

CONTRACTS – Knapp, Spring 2003

1) INTERPRETATION

•Q: Word of phrase in dispute bt the parties, how should court interpret?

i) THEORIES

- (1) Rules of Interpretation covers both oral AND written agreements (see PER)
- (2) Classical K: **Subjective Approach** - “was there a meeting of the minds” if both parties did not have the same interpretation = NO K.
- (3) Modern K: **Objective Approach**
 - RS § 230 - words and conduct should be interpreted according to RP standard
 - RS 201(1) - if both parties have same interpretation = that meaning governs (**Joyner**)
 - RS 201 (2) - if one party knew or had reason to know = that meaning of the innocent party governs
 - RS 201 (3) - neither party knew or had reason to know of the others interpretation = NO K (See **Raffles**)

ii) AMBIGUITY TESTS:

- (1) “**Four Corners**” or “**Plain Meaning**”:
 - (a) Extrinsic evidence only admissible if ct concludes that K is Ambiguous.
 - (b) Ambiguity determined from facial reading of K → if ordinary reader of English would find only one interpretation, K is clear and unambiguous and no Extrinsic evidence is admissible
 - (c) Exceptions:
 - (i) if parties agree to idiosyncratic meaning, ct will honor their agreement (RS2 §203 (c))
 - (ii) Fraud, duress, etc.
- (2) **Modern Approach:** (Holmes)
 - (a) Recognition that words generally have several meanings >> cts should admit all relevant extrinsic evidence in order to determine the intention of the parties.
 - (b) OBJ Extrinsic evidence admitted
 - (i) Preliminary *negotiations* and communications bt the parties
 - (ii) Defns in *statutes* - though NOT determinative
 - (iii) *Trade Usage*: Existence of relevant trade usage can overcome apparently unambiguous “plain meaning” of K language. (UCC 1-205)
 1. Parties must have actual knowledge of trade usage OR
 2. Trade usage must be so common that actual knowledge can be inferred (**Frigalment**)
 - (c) SUBJ not admitted: bc self-serving, needs verification

iii) CANON

- (1) RS2 §203 (a) prefer interpretation that makes agreement reasonable, **lawful and effective**
 - Noscitur a Sociis: Meaning of **words in series** effected by other words in series
 - Ejusdem Generis: **General term joined with specific**, one will be deemed to include only things that are like the specific
 - Expression Unius Exclusio Alterius: If **only specific**, not general, other items though similar are excluded
 - Ut Magis Valeat Quam Pereat: Interpretation that makes **K valid preferred** to one that makes invalid
 - Interpretation favored to person who **did not draft**
 - Before applied record should clearly show form of expression clearly chosen by one party rather than the other.
 - RS2 §206 – mostly applied to adhesion Ks with disparity of bargaining power bt the parties. But limited to that.
 - Interpret **K as a whole** – all writings together not in isolation
 - **Purpose of parties** given great weight
 - Specific provision is exception to general one
 - **Handwritten** provisions in printed form prevail
 - Public interest preferred

iv) **NOTES:**

(1) **Reasonable Expectations:** Court will not just enforce the “plain meaning” of adhesion K for insurance. P not bound to read and understand terms of adhesion K.

(a) **Factors: (C&J Fertilizer):**

- (i) Prior negotiations
- (ii) Term is bizarre, oppressive
- (iii) Eviscerates the non-standard terms explicitly agreed to
- (iv) Eliminates the dominate purpose of the transaction

(b) **SPLIT**

- (i) ½ states adopted reasonable expectation as applied to insurance Ks
- (ii) Others states strictly enforce words of K, absent misrep, overreaching, terms bizarre or oppressive
- (iii) Some only apply to **K’s of Adhesion**
 - 1. Standard form doc
 - 2. Take it or leave it basis
 - 3. Doc contains many terms
 - 4. Drafted by or on behalf of one party
 - 5. Party engages in numerous similar transactions
 - 6. Drafting party only enter into on terms contained in K
 - 7. Adhering party enters into few transactions of type
 - 8. Limited terms can be dickered over, adhering party must sign
 - 9. Principal obligation of adhering party to pay money.

(2) **Academic Criticism of “Plain Meaning”**

(a) Prof Zamir: preference to standards of reasonableness, good faith default to gap fillers and trade usages.

- Better conforms to intentions of the parties
- K law should be viewed as public rather than private law bc forces party into performance of agreement that it does not wish to honor
- Econ analysis – K law should attempt to max social utility not promote individual preferences.

(b) Prof Bernstein – should distinguish bt cases in which parties wish to preserve relationship and “end game” situations in which parties realize relationship has collapsed and are attempting to maximize their gains or min losses.

ii) **CASES:**

Case:	Joyner v. Adams
Facts:	Land development K – what is “completely developed” language in K.
Rule:	⊛ RULE - RS §201- look at - sub 2 = two levels of inquiry 1) what did parties ACTUALLY KNOW? (hard bc subjective). 2) Have REASON to know (enough facts in record that hard to believe that they didn’t know, or we think should have known)
A:	<ul style="list-style-type: none"> ⊛ TC finds D didn’t know and had no reason to know = finds for D. ➢ <i>Evidence on way negotiations proceeded relevant</i> - P’s negotiations recommended completed bldg clause, couldn’t decide on that. ➢ <i>Common practice in industry, “trade usage” evidence</i> - D = In industry completed = ready to build on not necessarily built on. P argues = she is not in real estate biz >> she didn’t know. <ul style="list-style-type: none"> ○ P’s testimony unclear ○ P did not directly communicate interpretation to D ○ Lack of evidence that D assented to interpretation ⊛ D’s evidence of industry custom

Case:	Frigalment Importing v. BNS Intn’l - “Chicken Case”
Facts:	P orders “chickens” expecting broiling/frying chickens - which defn of chicken should prevail?
Rule:	<ul style="list-style-type: none"> ⊛ Modified OBJ approach: Must show that when party not member of trade or other circle, must show that party had <u>actual knowledge of usage</u> or that <u>usage is so common</u> that knowledge can be inferred. ⊛ §202 (5) 203 (b) - Identify certain things that should be particularly relevant to interpretation <ul style="list-style-type: none"> ➢ What the parties have said ➢ Course of Performance, the way in which the parties have performed the disputed agreement, how they interpreted in the past ➢ Course of dealing - how parties behaved in past agreements ➢ Usage of Trade - ➢ Should find agreement valid rather than invalid, or reasonable rather than unreasonable.

Case:	C&J Fertilizer v. Allied Mutual
Facts:	Insurance adhesion K requiring indications of burglary to recover
Rule:	Court will not just enforce the “plain meaning” of adhesion K for insurance, instead court applies rule of Reasonable Expectations: P not bound to read and understand terms of adhesion K beyond range of reasonable expectation.

a) Parole Evidence Rule (PER)

- Q: should Evidence be Excluded as inadmissible

i) CL- ANALYSIS

(1) Traditional Approach

- (a) **Integration:** Must be determined from looking only at writing itself (4 corners)
 - (i) Merger Clause = conclusive
 - (ii) Ambiguity must be found in order to admit PEv – must be determined from 4 corners

(2) Modern Approach

- (a) **PER Applies:** PEv not admitted if would supplement or contradict written agreement
 - (i) PER does not bar evidence to “**explain**” agreement
 - (ii) Only applies to evidence before or contemporaneous w/ agreement
- (b) **Integration?**
 - (i) Full = complete + final expression of agreement
 - 1. No PEv to supplement or contradict
 - 2. PEv OK if explains
 - (ii) Partial = final + incomplete
 - 1. No PEv to contradict
 - 2. PEv OK to supplement, explain
- (c) **Integration Determined by?**
 - (i) Parties intended to be full integration
 - (ii) Look at facts and Circumstances surrounding agreement (RS §209(3) & 214(a-b))
 - (iii) In camera review to decide whether to submit to jury
 - (iv) Merger clause ≠ determinative; one factor to be weighed (RS §216)
 - (v) No need to find ambiguity (RS §212)
- (d) **Exceptions:** Doesn't apply to PEv
 - (i) To explain
 - (ii) Subsequent agreements
 - (iii) Oral Conditions Precedent (RS §217)
 - (iv) K Invalid due to – duress, fraud, undue influence, incapacity, mistake, illegality (RS §214(d))
 - 1. Fraud SPLIT
 - a. Some cts limit fraud exception to “fraud in the execution” – but most extend to “in the inducement”
 - b. Some cts find fraud exc doesn't apply if relates directly to subject of K (**Sherrod**)
 - (v) PE – most cts reject, however some cts allow if detrimental reliance
 - (vi) “Collateral Agreements”
 - 1. Only applies to an agreement that is about a subject “distinct from that to which the writing relates.” (**Thompson**)
 - 2. RS2 §216 (2) agreement not fully integrated if the parties have made a consistent additional agreement supported by consideration, or is “such a term as in the circumstances might naturally be omitted from the writing.”
 - (vii) Grounds for reformation such as lack of consideration

ii) RATIONALE:

- (1) Final draft intended to supersede any earlier negotiations
- (2) Earlier agreements may be irrelevant or misleading
- (3) Parol evidence more likely fraudulent, unreliable
- (4) Judicial economy, to exclude saves time
- (5) Encourage more efficient transacting

iii) NOTES:

- (3) **Merger Clause:** clause saying that writing is intended to reflect the entire agreement
 - (a) **Four Corners:** removes any doubt about integration = Total integration = NO PEv
 - (b) **Flexible Modern Approach:** merger clause given great weight, influence however is diminished if it is a standard term tucked away in boilerplate.

(4) Modern Approach **Analysis:** (See Flow Chart)

Evidence			
↓			
Integration →	FULL	PARTIAL	NOT INTEGRATION
	CONTRADICT	NO	NO
	SUPPLEMENT	NO	YES - possible other outcome of Thompson
	EXPLAIN	YES	YES

iv) **CASES:**

Case:	Thompson v. Libby (old case but not outdated)
Facts:	Guy buys logs and tries to breach K on grounds that D breached oral warranty agreement
Rule:	<ul style="list-style-type: none"> ✳ NO PEv admitted - Four Corners Rule: When parties deliberately reduce K to writing assumed that whole K reduced to writing and PER forbids addition where K is silent and to vary where K speaks. ✳ No Collateral K exception: Assume warranty is term of sale and not separate independent K, to justify admission of a parol promise on the grounds that it is collateral, promise must relate to subject distinct from that to which the writing relates

Case:	Taylor v. State Farm Insurance
Facts:	<ul style="list-style-type: none"> • Insurance Co. represents P in suit, fails to settle • Question of whether release agreement covers claim of bad faith.
Rule:	<ul style="list-style-type: none"> • Ct need not make preliminary finding that agreement is ambiguous before allowing extrinsic evidence to interpret agreement. Ct instead considers evidence to determine relevance to parties intent and applies PER to exclude from the fact finders consideration only the evidence that contradicts or varies the meaning of the agreement. • Merger clause denied - following RS

Case:	Sherrod
Facts:	P Ks to move dirt for lump sum based on Ds estimate of sq footage. More dirt, D refuses to pay P unless he signs K
Rule:	<ul style="list-style-type: none"> • Ct does not admit PEv bc Ev would supplement and contradict written K. Where an alleged oral promise directly contradicts the terms of the express written K, the PER applies. • Fraud Exception: No fraud bc fraud related directly to the SM of the K

v) **UCC ANALYSIS (§2-202)**

(1) **Integration?** Final + Complete Expression

(2) **Effect?**

(a) PEv cannot contradict

(b) PEv of prior or contemporaneous agreement can explain or supplemented by:

(i) Course of dealing

(ii) Course of performance

(iii) Trade Usage

1. SPLIT: some cts find admissible even if it contradicts agreement (**Nanakuli**)

(iv) Evidence of consistent additional terms

1. UCC §2-202 – “consistent additional term” should be excluded under sub (b) only when the ct thinks the term would be included in the writing if the parties had actually agreed on that term.

vi) **NOTES:**

(1) **Course of Performance** - (UCC §2-208 & RS§202(4))

(a) Action of parties in carrying out K

(b) One instance ≠ CoP

(c) Waiver = preference for interpreting deviation as waiver

(2) **Course of Dealing** - (UCC §1-205 (1) & RS §223)

(a) Relations bt parties prior to signing K

(3) **Trade Usage** (UCC 1-205 (2) & RS§222)

(a) Practice or method of dealing regularly observed in place, vocation or trade to justify expectation

(b) Trade SPLIT = some cts find newcomer’s not bound if not aware, some cts find all parties bound

(c) Extent of usage = well settled enough to justify expectation of observance

Case:	Nanakuli v. Shell Oil
Facts:	Price fix agreement of D to supply paving materials
Rule:	<ul style="list-style-type: none"> • §2-305 - Comment 3 - seller has to act in good faith, posted price satisfies good faith requirement. ⇒ Nanakuli has to prove that written word is not complete agreement OR Shell acted in bad faith Evidence used that price protection should be part of K.

