

**INTERPRETATION**

**Principles of Interpretation**

- 1) Classical K: **Subjective Approach** - “was there a meeting of the minds” if both parties did not have the same interpretation = NO K.
  - CASE: **Peerless** – thought different ships = “no meetin of the minds” NO K
- 2) Modern K: **Objective Approach**
  - RP standard
  - RS §201 – 1) what did party KNOW 2) have REASON to know.
  - Reason to know determined from
    - negotiations, trade usage (**Joyner v. Adams**)
    - Trade Usage must be so common knowledge can be inferred (**Frigalment**)

**Ambiguity Tests:**

- 3) **“Four Corners” Approach** or **“Plain Meaning”**
  - a) K must be ambiguous to allow in PEv.
  - 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
    - ii) Fraud, duress, etc.
- 4) **Modern Approach:** Recognition that words generally have several meanings >> cts should admit all relevant extrinsic evidence in order to determine the intention of the parties. (**Taylor**)
  - a) Types of 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) Code still find trade usage was not sufficiently established as facts to be persuasive (**Frigalment**)
- 5) **Reasonable Expectations** (Insurance Ks)
  - a) Adhesion K – no plain meaning. P not bound to read and understand terms of adhesion K beyond range or reasonable expectations shown by:
    - i) Prior negotiations
    - ii) Term bizarre, oppressive
    - iii) Eviscerates the non-standard terms explicitly agreed to (**C&J Fertilizer**)

**Parole Evidence Rule (PER)**

- 1) **Full Integration** (RS §210) = complete + final
  - a) 4 corners – Traditional view
    - i) **Merger clause**
    - ii) In absence of presume integration
    - iii) Bar any PEv
  - b) Modern Approach / RS
    - i) Not limited to 4 corners
    - ii) Consider “totality of circumstances”
    - iii) Integration = matter of intent not formality
    - iv) Merger clause – not conclusive
    - v) Evidence barred - if would contradict or supp, but not to explain.
  - c) **EXCEPTIONS:**
    - i) Explain meaning
    - ii) Agreement made after K
      - (1) Look for no oral modifications clause
    - iii) Oral Condition Precedent (RS 217)
    - iv) K invalid for fraud, duress, undue influence, incapacity, mistake or illegality (RS 214(d))
      - (1) CASE: **Sherrod** – no fraud bc fraud directly related to SM of K
    - v) Collateral Agreement (RS 216(2))
      - (1) Separate agreement or naturally omitted from writing
      - (2) CASE: **Thompson v. Libby** – warranty ≠ separate independent K >> no PEv admitted (traditional 4 corners approach)
- 2) **Partial Integration** = incomplete + final
  - a) PEv can supplement or explain – but NOT contradict
  - b) Determined from looking at writing itself (4 corn)
- 3) **UCC Approach (2-202)** – Final expression terms cannot be contradicted but can be supp or explained (**Nanakuli**)
  - a) **Course of performance** (UCC §2-208 & RS§202(4))
  - b) **Course of Dealing** (UCC §1-205 (1) & RS §223)
  - c) **Trade Usage** (UCC 1-205 (2) & RS§222)
    - i) Practiced normally in place, location and/or trade. Well settled enough to justify an expectation that it will be observed w/ the transaction in question
  - d) EXCEPTION: unless parties intended full integration not to be supplemented.

