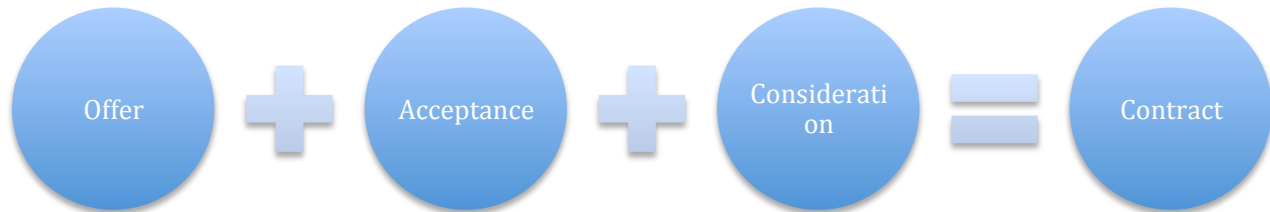


Contracts Outline

Sources of Law:

- Common Law
- Restatement of Contracts
- Uniform Commercial Code (UCC)
 - Governs sale of goods, goods = any movable item
- Convention on Sale of International Goods (CISG)

I. **Contract Basics:**



a. **Offer**

- i. Outward manifestation: oral, written or via conduct; and signal that acceptance will conclude the deal
- ii. Available for a reasonable amount of time
- iii. Person who gives offer can revoke it at any time

b. **Acceptance**

- i. Expression; or
- ii. Silence; or
 1. Custom in long relationships
- iii. Action.
- iv. Cannot be revoked
 1. Mailbox Rule = acceptance by mail creates a contract at the moment of dispatch

c. **Consideration**

- i. = agreement needs to be an exchange, you need both arrows
- ii. needs to be credible that they were bargained for and given in exchange
- iii. and it is a detriment
- iv. moral/past consideration = generally not sufficient
- v. preexisting legal duty is not consideration

d. **Formation:** UCC § 2-204 – broad, a k doesn't need special moment of the making

e. **Bilateral v. Unilateral Contracts**

- i. Bilateral Contract = exchange of mutual promises
 1. Exs. Horse exchange, any goods
- ii. Unilateral contract = acceptance by performance, limited to two scenarios:
 1. i. completion of performance is the only manner of acceptance; and
 2. ii. offer to the public
 - a. Ex. Bounty hunter "wanted dead or alive"

- b. Ex. Radio show offer \$100 to the 99th caller
 - c. Ex. Tramp must walk to the store to get the coat, Brooklyn Bridge walk for \$
- f. Dead man statute = when one party is dead, prevents extremely biased testimony, need evidence to strongly corroborate an agreement
- g. **Statute of Wills** = formal requirement helps courts avoid swampy analysis
- h. **Statute of Frauds** = things need to be **written down & signed** to be enforceable (affirmative defense, must bring it up in litigation or face malpractice) (UCC version is §2-201)
 - **Types of Ks that must be in writing:**
 1. Suretyship provision (ex. Co-singer)
 2. K for sale of interest in land
 3. K that cannot be performed within one year from its making (one-year provision) when there is no way you can perform the K in a year.
 4. Sale of goods in excess of certain value (\$500 or more in UCC)
 - **Exception to Statute of Frauds: (UCC exceptions §2-201(3))**
 - Promissory Estoppel §139 restatement
 - Specially made products
 - Admittance in court that K was made
 - Paying in reliance on the contract (promissory estoppel)
- i. **Benefits of Legal Formality (Fuller's F(n) of Form):**
 - i. 1. Evidence;
 - ii. 2. Caution;
 - iii. 3. Channeling
- j. **Promissory Estoppel** (Restatement 90) = consideration is not necessary if the facts indicate that the promisor should be estopped from not performing.
 - i. A promise is enforceable if necessary to prevent injustice if:
 1. The promisor should reasonably *expect to induct action or forbearance; and*
 2. *Such action or forbearance is in fact induced.*
 - a. (The remedy is Reliance Damages).
- k. Contracts subject to conditions of personal satisfaction
 - i. **Illusory promise** – not enforceable (exs. If you have a legal duty anyway, too subjective) no real commitment, the promise I just exchanged is (0 value) with what I give you
 1. Ex. "I promise I will stay here until noon, unless I change my mind."
 - ii. **Personal satisfaction clause** – a very subjective commitment, promisor is limited by good faith
 1. Ex. "I will pay you if I am personally satisfied with your work."

II. Policy Approaches to Judicial Intervention

- a. Strangle Hold Policy = its not easy for 1 party to get out of the k, unusually serious consequences, courts should intervene
- b. Dismal Swamp Policy = complex, “murky” relationships: history, vocabulary, implied understandings, then court reluctant to intervene
- c. Hot Potato Policy = if most parties don’t want outside intervention and think it would be an interference, they are not likely to go with court proceeds will be difficult to intervene with pissed off parties
- d. Living Tree Policy = based on a continuing relationship and ideas of “trust,” difficult for court to get involved

III. Family Contract Cases

- a. **Balfour v. Balfour** = husband England case, wife stays behind he is going to pay her, no intent of legal implications when they contracted, another said she didn’t make a bargain (no consideration)
- b. **Mehren v. Dargan** = you can’t contract to do something illegal; k violated public policy because the agreement frustrates the statutory policy favoring no-fault divorce, penalty clause
- c. **Miller v. Miller** = not considered a K even though it was incredibly formal for public policy reasons, not bringing up past arguments
- d. **Marvin v. Marvin** = k can’t be based on sex, even if sex was included if a provision is severable it is still valid. Family Law Act does not support rights on non-marital partners.
 - i. *Vallera v. Vallera* –
- e. **Hammer v. Sidway** – uncle will pay nephew if he doesn’t smoke or drink until he is 21, we will enforce this because it is a TRUST, a trust has no statute of limitation.
 - i. Trust = a gift with strings attached, not a K
 - 1. I would have had to put away money for you
 - ii. Uncle wasn’t asking him to do something that was already against the law
- f. **Kirksey v. Kirksey** – sister in law comes to live on house, issue of reliance, why did he actually want her to come live on the property, ruled for sister in law, consideration issue – was there a mutual exchange of promises or was brother in law just being nice?
- g. CONDITIONAL GIFTS
 - i. Gratuitous gift is a true “gift” – that’s what we assume families are doing unless evidence to the contrary
 - ii. **Ricketts v. Scothorn** – Restatement 90 – **promissory estoppel**, niece wins on promissory estoppel
 - 1. Uncle gives niece a note saying that she shouldn’t have to work and will pay her X

