for damages for total breach. (Express Repudiation)
        2. (b) A voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach. (Implied Repudiation)
    iii. Breach and Remedies
        1. A party to a contract commits a breach when she fails to perform her promise without a valid excuse.
            a. Once the other party breaches, that gives rise to the other party to a claim for damages, which entails a disaffirmance, or claim for a specific performance. Affirmance of the contract.
        2. Generally, the law has a bias for substitution over coercive relief.
            a. Money damages are the norm. The aggrieved (non-breaching) party will be measured in money damages.
            b. When the non-breaching party's actions are executory, there is a claim for damages. The other party may withhold performance and in turn reduce damages.
                i. Forgiven by the value of the excused performance.
                ii. If breach is a material breach, it is also the failure of a condition precedent of the performance because of the operation of construction conditions of exchange.
                    1. Breach without a specific performance. Substantial performance requires a performance without a material breach.

iii. Affirmative remedies and defensive remedies are available for non-breaching party in a material breach.
1. There could be recovery under the doctrine of divisibility or quantum meruit.

iv. Express and Implied Repudiation
1. Express repudiation is easy to spot because it is more simplistic and obvious.
2. Implied repudiation is more difficult to spot.
a. Conduct suggests that another party is not going to perform the contracted terms.
b. *Should there be a middle ground position open to a person in this position? One that reconciles the tension between the preferences that parties perform?*
c. Protect the party who justifiably becomes concerned with the other's performance.
3. Grounds for Insecurity (UCC § 2-609)
a. (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
b. (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
c. (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
d. (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

H. Enforcement (Damages)
a. **Place the parties in the position they were in as if the contract had not been breached and performance occurred.**
b. Usual measure of money damages for breach of contract is expectation.
i. Give the non-breaching party what was bargained for in money terms.
ii. Restatement (Second) of Contracts § 347 Approach on Damages
1. The injured party has a right to damages based on his expectation interest.
a. Ways interest is measured

i. (a) The loss in the value to him of the other party's performance caused by its failure or deficiency.
ii. (b) (Plus) any other loss, including incidental or consequential loss, caused by the breach.
iii. (c) (Less) any cost or other loss that he has avoided by not having to perform.

iii. Loss Volume Seller
1. Typically occur in the case of high-ticket items.
a. Examples: private jets, yachts
2. Limited number of buyers
a. Only produce so many as there is demand for the given goods.

iv. **"The cost avoidance concept often comes into play when a non-breaching party claims lost profits as contractual damages."**
1. The cost is not saved; rather it is allocated to the other transactions making each one proportionately more expensive, and in turn, less profitable.
2. Must bear an amount of overhead.
3. Each transaction bears more overhead and is less profitable.

c. Types of Damages
i. Expectation Damages
ii. Consequential Damages
1. UCC § 2-715(2)
2. Limitations to Consequential Damages
a. Avoidable
b. Not foreseeable
c. Too indefinite.
i. Damages have not been proved with reasonable certainty.
3. Motion *in limine* - Preliminarily; presented to only the judge, before or during trial a question to be decided *in limine*.
a. Request to the judge of the court that certain evidence may or may not be introduced to the jury at trial. Typically done in chambers. Always outside the hearing of the jury.
b. Questions to be decided by the judge.

iii. Reliance Damages
1. Necessary to compensate the plaintiff for changing their position for detrimental reliance.
2. Restatement (Second) of Contracts § 349
a. The injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, <u>less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed</u>.

iv. Restitution Damages

1. General Overview
    a. Measured by the value of the benefit conferred on the promisor in the course of performance.
    b. Objective is not to put the promisee in the same position as before, but rather put the promisor (breaching) back in the position as if the promise had not been made.
    c. It does not take into account the expectation or reliance that produces the benefit.
    d. Usually the least generous.
    e. Differentiated from a quasi-contract because there is a definitive promise.
        i. Restitution damages are an alternative to an action to enforce the contract.
        ii. Breacher must account for the benefit conferred during the course of performance.
        iii. Measured by the amount necessary for the breaching party back into the position as if the promise had never been made.
2. Quantum Meruit – Allow a promisee to recover the value of services he gave to the defendant irrespective of whether he would have lost money on the contract and been unable to recover in a suit to the contract.
    a. Black's Law definition – A claim or right of action for the reasonable value of services rendered.
3. "Net Benefit" Rule – **Restatement (Second) of Contracts § 374**
    a. (1) Subject to the rule stated in Subsection (2), 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.
    b. (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.