## IMPLIED TERMS

### CL Implied Terms:

- 1) Employment K implied terminable at will, unless expressly otherwise
- 2) Unless express statement that K rts personal, presumption that K transferable
- 3) Presumption that bilateral Ks performance instantaneous
- 4) Unilateral K, longer performance must take place 1<sup>st</sup>.
- 5) Implied obligation to use "Best Efforts" (**Lady Duff**)
  - a) Possible exception = bargaining for a "chance"

### UCC Implied Terms

- 1) "Best Efforts" - UCC §2-306(2)
- 2) Reasonable Notice of Termination - §2-309(3)
  - a) Agreement of NO notice is VOID if unconscionable
  - b) Reasonable Notice = time to: (**Leibel**)
    - i) Recoup investment
    - ii) Minimize losses
    - iii) Find a substitute arrangement

### Implied Warranties

- 1) Caveat Emptor – is no more
- 2) **RS**
  - a) §14 = implied warranty for sale by description
  - b) §15 = implied warranty of quality
  - c) §16 = implied warranties in sale by sample
  - d) Warranty of Habitability (MAJ most leases)
  - e) Warranty of Skillful Construction (**Caceci**)
    - i) No major defects
    - ii) Can be disclaimed
    - iii) May require privity
- 3) **UCC**
  - a) §2-313 - seller can make an express warranty by words, sample or model.
    - i) Puffing?
    - ii) Reliance by buyer? (SPLIT)
  - b) §2-314 = implied warranty of merchantability
    - i) the goods are of quality and are fit for the ordinary purposes for which they are used. (seller can expressly disclaim §2-316)
    - ii) Seller = merchant regularly dealing
    - iii) Defect causes damage
  - c) §2-315 = implied warranty of fitness for a particular purpose
    - i) arises by implication of law, ONLY created
      - (1) Buyer relies on seller's skill or judgment to select a suitable product,
      - (2) Seller has reason to know of reliance.
      - (3) Breach does not require showing that goods are defective, ONLY that goods are not fit for particular purpose.
  - d) Disclaimer – "As is" clause (UCC §2-316)
    - i) Merchantability can be disclaimed if says "merch.." and is conspicuous
    - ii) General Disclaimer:
      - (1) Disclaims all implied warranties
      - (2) May not disclaim express warranties
      - (3) Cannot disclaim tort liability
    - iii) Failure to inspect – waives warranties on defects that examination could have revealed
    - iv) Course of performance / trade usage may exclude warranties

## 4) Implied Obligation of Good Faith (GF)

- a) Every K has (RS §205, UCC §1-203)
  - i) DEFN: GF = "honesty in fact" (UCC §1-201 (19))
  - ii) For MERCHANTS, GF requires honesty and "the observance of commercial standards of fair dealing in the trade." §2-103 (1b)
- b) Can't deny "fruits of the K"
- c) Lender Liability – must exercise GF in providing notice to cut off credit, or exercising "acceleration" rts (**KMC v. Irving**)
- d) Requirement K's / Output Ks (UCC §2-306)
  - i) "Best Efforts"
  - ii) NO Overdemanding – to "stockpile"
  - iii) Cannot reduce demand to zero – under demanding. (**Empire Gas**)
- e) Discretionary Rights: (Locke v. Warner Bros)
  - i) If K gives right to reject work – duty to exercise discretion w/ honesty and GF (SUB standard of honest dissatisfaction)
  - ii) Cannot frustrate party's rt to receive "fruits"
  - iii) EXCEPTION: express rt
- f) Termination at will Employment K:
  - i) At will – can terminate as long as no BF (MAJ)
    - (1) BF = violation of public policy, fraud, deceit (**Dupont**), to avoid paying benefits.
    - ii) Good Cause in Manual = offer of uni-K

**AVOIDING ENFORCEMENT** K VOIDABLE if:

**Minority** (RS 14)

- 1) **MAJ:** K VOIDABLE if contracting party under 18 (minor can choose to affirm or disaffirm a K)
  - a) Absent a showing that minor willfully misrepresented age; nullifies disaffirmance rule
  - b) Mere ignorance of minors age no defense → merchant on inquiry notice
  - c) On reaching the age of majority → minor must act w/in reasonable time to disaffirm, or rt to disaffirm deemed waived.
- 2) **Benefit/Depreciation Rule:** upon rescission recovery of the full purchase price is subject to deduction for the minors use. Determined by either:
  - a) Minor's use of goods
  - b) Depreciation or deterioration of goods in his or her possession
    - i) 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
- 3) **Necessaries:** Minor liable for the reasonable value
  - a) Eg. Food, clothing, shelter, hospital bills, some cts willing to construe more broadly
    - i) If minor has ability to return home, apt lease ≠ necessary
  - b) Public Housing not deemed necessary