2. We don't treat promissory notes as delivered gifts because we say that what is dominant in that situation is the promise not the paper.
 3. Note here is just evidence of a promise to pay
- h. ***Davis v. Jacoby*** – judicial manipulation of K doctrine; promissory estoppel.
- i. Court wanted the outcome to serve the moral right so they manipulated k doctrine to fit the “correct” outcome.
- i. ***Brackenbery v. Hodgkin***- evil couple take care of grumpy mom, unilateral k awarded specific performance of deed of house, let the couple keep the house
- i. No personal satisfaction clause, BUT was displeased with actual care that she received.

IV. Seller's Obligations

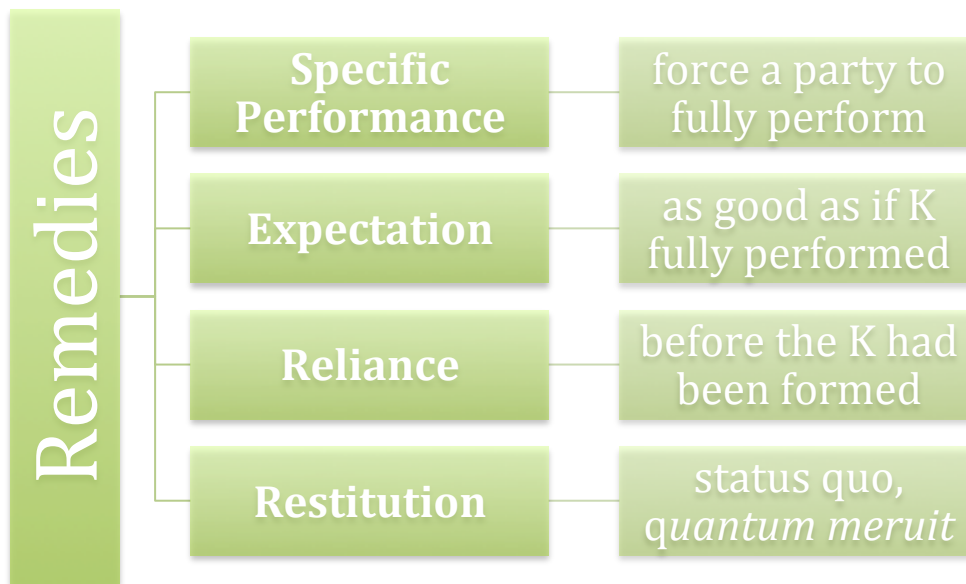
In general, the seller's obligation is to transfer & deliver;
and buyer's obligation is to accept & pay in accordance with the K. (UCC § 2-301)

- a. Deliver Goods §2-301
- b. Shipment under Reservation §2-505
- c. Transfer the Goods to Buyer §2-301
- d. **The Perfect Tender Rule §2-601**
 - i. Goods must perfectly conform to what was contracted for
 - ii. Tender must be made at a reasonable time §2-503(1)(a)
 - iii. If breach of PTR, then Buyer can:
 1. Reject the goods;
 2. Accept the goods; or
 3. Reject part & accept part of the goods.

V. Buyer's Obligations

- a. Accept goods
- b. Make payments
- c. Merchant's Duties Upon Rejection of Goods §2-603
 - i. Upon rejection, a merchant buyer must:
 1. Contact the seller
 2. Buyer must:
 - a. Take a §2-711 security interest in the goods
 - b. Resell them (any profits above the Buyer's damages must go to seller)
 - c. Buyer may “cover” (aka mitigate)– buy substitute goods elsewhere and charge the seller for the difference in price (§2-712; §2-713)
 3. Performance of Obligations Excused

VI. Remedies (\$)



a. 3 initial questions to ask:

- i. nature and extent of the plaintiff's compensable loss, including harm suffered and availability and form of the legal remedy or remedies to redress it;
- ii. if there is more than one means of remedying the loss, we must decide which of the available remedies most effectively and comprehensively compensates for it;
- iii. take into account any policies or principles that may limit the defendant's liability for the loss.

b. **WTF is a K breach anyway?** It is the failure by one or both parties to fulfill the contract. Can be either (1) material or (2) non-material.

c. **Specific Performance**

- i. Court order for parties to complete the contract (rare in US because we don't want courts involved in ongoing matters that would require a lot of oversight)
- ii. UCC §2-716 – Buyer's Right to SP or Replevin
 1. Goods are unique or in other proper circumstances
- iii. Woodward says this would be like involuntary servitude

d. **Expectation**

- i. To put parties in as good of a position as if the K had been fully performed
- ii. Default measure of damages. Aggrieved party is entitled to amount that will restore her to the position she would have been in had the K been fully performed.
- iii. ***Hadley v. Baxendale*** – the Foreseeability Test – “the damages which the other party out to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally...or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract”

1. UCC §2-715(2)(a) – expression of Hadley

RULES:

2. Arising naturally
 - a. General damages = what you normally get from breach of K, diff \$
3. Reasonably foreseeable
 - a. Special Damages = damages specific to this case & specific to these facts

iv. **Lake River v. Carborundum** (100)– breach deterrence v. liquidated Ds

1. Not enforceable LDs because it was a **penalty clause** and a conversion to keep the material
2. Blunderbuss K – would have had to pay certain damages no matter what point the K was breached
3. LD clause is valid when there is a proportionality
4. Benefit of LDs
 - a. Keep breach from happening
 - b. Predictability you know the worst case scenario
 - c. Shorter litigation time

v. Golden parachute – pg. 111

1. Using wealth to oppress people
2. “pound of flesh” = we don’t want to support retributive stuff

vi. Efficient Breach = **NIPSCO** good example.