2) IMPLIED TERMS

- Implied in fact - implied from parties conduct or words even though not literally expressed in K
- Implied in law - ct finds term should be part of agreement bc of statute, CL precedent, bc appropriate

a) CL IMPLIED TERMS:

- i) **Employment K** implied terminable at will, unless expressly otherwise
- ii) Unless express statement that K rts personal, presumption that **K transferable**
- iii) Presumption that **Bilateral Ks** performance instantaneous
- iv) **Unilateral K**, longer performance must take place 1st.

b) UCC IMPLIED TERMS:

- i) **Best Efforts** = exclusive dealership agreement imposes obligation to use “best efforts” to supply goods or promote sale. (UCC §2-306(2))
 - (1) Could find bargained for “chance” to show performance attractive
 - (2) CASE: **Lady Duff** - Designer of clothes signs exclusivity marketing K w/ D, then markets to Sears on her own. Although promise may be lacking, and yet the whole writing may be “instinct with an obligation,” imperfectly stated - then K exists. There was a duty on D to use “reasonable efforts” toward effectuating the K >> not “illusory”.
- ii) **Reasonable Notice** = one party terminates K (except on happening of agreed upon event) must give reasonable notice (UCC §2-309(3)) if absence of notice would be unconscionable.
 - (1) Notice Sufficient for affected party to seek substitute arraignment AND
 - (2) Time to recoup investment where dealer has made substantial investments in reliance on the agreement, sell product line, minimize losses.
 - (3) Reasonable based upon Principles of Good Faith OR industry standard
 - (a) CASE: **Leibel v. Raynor** – Reasonable notice required in Exclusive dealership oral agreement between manufacturer and supplier (distributor or franchisee)

a) **Implied Warranties**

- Traditional Rule = Caveat Emptor – “let the buyer beware”
- Undercutting unfair doctrine to respond to changing market conditions, modern courts implied warranties in law upon the seller of goods

i) RS

- (1) §14 = implied warranty for **Sale By Description**
- (2) §15 = implied warranty of **Quality**
- (3) § 16 = implied warranties in **Sale By Sample**

ii) CL

- (1) MAJ - implied warranty of **Habitability** in residential leases. Landlords must:
 - (a) Meet health and safety codes – make Repairs to ensure habitable condition
- (2) **House Merchant Warranties:** Most jx imply warranty for quality of new homes
 - (a) Houses must be constructed in skillful manner and free of material defect (**Caceci**)

iii) UCC:

- (1) **Applies to:**
 - (a) Sale of “Goods” = movable, tangible thing (UCC §2-105(1))
 - (b) Mixture of Goods and Svcs:
 - (i) “Predominant Factor Test” – which predominates weigh relative costs and parties bargaining
 - (ii) “Gravamen of Harm Test” – which is source of breach
- (2) **Express Warranty:** (§2-313) - seller can make an Express Warranty by words, sample, description or model.
 - (a) Puffing: Sales talk, sellers opinion ≠ express warranty
 - (b) Reliance By Buyer: Traditionally required buyer rely on seller’s statements, be “basis of bargain.” Most cts contend UCC eliminates the reliance requirement.

- (3) **Merchantability (§2-314)**
- (a) Merchant impliedly warrants to the buyer that the goods are of quality and are fit for the ordinary purposes for which they are used. (seller can expressly disclaim §2-316)
 - (b) Buyer must Prove:
 - (i) Sale of goods that were not merchantable
 - (ii) Seller is “merchant”
 - (iii) Defects in goods caused damage to P
 - (c) Disclaimer (“As Is” Clause) (UCC §2-316)
 - (i) Seller can disclaim implied warranty w/ appropriate language in K.
 - (ii) Express and Implied warranties may overlap and disclaimer may be effective for implied warranties but not express ones
 - (iii) CANNOT disclaim tort liability
- (4) **Fitness For A Particular Purpose (§2-315)**
- (a) Protects against goods that do not fit the buyer’s Particular Purpose
 - (b) Need not be defective in anyway
 - (c) Buyer Must prove:
 - (i) Buyer relies on seller’s skill or judgment to select a suitable product,
 - (ii) Seller has reason to know of reliance.
 - (d) Exceptions:
 - (i) Buyer insists on particular brand = NO warranty
 - (ii) Most cts require “particular purpose” must be other than ordinary use

(5) **CASES:**

Case:	Caceci v. Di Canio Construction
Facts:	D builds house for P, later structural damage to house bc D built w/o digging up rotting logs before laying foundation.
Rule:	Ct recognizes implied warranty that newly constructed homes will be built in skillful manner and be free of material defects
Notes:	<ul style="list-style-type: none"> ✳ Some cts require privity requirement, limiting warranty to initial purchaser ✳ Warranty can be disclaimed, however most cts view w/ suspicion ✳ Some cts refuse to extend warranty to additions to homes. Some cts have extended to major improvements to an existing home. ✳ Cts are divided over whether to imply warranty to commercial real estate.

b) **Implied Obligation of Good Faith (GF)-**

- Every K has CGFFD in performance and enforcement (but not for formation and negotiation) – UCC §1-203 & RS 205

i) **DEFN:**

(1) **UCC.**

- (a) Defines GF as “honesty in fact” → at a minimum lying and deception = bad faith (§1-201 (19))
 - (b) for MERCHANTS, GF requires honesty and “the observance of commercial standards of fair dealing in the trade.” (§2-103 (1b))
- (2) **RS §205** - extends duty of good faith and fair dealing to every K
- (a) Cannot undermine “spirit” of the agreement

ii) **APPLICATION:**

(1) **Lender Liability** – duty on lender to provide notice of intent to cut off credit to satisfy GF requirement

- (a) CASE: **KMC v. Irving Trust** – Obligation to act in GF requires lender to give reasonable notice to KMC to seek alternative financing, absent valid business reasons. Also required lender have “some objective basis upon which a reasonable loan officer would exercise discretion” . Ct implied duty of GF place limits on express terms of K.
 - (i) Criticism of KMC: GF cannot limit express rts in the K. Some cts have limited application of KMC to its facts
- (b) UCC §1-208 – acceleration clause when secured party deems himself insecure → acceleration must be made in GF

(2) **Requirements / Output K’s**

- (a) Theoretical Problems: Lack of consideration, mutuality and definiteness
- (b) Duties: GF requirement to not vary demands unreasonably disproportionate to needs (2-306(1))
 - (i) MAJ:
 1. Underdemanding: Buyer may reduce requirements to ZERO – if acts in GF. (**Empire Gas** – D acting in bad faith if has not commercial reason for demand of zero other than whim.)
 2. Overdemanding: Cannot stockpile

(ii) MIN: Agreed estimate to be treated as the center around which variation to occur (2-306)

(3) **Discretionary K's: (*Locke v. WB*)**

- (a) Defn: K gives one party power to exercise discretion
- (b) Duties: Must exercise discretion w/ "honesty" and GF and not frustrate other parties rt to receive K benefits
 - (i) Fancy / Taste = sole judge of satisfaction
 - (ii) Parties can expressly disclaim

(4) **Employment at Will: (*Dupont v. Pressman*)**

- (a) Term Employment: Termination must show "good cause"
- (b) Permanent Employment: Seldom recognized, must show good cause
- (c) Implied in Fact: Some cts find personnel manuals granting E'ees rt not to be terminated except for good cause = cause of action
- (d) At Will: E/p may terminate w/o cause regardless of motive – even for highly subjective business reasons (eg. Hatred, ill will, dislike)
 - (i) UNLESS: E/p conduct = fraud, deceit, misrep, or violation of public policy

iii) **NOTES:**

(a) 2 **contexts** for GF:

- (i) good faith purchase of goods and negotiable instruments AND
- (ii) GF in the performance and enforcement of Ktual obligations

(b) GF = **excluder**, defined by exclusion of types of bad faith:

- (i) Failure to fully disclose material facts, defects
- (ii) Willful Failure to substantially perform
- (iii) Abuse of Bargaining power, coercive bargaining
- (iv) Failure to cooperate
- (v) Lack of diligence
- (vi) Arbitrarily and Capricious termination of K
- (vii) Overreaching interpretation of K
- (viii) Harrassing other party
 - (ix) Bad Faith =actions not expressly forbidden but which violate the spirit of the K, by enabling party to realize gains that he had implicitly surrendered in the K, or by unfairly denying other party of realizing the fruits of the K she reasonably expected to receive

(c) **Fruits of the K Approach**: parties cannot do anything which will destroy or injury other parties right to receive the fruits of the K

- (i) Police opportunistic behavior
- (ii) Protecting reasonable expectations of the parties
- (iii) One parties actions though not expressly forbidden undermine the "spirit" of the K

(2) **CASES:**

Case:	Empire Gas v. American Bakeries
Facts:	Requirements K: P buys propane converters and output K to buy propane from D, D doesn't buy any propane
Rule:	<ul style="list-style-type: none"> • Ct finds §2-306 (1) GF requirement that output requirements cannot be unreasonably disproportionate to estimate does not apply, only applies for ballooning demand, not under demand. • D acting in bad faith if they had no business reason for deciding not to buy propane, can't be merely second thoughts about terms of K. Doesn't explain "change of circumstances" that would be required but says more than a "whim is required" <ul style="list-style-type: none"> • Other examples of bad faith: buying from someone else, reduced purchase to hurt P, competed w/ P

Case:	Locke v. Warner Bros
Facts:	Discretionay K: Clint Eastwoods ex arranges for WB to hire her so she would drop her suit, WB never looks at her scripts
Rule:	Where a K confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance w/ fair dealing.
A:	<ul style="list-style-type: none"> • WB was entitled to reject Ps work on the basis of subjective judgment and creative decision, but subjective dissatisfaction must be honestly held. Issue whether WB honestly rejected Ps scripts jury question. • Sometimes subjective standard as in Locke – "honest satisfaction" • Sometimes cts impose obj reasonableness standard

Case:	Dupont v. Pressman
Facts:	Termination at will K: Engineer confronts manager about possible conflict of interest, he is then given bad reviews and fired.
Rule:	<ul style="list-style-type: none"> • In terminating at will employment K, co. has duty to discharge employees ONLY in an honest way. • Bad Faith ≠ merely not likely someone, have to be fraud, deceit, intentional misrep. Of employees performance which causes dismissal may be actionable under CGFFD
A:	<ul style="list-style-type: none"> • If malicious deceit and subterfuge used to get P fired, and Co. knowing of these practices ratified Ps firing then they could be liable
Notes:	<ul style="list-style-type: none"> • EXCEPTIONS to Doctrine of Terminable at will <ul style="list-style-type: none"> ○ if firing violates public policy: 1) based on discrimination 2) discharge to avoid paying benefits 3) discharge for refusing to do criminal act ○ Where Employer made Misrep of Material Fact causing employee to rely on job ○ When employer committed itself to not terminating except for good cause through employment manual, public statements ○ Promissory Estoppel • Epstein argument: exceptions that are difficult to enforce may harm employees more than benefit. If employers know they might have to go through lengthy litigation to terminate employee they might be less likely to hire "risky" employees

3) AVOIDING ENFORCEMENT

- REMEDY = to put party in status quo before entering K

a) Minority

i) RULE:

(1) **Traditional:**

- If K prejudices Infant = VOID
- Necessaries = Enforceable
- Uncertain = VOIDABLE at infant's discretion

(2) **MAJ Modern:** K voidable if contracting party under 18 (minor can choose to affirm or disaffirm a K)

- Absent a showing that minor willfully misrepresented age; nullifies disaffirmance rule
- Mere ignorance of minors age no defense → merchant on inquiry notice
- On reaching the age of majority → minor must act w/in reasonable time to disaffirm, or rt to disaffirm deemed waived.

(3) **Benefit/Depreciation Rule:** Absent showing of overreaching (undue influence, unreasonable terms) where minor has actually paid \$ and taken article. Upon rescission of K infant entitled to recovery of the full purchase price subject to deduction for the minors use. Determined by either:

- Minor's use of goods
- Depreciation or deterioration of goods in his or her possession
 - CASE: **Dodson v. Shrader** – Kid buys car from dealership and trashes it. Where NO overreaching or undue influence, depreciation or use of goods will be deducted from minor's recovery

(4) **Tortious Conduct of Minor:** Minors ability to disaffirm restricted if engages in tortious conduct such as "misrepresenting" age or willfully destroying goods.