**Incapacity** (RS 15) Incompetent persons transactions are VOIDABLE.

- 1) IF ("**cognitive**" TEST): at date of transaction, party was not able to understand in a reasonable manner the nature and consequences of the transaction.
  - a) Guardianship = no competency (RS 13)
  - b) Required to restore consideration unless other party acted in BF
- 2) 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.
- 3) EXCEPTION:
  - a) Made on fair terms and in GF
  - b) Other party had no reason to know of incompetency
  - c) K not voidable if other party cannot be restored to status quo.
- 4) **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

**Duress:** K made under wrongful threat are VOIDABLE

- 1) **Physical Coercion** = threat to life or limb
- 2) **Non-Physical Coercion** = Econ Duress (RS 175)
  - a) Wrongful Threat (RS §176)
  - b) Lack of meaningful Choice
    - i) No reasonable Alternatives (sub test)
  - c) Resulting in action
    - i) CASE: **Totem Tug** – duress must come from D's wrongful conduct, NOT P's own necessity. Threat to breach or w/hold payment can be sufficient if no reasonable alternatives. Lawsuit ≠ reasonable alt.

**Undue Influence:** (RS §177) K VOIDABLE if take advantage of another's weakness of mind

- 1) Persuasion which tends to be coercive in nature
  - a) Inappropriate, time, place, no time for advisors, multiple persuaders (**Odorizzi**)
- 2) Which overcomes the will
- 3) Working on mental, moral or emotional weakness
  - a) Relationship of trust bt the parties, need not be present

**Misrepresentation:** (RS §164(1)) VOIDABLE if assent induced by fraud or material misrep.

- 1) K voidable if:
  - a) **Inducement** of assent by
  - b) **Fraudulent**
    - i) Intent to induce +
    - ii) Knowledge or belief that false
    - iii) Lack of confidence state or implied in the truth of assertion OR
    - iv) Knowledge that the party does not have the basis the he states or implies for the assertion
  - c) OR **Material Misrep**
    - i) likely to induce a RP to manifest his assent OR
    - ii) Maker knows
  - d) **Justifiable Reliance** (RS §164)
- 2) **Remedy:**
  - a) Rescission: injured party return money or property received under K
  - b) Restitution: Out of Pocket Rule
  - c) MAJ benefit of the bargain rule = put P where she would have been if D had spoken truthfully
    - i) Think Punitive Damages, ED bc also a TORT
- 3) **Opinion = Mis Rep** 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
- 4) CASE: **Syester v. Banta** – can't prey on weakness and represent expert knowledge to induce person to buy.

**Non-Disclosure:** 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) CASE: **Hill v. Jones** - suppression of a material fact which a party is bound in GF to disclose = false representation
    - i) Material Fact: one which a RP would attach importance in determining his choice of action

**Unconscionability** (UCC §2-302)

Ct can refuse to enforce K (or part of) if it was unconscionable at time it was made

- 1) Procedural = absence of meaningful choice
- 2) Substantive = harsh, one-sided, unreasonable terms
  - a) TEST: "shock the conscience" or RP

**CASES:**

- 3) **Ahern** – unfair price = uncon
- 4) **A&M Produce** – disclaimer of warranties + unfair surprise
- 5) **Walker Thomas** – race, class issues
- 6) **Adkins** – arbitration clause ≠ Uncon
- 7) **Cooper** – arb clause = Uncon bc adhesion K