1. If both parties are in a losing contract they should breach.
2. Coase Theorem = (economic perspective, Woodward doesn’t like) if there are no transaction costs, the good will end up with the person that values the goods the most
 - a. I’m going to do it until it is uneconomical for me to do this thing

vii. *Asante Technologies* – to opt out of CISG you have to explicitly say that

viii. **Parker v. 20th Century** (51)-

1. You don’t have to accept an inferior offer to mitigate. (2-709) (b).
2. We don’t give \$ for lost opportunity. You don’t have to accept different & inferior offers.

ix. **Copylease v. Memorex** (89) – specific performance not enforceable in US and even if you did it is more of a bargaining chip for better damages in settlement (law & action)

1. Uniqueness Test (UCC 2-716)
 - a. Specific performance may be decreed where the goods are unique or in other proper circumstances.

- x. ***Evergreen v. Milstead*** – drive in movie theater case should be open for summer but didn't open until later. Too many variables involved in a start up – you need a well-established business to determine the reasonable certainty of lost profits
- xi. ***Chung*** – (pg. 123) “contract is breached in a wanton or reckless manner as to result in a tortious injury, the aggrieved person is entitled to recover in tort”
 - 1. Emotional damages are allowed – window into the morality of breaching
 - 2. Proof of damages new businesses
- xii. **General Expectancy Damages Calculation**

$$\begin{aligned} &\text{Loss of value of the breaching party's performance} \\ &+ \text{any incidental and consequential costs generated by the breach} \\ &- \text{any payments received from the breaching party} \\ &- \text{any costs saved as a result of the breach} = \\ &\text{Expectation Damages of the Aggrieved Party} \end{aligned}$$
- xiii. UCC Sections: §2-709, §2-715
 - 1. Sellers Expectancy Damages:

$$K \text{ Price} - \text{Market Price} - \text{Incidental expenses} + \text{Expenses avoided}$$
 - 2. Buyer's Expectancy Damages:

$$\text{Price of substitute goods} - K \text{ price} - \text{incidental expenses} + \text{expenses avoided}$$
- xiv. **Liquidated Damages:** §2-718(1) – parties can agree to damages of a breach in their K
 - 1. Liquidated damages cannot be “**penalties**” (**pound of flesh**) any award unreasonably disproportionate to the actual damages incurred will be considered a penalty, and will not be enforced §2-718(1).
 - a. Case example where we had penalty damages
- xv. **Incidental Damages:**
 - 1. **Sellers** §2-706, §2-710 seller may recover incidental damages only (i.e. stop delivery charge, commissions, storage, resale costs)
 - 2. **Buyers** §2-715 – Buyer gets incidental and consequential damages
- xvi. **Direct Damages**
 - 1. Damages for price §2-708(1) market price – K price; OR
 - 2. Damages for price if resold 2-706 resale price – K price; OR
 - 3. Lost Profit §2-708(2) IF:
 - a. Damages for price are “inadequate”
 - b. The seller is a “**lost volume seller**” – he has access to an unlimited supply of such items (and could have made two sales)
$$\text{Lost profit} = \text{retail sale price} - K \text{ price}$$
 - ***Neri v. Retail Marine Corp.*** (65) = case is a lost volume seller. Would a second sale occur if the first was not breached? UCC - 2-708(2)

- Construction cases are lost volume because contractor is not mitigating their damages by entering into a second contract because you have capacity to perform the contract that was breached and any other. (Pg. 79 casebook)

e. **Reliance**

- To put the parties in a position before the K had been formed
 - What did you spend relying that the K would be performed? Get to 0.
- Restatement § 349
- Security Stove v. American Railways*** – stove case, you can't put a number on the lost damages of future sales so they had to go with reliance damages.
 - Law can't calculate the potential injustice of loss here, so go with easier rule of reliance
 - Perfect Tender Rule §2-601 – if goods or their delivery fail to conform to the contract in any way, the buyer generally may reject all, accept all, or accept any units and reject rest
 - Reliance has to be reasonable
- L. Albert & Son v. Armstrong Rubber*** – See Restatement Contracts § 349 “losing contract” (this was the case where substitute rubber prices were inflated during WW2, but after Japan gave up the prices for natural rubber were cheaper than the shitty alternative). Get them to the losing bargain.

f. **Restitution** (essentially rescinding the entire K)