- MAJ = may disaffirm K, but may be liable in tort for fraud
- MIN = Benefit / Depreciation rule.

(5) **Necessaries:** Minor liable for the reasonable value

- Eg. Food, clothing, shelter, hospital bills, some cts willing to construe more broadly
 - If minor has ability to return home, apt lease ≠ necessary
- Public Housing not deemed necessary

ii) NOTES:

- (1) Rationale: protect minors from lack of judgment, from squandering wealth through improvident Ks
- (2) Release Agreements → minors can disaffirm, but releases signed by parents cannot be disaffirmed
- (3) Prof Edge → suggests tiered system of avoidance: conclusive avoidance for youngsters, presumption of incapacity at mid range, and rebuttable presumption at stage just before majority

b) Incapacity

i) RULE:

- (1) Incompetent persons transactions are **VOIDABLE**.
 - (a) MAJ: absent fraud or knowledge of the incapacity K's voidable in consideration of equitable concerns
 - (b) CASE: **Hauer v. Union State Bank of Wautoma** – If reasonably prudent contracting party knew or had reason to know of other parties incapacity they are on inquiry notice that K may be voidable.
 - (c) Can be liable for necessaries – same as w/ minors
 - (d) Must restore consideration if:
 - (i) K made of fair terms and in GF
 - (ii) Other party had no reason to know of incompetency
 - (iii) If other person cannot be restored to status quo = NOT voidable
- (2) **Competency Determined by**
 - (a) Presumption that everyone is competent – burden of proof on person seeking avoidance
 - (b) Hauer Ct uses "cognitive" TEST: whether the person involved had sufficient mental ability to know what he or she was doing and the nature and consequences of the transaction
 - (i) Evidence:
 1. lay and expert opinion,
 2. prior and subsequent adjudication of incompetency – ct appointed guardianship
 - (ii) Competency determined on date instrument executed
 - (c) RS §15 – Adds volitional test: a person lacks capacity to K if the person is unable to act in a reasonable manner in the transaction and the other party had reason to know of the condition.
- (3) **Intoxication**: RS §16 – K is voidable if other party knew or had reason to know of intoxication of other person. And other person unable to understand the transaction or act in reasonable manner

ii) NOTES:

- (1) **Minors** can disaffirm even if restoration can't be made, mentally incompetent → required to make restoration unless special circumstances
 - (a) Special circumstances = bad faith on contracting party
- (2) **Presumption** of competency, burden on the person seeking to avoid the K
- (3) Finding of Incompetency cannot be based upon person making an unreasonable decision

c) Duress

i) **Physical Threat** = K made under wrongful threat are VOID

ii) **Non-Physical (Econ Duress)**: VOIDABLE, binding unless disaffirmed.

- (1) Wrongful Threat
- (2) Lack of meaningful Choice
- (3) Resulting in action
 - (a) RS §175 – 1) wrongful or improper threat 2) lack of reasonable alternatives 3) actual inducement of the K by the threat

iii) NOTES:

- (1) **No Reasonable Alternatives**:
 - (a) Lawsuit ≠ adequate alternative if delay involved in pursuing would cause immediate and irreparable loss to one's econ. Or business interests
 - (b) Some courts require duress based on desperate need for \$ - other side must have cause financial hardship
 - (c) Many Source of Goods, Services, Funds
 - (d) Toleration
 - (e) Financial Hardship
 - (i) Judge Posner → requires threatening party be actually responsible for financial hardship
- (2) **Threat**:
 - (a) Does not have to be criminal or tortious
 - (b) Threats to breach a K or w/hold payment can be sufficient if made in bad faith (RS §176)
 - (c) Threats to commit a crime or tort
 - (d) Threats of criminal prosecution
 - (e) RS §176(2) Threat improper if for an illegitimate end and resulting agreement did not involve a fair exchange

- (3) **Actual Inducement:** threat must “substantially contribute” to manifestation of assent
 (a) TEST: whether the will of the person induced by the threat was overcome. NO LONGER that of a reasonably firm person

iv) **CASES:**

Case:	Totem Marine Tug v. Alyeska
Facts:	Pipeline co. contracts w/ P to transport materials, after much delay P in financial straits, D makes sign release
Rule:	<ul style="list-style-type: none"> ● Must show duress resulted from Ds wrongful and oppressive conduct and not the Ps own necessity ● Threats to breach K or w/hold payment can be sufficient if no immediately reasonable alternatives

d) **Undue Influence**

- i) **DEFN:** “taking unfair advantage of another’s weakness of mind... or taking grossly oppressive and unfair advantage of another’s necessity or distress.”

ii) **ELEMENTS:** K VOIDABLE if:

- (1) Persuasion (which tends to be coercive in nature)
- (2) Weakness (overcoming will, taking unfair advantage of mental, moral or emotional weakness)
- (3) Confidential Relationship (NO Longer required)

iii) **NOTES:**

- (1) **Confidential Relationship** need NOT be present
- (2) **Weakness:**
 - (a) need not be longlasting nor wholly incapacitating
 - (b) Can be severe emotional strain
- (3) **Characteristics of Overpersuasion:**
 - (a) Unusual inappropriate time or place
 - (b) Demand business finished “at once”
 - (c) Emphasis of untoward consequences of delay
 - (d) Multiple persuaders against one servient party
 - (e) Denial of or statement no time to consult 3d party advisors (eg. Atty, broker)
- (4) **Differences for other means of Avoidance:** (Odorizzi)
 - (a) Duress: traditionally defn of duress including only *threat of physical force* against person or family members
 - (b) Fraud: conscious *misrep or concealment*, or non-disclosure of material fact which induces innocent party to enter into K
 - (c) Constructive Fraud: arises on breach of duty of one in *confidential or fiduciary relationship* which induces justifiable reliance
 - (i) Employer → Employee NOT sufficient relationship
 - (d) Mistake: errors as to the nature of the transaction

iv) **CASES:**

Case:	Odorizzi v. Bloomfield School District
Facts:	Teacher arrested for homosexual activity, principal went to his house to get his resignation
Rule:	Ct finds elements of Undue Influence → school took advantage of teacher’s weakened state of mind in securing his resignation.

e) **Misrepresentation**

i) **DEFN:** RS §164(1) – K Voidable if assent induced by fraudulent or material misrepresentation which injured party justified in relying

ii) **ELEMENTS:**

- (1) Misrep (either fraudulent RS162(1) or material 162(2))
- (2) Knowledge of falsity (reckless or neg sufficient)
- (3) Intent to induce Reliance
- (4) Justifiable reliance
- (5) P damaged

iii) **NOTES:**

(1) **Puffing v. Misrep:**

(a) **Opinion:** expression of belief w/o certainty as to the existence of a fact (RS §168(1))

(i) Can be Actionable if:

- 1. Misrep if person stating misrepresented state of mind
- 2. RS § 169 - if one giving opinion:
 - a. Relationship of trust or confidence
 - b. Is an expert on matters covered by opinion
 - c. Renders opinion to one who is particularly susceptible to misrep

(2) **Remedy:** P has choice of avoidance OR rescission

(a) **Rescission** requires injured party return money or property received under K

(b) **Out of Pocket Rule:** P can recover the difference bt what she parted w/ and what she received + consequential damages. Designed to “put the P back where she was”

(c) **MAJ – “benefit of the bargain” Rule:** the P is to be put in the position she would have been in if the D had spoken truthfully

(d) **Disclaimers** (Integration Clause / Release of Liability)

(i) INVALID if used fraud to procure K

(ii) “specific” disclaimer of representations = no tort action because P cannot show reasonable reliance

(iii) Disclaimers effective for innocent/neg misreps but not for material or intentional misreps

(iv) PEv always admissible to show fraud (RS §214(d))

(3) Misrep can be **Negligent or Reckless** (RS 162(1)(b))

iv) **CASES:**

Case:	Syester v. Banta
Facts:	Dance school induces old lady to buy many dance lessons
Rule:	<ul style="list-style-type: none"> ● Jury’s determination that Misrep induced P to buy lessons and release lawsuit was correct. D preyed on weakness of P and used their expert knowledge as dance instructors to induce her to buy lessons she didn’t need and wouldn’t benefit from because they told her she could be a professional dancer ⊛ Undue Influence/Duress <ul style="list-style-type: none"> ➢ Trust in dance studio and their instructors to work toward her benefit in terms of her dancing ➢ Used specialized knowledge to persuade her, unfair persuasion by the use of authority. ➢ Was she unusually susceptible? YES, elderly, alone, no family, they’ve played on her emotions

f) **Non-Disclosure**

i) **ELEMENTS:** Vendor has affirmative duty to disclose material facts where: (RS §161)

- (1) Disclosure is necessary to prevent **previous assertion** from being misrep, fraudulent or material
- (2) Correct mistaken **basic assumption** on which party is making the K, and Non-disclosure = bad faith
- (3) Disclosure would **correct a mistake** of the other party as to the contents or effects of a writing,
- (4) Entitlement through **relationship of trust** and confidence
 - (a) Material Fact affecting value of property – known to one but not reasonably capable of being known to other
 - (b) Material = RP would attach importance

ii) **NOTES:**

- (1) **Classical K** = caveat emptor, no duty on seller to disclose
- (2) Keeton: **Fairness factors** in determining when disclosure required:
 - (a) Difference in degree of intelligence bt the parties
 - (b) Relationship bt parties
 - (c) Manner in which info acquired (chance, effort, or illegal)
 - (d) Nature of fact non-disclosed – intrinsic defect not readily discernible
 - (e) General class to which the person concealing info belongs (buyer/seller)
 - (f) Nature of the K itself (leases, Ks of insurance)
 - (g) Importance of non-disclosed fact
 - (h) Conduct of person not disclosing (active concealment)
- (3) Kronman → should be distinction bt info that has been casually acquired and info that has been obtained through costly deliberate investigation and effort.
- (4) **Actual Knowledge:** Some cts require party seeking rescission to show other party had “actual knowledge” of the undisclosed fact.
- (5) RS §551 Torts → requires disclosure when:
 - (a) Fiduciary relationship
 - (b) Earlier disclosure would be misleading
 - (c) Facts basic to the transaction
- (6) **Oral Disclaimer:**
 - (a) Fraud vitiates every transaction, can get around K integration clause and PER
 - (b) Distinction bt whether disclaimer is general or specific
- (7) **Fiduciary Relationship** (RS §173)
 - (a) Terms of transaction must be fair and must be fully explained to the other party
 - (b) Fid has duty to prove compliance by clear and convincing evidence
 - (c) Eg. Broker, owner of nursing home, school teacher, acct executive, mere friendship ≠ fid)

iii) **CASES:**

Case:	Hill v. Jones
Facts:	P buy termite damaged house.
Rule:	<ul style="list-style-type: none"> ● Duty to speak → suppression of a material fact which a party is bound in GF to disclose = false representation <ul style="list-style-type: none"> → Duty: where seller knows of facts materially affecting the value of the property which are not readily observable = duty to disclose → Material Fact: one which a RP would attach importance in determining his choice of action <ul style="list-style-type: none"> ▲ Existence of termite damage = material fact

g) Unconscionability

i) **DEFN:** K which is both procedurally and substantively unconscionable, but not void for fraud. Ct. of law can give relief such as equity requires

ii) **ELEMENTS:**

- (1) **Procedural:** Absence of meaningful choice
 - (a) Consideration of circumstances surrounding transaction
 - (i) Gross inequality of bargaining power
 - (ii) Manner in which K was entered
 - (iii) Obvious education or lack of it
 - (iv) Economic distress or urgent needs
 - (v) Improvidence, ignorance, inexperience
 - (vi) Deceptive sales practices, other parties exploitation of any of above
 - (vii) In light of general commercial background and the commercial needs of the particular trade or case
- (2) **Substantive:** contract terms which are unreasonably favorable to other party
 - (a) Conspicuousness and intelligibility of the clause
 - (i) Reasonable opportunity to understand terms
 - (ii) Boilerplate or adhesion K
 - (iii) Inflated price
 - (iv) Unreasonable terms – eg. Add-on clause, arbitration clause,
- (3) **“Shock the Conscience” Standard**
 - (a) the terms are so oppressive no RP would make them
 - (b) No honest and fair person would accept them
- (4) Both elements of uncon required on **sliding scale** → more one element present less may be required of other