**Public Policy** K unenforceable if: (RS §178)

- 1) Statute
- 2) Public Interest > Parties interest
  - a) Nature of the public policy
  - b) Degree of forfeiture
  - c) Denial or relief would further the policy
- 4) Unclean Hands? – in pari delicto, cts won't get involved
- 5) CASE: **Borelli** – can't K to do thing marriage obligates you do
- 6) **RR v. MH** – surrogacy K = VOID if paid for weighing factors

## JUSTIFICATION

### Mutual Mistake (RS § 152)

- (a) Mutual Mistake at time of K
- (b) As to basic assumption on which K was made
- (c) material effect
- (d) K voidable by adversely affected property
- (e) UNLESS bears risk of mistake under § 154.
  - i) Risk allocated to him by agreement ("as is clause"?)
  - ii) Aware at time of K that he has limited knowledge about mistaken issue and treats knowledge as sufficient
  - iii) Risk allocated by cts bc reasonable
    - (1) Can take into account relief by way of Reformation, Restitution or otherwise

### Unilateral Mistake: (RS §153)

- 2) Uni-Mistake as to basic assumption of K
- 3) Material Effect
- 4) K voidable by adversely affected party UNLESS
- 5) Bears burden of risk of mistake AND
  - a) Mistake be such that enforcement of the K would be unconscionable (severe hardship or substantial loss)
  - b) The other party either have reason to know of, or be responsible for causing the mistake
- 6) SPLIT: Some cts hold other party must be able to be placed in status quo
- 7) 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.
- 1) **Sherwood – Barren Cow** - thing sold didn't exist
- 2) **Lenawee v. Messerly** – risk assigned w/ "as is" clause
- 3) **Wilfred v. Metropolitan** – if mistake so palpable to put other party on notice of existence = grounds for rescission

**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))

- 1) CASE: (River Phoenix case) – River dies >> co. not liable for film couldn't finish
- 2) CASE: Caldwell - theatre burns down, non-performance not the fault of the party claiming excuse

**Impracticability:** After K is made a party can have duty of performance discharged if:

- 3) Substantial reduction of value of K: Performance is made **impracticable**.
- 4) By the occurrence or non-occurrence of event which is **basic assumption** of which K is made
- 5) W/o the parties fault
- 6) Party does not bear the risk of the occurrence of that event by language or circumstances of K indicate contrary
  - a) Change in cost ≠ **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) Natural Disaster or War: cts generally UNwilling to grant relief
    - i) CASE: **American Trading v. Shell** → closing of Suez Canal due to war ≠ basic assumption of K >> NO relief
    - ii) CASE: **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
  - c) Econ Conditions ≠ **Karl Wendt**
  - d) Change in Statute ≠: **Mel Frank** – could use lease for other purpose. New law did not take away all purpose
  - e) Foreseeability SPLIT: MIN - Some cts require event be unforeseen or unforeseeable

**Frustration of Purpose:** Party can have duty's under K discharged if: (RS §265, 266)

- 1) Party's **principal purpose**
- 2) is **substantially frustrated**,
- 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
  - a) Not generally recognized in US
  - b) Object must be so clearly the basis for K that w/o it K makes little sense (**Krell** – king's coronation case)
  - c) Econ return / profitability ≠