d. Formula for Calculating Expectation Damages
    i. Restatement (Second) of Contracts § 347
        1. **(LV + OL) – (CA + LA)**

        (Loss in Value + Other Loss) – (Cost Avoided + Loss Avoided)
            a. LV – Difference between what was promised and what received.
                i. For payee (seller/supplier) – unpaid cost to complete or repair.

ii. For payor (buyer/recipient) – cost of substitute performance.

b. OL (Other Loss)
   i. Incidental loss – Expenses incurred as a result of the breach that would not have occurred if but for the breach.
      1. Any consequential loss that resulted.

c. CA – Cost avoided

d. LA – Loss avoided – gain made possible (mitigation)
   i. Foreseeability
      1. There are occasions that even if the aggrieved party is awarded for benefit of damages, the ultimate remedial objective to make the non-breaching party whole IS NOT SERVED.
         a. Loss in value – There are sometimes other losses beyond direct damages.
            i. Reflected in the contract market differential.
      2. Distinction between LV and OL
         a. Expenses incurred by the non-breaching party that would not have been incurred if but for the breach of contract.
         b. In order to resell goods and mitigate damages, non-breaching party make have to take additional steps to resell.
            i. Incurred costs.
         c. Consequential Damages – Typically much more substantial.
         d. The non-breaching party has relied on the performance when ordering other affairs, and will suffer an additional loss when the reliance is misplaced.
   2. Remedial objective to get the non-breaching party to be made whole economically.

e. Limitations on Damages
   i. Certainty
      1. Contract damages must be proved to a reasonable certainty in order to be awarded to the non-breaching party.
         a. Lost profits must be shown with reasonable certainty.
   ii. Foreseeability
      1. Applies to special or consequential damages.

2. The breaching party must be able to prove that, at the time of contract formation, it was able to reasonably foresee the loss that could be caused by the breach of contract.
    a. Made known during the formation process.
    b. General circumstances must be known to all.

iii. Avoidability
1. Mitigation – The non-breaching party can obtain substitute performance and minimize loss.
    a. Damages are **denied** to the non-breaching party if they were avoidable if only the non-breaching party had obtained specific performance.
        i. Breaching parties are not liable for damages that the non-breaching party could have avoided.
    b. Limitations
        i. The non-breaching party does not have to mitigate damages if doing so requires undue risk, burden, or humiliation.
            1. Example: Employment contracts
2. Because of the breach, the non-breaching party does not have to pay for the return performance.

f. Damages for Specific Performance
i. **Generally ordered when the remedy of (monetary) damages is adequate and when it is fair and reasonable to compel performance.**
1. Order for specific performance over money damages.
    a. Either to do something or refrain from doing something. Order to the person to perform or be in contempt of court.
        i. Prohibitory injunction – Restrains the defendant from taking a specific course of action.
    b. Often used as an indirect means as a force of duty owed.
2. Elements of Specific Performance as Damage Remedy
    a. Inadequacy of monetary damages
    b. "Equity"

ii. *Under what circumstances will a court assert its discretion and order an equitable remedy?*
1. General rules that guide courts as to when it is appropriate to provide equitable relief.
2. Restatement (Second) of Contracts §§ 357-369