iii) **NOTES:**

- (1) **UCC §2-302** - cts should pay attn to balance of bargain and way bargain was met.
 - (a) Directed at limitations of warranties and remedies
 - (b) Consumers deserve and need protection against unconscionability.
 - (c) Code says UnC *question for ct* not jury
 - (d) Resurgence of interest in the context of mandatory arbitration Ks. Defense against pre-dispute arb under federal UnC law (Ting)
- (2) **Other factors considered: (KS SC – Wille v. SW Bell)**
 - (a) Standard form K
 - (b) Limitation of available remedies
 - (c) Use of inconspicuous or incomprehensible terms
 - (d) Imbalance of bargaining power
 - (e) Exploitation of party's lack of experience, education or inequality of econ. Power
- (3) Application to **unfair price:**
 - (a) CASE: **Ahern** – woman hires AC repair man; Ct. granted relief bc D had greater knowledge of product, committed P to service charge, intimidated P w/ demand for payment >> uncon
 - (b) **RS §208** – excessive price may = uncon
 - (c) In practice cts SPLIT. To see if price uncon look to two factors:
 - (i) Price greatly exceeds market price
 - (ii) Price greatly exceeds % profit made by seller
- (4) **Limitations on Damages / Mandatory Arbitration / Confidentiality Clauses:**
 - (i) CASE: **A&M Produce v. FMC Corp.** - K for sale of agricultural machinery. K included disclaimer of warranties and consequential damages. Ct. found both: gross disparity of bargaining power and unfair surprise as disclaimer on back of K and not brought to attention
 - (b) Uncon largely unsuccessful in termination of franchise agreement clauses:
 - (c) Prof Mallor guidelines:
 - (i) Commercially capable parties → unfair surprise should not be recognized. Parties have duty to read, Capability should be determined from: level of education, opportunity for counsel, experience w/ type of transaction, commercial experience
 - (ii) Nonnegotiable Ks finding of uncon at least a possibility when:
 1. take it or leave it basis
 2. offerors terms more advantageous
 3. degree of choice

4. party in distress in dealing w/ monopoly or oligopoly
- (iii) Cts should give looser standard to commercial parties who are disadvantaged by bargaining capabilities; given little practical ability to codetermine terms. Unfair surprise should be as much a possibility for unsophisticated commercial parties as it is for consumers.

iv) **CASES:**

Case:	Williams v. Walker Thomas Furniture
Facts:	Women buys furniture w/ add-on, D repos all her furniture on one default
Rule:	Ct. finds TC should entertain that this K uncon. Find both elements of Pro and Sub uncon.

Case:	Adkins v. Labor Ready
Facts:	Arbitration Clause for worker at Temp agency not allowing class action suit, and requiring P pay part arbitration costs
Rule:	<ul style="list-style-type: none"> ● Ct. finds Arb clause OK bc of liberal fed policy favoring arbitration ● Ct. finds D's promise to also bring claim to arb sufficient consideration ● Arb clause ≠ unfair term bc cts can't treat arb as inferior or less reliable means of vindicating rts ● Where party seeks to invalidate arb clause on grounds that prohibitively expensive, that party bears burden of showing likelihood of incurring such costs

Case:	Cooper v. MRM Investment
Facts:	Arbitration clause for KFC worker claiming sexual harrasment
Rule:	<ul style="list-style-type: none"> ● K is unconscionable → beyond the reasonable expectations of the ordinary person, oppressive to the weaker party
A:	<ul style="list-style-type: none"> ● Procedural Uncon: <ul style="list-style-type: none"> → K was one of adhesion → standardized form, on take it or leave it basis → Waiver or rt to jury trial must be both knowing and clear → Lack of mutuality → Employer not bound to arbitration, no clear justification = less forum for neutral dispute resolution and more a means of maximizing employer advantage → Costs of arb create insurmountable obstacle → no vindication of fed sub rt ● Ct does not give credence to KFCs agreement to pay for arbitration → cannot save arb agreement that was carefully drafted by Attys after litigation
Notes:	<ul style="list-style-type: none"> ● Arguments for Arb: <ul style="list-style-type: none"> → Less expensive, more efficient, more flexible → Arbitrators have more freedom to do the right thing, can tailor decision to needs of marketplace → Allow co.s to give lower prices ● Arguments against <ul style="list-style-type: none"> → Cost imposed upon the consumer → Often not as prompt or inexpensive → Informal rules favor business, bc business "repeat player" → Precludes class actions → Eliminates any favorable precedent or law reform that could arise through litigation → Private not subject to public scrutiny → Little room for appellate review

h) Public Policy

- i) where policy declares there is some degree of illegality in the forming, carrying out or content of the K and the legislation does not provide remedies. K is VOID, other party may be able to recover restitution
- (1) RS § 179 – K directly at conflict w/ statutory law
 - (2) RS §178, 197
 - (a) Nature of the public policy
 - (b) Degree of forfeiture
 - (c) Unjust enrichment
 - (d) Denial or relief would further the policy
 - (3) More typical situation where K inconsistent w/ statute, but statute silent on question. Violations do not generally prevent enforcement of the K
 - (4) **Remedy:**
 - (a) Ct. can render K VOID and unenforceable
 - (b) Ct. can grant restitutionary relief
 - (c) Ct.s can grant EXCEPTIONS weighing whether
 - (i) Forfeited amount goes to state or other party
 - (ii) Forfeiture has direct relation to the conduct it penalizes
 - (5) **In Pari Delicto:** both parties engage in wrongful conduct = courts will no give remedy

ii) **CASES:**

Case:	Borelli v. Brusseau
Facts:	Women Ks w/ her husband to get some of his property in exchange for taking care of him while he is sick and wants to be at home
Rule:	● Ct finds NO consideration bc wife has preexisting duty to take care of spouse
Dissent	● No reason why wife should personally have to clean the bedpans, could K for the svc = sufficient extra consid to support the K

Case:	R,R. v. MH & another
Facts:	Parents pay women to be surrogate for their child. Women decides to keep baby, custody fight
Rule:	<ul style="list-style-type: none"> ● Ct finds compensation for surrogacy in direct conflict w/ laws prohibiting payment of \$ for adoption <ul style="list-style-type: none"> → Adoptive parents can pay expenses of birth parent but can make no direct payment to mother ● Surrogate parenting agreements should be given no effect until after reasonable time after child's birth or if agreement induced by payment of \$ <ul style="list-style-type: none"> → Mother should have time after child's birth to reflect on her wishes ● Other factors: <ul style="list-style-type: none"> → Mother's husbands consent → Mother adult w/ atleast one prior successful pregnancy → All parties evaluated for soundness → Father's wife incapable of carrying child → Intended parents be suitable persons to assume custody → All parties have advice of counsel → Any custody agreement subject to judicial determination based on "best interests of the child" → Also could have surrogacy agreement judicially approved before conception
Notes	<ul style="list-style-type: none"> ● RS §191 – K affecting custody of child unenforceable on grounds of public policy unless is consistent w. "best interests of child" ● Other thorny issues: <ul style="list-style-type: none"> → NO PP violation – K disposing of frozen embryos → Violation w/ sale of bone marrow – against statute prohibiting sale of human organs ● Distinguished w/ Gestational Surrogacy → (Baby Boy J v. Johnson) where another women's egg used in surrogate mother. Ct.s use Surrogacy K to determine parental rights

4) **JUSTIFICATION**

a) **Mutual Mistake**

i) **ELEMENTS:**

- (1) RS § 152 – MISTAKE
 - (a) Mutual
 - (b) at time of K
 - (c) mistaken as to basic assumption on which K was made
 - (d) material effect
 - (e) K voidable by adversely affected property
 - (f) unless bears risk of mistake under § 154.
 - Can take into account relief by way of Reformation, Restitution or otherwise
- (2) §154 - PARTY BEARS RISK OF MISTAKE if:
 - (a) risk allocated to him by agreement
 - (b) aware at time of K that he has limited knowledge about mistaken issue and treats knowledge as sufficient
 - (c) risk allocated by cts bc reasonable

ii) **NOTES:**

- (1) **Relief:** Restitution, Rescission or Reformation of K to change mistake
- (2) **Releases:** Three part test for determining whether release for personal injury can be avoided on grounds of mutual mistake:
 - (a) Person signed release w/o knowing had personal injuries
 - (b) Person assumed the risk that the condition might worsen
 - (c) If person signed knowing she had been injured, couldn't later avoid release on grounds that she did not know the extent of the injuries
- (3) **As Is Clause:** Indicate parties intent to allocate risk; may serve as disclaimer of warranties not indication to shift risk
- (4) **Scrivner's Error:** remedy = reformation

- (5) **Unilateral Mistake:**
- (a) RS §503 → if the other party knows or has reason to know the true facts or at least to know that there is a mistake
 - (b) RS §153 → permits avoidance of a K for “mistake of one party” requiring either:
 - (i) Mistake be such that enforcement of the K would be unconscionable
 - 1. meaning severe hardship or substantial loss
 - (ii) the other party either have reason to know of, or be responsible for causing the mistake
 - (c) SPLIT: Some cts distinguish between errors of fact and errors of judgment. Former grounds for rescission, latter are not.
 - (d) SPLIT: Many cts require mistake be non-negligent; RS does not require, only requires that mistaken parties conduct not fall below level of good faith and fair dealing.
- (6) CASE: Sherwood – Barren Cow
- (a) Seller thought cow was infertile so sold it for less - meat value; turns out cow was fertile.
 - (b) Ct found that thing sold didn't exist. Cow capable of breeding vs. infertile cow so commercially indistinguishable >> mistake in K was so material made K ineffective

iii) **CASES:**

Case:	Lenawee County Board of Health v. Messerly
Facts:	P buys property “as is” to rent, faulty septic tank blows up rendering property uninhabitable
Rule:	● Ct finds that although you could find c) satisfied bc mistaken as to use of property. That under 154 risk was assigned to P >> no recovery
Notes:	● UCC §2-316 - can disclaim implied warranty of merchantability - to explicitly disclaim or sell “as is” especially distressed used goods. ● Ct overrules barren cow case, limits it to those very specific circumstances and follows RS instead

Case:	Wilfred v. Metropolitan
Facts:	Ktr bids on job on reliance on mistaken subKtr bid. Job 100K below other bids. Ktr rechecks and tries to immediately rescind, D did not accept rescission
Rule:	⊗ Unilateral mistake can be grounds of rescission when mistake is so palpable that party not in error will be put on notice of its existence ⇒ Mistake related to a material feature of K ⇒ Occurred notwithstanding the exercise of reasonable care ⇒ Of such grave consequences that enforcement of K would be unconscionable ⇒ Other party can be placed in status quo
A:	⊗ Enforcement would force subK into bankruptcy = substantial hardship ⊗ D should have been placed on notice, bc mistake was so substantial ⊗ P exercised reasonable care, and mistake still happened

b) Impracticability

▲ involves changes in circumstances that occur bt making of the K and the time set for performance

- i) **ELEMENTS:** After K is made a party can have duty of performance discharged if: (RS §261-266, UCC §2-615-16)
- (1) Substantial reduction of value of K: Performance is made **impracticable**,
 - (2) By the occurrence or non-occurrence of event which is **basic assumption** of which K is made
 - (3) W/o the parties fault
 - (4) Party does not bear the risk of the occurrence of that event by language or circumstances of K indicate contrary

ii) **NOTES:**

- (1) **Impossibility** – When a person or thing “necessary for performance” dies or is incapacitated, is destroyed or damaged duty of performance is excused. (RS §262 (death incapacity of person), §263 (destruction of thing) ; UCC §2-613 (casualty to identified goods))
 - (a) **Code 2-613** - goods are destroyed, before risk of loss passes to the buyer. Failure to deliver is not a breach bc excused
 - (b) CASE: (**River Phoenix** case) – River dies >> co. not liable for film couldn't finish
 - (c) CASE: **Caldwell** - theatre burns down, non-performance not the fault of the party claiming excuse
- (2) **Impracticability** - performance is different than the parties contemplated, much more expensive, but also different kind of performance - conditions turn out to be different than the parties thought they would be at the time the K was made (RS §261, 266)
 - (a) CASE: **Mineral Park Land Co. v. Howard** - Gravel moving case, extreme increase in cost justified D's nonperformance. Even though performance was not “literally impossible”
 - (b) **Code 2-615** - excuse for the seller, if performance has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basis upon which the K was made. (Impracticability)