### Modification

- 1) **CL** → presumption that modifications are improper, there must be additional consideration for modification to K
  - a) Preexisting duty Rule: (RS §73) need consideration
  - b) EXCEPTION: unanticipated or unforeseen difficulties, which were not known or anticipated (RS §89)
    - i) Unanticipated circumstances
    - ii) Mutual rescission
      - (1) CASE: **Schwartzreich v. Bauman-Basch** → employer tore up old K when employee told him another co. offered to pay more = sufficient consideration.
    - iii) Detrimental Reliance on promise
- 2) **UCC §2-209**
  - a) NO consid needed
  - b) Burden on protesting to show mod coerced
  - c) 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
    - iii) NOM = "private SoF" (§2-209(2))
- 3) **SoF and modifications SPLIT**
- 4) **Exceptions to SoF**
  - a) §2-209(4) – however allows for modification by "waiver"
    - i) Waiver can be through reliance, part performance, or oral/conduct of parties
    - ii) Goods accepted
    - iii) Actual Performance
  - b) PER doesn't effect later agreements, NOM and no waiver clauses give PER protection for subsequent modifications as well
  - c) Immaterial Change
  - d) PE
- 5) **CASES:**
  - a) **AL Packers v. Domenico** – preexisting duty rule
  - b) **Galtaco** – must display protest to put other party on notice that you are not freely consenting. BF to assent intending not to pay
  - c) **Mama Rizzo's** – SoF modification must be in writing as well. Detrimental reliance that will be put in writing sufficient estoppel grounds for enforcement. Acceptance of payment = waiver

## RIGHTS OF 3d PARTIES

### Standing of Parties?

- 1) Intended Beneficiary? May sue if:
  - a) Interest Vests if: (RS §311)
    - i) 3d P manifests assent at invitation of P'ee or P'or
    - ii) 3d P materially changes position in reliance OR
    - iii) 3d P brings suit on the promise
  - b) Devised from:
    - i) Both Parties intended (**Gringerik**)
    - ii) P'ee Intent
    - iii) Foreseeable that P'or might be liable to 3d P
- 2) Incidental Beneficiary? May not sue (RS2 § 302(2) and 315)
  - a) MAJ of jxs allow intended beneficiary of will to sue atty for negligence in drafting will (**Stowe**)

**Assignment** = manifestation by owner of rt to transfer rt to another person (assignee) (RS §317(2))

- 1) To be Valid and Enforceable:
  - a) Assignor must make CLEAR his intention to relinquish rt to assignee
  - b) Assignor must NOT retain control over the rt or any power of revocation.
    - i) Pending litigation OK (**Herzog**)
- 2) Restrictions on Assignment
  - a) Violates Statute / Public Policy
    - i) No tort damages for pain and suffering
  - b) No assignment clause in K UNLESS
    - i) Payment of \$ - even against K (2-210(2))
    - ii) 1<sup>st</sup> construed as prohibition against delegation of duties
    - iii) 2d construed as promise not to assign that might lead to damages but will not render assignment ineffective RS §322 – unless STRONG language to contrary
  - c) Would have material adverse impact on the other party
    - i) Affect the duty of the O'or
    - ii) Increase Burden or risk imposed on O'or
    - iii) Impair chance of obtaining return performance
    - iv) Reduce value of return performance
- 3) Remedy:
  - a) Specific Performance
  - b) Nominal damages in light of the promisee's limited econ interest in performance

**Delegation of Duties:** (RS §322 (1), UCC §2-210(5)) Duty to perform can be delegated to 3d party UNLESS:

- 1) Personal Svcs K
- 2) Substantial Interest (UCC)
- 3) Delegation to Direct Competitor (**Sally Beauty**)
  - 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
  - c) Ct.s likely to enforce clause prohibiting delegation of duties

- (1) **Analysis:**
  - (a) Assignment OR Delegation?
    - (i) Valid w/ terms of K?
    - (ii) Effective?
    - (iii) Duties bt assigning/delegating party – original party – 3d party?

## CONSEQUENCES OF NON-PERFORMANCE

**Conditions:** Duty doesn't arise until condition event occurs

- 1) Express Conditions
- 2) Implied in Fact Conditions
- 3) Constructive Conditions

**Is other Party in Breach (Material Breach)?** Other party entitled to suspend performance until breach cured if (RS §241):

- 1) Further delay prevents or hinders making substitute arrangements
- 2) Degree of importance attached to performance w/o delay, by terms of K
- 3) §242 – reasonableness of injured party in communicating his grievance and seeking satisfaction
  - a) Demand for Assurances: (RS §251 UCC §2-609)
    - i) **Hornell Brewing v. Spry**

**Non-Material Breach = Partial 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 "cost to complete" damages (**Jacob and Youngs**)

- 1) Purpose of K
- 2) Harshness of non-recovery to the performing party
- 3) Impact on other party, to extent they are being deprived of what they reasonably expected and bargained for.
- 4) Motive of breaching party: Willful transgression? Or negligence?