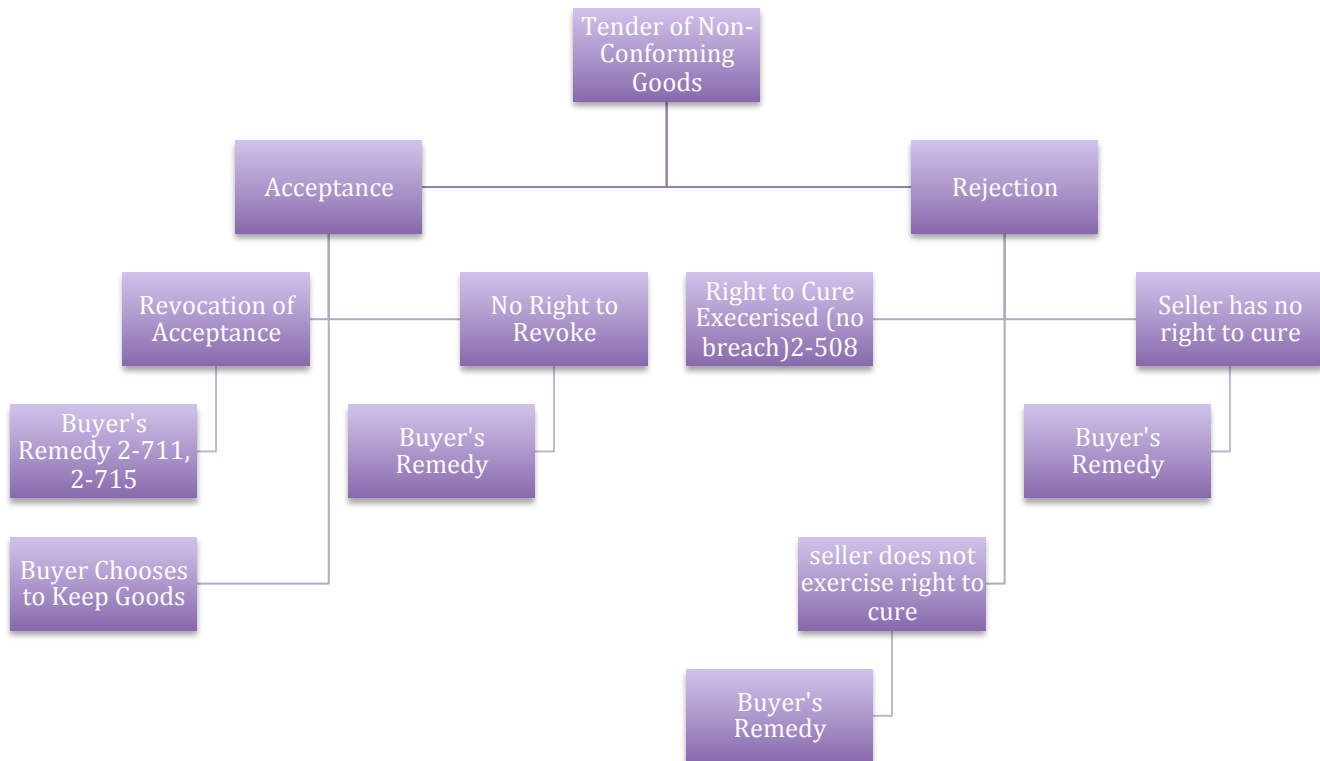
- To put parties in status quo and pay them for services rendered = “*Quantum meruit*” = reasonable value of services
- Unjust enrichment**
- Only remedy available if no K formed
- Must ask yourself whether or not the K was fully performed. IF fully performed then you can only recover K price. IF not fully performed then you get market value.
- Restatement § 370 - §373
- UCC Sections: §2-705, §2-305, §2-716**
- Exit case: *Colonial Dodge v. Miller* (166)**– payment does not equal acceptance
 - Acceptance §2-606
 - Reasons you can revoke acceptance §2-608 (1)
 - Must substantially impair the value *to him*
 - Material breach
- Oliver v. Campbell* (175)**– lawyer divorce action. We don't want to punish the client for firing their lawyer, we want to support client mobility. You can't collect above the K price.
 - Restatement 347 (b) – if fully performed you're limited to the max of the contract price
 - If not fully performed, damages are the reasonable value of your services
 - P wanted this because more \$ and expectation damages would be harder to prove

g. Difficulties with Restitution as a Remedy for Breach of K in building Ks

- i. ***De Leon v. Aldretie*** (189)- payments of the house, restitution case. P had paid 70% of the k price. Restitution for P in default. Similar to a penalty? Ruled it unjust and gave him the money.

Acceptance, Rejection, Cure & Revocation (UCC Art. 2)

Ex. Colonial Dodge case, not having the tire to the car was a non-conforming good

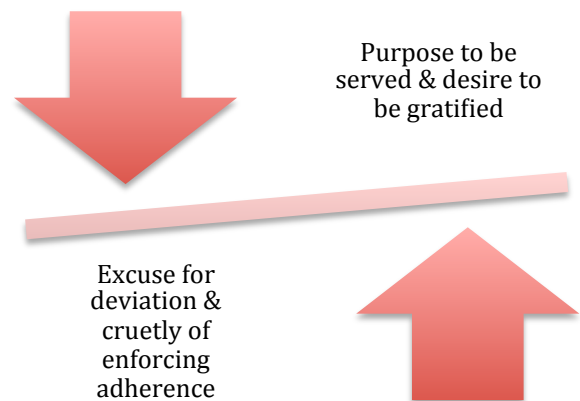


h. **Substantial Performance** – you did just enough that we are going to let it go

- i. ***Jacob & Youngs v. Kent*** – wrong pipes installed in house. Court held that defect was not so dominant or pervasive in any real or substantial measure to frustrate the purpose of the K.

1. Factors to weigh:

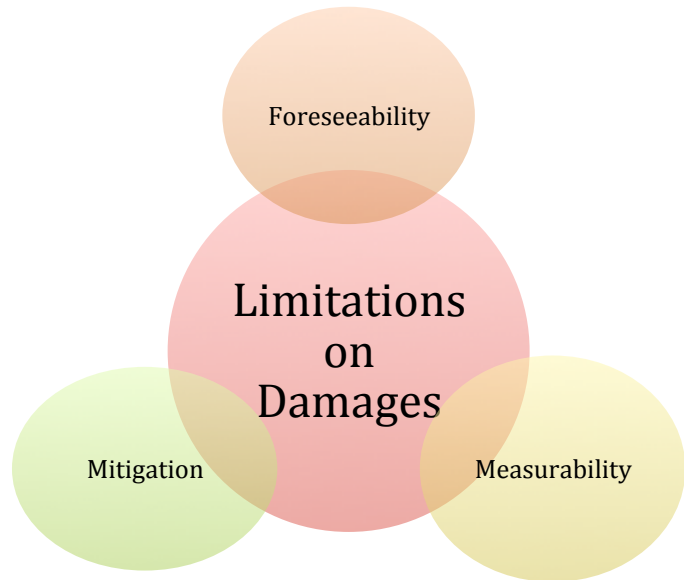
- Purpose to be served
- Desire to be gratified
- Excuse for deviation
- Cruelty of enforced adherence



- i. ***Plante v. Jacobs*** (172)– resell value of house did not change with wall being a foot off. Court found that it was not a substantial breach

j. **Limitations on Damages:**

- i. **Foreseeability**
(Hadley)
- ii. **Measurability** –
damages must be
measurable
- iii. **Mitigation** – parties
must/should attempt
to mitigate any losses
from breach of K. (i.e.
resell their goods).
Burden of proof is on
the D to prove that the
P did not mitigate. 2-
709(b)



k. **Measuring Subjective Losses**

- i. ***Peevyhouse v. Garland Coal Mining*** (pg. 196) – whether or not to apply diminution in value v. cost of performance rule. (both rely on Expectation principles) Court found that the back digging was incidental to the main purpose of the contract. My opinion – a misreading of the dismal swamp problem.
 1. Subjective value of a property and how that idea is applied.
 2. **Diminution in value**= (market value, objectified loss) the difference between the present value of the farm and what its value would have been if D had done what it agreed to do
 3. Restatement 168 –
- ii. ***Hawkins v. McGee*** (210)– Dr. guaranteed a perfect hand, guy got a harry hand. Trial Court instructed jury on reliance. Damage – getting guy back to his burnt hand.
- iii. ***Sullivan v. O'Connor*** (cap. 5)- nose job case – she gets the recovery for out of pocket expenses and worsening of her condition and pain & suffering of 3rd operation – should be reliance, because it is more manageable. She gets the consequential damages (3rd operation) in both ways of calculating.
 1. Woodward thinks she SHOULD get reliance
 2. Jury had no relevant evidence of pain and suffering for 3rd operation but that is what they awarded anyways
 3. Jurors were obviously in practice thinking about 2nd operation pain and suffering when they awarded the third.
 4. no ruling to apply. Mostly dicta.