- (i) Comment 9 - Farmer who ought to be excused, buyer might to be excused also under this (Frustration)
- (3) MOST CTs → **more expensive** or less profitable ≠ excuse
- (4) **Natural Disaster or War**: cts generally UNwilling to grant relief
 - (a) **American Trading v. Shell** → closing of Suez Canal due to war ≠ basic assumption of K >> NO relief
 - (b) **Kuhn** → air travel sufficiently disrupted during Gulf War, D called off conference. Ct finds fear of terrorism was unreasonable >> not grounds for excuse under impracticability
- (5) **Foreseeability_SPLIT**:
 - (a) Some cts require event be unforeseen or unforeseeable
 - (b) MOST cts, RS and UCC will grant relief even if event foreseeable
- (6) **Econ Analysis**: Says risk should be apportioned to “superior riskbearer” party who is in the best position to prevent the event from occurring
- (7) **Crop Failure**: UCC §2-615 Comment 9 or §2-613 → crop failure may be regarded as excuse where farmer has contracted to sell crops to be grown on designated land

iii) **CASES:**

Case:	Karl Wendt v. IH
Facts:	Sharp downturn in market causes D to sell to competitor who refuses to oblige by fixed price K
Rule:	<ul style="list-style-type: none"> ● Ct finds lack of profit ≠ impracticability; unless well beyond normal range bc this sort of fixed price K is intended to cover market fluctuations – reasonable expectations of parties as to apportionment of risk ● Mere Market shifts or financial inability DO NOT allow for discharge of K; econ loss of hardship NOT sufficient

Case:	Mel Frank v. Dichem
Facts:	P leased building to D to store chemicals, county ordinance said building not up to code to store chemicals, Di-Chem breaches lease
Rule:	⊛ Di-Chem did not specify to P that property to be used only for storage of chemicals, >> they could use still use property for other purposes

c) Frustration of Purpose

- i) **ELEMENTS:** Party can have duty’s under K discharged if:
 - (1) Party’s **principal purpose**
 - (2) is **substantially frustrated**, (K of no value)
 - (3) by the occurrence or non-occurrence of an event which was a **basic assumption** on which the K was made
 - (4) w/o fault
 - (5) Affect party did not bear the risk in language or circumstances of agreement

ii) **NOTES:**

- (1) **Frustration of Purpose** – exchange called for by the K had lost all value to the D bc of a supervening change in extrinsic circumstances
 - (a) CASE: **Krell** (king’s coronation case) → guy rented room to watch king’s coronation; king became ill >> D let out of agreement bc if had lost all value.
 - (b) Generally not been adopted in American law (RS §265, 266)
- (2) **principal purpose** The object must be so completely the basis of the K as both parties understand it w/o which the K would make little sense
- (3) **substantially frustrated**, Frustration must be so severe that it is not fairly to be regarded as w/in the risks that he assumed under K
 - (a) Not enough that becomes less profitable, Or even that affected party will sustain a loss

iii) **CASES:**

Case:	Karl Wendt v. IH
Facts:	Fixed price agreement in Dealer agreement (see above)
Rule:	Primary purpose of agreement was dealership agreement and not “mutual profitability” >> dramatic downturn didn’t substantially frustrate this purpose

d) Modification

i) RULES:

- (1) **CL** → presumption that modifications are improper, there must be additional consideration for modification K . Burden of proof on person seeking to enforce modification that it was proper.
 - (a) **Preexisting Duty Rule** (RS §73)
 - (i) **AL Packers v. Domenico** – fisherman ask for more \$ not enforced
 - (b) **EXCEPTION:**
 - (i) Unanticipated or unforeseen difficulties, which were not known or anticipated (RS §89(a))
 - (ii) Surrender of Defense (RS §74)
 - (iii) Detrimental Reliance (RS §89c)
 - (iv) Surrender of a Better Offer
 1. CASE: **Schwartzreich v. Bauman-Basch** → employer tore up old K when employee told him another co. offered to pay more = sufficient consideration.
- (2) **UCC §2-209** → basic assumption that all modifications are enforceable, shoe is on the other party to show modification was coerced.
 - (a) Obligation of GF to bar extortion of modifications w/o legitimate commercial reason
 - (i) Legitimate commercial reason = unforeseen econ exigencies;
 - (ii) GF binds party seeking to resist modification as well → cannot accept modification never intending to pay

ii) NOTES:

- (1) **SoF and modifications SPLIT**
 - (a) Some cts only require oral modification be in writing when oral mod brings K w/in SoF
 - (b) Most cts require also when original K was in writing
 - (c) Commentators disagree UCC §2-201(1) – only requires memorandum specify quantity; other terms such as price, may be expressed orally
- (2) **No Oral Modification Clauses:** §2-209(2) – authorizes parties to employ NOM clause to create “private SoF” governing modifications
 - (a) §2-209(4) – however allows for modification by “waiver” (though waiver not explicated)
 - (i) Waiver can be through reliance, part performance, or oral/conduct of parties
 - (b) PER doesn't effect later agreements, NOM and no waiver clauses give PER protection for subsequent modifications as well
 - (c) Brookside finds No waiver clause can be overcome by actual performance.

iii) CASES:

UCC	
Case:	Kelsey Hayes v. Galtaco
Facts:	Fixed price K to supply castings used by P to make brakes for Ford. D going out of biz says will continue to make castings if P agrees to price increase.
Rule:	<ul style="list-style-type: none"> ⊗ UCC §2-209(1) modifications must be asked for in GF. D used econ duress to coerce modification. P had no reasonable alternatives but to agree ⇒ P under obligation to display protest to modification to put other party on notice that modification is not freely entered into

Case:	Brookside Farms v. Mama Rizzo's
Facts:	Breach of requirement K to buy basil
Rule:	<ul style="list-style-type: none"> ⊗ UCC SoF modification has to be in writing as well ⊗ NOM = private SoF but D promised to make written notification of modification ⊗ Also no SoF protections for goods which payment has been made and accepted ⊗ No waiver agreement → ct finds acceptance of payment also applies as Exception to no waiver clauses, and constitutes unambiguous overt admission by both parties that K actually exists.

5) RIGHTS OF 3d PARTIES

a) Beneficiaries

i) ELEMENTS:

- (1) **Classical K law** - Every state has recognized 3d party actions to enforce Ks in some circumstances, traditional bases =
 - (a) "Creditor Beneficiary" = Original beneficiary of K assigns collection of K to 3d party to satisfy a debt. (**Lawrence v. Fox**)
 - (b) "Donee Beneficiary" case → where donee receives benefit not as obligation but as gift (**Seaver v. Ransom**)
- (2) **RS2 §302** → 3d party can have cause of action if
 - (a) Intended beneficiary AND (promisor must know or have reason to know 3d party intended to have rt of action)
 - (i) SPLIT: Some cts require intent of BOTH parties (**Gringerik**), Some cts look to promisee's intent.
 - (b) Rt of performance is appropriate to effectuate the intention of the parties AND
 - (i) Either Creditor Beneficiary or
 - (ii) Donee Beneficiary (though not explicitly referred to as such)

ii) NOTES:

- (1) **Incidental Beneficiary** → intended to benefit from the K, but not intended to have independent cause of action. (RS2 § 302(2) and 315)
 - (a) MAJ of jxs allow intended beneficiary of will to sue atty for negligence in drafting will (**Stowe**)
- (2) **Rationale** for allowing 3d party action: Judicial Economy. Creates shortcut, avoiding 2 lawsuits when you can get the same result with only one.
- (3) **Intention of Parties:** RS requires parties intend 3d party to have cause of action.
 - (a) Promisee – best interest served by having shortcut used, then he's not dragged into lawsuit
 - (b) Promisor – if he's going to be sued, does it matter who he's sued by
 - (i) Possible differences in liability?
 1. If sued by original Ktor – Promisee will only be liable for K price of services
 2. If sued by beneficiary – might be liable for all expenses incurred by that beneficiary. Could be much greater.
 - (c) TEST 1 = **Both Parties Intend (Gringerik)**
 - (d) TEST 2 = Look to **Promisee's Intent**
 - (e) TEST 3 = **Middle Ground Approach:** Don't consider intentions of the parties. Allow recovery if FORESEEABLE, that promisor might be liable to a 3d party. If foreseeable that actions might injure 3d party.
 - (i) Even if promisor had no desire to confer benefit on 3d party
- (4) **Factors in determining Intent**
 - (a) TEST: Totality of the circumstances:
 - (i) Language of K
 - (ii) Background of K
 - (iii) Considerations of fairness and practicality
- (5) **Other Issues:**
 - (a) Threshold Q: Does 3d party have Standing?
 - (i) Ability of promisor and promisee to vary the K
 - (ii) Defenses
 - (iii) Remedies
- (6) **Vesting:** when do rts of an intended beneficiary vest, and are >> no longer subject to change of agreement bt original parties.
 - (a) RS §311 – permits variation until 3d party has:
 - (i) Manifests assent at invitation of promisor or promisee
 - (ii) Materially changes position in reliance
 - (iii) Brings suit on the promise
- (7) **Remedy:**
 - (a) Specific Performance
 - (b) Nominal damages in light of the promisee's limited econ interest in performance

iii) **CASE:**

Case:	Grigerik v. Sharpe
Facts:	Landowner sells land and has S inspect to say suitable for bldg. G buys in reliance. Can G sue S? NO
Rule:	<ul style="list-style-type: none"> ● Both promisee and promisor have to have intention to create 3d party action – to create direct obligation to 3d party. <ul style="list-style-type: none"> → Determined from terms of K. read in light of attending circumstances → Motives and Purposes of the parties → Does NOT need to be EXPRESS language in K to create direct obligation to 3d party beneficiary

Case:	Zigas v. SC
Facts:	public housing case which allows private rt of action for beneficiary of gov't housing programs.
Rule:	<ul style="list-style-type: none"> ● Direct Beneficiary of housing program, not incidental >> have standing bc P's are the only ones who are going to be able to show economic repercussions and are the only parties that will enforce their rts. ● Program not intended to benefit the gov't >> intent of parties to give private rt of action ● Ct allows private rt of action, statute amended to take away
Notes:	<ul style="list-style-type: none"> ● RS2 §313(2) – promisor Kting w/ gov't entity may NOT reasonably expect to assume liability to members of the public who may be affected by a breach.

Case:	Stowe v. Smith
Facts:	Atty makes mistake in drafting a will. Atty can be liable for affect to 3d party.
Rule:	<ul style="list-style-type: none"> ● Administratrix of will has no incentive to bring suit, would prefer \$ stay in estate. If sues will only get attys fees ● Therefore, beneficiary only one available to enforce rts. Can get whatever damages resulted from attys mistakes. Son could allege that atty intended to assume a direct obligation to him when creating his mother's will. Svc did not have to be rendered directly to the son.

b) Assignment and Delegation of K Rights and Duties

i) **ANALYSIS:**

- (1) Assignment OR Delegation?
 - (a) Valid w/ terms of K?
 - (b) Effective?
 - (c) Duties bt assigning/delegating party – original party – 3d party?

ii) **ELEMENTS:**

- (1) K rt can be **assigned** (RS §317(2))
 - (a) Creates in the assignee a new rt
 - (b) Extinguishes the rt previously held by the assignor
- (2) Person who is subject to a duty of performance may **delegate** that duty. (RS §318(1))
 - (a) Not always permissible depending on degree of individual performance called on in the K
 - (b) Mere delegation does NOT relieve the bound party of duty to perform, until performance is actually rendered.

iii) **NOTES:**

- (1) **Assignment** = “manifestation intention by owner of rt to transfer rt to another person” (assignee)
 - (a) To be Valid and Enforceable:
 - (i) Assignor must make CLEAR his intention to relinquish rt to assignee
 - (ii) Assignor must NOT retain control over the rt or any power of revocation.
 - (b) Obligor need not accept assignment, at time of assignment, rt is held in trust by obligor.
 - (c) Assignment = both assignment of rights and delegation of duties (RS §328, UCC §2-210(4))
 - (d) Assignee stands in the shoes of the assignor – becomes subject to the same claims or defenses that that obligor has that arise out of the K assigned (eg. Bound by any arbitration agreement)
- (2) **Limitations on Assignment:** (RS §317(2))
 - (a) Conflict w/ statute or public policy
 - (b) Material adverse effect on other party
 - (c) Valid preclusion by K terms
 - (i) Public Policy
 - a. Cannot assign pre-judgment tort claims – don't want traffickers in lawsuit for pain and suffering
 - b. Cts reluctant to enforce future rts – protect parties from making improvident or fraudulent assignments
 - i. Exception: can transfer rt to payment expected from existing employment K

ii. Must manifest present transfer of rts

- (ii) Materially affect party to original K (RS §317 (2))
 1. change duty of obligor
 2. materially increase burden or risk imposed on him by K
 3. materially impair chance of obtaining return performance
 4. materially reduce value to him