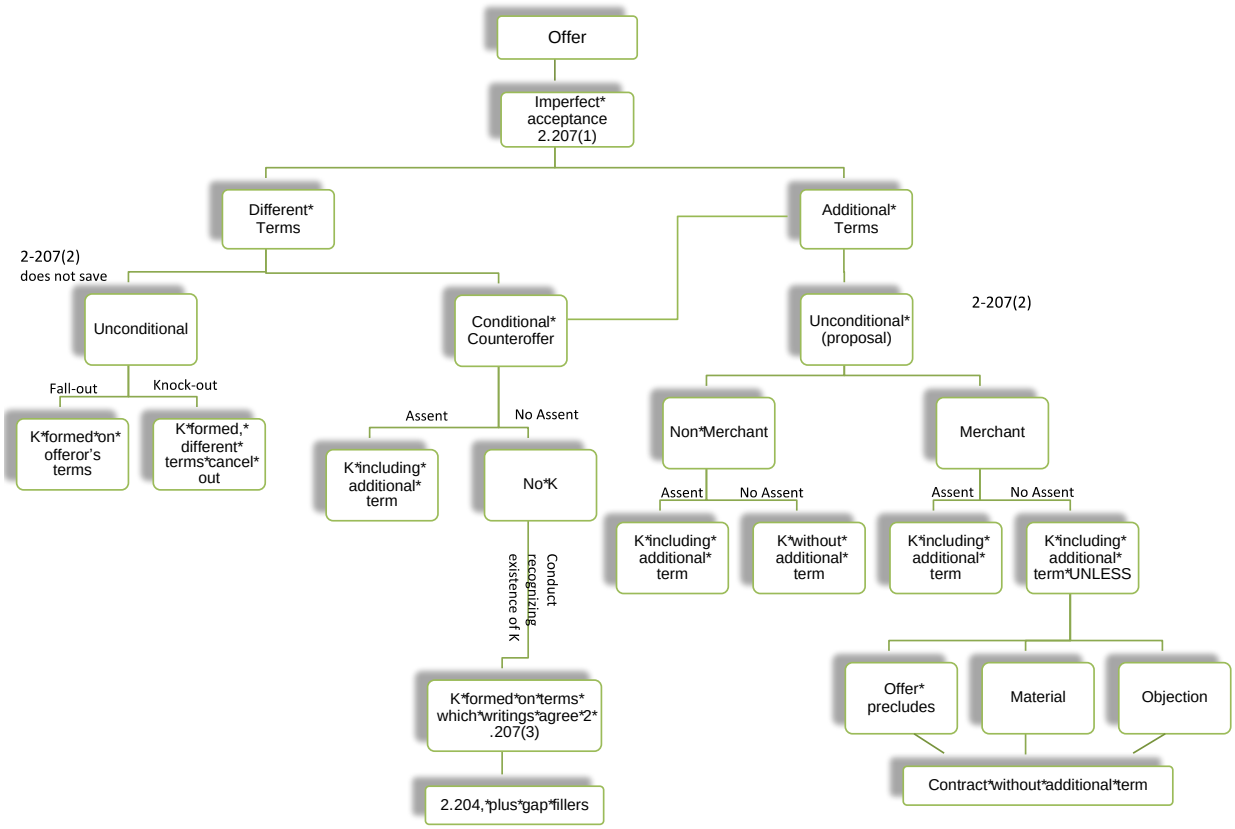
iii. Uniform Commercial Code § 2-716
1. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
    a. The subject matter of the contract may not be unique, but the terms of the contract may be unique, thus falling adequately under a test of uniqueness by the UCC.
2. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

3. (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

g. Liquidated/Stipulated Damages
   i. Can the parties alter those remedies by their prior agreements?
      1. Yes, to an extent. But given the notion of freedom of contract that exists when the parties are bargaining for the terms of the contract, the power to bargain for remedial rights is much more limited.
      2. There is a freedom to bargain, to some extent, for remedies.
   ii. Encounter the limits of freedom of contract when dealing with remedies sooner, as opposed to performance.
   iii. Theories of Liquidated Damages
      1. Traditional Approach – Restatement (Second) of Contracts § 356
         a. A court will not enforce a liquidated damage if it acts as a penalty or forfeiture clause.
         b. Parties bargain for stipulated damage to act as a deterrent for breach of contract.
            i. Avoids cost of litigation.
            ii. Promotes rational decision-making for the course of future conduct.
            iii. If damages will be difficult to assess and prove, it might be beneficial to define terms of damages ahead of time.
            iv. Parties might want to negotiate to minimize risk of breach.
            v. Minimum adequate remedy.
   iv. Consistent with freedom of contract – *What are the limits?*
      1. Allow the parties who have economic interests to allocate risk as they see fit.
      2. Adjust economic relationships accordingly.
      3. Generally aligned with conservatively-bent economics.
   v. Traditional Enforcement
      1. Parties must not intend the liquidation of damages to operate as a penalty of forfeiture.
         a. If compulsion of performance is a concern, why does intent matter? Does it operate as a penalty or not?
      2. Damages anticipated from breach must be uncertain in amount or difficult to prove.
      3. Provision must be a reasonable forecast of damages that are uncertain or difficult to prove.

a. When was forecast assessed?
    i. Traditional View – At the formation of the contract.
    ii. Contemporary Approach – Accept the reasonableness either at the anticipated or actual loss.

vi. Efficient Breach of Contract
1. If one party can breach the contract, and realizes that a better deal can be made with another party and still make the original affected party whole, it may be worth breaching.
2. Makes a lot of assumptions.
    a. Assumes no transaction costs.
    b. No moral notion to promissory liability.