Spring Semester

Favorite quote of the semester: "this being the statute of frauds, no argument is too stupid to advance."

I. Franchises

- a. ***Hoffman v. Red Owl Stores*** (377)
 - i. Hoffman relied on Red Owl promise and sold bakery & grocery store in reliance for a Red Owl franchise
 - ii. Promissory estoppel case, damages are reliance, but needed new trial on awarding damages
- b. Economic Considerations
 - i. Franchisee needs to know projection of proceeds v. the value of their investment
 - ii. Due diligence requires \$ and cooperation
- c. Franchise Contract
 - i. Favorable to franchisor because they created it
 - ii. Strict rules to protect "brand trademark"
 - iii. Termination provisions potentially onerous (personal satisfaction clause)
 - iv. Surprise inspections
 - v. Ability to dictate location
- d. So what are the benefits to a Franchisee?
 - i. Biz reputation = "goodwill"
 - ii. Advertising/marketing
 - iii. A stable product
 - iv. A biz model
 - v. Training
 - vi. HR support (i.e. employee manuals)
- e. ***Collins Drugs v. Walgreens*** (400)
 - i. Ending the franchise relationship
 - ii. Economic problems are not good cause
 - iii. Small drug store wanted injunction (think NIPSCO- we aren't going to allow this, they just want bargaining power) did get \$ damages

II. Long Term Employment

- a. **ADR in collective bargaining**
- b. Grievance Processes Under Collective Bargaining
 - i. ***In Re Trans World Airlines, Inc.*** (419)
 - 1. Employment agreement negotiated by union on behalf of its members, fired for "insubordination" instead of long hair
 - 2. Arbitrators are expected to bring in their own experience and understandings, not "logical" or "neutral"
- c. Judicial Review of Arbitration

- i. The trilogy = labor union cases decided on same day in 1960
 - 1. US Steelworkers of America v. Warrior & Gulf Navigation
- d. Employment Relations
 - i. Employer's assertion of power to hire and fire employees
- e. Proving Employment Contracts & Gaining Meaningful Remedies:
 - i. *McIntosh v. Murphy* (430)
 - 1. Justifications for statute of frauds:
 - a. Evidentiary
 - b. Cautionary
 - c. Channeling
 - 2. McIntosh gets mgmt. job in Hawaii, has to move, is there for 2.5 months then gets fired
 - 3. Reliance was such that injustice could only be avoided by enforcement of the contract

f. Employment at Will

- i. Employment at will means an employee can be discharged at any time
 - 1. A doctrine to get out of the "swamp of employment relations"
 - 2. Some argue that it is an "interjudicial race to the bottom in employment standards"
- ii. Modern Development of @ Will Doctrine
 - 1. Discrimination cases have forced due process into the workplace
 - a. Companies need strong records that the employee was bad at their job to fire them
 - b. Forces companies to develop processes to document poor performance
 - c. Thereby essentially builds "cause" into the firing process
- iii. Non-Compete Agreements (in PP section later)
 - 1. General rule = must be reasonable in geography & time
- iv. ***Wagenseller v. Scottsdale Memorial Hospital*** (447)
 - 1. In absence of a contractual provision, an @ will employee may be fired for good cause or for no cause, but NOT for bad cause
- v. *Forer v. Sears*
 - 1. "permanent employment" = at will employment, according to WI court
- vi. Skills & Value Problem Checklist w. Employment @ Will Client
 - 1. Conflict of interest check
 - 2. Engagement letter
 - 3. Client likely wants to know practical advice of "what to do" next
 - 4. Inform client of downsides of litigation
 - 5. Give advice on what you think are all potential consequences

III. Long Terms Relationships in Commercial Transaction

- a. Lawyers need to do due diligence – control risk
 - i. Look at the business assets:

1. Lease of premises
 2. Inventory
 3. Store fixtures
 4. Name & reputation
 5. Employees
 6. Etc...
- b. Form contract provisions
 - i. Typically there will be a cancellation-for-convenience provision
 - c. Soft concept – TRUST reduces transaction costs in business. Without trust, businesses need more internal processes in place to double check work.