**Total Breach?** Incurable, promisee entitled to:

- 1) W/hold performance
- 2) Terminate K
- 3) Claim full damages for Breach

**Anticipatory Repudiation** Reasonable grounds for "insecurity" as grounds for discharging obligations under

- 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.
    - i) **Truman Flatt v. Schupf**
- 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
  - d) **Hornell Brewing Co. v. Spry**

## Express Condition 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?** Fraud, non-disclosure
- 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.
- 2) **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**)
- 3) **Discretion:** (**Morin**) – "honest but subjective"

## DAMAGES

### Expectation Damages

- 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)
- 3) **UCC Damages** (breach of K for sale of goods)
  - a) **General Rule:** MV price – K price
- 4) **Interest:**

## Limitations on Damages

- 1) **Disclaimer:**
- 2) **Foreseeability:** R2 §351 – Damages not recoverable if D didn't have a reason to foresee.
  - a) – "flowing from breach" OR
  - b) "reason to know"
- 3) **Reasonable Certainty:** Have to establish fact of damage, not as close certainty regarding amount of damage
- 4) **Causations:** natural and proximately caused by breach, not remote or contingent

### CASE:

- 5) **Lukaszewski** – Employment K D = cost to replace
- 6) **Hadley v. Baxendale** – special damages other party has to have "reason to know" = foreseeability
- 7) **FloraFax** – lost profits to a reasonable degree of certainty

**Mitigation** P may not recover for those injurious consequences of D's breach which the P could have avoided

### 8) Alternative Lost Volume (**Jetz Svc v. Salina Properties**)

- a) Possessed capacity to make an additional sale
- b) Would have been profitable to make an additional sale
- c) Probably would have made an additional sale absent the buyer's breach.

### CASE:

- 1) **Rockingham** – can't pile on damages
- 2) **Boehm v. ABC** - Failure to take alternative employment is justified if other available employment is different from or inferior.

## Non-Recoverable Damages

- 1) Tort Damages?
  - a) Punitive
  - b) ED
- 2) Atty's Fees

## ALTERNATIVE DAMAGES

### Reliance Damages –

- 1) Measure of Reliance Damages if profits too speculative **RS §349**
- 2) CASE: **Wartzman v. Hightower**
  - a) EXCEPTION – Loss K: If breaching party can show - full performance would result in net loss
- 3) **Promissory estoppel:** Can get expect or "out of pocket expenses at courts discretion"
  - a) CASE: **Walser v. Toyota** –

### Restitutionary Damages

- 1) **Computation:** Restitutionary damages measured (as justice requires) by either:
  - a) Reasonable market value of svcs
  - b) "unjustly enriched". (RS §371)
    - i) Undiminished by an loss which would have been incurred by complete performance. (**Algernon Blair**)
- 2) Can be recovered by **breaching party - Lancelotti v. Thomas**
- 3) **"full performance"** EXCEPTION: when just owe \$\$, can't (**Oliver v. Campbell**)
- 4) **Discharged K** (due to incapacity, impracticability, etc): Either or both parties can be entitled to restitutionary relief (RS §374)

### Specific Performance

- 1) Adequacy of remedy
- 2) No Personal Svcs (Injunction?)

### Agreed Remedies

- 1) **Enforceable - Liquidated Damages Provision** = GF effort to estimate in advance the actual damages that will probably ensue from the breach
  - a) OBJ reasonableness test
  - b) Timing: Some cts determine from time of K, some at time harm suffered
- 2) **UNenforceable - Penalty** = fixed as a deterrent or punishment