§ 2-207 Imperfect Acceptances
see pages 7 and 8

Prior Question

New Era Homes entered into a written agreement with the Fosters to make extensive alterations to the Fosters' home, the reference therein to price and payment being as follows:

"All above material and labor to erect and install same to be supplied for $20,000 to be paid as follows:

- $1,000 on the signing of the contract
- $7,000 upon delivery of materials and starting of the work
- $8,000 on completion of rough carpentry and rough plumbing
- $4,000 upon job being completed."

The work was commenced and partly finished, and the first two stipulated payments were made. Then, when the "rough work" was done, New Era asked for the third installment of $8,000, but the Fosters would not pay it claiming that New Era's work was shoddy and demanding that it be corrected before payment would be made. Thereupon, New Era stopped work, claiming that the failure to pay the third installment was a breach. The Fosters hired another contractor to come in and complete the job at a total cost of $13,000.

New Era has now brought suit for $8,000 on the theory that since all the necessary "rough carpentry and rough plumbing" had been done, it was entitled under the contract to collect $8,000. The Fosters counterclaimed, asserting that New Era was in breach and demanding damages of $13,000 for the cost of completing the renovations. The evidence will show that the costs incurred by New Era up to the point that work was halted were $10,000. In addition, the estimated cost of completing the work was $6,000, although New Era was able to divert $500 worth of materials acquired for the Fosters' job to another job.

Both parties moved for summary judgment. The trial judge determined that because the contract did not specify a specific standard to which New Era's work was to conform, the Fosters committed a breach when they failed to pay the $8,000 after completion of the carpentry and plumbing work. The court therefore entered judgment for New Era in the amount of $8,000 on the basis that the parties' contract indicated their intent to be that the work to be performed by New Era was to consist of several distinct and separate items and that the price to be paid by the Fosters was to be apportioned to fall due under each specified stage of the work as it should be completed in accordance with the payment schedule set forth in the contract.

The Fosters have now appealed and you are the clerk employed by the judge assigned to write the opinion. Your judge tells you that just on a quick glance at the record she is convinced that this case needs to be remanded, but she doesn't have the time to explain to you why. However, knowing that you're well schooled in Contract Law, she says she's sure you can figure it out and, therefore, has asked you for a first draft of the opinion. On the way out the door, she adds that you better be sure in the opinion to provide the trial judge with some guidance on both the issues of liability and damages.

Please provide the opinion, explaining the basis for your conclusions.

Model Answer

There is an initial question of who committed the first material breach, which, from the facts, cannot be determined. Thus, summary judgment on this issue was inappropriate. The fact that the contract didn't specify the standards by which New Era's work was to be judged does not mean that less than competent work would be sufficient to satisfy its obligations. Rather, in the typical service contract, the provider is obligated to perform consistent with what would pass in the community for reasonably competent work. Failure to adhere to this standard would constitute a breach, triggering the owner's right to withhold his own performance and seek damages for breach. This can only be determined after presentation of evidence at trial

Even if New Era were to prevail at trial on this issue of breach, the judge also erred in obviously concluding that this was a divisible contract rather than a contract for the entirety, thereby permitted recovery by New Era commensurate with the amount of the consideration allocated to New Era's performance through completion of the third stage. Although the trial court properly recognized that this determination must be made based on the intent of the parties, the application of that standard was clearly erroneous and should not stand. Almost certainly, the Fosters were bargaining for the completion of the renovation work. The fact that the consideration was apportioned to different stages of performance does not conclusively establish that the parties really intended the work to be treated as discrete performances.

The purpose of contract law damages is to put the aggrieved party in as good of a position as performance would have. Therefore, New Era's damages, if it were to prevail, would properly be measured by the loss in value occasioned by the Foster's breach less the costs New Era was able to avoid as a result of not having to complete the work and the gain made possible as a result of the breach (loss avoided). Application of that formula in this case would produce the following result: $12,000 (unpaid contract price) less $6,000 (cost avoided) plus $500 (loss avoided or gain made possible) = $5,500. That amount, coupled with the $8,000 paid, the $6,000 in costs saved and the $500 mitigation equals $20,000.

If it is determined that New Era committed the first material breach by refusing to correct the substandard work and walking off the job, the Fosters' contention that they are entitled to damages based on the cost of completion, or $13,000, is equally infirm, as it fails to take into account the $12,000 they would have been required to pay out under the contract if New Era had not breached. Therefore, compensatory damages would only be $1,000, plus the consequential damages, if any, they could establish. It is unlikely, however, in the case of residential renovations that there would be any recoverable consequential loss.