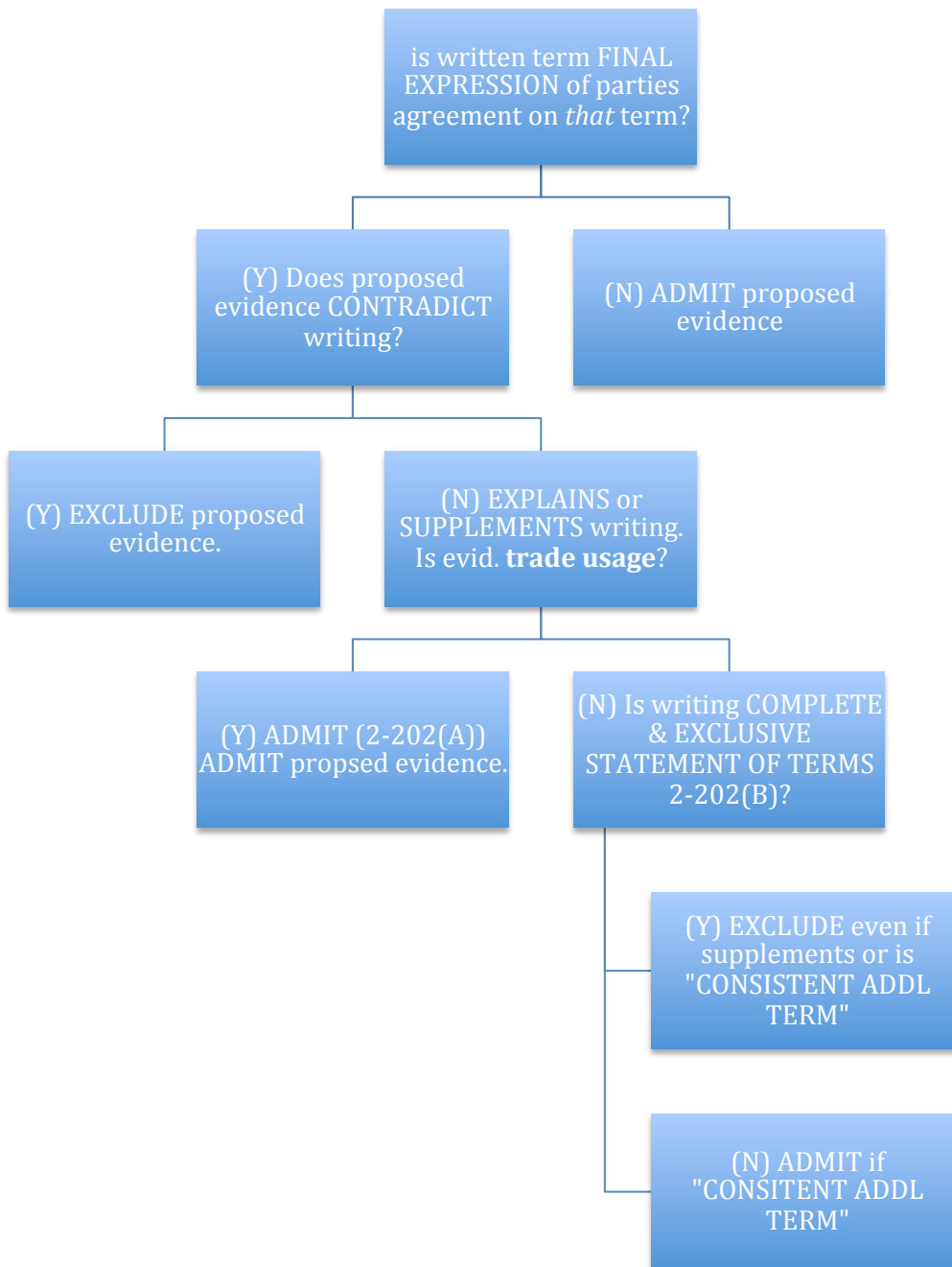
IV. Parol Evidence Rule

(special protection afforded to the written K)

- a. PER = prevents a party in a K from bringing extrinsic evidence that discloses an ambiguity and clarifies it or adds to the written terms of a k that appears to be whole.
- b. **Does PER apply?** (Calamri & Perillo article)
 - i. **Is the writing final?**
 1. Do the parties regard the writing as the final embodiment of their agreement?
 - ii. Is the writing a **complete or partial integration**?
 1. *Complete integration* = writing is final & complete
 - a. Cannot be contradicted or supplemented
 2. *Partial integration* = writing is final but NOT complete
 - a. May be supplemented by evidence of consistent additional terms
 - iii. What is the **purpose** of introducing this evidence? To:
 1. **Explain or Supplement terms of written k;**
 - a. Trade usage, course of dealing, and course of performance evidence is admissible
 2. **Consistent Additional Terms**
 - a. Allowed only for partial integration
 3. **Contradict terms of written k.**
- c. Williston “4 corners” approach elevates writing above all else
- d. Corbin approach = language cannot prove itself
- e. **Merger clause** = writing expressly declares that it contains the entire agreement
 - i. i.e. “this writing contains the complete & entire agreement of the parties.”
- f. PER Cases:
 - i. Laith = ice house, buyers got fucked over – couldn’t use evidence of conversation, 4 corners approach was used
 - ii. Dore = employment
 - iii. Masterson = allowed PER

g. UCC APPROACH TO PER (UCC § 2-202)

- i. Integration = intended by parties as final expression
- ii. **PER Steps under UCC:**



V. Social Controls on Free Contracting



a. Illegal Contracts

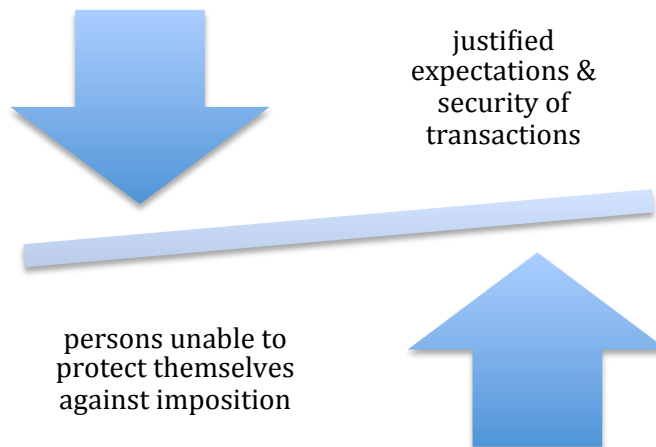
- i. Illegal contracts are UNENFORCEABLE
 1. Usually hidden values are operating in an illegal contract case
 2. Knowledge of WHY the party wants a provision is important to determine if it is fraudulent
- ii. *Edna Carrol v. Agenes Beradon* (494)
 1. Legal form, illegal substance
 2. Prostitution house k, really a contract for the business
 3. Beardon stopped paying for prop and then said she didn't have to keep paying for the k, B tried to raise illegal k as defense – mortgage with Edna
- iii. *Coma Corp v. Kansas Dept. of Labor* (499)
 1. Restaurant tries not to pay “illegal immigrant”
 2. We want to protect wage earners so we want to pay undocumented immigrants
 3. Comparative fault in illegal contracts
- iv. *Karpinsky v. Collins* (Danzig)
 1. Milk price controls case, P wants to recover \$ for secret rebates/kickbacks
 2. Comparative fault in illegal contracts
 3. *In pari delecto*= equally at fault
 4. If you are NOT *in pari delecto* you can get restitution damages, so a k doesn't matter anyways

b. Contracts that Violate Public Policy

- i. **Rest. §178** – a promise is unenforceable if the interest in its enforcement is clearly outweighed in the circumstances by a PP against the enforcement of such terms
- ii. *Fullerton Lumber Co. v Torborg* (Danzig)
 1. No compete clause in employment contract, guy left to start his own lumber biz
 - a. Was a 10-year no compete too long?
 2. Damages probably impossible to calculate
 3. “blue pencil test” = the court can delete shit from the k and what is left is “still” what the parties agreed to...(cough cough BS)
- iii. **Anti-Competitive Contracts (Non-Competes)**
 1. Rule: non competes must be reasonable in:
 - a. geography; and
 - b. time.
- iv. Sources of PP:
 1. Legislation (best bet, judge doesn’t have to stretch); or
 2. Judicial decision.