- (3) **Delegation of Duties:** Ct.s likely to enforce clause prohibiting delegation of duties (RS §322 (1), UCC §2-210(5))
 - (a) In permissible cases → original obligor remains liable to obligee until performance is rendered by delegate
 - (b) UNLESS obligee consents to delegation and releases obligor – produces “novation” creates new duty (RS §280, 318)
 - (i) Limitations:
 1. Personal Svc K: Non-delegable, unless other party assents (RS §318)
 2. Unsatisfactory Delegation of Sale of Goods K: where delegated performance would be unsatisfactory to the obligee OR other party has substantial interest in having original obligor perform (UCC 2-210(1) – (not whether delegate would perform as well as orig obligor)
- (4) **Gratuitous Assignment:** Freely revocable unless formal GIFT requirements met.
- (5) **Non-Assignment Clause:** K’s assignable in face of Express K language forbidding.
 - (a) UCC §2-210(2) and 9-318(4), RS §322 – preference against non-assignment clauses
 - (i) “No assignment clause” will be 1st construed to prohibit delegation of duties, and
 - (ii) Alternatively, to constitute a promise not to assign rights that might lead to damages for breach
 - (iii) BUT will not render assignment ineffective.

iv) **CASE:**

Case:	Herzog v. Irace
Facts:	Dr to be paid for work w/ personal injury \$, sues attys for giving \$ to client instead.
Rule:	<ul style="list-style-type: none"> ● Transfer of proceeds from pending litigation is valid and enforceable assignment ● After receiving notice of the assignment, obligor cannot pay \$ to either the assignor or to other creditors. At time of assignment funds are held in trust exclusively for Assignee’s benefit and if paid to another, assignee is entitled to enforce rts against obligor directly.

Case:	Sally Beauty v. Nexxus
Facts:	Best Merged w/ SB (beauty distributions cos.) Means Nexxus’ exclusive distributorship agreement with Best would be assigned to a competitor Alberto-Culver, who owns SB.
Rule:	<ul style="list-style-type: none"> ● UCC bars delegation of duties if non-assigning party would find performance by a delegate substantially different from the thing which it bargained for. ● Ct finds it would prejudice the P’s to have K fulfilled by competitor.
Dissent:	<ul style="list-style-type: none"> ● Alberto-C required to use “best efforts” in K, out to make \$, would not be in their best interest to stymie SB’s business. They are also not direct competitors, Nexxus sells much cheaper product in grocery stores >> Nexxus would not be prejudiced and assignment should be allowed

6) CONSEQUENCES OF NON-PERFORMANCE

a) Material Breach

- i) **DEFN:** When does parties non-performance become material, and grounds for repudiation of K?
 - (1) **Conditions:** Duty of performance doesn’t arise until conditioning event occurs:
 - (a) Express Conditions
 - (b) Implied in Fact: (inferred from conduct of parties)
 - (c) Constructive Conditions: In the interests of justice, one party’s failure to perform justified other party in withholding performance in return. Legal Fiction, implied by cts.
 - (i) Equity Considerations: The more performance party has completed, the more the performing party has at stake and to deny recovery creates chance of “forfeiture” performing party losing everything at stake, and buyer getting everything
 - (2) RS §234 - **Bilateral K** – presumption that performance to be made simultaneously
 - (3) §234(2) – **Unilateral K** – performance of one party takes time
 - (a) Performance which takes time has to be done first, then creates obligation that other party has to pay.
 - (b) Default norm – performance finished → duty of payment triggered... tend to favor people w/ money

ii) **ELEMENTS:**

(1) **Material Breach** (RS §275)

- (a) Extent injured party deprived of substantial benefit he could “reasonably have anticipated”
- (b) Can injured party be adequately be compensated
- (c) Non-performing suffer forfeiture, has he partly performed
- (d) Non-performing’s motive for non-performance – wilfull, negligent, innocent?
- (e) Likelihood that non-performing will cure breach

(2) **Total Breach:** So material that non-breaching party entitled to suspend performance until breach is no longer material, breaching party has cured breach

- (a) Material Breach becomes Total Factors: (RS §241)
 - (i) Further delay prevents or hinders making substitute arrangements
 - (ii) Degree of importance attached to performance w/o delay, by terms of K
 - (iii) §242 – reasonableness of injured party in communicating his grievance and seeking satisfaction

(3) **Partial Performance**

- (a) CL: NO compensation bc entire performance = condition precedent
- (b) Restitution: Some courts allow quantum meruit recovery
- (c) Substantial Performance: (RS §237) Minor or immaterial deviations from the Ktual provisions do not amount to failure of a condition justify other parties non-performance. Other party can recover damages
 - (i) Cost of Completion (**Jacobs and Young**)

iii) **ANALYSIS:**

(1) Is the other party in breach?

- (a) Further delay prevents or hinders making substitute arrangements
- (b) Degree of importance attached to performance w/o delay, by terms of K
- (c) §242 – reasonableness of injured party in communicating his grievance and seeking satisfaction

(2) Has the breach become Total?

- (a) Repeated non-performance
- (b) Demand for Assurances (**Sackett**)

iv) **NOTES:**

(1) **Substantial Performance Factors:**

- (a) Purpose of K
 - (i) Intention of the parties
 - (ii) Language of the K
- (b) Impact on Parties:
 - (i) Degree and quality of performance rendered
 - (ii) What damages will appropriately remedy defects
 - (iii) Cost of completion or repair
- (c) Motive of the breaching party
- (d) Is K divisible?
 - (i) RS §240 – 1) apportion the performances into corresponding pairs of part performances 2) they must be agreed equivalents
 - (ii) Factors:
 - 1. Intention of the parties
 - 2. Language of the K
 - 3. Manner of performance
 - 4. Method of payment
 - 5. Attending Circumstances

(2) **Rules of Construction:** not applicable if parties intended otherwise expressed in K language or circumstances

(3) **UCC §2-601** Unless otherwise agreed, if good or tender of delivery fail to conform to K in ANYway, buyer can refuse to accept all or part of goods. Buyer has rt to absolutely refuse

(4) **Damages:**

- (a) Degree and quality of performance rendered
- (b) What damages will appropriately remedy defects
- (c) Cost of completion or repair
- (d) Non-Economic Injury: Psychic injury, Ct.s tend to value in \$ and compensate only for econ injury . They are much less willing to compensate non-econ injury → not always ignored but difficult to translate that type of injury into \$\$

(5) **Essence Clauses:** §242 stock phrase “time of the essence” phrases to be considered along w/ other circumstances not dispositive. Also parties can make performance by date “express condition” that delay will result in discharge of K

- (6) **Acceleration Clauses:** To get around Exception only allowing recovery for damages when breach is total. Clause states that if installment not paid on time, creditor may treat balance as entire balance being due immediately.

v) **CASES:**

Case:	Jacob and Youngs v. Kent
Facts:	Ktr fails to put in "Redding" pipe as called for in K
Rule:	<ul style="list-style-type: none"> ● <u>Substantial Performance</u>: Minor deviations from letter of K, doesn't necessarily constitute breach of K. Have to look to: <ul style="list-style-type: none"> → Purpose of K – Owner intended to get galvanized pipes not "Redding" pipes in particular – quality of pipes essentially the same → Harshness of non-recovery to the performing party = forfeiture, unjust enrichment → Impact on other party, to extent they are being deprived of what they reasonably expected and bargained for. → Builder wasn't willful, wasn't trying to reap profit of using cheaper pipes ● Owners remedy: compensation for difference in value. Since the value of the pipes is essentially the same D gets \$0 ● DICTA: Ct. does not foreclose the possibility that fulfillment is ONLY satisfied to LETTER of K, if explicitly stated in K.
Dissent:	<ul style="list-style-type: none"> ● Looks to letter of K. D had a rt to get what he bargained for, doesn't matter that pipes are of the same quality – owner should be able to w/hold payment if performance doesn't meet terms of K

Case:	Sackett v. Spindler
Facts:	P agrees to buy newspaper stocks, delays and delays, D pulls out of deal
Rule:	<ul style="list-style-type: none"> ⊛ <u>Repudiation</u>: can party repudiate based on action or non-actions of other party in anticipation of a breach <ul style="list-style-type: none"> ⇒ <u>Total Breach</u>: So material that non-breaching party entitled to suspend performance until breach is no longer material, breaching party has cured breach ⇒ <u>Material Breach</u>: (RS §275) <ul style="list-style-type: none"> ○ Cure – unlikely, P had been given many chances ○ D gave several opportunities to cure and was justified in demanding immediate performance

b) Anticipatory Repudiation

- ▲ AR = Reasonable grounds for "insecurity" as grounds for discharging obligations under K

i) **ELEMENTS:**

- (1) **Repudiation**: (RS §253(1) UCC §2-610) Clear manifestation of intent not to perform the K
 - (a) TEST: definite and unequivocal
 - (b) RESULT: Aggrieved party may:
 - (i) Resort to any remedy for Breach 2-703 or 2-711 OR
 - (ii) Suspend his own performance
- (2) Repudiating party has power of timely **Retraction** UNLESS: (RS §256(1) & UCC §2-611)
 - (a) Injured party has materially changed position in reliance OR
 - (b) Indicates that considers repudiation final.
- (3) **Assurances**: (UCC §2-609 & RS§251)
 - (a) Party w/ reasonable grounds for insecurity can
 - (i) Significant financial difficulty
 - (ii) Failure to perform important obligations
 - (iii) Failure to perform obligations under other Ks
 - (b) Demand adequate assurances
 - (c) Failure to give assurances = AR, terminating K
 - (i) Reasonable time = 30 days to respond

ii) **NOTES:**

- (1) RS §250 – **mere doubtful statements** that performance may or may not occur ≠ repudiation
 - (a) Additional Terms: Language "under a fair reading" that makes performance conditional on term which goes beyond the scope of original K = Repudiation
 - (b) 250(b) – conduct CAN = repudiation. If indicates that obligor unable or apparently unable to perform
 - (i) Must indicate performance is a "Practical impossibility"
 - (ii) Financial difficulty (to point of insolvency) ≠ AR; but does = grounds for demand of adequate assurances

iii) **CASES:**

Case:	Truman Flatt v. Schupf
Facts:	Rezoning for asphalt plant condition on sale of land
Rule:	<ul style="list-style-type: none"> ● Language saying they were withdrawing bid for rezoning, and making lower offer NOT clear manifestation of intent to repudiate ● P timely retracted repudiation AND D did not act in reliance OR indicate to P that they thought repudiation was final → No negotiations w/ other party to sell property

Case:	Hornell Brewing Co. v. Spry
Facts:	Arizona Tea Co. agrees to exclusive dealership agreement w/ Canadian swindler
Rule:	<ul style="list-style-type: none"> ⊛ UCC §2-609(1) – a party can demand assurances if they have “reasonable grounds for insecurity”. Non-compliance w/ demand for assurances = reasonable grounds to suspend performance ⇒ Factors: <ul style="list-style-type: none"> ○ Buyer’s exact words or actions ○ Course of dealing or performance ○ Nature of sales K ○ Industry ⇒ Reasonable = Good Faith standard
Analysis:	<ul style="list-style-type: none"> ⊛ Buyer perpetually in arrears, wouldn’t give confirmation of credit line, evidence that he wasn’t maintaining warehouse and vehicles for distribution >> demand for assurances reasonable and D’s failure to respond = Repudiation and grounds for termination of K.

c) Express Condition

- (1) Express Condition = duty spelled out in the K, upon which that formation of the K is contingent
(a) Obligor = performance obligation is at issue
(b) Obligee = to whom performance is owed.