c. Contract & Choice

Balance to Protect Conflicting interests:



i. Capacity to Contract

1. **Mental incapacity, drugs, age**
2. **Mental incapacity to contract**
 - a. Restatement §15 concerned with:
 - i. Status of individual; and
 - ii. Knowledge of “predator”
 1. Understanding
 2. Act in a reasonable manner
3. **Ks Made under the Influence of Drugs**

- a. *Harlow v. Kingston* –
 - i. you don't necessarily have to be drunk at time of contracting, drunken debauch that caused P to agree to a K to continue drinking binge upheld as a voidable contract
 - ii. Important fact – grossly inadequate consideration
- b. Restatement §16 – in most instance other party must have reason to know that by reason of intoxication the other party was unable to understand the nature and consequences of the transaction or to act in a reasonable manner

4. **Ks Made with Minors**

- a. Infancy = defense that a contract made with a minor is voidable at the minor's election
- b. Restatement 14 – only voidable contractual duties for anyone under 18
- c. PP rationale – easy to administer bright line rule, don't have to determine relative intelligence of minors, etc.

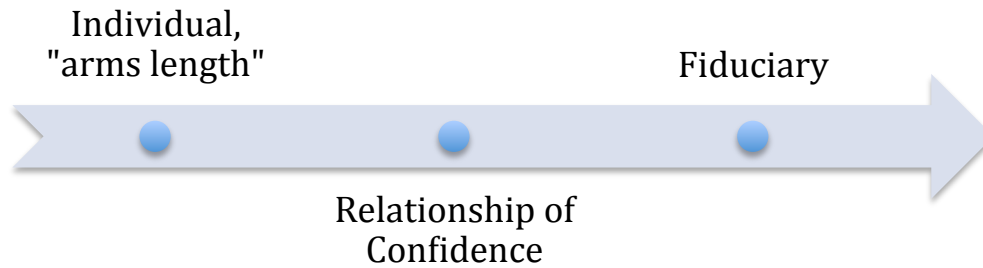
ii. **Duress (threat!)**

- 1. Duress = Lack of free will, proper v. improper advantage taking
- 2. *Mitchell v. CC. Sanitation Company* (533)
 - a. P signed 2 releases to his personal injury on the job, employer threatened to fire him if he didn't sign, incurred much more in personal injuries than the \$ he got
- 3. *The Selmer Co. v. Blakeslee Midwest* (541)
 - a. General contractor must provide material for subcontractor to do their work but breaches k by delivering material late, despite this breach the subcontractor agrees to an oral k to complete the work provided that GC pays extra cost
 - b. General rule = **If you extract a promise by means of a threat, the promise is unenforceable**
 - c. The mere stress of business conditions will not constitute duress where the D was not responsible for the conditions
- 4. Restatements §174-177

iii. **Undue Influence (relationships!)**

- 1. Unfair persuasion; and other party was vulnerable to such persuasion.
 - a. not a precise rule but must be something other than an impersonal market relationship
- 2. The court needs to see the weakness of the party wanting to get out of the contract as excusable
- 3. Undue Influence problems often arise in gifts & wills
- 4. Proper remedy are voidable k obligations and/or restitution of any benefits conferred
- 5. **Fiduciary** = person with an obligation to look out for the interest of another
 - a. Held to a higher standard or fairness

6. **Relationship of Confidence** = slightly lower responsibilities (i.e. siblings, close friends)
7. Relationships of dependency undermine contract system's assumptions (i.e. undermines the horse trade)
8. Spectrum of relationship type & high standard applied:



iv. **Duress v. Undue Influence**

1. Consider:
 - a. Bargaining disparity;
 - b. Threat & alternatives;
 - c. Subject matter of k;
 - d. Substance of the exchange;
 - e. Ps circumstances and other stuff

2. Duress v. Undue Influence Cases Matrix:

	<i>Mitchell</i>	<i>Selmer</i>	<i>Alaska Packers</i>	<i>Capps</i>	<i>Frowen</i>	<i>Oderrizi</i>
Bargaining disparity	Uneven, employer-employee		uneven	uneven	86 y.o. blind lady	Capacity issues, lack of sleep
Threat & alternatives	Sign or fired	Small amount or nothing	No fish or agree	Overt threat, take \$ or lawyers	None?	Give up job, no exposure
Subject matter of k	Personal injury & emp.	Commercial settlement	Emp/union	Extreme settlement agreement	Property sale	employment
Substance of the exchange	\$62 for \$40k medical bills	\$67k/120k	More \$ for same work	3cents/\$1	\$15k/mkt value of \$35k	
P's Circumstances & other stuff		Selmer's wide defense too much, can't let settlement ks unravel PP	No extra consideration, pre-existing duty rule, possibly a union busting case			K made in P's home, discrimination

v. Misrepresentation & Fraud

1. *Caveat emptor* = buyer beware
2. *Obde v. Schlemeyer* (557)
 - a. Terminate house case, Ds cleaned up just enough to hide surface termite damage, real damage still existed
 - b. Duty to warn triggered “where there are concealed defects dangerous to: property, health or life of tenant, which defect is KNOWN to landlord but NOT to tenant, and careful inspection would not reveal the defect”
 - c. Damages were the actual value or prop and what the property would have been worth had the misrep been true (perfect house – termite house)
3. **Fraud** –
 - a. Granted relief where D:
 - i. Wrongfully has made
 - ii. A material misrepresentation of
 - iii. Fact on which
 - iv. Plaintiff had a right to rely
 1. P must prove:
 - a. Reliance on the misrepresentation which
 - b. Caused
 - c. Injury
4. Benefits of Fraud COA
 - a. Punitive damages
 - b. Better narrative for court

vi. Good Faith & Fair Dealings

1. Restatement 205
2. *Market Street Associates v. Frey* (565)
 - a. Sought specific performance of the clause to buy property back – reasonable in property
 - b. We are okay with one party getting a “benefit of the bargain” but you can NOT take deliberate advantage of an oversight by your k partner concerning his rights under k
3. Litigation Strategy:
 - a. Paint bad guy as smart and cunning a deceptive whiz. The loser should be painted as dumb
4. *Henning v. Ahearn* (573)
 - a. CEO case, sought reformatory of k
 - b. Restatement §161

vii. All the Theories @ Once!