ii) **ANALYSIS:**

- (1) **Express Condition?**
(a) Strict Approach: Clear and unambiguous language establishing condition precedent = “if” and “unless / until”
→ failure of conditioning event = agreement of no further force or effect
(i) NO Substantial Performance (RS §237) (**Oppenheimer**)
(ii) Effect of Non-occurrence = No Ktual duty arises, D discharged (§225)
(b) Modern Ct Application: Cts only require strict performance of conditions which are MATERIAL
(i) Material = related to substance
1. Would excuse deprive other party of benefit of bargain?
2. OR just technical (eg. conditions of notice)
- (2) **Interpretation**: Ct can interpret doubtful language as promise or constructive condition
(a) Condition Implied in Fact:
(i) Imposed by ct to effectuate intent of parties
(ii) Same Legal Effect, PER applies
(b) Constructive Condition?
(i) Doesn’t have to be literally performed. Substantial performance is sufficient
(ii) Effect of Non-Occurrence = imposed by law and can be enforced as justice requires
(c) Promise? Non-performance ≠ K fails to come into being; Non-performance = breach.
- (3) **Excuse?**
(a) Countervailing Public Policy?
(b) Waiver? (RS §84(1))
(i) Benefitting party has to waiver
(ii) Was waiver retracted?
(c) Forfeiture? if would cause forfeiture and condition non-material will not be enforced (**JNA**)
(d) Prevention? Can’t prevent condition from occurring
(e) Bad Faith?

iii) **NOTES:**

- (1) **Condition Precedent** (RS §224) – an act or event, other than a lapse of time. Unless Condition excused, Condition must be fulfilled or NO K comes into being
(a) If so conditioned → no mitigation excuses non-occurrence of condition (RS §237)
(b) Substantial performance is insufficient
(c) Forfeiture - if would cause forfeiture and condition non-material will not be enforced (**JNA**)
(d) Policy: Freedom of K, letter of agreement should be given deference by courts for reliability and consistency

- (2) **Material Condition:** Some modern cts will insist on strict performance of condition when conditioning events are “material” to the agreement and the risks created thereby.
- (a) Part of the performance that obligor was to receive in exchange or material part of risk assumed
 - (b) Procedural or technical ≠ material; minor or trivial ≠ material
- (3) **Constructive Conditions** = imposed by the court to implement parties underlying intentions. “imposed by law to do justice.” Substantial compliance is sufficient
- (a) Different from express conditions which must be literally performed
 - (b) Interpretation CANNOT be used to prevent forfeiture when express condition is created using “unmistakable language.
- (4) Distinguished from a **Promise** → Non-performance ≠ K fails to come into being; Non-performance = breach.
- (5) **Waiver:** RS §84(1) – intentional relinquishment of known right
- (a) Non material condition - Effective w/o consideration or reliance
 - (b) Material condition cannot be waived UNLESS: reliance or consideration
 - (c) Waiver can be through course of conduct
 - (d) if non-material waiver Retraction
 - (i) must be timely, before time for fulfillment of condition has passed.
 - (ii) Obligee did NOT act in reliance of waiver
 - (e) If only one party bound → condition is waivable by that party alone.
- (6) **Prevention:** (RS §245) condition is excused in promisor wrongfully hinders or prevents condition from occurring.
- (a) Obligor has control – has at least the obligation to attempt to cause the condition to occur – Good faith or best efforts.
 - (b) Even not w/in obligors control – may be under obligation to cooperate w/ the oblige in causing the condition to happen, or at a minimum not impede those efforts
 - (c) Bad Faith – Fraud, non-disclosure
 - (d) Other party would have to establish causation, and not just honest opinion.
- (7) **Forfeiture:** (RS §229) – courts can excuse nonoccurrence of condition if forfeiture would result. And condition NON-material.
- (a) Failure to meet condition is unintentional and non-malicious
 - (b) No substantial harm would be imposed on other party
 - (c) And condition would cause substantial harm to forfeiting party
 - (d) Forfeiture can be reliance not just unjust enrichment to other party (RS contrary to **Oppenheimer**)
- (8) **Discretion:** Final approval left to obligor’s discretion. Cts distinguish between Functional v. Aesthetic
- (a) Objective:
 - (i) UCC §1-201(19) and 2-103(1b) - If intent of condition to give discretion as to matters of commercial quality, fitness or utility
 - (b) Honest but Subjective: Good Faith under code = honest dissatisfaction
 - (i) If involves personal aesthetics or fancy OR
 - (ii) If performance is to satisfaction of independent 3d party (RS §227 - less likely to be motivated by “selfish interests”)
 - (c) Unfettered Discretion -
 - (i) Eg. Code 2-326 - sale on approval - choose to go ahead of not go ahead, code says seller can be bound. Free to back out for no reason at all

iv) **CASES:**

Case:	Oppenheimer v. OYC
Facts:	OYC leases WTC office to P Fails to meet condition, Ct. upholds letter of K allowing D to terminate
Rule:	<ul style="list-style-type: none"> ● Express conditions must be literally performed, substantial performance is insufficient. Must comply to letter of the agreement. ● May be excused by waiver, breach or forfeiture, Counterveiling public policy?

Case:	JNA v. Cross Bay Chelsea
Facts:	Restaurant owner -Tenants have option to renew lease
Rule:	<ul style="list-style-type: none"> ● Equitable interest protected where forfeiture would result, unless condition is material (RS §229) <ul style="list-style-type: none"> → P made substantial improvements, and landlord not harmed by delay → P’s motive not malicious, was merely neglect

Case:	Morin v. Baystone
Facts:	SubK puts up AL siding on GM factory – GM has it taken down
Rule:	Reasonable person standard is employed when the K involves commercial quality, operative fitness, or mechanical utility which other knowledgeable person can judge... The standard of good faith is employed when the K involves personal aesthetics or fancy

7) DAMAGES

a) Computing Damages

i) ELEMENTS:

- (1) **Benefit of the Bargain Rule:** P gets what he would have gotten had K been fully performed (§347)
- (2) **Formula:** Loss in Value + Other Loss – Cost Avoided – Loss Avoided (in partial breach only first 2 factors)
 - (a) Loss in Value = value of performance that should have been received – anything actually received
 - (b) Other Loss = incidental (costs incurred to mitigate) & consequential (injury to person or property by breach)
 - (c) Cost Avoided = saving of further expenditure that would have been incurred
 - (d) Loss Avoided = \$ received thru mitigation

ii) APPLICATION:

- (1) **Real Estate K's:** D = K price + special damages – MV at the time of breach
 - (a) Special Damages = (C + I) recoverable only if reasonably foreseeable at time of K; NO speculative damages; injured party duty to mitigate
 - (b) MV:
 - (i) If resale occurs at arms length w/in a reasonable period of time = resale value;
 - (ii) if not = testimony from appraisers.
 - (iii) Listing prices of similar homes ≠ MV
- (2) **Employment K's:** D = Cost of obtaining other equivalent services + Foreseeable consequential
 - (a) ONLY for Fixed term K
 - (b) NO Specific Performance
- (3) **Construction Ks:** (RS §348) D = Builder's expected net profits + unreimbursed expenses at time of breach
 - (a) Cost to Complete MAJ: If builder's performance defective, D = reasonable cost of replacement or to complete
 - (b) Diminution in Value: Substantial GF performance but defects and correction would cause unreasonable econ waste.
 - (i) D = value of property as constructed – value had performance be properly completed
 - (ii) **American Std** – cannot be used if D breached intentionally
 - (iii) **Jacobs & Young** – in cases where would be econ. waste, OR
 - (iv) **Peevey House** – "idiosyncratic value" – coal mine agrees to put land back the way they found but ct doesn't require bc would cost substantially more than land is worth. However land has value to P which cannot be accounted for by the market
 - (v) Posner argues it should always be dim in value bc if owner really wanted restoration could have brought action for SP. And that any \$ recover would not be used to restore land, would be pocketed
- (4) **UCC Damages** (breach of K for sale of goods)
 - (a) General Rule: MV price – K price
 - (b) Seller's Damages: (UCC §2-708(1))
 - (i) D = MV (at time and place for tender) – Unpaid K price + incidental damages – expenses saved
 - (ii) Alternative - Seller's Resale Rule:
 1. For if market price has declined post-breach
 2. K price – Resale Price (if complies w/ 2-706)
 - (c) Buyer's Damages: (UCC §2-713)
 - (i) MV (at time of breach) – K price + I&C – Expenses saved
 - (ii) Buyer's Substitute Goods Rule: (UCC §2-712(1))
 1. Buyer can "Cover" its loss by purchasing substitute goods
 2. D = Purchase price of Substitute Goods – K price.

iii) NOTES:

- (1) **Interest:**
 - (a) Post-Judgment Interest: Interest accrues from date of entry of judgment OR date of verdict
 - (b) Pre-Judgment Interest:
 - (i) K language – if language of agreement calls for interest due for late payments on specified date. EFFECTIVE unless usurious
 - (ii) Absence of K language – ONLY when at the time of breach P's claim was for a "liquidated sum" or at least was for a sum that was in the court's view "readily ascertainable"

iv) **CASE:**

Cost to Complete	
Case:	American Standard
Facts:	D K's to remove bldgs and substructures. Doesn't completely do job bc finds would be really expensive and wouldn't improve MV of land that much
Rule:	<ul style="list-style-type: none"> ● Ct refuses to apply Jacobs and Young damages computation (sale price – MV at time of completion = \$3K) because breach was wilful, D can't just decide its not economically feasible to do job that he K'd to do. >> Ct applies Cost of Completion = \$90K. No Q of waste >> ct will not allow J&Y
Note:	<ul style="list-style-type: none"> ● Peevey House Case:

b) **Limitations on Damages**

i) **ELEMENTS:**

- (1) **Disclaimer:**
- (2) **Foreseeability:** R2 §351 – Damages not recoverable if D didn't have a reason to foresee.
 - (a) **General Damages:** If damages would occur in the ordinary course of events – “flowing from breach” OR
 - (b) **Special Damages:** If Special circumstances unique to P the other party must have had “reason to know” – Out of the ordinary damages have to be foreseeable atleast in kind
 - (i) Foreseeability of Loss TEST:
 1. RS §351 Focus on breaching party: OBJ standard – whether he knew or had reason to know that loss would be a foreseeable “probable” result of the breach
 2. Classical Tacit Agreement Test: other party “consciously assumed” the liability in question
- (3) **Reasonable Certainty:** Have to establish fact of damage, not as close certainty regarding amount of damage
 - (a) Can't be too speculative: Dependent upon taste or fancy which can't be devined.
- (4) **Causations:** natural and proximately caused by breach, not remote or contingent

ii) **CASE:**

Employment K	
Case:	Handicapped Children v. Lukaszewski
Facts:	Teachers quit job saying she has high blood pressure. School recovers
Rule:	<ul style="list-style-type: none"> ● Teacher is liable for cost of replacement (difference in her salary and replacements salary) within reasonable limitations. ● Have to hire person at salary demand most close to D's salary “Reasonable Substitute”. However as school didn't have a choice teacher liable for more expensive person's salary because school didn't bargain for higher qualified teacher.

Consequential Damages – Foreseeable?	
Case:	Hadley v. Baxendale
Facts:	Mill crank shaft broken and mill couldn't run. P sends out to be fixed but ct will not allow recovery for inoperation of mill because damages were not foreseeable.
Rule:	R2 §351 – To be recoverable damages must be foreseeable either 1) because ordinary course of events OR 2) special circumstances made D “have reason to know” damages would be incurred

Case:	FloraFax
Facts:	FF sets up telemarketing svc thru GTE to take flower orders, GTE incompetent and FF loses customers
Rule:	<ul style="list-style-type: none"> ● Consequential damages non-recoverable if disclaimed – Not so here ● Causation: Relationship would have continued if not for GTE's breach ● Foreseeable: Knew about FF's K's w/ other co.s and knew would be in jeopardy if GTE didn't perform ● Reasonable Certainty: will not fail for K provision allowing for cancellation bt FF and customers. GTE had no ability to utilize that clause >> cannot be used as defense. GTE had to show customers wouldn't have continued utilizing FF's svcs even if they had performed fully.