1. *Vokes v. Arthur Murray, Inc.* (575)
 - a. Old lady roped into multiple ks with dance studio, never improved dance skills

d. Form Contracts

- i. **Contract of Adhesion** = boiler plate, standard form k
 1. K where T&Cs are set by 1 of the parties and offered on a “take it or leave it basis”
- ii. Battle of the Forms = UCC 2-207
- iii. *McCutcheon v. David MacBrayne Ltd.* (583)
 1. Look at this again...
 2. UCC 2-719 (3)
- iv. *Yauger v. Skiing Enterprises* (592)
 1. Skiing case, little girl dies
 2. Form was called an “application” not a waiver
- v. Choice
 1. ***ProCD, Inc. v. Zeidenberg*** (599)
 - a. **Shrink-wrap licenses** – retail software packages are covered in shrink-wrap and vendors write licenses that become effective as soon as the customer tears the wrapping from the package
 - i. **Shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general.**
- vi. *Hill v. Gateway 2000, Inc.* (609)
 1. Arbitration clause, 30-day return...
 2. Acceptance was triggered when the Hill’s kept the computer for more than 30 days
- vii. *Closik (Closec) v. Gateway....*
- viii. Plain language statute = biz’s required to use common language & appropriately divide headings in form k’s
 1. PP rationales:
 - a. Better for biz because consumer knows the terms
 - b. Easier for biz to win in any litigations
- ix. “click to agree” doctrine – well established and accepted in k law, k forms at the click
- x. Reasonable Expectations as a Limit to Form Ks
 1. *C&J Fertilizer, Inc. v. Allied Mutual Insurance Co.* (616)
 - a. Burglary insurance policy so narrow not what a reasonable person would expect, had to be an outside job and visible marks by tools
 - b. Court considered the education of the guy who signed, he had signed similar insurance provisions that did not contain this language
 - i. Restatement 211 (3) applied
- xi. Some Risk shifting devices:
 1. Disclaimer of consequential damages
 2. Mandatory arbitration

e. Warranty, Disclaimers & Remedy Limitations

- i. Warranty = a promise, most likely to be in a sale of goods case
- ii. UCC Sections:
 - 1. §2-312 - Warranty of Title Against Infringement
 - 2. 2-313 - Express Warranties by Affirmation, Promise, Description, Sample
 - 3. 2-314 - Implied Warranty Merchantability
 - 4. 2-315 - Implied Warranty Fitness for a Particular Purpose
 - 5. 2-316 - Exclusion or Modification of Warranties

f. Unconscionability

- i. Unconscionability doctrine is a technique for controlling the quality of a transaction when the free market is ineffective.
 - 1. UNCON focuses on (1) unfair process AND (2) unfair results.
- ii. **UCC §2-302**
 - 1. Effect of the UCC provision is to reduce unconscionability applications
- iii. **Restatement §208**
- iv. How to Evaluate Unconscionability:
 - 1. **Procedural; AND**
 - 2. **Substantive**
- v. *Williams v. Walker-Thomas Furniture Co.* (668)
 - 1. Rent-to-own industry
 - a. A way to skirt around financial industry regulations, as rent to own you are still acting like a creditor, but don't have to deal with all the regulation
 - 2. Monthly installment k
 - 3. Add on clause
 - 4. **Cross-collateral clause** = company puts your \$ and spreads it a little bit among ALL the shit you owe \$ on, so you can never really pay off any one item
 - 5. *Replevin* = take back, repossess (§2-716(3))
- vi. *Jones v. Star Credit Corp* (675)
 - 1. K was for monthly rental of a \$900 freezer, P paid \$1,234 towards the freezer
 - 2. Max retail price of the freezer was actually \$300
 - 3. Salesman came into the house to k, people "let their guard down"
- vii. *Allen v. Quality Furniture* (Danzig)
 - 1. Predatory lending targeted at low income communities
 - 2. P thought she was buying food at cheap price, but instead bought commercial freezer
 - 3. "unconscionable facts:"
 - a. 8th grade education, low income, taking care of kids running around, sales pitch in her house, sales pitch is like fraud throwing in the freezer, attorney's fees provision is one sided in favor of company no matter what

4. **Acceleration Clause** = everything you own on a lease loan becomes due at the time of default
 5. **Holder in Due Course** = “dumping paper” means that the normal warranty claims are gone, the 3rd party is a BFP who isn’t held to those helpful standards
 - a. Seems like a fraudulent way to abuse protective legal principles
- viii. Remedies for Unconscionability = a court may: refuse to enforce a k; blue pen test the offending clause and enforce the remainder of the k; or limit the application of the offending clause to avoid any unconscionable result

ix. Consumer Arbitration

1. *Kilgore v. Keybank*

- a. Similar to a Ponzi scheme: helicopter school gets paid cash today for its current expenses, not the thing [education] you are buying in the future
- b. Damages sought was an injunction, this tactic “advanced the ball” for the clients because it helped to keep the case in judicial court
 - i. CA doesn’t allow injunction in arbitration

2. *AT&T v. Concepcion*

- a. California state contract law, which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

3. Why “Opt-Out” Options in Standard Ks Doesn’t Matter to Biz:

- a. Consumers don’t read k anyway
- b. Small window of time to opt out usually by the time someone has a dispute they have missed the time period
- c. Consumers don’t recognize legal terms as well as biz terms like payment
- d. The odds of small # of people who will opt out having causes of action later are even smaller