c) Mitigation

i) **RULE:** P may not recover for those injurious consequences of D's breach which the P could have avoided

ii) **APPLICATION:**

- (1) **Construction:** Party has duty to mitigate and can only claim labor and material they've expended up to point of breach + profit that would have been realized
 - (a) CASE: **Rockingham** - Guy continues to build bridge even though county says they don't want it. After one party has breach other party cannot continue to perform and recover damages for full performance.
- (2) **Employment:** Duty on employee to mitigate by finding alternative employment.
 - (a) If employee rejects offer, employer must show rejected employment was comparable or substantially similar to previous position.
 - (b) If shown, duty on Employee to show "special circumstances" justify rejection.
 - (i) CASE: **Boehm v. ABC** - ABC fires VP then claims he didn't adequately mitigate damages bc refused to take alternative employment w/ ABC. Employee must use reasonable efforts to seek alternative employment. Failure to take alternative employment is justified if other available employment is different from or inferior.
 - (ii) CASE: **McLaine** Case: Shirley not given movie she wants, studio offers her alternative and she rejects. Ct finds her rejection did not kill her case bc 2d movie was of different type and she didn't get same approval of directors etc.
 1. DISSENT: MAJ is too indulgent essentially abrogating duty to mitigate by saying she doesn't have to take a part that isn't exactly the previous role
 - (iii) CASE: **Fair v. Red Lion** - waitress discharged, files suit, restaurant hires back. Ct finds no recovery bc she didn't take offer of employment. Knapp worried that gives co.s too much latitude. How secure is employment once you've filed suit. And easy way for co.s around WT suits. If someone files suit just have to offer new position on substantially similar terms to avoid liability.
- (3) **Lost Volume:** If injured party could have the benefit of both Ks = "lost volume,"
 - (a) P must establish:
 - (i) Possessed capacity to make an additional sale
 - (ii) Would have been profitable to make an additional sale
 - (iii) Probably would have made an additional sale absent the buyer's breach.
 - (b) CASE: **Jetz Svc v. Salina Properties** - Apt complex breaks lease w/ Coin-op laundry svc. Ct awards full lease bc Jetz could have leased machines to S as well as to another apt bldg.

d) Non-Recoverable Damages

i) **ELEMENTS:**

- (1) **Punitive Damages:** Can only get punitive damages if breach of K in conjunction w/ intentional tort.
 - (a) Some courts allow punitive damages for breach of a K that involves breach of a fiduciary duty, fraud or an overreaching commercial organization
 - (b) Tortious Breach of K (outside of Insurance)
 - (i) Breach cause physical injury
 - (ii) Breach + traditional CL tort (ie fraud, conversion)
 - (iii) Means used to breach are tortious - deceit or undue coercion
 - (iv) Intentional Torts or Intent to Cause Harm: Party intentionally breaches the K intending or knowing that breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship OR substantial consequential damages
- (2) **Emotional Distress:** Generally foreclosed in breach of K cases.
 - (a) ED May be Appropriate when:
 - (i) In conjunction w/ tort - physical injury
 - (ii) K is type where ED particularly likely - RS §353 (eg. Notice of death, disposal of body, syphilis case)
 - (b) RS2 §353
 - (c) CASE: **Erlich v. Menezes** - Contractor botchs dream house. Ct doesn't allow PD bc Ktor didn't have reason to foresee that P's would suffer extraordinary amount of ED.
 - (d) CASE: **Freeman & Mills v. Belcher Oil** -
 - (e) CASE: **Roth v. Speck** - court applies UCC "resale price" as measure of damages in breach of employment K.
- (3) **Atty's Fees:** Generally no atty's fees UNLESS:
 - (a) K provision (Implied reciprocal, if one party allowed to recover under the K generally other party can too)
 - (b) Statute
 - (c) Special Circumstances where other parties conduct = bad faith, fraud (**Gamache** - insurance context)

(d) Collateral Litigation (must satisfy requirements of foreseeability and certainty RS §351)

ii) **NOTES:**

(1) **Rationale:** encouraging commerce/K relationships by enabling parties to estimate in advance the financial risks of their enterprise

iii) **CASE:**

Atty's Fees	
Case:	Gamache
Facts:	Guy gets sued by police for injuries incurred while he was resisting arrest. Insurance co. refuses to defend
Rule:	<ul style="list-style-type: none">● American Rule = no recovery of atty's fees, UNLESS:<ul style="list-style-type: none">→ Express agreement bt the parties→ Statute→ Insurance co. AND acting in bad faith, fraudulently or stubbornly litigious→ Insurance = "special relationship" bt the parties which allow recovery of atty's fees when fees incurred by failure of insurances duty to defend

e) **Justifications**

i) **NOTES:**

- (1) **Efficient Breach:** If breaching party would make more \$\$ by breaching - society is better off when the breach takes place bc damages are paid and more profitable K takes place elsewhere (defense to fact that you can't get punitive damages)
 - (a) **Criticism:** Still have transaction costs, and inefficient in the sense that undermines trust, certainty, predictability
- (2) **Surrogate Cost Theory**

8) **ALTERNATIVE DAMAGES**

a) **Reliance Damages**

i) **RULE:**

- (1) **Measure of Reliance Damages RS §349**
 - (a) Expenditures made in preparation for performance OR In reliance on the K
 - (b) Minus any loss that the party in breach can prove w/ reasonable certainty would have been suffered by P had the K been performed
 - (i) Limitations: Causation, Mitigation, Foreseeability, and Certainty

ii) **NOTES:**

- (1) **Profits too speculative:** Applied as an alternative to expectation damages - if anticipated profits are too speculative. Injured party can recover \$\$ spent in preparation for or in reliance on the K
 - (a) CASE: **Wartzman v. Hightower** – guy in flagpole perch, lawyer drafts incorporation wrong costing P's whole operation. Lost profits too speculative >> ct awards reliance damages. \$\$ spent by P in reliance on K
 - (b) **EXCEPTION – Loss K:** If breaching party can show - full performance would result in net loss
 - (i) Burden of proof on breaching party → to show venture so ill-conceived never could make \$\$.
 - (ii) P cannot escape the consequences of a bad bargain by falling back on his reliance interest
- (2) **Promissory Estoppel:** Cases where there is no actual K, but party has relied on promise. RS2 limits recovery as justice requires – up to courts discretion to determine damages restitution, reliance, or expectation
 - (i) Some cts allow Expectation damages – lost profits
 - (ii) Some cts strict view only reliance damages – “out of pocket expenses”
 - (b) CASE: **Walser v. Toyota** – guy relies on potential K to start Toyota dealership and purchases land. Ct finds out of pocket expenses appropriate bc RS gives cts discretion
- (3) **Mitigation:**
 - (a) NO defense if requires injured party to expend large amount of \$ or incur substantial obligations
 - (b) Equal opportunity of mitigation – could breaching party have expended money to cure? (**Hightowe**)

b) Restitutionary Damages

i) RULE:

- (1) **Computation:** Restitutionary damages measured (as justice requires) by either:
 - (a) Reasonable market value of svcs
 - (b) Extent by which D has been “unjustly enriched” – increased property value, etc. (RS §371)
- (2) **By Non-Breaching Party:** RS §347 - measure of restitutionary damages = reasonable value of performance
 - (a) Undiminished by an loss which would have been incurred by complete performance.
 - (i) CASE: **Coastal v. Algernon Blair** – Ktr would have lost \$ had K been fully performed. Other party breaches. Ct allows restitution damages undiminished citing RS §347
 - (b) “full performance” EXCEPTION: when other party has fully performed and just owe \$\$, can’t seek alternative restitution damages (**Oliver v. Campbell**)
- (3) **By Breaching Party:** RS §374 - Fact that one party is in breach doesn’t preclude that party in recovering for restitution - provided that you offset that restitution that the other party has suffered due to the breach
 - (a) CASE: **Lancelotti v. Thomas** – L leases sub shop on condition that he build additions to restaurant. L breaches and seeks restitution damages. Ct finds that mere fact that L is “wrongdoer” doesn’t preclude damages.
- (4) **Discharged K** (due to incapacity, impracticability, etc): Either or both parties can be entitled to restitutionary relief (RS §374)

ii) CASES:

- (1) **Ventura v. Titan** - Unjust enrichment can be invoked to recover for performing extra svcs not specified in original K. May recover if benefit is conferred “unknowingly” or “unwittingly”

9) SPECIFIC PERFORMANCE

i) RULE: Issue ≠ SM of K, but rather INADEQUACY, IMPRACTICABILITY of the REMEDY

- (1) **Adequacy – RS §360:** ONLY awarded if \$\$ damages inadequate (RARE)
 - (a) Difficult to prove damages w/ reasonable certainty
 - (b) Property is unique (ie. Land)
 - (c) Likelihood that \$\$ could not be collected
- (2) **Certainty of Terms:** Terms of K have to be sufficiently certain to provide a basis for a ct order (RS §362)
 - (a) Will not fail bc some terms left for future negotiation (**City Stores**)
- (3) **Ct Supervision:** Disfavored bc required extensive ct supervision
 - (a) Modern Trend → specific performance granted unless the difficulties of supervision OUTWEIGH the importance of specific performance (RS §366)
- (4) **Unfairness:** SP / injunction should be refused if:
 - (a) “Unclean Hands” (RS §364): K induced by mistake or unfair business practices
 - (b) Undue Hardship: Relief would cause unreasonable hardship or loss to the party in breach or 3d person
 - (c) Unconscionable: Exchange is grossly inadequate or the terms of the K or otherwise unfair.

ii) APPLICATION:

- (1) **Land / Real Estate:** Land generally considered UNIQUE >> \$ damages inadequate, and SP likely remedy
- (2) **Construction:** Unlikely SP bc difficulties w/ supervision, and construction svcs likely to be obtainable in the market
 - (a) CASE: **City Stores v. Ammerman** – mere fact that some terms are indefinite or subject to future negotiation bt parties will not bar decree for SP, if ct deems SP warranted. SP should be granted UNLESS difficulties of supervision > importance of SP to P. OR if would result in > hardship on D. Fact that D would lose > profits not sufficient hardship
- (3) **Sale of Goods** (UCC §2-716): ONLY when goods are UNIQUE
 - (a) Will usually be denied if goods readily available on the market, P can “cover” >> \$ adequate (§2-712)

- (4) **Personal Services:** Employee refuses to render svcs in breach of K
- (a) **SP:** Generally refused = involuntary servitude
 - (b) **Injunction:** Ct can prevent employee from furnishing those svcs to another person for duration of K, IF:
 - (i) Svc are UNIQUE or extraordinary (entertainers, athletes)
 - (ii) Irreparable harm will befall the employer
 - (iii) Restrained engagement would have been for a competitor of P; AND
 - (iv) Employee either EXPRESSLY or by clear implication agreed not to work elsewhere for the period of K
 1. CASE: **Opera Singer**
 - (c) Injunction should NOT be entered if:
 - (i) Compel an undesirable performance involving personal relations OR
 - (ii) Leave the employee w/o other means of making living RS §367(2)
 - (d) **Non-Compete Agreement:** Injunctive Relief not available after termination of K, UNLESS:
 - (i) Employee threatening to disclose trade secrets
 - (ii) Express agreement AND:
 1. SP necessary to protect trade secrets, customer lists or goodwill of the employer's business OR
 2. Employer is exposed to special harm bc of the unique nature of employee's svcs
 - (iii) BUT NO enforcement if otherwise valid term is UNREASONABLE in time, space or scope or would operate in a harsh or oppressive manner.
 - (iv) CASE: **ABC v. Wolf** – sports announcer signs K w/ another broadcaster. Ct will not grant injunction bc K had expired >> no existing employment agreement, no express anti-competitive covenant, no special tort injury, and to grant an injunction would unduly interfere w/ man's livelihood and inhibit free competition

10) AGREED REMEDIES

i) ELEMENTS:

- (1) **Enforceable - Liquidated Damages Provision** = GF effort to estimate in advance the actual damages that will probably ensue from the breach
 - (a) Damages to be anticipated from breach = uncertain in amount OR difficult to prove
 - (b) Parties intended clause to liquidate damages, ≠ a penalty
 - (c) Amount set in K is reasonable forecast of just compensation for the harm flowing from the breach
- (2) **Unenforceable - Penalty** = fixed not as a pre-estimate of probable actual damages but as a deterrent or punishment to prevent breach

ii) NOTES:

- (1) **RS §356** – Anticipated or Actual Harm. Should be deemed presumptively reasonable. Burden of challenging party to show unreasonable.
- (2) **UCC §2-718** – Damages can be stipulated in agreement BUT must be reasonable in light of anticipated actual damages, difficulties of proof of loss and inconvenience non-feasibility of otherwise obtaining adequate remedy
- (3) **Timing SPLIT:** Determining reasonableness from time of K. Some cts deny enforcement of liquidated damages clause if it is unreasonable in light of actual harm suffered, even if it was reasonable at time of K formation

iii) CASE:

Case:	Wasserman
Facts:	Commercial lease w/ cancellation clause specifying damages
Rule:	<ul style="list-style-type: none"> ● Must be "reasonable forecast" of provable injury resulting from breach. Harm is difficult to accurately estimate. Greater difficulty in estimating = more reasonable ● Cannot be intended to be a penalty ● Reasonableness determined at the time of K formation or at time of breach. ● Actual damages reflect reasonableness of prediction of damages. If grossly disproportionate cts determine parties original expectations were unreasonable